

The SOTHERTONS REPORT



JULY 2010

"Happy New Financial Year" and welcome to the last issue of the Report for the 2009/2010 year.

I hope that this new financial year leaves all the troubles behind that were so easily identified with the meltdown of the world's economies. It is hard to believe that as Europe and America tried to come to terms with the economic uncertainty that they faced, we here in Australia while primarily riding on the back of our raw material exports seemed to skirt in the main the troubles other world economies suffered.

The new Gillard led Federal Government will, over the forthcoming months have to deal with a range of major issues well beyond the saga of the Mining industry Supertax debacle.

As we move into this new next financial year there seems to be much that lies beyond the control of many of us that will need to contend with. It promises to be an interesting time and for many the coming year may be a difficult one.

Yet amongst all the uncertainty we all face one thing is guaranteed. The changes to the current taxing regime will continue unabated and despite protestations to the contrary that the government is trying to make it easier for all taxpayers the changes to the taxation legislation and its complexity continues unabated.

In this issue we cover the recommendations released in the Super System Review, the proposed Superannuation Co-Contribution changes and detail a warning issued by the ATO with respect to investing unwisely in tax effective Investments. We list the industries (transport, freight and automobile and their employees and contractors) that the ATO is currently focusing on.

In closing we wish all clients and service providers all the very best for the coming financial year and remember that all our Partners / Directors are there to be of assistance whenever you require.

Until next time. ■

SELF MANAGED SUPER FUND (SMSF)



New SMSF Member Verification Process in the Pipeline

The Tax Office has announced that it expects to implement, later this year, a new self-managed super fund (SMSF) member verification process, which is designed to enable authorised APRA-regulated super funds and other authorised entities to confirm whether or not the member requesting a rollover is actually a member of the SMSF.

The new process adds another plank to efforts by the Tax Office to deter schemes which seek to obtain illegal early access to or release of superannuation. The first plank, which has been in operation since January this year, involved upgrading the SMSF registration process so that new SMSFs may not be displayed on the Super Fund Lookup (SFLU) Website for up to seven days while the Tax Office carries out a risk assessment of the SMSF.



The new process is expected to make processing member rollovers from superannuation funds to SMSFs more efficient and secure. However, it would be important for the Tax Office to be notified quickly of any SMSF membership changes. For example, it would be prudent to ensure name changes are appropriately dealt with before a rollover is attempted by a member. ■

ATO Sends Warning to SMSFs Regarding Employee Share Schemes

The ATO has warned taxpayers of an arrangement where an individual nominates his or her SMSF as the acquirer of shares or share options under an employee share scheme and the trustee of the SMSF pays no consideration or less than market value consideration for the shares or options.

The warning provided in Taxpayer Alert TA 2010/3 states that the arrangement could have superannuation and income tax law implications for both the SMSF and the individual. ■

Tax Office Sets Compliance Focus Areas for 2010/11

The ATO has released its compliance program for 2010/11.

The program sets out risk areas facing the tax and superannuation systems identified by the ATO and the compliance activities that it plans to undertake to address them.

Despite acknowledging that most taxpayers demonstrate high levels of voluntary compliance, the ATO's latest compliance program flags needed attention on numerous target areas

including individual taxpayers claiming incorrect or fraudulent refunds and small businesses omitting or incorrectly reporting property sales in business activity statements.

The program also reiterated the ATO's continuing and increasing use of data-matching projects to verify information provided by individual taxpayers in their tax returns and by other parties. In particular, the ATO flagged interest in cross-referencing information relating to income received from employment, welfare, interest and dividends. This year, the ATO expects to data-match over 500 million transaction records reported to it by third parties. ■



ATO is Contacting Participants in Collapsed Agribusiness Managed Investment Schemes

The ATO has advised that it will be contacting approximately 60,000 identified participants of recently collapsed Agribusiness managed investment schemes (MIS) during August 2010 to help them understand the tax consequences of their investments.

The ATO has advised that affected taxpayers will need to factor in any changed tax implications in these schemes when they prepare their tax returns. ■

Reportable Employer Superannuation Contributions Definition: Changes Proposed

The Government has recently proposed that it will amend the law to clarify the scope of the reportable employer superannuation contributions (RESC) definition.

RESCs are generally superannuation contributions made under formal salary sacrifice agreements. Amounts reported as RESCs are used in determining eligibility for a range of government financial assistance programs.

The Minister for Superannuation, Chris Bowen, said the Government has become aware that some contributions made on behalf of an individual, which the individual or their employer has no real capacity to influence, are being captured by the RESC definition. The Minister said it wasn't the Government's intention for this to occur.

The changes are proposed to apply from 1 July 2009 to ensure that the contributions are not captured by the RESC definition. ■



GST and Requirements for Tax Invoices

The GST regulations which previously specified the requirements for documents to be tax invoices or recipient created tax invoices (RCTIs) have been removed.

This follows recent changes to the GST law which simplified the requirements for documents to be considered tax invoices or RCTIs by replacing those requirements with equivalent but more flexible principles.

The regulations commenced on 1 July 2010 and apply in relation to net amounts for tax periods starting on or after 1 July 2010. ■



Long Term Employee Absence – Unfair Dismissal

As a result of a recent 2010 decision handed down by the Industrial relations Arbitrator "Fair Work Australia" with respect to an unfair dismissal claim, I highlight matters that all employers need to be cognisant of.

Where sick leave is claimed, irrespective of whether it is paid or unpaid, ensure that all evidentiary requirements are met.

It is important that there is an understanding within an organisation's management team of what the evidentiary requirements are and furthermore that they are fully aware of the potential ramifications to the company if these requirements are not strictly adhered to.

Where an employee indicates they will be absent for what appears to be a lengthy period of time, ensure that there is evidence that the company, through its management team, has made enquiries surrounding:

- the length of time the employee will be absent
- any limitations that may result upon their return to employment
- a clear understanding of the condition that requires the employee to be absent for an extended time.

Ensure that all points noted above are requested from the employee in writing and if there is no follow up by the employee keep trying to elicit a written response and ensure that this is evidenced.

In correspondence to staff It is important to ensure that the firm highlights the legal ramifications to the employee if they ignore the requests made by management.

Needless to say should any client be faced with a potential long term absence by an employee that they seek suitable advice from a qualified legal practitioners operating as a specialist employment lawyer. Your Sothertons Director or Manager will be happy to make recommendations of suitable experts in this area of the law should clients not have their own preferred choice. ■

Reasonable Travel and Meal Allowance Amounts

The Tax Office has released a Taxation Determination which sets out the amounts the Commissioner considers are reasonable for the 2010/11 income year in relation to claims made for:



- overtime meal allowance expenses;
- domestic travel allowance expenses;
- travel allowance expenses for employee truck drivers; and
- overseas travel allowance expenses. ■

Payment Summaries and Reporting of Incorrect Super Amounts

The Tax Office says some employers have been incorrectly including compulsory superannuation amounts as reportable employer super contributions on their employees' payment summaries for the 2009-10 income year.

Reportable employer super contributions should only include additional super contributions made by an employer, for example, super contributions made on behalf of an employee under a salary sacrifice arrangement. The payments being incorrectly included cover things such as super guarantee contributions and industrial agreement (award) super contributions.



Employees should review their payment summaries and ask for amended payment summaries from their employers if they incorrectly contain compulsory super amounts as reportable employer super contributions. This is important because incorrect amounts included may affect eligibility for certain tax concessions and Centrelink benefits, and may cause a liability for the Medicare levy surcharge.



If employers have issued payment summaries to their employees that incorrectly include compulsory super amounts, they can notify affected employees and issue them with amended payment summaries. If employers have also already lodged their payment summary annual reports with the Tax Office, they will need to lodge an amended annual report. ■

Minimum Pension Drawdown Amounts – 50% Reduction to Continue

The Prime Minister has recently announced that the Government will extend for another year the 50% reduction in the required minimum payment amounts that must be made from account-based, allocated and market-linked pensions. The relevant regulations will need to be amended and the Government says this will be done in the new financial year.

The minimum amounts had been reduced by 50% for the 2008/09 and 2009/10 financial years – that will now be extended for the 2010/11 financial year.

- This means, for example, that the minimum annual drawdown
- for 2010/11 for someone aged 64 years or less will remain at 2%; and
 - for those aged 65 – 74, will be 2.5%. ■

Superannuation Benefits – Timing of Payment by Cheque

The Tax Office has issued a draft self-managed super fund determination which states that a superannuation benefit can be considered to be 'cashed' at the time a cheque or promissory note is issued to the member or beneficiary, provided the money is payable immediately (i.e. not post-dated) and the trustee takes all reasonable steps to ensure that the money is paid promptly (i.e. generally within a few business days). ■



Trust's Unrealised Gains can be Treated as Income

In a recent case, the NSW Court of Appeal has confirmed that it was permissible for a trust, in terms of its trust deed and accepted accounting principles, to treat unrealised gains made on share investments as income of the trust. ■



ATO Keeps a Close Eye on the Cash Economy

The Tax Office has reminded taxpayers that increased data-matching and benchmarking will be used to identify businesses participating in the cash economy.

The Tax Office says, this year, it will write to 110,000 small business taxpayers which it believes may be participating in the cash economy. It said the majority of the letters sent were to businesses reporting outside the small business performance benchmarks.

However, the Tax Office noted that businesses that fall within the benchmarks should not assume that they are safe from an ATO audit or review.

The Tax Office said the benchmarks complement its recently expanded data-matching program, which now includes data from online auction sites eBay and Trading Post.



The Tax Office Compliance Program for 2010-11 noted that the cash economy continues to be a major focus. Specific behaviours that the Tax Office is concerned about include: paying cash-in-hand wages; skimming some or all of the cash takings; barter and running part of normal business activities off the books. ■

Superannuation and Instalment Warrant Rule Changes

The superannuation law has recently been amended to reduce the risks for superannuation funds investing in limited recourse borrowing arrangements (eg instalment warrants).

The legislative changes seek to ensure that the recourse of the lender (or any other person) against the superannuation fund trustee for default on the borrowing is limited to rights relating to the acquirable asset. ■

Changes to Director Penalty Notices (DPNs)



Company directors need to be aware that there is a clamping down on unpaid taxes and an increased focus on phoenix avoidance as a result of recent amendments to the Income Tax Assessment Acts.

These amendments have been introduced pursuant to the **Tax Laws Amendment (Transfer of Provision) Bill 2010** which received royal assent on 29 June 2010 and came into effect on 1 July 2010.

The bill despite the change in Prime Minister from Rudd to Gillard has been moved through parliament very quickly. It was passed without amendment by the lower house on 13 June 2010, and by the senate on 17 June 2010.

These amendments have significant effect on the operation of the director penalty notice (DPN) provisions of the **Income Tax Assessment Act 1936** (Cth). These include changes relating to the collection and recovery of tax, forgiveness of commercial debts, leases of luxury cars, farm management deposits and general insurance. The amendments are particularly relevant to directors of companies and their advisers, where these reforms are aptly described as being 'anti phoenix' reforms.

Included in the amendments are the following:

- DPNs now take effect from the date they are posted, as opposed to the date they were received by the director(s) – this was the case at law following the New South Wales court of appeal decision in **Deputy Commissioner of Taxation v. Meredith [2007] NSWCA 354**, but has been subject to criticism. This is now enshrined in the legislation.

- The period provided by DPNs will increase from 14 to 21 days before the commission will take recovery proceedings against the director(s) – there have been complaints that the time for compliance (given some remote directors) was unreasonable and this addresses one common concern.
- The company will have a period of 21 days rather than 14 days to either comply with its tax obligation, appoint a voluntary administrator or wind the company up – again, allowing more time and in this circumstance, bringing the time limit in line with the time for a creditors' statutory demand (although that of course runs from the date of receipt by the company and not the date of posting).
- The provisions have been amended so that entering into an instalment arrangement will not remit the director's obligations under the DPN – this changes the position previously as an arrangement to pay the tax would bring the DPN to an end.
- Amendment of the provisions to make it more difficult for a director to rely on the defence that the director did not take part in the management of the company as a result of 'illness or other good reason' – it is now a requirement that the director show it would have been unreasonable to expect the director to have taken part in the management of the company at that time. This overcomes a number of decisions where the ATO was unsuccessful in DPN proceedings where directors have relevantly relied upon an extended illness or even, in one case, the illness of their wife to say that they were not involved in management.

Tightening the DPN regime will have positive implications for those giving advice to directors of companies as they will now be in a position to advise before the company gets in such a fraught financial position that they are beyond repair.

Currently, the DPN provisions only apply to certain withholding taxes. Given the complexity associated with the ATO issuing them (and having to separate the debts in their running balance accounts), they can take a very substantial time to issue. They can also be very difficult for directors to reconcile with any other notices issued by the ATO. Amendments mooted by the ATO (but not yet implemented) could result in either or both of the following:

- Directors being personally liable for tax debts of a company if they remain outstanding for three months or more.
- The ATO being able to issue DPNs for any and all taxation liabilities of a company.

Sotherton's will keep you informed as these matters continue to develop. ■

Excess Super Contributions Assessments Upheld

The Administrative Appeals Tribunal has found it did not have the jurisdiction to review a decision of the Commissioner, who had refused to make a determination to disregard (or to reallocate) excess non-concessional superannuation contributions made by two taxpayers. This was because the Tribunal was of the view that the making of the Commissioner's discretion is independent of the issuing of the assessments.



TIP Super investors can apply to the Commissioner to disregard or reallocate excess contributions for a financial year. However, the Commissioner's discretion is limited to special circumstances outside the control of the investor. ■

Cooper Super Review Makes 177 Recommendations

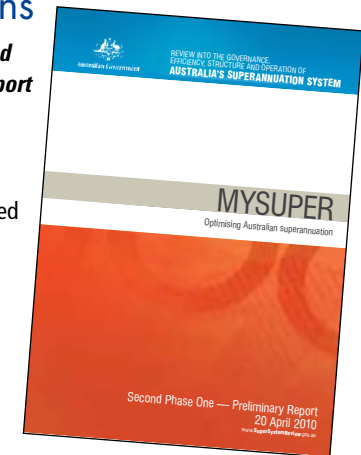
The Government has released the long-anticipated final report of the Super System Review.

The Review Panel, chaired by Jeremy Cooper, made 177 specific recommendations aimed at improving the governance, efficiency, structure and operation of the country's superannuation system.

A key proposal includes a simple low-cost superannuation product known as **MySuper** for investors who do not want to engage in superannuation decision-making.

In relation to self-managed superannuation funds (SMSFs), the Review Panel was not of the view that significant changes were required as it found that the sector was largely successful and well-functioning. Nevertheless, it made 29 recommendations relating to SMSF service providers, auditors and the regulatory framework. Notably, the Review Panel maintained its proposed ban on SMSFs investing in collectables and personal use assets. Examples include artwork, antiques and exotic cars.

The Government is expected to formally respond to the review within the next two months. ■



Important Lessons from OH&S High Court Case



EMPLOYER DUTIES

A recent case heard by the High Court of Australia highlights the need for employers to:

- Identify, assess and control health and safety risks, for employees and contractors; and
- Adequately supervise work activities.

Where a failure to fulfil these responsibilities occurs, this recent decision by the High Court suggests that future prosecutions will need to clearly define:

- How the defendant failed in fulfilling its responsibilities; and
- What should have been done to demonstrate compliance.

In the past it was adequate for the prosecution to merely state that a non-compliance existed by quoting a section of the relevant Occupational Health and Safety (OHS) legislation.

FATALITY ON A FARM

In March 2001 an experienced farm manager was killed on a farm in Picton, NSW while driving an all-terrain vehicle that was towing three lengths of steel. He left a safe and accessible farm road and drove overland down a hill, causing his vehicle to overturn.

Conviction of Employer and Director

A series of court proceedings ensued, lead by WorkCover NSW, in which the entity employing the farm manager and its director were found guilty of:

- Failing to take reasonable steps to ensure the health, safety and welfare at work of its employees; and
- Failing to ensure the health and safety of contractors on the farm.

In addition to a criminal conviction, the Director was fined \$11,000 and his business was fined \$110,000.

The Director and Business appealed the convictions handed down by the NSW Industrial Relations Commission, first to the full bench of the NSW Industrial Relations Commission, then the NSW Supreme Court and finally to the Court of Criminal Appeal. All of these appeals were unsuccessful.

Ultimately the defendants were granted special leave to appeal to the High Court of Australia.

Conviction Quashed.

On 3 February 2010 the High Court of Australia quashed all convictions and ordered WorkCover NSW to pay the legal costs incurred by them.

The Charges Were Flawed – Why?

WorkCover NSW based its prosecution on the deficiency of systems of work at the farm by quoting wording from the relevant legislation (the now superseded NSW Occupational Health and Safety Act 1983).

In so doing the High Court found that the prosecution failed to:

- Specify how the systems were deficient; and
- Define what the defendant ought to have done to eliminate or control the risk.

The High Court did not require the defence “to establish that every possible risk was obviated”, but rather to answer to a properly defined charge which stated clearly what the defence ought to have done.

What are the Implications for Employers?

This High Court case confirms that the duty for employers to identify, assess and control health and safety risks at the workplace, in relation to work undertaken by employees and contractors remains strict. This includes foreseeing reasonable actions that may be taken by employees and contractors, and an adequate system of supervision.

Why do Responsibilities Extend to Contractors?

Occupational Health and Safety legislation in Australia commonly applies the same duty of an employer towards its contractors, as it does towards its employees.

The decisions around how contractors are managed in practice need to be dynamic and often relate to the:

- Types of OHS risks involved;
- Level of OHS risk involved;
- Duration of the work;
- Complexity of the work (e.g. presence or absence of subcontractors); and
- Level of control the employer has over the workplace.

Important Lessons from OH&S High Court Case (continued)



What is Adequate Supervision?

In the case against the Director the High Court found that constant supervision “imposed obligations which were impossible to comply with and burdens which were impossible to bear”.

How much supervision is adequate is often the subject of much debate – both within workplaces and within the courts. The points mentioned in the previous section in relation to managing contractors are equally applicable to decision-making about supervision.

For example, workers who are off-site or remote could be authorised to perform defined work activities; work outside this scope would require them to contact a supervisor / manager for authorisation.

It remains that carefully documented procedures that provide a framework for decision making, coupled with practical training, strongly support quality decision making in this area.

Conclusion

The High Court case reinforces the need for employers to ensure they have systems and processes that review all job types undertaken by their employees and contractors, and proactively identify, assess and control OHS risk. An important element in managing workplace risk continues to be that of providing adequate supervision.

For an organisation that has well designed systems that are carefully implemented and rigorously enforced, the above case suggests that defence of future OHS prosecutions is likely to become easier. ■

Noel Arnold & Associates is one of Australia's largest Risk Management and OH&S Consultants. www.noel-arnold.com.au

FRAUD IN AUSTRALIA

Prevention, Detection & Response

DID YOU KNOW?

Almost HALF of all Australian companies have been hit by at least one incident of fraud.

- Four out of ten Australian businesses experienced at least one incident of fraud during economic downturn.
- Thirty-seven per cent of reported frauds cost more than \$1 million.
- Organisations often underestimate their future fraud risks.
- Fraud prevention should be a central component of ongoing operational risk management.
- Fraud is predominately perpetrated by people inside the organisation.
- Fifty per cent of reported frauds are committed by middle management.
- Organisations are likely to be defrauded by those they trust most.

Trust & Responsibility

Trust in one's employees is a wonderful characteristic. It shows that one is comfortable with the processes set in place to select and maintain staff.

Notwithstanding the above and the laidback attitude many Australian Managers have, it is critical that all businesses ensure that they put into place and then actively manage their own businesses with the correct levels of internal controls.

Those who rely on auditors to control and manage their businesses processes sadly misunderstand the role of the auditor.

The responsibility of one's business rests on the shoulders of the owners and the Directors they employ. This responsibility cannot be abrogated.

Business need to address fraud using a three-pronged strategy: Prevention, Detection and Response.

We deal with a number of aspects centering on prevention in this article.

Businesses are never going to be able to prevent all forms of fraud. There is always going to be some loophole that a desperate employee will exploit. However, it is important to be able to detect these when they occur.

From the prevention and detection standpoint a critical factor is to establish the correct culture from the top down that takes fraud seriously.

Directors need to understand the critical areas such as the procurement space, payroll and online banking payment systems; **basically wherever the money is.** Look at the controls in those areas and ensure that they working effectively to detect and prevent fraud.

Many small to medium enterprises have embraced or are in the process of embracing electronic banking, however to do so without thinking clearly of the security implications would be remiss. The result is an accident waiting to happen.

A large number of mistakes revolve around

- giving one trusted employee single operating authority
- not utilising the free security measures banks provide.

The thought process around many smaller businesses is that they wish to involve fewer personnel in administrative and book keeping functions thereby opening the door to potential fraud.

The courts and newspapers of recent times are filled with businesses similarly affected.

Single level authority is not the only weaknesses these businesses have succumbed to. Poor software administration as well as password security protocols are also to blame.

Clients should follow the following protocols at a minimum:

- There need to be at least two authorisations required for all transactions and where possible these authorisations should be tiered with a suitably qualified Director being one of the authority holders.
- The electronic package used must not allow for authorisers to be added or deleted by a system administrator.

- Strongly consider the adoption of a two factor authorisation process. This process used by banks is a process by which a user needs to supply two means of identification for each transaction. Usually this includes a device provided by a bank that produces a random security number to validate transaction coupled with a further pin identity number. This form of security is not offered to all clients by all banks but we suggest that all businesses discuss this process with their bankers.



- It is surprising to walk around a client's office at night and see computers left running. Apart from the undesirable environmental factors, leaving individual computers up and running all night or when their users are not in the office for extended periods of time allows easy access for other employees, cleaners or outside hackers to try and enter your computer and steal security PINs and other confidential information very often is located on these computers (even though strong security protocols would suggest no confidential information is stored on individual computers). We strongly suggest that all employee computers are turned off at night. Users who need to access their desktop remotely when they travel or work from home can still do so even with their desktop is turned off.

- Individual computers need to have security passes which are firstly kept confidential and well away from those involved with the accounting systems and secondly changed on a regular basis.

Recent cases involving Clive Peters and Fashion Group clearly highlight the consequences of too much trust being placed on one person with other security process, as highlighted above, not in place.

Remember without segregation of duties in a business's high risk areas, protection is compromised. If they are in place then fraud will require collusion.

It is hard enough in today's economic environment to run a profitable business, but do not allow bad business practices to, in the worst case scenario, put your business in jeopardy.



Recent Changes To Australian Migration Regulations

A Briefing Paper for Business Professionals

There have been numerous changes made to the GENERAL SKILLED MIGRATION PROGRAM over the last twelve months. The new financial year has seen further significant changes being introduced including new processing priorities and new skilled occupation lists which apply to most skilled applications lodged after 1 July 2010.

According to the Minister of Immigration and Citizenship, Senator Chris Evans, the new changes have been designed to complement other recent changes to skilled migration to ensure that the economy gets the skills it needs now. They help to better address the needs of industry by targeting skills in demand across a number of sectors, and help ensure that the skilled migration program is responsive to the current economic climate and the needs of the Australian economy.

The close election result is likely to mean a period of continuing uncertainty in relation to migration policy and it is hard to see a quick resolution of the many outstanding migration issues.

New Skilled Occupations List (SOL)

The introduction of a new list of occupations is part of a package of proposed reforms that reflects the government's commitment to a labour market demand-driven skilled migration program. It is also possible that there will be changes to the various components of the actual points test in the not too distant future.

The new list, released on 1 July 2010, is a reduced, restricted incarnation of the previous Migration Occupations in Demand List (MODL) and Critical Skills List (CSL) regimes and cuts by more than half the old List (from 408 occupations to 181).

[Continued]



Some of the occupations which are no longer on the SOL include:

- Cook, ■ Chef, ■ Hairdresser, ■ Pharmacist, ■ Graphic Designer and ■ Business and Information Professional.

Some of the retained occupations include:

- Accountant, ■ Architect, ■ Engineers, ■ Medical Professionals, ■ Motor Mechanic, and ■ many building trades.

Although the intention was to simplify the complex web of gazetted occupation lists to which applicants under the General Skilled Migration categories must refer, there are now no less than four gazetted occupation lists depending on when and on what basis a skilled migrant submits an application.

Changes to the priority processing of certain applications

These priority processing arrangements apply to applications already lodged with the Department of Immigration and Citizenship as well as to future applications and take into account the changes to the Skilled Occupation List (SOL) that came into effect on 1 July.

From 14th July 2010, processing in order of priority is as follows:

- Applicants sponsored under the Employer Nomination Scheme (ENS) and Regional Sponsored Migration Scheme (RSMS)
- Applicants nominated by a state or territory government agency with a nominated occupation that is specified on that state or territory's state migration plan (note that these migration plans have not been released yet)
- Applications on the new Skilled Occupation List (SOL).

All other applications are to be processed in the order in which they are received. The changes to priority processing do not change the criteria for the grant of a visa.

[Continued]

Recent Changes to Australian Migration Regulations – a Briefing Paper for Business Professionals (continued)

Employer Sponsorship – the way forward

In light of the changes to the General Skilled Migration program and given the priority processing arrangements, the current most effective visa for professional entry into Australia is through employer sponsorship.

To be eligible as a standard business sponsor, the employer must:

- be actively and lawfully operating a business in Australia
- have a genuine need for a paid employee to fill a position in their business
- have a current training strategy for existing Australian employees
- provide the employee with an offer of employment
- meet the gazetted minimum salary level.

The nominated position must meet the following requirements:

- be full-time, ongoing and available for at least 3 years (for the permanent option)
- provide working conditions that are no less favourable than provided for Australians undertaking equivalent work in the same workplace at the same location.
- be a highly skilled occupation that is specified on the relevant list – Employer Nomination Scheme Occupation List (ENSOL) and the gazette list for 457 occupations.

The employee will need to show evidence of relevant qualifications and / or experience as well as meeting immigration requirements of health and character.

[Continued]





The temporary and permanent options are:

- TEMPORARY BUSINESS VISA – Standard Business Sponsorship (Subclass 457) – valid for 4 years
- EMPLOYER NOMINATION SCHEME (Subclass 121/856) – Permanent Residence.

Business Skills – Visa Options

Business Ownership

To be eligible for this visa, the applicant must have an ownership interest in a main business (or two main businesses combined) with an annual turnover of at least AUD300,000 in at least two of the four fiscal years immediately before application and must have owned (together with applicant's partner) at least:

- 51 per cent of the business where the turnover is less than AUD400,000 per annum.
- 30 per cent of the business where the turnover is AUD400,000 or more per annum.
- 10 per cent where the business is a publicly listed company.

Senior Executive

This visa is for senior executive employees of major overseas businesses, who have significant net assets and a genuine and realistic commitment to participate in the management of a new or existing business. To be eligible the senior executive should demonstrate experience and skills to successfully manage a business in Australia and be under 45 years old.

Investor

This visa is for people who have a successful business or investment career, and have a genuine and realistic commitment to be involved in investing or business in Australia. To be eligible the applicant should be willing to invest funds in a designated investment in Australia for 4 years and should be under 45 years old.

Australian Immigration Advice

Applicants should ensure that when seeking advice in relation to Australian immigration they should only consult with registered migration agents. The migration agent registration authority only registers agents with sound knowledge of Australian immigration and has demonstrated their professionalism and competence in immigration law and practice. ■

Article by Lorraine Abraham of Ivan Chait & Associates, Specialists in Business & Family Migration

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An Extra 'Helping Hand' for Small Retailers

New resources developed by the Fair Work Ombudsman will help small businesses, by allowing them to access industry-specific information on the Australian retail sector.

The new resources can be found on the Fair Work website and will provide:

- tools to assist employers to calculate pay rates
- information on modern awards and the National Employment Standards
- example questions from employers
- information on conditions for apprentices and trainees, employing workers part-time and dispute resolution

Michael Campbell, executive director, Fair Work Ombudsman, said, **'the agency is devoting considerable resources to assist the retail industry. Essentially, it's a place for retail employers to access materials specifically designed for small-to-medium sized businesses.'**

Retailers can also obtain information by calling the Fair Work infoline on **13 13 94** between 8am 6pm on weekdays or by visiting the Fair Work website www.fwa.gov.au. ■



Cutting Red Tape for Small Business

The government is offering a free superannuation Clearing House service to small businesses with less than 20 employees.

The Clearing House is administered by Medicare Australia and lets employers pay their super contributions to a single location.

Small businesses that register to use the service will have their super guarantee obligation discharged when payment of the correct amount is accepted by the Clearing House in time for the super payment cut-off date (so long as the payment is not rejected by the fund). For information on the super payment cut-off date go to www.ato.gov.au and search for **'qc 24302'**.

Employers who receive an employee's choice of fund nomination will have their choice obligation discharged if they pass the information to the Clearing House within 21 days of receiving the choice of fund nomination.

For more information go to www.ato.gov.au and search for **'qc 00108082'**.

The Clearing House service will be available from 1 July 2010.

Small businesses can register with Medicare:

- online at www.medicareaustralia.gov.au/super
- or phone **1300 660 048**. ■



Division 7A Benchmark Interest Rate

The Tax Office has advised that, for the income year that commenced 1 July 2010, the benchmark interest rate to be used in calculating the interest component on the repayment of a private company loan received by a shareholder (or the associate of the shareholder) is **7.4%**. ■



Wills & Powers of Attorney

Do I really have to make a Will?

Whether we are too busy or have a superstitious fear that it is a self fulfilling act, it is surprising the number of people who don't have a will or if they do have one, have not recently updated it.

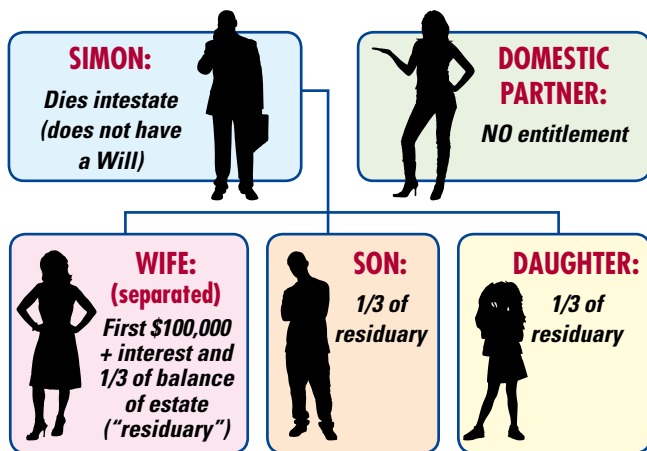
A few examples will show why having a will and reviewing it regularly is desirable.

Scenario 1:

Simon has two children and has separated from his wife, but is not divorced. He has two children from this relationship, a son who works in his business (and he would like his son to take over the business) and a daughter (who he would like to inherit his residential property).

He has a "domestic partner" but has not registered the relationship and the relationship has only existed for one year. Simon would like to make provision for his new partner and as his wife is financially independent he does not wish to make provision for her.

If Simon does not have a Will (and dies intestate), in Victoria his estate will be distributed as follows:



Scenario 2:

Simon has no family surviving him except for his only brother (whom he rarely sees) and a niece (the only daughter of his surviving brother) with whom he has a close relationship. Simon would like to leave his estate to his niece.

If Simon does not have a Will (and dies intestate), in Victoria Simon's surviving brother will be entitled to all of Simon's residuary estate.

It should be noted that in both scenarios, the estate is subject to the family provision legislation in Victoria which enables a person who was financially dependent upon the deceased to make a claim on the estate. Each state and territory has its own legislation relating to the distribution of intestate estates, and the provisions vary in each state.

A Will enables you to decide:

- how your assets are distributed after your death;
- when your assets are distributed; and
- who will manage your assets until they are distributed (executor and trustee).

Drafted by your lawyer, in consultation with your Accountant, a Will ensures that your assets are distributed as you intend, in the most cost effective way. Provision can be made to create testamentary trusts to protect your assets in the future and hold those assets on behalf of your beneficiaries. These trusts may protect your beneficiaries against claims from creditors or in family law disputes. Testamentary Trusts may also offer assistance if a beneficiary has a disability and they require special consideration or if a beneficiary is unable to handle their own financial affairs.

In a Will you can also:

- include directions regarding your personal wishes (funeral and burial or cremation wishes, guardianship of children under 18) – although not binding, these directions give a clear indication of your intentions;
- identify any specific items of a personal nature (for example jewellery or art work) that you would like to be given to a particular person; and
- provide for a charity or charities.

Your Will should be reviewed regularly and in particular, when there have been any changes in your circumstances

(e.g. marriage, separation, divorce, purchase of substantial assets). Marriage and divorce have an effect on the validity of some or all of your Will.

If you die without a Will (intestate), your assets are distributed according to statutory regime and may result in your assets being distributed in a completely different way from the way you would have distributed your assets under a Will (see Scenarios above). Also, an administrator will be appointed on your behalf, rather than you choosing this person to act. Any person with an interest in your estate can apply to be an Administrator – your nearest next of kin has the greatest claim to be an Administrator and this may not be the most suitable person to carry out this role.

An intestate estate is usually more costly to administer than an estate that is covered by a Will as more proof of entitlement to act on behalf of the estate is required.

Powers of Attorney – Why do I need one?

There are three types of Enduring Power of Attorney – Financial, Medical Treatment and Appointment of a Guardian.

- A financial power of attorney appoints an agent or agents to act on your behalf, either in all your financial affairs or the power can be limited to certain circumstances (for example selling a property or for a period while you are overseas). The appointment can be effective immediately or upon the occurrence of a specific event (for example if you are unable to make legal or financial decisions for yourself).
- A power of attorney for medical treatment enables your agent to make medical decisions on your behalf, if you are unable to make these for yourself. There are some limitations on the decisions which can be made.
- An enduring appointment of a guardian enables your agent to make lifestyle decisions for you in the event that you are unable to make these decisions – this can include decisions in relation to where you live and who can visit you. Your agent can make decisions that a parent could make for a child. ■

Prepared for Sothertons by Michael Sharp Legal, who provide specialist legal support to Sothertons Melbourne office.

Areas of practice: Commercial Law, Commercial Leasing, Estate Planning, Wills and Estate Administration.



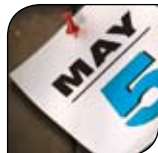
DATA BACKUP

We all know it's a good idea, but how well do our actions match our intentions?

There are many aspects of backup to consider, but first and foremost, we must understand how important it is. Data loss is not a matter of "if" but "when". Causes range from accidental deletion of a critical file, through to viruses, hackers, corruption of databases, breakdowns, up to theft and, worst of all, fire. Many businesses who religiously back up their data are still unable to recover from a fire because their backups were on the premises at the time of the disaster.





Equipment can be replaced, but customer details, receivables, designs, financial records, etc are not easily reconstructed.

What then do we need to think about?

- **MEDIA.** Magnetic tapes are still the most common, and they have many advantages: reusable but also archivable, high capacity, and robust. Other forms include external drives which simply plug into the USB port of either server or a workstation, and rewriteable DVDs. These have an advantage in that there is a reasonable expectation that the data can be transferred to replacement servers or computers simply and quickly (recovering data from a tape requires a matching drive of the same type and format), but costs add up as the volume of data grows 
- **SCHEDULING.** The best backup is the one that happens automatically. The frequency depends on the type of data being stored, and how expensive it would be for you to redo all the changes made to your systems and email since the last backup. All backup devices come with some sort of backup software, as do the major network systems, but a good investment is commercial backup software with advanced scheduling, email notifications, and, very importantly, the ability to backup data in databases and email systems without them being manually shut down first. 
- **REDUNDANCY.** A good basic system has a copy for each day of the week, plus one copy from each of the previous 2 weeks, plus a copy from each month, and an archive copy from each year. In a tape system, this would mean tapes labelled "Mon, Tue, Wed, Thu, Fri 1, Fri 2, Fri 3, Jan, Feb, Mar" etc plus "2010, 2009, 2008" etc. Remember that while we worry 

[Continued]

most about fire or breakdown, the most common cause of data loss is actually during normal operation – viruses, user error and corruption – in these cases the problem might not be noticed for some time.

- **COMPLETENESS.** Businesses commonly back up their server, but overlook all the data stored on laptops, even though laptops are extremely prone to damage, theft, and loss (ask any taxi driver). Similarly, data on PCs around the office is highly vulnerable. Whether it's simply a policy to ensure all data is stored centrally, or a technical solution like auto-synchronisation every time a computer logs into the network, backing up that data is essential. Also consider that, by default, Windows and Word, Excel etc save all data to the local drive of a workstation rather than the server – users usually aren't even aware of where the data is being stored. 
- **FUTURE.** High Australian internet costs have meant that only the biggest companies could afford to backup offsite "over the wire" (usually using a dedicated fibre link). As pricing changes it will be more common to pay someone else to hold a secure copy of your data, and any changes from day to day sent over the internet to their datacentre. Economies of scale mean they have the expensive systems no single business could afford by themselves. 
- **PERSONAL.** The proliferation of digital cameras and other mobile devices mean that more and more of our family memories are being stored electronically. While photo albums and stashes of cards and letters are rarely thrown out or broken, cameras and phones have become consumer items we replace every few years, and computers tend to have failures after 3 years. With this in mind, it is vitally important to make sure every piece of data you treasure is backed up. A simple USB drive will do the job cheaply with minimum fuss. Just make sure that every item you want to keep is in at least 2 places – e.g. copy photos onto your computer, but don't delete them off the camera until the computer is backed up. Ideally, have one USB drive at home and one at the office, rotating them periodically, in case the worst happens. 
- **RELAX.** Whether it's the "Oh, No!" moment when your finger leaves the delete key, or the crime scene tape around your office, stressful moments need not be catastrophic – if a backup can be restored. 

Russell Chapman, IT Manager Sothertons Brisbane ■

Share Investor, NOT a Share Trader

In a recent case, the Administrative Appeals Tribunal found a taxpayer was not carrying on a share trading business but rather he was a share investor.

During the 2007 and 2008 income years, the taxpayer was engaged in the buying and selling of shares. The taxpayer had lodged his tax returns on the basis that he was a share trader for the relevant income years.

However, after examining the indicators for such a business, the Tribunal was satisfied that the taxpayer was not carrying on a share trading business.



Shareholders should be aware that the Tax Office has its sights set on share disposals as part of its Compliance Program for 2010-11. It had also issued an alert mid last year warning taxpayers against claiming losses on revenue account when they had previously claimed gains on capital account (Taxpayer Alert TA 2009/12). ■



Soldier's Motor Vehicle Travel Expense Claim Denied

The Administrative Appeals Tribunal has denied a claimed deduction for motor vehicle travel expenses incurred by a soldier in the Australian Defence Forces in transporting his 'deployment priority 1' kit from home to barracks as the Tribunal found they did not have the essential character of a business expense, nor were they incurred in gaining or producing assessable income. Instead, the Tribunal considered the expenses were of a private or domestic nature in the circumstances.



Taxpayers can claim motor vehicle expenses on the basis they are carrying bulky equipment, but only if they can qualify that it is a necessary part of their job. ■



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