

Client News

Winter 2006

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Tax Time

It's that time of the year again, when accountants shift into overdrive and the rest of us wade through receipts and remittances.

The biggest job is left to the Australian Tax Office (ATO), which deals with all tax matters including superannuation, excise and the Higher Education Loan Programme (formerly HECS). Its Taxpayers' Charter outlines expectations of taxpayers, requiring us to be truthful and cooperative in dealings with the ATO, keep records in accordance with the law, take reasonable care in preparing tax documents, lodge punctual tax returns, and pay taxes by the due date. Penalties, including prosecution, may apply for any impropriety so understanding your tax obligations is important. Furthermore, learning how to identify potential advantages, as well as traps, puts you in a better position to make strategic tax choices.

For small business owners, the stakes are even higher. So it is important to learn the basics of tax planning and understand how tax obligations are affected by things like business structures, accounting and recordkeeping methods, income types, deductions, capital and operating costs.

Ultimately, the ATO's tax laws should support a revenue system that upholds social and economic policy and funds community services. However, the end of the financial year has again been loaded with demands for tax reform, particularly by business groups. Even federal cabinet experienced some unrest, following Malcolm Turnbull's report, entitled "*Taxation Reform in Australia: Some Alternatives and Indicative Costings*", which was released last August.

In an effort to control the tax debate just prior to the Budget announcement, Treasurer Peter Costello released the *International Comparison of Australia's Taxes* report, on 12 April this year. The benchmarking study was led by Peter Hendy (Australian Chamber of Commerce & Industry) and Dick Warburton (Chairman, Australian Board of Taxation).

The study purported to compare Australia's tax system against those of OECD and selected Asian countries. While the findings of the report determined Australia as having the eighth lowest tax in the developed world and a comparatively low GST rate, they also indicated that taxes on property transactions, levied by state governments, are the highest.

According to the report, Australia's corporate sector is overtaxed in comparison to other countries. Furthermore, Australia's tax treatment of losses, depreciation and amortisation of goodwill could be viewed as putting Australian companies at a competitive disadvantage in today's global market. While the 2006/07 federal budget provides some relief, with tax cuts for small business and generous depreciation rates, little has been done to remedy our increasing skills shortage and decelerated export growth.

In relation to personal income, high marginal tax rates could explain why many Australians working overseas are reluctant to return and may arguably put skilled migrant numbers at risk of decline. This year's budget has made some concessions with rate reductions, but these are aimed mainly at the top end. On a social level, high marginal tax is particularly crippling to low income earners on family benefits and other welfare.

Perhaps these are the concerns driving the government's recent provisions for offsets on medical expenses and child care tax. One of the intentions of the *Tax Laws Amendment Act 2005* (Cth) is to help families reduce their costs for approved child care, with a 30% rebate that can be claimed in this year's income tax returns. The Budget has also increased access to child care and extended large family supplements.

Are these and the new Budget provisions enough? The case for greater strategic reform of Australia's personal and corporate tax regimes continues to mount. In the meantime, the best we can do as individuals is to understand our obligations and make sure we comply with current law.

Useful Web links

For all your tax information visit the Australian Taxation Office www.ato.gov.au
For an overview and details of the 2006/7 budget go to www.budget.gov.au.

Contesting freedom

As the government ramps up its anti-terror laws and seeks to gain tighter control of civil liberties, Australian society arguably appears to be one of growing fear and suspicion. Words like 'suppression', 'surveillance' and 'sedition' reflect the hardline approach the government is taking on national security. Ultimately, it's about security of freedom; a phrase that sounds as paradoxical as the notion itself. Adversaries of anti-terrorism legislation claim that, if anything, the recent laws serve to stifle our democratic freedoms.

There are many organisations and communities that have expressed concern at the trend in recent laws. On Friday 28 April, the Media, Entertainment & Arts Alliance (MEAA) released its second report into the state of press freedom in Australia, following its recent submission to the Australian Law Reform Commission (ALRC) Inquiry into Schedule 7 – Sedition of the *Anti-Terrorism Act (No 2) 2005* (Cth) ("the Act").

The MEAA has advocated that sedition provisions of the Act are not necessary, particularly when existing legislation, like the *Crimes Act 1958* (Vic) and anti-vilification laws, adequately deal with such matters. They claim that Schedule 7 adds to the

mounting restrictions on press freedom, which include suppression of public information, threats to confidentiality of sources and penalties curbing investigative journalism in such matters as alleged contraventions of justice.

The MEAA's observation of the decline of press freedom extends to even broader issues for ordinary Australians wanting to retain their own rights to speak out and take action over public issues. In its submission to the ALRC, the MEAA claimed that legislation "will severely restrict freedom of expression in this country and threaten the nature of public debate, the cornerstone of democratic values."

A wider review of anti-terrorism legislation was recently conducted by the Security Legislation Review Committee, set up last October. Its report criticises the approach to the development and drafting of legislation dating back to 2002 and calls for sweeping changes. Its recommendations include: the removal of the Attorney-General's power to determine which groups constitute a terrorist organisation; tightening the definition of what constitutes a terrorist group; and giving suspected terrorists explicit rights to a lawyer, along with confidentiality.

With this and the ALRC's review of sedition legislation, publicly supported by some government members, the push for reform is still on the agenda. On a brighter side for the press, there has been recent victory with landmark national defamation laws that cap damages amounts, as well as moves towards limited legal privilege for journalists who refuse to disclose sources.

But the mood remains sombre in the face of big budget spending on national security measures and the escalation of powers for police and security agencies. These powers were more recently enhanced in the *Telecommunications (Interception) Amendment Bill 2006*, which provides for the interception of real-time (telephone) and stored (email) communications of non-suspects. Many would argue that these sorts of control measures provide even more reason for Australia to introduce a federal Bill of Rights. As it stands, Australia is virtually the only democratic country in the world without a Bill of Rights or similar. But that's another issue in itself; comparing the democratic value of rights administered by unelected judges against law-making by politicians with a popular mandate.

And so the debate continues to rage, with both sides ironically working towards the same goal: to protect the fundamental rights and freedoms of Australians.

More Information

From the LIV Bookshop

Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy, by Jenny Hocking, \$22;

The Case for an Australian Bill of Rights: Freedom in the War on Terror, by George Williams, \$16.95.

Useful Web links

The MEAA's submission to the ALRC can be accessed from their website at www.alliance.org.au.

No purple in chocolate

The "wouldn't it be nice if the world was Cadbury?" jingle may have to be put to rest following the recent Federal Court hearing of *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 4)* [2006] FCA 446 (27 April).

Multi-national chocolate giant, Cadbury Schweppes Pty Ltd (Cadbury), lost a long-running battle for exclusive rights over the colour purple when Justice Heerey vetoed its attempt to sue Australian-based confectioner, Darrell Lea Chocolates Pty Ltd (Darrell Lea), for using similar colours.

Between 2000 and 2004, Darrell Lea used the colour purple in its signage, staff uniforms and various product packaging, which has since been changed to blue. Cadbury alleged that such action by Darrell Lea contravened sections 52 and 53 of the *Trade Practices Act 1974 (Cth)* (TPA), misleading and deceiving consumers into buying Darrell Lea chocolate and passing off its goods as Cadbury products.

In order to make its claim, Cadbury needed to show that the purple colour is used as a brand identifier for the company's chocolate products, thereby serving to distinguish Cadbury from its competitors.

Cadbury dominates the world chocolate market and has used purple packaging for its products since the 1920s. In 2002 the company made an unsuccessful application to the Trade Marks Office (TMO) to register the colour purple as a trade mark of its chocolates and chocolate confectionery. In 1995 the *Trade Marks Act (Cth)* had broadened the definition of trade mark to include non-traditional forms such as shapes, colours, sounds, scents and certain aspects of packaging.

Despite Cadbury's intensive marketing efforts, a majority (56 per cent) of total sales for its products comprises goods which do not prominently feature the colour purple or use it to drive promotion. As a result, Cadbury was not able to show that its use of purple clearly distinguished its products.

Proving Darrell Lea had breached the TPA was also a challenge for Cadbury. Section 53 of the TPA prohibits a company from presenting itself or its goods as having a sponsorship or association which it does not actually have. In the Federal Court case, Cadbury pleaded that Darrell Lea's use of purple colouring in the marketing of its products suggested some form of consensual affiliation with Cadbury.

This claim was rejected by Justice Heerey, who in his judgement concluded: "*Cadbury and Darrell Lea are competitors in the retail chocolate market, yet they each have distinctive product lines which are sold from different sorts of premises under distinctive trade names. They have distinct identities in the market place. Cadbury does not own the colour purple and does not have an exclusive reputation in purple in connection with chocolate.*" (para 121)

Justice Heerey dismissed the case and adjourned the question of costs to be heard at a later date. In light of this ruling, Cadbury's separate appeal to the Federal Court (regarding the TMO decision not to register the colour purple as a trade mark) may need to be reviewed.

Useful web links

Information on trade marks is provided by *IP Australia*, which is responsible for administering patents, trade marks, designs and Plant Breeder's Rights in Australia: www.ipaustralia.gov.au

Law chases Mokbel's millions

It reads like a script from *The Sopranos*: multi-millionaire drug trafficker and gangland murder suspect, Tony Mokbel, is sentenced to 12 years' jail, while police investigate the local property developer's whereabouts following his 'disappearance' during the trial.

Mokbel was first arrested back in 2000 for importing \$2 billion worth of ephedrine; a charge that was later reduced. A separate charge relating to alleged cocaine importation was also laid. Though he was initially granted bail, this was revoked in 2001, around the time that his assets were frozen. Later, the expectations of a lengthy trial delay saw him granted bail again in 2002.

Only recently, the long-running trial in the Victorian Supreme Court ended with a guilty verdict for the importation of two kilograms of pure cocaine. However, before the judgement was handed down, Mokbel vanished (allegedly overseas) and his defence team withdrew from the trial. Despite his absence, the 12-year sentence was imposed. Mr Mokbel's sister-in-law was ordered to pay to the court the sum of \$1 million, representing the amount that had been put up as surety for his appearance when Mokbel was granted bail in 2002.

When arrested, Mr Mokbel's assets, estimated at \$20 million, were frozen by the Victorian County Court. Despite his attempts to overturn the order, claiming it did not make provision for him to meet reasonable living expenses, the Supreme Court upheld the County Court order. More recently, in December 2005, he was served with a \$4 million back-tax order as part of a crackdown by federal agencies on organised crime.

At both the state and federal level, legislation exists to extract from offenders the proceeds of their crimes. Measures in place seek to prevent financial profiteering from illegal activities. Orders in relation to property can include the freezing of assets, forfeiture, search and seizure and, ultimately, the confiscation of assets.

The Asset Confiscation Office looks after the enforcement of confiscation orders under the *Crimes (Confiscation of Profits) Act 1986* (Vic) and the *Confiscation Act 1997* (Vic). Confiscation usually involves the offender surrendering the proceeds of a crime to the state by having property that is used to commit a crime seized and forfeited, or paying back to the state the dollar value of the benefit received as a result of the crime (this is called a Pecuniary Penalty Order).

Seized assets are then usually sold at Auction, the process of which is administered by the Asset Confiscation Office. In some cases, the victim of the crime may be able to seek restitution or compensation from proceeds of the forfeited assets where they have obtained a Compensation Order from the court.

In the Mokbel case, police seized several properties, investments and other assets from his considerable holdings. Despite this, it is believed that Mokbel was still able to successfully send \$20 million overseas around the time of his disappearance. Clearly, it is difficult for authorities to confiscate all the profits of crime, but the chase continues.

Useful web links

For information about the Asset Confiscation Office, the types of property that can be confiscated, auctions and more visit www.justice.vic.gov.au/assets

Duty of child care

Recent budgetary measures to increase child care places and introduce other family-friendly initiatives are welcomed by the nation's working mums and dads. As the corporate sector cashes in on the growing need for child care, a recent case has brought the debate back to basics: just who is responsible for the supervision of your child?

In *ABC Developmental Learning Centres Pty Ltd v Wallace* [2006] VSC 171, Victorian

Supreme Court Justice Kevin Bell addressed the question of whether a child-care centre can be held criminally liable when staff fail to provide adequate supervision.

Last year, a Sunshine Magistrate ruled that the publicly-listed ABC Developmental Learning Centres Pty Ltd (ABC) was ultimately responsible for the failure of its staff to supervise a two-year-old child. The boy had escaped, by scaling a playground fence, from ABC's Hoppers Crossing centre in 2003. While the child was found safe and unharmed by neighbours soon after the incident, the Magistrate fined the company \$200 under the *Children's Services Act 1996* (Vic).

ABC appealed to the Victorian Supreme Court, arguing that the incident was not attributable to a failure in centre management or its systems, but wholly to the individual staff involved. Justice Bell did not agree, stating that *"the obligation to protect and supervise children may be criminally enforced against both a proprietor company and its staff"* (para 58). He concluded that the offences, which included *"failing to take reasonable precautions to protect the child from hazards and failing adequately to supervise him"*, were made out in accordance with the requirements of sections 26 and 27 of the *Children's Services Act 1996* (Vic).

In his judgement, Justice Bell also identified the protection of the child as being the critical consideration in the case. He acknowledged the extreme vulnerability of young children when they are separated from their parents or guardians for long periods during the day.

For many of today's dual-income families, professional child-care has become a necessity, not a choice. ABC's recent decision to increase its number of centres from 700 to 850, across Australia and New Zealand, reflects this level of demand. The expansion not only satisfies the company's stakeholders, but also responds to the chronic shortage of child-care places and the long waiting lists currently faced by Australian families. Hopefully, recent budget measures will go some way towards addressing the problems of supply and demand.

This Supreme Court case highlights the duty of care owed by all child-care professionals and supports the demands and expectations of the community in making the protection and safety of children of paramount importance.

In the Supreme Court hearing, costs were awarded to the Department of Human Services, the body that originally prosecuted ABC Developmental Learning Centres Pty Ltd in the Magistrates' Court.

More information

Useful web links

The National Childcare Accreditation Council is a quality assurance body. Its website includes the latest reports and statistics: www.ncac.gov.au

Where there's a Will

Speculating about life and personal longevity may seem less than uplifting, particularly when you're feeling healthy and indomitable. The issue of making a will can be considered as premature, or even ominous, to some. But planning now for future contingencies is the most effective way to ensure the protection of your family's welfare.

If you don't make a will, you risk the protection and security of those you leave behind. If you die without a will, you are said to have died 'intestate' and your assets are sold and distributed according to a specific formula outlined in the *Administration and Probate Act 1958* (Vic). Even if you do make a will, if you fail to make it properly or do not make it legally enforceable, the result can be just as chaotic.

A will is not set in stone, so when circumstances change, the will can be changed too. Regular reviews and updates might be driven by any number of factors, including changes in relationships, a birth or death of a family member or beneficiary, and the acquisition or sale of assets bequeathed in the will. It is recommended to review your will every five years.

In addition, automatic changes to your will can be determined by the happening of certain personal events. Marriage after the making of a will renders that will invalid. And, while a will made prior to a separation will not be affected, a divorce will automatically revoke any gifts to the divorced spouse, as will their appointment as executor in the will.

Because a will is a legal document setting out your intentions regarding the distribution of your assets upon your death, lawyers are often involved in the process. They act to ensure the will is clearly and correctly drawn up, signed and witnessed, and complies with all legal requirements. A lawyer will also be able to advise on the best way to update your will, clarify the role of an administrator or executor, and ensure your interests are represented in any associated claim.

There are three main steps to follow when making your will:

1. Assess your assets, which may include a house, land, car, shares, insurance and superannuation benefits, money and other personal possessions. Understand what you own and how you own it.
2. Determine your beneficiaries and consider likely claims or challenges that could be made. There are issues that arise under certain circumstances, including mixed families, vulnerable beneficiaries, children of divorced parents and children less than 18 years of age.
3. Consider other issues regarding the will including legal compliance, tax effectiveness (with particular regard to trust holdings and estate planning), and likely challenges or claims to particular assets.

In 1997, the *Wills Act* (Vic) was amended to extend the number of people who could make a legal claim against a deceased estate. Those entitled to claim now include any person who can show that the deceased had a responsibility to provide for them. Prior to this, only a spouse and children (with the exception of step-children) of the deceased could make a claim. Now, legislation takes into account the rights of domestic partners and wider family arrangements, including same sex relationships. While the revised Act has led to an increase in challenges and claims, it has also arguably made the system fairer by taking into account the changing dynamics of modern relationships and families.

Asset distribution upon death does not have to be a complicated process. Careful planning and professional advice will ensure that your will is valid and your intentions clear. Leave a legacy, not a law suit.

Useful web links

For general public information regarding wills, probate and powers of attorney visit:
www.liv.asn.au/public/legalinfo/wills/wills-Wills.html

Website reviews

Department of Human Services

www.betterhealth.vic.gov.au

This consumer health website is loaded with healthy recipes, fact sheets, health calculators, a calendar of health events across the state, a medical dictionary, an interactive section and much more. The wealth of information is easy to access and covers everything from physiological issues, to nutrition, pregnancy and mental illness.

ACCC's Scamwatch

www.scamwatch.gov.au

The internet age has given way to innumerable scams, which often infiltrate our inboxes and can be hard to monitor or qualify. The Australian Competition and Consumer Commission's Scamwatch website is dedicated to educating people about existing scams, what to watch out for and strategies for protection. Visitors are also encouraged to report a scam and promote awareness.

Travel Compensation Fund

www.tcf.org.au

The Travel Compensation Fund (TCF) regulates travel agents, provides compensation to consumers, and ensures that travel agents have and will continue to have sufficient financial resources to secure the right to trade. Consumers may refer to the TCF website for advice in the event that their travel agent experiences business or financial difficulties that may affect their travel plans. There are two separate sections for travel industry visitors and travel consumer visitors.

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This newsletter is not intended to be the definitive analysis of legislation. Professional advice should be taken before any course of action is pursued.

PUBLISHED BY THE LAW INSTITUTE OF VICTORIA