



SERVICE PROFILE

Estate Wise

Introducing a new on-line estate planning support and advisory service for accountants, financial advisers and their clients.

Estate Wise is an internet-based estate planning service supported by DW that has been designed to provide the perfect balance of traditional estate planning services and innovative on-line tools. It's fast, easy, cost-effective and unthreatening, whilst still providing the security of expert, one-to-one consultation.

Estate Wise makes it possible for individuals, either by themselves or through their accountant, financial planner or DW, to achieve their estate planning objectives from almost anywhere.

In essence, the relevant client data is submitted on-line at the Estate Wise website - www.estatewise.com.au - following which the draft estate planning documentation will be forwarded to the client and their nominated advisers within hours. The panel on the right shows the estate planning documentation currently available, with more (including business succession documentation) soon to be added.

Then the client need only arrange an appointment with a member of the DW Wills, Estates & Business Succession team for one-to-one legal approval and execution of their documentation. Simple!

If you are an accountant or financial adviser, Estate Wise and DW will work with you to *enable you to deliver expert estate planning outcomes to your clients from within your own office environment and in a way that suits you.*

Best of both worlds

According to Estate Wise founder Jeremy Duffy, the service provides an "ideal blend" of traditional and innovative legal delivery methods, retaining the best qualities of each and removing their weaknesses.

"The Estate Wise system and website is solely focused on estate planning, so doesn't confuse the client with hundreds of different documents and services across multiple areas of law," says Jeremy.

"It's simple to navigate and fast to operate. The system also allows the client and their adviser to access any support they need throughout the process, and backs all this up with the peace of mind of requiring experienced lawyers to sign off on all documents and ensure they're absolutely appropriate for the client's particular needs and circumstances."

Jeremy added that, throughout the system's extensive test phase, all clients who trialled it received their documents on time and in accordance with initial cost estimates.

"What's more, only one meeting with a lawyer was required to finalise the documents in those cases, though of course more time may be required in more complex cases."

Documents on Demand

A rapid turnaround is available on the following draft documents:

- Testamentary Trust Wills
- Simple Wills
- Powers of Attorney
- Powers of Guardianship
- Medical Powers of Attorney
- Anticipatory Directions
- Death Benefit Directions.

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Jeremy Duffy of Estate Wise

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Competition & Consumer Laws

When a Business is a “Consumer”.... Plus the New Regulations

Estate Wise

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Benefits for accountants and financial advisers

The Estate Wise service also offers other specific benefits for accountants and financial advisers, says DW Senior Associate Kieren Moore.

Kieren notes that the Estate Wise system can be customised to complement the current service offering of any financial planning or accountancy practice.

“This is a fantastic way for such professionals to significantly strengthen their client relationships, and therefore their practices, and increase their revenues” he says.

“It allows them to quickly and easily address the estate planning needs of their clients at any time and with complete legal certainty, including those arising from any significant transaction or change in circumstances.

It also provides further networking, referral opportunities and growth for participating financial planning and accounting professionals.”

Estate Wise and DW will work with Financial Advisers to effectively turn their practices into one-stop Estate Planning Services for clients.

To learn more, visit www.estatewise.com.au or speak to a member of the DW Wills, Estates & Business Succession team on (08) 8410 2555.

From 1 January 2011 the name of the *Trade Practices Act 1974 (Cth)* changed to the *Competition & Consumer Law Act 2010 (Cth)* [Act] (see our newsflash in November last year, entitled “*Business Beware: The New Competition and Consumer Laws*”). The changes effected by the Act include the substantial requirements contained in *The Australian Consumer Law* set out in Schedule 2 of the Act [ACL].

The purpose of the ACL is to create a single national law concerning consumer protection, thereby allowing consumers consistency in cross state transactions. The creation of this national legislation allows for enforcement by both national and state regulatory bodies. The powers granted to these bodies under the ACL are broad, and can include substantial civil and criminal penalties.

The states and territories have adopted, or will adopt, identical legislation to ensure consistency in the approach. South Australia has passed the *Statutes Amendment & Repeal (Australian Consumer Law) Act 2010*, which gives the ACL effect in South Australia, and other states and territories have or will pass similar legislation.

The ACL extends beyond consumer transactions

The ACL is described as a “consumer law”, but many of its provisions apply whether or not a “consumer” is involved.

For example, some sections apply where something occurs “in trade or commerce”, regardless of whether or not a consumer is

involved such as section 18 of the ACL relating to misleading or deceptive conduct (the successor to the well known and often litigated section 52 of the Trade Practices Act).

Also, importantly, the *consumer guarantees* prescribed by the ACL apply to supplies to a “consumer”, but by reason of the definition of “consumer” in the ACL this includes supply in business to business transactions where the amount payable for the goods or services does not exceed \$40,000.00.

Services are Included

Transactions affected include supplies of services not just goods. Consumer guarantees applicable with respect to services including (for example) professional services, comprise guarantees that services:

- will be rendered with due care and skill (section 60);
- are fit for a particular purpose, if made known expressly or by implication (section 61(1));
- will achieve a result, if it is made known expressly or by implication, that the result is to be achieved by the services (section 61(2)); and
- are to be supplied within a reasonable time, unless a time is fixed (section 62).

These guarantees cannot be excluded.

In addition, in circumstances where the services are “wholly or predominantly for a personal, domestic or household use or consumption”, the “unfair contract terms” provisions of the ACL will apply to businesses which provide standard contracts,

including, for example, letters of engagement for professional services. Terms in such a contract that are *unfair*, within the meaning of the ACL, will be void.

Standard form contracts for goods or services should, among other things, be amended to include one single price, inclusive of GST (and other charges), in order to comply with section 48 of the ACL.

“The ACL is described as a “consumer law”, but many of its provisions apply whether or not a “consumer” is involved”.

New Regulations

Some of the sections of the ACL require regulations for their full effect. Regulations entitled the *Trade Practices (Australian Consumer Law) Amendment Regulations 2010 (No. 1)* were made on 16 November 2010 [Regulations].

The Regulations contain a three-step program for the introduction of certain prescribed requirements and other matters, with the more straightforward obligations commencing from the start of this year, others commencing on 1 July 2011 and some of the most prescriptive requirements not commencing until 1 January next year.

Unsolicited supplies and agreements

The first schedule of the Regulations contains requirements relating to “unsolicited supplies” and “unsolicited consumer agreements”.

“The purpose of the ACL is to create a single national law concerning consumer protection, thereby allowing consumers consistency in cross state transactions”.

"...it is important that all businesses urgently review their terms of trade and other documentation in relation to both consumer and business to business transactions to ensure compliance with these legislative changes".



"Unsolicited supplies" relate to door to door or telephone sales, whereas "unsolicited consumer agreements" are agreements for the supply of goods or services that are made from negotiations not occurring at the supplier's place of business (or are made by telephone) and where the consumer did not invite those negotiations.

These regulations prescribe requirements for contracts and notices, and include obligations for specific statements, text and formats, such as;

- on invoices and other documents, to ensure, where applicable, that they are not deemed to *assert a right to payment*, the statement that *"This is not a bill. You are not required to pay any money"*;
- the name, address and details of the supplier must be included in any "unsolicited consumer agreement"; and
- information regarding termination rights must be supplied before and at the time of entering any "unsolicited consumer agreement", including a statement on the front page of the unsolicited consumer agreement that "you have the right to cancel this agreement within 10 business days..."

"...this includes a supply in a business to business transaction where the amount payable for the goods or services does not exceed \$40,000.00".

Repair of electronic devices

The second schedule of the Regulations, which comes into effect from 1 July 2011, inserts a new regulation in relation to the

repair of electronic devices that are *"capable of retaining user-generated data"*. Such devices (which include computer hard drives, mobile phones, media players and games consoles) must contain a statement noting that repairs *"... may result in the loss of data..."*.

Warranties against defects

The third schedule, containing the most complicated and prescriptive requirements, will come into effect from 1 January 2012. These relate to the legislative requirements for *"warranties against defects"*. The ACL (in section 102) provides for the Regulations to prescribe requirements on the form and content of warranties against defects.

Regulation 90, in the third schedule, includes the requirements that any warranty:

- must be transparent;
- must concisely state what is required to be done by the consumer to have the warranty honoured and entitle the consumer to make a claim, including the details of to where a claim should be sent;
- must include contact information of the person or business providing the warranty; and
- must state the period of the warranty.

The following wording must also be included: *"Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure"*.

Due to the prescriptive nature of these Regulations, businesses will need to carefully review their documentation in relation to warranties to ensure strict compliance with the applicable requirements by next year (and to ensure that documents are presently compliant with the provisions of the ACL and Regulations that are already in force).

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What action must be taken by businesses?

As previously advised, it is important that all businesses urgently review their terms of trade and other documentation in relation to both consumer and business to business transactions to ensure compliance with these legislative changes.

The time to act is **NOW**.

Where There's a "Will" There's a Way

The Importance of Having a Will

It is difficult for anyone when a loved one passes away but when that person has not left a will, this can add significant legal complications, which can often last many years. Not only does this cause a great deal of added stress to a grieving person, it also can cause family breakdowns, numerous disputes, significant (and potentially avoidable or minimisable) taxation liabilities and significant legal fees. With these issues it is difficult to understand why over half of Australia's adult population have not made a formal will.

Intestacy

Dying without leaving a valid will is referred to as "dying intestate". If a person dies intestate, the property belonging to the deceased (the estate) is inherited according to a strict set of provisions called the intestacy rules. In other words, instead of the property being distributed to the deceased's nominated beneficiaries under a will, the estate is distributed to family relations in a specific, inflexible order. This often results in unintended consequences. Dying intestate also gives rise to the issue of who is to be responsible for administration of the estate and the administrator(s) potentially having to account to the Public Trustee.

There are two forms of intestacy, a total intestacy where the deceased dies without leaving a valid will, and a partial intestacy where the deceased's will does not provide for the distribution of all estate property in the circumstances. For the purposes of this article, we will concentrate on a total intestacy.

Part 3A of the *Administration and Probate Act 1919 (SA)* deals with the distribution of an intestate estate. Firstly, one or more administrators need to be appointed to administer the estate. The administrator(s) will usually be one or more of the beneficiaries under the intestacy rules. Once the appointment has been made it is the responsibility of the administrator(s) to determine the net value of the estate. The net value of the estate is calculated by determining the estate assets and their value and then deducting the debts and liabilities of the deceased, including funeral expenses, testamentary expenses, costs of the administration of the estate and claims of creditors. If the deceased is survived by a spouse, the value of all personal chattels must also be deducted.

A spouse also includes a "putative spouse". A putative spouse is entitled to claim rights to the estate if a relationship exists in accordance with the criteria outlined in the *Family Relationships Act 1975 (Cth)*. A court must declare that a person is a "putative spouse" so a partner left behind who is not a legal wife/husband must take steps to establish in the court that they are in fact a "putative spouse". This can result in significant delay in the distribution of estate assets to a partner who is not legally recognised as the husband or wife of the deceased.



"... instead of the property being distributed to the deceased's nominated beneficiaries under a will, the estate is distributed to family relations in a specific, inflexible order. This often results in unintended consequences".



Distribution

Depending on the nature of the estate assets, the administrator(s) may need to apply to the Supreme Court for a grant of Letters of Administration (the equivalent application if the deceased left a will is called 'Probate'). For example, if the deceased held land either solely, or as a tenant in common, the administrator will not be able to deal with the deceased's legal title in the land until the grant has issued.

Once the value of the estate is established and the grant of Letters of Administration has (if necessary) been made, the net assets of the estate can be distributed. The formula for distribution of an intestate estate is governed by section 72G of the *Administration and Probate Act (SA)*, which provides as follows:

1. If there is a surviving spouse and no children, the whole of the estate will go to the spouse;
2. If there is a surviving spouse and children and the value of the estate does not exceed \$100,000.00, the whole of the estate will go to the spouse;
3. If there is a surviving spouse and children and the value of the estate does exceed \$100,000.00, the spouse is entitled to \$100,000.00 plus half of the remaining balance of the estate and the children are entitled to the balance of the estate (equally);
4. If there is no surviving spouse but are children, the children will be entitled to the whole of the estate;
5. If there is no surviving spouse or children, the whole of the estate will go to surviving relatives (section 72B of the *Administration and Probate Act* defines "relatives").
6. If there are no qualifying relatives or dependents, the assets of the deceased will pass to the Government.

The above distribution formula can obviously cause problems when there are ex-partners, step children, step parents, blended families, etc involved. There may also be issues surrounding parents of the deceased and a putative spouse. This in itself can cause complications if a parent decides to dispute any application seeking a declaration for putative spouse status.

Furthermore, if a spouse/domestic partner resides in a dwelling house, which was also the dwelling of the deceased, and the house is not subject to the survivorship rules, the surviving spouse must take steps in accordance with section 72L of the *Administration and Probate Act*. That is, the spouse has only three months from either the date of the administration grant or the date from when notice is served by the administrator to elect to acquire the deceased's interest in the dwelling house. This may cause significant problems if the surviving spouse is not financially sound. This type of problem can be addressed by having a valid will.

Court can vary the entitlements

Whilst Part 3 of the *Administration and Probate Act* provides a formula for distribution of an intestate estate, the Court still has power to vary the entitlement to beneficiaries. A claim can be made under

"... it is difficult to understand why over half of Australia's adult population have not made a formal will".

section 7 of the *Inheritance (Family Provision) Act 1972 (SA)*. The persons entitled to make such a claim are:


- spouse of the deceased
- a person divorced from the deceased
- a domestic partner of the deceased
- a child of the deceased
- a child of a spouse or domestic partner who was maintained by the deceased immediately before death
- a grandchild of the deceased
- a parent of the deceased
- a brother or sister of the deceased.

To be successful in such a claim, certain criteria must be met. Without descending into detail, essentially a claim will be upheld if any of the above class of persons can persuade a Court that they have been left without adequate provision for their proper maintenance, education and advancement in life. These types of applications can be complex, timely, very expensive and the outcome difficult to anticipate. While an application of this nature can also be brought if the deceased leaves a will, a will provides guidance to the Court as to the deceased's last wishes.

"By failing to make a valid will, a person foregoes the right to express his or her wishes on how their estate is to be distributed on death".

By failing to make a valid will, a person foregoes the right to express his or her wishes on how their estate is to be distributed on death. Leaving a valid will affords protection to those loved ones left behind. It also means that the set distribution formula as outlined above is not applied and the executor(s) can generally administer the estate in accordance with the deceased's parting wishes. For those of you who do not have a will or know someone that does not, it is an important legal and moral tool that should be attended to by all of us. The complications for those left to deal with an intestate estate can cause heartache, stress and wastage of the estate.

It is recommended that a lawyer with estate planning expertise be consulted before making a will. It can be the case that the majority of a person's wealth is not capable of being left in a will, such as assets held jointly, superannuation and money held in a family trust. Further, a simple will kit may be largely ineffective in providing any tax saving or asset protection benefits.

Donaldson Walsh has expertise in the areas of estate planning, the administration of estates and with respect to contested estates. 

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NEWS & VIEWS



Margaret Kaukas & Megan Langford

**Modern Awards
All SA Private Sector Employees Now Covered by Modern Awards**

2011 will see yet another change in South Australia's workplace relations system, with the remainder of unincorporated employers becoming covered by the national regime of modern awards.

Since the beginning of 2010, modern awards have applied to employers that are trading corporations, but employers structured as sole traders, partnerships, incorporated associations and non-trading corporations have, to date, not been required to comply with modern awards, by reason of a "transitional period".




On 1 February 2011, the transitional period for sole traders, partnerships, incorporated associations and non-trading corporations ended, and such entities must therefore comply with the modern awards.

This is the final stage of the plan in which South Australia (and three other States) referred their industrial relations powers to the Commonwealth, to standardise award coverage throughout the majority of Australia.

Employers new to modern award coverage should find their applicable award and ascertain precisely what their transition requirements are. Penalties, loadings and wages will be 'phased' up or down, to match the transitional rates 'corporate' employers have been paying since 1 July 2010. Transitional requirements under the awards vary however, so every employer should ensure that they have carefully checked their specific obligations.

The transition process will continue until 2014, at which time all employers must comply with all minimum standards in the modern awards.

It is critical that employers comply with modern awards, as a failure to do so can result in significant fines, and claims for underpayment of award entitlements.

For further information on modern awards and the transition process, contact DW's Workplace Relations Team. 

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INSIGHT | Sandy Donaldson & Tim Duval

SA STILL the Highest Business Tax State

2010 IPA Business Tax Calculator

Last year we reported on the findings in the Institute of Public Affairs (“IPA”) *State Business Tax Calculator* for 2009 (see *DW Report, Summer 2010*). In the 2009 Calculator, the IPA concluded that “*South Australia has the highest business taxes of the six Australian states*”.

In the 2010 Calculator, the IPA finds that:

“For the second consecutive year, South Australia is assessed as imposing the highest level of business taxes”.

The Calculator can be viewed on the IPA Website at <http://ipa.org.au>. The methodology used in the Calculator is to calculate the tax liabilities of a hypothetical “*reference business*”, based on methodology used by the World Bank, being one which is assumed to have:

- 60 employees;
- assets of \$16 million;
- profit of \$5 million.

Constraints on Business Growth

The IPA advocates reform of State and Territory taxation and notes that “*State business taxes are widely held to impede efficiency, which constrain business growth and hence the development of Australia’s market-based economy*”.

The *Australian* front page on 10 January 2011, reporting on the IPA Calculator, leads with the headline:

“HIGH TAX HURTS THE LAGGARD STATES”

It goes on to say:

“High taxes in NSW and South Australia risk entrenching the nation’s two-speed economy providing a new impetus for business and workers to flow to the mining boom states of Queensland and Western Australia.”

State and Territory Comparisons

The main results table in the Calculator sets out the aggregate business tax burden on a *reference business* in each State and Territory as follows (from high to low):

SA	\$281,744.00
ACT	\$275,015.00
NSW	\$270,129.00
TAS	\$265,248.00
QLD	\$264,630.00
VIC	\$256,830.00
WA	\$256,195.00
NT	\$234,656.00

Land Tax and Stamp Duty: The Big Items

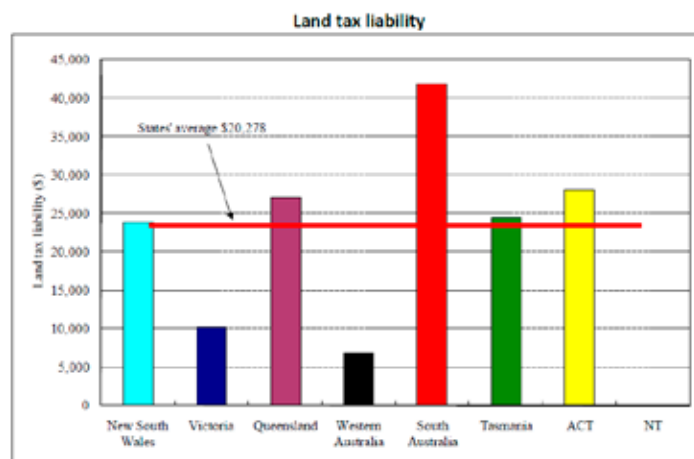
South Australia is very competitive in the area of payroll tax. The payroll tax imposition on a reference business for SA is lower than all other States and Territories, other than NT. Payroll tax is by far the major component of tax burdens on businesses (33.4% for a *reference business* for all States and Territories, according to the IPA).

However, the taxes that push SA above all others are land tax and stamp duty. SA is above average for stamp duty, though less than Victoria and ACT, and for land transfer duty. It is the second highest (coming after Victoria) for all business stamp duties.

Land tax is the stand-out tax which pushes SA above the rest. As the IPA reports:

“The annual South Australian land tax liability of \$41,895.00 is a massive 106 percent above the states’ average”.

This is illustrated by the IPA graph:



As at 31 December 2010. Based on tax liabilities borne by a reference business. WA land tax burden includes Metropolitan Regional Improvement Tax (MRIT).
Source: IPA State Business Tax Calculator.

Escalation in Values and Tax

It is not surprising that the “take” of SA from land tax and property-related stamp duty has soared. Both land tax and stamp duty are assessed in SA on sliding scales, increasing according to value, and property values, as everyone is well aware, have increased substantially in the last decade.

Land tax rates in SA for the 2010/2011 year, and beyond, increase on the basis of the following “*thresholds*”:

Up to \$300,000	NIL
\$300,000-\$550,000	0.5% over \$300,000
\$550,000-\$800,000	+1.65% over \$550,000
\$800,000-\$1 million	+2.4% over \$800,000
Over \$1 million	+3.7% over \$1 million

The *thresholds* are indexed for the 2011/2012 financial and subsequent years on the basis of Valuer-General valuations.

Stamp duty rates start at 1% for the price or value of the property that is transferred up to \$12,000.00 and progressively escalate to a maximum 5.5% on the excess over \$500,000.00.

The stamp duty thresholds are not indexed, and have not been changed for a long time. According to a chart on Myrpd.com.au (www.myrpd.com.au), the median Adelaide house price in November 2000 was around \$150,000.00 and in November 2010 was around \$400,000.00. That is an increase of 267%, and an increase of stamp duty revenue of that percentage is obviously substantial. However, because of the flexible and unindexed thresholds, the stamp duty on the purchase of a property for \$150,000.00 in 2000 would have been \$4,830.00. Whereas in 2010, duty on a property purchased for \$400,000.00 would be \$16,330.00, an increase of 338%. This example concerns a residential, rather than a business property, but the principle is the same.

The imposts do not end there, of course. Registration fees at the Lands Titles Office are calculated on the basis of consideration, notwithstanding the payment of stamp duty and notwithstanding that the amount of consideration has no relevance to the work required for registration of the transfer. The registration fee for a transfer of a \$400,000.00 sale would be \$2,561.00 (so the total of stamp duty and fees on such a sale is \$18,891.00). In addition, however, there are local government rates and the *Emergency Services Levy*, calculated under the arcane formulas under the *Emergency Services Funding Act 1998*.

Tax Reform?

The IPA Calculator notes that “variations in tax competitiveness between States and Territories appear to be mainly driven by differences in property taxation”, and goes on to say that “South Australia should target land tax reductions as a priority”.

Is this likely? The answer is probably “no”. Governments must collect tax, and are notoriously short-sighted and politically motivated in determining the style and rate of taxes.

Stamp duty is not a particularly equitable or efficient tax, and the States are obliged to continue to phase out business-related stamp duties in accordance with the *New Tax System* agreement between the States and the Commonwealth on the introduction of the GST.

In the Final Report of the Henry Review “*Australia’s Future Tax System*”, it is said that:

“Ideally, there would be no role for any stamp duties, including conveyancing stamp duties, in a modern Australian tax system. Recognising the revenue needs of the States, the removal of stamp duty should be achieved through a switch to more efficient taxes, such as those levied on broad consumption or land bases. Increasing land tax at the same time as reducing stamp duty has the additional benefit of some offsetting impacts on asset prices.”

Recommendation 52 in the Report states:

“Given the efficiency benefits for broad land tax, it should be levied on as broad a base as possible. In order to tax more valuable land at higher rates, consideration should be given to levying land tax using an increasing marginal rate schedule with the lowest rate being 0, with thresholds determined by the per-square-metre value.”


Recommendation 53 goes on to state:

“In the long run, the land tax base should be broadened to eventually include all land. If this occurs, low-value land, such as most agricultural land, would not face a tax liability where its value per square metre is below the lowest rate threshold.”

These recommendations have not received anywhere near the same publicity as the recommendations of the Henry Review in relation to taxation of non-renewable resources, which appear in the same section of the Report.

Given this thinking, it is unlikely that there will be any substantial alteration to the land tax system in South Australia. Unfortunately this is contrary to the recommendations in the Henry Report, relating to abolishing stamp duty on real property and extending the base of land tax, by removing or limiting current exemptions, which, while increasing the overall amount of land tax, may permit a reduction in land tax rates.

New “Landholder” Stamp Duty

Far from reducing stamp duties, the state government announced as part of the state budget handed down on 16 September 2010 that it intends to replace the *land rich* provisions in the *Stamp Duties Act* with a *landholder* model, as exists in some other states. A draft Bill has been proposed with a view to introduction of the new model on 1 July 2011. The *landholder* model for stamp duty will substantially widen the scope of entities and assets that will give rise to a liability for stamp duty. 

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Hit the Ground Running

Paid Parental Leave

Since 1 January 2011, new parents across Australia have had access to paid parental leave. But what exactly is paid parental leave, and what impact will it have on employers?

A short explanation of the new entitlements, and what role employers are expected to play in the administration of this new scheme follows.

In brief

“Paid parental leave” is actually something of a misnomer – it is not a new form of leave. Rather, it is an entitlement of up to 18 weeks’ pay at the Federal minimum wage for eligible employees during the first 12 months after the birth or adoption of a child. More correctly named “parental leave pay”, it is intended to interact with the 12 months’ unpaid leave provided to employees under the National Employment Standards, and is additional to any paid parental leave programmes that employers already have in place.

“...it is an entitlement of up to 18 weeks’ pay at the Federal minimum wage for eligible employees during the first 12 months after the birth or adoption of a child”.

The scheme allows employees to maintain contact with their employers during their leave with 10 days of ‘keep in touch’ time, to be used for activities such as training. Employers will be required to pay the worker for days the employee spends at the workplace for ‘keep in touch time’.



Which employees are eligible?

Employees must meet several criteria to be eligible for parental leave pay. Specifically, employees must:

- Be the primary carer of the child
- Be on leave (or at least not working) after the birth or adoption
- Be an Australian resident, and
- Satisfy the “work test” and the “income test”.

Satisfying the work test requires employees to have worked at least 10 of the 13 months preceding the birth or adoption, and at least 330 hours in those 10 months, with less than an eight week period without working during this time.



The income test requires employees to have earned no more than \$150,000 in individual adjusted taxable income in the previous financial year.

In the event that a parent is no longer the primary carer, he or she can transfer any remaining entitlement to parental leave pay to their partner or the child’s other parent, provided he or she is eligible and takes on the primary carer role.

“...employers are not expected to make parental leave payments out of their own pockets. This scheme is funded by the Federal Government”.



“After 1 July, the FAO will provide payments to employers, who will be expected to forward them to employees, generally through their usual pay cycle”.

The employer’s role before 1 July 2011

Most importantly, employers are not expected to make parental leave payments out of their own pockets. This scheme is funded by the Federal Government. Further, employers are not currently responsible for the administration of the scheme, though this will change as of 1 July 2011.

Employees requesting paid parental leave should always be directed to the Family Assistance Office (“FAO”). The FAO assesses eligibility and determines the payments that employees will receive. Until 1 July, the FAO will make direct payments to employees.

Gearing up

After 1 July, the FAO will provide payments to employers, who will be expected to forward them to employees, generally through their usual pay cycle. However, when an employee has less than 12 months’ service prior to the expected date of birth or adoption, and will receive less than 8 weeks’ pay, the FAO can provide the payments directly.

Employers will need to register for the parental leave pay scheme through Centrelink Business Online Services and provide information to the FAO, such as bank account and payroll details. Employers will also be required to keep financial records for the receipt of funds from the FAO

and the payment of funds to employees. This may mean that many employers need to upgrade their payroll systems to meet their forthcoming responsibilities.

For further information about the “paid parental leave” scheme, contact DW’s Workplace Relations Team.



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Small Business Employers & Unfair Dismissal

The Small Business Fair Dismissal Code

Synopsis

From 1 January 2011 the method of calculating whether an employer is a “small business employer” for the purposes of the “Small Business Fair Dismissal Code” has been simplified.

The *Fair Work Act* provides that a dismissal by a “small business employer” will not be unfair if the small business employer has acted consistently with the “*Small Business Fair Dismissal Code*” (outlined further below). This results in a slightly less onerous responsibility upon “small business employers” in relation to dismissal than applies to other employers.

Prior to 1 January 2011 a “small business employer” was defined as an employer who – at the time of the dismissal or immediately before the dismissal – employed less than 15 full-time equivalent employees. Full-time equivalent employees were calculated by reference to a complicated formula provided in the legislation.

As from 1 January 2011 a “small business employer” is calculated by a simple head count of all employees, including:

- Casual employees, but only if at the relevant time the casual employee had been employed on a regular and systematic basis;
- Employees of associated entities (see below);
- The employee who is being dismissed and any other employee who is being dismissed at the same time.

Small business employers – including franchisors and franchisees – may need to review their manuals and processes to take account of this change.

Small Business Fair Dismissal Code

The *Small Business Fair Dismissal Code* provides that it will be fair for a “small business employer” to dismiss an employee in the following circumstances:

- **Summary Dismissal:** Without notice or warning when the employer believes on reasonable grounds that the employee’s conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, but not essential, that an allegation of theft, fraud or violence be reported to the police, and that the small business employer has reasonable grounds for making the report to police.

“This results in a slightly less onerous responsibility upon “small business employers” in relation to dismissal than applies to other employers”.


- **Other Dismissal:** In other cases, if, prior to the dismissal, the small business employer has: given the employee a valid reason, based on the employee’s conduct or capacity to do the job, why he or she is at risk of being dismissed; warned the employee verbally or in writing that he or she is at risk of dismissal if there is no improvement; and provided the employee with an opportunity to respond to the warning and a reasonable chance to rectify the problem. Rectification of the problem might involve the small business employer providing additional training and ensuring that the employee knows the employer’s job expectations.
- **Procedural Matters:** In discussions with an employee in circumstances where dismissal is possible, the employee is allowed to have another person (who is not a lawyer acting in a professional capacity) to assist.

Associated Entities

The *Corporations Act* defines one entity (the associate) to be an associated entity of another entity (the principal) if:

- The associate and the principal are related bodies corporate; or
- The principal controls the associate; or
- The associate controls the principal and the operations, resources or affairs of the principal are material to the associate; or
- The associate has a qualifying investment in the principal and has significant influence over the principal, and the interest is material to the associate; or
- The principal has a qualifying investment in the associate and has significant influence over the associate, and the interest is material to the principal; or
- A third entity controls both the principal and the associate, and the operations, resources or affairs of the principal and the associate are both material to the third entity.

The definition of “associated entities” contained in the *Corporations Act* will not usually apply to fellow franchisees. However, when a franchisee operates multiple sites of the franchised business these ‘multi-sites’ may be considered associated entities. If the combined employee head count of the multi-site operations is 15 or more, the franchisee should seek appropriate legal advice.

For further information on the Small Business Fair Dismissal Code, identification of a “small business employer”, and advice in relation to whether a particular entity is an “associated entity”, please contact DW’s Workplace Relations Team. 



INSIGHT | John Walsh

WorkCover 2011

The Year of the Rabbit or the Year of Uncertainty?

Employers and workers alike face another year of uncertainty with a range of issues likely to impact upon the troublesome WorkCover Scheme.

Towards the end of last year there were a number of announcements made and decisions taken which, together with judicial interpretation of the Scheme, will impact this year and beyond.

Scheme Performance

The Annual Report was released on 30 September 2010 for the financial year 2009/10.

WorkCover announced a profit of \$77 million for the financial year, a reduction in the unfunded liability to \$982 million at 30 June 2010 and an increase in the funding ratio to 61.5%. The Annual Report confirmed the intention to reduce the average levy rate from 3% to 2.75% for the 2010/11 financial year. On its face a positive result – but more of that later.

Legislative Change

The Honourable Paul Holloway foreshadowed a draft Bill to reform WorkCover's dispute resolution processes to "create a more equitable process with speedier outcomes for injured workers, without undermining the financial strength of the WorkCover Scheme". The draft Bill sets out a wide range of amendments which will significantly impact the dispute resolution process and are heavily reliant upon effective Medical Panel processes – more of this later.

WorkCover Performance Review

In March 2007 the government revealed that the WorkCover Board had proposed radical amendments to the WorkCover

Scheme in South Australia. That radical legislative reform resulted in an overhaul of the Act in 2008. At the time MLC John Darley was successful in incorporating into the legislative change a review of the impact of the changes. The review is in process now and submissions were accepted until 4 March. The review is headed by Bill Cossey AM, a former senior public servant and it can be expected to be a political hot potato because many in the union movement feel that the reforms have not achieved the aim of increasing the return to work rate and reducing the unfunded liability but they have unfairly penalised injured workers. They may well be right.

Participants in the Scheme

Towards the end of last year, decisions were taken by the WorkCover Board in relation to contracts for claims management and the provision of legal services. In each case the incumbents remain in place until 31 December 2012, ensuring a period of stability, at least, in relation to claims management and the provision of legal services.



Levy Rate

When the government committed to the reform package which led to legislative change in 2008, one of the objectives was that the average employer levy rate be reduced to a range of 2.25% to 2.75% by 1 July 2009. The Global Financial Crisis took care of that but it is still proposed that the average levy rate will

decrease from 3% to 2.75% in 2010/11. It remains to be seen whether that will occur. In the meantime WorkCover is developing a new employer premium payment system for South Australia to replace the bonus penalty scheme which ceased on 30 June 2010. It was originally hoped by WorkCover that the changes would be implemented by 30 June 2011. It can be expected that there will be winners and losers out of any change but more about that later.

Scheme Performance

The generally positive commentary by WorkCover around the release of the Annual Report hides some worrying factors.

Unfunded Liability – although the unfunded liability fell from \$1.059 billion to \$982 million, the turnaround largely came as a result of a positive return on investment. Investments grew to 12.3% and delivered a return of \$138 million, but there are some worrying signs. There was an underwriting loss of \$18 million!

"The generally positive commentary by WorkCover around the release of the Annual Report hides some worrying factors".

The underwriting loss is the shortfall between levy collected from registered employers and the cost of claims. In contrast the previous year delivered a positive result to the tune of \$107 million. During the 2009/10 year there was a \$109 million increase in the cost of claims! The Chairman's Statement, however, highlights a claims liability saving, rather than the underwriting loss. The claims liability result reflects the difference between the projected liability at the start of the period, the actual liability at the end of the period and the payments made in the period. He describes claims management as the core business that WorkCover is responsible

for and the one factor influencing WorkCover's unfunded liability that is within its control and he expresses pleasure that, "we have reduced the number of long term claims (ie, claims greater than three years old) to 1,718, which is the lowest number of long term claims since August 2001". The reduction in claims liability and the reduction in the number of long term claims is, however, heavily influenced by the very high level of redemption payments made pursuant to Section 42 of the Act. Section 42 of the Act was amended amongst the raft of changes implemented in 2008 and it is the clear intention of the legislation to significantly limit redemptions in order to change the "lump sum culture" which was blamed by WorkCover for the deterioration in the Scheme over the last 10 years. It is interesting to note, therefore, that in 2008/9 total redemption payments made were \$147 million (an average of \$83,000.00 per payment) and in the 2009/10 year total redemption payments were \$123 million with an average amount of \$95,000.00 per redemption. The "savings" on claims liability in the last two years and the reduction in the number of long term claims seems to have come about as a consequence of a significant increase in total redemption payments over recent years (\$76.6 million in 2007/8 and only \$34 million in 2006/7).

The actuarial review which accompanies the Annual Report refers to the reduction in liability of \$81 million and tells us that "this favourable movement arises from continued execution of the tail redemption strategy, as well as some favourable experience for the 2005/06 accident year (where some claims had been managed under the tail claim management strategy, and some managed toward a WCR outcome under the new legislative provisions)". It must be questioned whether a reduction in the liability of \$81 million is a good result when it has been achieved by a payment of \$123 million as a

"...many in the union movement feel that the reforms have not achieved the aim of increasing the return to work rate and reducing the unfunded liability but they have unfairly penalised injured workers. They may well be right."



"If the return to work rate continues to deteriorate and the 2008 amendments and the Medical Panel do not, together, remove claimants from the Scheme and there is no ability to redeem long term claimants, it can be expected that the unfunded liability will continue to grow and the funding ratio deteriorate".

result of "continued execution of the tail redemption strategy". It also poses a serious challenge to the viability of the Scheme when legislative change severely restricts WorkCover's ability to use a redemption strategy as the main lever to reduce the number of long term claims. The clear intent is to replace a redemption strategy with one that utilises the effect of the amendments and the role of the Medical Panel to reduce the number of long term claims. The effectiveness of the amendments and the Medical Panel in achieving the Government's aim is questionable.

An analysis of the reported return to work rate also gives cause for concern. Despite the high cost of rehabilitation, South Australia has consistently performed poorly against the national average in the return to work rate. In the 2008/09 year there was a marked improvement from 75% to 82% (the national average at the time was 83%) but the gap is widening again with the return to work rate for South Australia decreasing to 80% and the national average trending up to 85%. If the return to work rate continues to deteriorate and the 2008 amendments and the Medical Panel do not, together, remove claimants from the Scheme and there is no ability to redeem long term claimants, it can be expected that the unfunded liability will continue to grow and the funding ratio deteriorate.

As the economy recovers from the Global Financial Crisis there is a risk that claim numbers will increase. A recent Australian study has found that worker's compensation "claims activity" tends to increase during an economic recovery, and not

when times are tough, as is often believed. There are a range of factors said to be responsible. As business confidence rises hiring activity increases and often the average age is lower as experienced and highly paid workers are replaced with younger and less experienced workers. There is a higher risk of injury with less experienced workers. An increase in production can also mean longer hours and overtime which places workers under additional physical and mental stress, both of which have the potential to lead to a claim.

Scheme Review

The review conducted by Bill Cossey comes at an interesting political time for the Government with generational change in the parliamentary party taking a lot of focus and an increasingly confident and stable Opposition looking to take advantage of disunity in Labor ranks. Unions SA is understood to



have prepared a consolidated submission on behalf of all unions calling for major reforms. Unions SA Secretary Janet Giles, who resigned from the WorkCover Board in protest over the reforms, was quoted as saying that: "Our submission will show injured workers have been the innocent victims of a failed experiment by Mike Rann and Kevin Foley – the aim to increase the return to work rate and

"Our submission will show injured workers have been the innocent victims of a failed experiment by Mike Rann and Kevin Foley – the aim to increase the return to work rate and reduce the unfunded liability have not been achieved, yet workers have suffered enormously".

reduce the unfunded liability have not been achieved, yet workers have suffered enormously".

Whilst the unfunded liability at 30 June 2010 has reduced, the underlying fundamentals raise concerns. The Annual Report showed that its performance worsened in the six months to June 2010 and if that trend has continued it can be expected that currently the "real" unfunded liability is back in excess of \$1 billion. Coupled with the underwriting loss, the worsening of the performance of the Scheme has the potential to affect the state's AAA rating.

"The political pressure will be intense. The government will not be able to satisfy the unions (who will seek fundamental change to restore benefits to injured workers), the ratings agencies or employers, who will be keen to see WorkCover deliver upon its stated intent to reduce the levy rate".

The political pressure will be intense. The government will not be able to satisfy the unions (who will seek fundamental change to restore benefits to injured workers), the ratings agencies or employers, who will be keen to see WorkCover deliver upon its stated intent to reduce the levy rate.

Legislative Reform

Minister Holloway has flagged his intention to introduce legislation to simplify WorkCover's dispute resolution processes, "to deliver faster results for injured workers". He asserts that, "the proposed changes will create a more equitable process with speedier outcomes for injured workers, without undermining the financial strength of the WorkCover Scheme". The timing of the announcement towards the end of November 2010 is puzzling, coming as it does as a review of the Scheme is in process. Without going into detail in relation to the proposed changes it is sufficient to say that rather than simplifying the dispute resolution process, taken as a whole, they add a layer

of complexity to the process and are heavily reliant upon the ability of Medical Panels SA to deliver opinions upon medical questions referred to the Panel. Current experience suggests that it is unlikely in the extreme that Medical Panels SA will be able to deliver opinions within the timeframe (14 days) proposed. In addition, I have no doubt that jurisdictional issues will need to be dealt with by the Supreme Court.

Once again it appears that the government has elected to introduce complex process by legislation to address a perceived

problem which could have been addressed by the simple expedient of introducing an automatic 28 day restoration of income maintenance payments in circumstances where the Compensating Authority seeks to discontinue or reduce weekly payments.

Employer Payment System

Most employers will be familiar with WorkCover's Bonus Penalty Scheme which was first introduced in 1990. That Scheme ceased to operate on 30 June 2010 and now all registered employers pay a levy calculated on the basis of the relevant industry rate multiplied by employer remuneration. It is likely that the new system will require legislative amendments and its expressed aim is to balance "user pays"

continued on page 12

"...there are some worrying signs that WorkCover is seeking to exercise greater influence directly with individual Self Insurers by restricting consultation with SISA, the organisation which represents this important group of stakeholders. Quite why WorkCover has chosen this potentially confrontational approach with a group of employers which out performs the Scheme is a mystery".

WorkCover 2011

continued from page 11

and "insurance protection". WorkCover's new CEO, Rob Thompson, returned to South Australia from New South Wales where he was General Manager of the Workers Compensation Division of WorkCover NSW and he is "keen to have a system that focuses on employers preventing injuries and encourages them to keep their workers at work, or if time off is required, to support their workers to return to work". It would be reasonable to assume that whatever scheme is introduced will closely resemble that which operates in NSW, where small employers are industry rated, medium and large employers experience rated and large employers given the option of retro paid loss.

WorkCover is currently engaged in a consultation process with stakeholders, whilst no doubt working on the mechanics of its preferred premium payment system. It will require legislative change which is normally a long process and one which will likely be affected by the current review of the Scheme. It would seem optimistic to expect the new system to be agreed upon and legislation passed to allow implementation for the 2011/12 financial year, but it will be most interesting to see how the initiative is pursued.

EML & the Legal Panel

The Board's decision to effectively extend EML's claims management contract to 2012 and do the same with their legal panel will at least provide a degree of stability in claims management and it can be expected that EML will work very hard to improve its performance so that it is well placed to continue as the outsourced claims manager for WorkCover beyond December 2012. The performance of EML in managing

"It was intended that many of the functions of the Worker's Compensation Tribunal would be undertaken by the Medical Panel whose decisions would be final and conclusive".

"front end" claims and ensuring effective rehabilitation and care after an injury will be critical in maintaining their position and injured workers will benefit from EML's motivation to improve injury and case management outcomes over the next two years.

Judicial Intervention

The key amendments to the Scheme introduced in 2008 were those that provided:

- The ability to discontinue weekly payments of income maintenance at 130 weeks post-injury for partially incapacitated workers who were not working to their maximum capacity in suitable employment; and
- The introduction of Medical Panels to determine questions that are wide ranging in nature and deal with issues of fact and law.

It was intended that many of the functions of the Worker's Compensation Tribunal would be undertaken by the Medical Panel whose decisions would be final and conclusive. Importantly the role of the Medical Panel and the binding nature of its decisions was intended to underpin the "work capacity reviews" and ensure the ongoing removal of long term claimants from the Scheme. A recent decision of the Full Bench of the Worker's Compensation Tribunal in the matter of *Davey* reinforces the need for procedural fairness in making work capacity decisions and its effect will impede the ability of EML to carry out work capacity reviews and implement them in a timely fashion. WorkCover is considering an appeal to the Supreme Court and so uncertainty will remain until a definitive decision is made at that level. Of even more significance is the decision of the Supreme Court in the matter of *Yaghoubi*. The matter proceeded to hearing in the Supreme Court in early

December and judgment has been reserved. In that case the rejection of the worker's claim for various disabilities saw medical questions relevant to the subsequent dispute referred to the Medical Panel by EML. The worker in question refused to attend the medical examination with the Panel and the question before the Supreme Court is whether EML's referral of the medical question to the Panel was valid in circumstances where the dispute in question had been referred to the Tribunal for judicial determination. The question of law raises a constitutional issue, namely whether a decision of the Medical Panel can bind the Worker's Compensation Tribunal in its determination of a dispute which has been properly referred to the Tribunal.

"The constitutional issue of the binding nature of a Medical Panel decision may also be the subject of consideration by the High Court".

If the Supreme Court determines that the Medical Panel cannot bind the Tribunal and/or it concludes that a dispute having been referred to the Tribunal for judicial determination, the compensating authority cannot refer a medical question to the Panel of its own motion, it will have significant ramifications and significantly reduce the effectiveness of "work capacity reviews" to remove claimants from the Scheme. It necessarily follows from this result that claims costs will increase and the tail will grow, as will outstanding claim liabilities and the unfunded liability. The ability of the government to deliver the reduction in the levy rate promised for the state's employers will be in question.

The constitutional issue of the binding nature of a Medical Panel decision may also be the subject of consideration by the High Court.

A Victorian employer has launched a High Court Appeal against a decision of the Victorian

Court of Appeal which ruled that a Medical Panel's finding would bind the jury hearing the case in the County Court. The County Court had made a preliminary ruling prohibiting the employer from leading evidence contrary to the Panel's findings about the former employee's psychiatric state.

Uncertainty

The latest actuarial review is heavily qualified, and properly so. The actuary quite reasonably points out that "we expect it to be a number of years until the financial impact of the reforms can be confidently determined" but, "judicial interpretation of the legislative changes continues to be a source of uncertainty in estimating the Scheme liability".

2011 is shaping up to be an interesting year for Self Insurers as well. Although largely unaffected operationally by the 2008 legislative amendments there are some worrying signs that WorkCover is seeking to exercise greater influence directly with individual Self Insurers by restricting consultation with SISA, the organisation which represents this important group of stakeholders.

Quite why WorkCover has chosen this potentially confrontational approach with a group of employers which out performs the Scheme is a mystery.

2011 is the year of the Rabbit in the Chinese Lunar Calendar but so far as WorkCover is concerned it is better termed the Year of Uncertainty. 🐰

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Love Me (Legal) Tender

The Many Ways of Making Payment

There are now many ways of making payment for the price of goods or services, or other debts obligations. These include:

- Cash (notes and coins);
- Cheques or other negotiable instruments;
- Credit cards;
- Electronic funds transfer (e.g. B-Pay).

Issues sometimes arise as to the appropriateness, or effectiveness, of a method of payment, such as to whether:

- a trader can be required to accept a particular form of payment;
- a payment made in a particular manner is an effective discharge of a debt;
- an offer of payment by a particular mode is a "legal tender".

What is Legal Tender?

There is no statutory definition of what constitutes "legal tender", although this expression is used in some Acts. The Reserve Bank of Australia, on its website (www.rba.gov.au/banknotes/legal-framework) refers to the *Concise Oxford Dictionary* definition of legal tender as "currency that cannot legally be refused in payment of debt (usually up to a limited amount for baser coins, etc)".

Section 36 of the *Reserve Bank Act 1959* stipulates that Australian notes are a legal tender throughout Australia. The *Currency Act 1965* specifies in clause 16 that:

"(1) A tender of payment of monies is a legal tender if it is made in coins that are made and issued under this Act and are of current weight..."

There are, however, limits for a tender made in coins, so that coins are only legal tender where the amount:

- does not exceed 20 cents if in 1 cent or 2 cent coins (which have now been withdrawn, but are still legal tender);
- does not exceed \$5.00 if any of 5 cent, 10 cent, 20 cent or 50 cent coins are tendered;
- does not exceed ten times the face value if coins in the range of 50 cents to \$10.00 (if they exist) are offered; and
- is up to any value if coins of a value greater than \$10.00 (if they exist) are offered.

A coin may not be of current weight if it has become diminished by wear or otherwise to be less than the prescribed weight (Section 16(2)).

The references to coins up to or over \$10.00 may seem strange. Currently the \$2.00 coin is the highest value coin in circulation. However, the Royal Australian Mint has issued quite a few gold and silver \$10.00 coins. Notable among them are Gold Proof coins described as:

- 2007 Kangaroo Gold Proof- Rolf Harris,
- 2007 The Pig Lunar Gold Proof, and
- 2008 Year of the Rat.

If you have these, however, it is not likely that you will be tendering them at the local supermarket at face value for the weekly groceries.

Other Forms of Payment

No forms of payment other than cash (notes or coins) are specified in legislation as legal tender, but a contract between parties, which may be express or which could be evidenced by their conduct or trade practices, may require or allow other forms of tender and payment.

A contract can expressly specify the required form of payment, or effectively define what will be "legal tender" for that contract.



Must a Tender be Made in Cash?

If a payment is offered (or tendered) in cash (subject to the limits relating to coins), it should be accepted in payment of a debt unless a contract specifies another form of payment. If not accepted, the refusal to accept the tender is not illegal, but the party to whom the payment is due may not later be able to effectively sue for a payment of the amount that has been tendered.

A trader is not, however, obliged to accept payment by cash if it is made known in the terms of contract, or before the offer and acceptance for a contract is complete, that cash will not be accepted. So, an automatic check-out machine in a supermarket which will only accept notes, not coins, or vice versa, or a requirement that a trader will only accept payment by credit card, if this is made known up-front, will preclude an effective legal tender by cash or other modes of payment.

Currency for Payment

Unless another form of currency is specified, the currency for payment in Australia will be the Australian dollar, which is the monetary unit, or unit of currency, of Australia (*Currency Act* Sections 8 and 11).


Acceptance of Cheques or Negotiable Instruments

If a cheque or other negotiable instrument is accepted then (subject to any terms of a contract) this will discharge a payment for which it is tendered. If the cheque or other negotiable instrument is subsequently dishonoured, then there may be no right to sue for the debt, but the party accepting the cheque or other instrument may have an action for its dishonour.

Payments by EFT

Most electronic funds payments, such as B-Pay, will be expressly permitted (often encouraged) and accepted by traders as good legal tender and discharge of obligations. If electronic funds transfer is not specified as a mode of payment in a contract, it is hard to imagine that a party that receives an effective funds transfer would not accept this but, theoretically, it may not be an effective payment under the terms of a particular contract.

Terms of Trade

Currently traders should be reviewing terms of trade and contracts to take account of the requirements of the new *Australian Consumer Law* and the introduction of new rules for security for payments under the *Personal Property Securities Act 2009*, when this comes into effect in May 2011, and it would be wise also to review provisions relating to modes of payment to ensure that these are appropriate. 



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CASE IN POINT | Josh Richards

The Spam Act



Virgin Blue Fined for Sending Unwanted Marketing Emails

Virgin Blue Airlines (“**Virgin Blue**”) has been fined \$110,000.00 by the Australian Communications and Media Authority (“**ACMA**”) and will overhaul its email marketing after consumers complained that they were unable to unsubscribe from the airline’s mailing list.



Virgin Blue contravened the *Spam Act 2003 (Cth)* when the company continued to send commercial emails despite recipients’ multiple attempts to unsubscribe from its mailing list. During the ACMA investigation, Virgin Blue acknowledged that it had experienced problems with its email marketing systems,



Josh Richards Solicitor

which led to some previously unsubscribe consumers continuing to receive emails.

ACMA accepted an enforceable undertaking from Virgin Blue, which commits the airline to a thorough overhaul and independent assessment of its email marketing practices. Virgin Blue will engage an independent third party to thoroughly assess its email marketing processes and to implement any recommended changes. The airline will also provide training to relevant employees, establish a complaints handling policy, and audit 10 per cent of its email marketing campaigns monthly for a year. All of this will prove to be extremely costly for the airline.

“...the Act prohibits the sending of unsolicited commercial electronic messages known as ‘Spam’.”

ACMA Chairman, Chris Chapman, stated, ‘Businesses which market by email need to regularly test that the unsubscribe function in their messages is working properly’. ‘The Spam Act requires that a request from a consumer to be unsubscribed from commercial emails be addressed.’

The Spam Act

The *Spam Act* (“**the Act**”) is not legislation dealing with ‘Spiced Ham’, or canned precooked meat product known as ‘Spam’.

Rather the Act prohibits the sending of unsolicited commercial electronic messages known as ‘Spam’.

The Act covers, emails, instant messaging, SMS (text messages) and MMS (image-based

mobile phone messaging) of a commercial nature. The ACMA enforces the Act and accepts complaints, reports and enquiries about Spam in Australia.

Section 6 of the Act provides that Spam relates to messages sent to Australians by email, SMS, MMS or instant messages that:

- Offer, advertise or promote the supply of goods, services, land or business or investment opportunities;
- Advertise or promote a supplier of goods, services, land or business or investment opportunities;
- Assist a person to dishonestly obtain property, commercial advantage or other gain from another person.

The Act contains three main rules that message senders must comply with – consent, identification and unsubscribe facilities.

Consent

Commercial electronic messages sent to Australians must be sent with your consent. The Act provides for two types of consent – express and implied.

Express consent being that you have deliberately and intentionally opted-in to receiving electronic messages from the message sender.

Inferred consent relies on a relationship that you may have with the sender. The Act provides that consent can be inferred from your conduct or relationship that a message sender has with you. The message sender may decide

“The Act contains three main rules that message senders must comply with – consent, identification and unsubscribe facilities”.

that because you have an existing relationship, you would be interested in receiving electronic messages about similar products and services. For further detail on ‘consent’, see Schedule 2 of the Act.

Identity

All commercial electronic messages must include clear and accurate identification of the sender of the message and information on how you can contact the sender.

Unsubscribe Facility

All commercial electronic messages must contain an unsubscribe facility. This means that there must be a way in which you can opt out of receiving messages, regardless of you having consented to receiving commercial electronic messages.



A message sender has five working days to act on an unsubscribe request.

Comments

The ACMA does investigate and will penalise contraventions of the Act. Companies in Australia need to regularly test the unsubscribe function in the electronic messages that they send, otherwise they risk significant penalties and sanctions being imposed by ACMA. ☒

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INSIGHT | Alan Branch

International Franchising

Report on 2011 IFA Convention in Las Vegas

This year the International Franchise Association (IFA) held its Convention in Las Vegas Nevada. Alan Branch, head of Donaldson Walsh Lawyers Franchise team attended as part of the Australian delegation and 2700 other registrants and 500 exhibitors.



The conference mood was positive and looking to regain the lost ground from the last 2 years of the GFC. As well as covering international expansion, economic and government issues, Alan attended fascinating topics about dealing with successful sports stars entering franchising after their NFL careers, tough times dealing with independent Franchisee Associations and talking with major brands wanting to come into Australia looking for partners.

Many were aware of the proposed SA and WA franchise legislation and passed on that Iowa tried this and ruined their franchise sector until the laws were revoked.

It is encouraging that even the WA Government Small Business Corporation submitted a 14 page condemnation of the proposed WA laws and concluded the proposed WA Bill would create an uneven playing field and a regulatory quicksand that business across the country will be forced to navigate through and would create significant potential risks, costs and unintended consequences associated with the proposed Bill, which may leave small franchisors and franchisees in WA worse off.

What do American's want?

Major American franchise systems want expansion. USA locations are still slow and so growth needs to be on an international level.



Las Vegas

As there is parity with the \$USD, any Australian looking to acquire the Australian master rights to a US brand will get good value. However the acquisition price is only a short term issue.

To acquire international rights you need a solid understanding of the differences between USA and Australian business, financial and labor styles and costs.

You also need a level of stubbornness to ensure that the USA firm appreciates that though Australians look the same, we are not the same as them. Just think of how much turkey meat is sold in the USA compared to here, while wage rates, rents and customer tipping in the USA also contribute to major differences.

Interested in seeking a business opportunity?

People thinking about acquiring overseas franchise systems for Australia will need guidance, benchmarking and insight into the trends within global franchising.

Donaldson Walsh is delighted that, as confirmed by our franchise team's numerous Awards, businesses can have confidence to know we at Donaldson Walsh have the right answers and can be trusted to deliver the contacts, experience and skills needed to complete the deal.

For assistance and advice on International Franchising, please contact DW's multi-award winning team.



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Head of the Family

Christian Munt, Special Counsel

The Head of our Commercial Disputes & Insolvency team is used to leading by example. In the 2010 edition of Doyle's Guide to the Australian Legal Profession, Christian was named as one of the country's Top 20 Rising Stars in both Commercial Litigation and Insolvency & Reconstruction. But as the father of two energetic young boys, the greatest test of his leadership may well be at home. And it's a challenge he's relishing.

Christian's never been one to back down. Since he began practicing law in 1997 he's consistently put his hand up no matter how difficult the task, and this instinctive tenacity has played no small part in his rise to national prominence.

As you'd expect of someone in his position, he's also remarkably well organised and knowledgeable in his chosen field. In 2006, however, he entered a new field that has pushed all these qualities to the limit, just as it has for billions of others before him; parenthood.

When Christian and his wife Liz's first-born, Max, entered the world their lives were irreversibly changed.



"It fundamentally altered the focus of our thoughts," says Christian. "It really did put things in perspective as to what's most important in life.

"The intermittent exhaustion makes it

hard to maintain that perspective at times," he adds with a grin, "but the depth of love and joy we felt then, and will always feel, is quite incredible."

That depth was added to in 2008 with the arrival of a second son, Richie, instantly doubling their joy and, of course, their workload.

"It probably won't come as a surprise to anyone who knows me that I've occasionally been described as 'very particular'," Christian laughs. "I like to keep things in order. But organising two children is a different thing altogether.

"I can't say the transition from courtroom to kid's room has always been smooth for me!" He pauses for a second, then adds: "My negotiation skills, however, have proven handy when resolving toy-related disputes."

According to Christian the boys adore each other, but are very much carving out their own identities. Max is outgoing, very physical and



fits into any social situation, although he's still "prone to the odd turn", like any four year old.

"He also displays a knack for slapstick comedy," says Christian. "We're starting to think he might be the next Jim Carey."

Richie, on the other hand, is much more circumspect and "intellectual", is very strong-willed and has quite a mischievous side.

A recent event summed up their differences perfectly, says Christian.

"The boys had a sleepover with their grandparents a few weeks back, and when we picked them up there was a story for each.

"They'd gone to the park and Max had rapidly befriended a bunch of complete strangers who were having a party, and ended up sitting at their table. Richie, meanwhile, stuck with 'Gran' and dug in his heels when she asked him to use his manners to request a drink of apple juice.

"He held out for over an hour, during which time the subject was revisited on a number of occasions, before he grudgingly let out a tortured 'pleeeeeease'."

With healthy growing children and a healthy growing professional profile, things are clearly "on track" for Christian at the moment. But if there's one thing fatherhood has taught him it's that nothing can ever be taken for granted.

"Life's like a Showdown, really" says the committed Adelaide Football Club fan.

"It's nice when my team wins, but as much as I'd enjoy letting our Power-mad Managing Partner John Walsh know about it, I know that unless the boys keep their heads down the tables could easily be turned next time 'round.

"So I'm keeping mine down, don't worry about that!"



LIKE TO TALK?

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