ANDERSON RICE *Lawyers*

Anderson Rice News
Winter 2007 Edition

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Superannuation Funds
The Supreme Investment Vehicle

Justin Wood & Steve Tyshing

Superannuation funds now look like the supreme investment vehicle for Australians. Deductible contributions taxed at 15%, earnings taxed at 15%, capital gains taxed at 10%. With a structured portfolio including Australian shares - franking credits may mean there is no tax at all! Best of all, withdrawals made after age 60 have no tax whether taken as a lump sum or pension. This may be utopia!

The complexity of superannuation has been a major deterrent for many Australians to use the tax concessional superannuation environment to save for their retirement.

Sweeping changes are being made to the superannuation system to make it a simpler system to understand. The changes are due to commence 1 July, 2007 and it is expected the changes will substantially alter many retirement strategies, with most retirees paying much less tax, if any.

THE NEW RULES

1. NO TAX ON END BENEFITS (AFTER AGE 60)

Currently Australians' superannuation is taxed at four levels:

- Contributions - 15%;
- Investment Earnings - 15%;
- Capital Gains - 10% and;
- On withdrawal - complex rules apply.

While contributions tax, earnings and capital gains tax will remain, there will be no tax at the withdrawal stage for most benefits. From 1 July 2007, the changes mean that no tax will be paid on most superannuation benefits paid from age 60 (either as a lump sum or as a pension).

Note: Tax will still be paid on superannuation benefits paid to a person aged less than 60.

2. REASONABLE BENEFIT LIMITS (RBL) ABOLISHED

No more RBLs and complicated strategies to overcome Lump Sum and Pension excess benefit issues.

This measure enables a greater level of savings to be accumulated in the concessionally taxed superannuation environment without incurring any penalties. It reduces the complexity of retirement calculations, removing some of the hardest planning questions and difficulties.

Tip: As the intended start date for this measure is not until 1 July 2007, strategies to delay being assessed against an RBL for the 2006/07 financial year must be considered.

3. COMPULSORY CASHING ON RETIREMENT ABOLISHED

People who are over age 65 will be able to retain their superannuation in the accumulation phase indefinitely. There will be no compulsory draw down rules under the new arrangements. Funds will not be compelled to exit members reaching 75. Members can choose to stay in the fund, drawing lump sums as required, or draw a pension.

Note: Tax still payable on income and capital gains whilst in the accumulation phase.

4. AGE BASED LIMITS / EMPLOYER DEDUCTIBLE CONTRIBUTIONS

Currently, age based limits restrict the amount of contributions that may be made to superannuation via a combination of employer

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contributions, salary sacrifice or self employed contributions.

The various age based limits will be replaced with a limit of $50,000, regardless of the member's age (from 1 July 2007). Contributions above this level will be taxed at the highest marginal tax rate.

The limit for compulsory employer contributions under the Superannuation Guarantee will remain to age 70. Employers will be able to claim a deduction on contributions up to age 75.

Note: A transitional period for people aged 50 and over will apply. From 2007/08 to 2011/12 the limit for persons aged 50 and over will be $100,000. This limit will drop to $50,000 from 2012/13.

Tip: For those aged 50 and over deductible contributions of $105,113 are still available this year (prior to 30/6/07)

5. SELF-EMPLOYED TO RECEIVE 100% TAX DEDUCTION + CO-CONTRIBUTIONS

For the self-employed, the $5,000 +75% tax deduction for superannuation contributions will be scrapped and will be replaced with a 100% tax deduction. The ability to make deductible superannuation contributions is to be extended from age 70 to 75.

6. UNDEDUCTED CONTRIBUTIONS WILL BE CAPPED AT $150,000 A YEAR FOR EACH MEMBER.

Previously there was no restriction on undeducted contributions. The new cap will be averaged over three years to allow people to accommodate larger one-off payments of $450,000, up to age 64.

Tip: For this year only (prior to 30/6/07) undeducted contributions up to $1,000,000 per member are allowed.

7. LUMP SUM PAYMENTS PAID TO INDIVIDUALS UNDER 60 YEARS

For members aged between 55 and 59 receiving lump sums, the lump sum tax components will be simplified. The various levels of complexity will be replaced by two components: a taxable component and an exempt component.

8. UNDER 60 - BEWARE

Strict (and sometimes complicated) rules still apply to those receiving superannuation benefits under 60 years of age.

Tip: For those aged 55 to 59, "Transition to Retirement Pensions" may be used very tax effectively to facilitate a major reduction in salary (with consequent tax savings), in favour of large salary sacrifices into superannuation.

For further information contact:

This article is brought to you by Justin Wood and Steve Tyshing of Haines Muir Hill (HMH) Chartered Accountants. HMH will be regularly contributing to the Anderson Rice newsletter by providing updates on financial services and products. HMH Chartered Accountants can be contacted on 9840 2200 or you can visit their website at www.hmh.com.au.

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CASE NOTE

Tim Donaghey

Bryson v Dy-Mark Australia Pty Ltd [2007] AIRC 339 (2 May 2007)

Background

On 16 October 2006 Richards SDP of the Australian Industrial Relations Commission ('**AIRC**') made a decision in relation to the termination of Dennis Bryson's ('**the Employee's**') employment with Dy-Mark (Aust) Pty Ltd ('**the Respondent**') pursuant to the pre-Work Choices provisions of the *Workplace Relations Act* 1996 (Cth) ('**WR Act**').

The Employee was involved in the graphic arts industry, and worked as a graphic artist and stencil cutter. In its decision in print PR974176 ('**First Decision**'), the AIRC found that the termination of the Employee was harsh. The parties sought and obtained a 14 day period in which to make submissions as to remedy. The AIRC published a separate decision in relation to remedy.

DECISION AS TO REMEDY

The First Decision of the AIRC was made prior to commencement of Work Choices. For convenience (and for reasons including the likely use of this decision under current legislation) I refer to the sections of the WR Act in the post-Work Choices legislation.

Reinstatement

The Employee made submissions regarding the proper remedy. The Employee submitted that reinstatement was 'appropriate' within the meaning of the legislation. He sought reinstatement to his prior position of graphic artist and stencil cutter under section 654(3)(a) of the WR Act, and a payment effecting continuation of service, under section 654(4). In the alternative, the Employee sought reinstatement to a position no less favourable than his prior position, under section 654(3)(b) of the WR Act. Alternatively to both reinstatement orders, the Employee sought compensation in lieu of reinstatement under section 654(7) of the legislation.

In the First Decision, the AIRC noted tensions in the workplace which arose from allegations (which the AIRC found not proved) that the Employee had downloaded pornography to his work computer, including child pornography. In the decision as to remedy, the AIRC reviewed these findings, as well as facts such as:

- the inflammatory allegations of the existence of a 'conspiracy' against him, which the Employee made during the hearing; and
- the otherwise harmonious nature of the Respondent's workplace.

The AIRC found that both forms of reinstatement order were not appropriate, within the meaning of the WR Act. This was on the basis that the reinstatement of the Employee would tend to 're-excite' tensions within the workplace; and thereby undermine an orderly workplace.

Compensation

The AIRC then considered the alternative remedy of compensation in lieu of reinstatement. Included in the AIRC's decision was consideration of two broad issues in relation to determining the amount of compensation in lieu of reinstatement. The first was the facts relevant to the amount of reinstatement, in which the following questions were significant:

- the limited amount of income earned by the Employee after termination;
- the fact that the Employee earned casual wages, and was unable t

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The AIRC found a problem with the mitigation of the Employee, who claimed not to be able to obtain full-time employment. On the evidence presented to him, the member of the AIRC found that conclusion unlikely.

In applying the Sprigg test, derived from *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21 and other cases, the AIRC rejected the notion that the AIRC should find the results of the Sprigg test inadequate, and respond by 'increasing' the amount ordered to properly compensate the Employee. Such an finding and an increase was made by a full bench of the AIRC in *Moore Paragon No 2* [PR942856]; (2004) 130 IR 446.

On the basis of these findings, the AIRC ordered the Respondent to pay the Employee $10,000 (subject to taxation) in lieu of reinstatement within 14 days.

RATIONALE OF THE DECISION

This decision considers *Moore Paragon (No 2)* albeit under quite different circumstances. The particular disability of the applicants in that case and long-term difficulties associated with limited capacity for work were not present in this case. This decision is notable, however, for questioning the ruling in *Moore Paragon (No 2)*: in its terms, this decision tends to support some form of return to the orthodoxy of the Sprigg test, which deals with remedies under the termination division of the WR Act. The second use of this case derives from its consideration of reinstatement. Unusually, it considers the allegations of the Employee and the conduct of the case, in light of the test of 'appropriateness'.

Despite being decided under the pre Work Choices form of the WR Act, the ongoing political debate concerning the nature of and effect of the termination division of the WR Act has an effect on advice given in relation to termination cases. Often, the possibility or probability of reinstatement and the quantum of compensation will guide parties' decisions in relation to:

- the likelihood of settlement of a termination case; and
- the quantum of any offer which is made.

To this extent, a high degree of certainty as to the likely remedy which may be ordered by the AIRC is not merely desirable in termination cases; it is vital both to parties and to those advising in relation to them. While not more authoritative than the ruling in *Moore Paragon (No 2)*, this case assists to that end.

For further information contact:

This article is brought to you by Tim Donaghey, Employment & Industrial Law barrister. Tim regularly contributes to the Anderson Rice newsletter by providing updates on recent case law and legislation. Tim can be contacted on tim.donaghey@vicbar.com.au.

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CASE NOTE Nicole Baker

Husson v Keppel Prince Engineering Pty Ltd & Anor [2006] VSC 412 (3 November 2006)

Background

The Plaintiff, a 46 year old rigger, was employed by the first defendant, Keppel Prince Engineering Pty Ltd ("**KP**"), as part of a team carrying out maintenance upon an ingot mill at a smelter operated by Alcoa Portland Aluminium Pty Ltd ("**PA**"). His main duties involved working with cranes and forklifts for the purpose of general maintenance. The plaintiff suffered injury when he manually removed a hydraulic ram (which powered the centering device) and backed himself into a piece of steel hanging out of a beam.

Although he had a sore back, the plaintiff did not report the incident to his employer.

After a few weeks the plaintiff's back pain worsened and he visited his medical practitioner. Medical investigation showed that the plaintiff had a pre-existing condition - *spondylolisthesis* - at the junction of the lumbar and sacral spines, causing the lower end of the lumbar spine to sit forward about 1.5cm upon the vertebra below. The incident at work rendered this condition symptomatic.

Proceedings

Breach of Duty of Care

Osborn J of the Supreme Court considered various issues, including whether the injury was caused by reason of breach of the duties of care owed to the plaintiff by KP and/or PA respectively.

His Honour held that KP did not provide a safe system of work in accordance with its non-delegable duty of care. Specifically, it did not warn or otherwise protect the plaintiff from the risk of injury.

With respect to PA, his Honour found that the protrusion in which the plaintiff injured himself was caused by PA's servants or agents in the course of carrying out his work on the cooling cabinet. His Honour found that the ingot mill was strictly controlled by PA and that work on the plant within it was done either by or on behalf of PA.

Osborn J held that it was reasonably foreseeable by PA that:

(a) The plaintiff might be injured by a protrusion on the end column in the course of removing the ram; and

(b) Such protrusion might be overlooked in the final hazard assessment inspection and not come to the plaintiff's attention before he was injured despite the exercise of reasonable care by him in carrying out the task he was required to do.

Wrongs Act 1958, section 14B

His Honour consequently found that PA owed the plaintiff a duty of care as an occupier to the ingot mill to take reasonable care in accordance with s.14B of the *Wrongs Act 1958* ("**the Act**") and noted the common law principles as enunciated by Mason J in *Wyong Shire Council v Shirt*.

Interestingly, Osborn J proceeded to consider each factor as listed under sub-section (4). His Honour said:

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(a) The gravity and likelihood of the probable injury

75 The nature and location of the protrusion, coupled with the likelihood that the plaintiff might back into it without observing it, rendered it likely that the protrusion could cause serious injury to the plaintiff or other persons involved in a similar manoeuvre.

(b) The circumstances of entry into the premises

76 The plaintiff entered into the premises under instructions to carry out a particular job, within a secure area, during a confined time frame. All of these circumstances support the view that the occupier controlling the particular area in issue, should have taken reasonable steps to avoid the risk presented by the protrusion.

(c) The nature of the premises

77 PA conducted a highly organised industrial operation upon the premises.

(d) The knowledge which the occupier has or ought to have of the likelihood of persons or property being on the premises

78 PA knew that the plaintiff and/or his fellow workers would be present in the vicinity of the protrusion in order to carry out PA's work order.

(e) The age of the person entering the premises

79 The plaintiff was an adult and experienced rigger.

(f) The ability of the person entering the premises to appreciate the danger

80 The danger was partly concealed in that it was both customarily and in fact approached by the plaintiff moving backwards. Further, it was located in a dimly lit location, adjacent to but not forming part of the machine from which the centering device was removed and in circumstances where the centering device might reasonably have been expected to be the focus of attention of those doing the relevant job.

(fa) Whether the person entering the premises is intoxicated by alcohol or drugs voluntarily consumed and the level of intoxication

81 The plaintiff was not intoxicated and there is nothing to suggest that he was other than usually alert.

(fb) Whether the person entering the premises is engaged in illegal activity

82 The plaintiff was engaged in precisely the activity he was requested by KP to carry out for and on behalf of PA.

(g) The burden on the occupier of eliminating the danger or protecting the person entering the premises from the danger as compared to the risk of the danger to the person

83 The danger was relatively easily eliminated by PA, simply by cutting away or grinding away the protrusion. Either course involved minor work compared with the scale of the industrial operation at the smelter. Conversely, if the protrusion was not eliminated as a danger it represented a significant risk to persons carrying out work in the manner of the plaintiff and/or backing into the end column for some other reason.

In light of the above, his Honour subsequently found that PA did not discharge its duty of care to the plaintiff. PA failed to take reasonable steps to see that the plaintiff would not be injured by reason of the state of the premises.

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Contribution

Osborn J held that the plaintiff's injury was caused by PA's breach of duty towards the plaintiff and accordingly found PA 80% and KP 20% liable pursuant to sections 23B and 24(2) of the Act.

General Damages - pain and suffering

His Honour outlined the plaintiff's employment history leading up to his accident. Upon considering a number of medical reports, including those of the plaintiff's general practitioner, a number of orthopaedic surgeons, general surgeon, neurosurgeon and psychologist, Osborn J found that the plaintiff would now face a life of probable ongoing pain and restrictions that would materially affect his quality of life. His Honour thereby assessed the plaintiff's damages for pain and suffering at $160,000.

Economic Loss

In terms of economic loss, his Honour was satisfied that the plaintiff had lost the capacity to do heavy work and was unable to sit or stand for long periods of time. It was found that the plaintiff had not been able to find suitable employment given the restrictions he had suffered. Accordingly, his Honour held that the plaintiff should be compensated for his past economic loss and that that amount should be calculated in accordance with *Fox v Wood* (which includes past loss of earnings and superannuation).

His Honour relied on the various medical reports which supported the view that the plaintiff would be able to retun to light work duties subject to restrictions. In accepting the plaintiff's future earning capacity at $520,000, but for the incident in which he was injured, his Honour allowed in excess of $200,000 for future economic loss.

Given the findings made by his Honour Osborn J, it is important to remember that sections 14B(3) and 14B(4) of the *Wrongs Act* are applicable to landlords in control of premises, occupiers of premises and the Crown.

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Negotiating the Sale of Your Business

Jacqui Guthridge

Are you considering selling your business?

The majority of sellers do not seek legal advice until an "in-principle" agreement has already been reached. However, pre-contractual negotiations must be strategically planned, as they will form the essential terms and conditions of the agreement and it is therefore prudent to consult your legal representative. If you are about to embark upon sale negotiations, there are several issues that you must consider before entering into a formal contract of sale.

Sale of Business or Sale of Entity?

You need to determine whether you will sell the business as a whole, or just its assets. To a large extent, this will be determined by the purchaser.

A purchaser may wish to purchase only the assets of the business, rather than the entire entity, so that it does not become liable for the previous owner's liabilities, which may include tax liabilities and potential liabilities arising out of actions brought against it or for breaches of law. If this is the case, a seller will need to determine which assets are held by the business, ensure that they are able to be transferred and their estimated value. This may include plant and equipment, trading stock, land and buildings, goodwill, intellectual property, know how etc.

Conversely, a prospective buyer may prefer to purchase the entire entity to avoid the need to transfer contracts, transmit employees, transfer the ownership of individual assets and reduce the formalities of obtaining consents from a range of third parties (ie landlords and mortgagees) and/or the need to transfer or obtain new licences for the operation of the business.

Preparing for Due Diligence

Any prospective purchaser will demand the opportunity to review the assets and accounts of the seller's business. It is therefore prudent for seller's to conduct their own due diligence prior to this occurring to ensure that there are no unexpected skeletons in the closet that may scare off prospective purchasers. It will also assist sellers to ensure that they are asking a fair selling price. This may involve formalising any "handshake" agreements with suppliers, customers, shareholders and employees. A seller should have the following documents ready for inspection:

- Titles to all properties
- Leases (premises and plant)
- Motor vehicle registration
- Statutory permits and licences
- Major contracts
- Trade mark Certificates of Registration
- Income tax returns
- Payroll tax returns
- Evidence of GST/BAS compliance
- Business Names

Confidentiality Agreement

If a prospective purchaser (who will often be a competitor) is given the opportunity to investigate your business, it is vital that they enter into a confidentiality agreement to ensure that this information does not become available to anyone else.

Restrictions on Sale

It is important to ensure that you do not contravene the company constitution, unit trust deeds, shareholder/unitholder agreements and the ASX Listing Rules when selling your business. For instance, there may be a decision-

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making procedure, such as a shareholder's resolution, that must be followed to have such a sale approved.

Continuing restraints on Sellers after the Sale

Prospective purchasers will attempt to restrain the seller and/or its officers from competing in a particular geographical area, for a particular period of time, in certain business ventures. They may also require some support or tuition before and after completion of the sale, often satisfied by the transfer of some key employees.

The above represents just a brief overview of the issues faced by potential sellers and should not be relied upon alone. Obtaining legal advice early on in negotiations reduces the likelihood of problematic negotiations over the contract of sale when it comes time to formalise the arrangement.

Anderson Rice Lawyers has extensive experience in the purchase and sale of businesses, acting for both vendors and purchasers. If you are considering selling your business, please contact us to ensure that these preliminary steps to the sale of your business are attended to in a comprehensive manner with a view to protecting your future business interests.

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CASE NOTE Caitlin Tierney

Taylor v Mountain Pine Furniture Pty Ltd [2006] VSC 499 (15 December 2006)

Background

During the course of his employment with Mountain Pine Furniture Pty Ltd, the plaintiff injured his neck and left big toe when the truck he was driving was involved in an accident. The plaintiff underwent surgery for his neck facture, making a good recovery with only expected stiffness remaining.

After having submitted a claim for compensation to his employer pursuant to s.98C of the *Accident Compensation Act* 1985 (*ACA*) in respect of sustained injuries, a dispute over the assessment of the plaintiff's degree of impairment was referred to a Medical Panel pursuant to s.104B(9) of the *ACA*. The Medical Panel's opinion was returned, deeming the plaintiff to have 16% whole person impairment resulting from the accepted injuries, which amounted to permanent impairment.

The plaintiff was however dissatisfied with this finding, seeking judicial review of its decision. This newly constituted Medical Panel apportioned 1% impairment towards the plaintiff's toe injury and 15% towards his neck injury. This was in accordance and reference to the *AMA Guides to the Evaluation of Permanent Impairment* (Fourth Edition), which is the permanent impairment criteria imposed by the *ACA*.

The plaintiff remained dissatisfied, arguing that the second Panel had erred in failing to apply the Injury Model as outlined in Chapter Three of the *AMA Guides*. Paragraph 3.3d provides that no heed should be paid by the assessors towards any post-surgery improvement to a claimant's condition. Hence the plaintiff contended that the Medical Panel's consideration of his improvement since surgery, was irrelevant when making an assessment.

The Panel's opinion however was different. It had discovered the 'apparent conflict' between two separate parts of the *AMA Guides*, whereby Section 1.1 provided that a finding of permanent impairment is an injury which is unlikely to change in spite of further medical or surgical therapy. Meanwhile Section 3.3d of the *AMA Guides* stated that 'surgery to treat an impairment does not modify the original impairment estimate'. The panel resolved this conflict by reasoning that Section 1.1 of the *AMA Guides* was in line with the general premise of the Guides' glossary, hence requiring an assessment of the plaintiff based upon his post-surgery condition.

Supreme Court Decision

Subsequently in this case, the Supreme Court considered the correctness of the Medical Panel's approach to Chapter Three of the *AMA Guides* in assessing the plaintiff's level of impairment, alongside whether in using the Injury Model, the Panel ought to have taken account of the extent to which surgery had a remedial effect on the plaintiff's neck.

The Medical Panel argued in it's defence that the underlying purpose of the *AMA Guides* was an overriding requirement found in s.1.1 of Chapter 1 of the Guides whereby an assessment of permanent impairment should only be made when the patient's 'residual disabilities were stabilised and permanent'. This was essential to their justification that a patient's post surgical state should be taken into account, irrespective of Section 3.3d of the *AMA Guides*.

However this requirement that injuries must be stabilised and permanent prior to an impairment assessment taking place, was found to be a mere directive as to *when* that task may be undertaken,

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as opposed to *how*. This out-rules the capability of s1.1 overriding s3.3d of the *AMA Guides* for the purposes of making a finding that such assessments must be based on the claimant's pre-surgery state alone, irrespective of the effects of corrective surgery.

Examples from previous impairment assessments by Panels showed that 'the intention of the Guides is to remove from account, any effect of surgery – remedial or adverse': *Victorian WorkCover Authority v Alcoa Portland Aluminium Pty Ltd* [2006] VSC 502 (15 December 2006) at 20.

It was found that it was not within a medical examiner's or Panel's ambit of authority to ignore express directions found in Section 3.3d of the *AMA Guides*, and hence make impairment assessments after considering the effects of surgery.

Only changes in signs or symptoms that may be caused by surgery are to be ignored, whether the response to treatment is favourable or unfavourable.

Rationale for this was given that 'a failure to differentiate between the original trauma and the effect of surgery would introduce an unacceptable risk of injustice in the assessment of impairment and thus the assessment of compensation at large. It is clearly not a requirement of the Guides': *Victorian WorkCover Authority v Alcoa Portland Aluminium Pty Ltd* [2006] VSC 502 (15 December 2006) at 23.

Summary

The Medical Panel was held to have failed to exercise its powers according to law, as it failed to apply the prohibition on taking into account the effect of the plaintiff's surgery in reaching its conclusion, as outlined in s.3.3d in the *AMA Guides*.

Relevance to the *Wrongs Act* 1958

Section 28LH of the *Wrongs Act* provides that assessments of impairment must be made in accordance with the *AMA Guides*. Given the above decision's findings that those Guides require that assessment must be based on claimants' pre-surgery state alone, irrespective of the effects of surgery, referrals of assessment made pursuant to the *Wrongs Act* will likely stand.

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