In the Loop - Spring 2019

The Hicks Oakley Chessell Williams Newsletter

HICKS OAKLEY CHESSELL WILLIAMS
Lawyers & Notary

A message from Director & Principal Lawyer, Matthew Hicks

Welcome to the Spring edition of In the Loop. We trust it is informative and useful. In these days of constant information access (or bombardment), it is easy to be overwhelmed. We try to keep our articles brief and to the point. This edition covers a range of topics that might be of interest. I would like also to welcome to the HOCW team our recent arrivals mentioned in this edition.

Welcome Natalie Talia to our Wills & Estates Team

Natalie joined the firm in August 2019. In Natalie's previous role as Senior Associate to the Honourable Justice Robson and, having gained experience in that role in the Commercial Court, Natalie was given the opportunity to serve in the inaugural role of the Lawyer assisting the Trusts, Equity and Probate list of the Supreme Court of Victoria.

So valuable and enjoyable was that experience that Natalie now practises predominantly in the area of estate administration and litigation.

John Sharkie & Brendan O'Keefe join HOCW

Hicks Oakley Chessell Williams Lawyers have merged with the Malvern East law practice of John R Sharkie, Lawyers & Solicitors.

We are delighted that John Sharkie and Brendan O'Keefe have both moved across to our firm and are based at our Mount Waverley Office.

John and Brendan are highly experienced legal practitioners in both private law and commercial law, including wills, estates & probate, property & conveyancing, leasing, commercial law, litigation and building & construction.

Wills and deeds held by John R Sharkie have been acquired by Hicks Oakley Chessell Williams Lawyers.

Congratulations Lachlan Vallance on being recognised as a Leading Wills & Estates Litigation Lawyer

Hicks Oakley Chessell Williams Lawyers congratulate Lachlan Vallance, Director & Principal Lawyer and Wills & Estates Accredited Specialist, for being listed in the 2019 Doyle's Guide.

Lachlan is listed in the category of Leading Victorian Wills & Estates Litigation Lawyer as well as in the category of Leading Victorian Wills, Estates & Succession Planning Lawyer for 2019.

David Williams was also listed in the category of Leading Wills, Estates & Succession Planning Lawyers - Victoria, 2019.

Our law firm is also proud to be listed as a leading Victorian Wills, Estates & Succession Planning Law firm as well as a Leading Victorian Wills & Estates Litigation Law Firm for 2019.

A big thanks to all our clients and peers for recognising Lachlan Vallance, David Williams and the Wills and Estates Team's expertise and abilities in these areas.

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Commercial Litigation;
Commercial Tenancy Law;
Family Law;
Wills & Estates

p.t.o.

Five Things you need to do with your Company's Registered Office Address

Many important documents are sent to registered offices. They often require prompt attention otherwise there could be serious consequences.

Here are five things you need to do with your company's registered office address.

1. **Know the address -** Ensure the registered office of your company (as recorded with ASIC) is up to date and is known to all those who control the company. (It's not unheard of for directors to forget whether the registered office is the office of their accountants, their lawyers, their current home address or their old home address or some other address.)
2. **Put procedures in place for your mail to be forwarded promptly -** If your registered office is the office of an accountant, lawyer or some other entity, ensure that they have procedures in place to forward mail on to you promptly.
3. **Deal punctually with any formal legal notices received -** Pay particular attention to creditor's statutory demands, any Court documents or tax office documents such as Directors' Penalty Notices, as strict time limits apply.
4. **Know that a creditor's statutory demand is urgent -** If a creditor's statutory demand is received, obtain urgent legal advice, noting the strict 21 day time limit to file and serve a Court application to set aside the demand.
5. **Check the address the statutory demand lists -** If a statutory demand lists a physical address for service of an application to set aside the demand, serve the application at the physical address – not the email address.

Consequences of not dealing with important legal documents promptly

One type of document in particular can be a real problem if it is not dealt with – your company could be put into liquidation. That document is the creditor's statutory demand under the *Corporations Act 2001*. This is a formal demand which claims that the company owes a debt. The debt does not have to be based on a Court judgment or order.

What to do if you receive a Creditor's Statutory Demand - immediately!

Under the *Corporations Act* there is a strict 21 day time limit in which to respond to the demand. If the company has a genuine dispute about the debt, or an offsetting claim, it can apply to a Court (the Federal Court or the Supreme Court) to set aside the demand. It is critical that the Court application, accompanied by a supporting affidavit, is filed with the Court and served on the (alleged) creditor – within 21 days of service. No extension of time is possible.

Application Dismissed - a recent example of a Federal Court decision

Sheraz Pty Ltd v Rumsley [2019] FCA 493 - the company filed with the Federal Court an application to set aside a statutory demand on the basis that there was a genuine dispute about the debt. That took place within 21 days of receipt of the demand. All fine so far. However, the company did not serve the application until emails were sent to the office of the creditor between 4.58pm and 5pm on the last day of the 21 day period. The statutory demand did not list an email address as an address for service. The lawyer who served the statutory demand did not actually open and read the email serving the application to set aside for over a week, due to personal circumstances.

Accordingly, the Court found that the application to set aside the statutory demand was not served until after the 21 day period. There was no scope to argue that the application had come to the attention of the person who served the demand within the 21 day period (which would have allowed a finding that there had been valid informal service within the 21 day period).

The application to set aside the statutory demand was dismissed. Subject to further possible arguments (which the Court decision noted), it would then be open for the creditor to apply to wind up the company on the basis that it is deemed to be insolvent.

Matthew Hicks - Director & Principal Lawyer, Accredited Specialist - Commercial Litigation

New Cladding Legislation - what this means for you...

The Building Amendment (Cladding Rectification) Bill 2019 (Bill) was introduced into the Legislative Assembly by the Victorian State Government on 15 October 2019.

The Bill introduces amendments to the *Building Act 1993* (Principal Act) including but not limited to:

- Providing the Victorian Building Authority (the Authority) with further functions in relation to cladding rectification including making payments to individuals or bodies (i.e. owners corporations) eligible for financial assistance for rectification work.
- Establishing a new account within the Authority – the Cladding Safety Victoria Account enabling the funds in the account to be paid out from the Account for rectification work, review of the building legislative framework and other purposes.
- Imposing additional levies on certain building permits, depending on the location of the building work and classification of the building within the meaning of the Building Code of Australia (i.e. apartments, hotels, laboratories and factories), the costs of the building work and whether the applicant has sought to use staged building permits. The additional building permit levy will be placed towards the costs of carrying out the Authority's functions for cladding rectification.

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New Cladding Legislation - what this means for you... (cont.)

The Bill will also amend the Principal Act to provide that the rights and remedies of an owner to whom financial assistance is granted are subrogated to the State. This will allow the State to take legal action or make a claim against any person in relation to the installation of non-compliant cladding.

If the bill is enacted, what does this mean for you?

The State on behalf of owners and owners corporations affected by non compliant cladding, may be able to take legal action to recover your losses. However it is not clear if all buildings, or which buildings, might be included in the scheme. The subrogation of rights to the State includes all rights the owner of the building has against the wrongdoer whether it is in contract, tort and equity or under legislation. In essence, this will mean that innocent victims in at least some cases will not have to spend their own time and money pursuing building practitioners.

The Bill makes provisions that if staged building permits are required, the application will need to specify the contract price and or relevant information for the entire building work in order for the Authority to assess the rate and levy payable. The introduction of this amendment is to address the prospect of building practitioners breaking up the building work to avoid the increase in building permit levies. The additional rates will apply to building works equal to or greater than $800,000.

The Bill was read for the second time on 16 October 2019, with the debate adjourned until Wednesday 30 October. Watch this space for further updates on this matter.

Nicolle Ang - Lawyer

CGT 'Safe Harbour' for Selling an Inherited Property

The sale of your main residence (home) is generally exempt from Capital Gains Tax (CGT). If you pass away, your main residence may be sold by your executors or beneficiaries.

This article outlines the main residence exemption for deceased estates and the 'safe harbour' for executors and beneficiaries to access the exemption where certain factors delay the sale.

Two year time limit

As a general rule, the sale of a deceased's home will not attract CGT if it is completed within two years of the death. This is the deadline for final settlement to occur.

Commissioner's discretion to extend the two year limit

It may not be viable for executors or beneficiaries to complete the sale within two years of the death. For example, the estate may be placed on hold due to litigation.

The Commissioner of Taxation has the discretion to extend the two year time-frame where factors outside the control of the executors or beneficiaries substantially delay the sale.

Until recently, it was necessary to apply to the Commissioner for the discretion to be exercised.

The Australian Taxation Office (ATO) has released a Practical Compliance Guideline (PCG 2019/5) which outlines:

1. the factors the ATO will consider in deciding whether to exercise the discretion; and
2. a 'safe harbour' compliance approach allowing executors and beneficiaries to regard the discretion as having been exercised if certain criteria are met.

'Safe harbour' conditions

Each of the below conditions must be met for executors or beneficiaries to treat the discretion as being exercised in their favour:

- During the first two years post-death, more than 12 months was spent addressing at least one of the following issues:
  - ◊ the Will or ownership of the property was challenged;
  - ◊ the Will created a life interest or other equitable interest which delayed the sale of property;
  - ◊ the estate administration was delayed due to the complexity of the estate; or
  - ◊ the property settlement was delayed or failed due to factors outside the executor or beneficiary's control.
- the property was listed for sale as soon as practicable once these issues were resolved and the sale was actively managed to settlement;
- settlement occurred within 12 months of the listing; and
- none of the following factors caused material delay to the sale:
  - ◊ waiting for the property market to improve;
  - ◊ refurbishing the property to maximise the sale price;
  - ◊ inconvenience caused to the executor or beneficiary in arranging the sale; or
  - ◊ unexplained periods of inactivity by the executor or beneficiary in administering the estate.

What if the 'safe harbour' conditions are not met?

Where the 'safe harbour' criteria are not fully satisfied, executors and beneficiaries may apply to the Commissioner to exercise the discretion by way of a private ruling.

The Commissioner will look favourably upon allowing a longer period where any of the 'safe harbour' criteria (as above) delayed the sale of property.

Factors that would weigh against the Commissioner exercising the discretion include those listed above.

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CGT 'Safe Harbour' for Selling an Inherited Property (cont.)

In reviewing an application, the Commissioner may also consider:

- the sensitivity of the executor or beneficiary's personal circumstances and that of the other surviving relatives; and
- any difficulty in locating the beneficiaries required to prove the Will.

The Commissioner will place greater weight on the circumstances causing delay (rather than the length of the delay).

Lessons for executors and beneficiaries

Executors and beneficiaries seeking to rely on the 'safe harbour' must keep detailed records of the sale (including the circumstances which caused delay).

It is critical that executors and beneficiaries obtain expert legal and financial advice when selling a deceased's main residence and administering an estate. This will ensure the beneficiaries' interests are protected and the estate receives beneficial tax treatment as far as possible.

Deborah Kliger - Associate

Landlord & Tenant Reminder: Disclosure Rights & Obligations

The purpose of *Retail Leases Act 2003* (Act) is to "enhance the certainty and fairness of retail leasing arrangements between landlords and tenants and the mechanisms available to resolve disputes concerning leases of retail premises". One mechanism used to enhance that certainty and fairness is the requirement that certain information about the premises be disclosed to the tenant to ensure the tenant is aware of the implications of entering into a lease.

The disclosure statement basically seeks to provide the tenant with as much information as possible regarding the premises before the lease is executed.

The Act contains strict disclosure requirements which may have severe consequences for a landlord, and in some circumstances for the tenant, if they are not complied with.

Form of Disclosure Statement

The *Retail Leases Regulations 2013* (Vic) (Regulations) prescribe four disclosure statements to be used in the following circumstances:

Schedule 1 - New lease if the retail premises are not located in a retail shopping centre.

Schedule 2 - New lease if the retail premises are located in a retail shopping centre.

Schedule 3 - On renewal of lease for retail premises not located in a retail shopping centre as well as those located in a retail shopping centre.

Schedule 4 - On assignment of lease where ongoing business, the form of tenant's disclosure statement is in Schedule 4.

Consequences

If a landlord does not give the tenant the correct form of disclosure statement within the timeframes provided under the Act the tenant may:

- withhold rent until the day on which the landlord gives the tenant the disclosure statement; and
- not be liable to pay rent attributable to the period from and including the day on which the notice was given until and including the day on which the landlord gives the tenant the disclosure statement; and
- give the landlord a written notice of termination at any time up to 7 days after the landlord gives the tenant the disclosure statement.

Landlord's defence

Where a tenant exercises its right to terminate the lease, the landlord may object to the termination of the lease within 14 days after being given the notice on the grounds that:

- the landlord has acted fairly and reasonably and ought to be excused for the contravention; and
- the tenant is substantially in as good a position as the tenant would have been in if there had been no contravention.

If the tenant accepts the landlord's notice of objection or the tenant does not advise the landlord in writing within 14 days after being given the notice whether or not it accepts it, the lease will continue.

Tenant's Disclosure Statement

If the assignment relates to premises to be used for an on-going business, the tenant must give both the landlord and the proposed new tenant a disclosure statement set out in Schedule 4. This will release the tenant and any guarantor from the assignment date so long as the disclosure statement does not contain information that is false, misleading or materially incomplete.

If the assignment does not relate to an ongoing business, an outgoing tenant must give the incoming tenant a copy of any disclosure statement given to the tenant concerning the lease and details of any changes of which the tenant is aware, or could reasonably be expected to be aware, that have affected the information in the disclosure statement since it was given to the tenant. The outgoing tenant can request the landlord provide a new disclosure statement in order to comply with its obligation and the landlord must do so within 14 days.

It is important that both landlords and tenants are aware of and comply with their disclosure rights and obligations under the Act in order to avoid the harsh consequence of non-compliance.

Dianne Hodge - Senior Associate,
Accredited Specialist - Commercial Tenancy Law