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## May 2005 Newsletter

***This newsletter deals with what happens when a contractual provision is illegal because of the Trade Practices Act, with the new superannuation "condition of release" and planning opportunities and with the obligation to pay redundancy when a business is transferred.***

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### TRADE PRACTICES

#### CAN AN ILLEGAL PROVISION VOID AN ENTIRE CONTRACT?

The *Trade Practices Act* makes certain categories of agreements or contractual provisions illegal. These include exclusionary provisions, boycotts, agreements with an anti-competitive purpose or effect, exclusive dealing, third line forcing, price fixing and resale price maintenance. Is the whole of a contract containing the provision illegal or only the provision itself?

Section 4L of the Act states that if the illegal provision can be severed from the contract, the balance of the contract will be valid and enforceable. The test is whether the contract can still operate as intended without the illegal provision so its elimination changes only the extent but not the nature of the contract. If the illegal provision is integral to the operation of the contract, it cannot be severed and the whole contract will be illegal.

This problem arose in a recent Federal Court case, *Rieson v SST Consulting Services (SST)*. SST's business was related to shipping and included packing, unpacking and warehousing imported goods and storing, handling and repairing empty containers.

SST sold its business to Mayne Nickless (**Mayne**) and had a management contract with Mayne. SST later loaned \$1m to AFS, a

freight forwarding agent, on condition that AFS obtain all its packing and unpacking services from Mayne. If AFS failed to do so, then it defaulted under the loan. Rieson was a director of AFS and guaranteed its performance under the loan.

When AFS was sold to a competitor of Mayne, it stopped sending its services to Mayne. SST called in the loan and sued the guarantors for the balance. Clearly, the condition requiring AFS to obtain its pack and unpack services from Mayne was a tying arrangement and illegal under the *Trade Practices Act*. SST argued, however, that the balance of the contract was valid because the tying arrangement could be severed from the loan.

The Full Federal Court disagreed. It found that the structure of the transaction made the tying arrangement and the loan one indivisible whole. Both parties understood that there would have been no loan without the tying arrangement and that the tying arrangement was at the heart of the contract. To excise the tying arrangement would alter the nature of the contract. This meant that the whole contract was illegal and SST could not enforce the guarantee. It, therefore, effectively lost its investment.

The lesson is that loan agreements should be kept separate from any other business

agreements. This means that if the other agreements fall foul of the *Trade Practices Act*, the loan obligation can still be enforced and the investment recovered.

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## **SUPERANNUATION**

### **NEW CONDITION OF RELEASE – PLANNING OPPORTUNITIES**

Before a member's benefit in a superannuation fund can be paid to the member, there must be a "condition of release". Prior to recent amendments to the *Superannuation Industry (Supervision) Regulations*, the usual "conditions of release" were:

- retire from the workforce having attained the age of 55;
- cease gainful employment having attained the age of 60; and
- attain the age of 65.

Under each of these "conditions of release", there are no cashing restrictions i.e. benefits can be paid by way of lump sum or pension payments.

By *Superannuation Industry (Supervision) Amendment Regulations 2005*, a new "condition of release" was added. This "condition of release" is "attaining preservation age". A member's "preservation age" will depend on when he or she was born. For a member who was born before 1 July 1960, the preservation age is 55 years of age. However, unlike the "attaining the age of 65" "condition of release", there are restrictions in the manner in which a member can receive his or her benefits, namely, the benefits must be paid by one or more non-commutable pension or annuity.

The significance of the new "condition of release" is that it is no longer necessary for a member who attains the age of 55 to retire from the workforce to access a pension from the fund. The member can keep on working and use the pension received to supplement his or her other income. Assuming part of the assets of the fund is not funding the pension, the member can then subsequently satisfy the requirements of another "condition of release" which has nil cashing restrictions, and receive the remaining benefits in a number of different ways. A considerable degree of flexibility may be given to a member.

There is also, potentially, a further benefit to the trustee of the superannuation fund. Where an asset of a fund is being used to fund a member's pension, any income or gain on such asset is subject to 0% rate of tax. The trustee of a fund may hold an asset that has substantially increased in value which it wishes to realise. If the member has attained the age of 55 and does not wish to retire from the workforce, a non-commutable pension can be commenced for the member, the asset realised, with a 0% rate of tax applying to any capital gain.

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## **EMPLOYMENT LAW**

### **TERMINATION ENTITLEMENTS ON CHANGE OF EMPLOYER**

Australian Workplace Agreements (AWA's) and awards set out employee's entitlements when an employee's position becomes redundant. These are binding on any employer to which a business or part of a business is transferred. Two recent High Court decisions have considered these obligations.

In the first, *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Limited*, Gribbles had taken over a radiology practice which operated from leased premises. It had no agreement with the prior operator of the practice, MDIG, but the business was the same and it employed the same staff at the same location. The practice was not economically viable and Gribbles closed it, terminating the services of the staff. There was an award in place requiring an employer to which a business was transmitted ("successor" employer) to pay redundancy in these circumstances. Gribbles refused.

Was Gribbles a "successor" employer for the purposes of the award? The High Court said no. Before the award or AWA was binding on the new employer, it was necessary to identify the precise business of the former employer and what part of that business was enjoyed by the alleged successor. The obligation to pay redundancy did not arise when a particular kind of business was taken on by a new employer, only when the whole or a part of the same business was transmitted by the owner of that business to someone else. Here, MDIG had not **sold** or **transferred** any property or part of the business to Gribbles. Accordingly, Gribbles was not bound by the award and did not have to pay the employees severance pay.

The second case, *Amcors Ltd v CFMEU*, arose as a result of a demerger. Amcor had employed staff to work in a business run by a subsidiary, Paper Australia. As a result of the demerger, Amcor sold Paper Australia to Paper LinX. All of the Paper Australia employees were given employment on the same terms with Paper LinX and in fact, Paper LinX employed all of them to do the same jobs with Paper Australia as they had before the demerger.

The question was whether Amcor was required to pay redundancy to the employees because their Amcor positions no longer existed.

The High Court again said no. The positions were continuing on and were not redundant. The business carried on as it had previously and the employees continued to do the same work, on the same terms and conditions with the same company as before, with their accrued entitlements intact. The issue was not whether the position became redundant **in a particular business**, but whether the **position itself became redundant**. It was only if the **position** did not exist any longer that either the former or the successor employer had an obligation to pay redundancy payments.

What these cases demonstrate is that an obligation to pay redundancy payments may fall on a former or successor employer by reason of an AWA or an award. However, the obligation does not arise:

- merely because the old employer no longer needs the position the employee filled; or
- where the employer abandons the business to a new company, which subsequently employs the same people in its own business and then closes the business down.

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