

## February 2003 Newsletter

*This newsletter deals with the Australian Taxation Office's renewed focus on self-managed superannuation funds, the Financial Services Reform Act 2001 and the impact on businesses of the Civil Liability Act 2002.*

### SUPERANNUATION

On 11 February 2003, the Australian Taxation Office ("ATO") released Taxpayer Alert 2003/1, which deals with arrangements having the following features:

- a business is operated in a trust, partnership or company structure;
- the trustee of a fixed trust has an interest in the business;
- the trustee of a self-managed superannuation fund has an interest in the fixed trust;
- operating entity distributes a substantial amount of income to the trustee of the fixed trust; and
- trustee of superannuation fund claims its share of income from the fixed trust is subject to tax at the concessionary rate of 15%.

The ATO's concerns are:

- whether the trustee of the fund is deriving "special income" so that the trustee of the fund is subject to tax at 47% on that income;
- the ability to divert moneys to the trustee of the fund that would otherwise have been subject to age-based deduction limits if made by way of a contribution; and

- the avoiding of the superannuation surcharge (since a contribution is not being made).

Taxpayer Alert 2003/1 clearly shows that the ATO is concerned as to the "diversion" of income to trustees of funds through interposed fixed trusts. From a practical point of view, what the above means is that trustees of superannuation funds have to now be even more cautious where they seek to derive, whether directly or indirectly, income from a business source.

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### COMMERCIAL

#### *FINANCIAL SERVICES REFORM ACT 2001 ("FSR")*

On 11 March 2003, we will be half way through the 2-year transition period for many parts of the FSR. That means a greater focus on compliance – and a change in investment products.

The aims of the FSR were:

- to try to provide similar rules for similar financial products such as securities, foreign exchange, superannuation, life insurance, deposit accounts and e-cash;

- to ensure that the same disclosure standards will apply to similar products;
- financial markets (e.g. the Stock Exchange, Futures Exchange or Clearing Facilities) will be subject to a single licensing system;
- providers of financial services are subject to the same licensing system regardless of the financial service – before there were separate licensing systems for different types of products.
- to ensure that the providers of financial services have to comply with a number of disclosure and consumer protection requirements when dealing with retail clients. For example, the trustee of a superannuation fund that has net assets of at least \$10 million may be regarded as a wholesale client but the trustee of a smaller superannuation fund, or an individual investor in funds, will be regarded as a retail client.

FSR doesn't cover credit including consumer lending, credit cards and phone cards. Also there are some other exclusions including health insurance and interests in some unregistered managed investment schemes.

For customers, FSR has meant lots of paperwork, including financial services guides, statements of advice and product disclosure statements.

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## LITIGATION

### IMPACT OF THE *CIVIL LIABILITY ACT 2002* ON BUSINESSES

Much litigation against business results from negligence claims, particularly those arising from public or occupiers' liability. The *Civil Liability Act 2002* seeks both to limit the rights of persons to make general negligence claims and to limit the rights of recovery for personal injury damages.

Most importantly, the Act allows parties to a contract to limit their respective liability, rights and obligations under that contract. This means that parties to a contract can successfully expressly limit their respective liability and the Act has no effect on the operation of the limitation.

### **When is a person liable under the Act for negligence?**

The Act does not change when a claim for negligence arises. What it does is limit the duty to take precautions.

Under the Act, a business proprietor will still need to take precautions against a risk of harm where:

- the risk is one which the proprietor knew or ought to have known about;
- the risk is not insignificant or trivial;
- there is a probability of harm if the precautions are not taken;
- some degree of harm is likely to occur;
- a reasonable person in the proprietor's position would have taken precautions.

In deciding whether precautions should have been taken, or were adequate, the Court will consider whether the burden of taking precautions to avoid the risk is unduly onerous in the circumstances. The Court will also consider the social utility of the activity creating the risk.

The changes may result in savings for many businesses, particularly where the burden of taking the precautions is unnecessarily onerous compared to the likely degree of harm.

The Act also reinstates contributory negligence as sometimes being a 100% defence against liability. This leaves it open for a Court to find that an injured person has acted unreasonably and has contributed to his or her own loss by failing to take reasonable care to avoid self harm. The Court will only make this finding where it is just and equitable in the circumstances of the particular case.

## **Lawyers' Certificate requirements**

As a result of the Act, a solicitor or barrister can only act on a claim or a defence of a claim for damages if the lawyer believes on the basis of provable facts and a reasonably arguable view of the law that the plaintiff has reasonable prospects of either recovering damages or reducing the award, as the case may be. If a lawyer breaches this provision, he or she can be ordered to pay costs or to justify his or her conclusion as to the reasonableness of the prospects of success.

This may cause a lawyer to cease to act for a claimant or defendant where he or she becomes aware of material casting doubt on

a client's claim. The lawyer can be put in this position regardless of the instructions he or she receives from the client.

The intention behind these provisions is to induce lawyers to encourage their clients to either not bring a claim or to settle a claim earlier. The other incentive for this to occur is the threshold placed in the Act on recovery of personal injury damages.

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