

Liability limited by a scheme approved
under Professional Standards Legislation

January 2005 Newsletter

This newsletter (being the first newsletter produced at our new premises) deals with proposed relief to small businesses in relation to unfair dismissal claims, the application of Part IVA of the Tax Act 1936 to superannuation contributions and the changes to the Business Names Act.

EMPLOYMENT LAW

PROPOSED RELIEF FOR SMALL BUSINESSES IN RELATION TO UNFAIR DISMISSAL CLAIMS

The Federal Government has last month introduced the *Workplace Relations Amendment (Fair Dismissal) Bill 2004 (Bill)*. The Bill will amend the *Workplace Relations Act 1996 (Act)* to protect small businesses from unfair dismissal claims.

The Bill proposes to:

- prevent employees of small businesses from applying under the Act for a remedy in respect of harsh, unjust or unreasonable termination of employment; and
- require the Australian Industrial Relations Commission (**Commission**) to order that an unfair dismissal application made by a small business employee is invalid, if the Commission is satisfied that the application is outside the Commission's jurisdiction because of the small business exemption. The Commission will have the power to make such an order without holding a hearing.

Under the Bill, a "small business" is a business with fewer than 20 employees. All regular employees must be counted when calculating the number of employees. This

includes any employee who has been terminated and any permanent casual employee who has been engaged by the employer for at least 12 months (but not other casual employees).

It should be noted that the Bill will not apply to apprentices and trainees. Apprentices and trainees, however, may be excluded from seeking an unfair dismissal remedy for other reasons. For example, apprentices may be excluded on the basis that they are engaged under a contract of employment for a specified period of time. Of course, this will depend on the terms of the particular contract or indenture of apprenticeship.

It is expected that the Bill will be passed in the first half of 2005 and would only apply to employees who started their employment after the Act commenced.

Lena Banoob

Email: lana@parrycarroll.com.au

Phone: 8257 3131

SUPERANNUATION APPLICATION OF PART IVA TO SUPERANNUATION CONTRIBUTIONS

The Australian Taxation Office ("ATO") has stated, a number of times, that it may disallow superannuation contributions made by an employer on account of an associated employee on the basis that the quantum of

the superannuation contribution made is not "commercially justifiable". This is notwithstanding the fact that the amount of superannuation contribution claimed as a deduction is within the relevant age based deduction limit for the person for whom the contribution is made and otherwise satisfies the requirements of Section 82AAC of the *Income Tax Assessment Act 1936* ("*Tax Act 1936*").

The generally accepted view is that provided the relevant person is an employee and the quantum of the contribution is within the relevant age based deduction limit, the ATO does **not** have power to disallow the superannuation contribution as an allowable deduction. This is on the basis that Section 82AAC of the *Tax Act 1936* determines the deductibility of superannuation contributions made by an employer. However, the question arises whether the ATO could apply the general anti-avoidance provision, Part IVA of the *Tax Act 1936*, to disallow the deduction.

In *Ryan v Commissioner of Taxation* (2004) AATA 753, the taxpayer provided personal services as a computer consultant through a company that he and his wife controlled. The company paid the taxpayer's wife a small salary for her secretarial assistance but made large superannuation contributions on her account. These contributions exceeded the value of her work for the company but were within the age based deduction limits prescribed in Section 82AAC of the *Tax Act 1936*. The ATO argued that Part IVA of the *Tax Act 1936* applied to include the amount of the "excess contributions" in the taxpayer's assessable income.

The Administrative Appeals Tribunal ("AAT") held in *Ryan* that Part IVA did **not** apply. This was on the basis it could not be reasonably expected that the amount paid to the superannuation fund in respect of the taxpayer's wife would have otherwise had been paid to him personally i.e. there was no

"tax benefit". The AAT also held that there was not a dominant purpose of obtaining a tax benefit.

In Draft Taxation Determination TD2004/82 released on 22 December 2004, the ATO has indicated that it accepts, absent unusual features, that Part IVA will **not** apply to a company or trustee of a trust that makes superannuation contributions up to the age based deduction limit in respect of an associate of the main service provider. Thus, provided the associate renders services to the company or the trustee of the trust, the ATO accepts that a superannuation contribution up to the age based deduction limit is an allowable deduction and that Part IVA does not apply.

However, Draft TD2004/82 notes that if the associate is employed in circumstances where it is clear that such employment was solely to allow the diversion of superannuation contributions from the main service provider, the ATO may apply Part IVA. Draft TD 2004/82 also refers to the potential application of Part IVA to cases that have "unusual features" (without outlining what those "unusual features" are).

Generally, the release of Draft TD2004/82 as the ATO's view on the application of Part IVA to superannuation contributions is good news. However, some doubts still exist as to what the ATO will consider "contrived" or "unusual" arrangements and, therefore, potentially subject to the application of Part IVA.

Greg Ganz

Email: greg@parrycarroll.com.au

Phone: 8257 3111

COMMERCIAL LAW

CHANGES TO BUSINESS NAMES ACT

The *Business Names Act 2004* commenced on 5 October 2004.

It makes a number of changes to the business name registration system in NSW including:

- exempting businesses that trade exclusively over the internet from the requirements to register a business name;
- allowing the registration of multiple business names so long as the applicant carries on or intends to carry on the business in the State in the immediate future;
- abolishing the requirement for interstate traders registering a business name in NSW, to have a resident agent in NSW.

There are separate procedures existing to deal with fights over rights to domain names and it seems that the NSW Government agreed that a State registration system had no place

in dealing with domain names, which are hardly restricted to any particular State.

It is important to remember that although registration of a business name is normally a necessary condition for the use of a business name, it offers little protection of rights to the name. Parties wishing to protect rights to their name should look at trademark protection and gathering evidence to establish the extent of their goodwill and marketing efforts. The parties should be sure not to turn a blind eye to others that may use their name, as this will weaken any “exclusivity” in the public mind associated with their name and, accordingly, reduce their rights.

Selwyn Black

Email: selwyn@parrycarroll.com.au

Phone: 8257 3113
