

Worrall Moss Martin News

Issue 12, January 2020



Expert advice
and solutions



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Law Update - Changes Effective 1 January 2020

The following changes came into effect on 1 January 2020.

1. 'Foreign Investor Duty Surcharge'

Although originally intended to be effective from 1 January 2020, the following increases in 'Foreign Investor Duty Surcharge' for acquisitions by foreign persons under the *Duties Act 2001* (Tasmania) will not increase until 1 April 2020:

- the 'Foreign Investor Duty Surcharge' for residential land will increase from 3% to 8%; and
- the 'Foreign Investor Duty Surcharge' for primary production land will increase from 0.5% to 1.5% .

A summary of the 'Foreign Investor Duty Surcharge' and the increase in rates was provided in Worrall Moss Martin News - Issue 3, July 2019.

2. 'First Home Loan Deposit Scheme'

From 1 January 2020, applications can now be made by eligible first home buyers (on low and middle incomes) to access the 'First Home Loan Deposit Scheme' under the *National Housing Finance and Investment Corporation Amendment Act 2018* (Commonwealth) to purchase a home with a deposit of as little as 5%.

Importantly, the scheme is only available to the first 10,000 eligible borrowers who apply.

A summary of the 'First Home Loan Deposit Scheme' was provided in Worrall Moss Martin News - Issue 8, November 2019.



Vincent Ertl
Lawyer



David Bailey
Senior Associate

3. 'Paid Parental Leave'

For parents of children born or adopted on or after 1 January 2020, the work test under the *Paid Parental Leave Act 2010* (Commonwealth) will be amended to allow more women to qualify.

- Currently to qualify for paid parental leave, a parent must have worked a minimum of 330 hours in 10 of the 13 months prior to the birth, with no more than an eight week break between two working days.
- The amendments extend the break between working days from eight to twelve weeks, and allow women to move their work test period if they have had to stop work early due to a workplace hazard.

4. 'Opt Out of the Superannuation Guarantee'

From 1 January 2020, certain Australian workers with multiple employers are eligible to apply to 'opt out' of receiving the superannuation guarantee from some of their employers. This is particularly of interest to high income earners who may be unintentionally going over the concessional contributions cap.

According to the Australian Taxation Office, a person may be eligible to 'opt out' if they:

- have more than one employer; and
- expect the employers' mandated concessional super contributions to exceed the concessional contributions cap for a financial year.

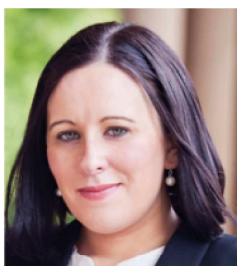
Can I Leave my Estate to my Pet?



Ashleigh Furminger
Lawyer

Australia has one of the highest rates of pet ownership in the world, with 62% of Australian households owning pets. To many people, pets are now considered 'part of the family'. A recent American study found that 81% of pet owners say they value their pets as much as their own children, and that more than 50% of pet owners prefer the term 'dog parent' to 'dog owner'.

Whether your pet is a dog, a cat, a pigeon, a snake or any other animal, properly documenting and providing for who will care for them, and how they will be provided for if you become incapacitated, or if you die, is a vital part of any estate plan.



Kimberley Martin
Director

When considering how you can make provision, and what plans can be put in place, for your pet or pets, the following information may be useful.

Can I gift my pet to another person or institution? Yes. In Australia, the law considers pets to be tangible personal property, like your car, jewellery and furniture. This means that you can gift your pet (during your life and on your death) to any person or institution you choose. When choosing a person or institution you should carefully consider whether the person or institution is able to provide the necessary care for your animal, both in the short and the long term.

Can I gift my assets directly to my pet? No, not in Australia. As tangible personal property, a pet is not capable at law of owning assets. Only a 'person' (which includes a company) can own property and other assets.

Can I gift a sum of money for the care of my pet? Yes. There are a number of ways that you can gift money to provide for the care and maintenance of your pet:

- you can direct your attorneys (appointed under an Enduring Power of Attorney) to pay all expenses including food, accommodation, and veterinary fees for your pet;
- you can make a conditional or unconditional gift of money in your Will to the person or institution that you gift your pet to; or
- you can direct in your Will that a sum of money be set aside, and a 'pet trust' or 'animal fund' be created to provide for the care and maintenance of your pet. Alternatively, you can set up a 'pet trust' or 'animal fund' during your life, and you could gift a sum of money to that trust or fund to provide for the care and maintenance of your pet. Although, the pet cannot be a beneficiary of the trust, with appropriate planning and documentation, the executor or trustee can be directed to pay the expenses for the care and maintenance of the pet.

Who should I choose to care for my pet? It is vital that the right people or institutions are chosen to care for your pet, and to administer your estate or trusts in a way that ensures your pet will be properly taken care of. When choosing a person (for example a partner, adult child, parent, brother, sister or friend) or an institution (for example a charity or pet legacy program) you should consider people who have met your pet and have cared for pets themselves. You should also consider a substitute person, if your first choice is unable to accept the responsibility of caring for your pet.

Remember, the person you choose will have full decision-making power over your pet's care, including veterinary treatment and euthanasia. You should ensure you choose a person you trust to do what is in your pet's best interest.

Can I direct for my pet to be euthanised? It depends on the circumstances. If the pet is young, in good health, or there are other humane alternatives available, the direction to have them euthanised may be overruled or ignored. If euthanasia is appropriate, for example where the pet is old or requires extensive treatment or care, the direction may be carried out.

Should I detail my wishes about the care and maintenance of my pet? Yes. If there are specific things that you think the person, or institution, should know about your pet (including special needs, routines, sensitivities, behaviours or preferences) you may consider creating a memorandum of wishes or pet care plan.

Extravagant examples of providing for pets: Although not Australian examples, across the world there are many examples of extravagant provisions being made for pets:

- In 1991, German countess Karlotta Leibenstein gifted her dog, Gunther III \$80 million USD (German law allows the gifting of assets to a dog). When Gunther III died, his son Gunther IV inherited the fortune. That fortune is now said to be \$400 million USD. It is also reported that Gunther IV is waited on 'paw and foot' by a personal maid and butler. He eats steak and caviar for dinner at the 'beck and bark' of his human staff, enjoys cool summers in his customised swimming pool, and rides around in a limo as he is brought from one multi-million dollar home to the next.
- In 2007, New York real estate tycoon, Leona Helmsley gifted \$12 million USD to a trust for the care of her Maltese dog, 'Trouble'. After lengthy and costly litigation, the trust was deemed to be excessive and the funds for the care of Trouble were reduced to \$2 million USD, with the balance being redirected to the deceased's family and various charities. This figure was deemed to be sufficient to cover Trouble's annual expenses, which included: \$100,000.00 USD for security (the dog received at least 20 death threats); \$8,000.00 USD for grooming costs; \$18,000.00 USD for medical expenses; \$60,000.00 USD for her guardian's annual salary; and meals that included 'hand-fed crab cakes, cream cheese, and steamed vegetables with chicken'.
- Oprah Winfrey is said to have created a \$30 million USD trust for her dogs (Sadie, Sunny, Lauren, Layla and Luke) and other animals.

Worrall Moss Martin Lawyers has specialist skills and experience in estate planning, including planning for pets. Please contact Kimberley Martin, or Ashleigh Furminger if you have any questions about the matters set out in this article, or to discuss the plan for your pet.

Are You, or the Beneficiaries of Your Will, an Australian Resident for Tax Purposes? How Might this Affect You? How Might it Affect Your Estate?

In the recent case of *Harding v Commissioner of Taxation* [2019] FCAFC 29, the Full Federal Court was required to determine whether an Australian expat⁽¹⁾ was an Australian resident for tax purposes, and therefore required to pay tax (in Australia) on their overseas income.

This decision clarifies the test used to determine whether a person is an Australian resident for tax purposes in favour of expats, making it less likely that an expat will be required to pay tax in Australia on their income earned while working overseas in certain circumstances. The Commissioner of Taxation was refused leave to appeal the Full Federal Court's decision by the High Court.

The Facts: Mr Harding, an Australian citizen, had worked overseas for a substantial part of his adult life as an aircraft engineer. In 2009, he accepted an offer to work in Saudi Arabia and relocated from Australia to Bahrain. He would travel each day from Bahrain to Saudi Arabia for work.

When Mr Harding relocated to Bahrain, he sold all of his significant possessions in Australia, including his boat and car. His family remained in Australia and Mr Harding retained joint ownership of the family home in Queensland.

It was intended that Mr Harding's wife and youngest son would relocate to live in Bahrain once his youngest son finished school. While waiting for his family to relocate to Bahrain, Mr Harding lived in an apartment building. He moved several times from unit to unit (each fully furnished) within a single unit block. Mr Harding's wife and son ultimately did not relocate to Bahrain.

In 2011, the Commissioner:

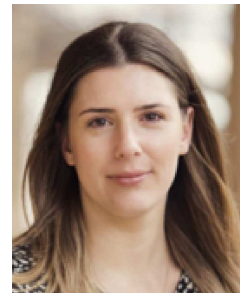
- determined that Mr Harding had retained Australia as his residence, having not established a permanent house or apartment in Bahrain as his 'permanent place of abode'; and
- determined that Mr Harding was a resident of Australia, and was required to pay tax in Australia on his overseas income.

The Law: In Australia, an individual will be an Australian tax resident if they meet any one of the following four tests:

- they 'reside' in Australia - with the determination being based on the ordinary meaning of the word 'resides';



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Lawyer



Megan Bird
Lawyer

- their domicile⁽²⁾ is in Australia, unless the Commissioner is satisfied that their 'permanent place of abode' is outside of Australia;
- they have been physically present in Australia for 183 days or more (whether continuously or with breaks) in the tax year; or
- they are a contributing member of the Public Sector Superannuation Scheme or the Commonwealth Superannuation Scheme. A spouse, and any child under 16, of a person who meets this test is also considered an Australian resident for tax purposes.

The determination of the Commissioner was upheld by the Federal Court, but was recently rejected on appeal by the Full Federal Court.

The Decision of the Federal Court: The Federal Court held that Mr Harding was an Australian resident for tax purposes because he did not have a 'permanent place of abode' outside of Australia. According to the Federal Court a 'permanent place of abode' was to be interpreted as referring to a specific house, apartment or address. As Mr Harding did not have a permanent house or apartment, regardless of his intention to permanently leave Australia, he was a 'resident' and would be taxed in Australia on his overseas income for that year.

Mr Harding appealed the decision to the Full Federal Court.

The Decision of the Full Federal Court: The Full Federal Court unanimously allowed Mr Harding's appeal, finding that his permanent place of abode was Bahrain.

The Court held that:

- while Mr Harding returned to Australia to visit his wife and children, and stayed at the family home at Warana, his visits were solely for the purposes of seeing his family and encouraging his wife to move to Bahrain, and he did not intend to return to live in Australia;
- while Mr Harding retained financial connections to Australia, these were remnants of his residency, and indicative of him retaining financial responsibilities to his wife, and children, who remained in Australia;
- despite Mr Harding's employment being temporary, and evidence that his employment contract may have required him to leave Saudi Arabia upon termination of his employment contract, the Court accepted Mr Harding's evidence that he would remain in the Middle East if his contract were terminated;
- the test for whether a person has a 'permanent place of abode' outside Australia is to be determined by the person's intention about whether their accommodation outside Australia is a 'permanent place of abode', and not the nature of the accommodation; and
- the word 'place' in 'permanent place of abode' invites consideration of the town or country in which an individual physically lives in 'permanently'. Provided the individual has permanently left Australia, it is not a requirement that a particular house or apartment in that foreign country is lived in. The fact that a person is staying in rental accommodation is not determinative of whether they have established a permanent place of abode outside Australia.

The High Court refused the Commissioner's special leave application to appeal the Full Federal Court's decision.

Key Points: The decision of the Full Federal Court, and the High Court's refusal to allow special leave to appeal, broadens the interpretation of 'permanent place of abode' to a country or state, rather than a particular dwelling. This is significant because, as identified by the Court, 'it is relatively common place for Australians who seek to make their life in another country to rent accommodation on a temporary basis, sometimes for several years, whilst they seek a more permanent home'.

The tax residency of a deceased person, and of the beneficiaries of a deceased estate, can have significant tax implications during the administration of the estate. Tax residency will affect (amongst other things):

- the tax free rates that are applicable - Australian tax residents receive the benefit of a tax-free threshold, and a low marginal tax rate of 19% up to a certain amount. Non-residents do not have the benefit of the tax-free threshold and have different (higher) tax rates and may be subject to a 10% withholding tax on any interest earned; and
- eligibility for CGT concessions and discounts - Australian tax residents receive a 50% CGT discount and the main residence CGT exemption applies. Non-residents are not entitled to claim those concessions.

Worrall Moss Martin Lawyers has specialist skills and experience in estate planning and estate administration, including dealing with tax issues that arise from our clients (or their beneficiaries) being non-residents in Australia for tax purposes. Please contact Kate Moss, Kimberley Martin, Hannah Boxall or Megan Bird if you have any questions about the matters set out in this article.

- (1) An Australian citizen living or working in a country of which they are not a citizen.
- (2) The country that a person treats as their permanent home, or lives in and has a substantial connection with.

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Further Information

Our Website

A wealth of information in relation to estate and commercial matters can be found at our website www.pwl.com.au

Contributions

Contributions and suggestions from Worrall Moss Martin News readers are always appreciated. Email us at info@pwl.com.au

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