DW Fox Tucker Lawyers

2016

Autumn Report

People First

It's a simple philosophy that is paying dividends for one South Australian building company.

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CLIENT PROFILE

Felmeri Homes

"Anyone can just 'push up' a house. But, at the end of the day, someone will need to live there - and it's really important to get their vision through."

Frank Felmeri is talking about the ethos that helped Felmeri Homes achieve significant growth over the last two years.

"Our company culture is all customer focussed. Our aim is to give our clients the value that they don't get elsewhere. We do that by listening to them, paying attention to what they want and being a bit innovative."

As one of the Directors of the company – his father, who is also named Frank, is the other – he is charged with steering a course through what is invariably described as a 'challenging' local market. However, it's one that both Franks understand well.

"In Adelaide, you get more referrals. You need to be really careful that you're doing the right thing by your clients and that you're networking effectively… It is dominated by relationships, rather than just purely advertising to the market. Which is a good thing… people know you and understand what you're about."

With customer satisfaction given a high priority, it follows that Felmeri Homes work hard to eliminate every possible annoyance for clients. They offer a 100% fixed price guarantee and closely monitor the quality of each build to ensure the finish and quality is at a level that the owners will be proud of. As the company sees it, delivering a build of the highest quality first time, every time is one of their keys to success. This attention to detail has allowed the company to get a larger foothold in the industry.

"Initially, we only did high-end housing: one-off custom homes. Then our business progressed into larger residential developments, commercial and industrial."

The increase in building volume has allowed them to pass on the savings from their reduced unit costs and also employ more people. Fully licensed in residential and commercial construction, they also got through the rigorous selection process to be added to the State Government's preferred tenderer list.

At the end of April, Felmeri Homes signed their first contract with the State Government to deliver fifteen home and land packages at Park Holme. Interestingly, these will be part of the Affordable Homes initiative. Feedback from those involved in the selection process suggests Felmeri Homes' vision for the project was important in securing the contract.

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"Our company culture is all customer focussed. Our aim is to give our clients the value that they don't get elsewhere. We do that by listening to them, paying attention to what they want and being a bit innovative."

Says Frank, "Every tenderer was asked to draw up plans. We put a lot of effort into those drawings to make sure that, as well as being architectural, well designed and meeting the criteria, they were also cost effective… We are a family owned, boutique business compared to the majors and I think we just added a bit of extra attention to detail."

Even with a healthy list of jobs on the go for this year, he acknowledges the Park Holme project as an important milestone for the company and one that will comprise around 10% of their annual turnover. He credits his General Manager, Fritz Tambe with spearheading the win. In the position for just over a year after more than a decade with the Master Builders Association, Fritz is one of the new hires – and again, it was a decision made with the customer in mind.

We are a family owned, boutique business compared to the majors and I think we just added a bit of extra attention to detail."

Felmeri Homes Directors, Frank Felmeri Junior and Frank Felmeri Senior

"That's really the basis of our success – our staff. The kind of people we want (are) people that are going to have similar views and a client focus."

It's worth noting that the company's rapid growth in projects and staff has seen them move premises twice in less than three years. In March, they relocated to a character building on King William Road, Wayville, which they transformed internally in just five weeks into a light and modern working environment. Having sixteen fulltime staff now, Felmeri Homes only use half the offices – leaving them with plenty of room for the future.

Their insistence on working with the right people extends to external advisors too. With Liam McCusker of DW Fox Tucker as their legal advisor for the last five years, Frank says focussing on getting right the 'front end' of their business, such as contracts, has enabled the company to avoid any issues with disappointed clients or creditors.

"Liam reviews our contracts and makes sure the right result is achieved on both sides of the fence… I think it's quite a regular thing where (his) advice does save us – not just financially, because perception is also very important. If Liam says something, then we act upon it because we believe he's always got our best interests at heart."

"The reason that we work together, and work so well, is that we both have the same ethos when it comes down to it."

It's that customer focus, yet again.

For more information about Felmeri Homes:

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NEWS & VIEWS | **By John Walsh & Nick Wockel**

The Return To Work Act Revisited

Issues for employers and unintended consequences

The Return to Work Scheme came under fire late last year for inadequately providing for police injured in the line of duty.

In particular, the Police Association criticised the Scheme because many police officers injured in the line of duty would not satisfy the 30% whole person impairment threshold, yet would still suffer ongoing medical problems and a partial or total inability to return to their pre injury duties.

The Police Association's President, Mark Carroll, said:

> "We have a unique role in Australian society. In the Western world police officers are unlike any other employee, we take a sworn oath to office, which means there are really no safe systems of work.
>
> "When everyone is running out of danger, we are running in ... every other emergency service worker has choices in relation to their work, those same choices don't apply to police officers."

In February, Industrial Relations Minister, John Rau announced a new Enterprise Bargaining Agreement with the Police Union, which included provision for police officers injured in the line of duty to receive permanent ongoing medical and financial support regardless of the fact that an individual officer does not reach the 30% whole person impairment threshold to be categorised as a seriously injured worker under the Act and, therefore, entitled to ongoing income maintenance and medical expenses.

Mr Rau had previously resisted the Police Union's campaign, but he appears to have been won over by the arguments put forward by Peter Malinauskas, Minister for Police, who upon stepping into the role made it clear that the Police Union's demands were "worthy of examination".

Subsequently Australian Nursing and Midwifery Federation SA's Secretary Elizabeth Dabars, Ambulance Employees' Association SA General Secretary Phil Palmer and United Fire Fighters Union SA

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There can be no doubt that nurses, paramedics and firefighters are often required to place themselves in dangerous work environments as are other emergency service workers and volunteers.

Secretary Greg Northcott all sought similar consideration for their members who were often confronted with risk of injury as a result of being exposed to dangerous situations.

There can be no doubt that nurses, paramedics and firefighters are often required to place themselves in dangerous work environments as are other emergency service workers and volunteers.

In New South Wales the major reforms undertaken in 2012 to reduce benefits to address the deficit of more than $4.1 billion took effect. The changes, whilst affecting all new and existing workers compensation claims, did not impact upon:

- Police Officers, Paramedics and Firefighters;
- Workers injured while working in or around a coal mine; and
- Emergency service volunteers.

Claims by those "exempt" workers continue to be handled as though the June 2012 changes never occurred.

It will be interesting to see whether pressure from Nurses, Firefighters and Paramedics will see amendments to the Act or whether, like the police, they will seek to address the issue through enterprise bargaining agreements.

While it seems superficially attractive to maintain the integrity of the *Return to Work Act* by making provision for a class of worker "injured in the line of duty" outside of the Act it does also pose its problems.

The *Return to Work Act* has its own dispute resolution process in the South Australian Employment Tribunal. The Tribunal will have no jurisdiction over a dispute that arises as part of an enterprise bargaining agreement. How will such disputes be handled?

It is entirely feasible for two workers to be injured in similar fashion in the same incident, with one having the benefit of extended benefits as a result of an enterprise bargaining agreement, while the other has no such benefit because he or she has a different employer. For instance, a nurse employed in the public sector will often work alongside a nurse from an agency and both would be subject to the same risk of injury.

Extending benefits available to an injured worker through an enterprise bargaining agreement is not unusual. Extended cover for journey accidents is not uncommon. Some enterprise bargaining agreements provide for income maintenance to be maintained at the 100% rate rather than "stepped down" after the period mandated by the Act.

It is not difficult to envisage greater use of the enterprise bargaining process to obtain increased benefits beyond those existent in the *Return to Work Act* for employees in other industries, particularly during a period of low wage growth.

The latest statistics available from Safe Work Australia reveal that employees in agriculture, forestry and fishing had the highest incidence of serious claims. The incidence is about double the national average. Similarly, transport, postal and warehousing industry employees were only marginally behind making 19.1 serious claims per 1000 employees.

Labourers, machine operators and drivers all have high incidence rates of serious claims. A reasonable argument could be raised on behalf of workers in these industries which have high incidence of serious claims that they too have been "injured in the line of duty". It will be most interesting to see whether the deal with the police has opened the door to greater use of the enterprise bargaining process to achieve benefits that are not available under the *Return to Work Act* and even more interesting to see how the inevitable disputes are managed.

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NEWS & VIEWS | **By Sandy Donaldson**

The Panama Papers - Are You Next?

Amendments to the Privacy Act for serious breaches

The recent spectacular leak of documents from the Panama law firm Mossack Fonseca illustrates just how easy it is with modern technology to access and disseminate vast amounts of information. The leak is said to have comprised some 2.6 terabytes with some 4.8 million emails, 3 million database entries, 2.2 million PDFs, 1.2 million images, 320,000 text files and 2,242 files in other formats.[1]

It is not known how the leak from Mossack Fonseca occurred. The data was provided by an anonymous source to a German newspaper under strict conditions to prevent identification of the source. Mossack Fonseca has reportedly said that this was not an "inside job" but that the firm had been "hacked".[2]

Could this happen to you?

The Australian Cyber Security Centre released in December 2015 the *2015 ACSC Cyber Security Survey: Major Australian Businesses*. Respondents to the survey reported cyber security incidents (those considered to have harmed the confidentiality, integrity or availability of a network's data or systems) in the last 12 months. As the name of the survey indicates, most of the respondents (67%) were from large organisations (200+ employees), 23% from medium-size organisations (21-199 employees) and 10% from small organisations (less than 20 employees). A breakdown of the responses was:

- no incidents – 42%
- 1 to 5 incidents – 40%
- 6 to 10 incidents – 6%
- 10+ incidents – 5%
- don't know – 8%.

Respondents to the survey identified the following cyber threats that they considered to be of the most concern:

- 72% – ransomware or scareware
- 70% – theft or breach of confidential information
- 67% – targeted malicious emails
- 62% – unauthorised access to information from an outsider
- 58% – social engineering
- 56% – unauthorised access to information from an insider
- 55% – loss or destruction of information
- 54% – loss of serviceability
- 52% – virus or worm infection
- 46% – trojan
- 46% – unauthorised modification of information
- 40% – theft or loss of intellectual property
- 40% – rootkit malware
- 36% – denial of service attack
- 32% – compromise of mobile devices and laptops
- 24% – wire fraud
- 22% – theft of mobile devices and laptops
- 7% – other.

Responses indicated that the following were the cyber actors of most concern:

- 60% – trusted insiders
- 55% – issue motivated groups or hacktivists
- 54% – organised criminal syndicates
- 54% – state-based actors
- 45% – individuals
- 4% – other.

From these responses, and anecdotally, the potential for a cyber attack and unauthorised access to information on a network is far from remote, particularly with substantial increases in ransomware attacks.

Reporting of incidents

The ACSC Report indicated that only 51% of respondents reported cyber security incidents to an official body such as CERT Australia (the Australian national computer emergency response team) or law enforcement agencies or ACORN (the Australian Cybercrime Online Reporting Network).

Another regime may soon exist for mandatory reporting of incidents which result in unauthorised disclosure of personal information or credit information within the ambit of the *Privacy Act 2008 (Cwlth)*. An Exposure Draft Bill, the *Privacy Amendment Bracket Notification of Serious Data Breaches) Bill 2015*, has been released for comment and submissions closed on 4 March 2016.

Privacy Act amendments

The amendments that are proposed in the draft Bill arise from Report 108 of the Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*. The main concern is the increasing amount of personal information held in relation to individuals and the possibility of identity fraud.

The Discussion Paper for the draft Bill indicates that the intention is that:

- notification to the Australian Information Commissioner and to an affected individual would be required for a ***serious data breach***
- a *serious data breach* will be one involving unauthorised access or disclosure of personal information, credit reporting information, credit eligibility information or tax file number information
- the unauthorised access or disclosure must be such as to *put any of the individuals to whom the information relates at **real risk of serious harm***.

Notification would be required if a serious data breach has occurred, or if an entity has reasonable grounds to believe that this has occurred.

Submissions have been made by numerous organisations in relation to the draft Bill. Many submissions, including that of the Australian Information Industry Association raise concerns at some of the unclear concepts and strict obligations that are contained in the draft.

...the potential for a cyber attack and unauthorised access to information on a network is far from remote, particularly with substantial increases in ransomware attacks.

[1] Wikipedia, https://en.wikipedia.org/wiki/Panama_¬Papers, *Leak timeline and logistics.*
[2] *Ibid, Mossack Fonseca responses.*

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CYBER SECURITY

In view of the increasing prevalence of cyber threats, all businesses would be wise to ensure that they have appropriate security strategies and safeguards. What may be appropriate for any particular organisation will depend very much on its size, operations and circumstances. Losses and liabilities that may arise from an adverse cyber security incident can be substantial.

The Discussion Paper issued with the draft Bill Office of the Australian Information Commissioner (OAIC) will issue guidelines for concepts. The OAIC already has an extensive *Data Breach Notification Guide*, issued in 2014.

The Government is considering submissions and is in the process of preparing a revised draft Bill for Parliament. If an Act is passed that is consistent with the draft Bill, it will commence 12 months after Royal assent.

Who will be subject to the Notification Requirements?

The requirements for notification in the draft Bill, if it becomes an Act, will apply to any entity that is an *APP entity* under the *Privacy Act*. This will include any business with an annual turnover of more than $3 million, and will also include any business that provides a *health service* (as widely defined) or any business providing personal information in return for benefits.

Australian Cyber Security Strategy

The Australian Government recognises the risks that are posed by data breaches and on 21 April 2016 released an Australian *Cyber Security Strategy*. The Attorney-General's Department advises that the Strategy establishes five themes of action for Australia's cyber security over the next four years to 2020:

- a national cyber partnership between government, researchers and business
- strong cyber defences
- global responsibility and influence
- growth and innovation
- a cyber smart nation.[3]

The Government will commit $230 million to advance the strategy, indicating the seriousness with which the Government views cyber security and protection of data.

Business Security Strategies

In view of the increasing prevalence of cyber threats, all businesses would be wise to ensure that they have appropriate security strategies and safeguards. What may be appropriate for any particular organisation will depend very much on its size, operations and circumstances.

Losses and liabilities that may arise from an adverse cyber security incident can be substantial. Apart from internal disruptions and costs, liabilities may exist to individuals and other third parties, whether by reason of *Privacy* legislation or by reason of obligations of confidentiality and care that may be owed to other parties with information held by an organisation.

The ACSC Report mentioned above indicates that predominant factors contributing to industry cyber incidents were identified as staff errors or omissions and poor security culture, as well as misconfigured systems and sophistication and targeting of the incidents. Having comprehensive and appropriate staff policies, procedures and guidelines, as well as training and information in relation to IT security and management, can substantially reduce the risks.

DW Fox Tucker can assist in preparing and reviewing policies and conditions for IT management, as well as policies that are specifically required by legislation as an APP Privacy Policy and a Credit Information Policy.

[3] Attorney-General's Department, https://www.ag.gov.au/RightsAndProtections/CyberSecurity/Pages/default.aspx

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NEWS & VIEWS | By Julie Van der Velde & Nick Wockel

Tax Transparency After the Panama Papers

Disclosure obligations and tax avoidance

The recent leak of the Panama Papers has reinvigorated worldwide public calls to try to put an end to tax evasion and minimisation through tax havens. This has resulted in many countries proposing more restrictive rules for offshore trusts and shell companies in an attempt to quash alleged international tax avoidance schemes.

International trust structures have come in for particular attention after the leaked documents highlighted features that may be used to avoid disclosures and consequently taxes.

The New Zealand government has called for an independent review of its disclosure rules in relation to foreign trusts. The key issue is that New Zealand's disclosure rules relating to trusts are vulnerable as very little information is required. Currently, only the name of the trust and trustees must be disclosed, neither of which are likely to yield information on who actually benefits from the trust.

We expect the independent review to result in more onerous disclosure obligations for foreign trusts, possibly including details of the names and place of residence of the creator(s) and beneficiaries. This may also include details of all beneficiaries who have received a benefit from the trust and the amount. While some countries, such as Panama, have resisted entering into International Agreements for the exchange of information with Australia many so called tax haven countries have done so and pressure will be mounting on those who have not to make such arrangements, if not with Australia, then with other countries with whom Australia has such agreements.

The data dump has also stimulated further discussions on tax avoidance in Europe and the proposal that all trusts be required to disclose beneficiaries. The legislation and the general law concerning trust structures is different in every country and most of Europe uses the civil law, rather than English law, so a universally consistent regime for trusts is not likely.

The United Kingdom is not in favour of wide disclosure laws as UK trusts, like our own, do not always list specific beneficiaries and members of a class of beneficiaries may change.

It has announced plans to create a public register and reveal the identities of beneficial owners of shell companies in a move claimed to be aimed at preventing company tax avoidance. The proposed public register would hold information on those with an interest in more than 25% of company shares or voting rights, or otherwise control how the company is run. Companies will have an obligation to provide updated information at least once every year, including the individual's name, date of birth and nationality.

Australia's Assistant Treasurer, Kelly O'Dwyer, has recently announced that the current government plans to follow suit with its own public register for shell companies in a move to prevent company tax avoidance. The proposed scheme is consistent with the G20 standards.

> "It does improve transparency. It means that the public and law enforcement agencies know who ultimately controls the company. It means it is a lot easier to expose wrongdoing or fraudulent conduct. It makes it much easier to disrupt illicit financial flows and it makes it much, much harder to engage in tax avoidance" said Australia's Assistant Treasurer, Kelly O'Dwyer.[1]

Increasing tax transparency and trying to stop tax evasion should no doubt be promoted. However, there are serious privacy concerns in revealing information to competitors and exposing the financial position of individuals.

While a public register would create greater transparency of ownership by allowing people to see who is really in charge, it may also capture individuals with good reasons to protect their privacy. If there is to be an Australian register, we would counsel it to be a private register that can only be accessed by the tax authorities rather than the general public.

Several other responses have been made through political processes and the ATO to the revelations concerning the Panama Papers so far and more can be expected.

How long will it be until both the UK and Australia follow the EU and NZ in requiring further disclosure about trust beneficiaries? It seems likely this is not a question of 'if' it happens but instead a question of 'when' it happens.

International trust structures have come in for particular attention after the leaked documents highlighted features that may be used to avoid disclosures and consequently taxes.

[1] http://www.theguardian.com/australia-news/2016/apr/22/coalition-to-create-public-register-to-reveal-true-owners-of-shell-companies

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INSIGHT | **By Briony Hutchens & John Tucker**

"With no Survivorship"

Is it needed?

When you hold land in a trust, the trust is not noted on the register at the Lands Titles Office or on the certificate of title for the land. Instead, the register and the title simply show that the land is held in the name of the persons who act as trustee of the trust. The reason for this is section 162 of the *Real Property Act 1886* ("RPA") which prohibits the Registrar-General from entering any particulars of a trust on the register.

For this reason, it has become common practice to note trustee capacity by noting on the register that the registered proprietors hold the land "with no survivorship". While effective to indicate a trust holding, this technique can lead to a number of practical problems which are often not considered at the time the phrase is employed.

The words "with no survivorship" can be used where there are two or more registered proprietors who jointly hold the land as trustees. The effect of this is that it will not be lawful for any less number of joint proprietors than the number registered at the time that the notation is made to transfer or otherwise deal with the estate or interest in the land without first obtaining an order of the Court (section 165 of the RPA).

Alternatively, the notation can state that the above restriction as to transfer or other dealings with the land will not apply unless the number of persons registered as proprietors drops below a certain number. For example, the notation may operate such that the restrictions on dealings only applies once the number of proprietors drops below two, even if there were more than two proprietors at the time that the notation was made.

The notation acts to deny the operation of ordinary principles of survivorship that apply to joint proprietorship. This means that when one of the owners dies reducing the number of trustees to one or less than the specified number, title to the land does not vest in the survivor(s).

In practical terms, this means that if the number of trustees of the relevant trust drops below either the number existing at the time that the notation was made or the other number specified in the notation, a dealing with land to be registered by the Registrar General cannot be made without an order of the Court unless and until the requisite number of trustees is restored.

Consequently, in the event of the death, retirement or removal of a trustee which would cause the number of trustees to drop below the required number, the endorsement will compel the appointment of a replacement trustee and their registration as a proprietor of the land before any further dealing in respect of the land can be effected. This is so even if the terms of the relevant trust deed or the *Trustee Act 1936* do not require the appointment of a replacement trustee and the surviving trustee or trustees are otherwise authorised at law to deal with the property.

It is common practice for trust deeds not to impose a minimum number of trustees. Ordinarily, therefore, where a trustee dies, retires or is removed, there is no need to appoint a replacement. In fact, there may be any number of reasons why the remaining trustee or trustees may not want to appoint a replacement. The requirement to do so in order to comply with the provisions of the RPA can therefore impose an unnecessary burden on the surviving trustee or trustees.

The most obvious example of where this may cause difficulties is in a family trust.

The most obvious example of where this may cause difficulties is in a family trust. For example, Mr and Mrs A, a married couple with two children, act as trustee of the A Family Trust and in that capacity purchase a piece of land. The title notes that they hold the land "with no survivorship". Subsequently Mr A dies. The trust deed does not require there to be more than one trustee at any time. Accordingly, upon Mr A's death, the trust deed provides that Mrs A becomes the sole trustee of the trust. However, as the ownership was noted as being "with no survivorship", Mrs A cannot transfer or otherwise deal with the land in any way unless at least one further trustee is appointed. The logical thing to do would be to appoint Mr and Mrs A's two children as additional trustees. However, this may not always be appropriate and can create its own practical difficulties if one child is not in harmony with the other or with Mrs A and refuses to agree to proposed actions or if the trust deed allows decisions of a majority of the trustees to be binding on all, the children could potentially exercise powers of the trustee against the wishes of Mrs A.

It is relevant to observe that there is no requirement for a trust holding to be noted with "with no survivorship" on the title. From an evidentiary perspective, the notation serves no purpose other than to notify that the land cannot be dealt with by a single surviving joint proprietor. It does not, by itself, provide any evidence of particular trusts that the land is held on. There are other ways that the trust holding can be indicated on an LTO panel form Memorandum of Transfer, for example by noting in the consideration panel that the consideration is paid by the transferee in its capacity as trustee of the particular trust. In addition to this, there are any number of ways to evidence the trust capacity through contracts or other documents recording the details of the transaction pursuant to which the transfer or other dealing occurs, but these do not achieve notation on the certificate of title and this limitation appears to be the genesis of the current preference for use of the term "with no survivorship".

While there may be instances in which the use of "with no survivorship" and the resulting requirement for a minimum number of trustees to be maintained are justified, the perceived benefits from its use, as opposed to the practical problems that can arise from its use, warrant closer consideration than they appear to be receiving in current conveyancing practice.

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INSIGHT | **By Mark Minarelli & Sandy Donaldson**

Wills for Different Countries

International wills vs concurrent wills

Do you live in Australia and have assets overseas? What happens to the assets when you die?

Making a will is highly recommended, particularly if a person has substantial assets. The main reason is to ensure that, on death, the person's assets are received by, or held for the benefit of, the person or persons that are intended by the deceased. If there is no will, the assets will be distributed in accordance with the laws of the country where they are situated.

In South Australia the estate of a person who dies without a valid will (an intestate estate) must be distributed as follows in the scenarios below (there are obviously other scenarios):

- if there is a spouse (including a domestic partner) only, to the spouse;
- if there is a spouse and children, the spouse is entitled to all of the estate if it does not exceed $100,000;
- if the estate is more than $100,000, the spouse will receive $100,000, personal belongings and one half of the balance of the estate and children will be entitled to the rest in equal shares. The Public Trustee will hold the shares of the children until they are 18 years old.

This may not be what a person would wish for the distribution of their estate. The most common form of simple wills is for an estate to be left only to a surviving spouse, and not to children.

There are other benefits in making a will, as an application for probate of the will may be easier than an application for administration of an intestate estate. It is also possible to use wills for more creative estate planning such as testamentary trusts which may assist to retain assets within families and have taxation benefits.

Assets in different countries

It is becoming common for people to have substantial assets in different countries. In Australia, there are many people who live in Australia and have assets here, and also assets in another country, often their birth country, such as European countries, China and India.

When assets are held in different countries, or "*jurisdictions*", very careful consideration may be required for the making of a will that deals with the assets in each jurisdiction.

Foreign wills

Each country has its own laws relating to the making of wills and to the distribution of intestate estates (if there is no will).

Most wills, if only a single will is made, relate to all of the property of the will-maker wherever it is situated. In many jurisdictions (including South Australia) a will that is validly made in another country may be accepted, but it will be necessary to prove that the will has been made in compliance with the internal law of the country where it is made.

In some countries, however, foreign wills may not be acceptable, or provisions of the foreign will may not be valid. For example, in some countries the concept of a trust, which is common in wills made in Australia, may not be recognised.

Wills for assets in different countries

There are, generally, two methods of creating wills which are effective for assets in different countries. These are:

- an *international will*; or
- *concurrent wills*.

For reasons that are explained below, we suggest that concurrent wills will usually be the best solution.

International wills

An *international will* is one which is made in accordance with the *Convention Providing a Uniform Law on the Form of an International Will 1973*. This is a Convention to which many countries, including Australia, are parties. In South Australia the Convention has the force of law under section 25G of the *Wills Act 1936*.

It is very difficult to make a "one-size-fits-all" will.

Under the Convention, a will that is made in accordance with the requirements of the Convention will be recognised in countries that are parties to the Convention. The requirements for a will in the Convention are substantially the same as the requirements for making a will in Australia. The main requirement in the Convention for an international will is that the signing of the will must be witnessed by three people:

- two witnesses who must also sign the will; and
- an *authorised person* who must sign both the will and a certificate in the form required by the Convention. In Australia, an *authorised person* is a notary public or a legal practitioner.

Although an *international will* may be accepted in other countries, it may still not be appropriate, or may not be clearly interpreted, particularly where the laws of the other country are different from the laws of the place where a will is made, or where there are language differences. It is very difficult to make a "one-size-fits-all" will.

If there is no will, the assets will be distributed in accordance with the laws of the country where they are situated.

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When assets are held in different countries, or "jurisdictions", very careful consideration may be required for the making of a will that deals with the assets in each jurisdiction.

Concurrent wills

A better solution may be for a will-maker to prepare wills which apply separately in different countries. These are often called "*concurrent wills*". It is possible to make a will which only applies to specific assets, or assets in a specific jurisdiction. If a will is made for Australian assets, this can be drawn by, or with assistance from, a lawyer in Australia so as to be appropriate for this jurisdiction. Another will may be drawn for property in another country, and it is advisable that this will should be drawn with assistance from a lawyer or notary who is familiar with the laws of that country.

It is possible for a number of concurrent wills to be created for different countries. Usually, one of the wills will relate to all of the property of the will-maker, wherever property is situated, other than property in each jurisdiction for which another concurrent will is made, so that if property is located in other countries that are not covered by a specific will, the general will should apply to that property.

A very practical advantage of concurrent wills, rather than one will (whether or not this is signed as an *international will*) is that application may be made for probate of each will in the country to which it applies. If there is only one will, it will be necessary for an application for probate to be made in one country and then for the probate to be resealed in each other country in which the will is required to be proven. The requirements for re-sealing may be complicated and will certainly take longer than a separate application for probate for separate concurrent wills.

If concurrent wills are made, very great care must be taken to ensure that these are each properly made and effective for the jurisdictions to which they apply. Usually, a will will revoke former wills that are made by the will-maker so that if concurrent wills are made it must be clear that each will does not revoke another concurrent will. It is particularly important to keep this in mind if the wills are made in different countries with the assistance of different advisors.

Making concurrent wills may be a somewhat complicated process, but it may be a very worthwhile process if the result is to give effect to the intentions of a will-maker. Concurrent wills may avoid many difficulties and unintended consequences for the distribution of the estate of the will-maker in different countries and thereby avoid or reduce costs which would otherwise apply.

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University of Adelaide Law School Prize Ceremony

DW Fox Tucker Lawyers Prize for Income Tax Law

The annual University of Adelaide Law School Prize Ceremony was held the evening of 30 March 2016 to recognise student excellence in the 2015 undergraduate and postgraduate programs.

DW Fox Tucker Lawyers joined students (current and former), parents, friends, staff and other sponsors to present and celebrate the achievements of these truly exceptional students. The retiring Justice Sulan of the South Australian Supreme Court provided inspirational and often humorous guidance to all in attendance in Adelaide's beautiful Elder Hall.

Senior Associate Brett Zimmermann, a long-time member of the firm's well-respected tax division and university seminar facilitator in the subject, was very pleased to represent the firm and present the sponsored "*DW Fox Tucker Lawyers Prize for Income Tax Law*" to Daniel Marateo.

The firm would again like to publicly congratulate Daniel on his prestigious win, and wish him the very best with his future endeavours.

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INSIGHT | **By Liam McCusker & Tarley Leideritz**

"The first thing we do, let's kill all the lawyers"

William Shakespeare (1564-1616).

But then who will we have left to sue?

It is trite law that a lawyer will owe a duty of care to their retained client to perform legal services with the skill, care and diligence as is reasonable to expect from a person professing to have the expertise, skills and qualifications of the lawyer.

It is also well accepted that, generally speaking, lawyers do not owe a duty of care to persons who are not their clients – or at least… it was!

There are now a number of recognised circumstances in which a duty of care on the part of a lawyer may arise independently of a retainer to persons who may not be a client in the traditional sense.

By way of example, a duty of care has been recognised as being owed by a lawyer to a:

- non-client in the context of a negligent misstatement made by a lawyer causing loss;
- a beneficiary of a client's will, in the absence of reliance by the third party beneficiaries; and
- a client's trustee in bankruptcy as a result of the reliance by the trustee on the lawyer.

There are other novel scenarios in which a duty of care on the part of a lawyer may arise independently of a retainer which have not yet been considered by the Courts – many of which have arisen from the law's innovative nature.

Take the following example arising from developments in the area of Family Law – more particularly, the use of cohabitation agreements prior to marriage.

Imagine you are a successful entrepreneur and you have a *de facto* partner who is about to inherit a small family fortune. You each have children from previous relationships and you both want to ensure your respective children get what you intend to leave them. More pressingly, though, you want to protect your assets from each other in the event your *de facto* relationship ends in separation.

Accordingly, you engage a lawyer to assist you in documenting an agreement with your *de facto* partner pursuant to which your respective assets will be kept separate in the event of a separation. Your *de facto* partner engages her own lawyer for the same purpose.

Your *de facto* partner's lawyer suggests that a cohabitation agreement would be appropriate and you and your *de facto* partner take his advice and instruct him to prepare a draft. After some negotiation between your lawyer and your *de facto* partner's lawyer as to the precise terms, a final cohabitation agreement is prepared by your *de facto* partner's lawyer and executed by you both.

Unfortunately, some years later, your relationship ends in separation. So what about your assets? No need to worry, they are protected by the cohabitation agreement right? Wrong.

Your now ex-*de facto* partner commences Court proceedings against you seeking a declaration from the Court that the cohabitation agreement is invalid and unenforceable upon the basis that she was not provided with legal advice on the cohabitation agreement by her lawyer prior to signing it as required by the *Family Law Act 1975* (Cth).

Clearly, your ex-*de facto* partner's lawyer owed a duty of care to her to perform the legal services with skill, care and diligence and, in failing to properly advise your ex-*de facto* partner prior to the signing of the agreement, he may have failed in that duty. But, that is nothing to do with you. You didn't know that and could not have done anything to prevent that situation from occurring. Surely you are entitled to rely upon the terms of the cohabitation agreement?

Unbelievably, the Court does not agree and finds that, in the absence of your ex-*de facto* partner having been properly advised on the terms and effect of the cohabitation agreement, it should be set aside on just and equitable grounds (being, that you stand to be placed in a far more financially beneficial position if the cohabitation agreement is enforceable). You end up paying your ex-*de facto* partner a significant sum of money and transferring some of your favourite assets.

It is also well accepted that, generally speaking, lawyers do not owe a duty of care to persons who are not their clients – or at least… it was!

How do you recover your loss? Arguably, your ex-*de facto* partner has done nothing wrong (other than potentially exploiting a legal loophole). Your lawyer has also done nothing wrong – as it was never his role to advise your ex-*de facto* partner. He, like you, expected her lawyer to do his job. Are you left bearing your losses?

Well, as a result of developments to the laws of negligence in cases such as *Perre v Apand Pty Ltd*,[1] *Caltex Refineries (Qld) Pty Ltd v Stavar*,[2] *Carey v Freehills*,[3] *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[4] and *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords*,[5] it is arguable that your ex-*de facto* partner's lawyer owed you a duty of care, the breach of which means he is liable to pay you damages for the loss you suffered as a result of the cohabitation agreement being invalid and unenforceable.

The rationale for extending that duty of care to you can be explained as follows.

The creation of the cohabitation agreement was not a scenario in which the parties were in dispute, or in which the parties' interests were (whilst similar) distinct (such as a lease agreement). Rather, in seeking to create the cohabitation agreement, the parties' respective interests were aligned – and both the parties' lawyers were working together to achieve the same outcome.

Both parties were readily identifiable (and, in fact, known to each lawyer). The use of separate representation was, in fact, merely a necessary imposition to ensure that both parties obtained independent legal advice on the terms and effect of the cohabitation agreement (thereby, significantly diminishing the ability of either party to later argue that they didn't know what they were signing). However, in not properly advising your ex-*de*

[1] (1999) 198 CLR 180.
[2] (2009) 75 NSWLR 649.
[3] [2013] FCA 954.
[4] [1964] AC 465.
[5] (1997) 188 CLR 241.

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facto partner, her lawyer placed you in a position where:

- you became vulnerable to the consequences of his acts and/or omissions concerning the provision of legal services to your ex-*de facto* partner;
- you were likely to suffer loss by reason of his failure to provide legal services with the skill, care and diligence as is reasonable to expect from a person professing to have the expertise, skills, and qualifications that he did; and
- you were unable to protect yourself against the consequences of a failure by him to perform the legal services with the skill, care and diligence as is reasonable to expect from a person professing to have the expertise, skills, and qualifications that he did.

As a result of the developments to the law of negligence, it is not just lawyers who are becoming more exposed to claims by non-clients. Rather, all professionals must now accept that a risk exists that non-clients who are vulnerable to that professional's acts or omissions (in the sense of being at risk of suffering loss in circumstances where they cannot take steps to protect themselves from the consequences of a professional's negligence), may also be entitled to bring a claim for professional negligence against them.

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Tarley Leideritz Lawyer

Supporting Our Community

Leukaemia Foundation

Liam's greatest shave

DW Fox Tucker would like to thank everyone who donated to our World's Greatest Shave fundraiser.

One of our very own directors, Liam McCusker, volunteered to shave his head if we raised $1,500 for the Leukaemia Foundation.

We are pleased to announce that a total of $1,766 was raised and Liam has now shaved his luscious locks!

The money raised will go towards blood cancer research which is needed urgently to find better treatments and cures, as well as supporting families with practical and emotional support during the long and gruelling treatment process.

If you would like to know more about the Leukaemia Foundation and the fantastic work they do, please visit their website via this link: www.leukaemia.org.au/

Hutt St Centre

Angel for a week

We are pleased to announce that we have continued our involvement with Hutt St Centre.

Each year Hutt St Centre serves around 50,000 meals and offers social work and support services to nearly 2,000 homeless and disadvantaged people. Showers, laundry facilities, visiting health professionals, an aged city living program for their older clients, recreation activities, education and training, legal aid and assistance with finding housing are all services provided to the 200 plus people who visit Hutt St Centre each day.

DW Fox Tucker was proud to be an "Angel for a Week" this year, providing breakfast and dinner for everyone who visited Hutt St Centre in the week commencing 14 March. We also had our staff helping out in the kitchen each day that week!

If you would like to know more about Hutt St Centre and the difference they make to the lives of homeless and vulnerable residents of inner-city Adelaide please visit www.huttstcentre.org.au/

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NEWS & VIEWS | By Lisa Harrington & Alex Bastian

Licensee Update - Part 2

Avoiding disciplinary action

You may have seen our recently published "Licensee update - Part 1" which discussed some simple but often forgotten aspects of the *Liquor Licensing Act* (**The Act**) and advised on how to avoid disciplinary action (visit www.dwfoxtucker.com.au/2016/03/licensee-update-part-1-avoiding-disciplinary-action/). That advice asked Licensees to asses some of the compliance issues of the Act regarding the need to seek the Commissioner's approval before making changes. This included changes to the corporate structure of a Licensee entity, physical changes to the licensed premises and entering into profit sharing arrangements. Part 2 of our Licensee update on how to avoid disciplinary action focuses on the day to day management and compliance issues which affect Licensees.

Public display requirements

- **Liquor Licence** – All Licensees must ensure that a copy of their licence is displayed at or near the front entrance of the licensed premises. Even in cases where a Limited Licence has been granted the Commissioner will generally require a copy of that licence to be displayed in a prominent position on the licensed premises, and that Licensees are aware of the conditions of their licence.
- **Notices to Minors** – A section 113 Notice to Minors sign must be displayed in a prominent position in each part of the licensed premises to which access to minors is permitted.

  A section 112 Notice to Minors sign must be displayed at each entrance of the licensed premises, or part of the licensed premises at any time when access is prohibited to minors.

  For holders of an Entertainment Venue Licence minors are prohibited between 9pm and 5am (other than in an area that has been approved by the licensing authority), and for holders of any other licence between 12 midnight and 5am (other than in a dining room, a bedroom or some other area that has been approved by the licensing authority).
- **Responsible Persons** – Unless a Licensee has been granted an exemption there must be at least one responsible person (**RP**) on duty at all times when the licensed premises is open to the public. An RP must wear an ID badge in a prominent position which is clearly visible at all times.

  To be an RP, an employee (or owner) must have completed a Personal Information Declaration and been approved by Consumer and Business Services as being a fit and proper person. This person would need to show knowledge of the requirements of the Act and matters relating to the responsible service of alcohol.

  It is also important to note that all staff involved in the service or supply of alcohol must have completed nationally accredited responsible service of alcohol training.

Other requirements

- **Licensed Premises Plans** – While plans do not need to be displayed to the public, they must be kept on the licensed premises at all times and made available to an authorised officer, who include Police and Licensing Inspectors, upon request.
- **Management Plan** – It is a requirement of the General Code of Practice that each Licensee must prepare a management plan specific to the licence and venue. A copy of the management plan must be kept on the licensed premises and staff must be aware of the material contained in the management plan as well as its location.

  It is also a requirement that the management plan is reviewed every two years or when operations under the licence alter in such a way that warrants a review and modification of the management plan to be undertaken.

  Each staff member involved in the service or supply of alcohol must be trained in relation to the management plan on induction and refresher training must be provided every two years. Licensees are also required to keep a record of such training and it is recommended that details of training are kept with the management plan.

Non-compliance with the above requirements is generally an offence under the Act and can attract hefty fines and potentially licence disqualification in some instances particularly for repeat offenders. If Licensees are unsure as to whether the venue is compliant with the Act or need to know where they can get a copy of any of the above material including draft management plans, they should contact one of the experienced practitioners listed below.

What to do if you receive a complaint for disciplinary action?

Call us!!!

If you receive any complaint for disciplinary action from the Police or the Commissioner, no matter what the subject of the complaint, we can help.

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CASE IN POINT | **By Julie Van der Velde & Nick Wockel**

New Risk for Accountants

Accountant faces legal action for processing underpayments

A Victorian accounting firm faces legal action for its alleged involvement in the underpayment of wages to two of its client's employees.

The Fair Work Ombudsman ('FWO') has commenced proceedings in the Federal Circuit Court against EZY Accounting 123 Pty Ltd ('EZY Accounting') for allegedly being involved in contraventions of the *Fair Work Act 2009* (Cth) ("FW Act") by its client, Blue Impression Pty Ltd ('Blue Impression').

EZY Accounting provided payroll services to Blue Impression.

FWO alleges that EZY Accounting's involvement in the contravention was that it knew when providing these payroll services that the wage rates paid to two of Blue Impression's employees were well below those set out in the *Fast Food Industry Award 2010*.

Blue Impression operates a fast food restaurant in Melbourne. The restaurant allegedly underpaid two of its employees a total of $9,549.00 between September 2014 and April 2015.

FWO says the two employees, staying in Australia on 417 working holiday visas, were not paid the following minimum entitlements required to be provided under the *Fast Food Industry Award 2010*:

- The minimum base rate of pay as the employees were paid flat rates as low as $16.50 an hour;
- The required amount of penalty rates for work on the weekend or public holidays; or
- The required amount for casual loadings.

FWO is seeking the imposition of a civil penalty upon EZY Accounting on the basis that it was an accessory to the contraventions by Blue Impression because they processed the underpayments.

FWO is seeking the imposition of a civil penalty upon EZY Accounting on the basis that it was an accessory to the contraventions by Blue Impression because they processed the underpayments.

In 2014, Blue Impression was reminded of its obligations under the FW Act after an audit found that it underpaid 12 employees a total of $8,800. EZY Accounting was involved in the audit as they assisted Blue Impression to calculate and rectify the underpayments. FWO says that EZY Accountants were therefore aware of the minimum wages payable under the *Fast Food Industry Award 2010*.

Blue Impression and EZY Accounting each now face penalties of up to $51,000 per contravention, while Blue Impression's operations manager also faces penalties of up to $10,200 per contravention.

Key message for advisers

For some time, the FWO has been closely examining the involvement of third parties in contraventions of the FW Act, but this is the first time that the FWO has commenced legal action against an accountant as an accessory. In a recent statement, the FWO said:

> *"Small business relies heavily on trusted advisers, and if they give incorrect or bad advice, or deliberately assist with the contravention, should they not be held accountable?* ***In situations where we believe accountants or other professionals knowingly facilitate contraventions of workplace laws, we are prepared to hold them to account.****"*[1]

It is important for accountants and advisers assisting businesses with their employment obligations to be aware that where this results in the business contravening a civil penalty provision of the FW Act, whether because of an underpayment or non-payment of a minimum entitlement under a Modern Award or the National Employment Standards, that they may be taken to have contravened the same civil penalty provision of the FW Act themselves.[2]

[1] https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/february-2016/20160219-blue-impression-litigation
[2] *Fair Work Act 2009* (Cth) s 550

For some time, the FWO has been closely examining the involvement of third parties in contraventions of the FW Act, but this is the first time that the FWO has commenced legal action against an accountant as an accessory.

The EZY Accounting case demonstrates the need for accountants and business advisers to ensure their advice is compliant with the FW Act. Although accountants cannot be held to the same standard as legal advisers, we suggest that accountants who are involved with the calculation and processing of payments to their clients' employees will need to be able to establish that they have taken steps to ensure they are not involved in any contravention of the FW Act.

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NEWS & VIEWS | **By William Esau & Briony Hutchens**

Land Tax

Land held on behalf of two or more family trusts - the aggregation principle

On 25 February 2016 the Commissioner of State Taxation issued Revenue Ruling LT004 which seeks to clarify the operation of section 13(3)(b) of the *Land Tax Act 1936* (Act) and, in particular, the circumstances in which land will be considered to be held in trust for the same beneficiary.

Section 13(3)(b) provides a qualification to the aggregation principle. The "aggregation principle" is the principle under which the taxable value of all land owned by the same taxpayer is aggregated for the calculation of land tax (refer sections 2(1) and 8B of the Act).

The scheme of the Act is such that trusts are not recognised as an owner of land. Instead, the trustee of the trust is the owner, and therefore taxpayer, in respect of land held in its trustee capacity. Under the aggregation principle, all land held by a person as trustee, even as trustee of separate trusts, would therefore be aggregated for land tax. The purpose of section 13(3)(b) is to ensure that the aggregation principle does not apply to aggregate land held on trust for different beneficiaries.

Essentially the section provides that if land is held on trust, notice of the trust is given as required by regulation and the trustee is the taxpayer for the land, the taxable value of the land will **not** be aggregated with the taxable value of other land owned by the same trustee/taxpayer **unless the other land is held in trust for the same beneficiary**.

There has long been debate as to when land will be considered to be held in trust for the same beneficiary, particularly in the context of discretionary trusts where it is generally accepted that no beneficiary has an interest in any of the assets of the trust but rather only the right to be considered by the trustee when exercising its discretion. In this situation, it is arguable that the assets of the trust are not held "in trust" for any beneficiary and therefore the aggregation principle cannot apply, even if the defined class of beneficiaries of two discretionary trusts are the same or substantially the same. In other words, the expression "the same beneficiaries" can only refer to persons or entities who have a beneficial interest in the assets of the trust.

The Commissioner in LT004 has taken a different view, stating that the word "beneficiary" is to be read as including "beneficiaries" and treating the property of a discretionary trust as being held in trust for all persons within the class of potential beneficiaries of the trust. Importantly, the Commissioner states that where the trust has different income and capital beneficiaries, it is the capital beneficiaries that must be the same. Further, he considers the identity of any default beneficiary or takers in default, i.e. persons in whom the assets or income of the trust will vest in default of the trustee exercising its discretion in favour of another person or persons, to be irrelevant.

...where two separately settled trusts have the same general class of beneficiaries and the same trustee, the land held in those trusts will be aggregated by the Commissioner for land tax purposes, potentially resulting in a substantially higher land tax liability.

This means that where two separately settled trusts have the same general class of beneficiaries and the same trustee, the land held in those trusts will be aggregated by the Commissioner for land tax purposes, potentially resulting in a substantially higher land tax liability.

It has been common practice where persons hold multiple land assets with significant values to have each parcel held under a separate trust, albeit for the same beneficiary class and usually, for commercial convenience, with the same trustee. In these situations, the Commissioner will, on the views expressed in LT004, now seek to aggregate these land holdings.

In order for the exception in section 13(3)(b) to apply, the taxpayer must demonstrate to the Commissioner that the beneficiaries of each trust are different. As it is the wider class of beneficiaries that the Commissioner claims is relevant (not simply as the contrary argument requires, an identified same beneficiary or beneficiaries in whom interests in the respective lands are vested) merely naming a different (but related) primary or specified beneficiary in each trust may not be enough to create different beneficiaries if the definition of the beneficiary class is such that the same persons qualify as beneficiaries of both trusts. This is not always the case, however, and an analysis of the terms of each trust may reveal differences in the potential beneficiary class in which case section 13(3)(b) would apply.

DW Fox Tucker can assist affected taxpayers in reviewing the application of the aggregation principle to their individual circumstances, applying to the Commissioner for de-aggregation of two or more trusts and as to whether holding can be restructured to prevent aggregation. In this regard there are anti-avoidance provisions in the *Taxation Administration Act 1996* which will potentially prevent a restructuring predominantly for this purpose.

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NEWS & VIEWS | **By Briony Hutchens & Amy Bishop**

Stamp Duty Amendments

Effect on business sales and unit transfers

In our Winter Report we wrote about the Government's announcement in the 2015/2016 budget that it would be abolishing stamp duty on non-real property transfers and phasing out stamp duty on non-residential and non-primary production property (visit www.dwfoxtucker.com.au/2015/09/proposed-stamp-duty-changes/).

This was announced to mean:

- No stamp duty on business transfers;
- Abolition of stamp duty on unit transfers, except where the trust held land;
- Phasing out of stamp duty on transactions involving non-residential and non-primary production property.

Since the announcement, legislation has been passed to enact the changes. The legislation in its draft form was criticised by industry bodies as not achieving the stated objectives, and we have previously outlined some problems that we perceived from the draft legislation.

The *Statutes Amendment and Repeal (Budget 2015) Bill 2015* was passed without significant amendment and taxpayers and practitioners are now faced with the problem of applying the legislation. On top of this, the Commissioner of State Taxation's application of the law is not consistent with what was expected under the announcement. The result is that a number of transactions that, under the announcement, were expected to be exempt are now being brought back into the stamp duty net.

This article will examine two issues in particular. Firstly, the effect of the Commissioner's view that all assignments of lease are dutiable, even if they have no market value, and secondly, the stamping of transfers in a unit trust.

Using leases to impose duty on business transfers

A leasehold interest comprises an interest in land for the purposes of the *Stamp Duties Act 1923* (**the Act**). Consequently, the transfer of a leasehold interest constitutes a conveyance or transfer of land. Where the conveyance or transfer of such interest is liable to stamp duty, the transaction will be a "dutiable land transaction" for the purposes of the Act.

The significance of this is that where an arrangement includes a dutiable land transaction, stamp duty will be payable in respect of not only the conveyance or transfer of land, but also in respect of the conveyance or transfer of "prescribed goods".

Prescribed goods are defined in section 104B(4) of the Act to mean goods that have a significant connection with the land, but does not include the following:

(a) goods that are stock-in-trade;

(b) materials held for use in manufacture;

(c) goods under manufacture;

(d) goods held or used in connection with land used for primary production;

(e) livestock;

(f) a motor vehicle or trailer;

(g) a ship or vessel.

As we pointed out in our previous article, it is generally accepted that where a market value (or above market value) rent is being paid under a lease, the interest of the lessee has no value. Where the rental is less than the considered market rate, however, the interest of the lessee is considered to have value.

On this basis, it is arguable that stamp duty is only payable, and therefore that there is only a dutiable land transaction, in respect of the assignment of the lessee's interest where the lessee is paying less than market rent.

The Commissioner has now taken the position that all assignments of lease are dutiable, even if they have no market value. This is on the basis that all leases have a nominal value so, even where they are assigned for no consideration, there will be nominal stamp duty payable. The result is that all assignments of lease will be liable to stamp duty of at least $1.00, thereby resulting in a dutiable land transaction. Consequently, any transaction that involves the assignment of a lease will also bear stamp duty in respect of any goods with a significant connection to the land the subject of the lease being assigned that are prescribed goods.

Most significantly, this means that many business sales which were expected to be exempt from stamp duty at the time of the announcement are in fact dutiable to the extent that they convey an interest in prescribed goods. Where the prescribed goods are transferred as part of a dutiable land transaction that involves land other than residential or primary production land (i.e. commercial land), the Commissioner is allowing the taxpayer the benefit of the current one third[1] reduction in stamp duty, despite this not being as yet contained in the legislation.[2]

So what exactly are prescribed goods? Firstly, prescribed goods must be goods. Accordingly, goodwill, intellectual property, debtors and stock are all outside the scope of prescribed goods and will not be dutiable. However, it is difficult at this stage to have any certainty beyond that. The problem lies in determining what amounts to a 'significant connection' to the land, given that this phrase is not defined in the Act. It is relevant to note that fixtures and anything "fixed to the land" are considered for the purposes of the Act to be part of the land, and are therefore assessable in respect of the conveyance of the land. Prescribed goods will therefore exclude these assets.

[1] For transactions occurring between 7 December 2015 and 30 June 2017. This will be increased to two thirds for transactions occurring between 1 July 2017 and 30 June 2018, with duty being abolished in full from 1 July 2018.

2 As the right to this concession is not clear in the legislation, this leaves taxpayers in a precarious position if needing to assert any entitlement to this concession.

continued overleaf...

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Stamp Duty Amendments

Effect on business sales and unit transfers

...from previous page

Examples of prescribed goods provided by Revenue SA include shop counters and refrigerated display cabinets, presumably on the basis that they are not fixed to the land. This is even if the lessee has an obligation to remove the goods at the end of the lease. It would seem to us there is scope to argue against this view on the basis that these assets, while having a significant connection to a business conducted on the land, do not have a significant connection to the land itself which may be used for some other purpose without these items.

So how far can prescribed goods go? If you take a supermarket business, for example, it seems that the Commissioner would consider the shop counters and all fridges and freezers to be prescribed goods, but what about items such as shelving, cash registers and point of sale systems? We would argue that these are not prescribed goods given that they can be easily removed and are not fixed to the land in any way. Another example is the sale of a hotel business operated from leased premises. The Commissioner's view is that all built in bar fridges and other built in furniture are prescribed goods, but what about other items such as beer taps and lines, commercial kitchen equipment and bar stools and tables that are bolted to the ground?

There are any number of examples of items that could, on the Commissioner's view, be considered prescribed goods. Aside from the monetary liability that this creates for the purchaser, it imposes a significant administrative burden on both the taxpayers and the Commissioner in identifying prescribed goods.

Given these issues, we would hope that the Government takes advantage of the opportunity to amend the legislation to address the problems currently arising when it legislates the early operation of the one third reduction in stamp duty.

Transfers of units

Under the amendments, transfers of units in a unit trust that does not hold land (or an interest in land) will be exempt from stamp duty. Further, stamp duty will be phased out in respect of unit transfers in trusts that hold non-residential and non-primary production land (i.e. in unit trusts that hold commercial land) with the effect that from 1 July 2018 no stamp duty will be payable in respect of the transfer of such units. Until then, duty will be reduced by one third for transactions occurring between 7 December 2015 and 30 June 2017 and by two thirds for transactions occurring between 1 July 2017 and 30 June 2018. This applies to both conveyance duty under section 71 and landholder duty under Part 4 of the Act.

Where the unit trust holds residential or primary production land, a transfer of units will continue to be dutiable at full rates under both section 71 and the land holder provisions of the Act until 1 July 2018, at which time conveyance duty under section 71 will be abolished and the $1M threshold under the land holder provisions will be removed. The result is that unit transfers will become solely dutiable under the land holder provisions. Given that these provisions only operate in respect of transactions that result in a person or group becoming the owner of 50% or more of the units in the trust, unit transfers that don't meet this threshold will not be dutiable.

Currently section 71(4) of the Act deems a unit holder to have an interest in each asset of the unit trust. The transfer of a unit is therefore a conveyance of the unit holder's deemed interest in each of these assets. The amendments operate such that the transfer of an interest in each asset of the unit trust other than land and prescribed goods is now exempt from stamp duty. The result is therefore that stamp duty in respect of a unit transfer is now to be calculated only by reference to the value of the interest in the land and prescribed goods that are conveyed by the unit transfer.

Prior to the amendments, the value of a unit for the purposes of assessing conveyance duty under section 71 of the Act was determined by reference to the net assets of the unit trust. As a result of the amendments, the value of the unit is now to be calculated by reference only to the net value of the land and prescribed goods held by the trust.

In working out the 'net value', the Commissioner will deduct from the value of the land and the prescribed goods the whole of any liability secured against the land and a portion of any business or commercial loans that are not secured over any assets of the trust. The portion is determined by reference to the value of the land and prescribed goods calculated as a proportion of the total value of the assets of the trust. This is not legislated, it is simply an administrative position taken by the Commissioner. An example of this valuation methodology is provided below.

As noted above, until 1 July 2018, transfers of units in a trust will be subject to both conveyance duty under section 71 and land holder duty under Part 4 of the Act. Land holder duty will only apply where the value of the land in South Australia held by the trust is more than $1M and where the transaction results in a person or group holding 50% or more of the units in the trust. Landholder duty is calculated by reference to both the value of the South Australian land held by the entity and the value of the "South Australian goods" held by the entity. South Australian goods has a similar, although not identical, definition to prescribed goods and it is expected that in practice the Commissioner will treat the same assets as both South Australian goods and prescribed goods. A rebate is then applied under section 102A(7) of the Act to reduce landholder duty by the amount

...the Commissioner of State Taxation's application of the law is not consistent with what was expected under the announcement. The result is that a number of transactions that, under the announcement, were expected to be exempt are now being brought back into the stamp duty net.

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The problem lies in determining what amounts to a 'significant connection' to the land, given that this phrase is not defined in the Act.

of the conveyance duty paid under section 71 in respect of the transfer of the interest in the land and the South Australian goods. This is to reflect that taxpayers would otherwise be paying duty twice in respect of the transfer of an interest in these assets – once under section 71 and again under the landholder provisions.

However, there is a problem with the rebate. Section 102A(7) was inserted prior to the amendments when conveyance duty was paid on the net value of all assets of the trust and, accordingly, was drafted such that the provision applied to rebate only a percentage of the conveyance duty equal to the value of the land and goods calculated as a percentage of the total value of all assets of the trust.

While the Act has been amended to remove conveyance duty in respect of the transfer of an interest in assets other than land and prescribed goods, section 102A(7) has not been amended. The result is that only a portion of the conveyance duty remains rebatable, even though conveyance duty is now paid only in respect of the transfer of an interest in land and goods and therefore should be rebated in full. This is a significant oversight and one which results in additional duty being payable as demonstrated by the example below. The Commissioner is aware of this problem and we believe will be rectifying it in due course. In the meantime, however, taxpayers may need to apply for ex gratia relief to get the benefit of a full rebate of the conveyance duty.

The following example demonstrates how duty will be calculated on the transfer of units. Assume the unit trust has the following assets and liabilities:

Assets

South Australian land $2m

Cash $200k

Debtors $50k

Stock on hand $500k

Plant & equip $300k (significant connection with the land)

Liabilities

Loan (secured by mortgage against the land) $1m

Creditors $30k

Bank facility (secured by charge over assets) $500k

Stamp duty on a transfer of 50% of the units in a unit trust would be calculated as follows:

1. For conveyance duty purposes (section 71) duty is calculated as follows:

   Value of the units:

   Assets: Land $2m

   Plant & equipment $300k

   Less Liabilities:

   Loan (secured by mortgage against the land) $1m

   Bank facility $377,000 (being 75.4% of the liability)

   NET VALUE = $923,000

   Value of units transferred (50%) = $461,500

   Stamp duty = $19,405

   Less:

   1/3 reduction ($6,468.33)

   Stamp duty payable = $12,936.67

2. For land holder purposes (Part 4) duty is calculated as follows:

   Value of interest acquired:

   Assets: Land $2M

   Plant & equipment $300,000

   TOTAL: $2,300,000

   Value of interest transferred (50%) = $1,150,000

   Stamp duty = $57,080

   Less:

   Rebate (section 102A(7)) = $9,754.25 being 75.4% of $12,936.67

   Landholder duty payable = $47,325.75

   Total duty payable in respect of the transaction (under section 71 and Part 4) is therefore $60,262.42

By comparison, a transfer of a 50% interest in the land and prescribed goods themselves would have resulted in stamp duty of $57,080 (based on a value of the interest transferred of $1,150,000).

The difference in stamp duty lies in the rebate under section 102A(7). If a full rebate is given for the conveyance duty, then no additional stamp duty is payable over and above what would have been payable on a transfer of a 50% interest in the assets themselves.

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INSIGHT | **By Mark Minarelli**

Aged Care

Estate planning and substitute decision-making

"My Aged Care" was introduced on 1 July 2013 and consists of the My Aged Care website and the My Aged Care contact centre. This initiative of the Commonwealth Government provides an integrated web-based portal for care recipients, assessors and service providers (visit www.myagedcare.gov.au). Under the Budget released on 3 May 2016 $136 million will be spent over the next four years on the My Aged Care contact centre to meet a significant increase in demand.

The Commonwealth Government has in the last three years introduced changes to the aged care system known as "Living Longer Living Better" (LLLB).

The reforms are designed to address:

1. The escalating proportion of the population of people aged 65 and over; and
2. The exponential future increase in the cost of aged care as a result.

The LLLB reforms introduce the concept of user pays as a trade-off for more choice for care recipients.

The key reforms include:

1. Removal of low and high care distinction - under the quality of care principles 2014, a provider must provide the care or services set out under those principles to any care recipient who needs them.
2. Accommodation bonds and charges no longer apply.
3. The fees charged for home care are based on the level of care required whilst the fees charged for residential care are based on the level of care required and accommodation.

The actual fees charged will depend on an assessment of income and assets. In other words, the level of Government support will depend on the financial position of the care recipient, with the level of support diminishing the higher the level of income and assets of the care recipient. The assessment therefore differs from that formally applying, which was an assessment based on income only. The inevitable consequence is that a care recipient will in the future pay more for aged care.

The basis of the fee payable by a care recipient is a complex formula simplified by a "fee estimator" on the My Aged Care website.

Care recipients will be asked to pay:

1. An accommodation payment; or
2. An accommodation contribution (depending on means).

An accommodation payment reflects a market price for the accommodation (room) and an accommodation contribution reflects a means tested contribution for the accommodation (room) provided.

The LLLB reforms also require a provider to publish the maximum prices charged for a room – currently the range is $250,000 to $550,000.

The reforms introduce two categories of residential care recipients:

1. Low means residents who pay:
   - Refundable Accommodation Contributions (RACs); and
   - Daily Accommodation Contributions (DACs).

   These payments or contributions are based on means tested amounts (a formula combining income and assets converted to a daily amount). The Commonwealth pays all approved residential care providers an accommodation supplement for each resident whose "means tested amount" is below the supplementary threshold – that is $53.84 or $35.08 per day depending on how recently the facility was built.

2. Non low means residents who pay:
   - Refundable Accommodation Deposits (RADs); and
   - Daily Accommodation Payments (DAPs).

A full explanation of the fee structure is beyond the scope of this article. How the fee is paid is, however, of crucial importance in relation to estate planning and a consideration of substitute decision-making (that is, powers of attorney and advanced care directives).

A person entering into the aged care system, particularly residential aged care (and also that person's family), will have a number of challenges to consider including:

1. The legal capacity of that person at the time of entry.
2. The representative(s) appointed by that person at the time of entry.
3. The adequacy of the formal appointment of the representative(s).
4. The impact the cost of aged care will have on the value of the estate of that person over time.
5. How that person will pay for the aged care – particularly the combination of the RAD, DAPs and RAC.
6. Whether the RAD will be eroded over time by deduction of DAPs or whether the RAD will be maintained at entry level over time.
7. A detailed understanding of the written agreement to be entered into with the provider (Price Agreement). The provider almost certainly will require the appointment of an attorney or representative and in some cases may require:
   - a guarantor of the Price Agreement – e.g. a family member; and/or
   - a registered or unregistered (equitable) mortgage over property owned either by the resident <u>or</u> a third party to secure payment obligations of the resident under the Price Agreement.

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The inevitable consequence is that a care recipient will in the future pay more for aged care.

8. The adequacy of that person's current will to deal with and react to the now changing nature of both the composition of that person's estate and the escalating liability of aged care.
9. In many cases a decision will need to be made as to whether to rent or sell the former family home. In both cases (depending on how the accommodation payment or contribution is to be paid), investment of the rental proceeds or sale proceeds may need to focus on income rather than capital growth.
10. In the case of a couple, whether they will both enter the aged care system at the same time and whether they will be separated or continue living together. If they do not enter the system at the same time, issues of jointly owned property arise which in some circumstances impact on the means test assessment for the person in care. Consideration may need to be given to the severance of the joint ownership and a reconsideration of both parties' wills.
11. The prohibition against third parties paying accommodation payments for a resident has been removed but there is still the requirement that any refund be made to the resident, or more likely meaning the estate of the resident. If a family member pays the RAD on behalf of a resident, in the absence of security, that person will be an unsecured creditor of the estate.

It becomes obvious when discussing these challenges that the person / resident is being called upon to make decisions at a time when frailty and decreasing capacity may create the need for powers of attorney and advance care directives. These documents must, however, be put in place when the person has the required legal capacity, preferably well before retirement. It has been estimated that over 50% of people in residential care have a dementia diagnosis. As people live longer the requirement for trusted representation and assistance becomes inevitable.

Whether this is to be found within the family or from outside the family will vary from situation to situation. In the absence of any good reason to the contrary, one would think that family is the starting point. If it is not then alternatives need to be considered.

The changing landscape in aged care brings with it the need to anticipate and respond to both the system itself and personal circumstances. Delay beyond the critical point (loss of capacity or failure to properly structure income and assets) will be a cause of trouble not only for the individual, but also for their family.

To quote Lewis Carroll, "*The time has come the walrus said, to talk of many things…*"

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SUITS OFF | **Staff Profile**

Victory ... at work & play

Brendan Golden Director

Away from work, Brendan coaches a group of a dozen pro runners and competes in sprints. However, not all of his races have been run at lightning speed.

Brendan gets together with his runners three times a week. He says, “The great thing about my running group is that half of them are adults and half are school-age kids – it is a really interesting mix.”

Brendan with his running group

Since 2001, he has also been the President of the South Australian Athletic League.

Coaching is his way of relaxing away from work and demonstrates at a grassroots level his commitment to the sport. “Seeing kids develop, not just in their athletics careers, but also personally … that’s really rewarding.”

He notes the parallels between legal practice and athletics competition. “Both pursuits might be regarded as fundamentally

Brendan (far left) in his capacity as President of the SA Athletics League at the official presentation to the 2014 Bay Sheffield winner.

“Seeing kids develop, not just in their athletics careers, but also personally … that’s really rewarding.”

individual. There are teamwork aspects though and the challenge is to improve performance in both.” However, Brendan believes, for him, the crossover is in taking the skill sets from his sports administration experience– such as strategic planning, business development and marketing – into his legal work.

When asked about the most challenging aspect of his work, he says, “Managing client expectations. The legal process… is much slower than most clients expect.”

“At the start of any proceeding, the client needs to know what the time frame looks like, how much they’re likely to spend and how much they’ll recover.’”

“There is always something to pay, to give, in return for getting a matter resolved at an early opportunity. Very often it means the client needs to put principles aside… and think what is the best thing to do for their business.”

That said, some of the most satisfying matters in Brendan’s career have been slow-burners.

In 2000, Brendan worked in London on a Public Inquiry into one of the UK’s worst shipping disasters. The Marchioness Inquiry, presided over by Lord Justice Clarke, investigated the circumstances of the collision on the Thames River between the Marchioness (a pleasure boat) and the Bowbelle (a commercial sand dredger). 51 people lost their lives in the collision.

“My role was initially to take all of the witness statements. That developed into being an instructing solicitor to the Inquiry. ”

“The Inquiry went for a year and because it was so high profile and had 15 different parties, had to be conducted in Westminster Central Hall. It was supposed to be Britain’s first paperless inquiry, but it didn’t quite work out that way: 55,000 documents, across 15 different parties.”

The actual hearing went for six weeks and the findings were damning of all parties involved in the accident and many of those working in its aftermath.

Brendan, at the coalface of the Inquiry, was surprised at the lack of regulation that contributed to the collision. “Over the years, the Marchioness had additions made to it, so the wheelhouse at the front couldn’t see what was coming from behind. With the Bowbelle, its wheelhouse was at the back of the vessel, so it couldn’t see what

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One of Brendan's runners, 13 year old Molly Farmer, winning the Under 14s Bay Sheffield final in 2014 (left) and winning her Under 17s 100m heat at the 2016 Stawell Gift Carnival (right). Molly is currently ranked number 2 in Australia for the 100m and 200m.

was in front. It didn't have proper strategies in place to be able to safely navigate anything that might have been in front of it. Basically, it navigated by the arches on the bridges. My immediate thought was, 'How come this hasn't happened before?'"

Unsurprisingly, the Inquiry led to wide-ranging changes in boating safety on the Thames and the introduction of tighter statutory controls on the use of English waterways.
"The captain of the Bowbelle had been drinking before he went to work. The police didn't breath test him until the following day. The water police ran over one of the survivors and broke her leg. The Port of London didn't have adequate protocols in place to prevent accidents like this. Different port surveyors were questioned because they allowed both boats to be changed from their original designs and that reduced their ability to safely navigate the river. It all contibuted to a monumental disaster."

Working on the Inquiry was pivotal in Brendan's career. He says, "Yes, it helped. It was challenging work and certainly outside of the comfort zone."

More recently, Brendan cites a career highlight as achieving success in a litigation case that went for more than five years.

"We acted for the liquidator of a fruit Co-op who had entered a joint venture. The joint venture was basically to be a packaging company. It didn't work and the bank called in the loans, which the Co-op paid. When the Co-op sought contribution from their joint venturer, the contribution claim was defended aggressively with all manner of defences and applications."

The Co-op members ended up receiving 100 cents in the dollar plus interest. "That never happens in a liquidation. It was a dream result."

Says Brendan, "Normally a liquidator doesn't have the resources to fight long term litigation. In this matter though, the liquidator was funded and had the support of their committee of inspection to prosecute the proceedings.

The Co-op members ended up receiving 100 cents in the dollar plus interest. "That never happens in a liquidation. It was a dream result."

During the course of public examinations it emerged that the joint venture partner had no assets.

"They were avoiding any risk. We amended the claim to add a misleading and deceptive conduct allegation and claimed all of the losses suffered by the Co-op, not just the contribution."

"The most satisfying thing was that the money that came in went out to all of the Co-op members who had been doing it tough."

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