

JR news

SPRING 2009



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Editorial

This edition of JR News provides a commercial insight on managing relations with nervous financiers.

There has also been a recent court (AAT) decision reinforcing an employer's obligation to pay superannuation guarantee for certain types of contractors. In these times where clients are adopting more flexible labour practices, understanding potential superannuation exposures is important.

We also continue our payroll tax series and provide an update on the ATO's push to tighten corporate ownership of lifestyle assets through Division 7A.

We hope you enjoy this edition of JR News!

Non-Commercial Losses: Draft Legislation

Treasury has released exposure draft legislation to implement changes announced in the 2009 Federal Budget to tighten the non-commercial losses rules for individuals. In the Budget, the Government announced that taxpayers with an adjusted taxable income of over \$250,000 will only be able to deduct expenses from non-commercial business activities against the income from those activities. Any excess deductions will be quarantined to the business activity. Industry consultation has been engaged by Treasury and we await the revised draft of the proposed legislation.

Non-Commercial Loan Rules in Division 7A

Treasury has released a discussion paper on the Government's 2009 Federal Budget announcement to tighten the non-commercial loan rules in Div 7A of the ITAA 1936. The Government's announced changes propose to extend the Div 7A rules so that "payment" includes the use of company assets by a shareholder (or their associate) for free or at less than their

market values. However, there will likely be a carve-out for "minor and infrequent use" of company assets.

These proposals by Treasury could have a wide reaching impact on clients who use company structures to protect lifestyle assets.

We are uncertain when draft legislation will be released, however we will receive it with much interest.

It is too early to pre-empt what structural changes may be required to avoid the negative consequences of Div 7A particularly where any restructure of asset holdings would likely incur a stamp duty cost.

However, the discussion paper outlines clearly enough the Treasury's intent. Therefore no lifestyle assets should be acquired in a company structure until clarity is received on the proposed Div 7A amendments.

Kylie Lamprecht,
Business Advisory Services Partner



Employees v Contractors

With clients scaling back their work forces and some engaging more contractors for labour flexibility, the question of requirement to remit superannuation is becoming more common.

For many years determining when a contractor should be treated as an employee for superannuation purposes has not always been clear.

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A recent case, referred to as Griffith's case, has been subject to an AAT hearing and has provided further weight behind contractors being classified as employees for superannuation purposes.

In Griffith's case, the AAT upheld superannuation guarantee charge (SGC) default assessments against an employer for failing to make minimum superannuation guarantee contributions in respect of an individual operating within the taxpayer's business.

After examining the indicators of an employer-employee relationship, the AAT held that the relevant individual was clearly an "employee" of the business according to ordinary concepts. In rejecting the taxpayer's contention that the individual was an independent contractor, the AAT said he was an "employee" in any event under s 12(3) of the Superannuation Guarantee (Administration) Act 1992 (SGAA) as it found *he was clearly remunerated either wholly or principally for his personal labour*.

The AAT also rejected the taxpayer's argument that the individual had agreed that he would not be paid superannuation as a term of his engagement. In this respect, the AAT noted that parties cannot "contract out" of their obligations under the SGAA. Heavy penalties were applied.

Who is an Employee?

The definition of an "employee" for superannuation guarantee purposes is contained in s 12 of the SGAA. The definition includes (but is not limited to):

- individuals who work under a contract that is wholly or principally for the labour of the relevant individual;
- individuals who are paid to:
 - perform or present, or to participate in the performance of, any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills;
 - provide services in connection with an activity referred to in the above point;
 - perform services in, or in connection with, the making of any film, tape or disc or of any television or radio broadcast;
 - individuals who are employed by the Commonwealth, state or territory; and
 - members of an eligible local governing body.

However, individuals who are paid to do work wholly or principally of a domestic or private nature for not more than 30 hours per week are not regarded as employees in relation to that work.

Commissioner's Views

In Superannuation Guarantee Ruling SGR 2005/1, the Commissioner explains when an individual is considered to be an "employee" under s 12 of the SGAA. In addition, the Commissioner discusses the various indicators the courts have considered in establishing whether an individual is an "employee" within the common law meaning of the term.

The Ruling states that whether an individual is an "employee" is a question of fact, which is determined by examining the terms and circumstances of the relevant contract, having regard to the key indicators expressed by case law. It also states that one indicator is not determinative but rather the totality of the relationship between the parties must be considered.

According to the Ruling, if an individual performs work for another party through an entity (e.g. a company or a trust), an employer-employee relationship between the individual and other party for superannuation guarantee purposes does not arise either at common law or under the extended definition of "employee".

In the Commissioner's view an independent contractor is contracted to achieve a result. Conversely, an "employee" is contracted to provide his/her labour which enables the employer to achieve a result.

The Ruling states that, in determining whether a contract of service exists, it is important to consider the relevant facts and circumstances of the contract. It also states that no single indicator is determinative of the contractual relationship but

rather the totality of the relationship must be considered to determine whether an individual is an employee or independent contractor.

The Tax Office also states that the first step to determine the true nature of a contract is to examine the way in which the contract was formed. In the Commissioner's view, the terms and conditions of the contract, in light of the circumstances surrounding the formation of the contract, will always be of considerable importance to the proper characterisation of the relationship between the parties. However, it is important to realise that the classification of an individual as an "employee" or independent contractor is based on the economic substance of the contract and not the legal terms ascribed in the contract.

Control Test

The classic test regarding whether or not an employment relationship exists is the "control test". Simply put, an "employee" is one who is under an obligation to obey the orders of his/her employer regarding the manner of the performance of a task. In recognition of a highly skilled workforce, the Commissioner says that the importance of control lies not so much in its actual exercise but rather an employer's retention of a prerogative to direct the employee. Some indications of the control test include where the employer has a right to:

- control the employee's activities during work hours;
- restrain the employee from working for others and engaging in other activities;
- set dress standards, behaviour standards and control other aspects of behaviour;
- control the hours of work, work allocated and performance standards; and
- remunerate the persons at an agreed level and not in respect of profits gained.

In SGR 2005/1, the Commissioner notes that it is not uncommon for contracts for services to specify a high degree of direction and control. So while the existence of control is significant, it is not the sole criterion by which to gauge whether an employee-employer relationship exists. Rather, the control test is one among a number of factors which must be considered when ascertaining whether a contract of service exists.

Integration Test

Another test which may be applied is the "integration test". Broadly, this test draws a distinction between individuals whose work is part of the core business of an entity and those whose services are engaged by the entity to perform peripheral functions. The integration test is likely to be satisfied if:

- the relationship between the worker and the employer is a continuing one;
- the worker's activities are effectively restricted to providing services to only one employer; and/or
- the worker does not generally profit commercially from the relationship.

The Holistic Approach

The courts also adopt a holistic view when determining whether or not an employee-employer relationship exists. That is, all factors in a particular circumstance are considered together to ascertain if it is more appropriate to treat an individual as an "employee" than as an "independent contractor". These factors can include:

- the right to suspend or dismiss the individual engaged;
- the mode of remuneration;
- the provision of benefits such as annual and sick leave;
- the requirement for the individual to wear a company uniform;
- the deduction of income tax; and
- the provision and maintenance of the equipment.

Will a simple written contract overcome the SG ones?

Unfortunately not... In SGR 2005/1, the Tax Office sets out 3 criteria which it considers are indicative of whether a contract which does not give rise to a common law relationship can be considered a contract wholly or principally for labour once the conduct of the parties has been assessed. These criteria are:

- the individual is remunerated (wholly or principally) for their personal labour and skills;
- the individual must perform the contractual work personally (there is no right of delegation); and
- the individual is not paid to achieve a result.

Additional SGC Cost

If it transpires that an employer is required to remit superannuation for a contractor and has not done so by the prescribed dates (refer earlier addition of JR News or discuss with your JR advisor) then the superannuation guarantee charge (SGC) is invoked.

The SGC comes at a higher cost than the original unpaid superannuation amount and is not tax deductible.

Taking on a Contractor

We have found when taking on a new contractor, where the role is principally for the contractor's labour then caution needs to be taken with respect to dealing with the superannuation guarantee.

If the contractor is operating through their own company or trust then superannuation guarantee is not the payer's obligation.

If however the contractor is an individual and is likely to fall into the superannuation guarantee net then it is best to negotiate this deduction out of the contracted rate up-front.

FBT and Laptop Computers

In the 2008 Federal Budget, the Treasurer announced that the FBT exemption for certain work-related items such as laptop computers would be tightened.

For laptops purchased after 7:30pm on 13 May 2008, the FBT exemption will only apply if the laptop is **primarily for use in the employee's employment**. This measure was introduced to ensure consistency with the rules that apply to other work related items such as mobile phones.

In most employment scenarios, where an employee requires a laptop for work, one will be provided by the employer and in these cases, the benefit will be exempt from FBT. What is less clear is where an employee wishes to salary package the purchase of a laptop.

The ATO has recently issued an Interpretative Decision (ATO ID 2008/127) which gives some insight into its views on the application of the exemption where a laptop has been provided to an employee. As confirmed by the ATO, to determine if the exemption applies, it is necessary to consider the intention of the employer at the time the laptop was first provided to the employee. As such, usage after the laptop has been provided is irrelevant and the keeping of logbooks or similar records of actual use is of no value in deciding this issue.

As a rule, a laptop provided through a salary sacrifice arrangement would not be provided **primarily for use in the employee's employment**. The employee's preparedness to sacrifice salary in return for the laptop suggests that, in most cases, they are doing so for a private benefit rather than for a purpose related to their employment.

Notwithstanding this basic proposition, there could be circumstances where the employer and the "employee" agree to a salary sacrifice arrangement where a laptop is not otherwise made available by the employer and the intention of the employer is to provide it primarily for use in the employee's employment. Possible factors to be considered in deciding this issue could include:

- What is the job description of the employee?
- What type of work is to be performed by the employee?
- How does the use of the laptop computer relate to the employee's employment duties?

- What is the employer's policy and what are the conditions placed on the use of the laptop?
- Special circumstances such as the employee wanting a laptop which is more powerful or in some way different to the laptop that the employer might otherwise provide.

Where a decision is made to provide a laptop to an employee under a salary sacrifice arrangement and treat it as exempt from FBT, it is recommended that the rationale for why it is provided for use in the employee's employment be clearly documented and placed on the FBT file. In applying the exemption, employers should always be mindful that they are liable for any unpaid tax should the ATO determine that the laptop is not exempt.

Michelle Womersley, Business Advisory Services Manager

Financial Difficulties – Working With Your Bankers

Unfortunately during this severe economic downturn a number of our clients have and will find themselves in financial difficulties.

Many of these difficulties will be caused through no fault of our clients – they will simply be caught out by the rapid decline in economic conditions, and/or a rapid decline in asset prices such as properties. However, in some cases clients will have contributed to their own difficulties with over optimistic expenditure of boom time profits and over optimistic gearing.

Many of our clients, like a number of us at JR, will recall the last recession in the early 1990's. The way banks handle these difficulties we expect will be along similar lines and we can draw on that experience.

If a client's situation becomes of concern to their bankers, the client may find that management of their account with the bank is moved from local branch management to some form of credit section within the bank, where the relationship will move to entirely concentrating on improving the bank's position.

It is always helpful to understand the position of bankers, which is really quite simple. They lend money to earn interest and to make a profit for themselves. They need to be confident that the cashflow of the business will always be sufficient to pay their interest, and they need to be confident that the money they have advanced is not at risk, even under adverse circumstances. As soon as a banker becomes concerned that either the cashflow will not be sufficient to pay the interest, or the loan amount may not be secure, they will take steps to improve their position.

As already mentioned, the first step is generally to move management of your account to a central "credit service" department in the bank. The exact structures are different in all the banks and the degree of credit supervision will depend on how serious the bank regards the situation. The level of credit supervision will range from a fairly hands-off monitoring, with the expectation that some corrective action will be taken and then the account will return to a normal relationship. At the other extreme, the account will be placed in an 'asset management' section where all assets have to be realised, with a view to repaying the bank and there is no real suggestion of any continuing banking relationship. There are degrees of supervision between the two extremes listed above.

Once the account is moved, the credit section will generally deal with the account on a 4-Stage process, namely:

1. Getting the facts of the situation;
2. Agreeing a plan for corrective action;
3. Implementing the plan; and
4. Monitoring progress.

The first reaction of clients in this situation is to think that "this is the end of the earth" and that they are going to end up bankrupt. In most cases this is not the result. Over the years we have assisted a large number of clients through these situations and many have gone on to be highly successful. Whilst no one likes to admit it, in many cases the bank forces an action program that probably needed to be implemented anyway.

To survive this situation, it is important to understand the 4-Stage process set out above, and to be "ahead of the game" in terms of implementing the process for the bank.

Firstly, giving the bank the facts. This includes the following:

1. Up-to-date financial statements.
2. Updated property valuations and possibly plant and equipment valuations.
3. Profit and cash projections going forward.
4. Some written commentary on the current business and business plan going forward.

If the bank does not have the facts it will be more nervous about its position and more inclined to take action to your detriment. It will also be more likely to appoint an independent accountant to prepare a report to obtain the facts with an associated cost involved.

Secondly, putting a plan to the bank that aims to correct the situation. The overriding philosophy should be to do everything the bank would do if they took control themselves.

If you are taking all sensible action, there is no need for the bank to appoint an administrator. Obviously some very hard decisions will often be involved at this point, but they have to be taken. Often the best approach is to decide what you would really like to salvage out of the situation, for example your home and core business, and everything else is then sold. Corrective action will also often involve a restructure of your business as well as the sale of certain assets, perhaps an investment property or weekender.

Having worked out a corrective action plan in consultation with your own advisors, put the plan and the implementation timetable to the bank to obtain their support.

Thirdly, implementing the plan. As soon as the plan has been agreed, it should be implemented as a matter of priority. Banks like to see good steady, genuine progress.

Finally, monitoring. During this phase regular reports and meetings with the bank are essential. The better informed the banker, the less likely they are to create pressures and difficulties.

The final message is to recommend that if you know that financial difficulties are developing, implement this 4-Stage process yourself early, rather than delaying and waiting for the bank to force you to do something. **The earlier the action the better the outcome.**

Payroll Tax Changes – Exclusion from Grouping

We continue to outline the payroll tax changes that apply from 1 July 2008.

In this newsletter we look at the Office of State Revenue's new ruling explaining the Commissioner's discretion to exclude an employer from a payroll tax group, including the matters taken into account in exercising the discretion.

It is designed to avoid anomalies that may arise from strict application of the grouping provisions. It cannot apply where employers are grouped because they are related corporations.

The new ruling is effective from 3 July 2009.

Granting of Exclusion

In order for an employer to be granted an exclusion from a group, the Commissioner must be satisfied that:

- the business is carried on independently of businesses carried on by any other member of the group; and
- the business is not connected with the carrying on of businesses carried on by any other members of the group.

The matters that the Commissioner must have regard to are:

- the nature and degree of ownership and control of the businesses;
- the nature of the businesses; and
- any other matters the Commissioner considers relevant.

The Commissioner must be satisfied that:

- there is not a continuous course of active and significant relationship, in a business or commercial sense, between the carrying on of the employer's business and the carrying on of businesses conducted by any other member of the group; and
- the connections which do exist are no more than casual, irregular or occasional occurrences.

Matters Taken Into Account

In making a decision, the Commissioner will consider the nature and extent of all relevant agreements and dealings between the employer and other members of the group, including:

- (a) the nature and extent of any commercial transactions between the members, including the value and percentage of the employer's total business which is conducted with other members of the group;
- (b) the extent to which members share resources, facilities or services, including premises, staff, management and accounting services;
- (c) the extent to which the employer controls or is involved in managerial decision and day to day administration of the other members and the extent to which other members control or are involved in managerial decisions and day to day administration of the employer;
- (d) the extent to which there are financial interdependencies, including intra-group loans or guarantees and common banking facilities, and the terms and conditions attached to such agreements;
- (e) the degree to which there is a connection between the employer and other members of the group in the purchase or sales of goods and services;
- (f) the extent to which there is a connection between the nature of the businesses of the employer and other members of the group; and
- (g) the extent to which there is a connection between the ultimate owners of the employer and other members of the group.

None of the matters listed above are determinative in isolation from the other matters listed, nor are they an exhaustive list of the relevant issues. Each case will be considered on the basis of all of the relevant facts and circumstances.

Where employers are grouped, payroll tax liability depends on the combined Australian wages of all group members. Only one deduction may be claimed by the designated group employer.



Therefore, employers that are grouped but believe that their businesses are carried on independently should consider applying for an exclusion from grouping.

Ian Jones, Business Advisory Services Partner (left) will continue this payroll tax series in future editions for JR News.

Tax Diary Dates – November 2009 to March 2010

21 Nov 2009 Lodgement and payment of the October 2009 monthly BAS/IAS.

28 Nov 2009 Due date for lodging the Superannuation guarantee charge statement – quarterly and paying the super guarantee charge for first quarter 2009/2010, if sufficient contributions were not paid on time.

1 Dec 2009 Payment of income tax for taxable large/medium companies and superannuation funds. Lodgement of return due 15 January 2010.
Payment of income tax for taxable head company of a consolidated group where a member is deemed a large/medium taxpayer in the latest year lodged. Lodgement of return due 15 January 2010.
Payment of income tax for companies and superannuation funds where lodgement of income tax return was due 31 October 2009.

21 Dec 2009 Lodgement and payment of the November 2009 monthly BAS/IAS.

15 Jan 2010 Lodgement of income tax return for taxable large/medium business taxpayers per latest year lodged (all entities except individuals) unless required earlier. Payment for companies and superannuation funds was due 1 December 2009.
Lodgement of income tax return for taxable head company of a consolidated group where a member is deemed a large/medium taxpayer in the latest year lodged (including new registrants) unless required earlier. Payment was due 1 December 2009.

21 Jan 2010 Lodgement and payment of the second quarter 2009/2010 IAS for head companies of consolidated groups.
Lodgement and payment of the December 2009 monthly BAS/IAS.

28 Jan 2010 Payment of superannuation guarantee contributions for the second quarter 2009/2010.

21 Feb 2010 Lodgement and payment of the January 2010 monthly BAS/IAS.

28 Feb 2010 Lodgement and payment of the second quarter 2009/2010 year BAS/IAS.
Payment of the second quarter 2009/2010 PAYG instalment notice. Lodgement only required if varying the instalment amount.
Lodgement of income tax return for non-taxable large/medium business taxpayers per latest year lodged (all entities except individuals).
Lodgement of income tax return for new registrant large/medium business taxpayers.
Lodgement of income tax return for non-taxable head company of a consolidated group (including new registrants) where a member is deemed a large/medium taxpayer in the latest year lodged
Lodgement of income tax return for members of a consolidated group who exit for more than one day during the financial year.
Lodgement of income tax return for new registrant (taxable & non-taxable) head company of a consolidated group.

Lodgement and payment of income tax return for new registrant self managed super funds (SMSFs).
Lodgement and payment of income tax return for non-taxable and new registrant large/medium business super funds per latest year lodged.
Lodgement and payment of Annual GST Return if taxpayer does not have an income tax return lodgement obligation. Otherwise, must be lodged by income tax return due date.
Due date for lodging the Superannuation guarantee charge statement – quarterly and paying the super guarantee charge for second quarter 2009/2010, if sufficient contributions were not paid on time.

21 March 2010 Lodgement and payment of the February 2010 monthly BAS/IAS.

31 March 2010 Lodgement and payment of income tax return for companies and superannuation funds with total income >\$2m per latest year lodged (excludes large/medium business taxpayers).
Lodgement and payment of income tax return for head company of consolidated group that has a member with total income >\$2m and is not deemed a large/medium business per latest year lodged, unless required earlier.
Lodgement of income tax return for individuals and trusts which were tax level 6 per latest year lodged. Payment is due per notice of assessment.

What's Happening at JR

Manager Appointments

Alex Clark – JR.Bizlink

Alex is the newest member of the JR.Bizlink team and brings with him over ten years of knowledge and the ability to provide consulting, architecture and development expertise around the "Greentree" accounting package.

He boasts experience as a lead programmer in Greentree and works with dealers on specification and implementation issues. Alex also provides an onsite technical resource by working with clients on implementations, upgrades and fault diagnoses.

Alex also works closely with clients to get the best from their "Greentree" implementation, including business analysis and customisation services.

Touch Football

JR has had a very active year, entering almost all available sporting events. Recently JR entered two teams into the ICAA Touch Football Day and the day included some memorable highlights...

Following a first up loss, the JR Jets defence was in big trouble early in game two. Matt Smith successfully imported his AFL skills to steal a crafty intercept. Forced to race the entire 60 metres to the try line, Matt showed impressive team spirit by immediately substituting off the field to share the game time around. The intercept made the difference, the JR Jets beating the eventual winners of their pool 2-1. However, consistency would be the achilles heel of the JR Jets, the team missing the playoffs by a single point.



The fortunes of the JR Jaguars were somewhat mixed. Down four games to nil and staring down the barrel of a wooden spoon playoff, the JR Jaguars pulled out the trump card in the final game, bringing in Brett Headrick for a cameo appearance. As predicted, Brett scored a touch down, the Jaguars running out 4-0 victors in their final game, avoiding the wooden spoon playoff and finishing on a high.

Bridge to Brisbane

The following weekend was the Bridge to Brisbane... this bright and sunny Sunday morning run, called for an early start with some people waking up before 5am to get to the start line on time. JR had an eager and mostly under prepared group of entrants. The 15 entrants in their JR shirts were barely noticeable between the 45,000 other runners – some in some fairly outrageous costumes. Mark Nicholson and Norman Thurecht both clocked in with a final time of under 42 minutes, although a birdie tells me that Mark was doing all the work. Without Brett Headrick cooking a BBQ breakfast there was no big meet up at the end to gloat (or cry) about times, but by the end most people were just happy to cross the finish line and go home.

Keep your eyes open for future updates on the Brisbane to Gold Coast Cycle (October 11) and the ICAA Netball Day (October 18).



JR End of Financial Year Ball



The 2009 financial year has come and gone and JR celebrated it in style at Customs House at our annual ball. An enjoyable night was had by all, with staff and partners there to celebrate the night masquerade style.

The evening started with canapés and drinks on the terrace overlooking the beautiful lights of the Story Bridge while listening to a 3 piece string quartet. A three course meal in the Long Room followed, with the majority of people deciding to let their hair down on the dance floor for the remainder of the night. The Ball coincided with JR's 35th anniversary as a firm, so it was a timely celebration to reflect on how far we have come. JR's Social Club did an amazing job in organising the event which was definitely a night to remember!

olivia's lunch

Our JR female partners (Teresa Hooper, Katrina Haiduk and Kylie Lamprecht) were honoured to host a table at "Olivia's Lunch". Our clients, Brett & Maria Clark (Chemist Warehouse), started this charity event in conjunction with Mater Little Miracles Foundation in memory of their daughter Olivia.

The purpose of the lunch is to raise funds for equipment purchases for the special care units and undertake vital research to help premature babies in their fight for life. This year, Channel 9 news anchor, Heather Foord was MC and well-known columnist, Frances Whiting, shared her witty insights on kids, motherhood and life-in-general. The St Lucia Golflinks venue was buzzing with 500 females enjoying the fashion display and lots of champagne for a great cause. Dr Melinda Pascoe (Neurology Choice) was the highest bidder in the artwork auction and Kim Prior (Prior Industries) enjoyed a win on the silent auction. Many thanks to our JR clients in attendance and your generosity. The Partners were very pleased to present a cheque for \$10,000 on the day. Currently donations stand at \$80,000 which is \$20,000 shy of the goal for 2009 of \$100,000. Should you wish to make a donation direct to Mater Little Miracles Foundation, please email Billie-Jay.Porter@mater.org.au

Clients attending on the day include Lyn Guy; Melinda Pascoe; Kirsten McKerrell; Suzanne Jacobi-Lee; Kim Prior; Sue Holzberger; Nadia Hughes; Leona Collins.



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