

# Autumn Report

## Supporting the wine supply chain

*Continued on page 2*

### inside this issue

**PAGE 5** | Succession Planning  
Protecting your business, your estate and you

**PAGE 6** | Do You Have Goodwill  
High Court reprises Federal Commissioner of Taxation v Murry in Placer Dome

**PAGE 8** | Director Identification Number Bill  
The war against phoenixing

**PAGE 9** | Provision of Suitable Employment Under  
Section 18 of the *Return to Work Act 2014* (SA)

**PAGE 12** | FWC Proposes the Introduction  
of Additional Requirements for Award Based  
Annualised Wage Arrangements

**PAGE 16** | Fair Work Rejects 'Living Wage'  
Argument of the ACTU in Minimum Wage Review  
Decision

**PAGE 19** | Registration of Everything  
(Commonwealth Bill)  
Business names and trading names on the ABR

**PAGE 22** | Offloading Tax Liabilities Between Spouses  
High Court decision of the Commissioner of Taxation  
v Tomaras

**PAGE 25** | Crowd-Sourced Funding for Private  
Companies

**PAGE 26** | Suits Off  
Staff Profile: Joseph DeRuvo, Managing Director

**DW Fox Tucker Lawyers**

L14, 100 King William Street, Adelaide, SA 5000  
p: +61 8 8124 1811 e: info@dwfoxtucker.com.au

[dwfoxtucker.com.au](http://dwfoxtucker.com.au)

## CLIENT PROFILE

# Wine Industry Suppliers Australia (WISA)

When it comes to the future of wine, WISA is all over it.



From Artificial Intelligence (AI) implementation and smartphone innovation, to lobbying government on legislation and worrying about crop-killing bugs, there's a lot on the proverbial plate for Wine Industry Suppliers Australia (WISA) - and therefore plenty to talk about with its Chief Executive Officer, Matthew Moate. But first, as DW Fox Tucker is unashamedly a wine-loving organisation, we all want to know how this lucky man ended up at the forefront of one of the trendiest, tastiest industries in the country.

*"It's my dad's fault", smiles Matthew. "As a teacher, he always said that, because I didn't select the preferred subjects in year 12, I wouldn't get into Uni. That was fine, I wasn't planning on going to Uni. But nearing the end of high school I had a change of heart and I scoured the Uni courses to see which ones I could get into. Wine Marketing or Aged Care were my choices. It wasn't a difficult*

*decision. My first entry into the wine industry wasn't a traditional pathway either, as I scored an entry level job in Freight Forwarding which led to a fast paced move through the operational ranks, then into sales which lead to setting up a New Zealand office, getting poached by a wine industry supplier, winning a national award and over time becoming what I guess you'd call a bit of 'a face' in the industry".*

Matthew's contribution to the industry, through WISA, began with election to the board in 2009 after joining as a member in 2007 and being recognised as the Association's 2008 Supplier of the Year Award winner. Election to the chair followed in 2010, and in 2013 he was asked by the board to take on the role of Executive Officer. Matthew has since transitioned from this role to become WISA's Chief Executive Officer; cementing his position as one of the key cogs

driving change and growth in the wine industry. He relishes the hard work and is deeply driven to achieve the best outcomes for every supplier and stakeholder along the wine value chain.

Unlike the more widely known national regulatory body, Wine Australia, which focusses on the frontline stakeholders like producers and wineries, WISA casts a much wider net to bring all vested suppliers and related businesses under one helpful wing. *"Our member base is so broad", Matthew explains, "because we represent the entire supply chain. Anyone from equipment manufacturers and ingredient producers, to law firms and tourism operators, we service, connect and advocate for anyone involved in getting grapes into glasses. Great wine relies on an innovative and dynamic supply chain."*

WISA has been working with

this diverse and widely spread network of wine industry supplier stakeholders since 2000, following a strong call from the organisations themselves for some representation focussed on the value, capability and competitiveness they deliver to industry. *“With members like yeast and chemical suppliers we’re not exactly on the sexy side of the wine industry, and you don’t see big profiles of us in the glossy mags”*, jokes Matthew. *“But with 45,000 professionals working in the grape and wine supply chain, we have a very strong platform for those needing a voice... and WISA has had significant success in helping ensure the smoothest transition possible for our members into an era of tightened legislation, ground-breaking technology and vast shifts in the way the market works.”*

### Blanket stink bug regulations threaten wine barrel makers

When asked about what crucial issues are ongoing right now, the first words out of Matthew’s mouth are *“Brown Marmorated Stink Bug”*. A particularly nasty strain of stink bug which *“infests in plague proportions, sucking out all the goodness of vines and fruit, destroying crops and can infest buildings in its path”*. The Brown Marmorated Stink Bug has yet to find its way to Australian shores, and the government understandably wants to keep it that way, so there are strict blanket regulations around the treatment of a range of high risk products, which depart various target origin countries on a shipment to Australia between 1 September and 30 April (the stick bug’s preferred method of travel when wanting to escape a cold European winter). One product that is caught up in this is oak barrels - imported

for wine making purposes.

*“But here’s the thing”*, Matthew explains, *“a finished oak wine barrel is already subject to incredibly stringent food grade safety regulations, in fact it’s legally considered an ingredient, so the processes a wine barrel already goes through is more than enough to ensure there are no bugs on board. What’s more is the regulated bug heat treatment for standard timber can damage a wine barrel, excessively drying out the wood to cause leaking, and the additional costs and delays involved in the treatment permeate down the supply chain. All of which causes significant extra costs for industry, in extreme cases for smaller oak barrel distributors it could easily make their business unviable if they are unable to pass the costs on”*.

So, what has WISA been doing about it? Intense lobbying to the government department for agriculture and water resources, ensuring the industry concerns are top of decision-makers’ minds, and campaigning for tailored exclusions in regulations. Relentless liaison between different stakeholders along the supply chain, ensuring that wine producers understand that it isn’t the oak suppliers who are to blame for the increased costs, bringing groups together and ensuring everyone fully understands what’s going on. *“We also give expert advice and assistance where it’s needed, helping companies manage the change in their operations required to meet regulations in the smoothest way possible. We are confident that at least we can have a discussion with the department to safeguard oak producers from regulations for the upcoming 2019/20 season.”*

### Artificial Intelligence set to deliver highly desired cost efficiency

In stark contrast to the age-old challenges of crop-harming bugs and the logistics of moving barrels around, another of WISA’s big focusses at the moment is encouraging and supporting new technologies such as AI across Australian vineyards, to deliver badly needed efficiencies for growers and producers. Matthew sets the scene: *“Wine industry overheads, costs per litre of product produced, are much higher and more difficult to manage than all-year-round drinks like beer and spirits. Wine is made once a year over three or four months, leaving high-cost infrastructure effectively a liability for the rest of the year. Huge competition from other countries with much lower production costs, a 60% export ratio, a uniquely intrinsic link to tourism and all the uncertainty that can bring. There are so many factors which make it especially hard to achieve the efficiency needed to compete in the world of wine... but luckily, there’s some exciting, super-efficient technology on the horizon that can provide Australian wine producers with a global competitive edge”*.

### WISA’s ‘top 5 ones to watch’ in wine technology

1. Nanosatellite technology will revolutionise communications between crop sensors, especially in areas where there is currently no terrestrial network, bringing sensor connectivity costs borne by farmers down to as little as \$2 per device per year - compared with the current need for individual sims and basic mobile plans per device.

*continued overleaf...*

*...from previous page*

2. Geospatial satellite imagery used in conjunction with AI is now being used to survey land and identify vineyards, allowing industry to have a much more accurate understanding of the national footprint and future investment requirements.
3. Infrared spectrometry technology combined with automated GPS job management systems is making giant, cost-efficient leaps in allowing precision viticulture, where only parts of vineyards are treated rather than a blanket approach across a full vineyard. This provides savings on inputs such as sprays and labour costs.
4. AI software is being used to help make faster, more effective decisions in manufacturing, at every point from managing tank farms to bottling, labelling and supply chain logistics.
5. A \$50 smartphone accessory now turns the device into a microscope, so a farmer on the vineyard can snap a bug or strange mark so AI can then determine the pest or disease and potentially provide a remedial course of action.

Matthew is clearly excited by innovations in WineTech. *"We're only just scratching the surface of the technology that will be part of the vineyard and wineries of the future. Our national and international connections provide a pathway for adoption by industry and allows Australia to stay ahead of the curve".*

WISA's objective is to embrace this technology, track its capability and communicate the benefits effectively at every point in the wine supply chain, through a wide-ranging program of events, a dedication to connecting stakeholders with each other, and making sure no-one misses out on any innovations which apply to their side of the business. *"We provide a platform for wine businesses big and small, to ensure they are part of the conversation and get their voices heard. Everything we do is about helping to connect and communicate, so together we can maintain and develop a strong, agile, dynamic market place at the forefront of all available technologies".*

**So, what's next for WISA?**

*"Watch out for WISA's 2019 Wine Industry Impact Awards", Matthew suggests. "We're delighted that DW Fox Tucker has been a valued partner of these*



*awards for nearly a decade and we're really excited about this year's competition, we have more than 140 wine businesses in our membership, and many of them have been doing incredible things over the last 12 months."*

*"Plus of course we'll be playing a big part at the national WineTech tradeshow and the Australian Wine Industry Technical Conference - to be held in Adelaide this July. It only happens every three years, so everyone who's anyone in wine will be there, along with some jaw-dropping advances in wine production innovation. We can't wait!"*

All in all, it seems that with WISA's help every business along the wine supply chain is in great shape to continue growing long into the future. And we'll drink to that.

The WineTech Trade Exhibition takes place every three years. The next exhibition is happening this year at the Adelaide Convention Centre between 22nd and 24th July, with an industry conference running in tandem from 21st to 24th July.

**FOR MORE INFORMATION ABOUT WISA:**

Phone: +61 (0)409 783 221

Visit: <https://www.wisa.org.au>



INSIGHT | By Briony Hutchens

# Succession Planning

## Protecting your business, your estate and you

You may be surprised to hear that in a recent Family Business Australia survey less than 30 per cent of family businesses indicated that they have a formal succession plan in place.

The failure to properly prepare for an owner's retirement, or unexpected departure due to ill-health, greatly reduces the chance of a business surviving the transition to new ownership or management. If appropriate measures haven't been taken, significant difficulties can also occur where a business owner loses capacity due to disability or illness.

Issues that commonly arise from the absence of an adequate succession plan include:

- exposure to unnecessary capital gains tax (**CGT**) and stamp duty liabilities;
- uncertainty and suspicion developing amongst family members about their future role in the business; and
- the potential for one or more family members to subsequently oust a sibling or other close relative from the business.

With proper planning, these problems can be diminished or avoided altogether. If appropriately structured, opportunities may also exist to apply the small business CGT concessions to reduce or eliminate CGT on the disposal of business assets and to take advantage of stamp duty exemptions if any land needs to be transferred.

To develop a successful succession plan, the existing legal structure of the business requires a thorough examination. This includes:

- undertaking a review of the constitution and share register if the business is operated through a company; and
- scrutinising the governing deed where the business is held under a trust.

The financial accounts of the relevant entity should also be analysed.

A Will plays an important role in succession planning and therefore needs to be kept up-to-date. Regularly reviewing your Will provides the opportunity to reconsider your choice of executors and to assess whether the gifts

you intend to make remain appropriate. Where a Will operates imperfectly, the beneficiaries are frequently left to decide amongst themselves how the deceased's assets should be distributed. Apart from providing the opportunity for family disputes, this causes CGT and stamp duty liabilities that could otherwise be avoided.

Although it's not possible to prevent a disgruntled family member from making a claim pursuant to the *Inheritance (Family Provision) Act 1972 (Family Provision Act)*, there are ways of minimising the success or effect of such a claim with proper planning. For example, superannuation, jointly-owned assets and assets held on trust are all able to be put beyond the reach of the Family Provision Act.

Finally, while you remain healthy, mentally aware, and in full control of your affairs, it's also appropriate to consider planning for the possibility of losing capacity due to disability or illness. Various instruments exist that enable trusted family members or friends specifically chosen by you to make decisions on your behalf in the event of a loss of capacity, namely:

- an Enduring Power of Attorney – this covers property and financial matters only; and
- an Advance Care Directive – this covers decisions regarding your future health care, end of life, preferred living arrangements and other personal matters and replaces any existing Enduring Power of Guardianship and Medical Power of Attorney.

**FOR MORE INFORMATION OR ASSISTANCE  
DEVELOPING YOUR SUCCESSION PLAN PLEASE  
CONTACT:**



**Briony Hutchens** Director

p: +61 8 8124 1821

[briony.hutchens@dwfoxtucker.com.au](mailto:briony.hutchens@dwfoxtucker.com.au)

INSIGHT | By Sandy Donaldson &amp; Julia Schinella

# Do You Have Goodwill?

## High Court reprises *Federal Commissioner of Taxation v Murry* in Placer Dome

If you or your company has a business, there is probably goodwill for the business. But it may not be quite what you think.

### What is goodwill?

The first meaning of “*goodwill*” in the Oxford English Dictionary is “*virtuous, pious or upright disposition or intention*”, but that does not sound like what we are talking about. The last meaning given in the OED, in relation to commerce, is “*The privilege, granted by the seller of a business to the purchaser, of trading as his recognised successor; the possession of a ready-formed ‘connexion’ of customers, considered as an element in the saleable value of a business, additional to the value of the plant, stock-in-trade, book-debts, etc*”.

That sounds more like it. *Goodwill* is the difference between the value of tangible assets on the one hand and the value of the business as a going concern, or market capitalisation of the company on the stock exchange, right? Wrong, at least from a legal perspective, rather than accounting practice.

### Murry’s Case

It is now nearly 21 years since the High Court delivered its judgement in *Federal Commissioner of Taxation v Murry*<sup>1</sup> and in a unanimous judgement of four judges<sup>2</sup>, with Kirby J dissenting, set out principles as to what constitutes *goodwill* at law and said that the accounting and commercial view of goodwill should not be regarded as an accurate statement of the legal definition of goodwill. The Court made reference to one of the most frequently quoted definitions of goodwill by Lord McNaughton<sup>3</sup> reading, in part, that *goodwill* is “... *the attractive force which brings in custom*”.

The main feature of goodwill emphasised by the High Court was that goodwill is not something that is separate from a business, or which can be dealt with

separately. The Court, however, did recognise that goodwill is property saying:



*“From the viewpoint of the proprietors of a business and subsequent purchasers, goodwill is an asset of the business because it is a valuable right or privilege to use the other assets of the business as a business to produce income. It is the right or privilege to make use of all that constitutes “the attractive force which brings in custom” goodwill is correctly identified as property, therefore, because it is the legal right or privilege to conduct the business in substantially the same manner and by substantially the same means that have attracted custom to it. It is a right or privilege that is inseparable from the conduct of the business”.*

Applying these concepts, the majority of the Court held that the transfer of a taxi license together with a vehicle and shares in a taxi company for a total consideration of \$220,000 of which \$189,000 was asserted to constitute goodwill did not include any goodwill for the purposes of the exemption of part of a capital gain in accordance with section 160ZZR of the *Income Tax Assessment Act 1936*, emphasising that “*Care must be taken to distinguish the sources of the goodwill of a business from goodwill itself*”.

### Placer Dome

The High Court has recently had cause to consider again the concept of *goodwill* in *Commissioner of State Revenue v Placer Dome Inc*<sup>4</sup>, and in a judgement delivered on 5 December 2018 has reaffirmed the principles in *Murry’s Case*, again in a majority judgement of four judges<sup>5</sup>, with the fifth judge<sup>6</sup> agreeing with the decision for somewhat different reasons.

<sup>1</sup> *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605.  
<sup>2</sup> Gaudron, McHugh, Gummow and Hayne JJ.  
<sup>3</sup> *Inland Revenue Commissioners v Muller & Co’s Margarine Limited* [1901] AC217.

<sup>4</sup> *Commissioner of State Revenue v Placer Dome Inc* [2018] HCA 59.  
<sup>5</sup> Kiefel CJ, Bell, Nettle and Gordon JJ.  
<sup>6</sup> Gageler J.

There was somewhat more at stake in the *Placer Dome* matter than in *Murry*. The matter involved the now repealed “*land rich*” provisions of the *Stamp Act 1921* (WA) and the central question was whether the acquisition of the shares in Placer Dome Inc by Barrick Gold Corporation was assessable for stamp duty on the basis that Placer Dome was a “*listed landholder corporation*”. This depended on whether the value of Placer’s land was below the 60% threshold specified in the legislation.

Barrick contended that prior to its acquisition Placer had goodwill with a value of \$6.506 billion, and that the value of its land was less than 60% of its assets. The Commissioner disagreed and assessed ad valorem stamp duty of \$54,825,300. This assessment was objected to by Barrick, and an appeal made to the State Administration Tribunal and then to the W.A. Court of Appeal which held that Placer had substantial legal goodwill on the basis of the value of its business as a going concern.

The Commissioner appealed to the High Court and the appeal was allowed. The conclusions of the majority judgement, after first emphasising that any valuation exercise must be undertaken in the legal and factual context which arises were that:

*“... at the acquisition date, there were no sources of goodwill that could explain the \$6 billion gap which was attributed by Barrick to good will. That unexplained gap suggests that the DCF calculations used by Barrick’s valuers to value Placer’s land, its principal asset, were wrong. Put in different terms the danger identified by the majority in Murry of attributing a value to goodwill which actually inheres in an asset was readily apparent.*

*... goodwill has sources, not elements, and the sources of goodwill for legal purposes are those which generate or add value (or earnings) to the visitors by attracting custom. But, in seeking to identify the sources that generate the custom of the business, it is important to recognise that goodwill has no existence independently of the conduct of that business; goodwill cannot be severed from the business which created it”.*

Apart from going concern value, Barrick identified a number of asserted objective sources of goodwill which

included Placer’s personnel, the technical capacity of the personnel, innovative mining techniques, strong and experienced management, structures and systems, and synergies of the combined entities. The Court held however that none of these sources were capable of generating any relevant goodwill or goodwill of any material value. In relation to synergies, it pointed out that these were not a source of places goodwill but, if any, the combined entities.

Although the “*land rich*” stamp duty legislation in Western Australia and elsewhere has been replaced, the existence of *goodwill* and the principles derived from *Murry and Placer Dome* may still be relevant for stamp duty and other taxation purposes. Clearly, if the existence or value of *goodwill* is likely to be an issue, the balance sheet of the business should not be relied on to determine this and careful consideration should be given to whether there is any *goodwill* which can be substantiated for legal purposes.

**FOR MORE INFORMATION OR ASSISTANCE  
PLEASE CONTACT:**



**Sandy Donaldson** Director

p: +61 8 8124 1954

[sandy.donaldson@dwfoxtucker.com.au](mailto:sandy.donaldson@dwfoxtucker.com.au)



**Julia Schinella** Associate

p: +61 8 8124 1869

[julia.schinella@dwfoxtucker.com.au](mailto:julia.schinella@dwfoxtucker.com.au)

NEWS &amp; VIEWS | By Sandy Donaldson &amp; Marianna Danby

# Director Identification Number Bill

## The war against phoenixing

The latest advance by the Commonwealth Government in its war against *phoenixing* (see our articles in our 2018 Spring and Autumn Reports) is the introduction to Parliament of the *Treasury laws Amendment (Registries Modernisation and Other Measures) Bill 2019* (the **DIN Bill**). The DIN Bill has been “bundled” with the *Commonwealth Registers Bill 2019* (**Registers Bill**) for modernisation of Commonwealth registers (see our article in this Report).

Schedule 2 of the DIN Bill amends the *Corporations Act 2010* and the Corporations (Aboriginal and Torres Strait Islander) Act 2006 to introduce a Director Identification Number (DIN). The Explanatory Memorandum for the Bill estimates the total cost of “*phoenixing*” to the Australian economy is between \$2.9 billion and \$5.1 billion annually.

### What is a DIN?

The concept of a DIN was first announced by the government on 12 September 2017 and had been recommended by the Productivity Commission in its September 2015 final report into *Business Set-up, Transfer and Closure*. The Explanatory Memorandum explains the intent and operation of the DIN as follows:

*The DIN will require all directors to confirm their identity and it will be a unique identifier for each person who consents to being a director. The person will keep that unique identifier permanently, even if they cease to be a director. It is not intended that a person’s DIN will ever be re-issued to someone else or that one person will ever be issued with more than one DIN (except in limited circumstances such as when a record is corrupted). As such, the DIN will provide traceability of a director’s relationships across companies, enabling better tracking of directors of failed companies and will prevent the use of fictitious identities. This will assist regulators and external administrators to investigate a director’s involvement in what may be repeated unlawful activity including illegal Phoenix activity.*

### Who is required to have a DIN?

The new law will require a DIN to be obtained by a person defined as an **eligible officer**. This will include directors and alternate directors and any other officer

of a **registered body** prescribed by regulation. This could, potentially, include secretaries. This does not, at least initially, include a “de facto” or “shadow” director within the definition of “*director*” in Section 9 of the Corporations Act.

A **registered body** includes a company, registered foreign company or registered Australian body or an Aboriginal and Torres Strait Islander corporation, which is registered under the Corporations (Aboriginal and Torres Strait Islander) Act 2006.

### Applying for a DIN

The recording and administration of DINs will be undertaken by a registrar in accordance with the new registration regime to be established by the Registers Bill. The registrar will not be able to allocate a DIN to a person without an application by the person, but the registrar will be able to direct a person to apply for a DIN.

When the law is in operation and a registrar has been appointed, a person intending to be a director must apply for a DIN prior to an appointment as a director. In the first year, however, there will be an additional 28 days allowed within which to apply. For existing directors, a period to be specified by legislative instrument to be made by the Minister (understood to be 15 months) will be allowed for an application to be made.

### Verification of identity

The Registers Bill requires the registrar to give a person who has applied a DIN if “*the Registrar is satisfied that the person’s identity has been established.*” The Registers Bill does not specify how a person’s identity is to be established, but does allow the registrar to request a person’s tax file number. The provision of a tax file number cannot be required, only requested, but the Explanatory Memorandum says that “*The use of a person’s tax file number (when provided) is likely to reduce the time and cost involved in establishing a person’s identity to the benefit of both the applicant and the registrar.*”

It would seem from this that the main way of establishing identity for an Australian resident will be provision of a tax file number. However, establishment of identity of directors who are not Australian residents, whether for



Australian companies or registered foreign companies, could give rise to some complexities.

### Compliance with the requirements for DINs

As may be anticipated, there are civil and criminal penalties which will apply to contraventions of the requirements for DINs, such as failure to apply prior to appointment, or if directed by the registrar, applying for multiple DINs, misrepresenting a DIN, or being an accessory to misrepresenting a DIN. All of these carry a civil penalty of \$200,000.00 for a natural person and imprisonment for 12 months for applying for multiple DINs.

### Status of the Bill

This Bill, like the *Commonwealth Registers Bill* with which it has been “*bundled*” lapsed on the dissolution of the Parliament prior to the recent election. As the Government has now been re-elected, and as this has long been on the Government’s agenda, it can be expected that the Bill will be reintroduced.

No doubt the new law will be well-publicised if and

when it comes into effect, but all *eligible officers* and *registered bodies* that will be affected by the law should be alert to ensure that when it does come into effect DINs are obtained within the prescribed periods.

### FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:



**Sandy Donaldson** Director  
p: +61 8 8124 1954  
[sandy.donaldson@dwfoxtucker.com.au](mailto:sandy.donaldson@dwfoxtucker.com.au)



**Marianna Danby** Associate  
p: +61 8 8124 1833  
[marianna.danby@dwfoxtucker.com.au](mailto:marianna.danby@dwfoxtucker.com.au)

DISSECTING DECISIONS | By Patrick Walsh & Tiffany Walsh

## Provision of Suitable Employment Under Section 18 of the *Return to Work Act 2014 (SA)*

Decisions regarding the application of Section 18 of the *Return to Work Act 2014 (SA)* (**the Act**) are slowly trickling out of the South Australian Employment Tribunal. This is providing some more clarity, but a lot of questions still remain. Below is a brief summary of the decisions to date.

### *Walmsley v Crown Equipment Pty Ltd* [2016] SAET 4

In *Walmsley v Crown Equipment Pty Ltd* [2016] SAET 4 the worker, Mr Walmsley, had been injured in compensable circumstances. The employer, Crown Equipment Pty Ltd, terminated his employment as, amongst other things, they considered he was unable to fulfil the inherent requirements of his pre-injury role as a result of his injury. Prior to the worker’s employment being terminated, he was performing a collection of modified duties which he had capacity to perform. The worker sought an order under Section 18(5) of the Act that he be provided with employment.

The employer argued that if it was to continue

providing the worker with the collection of modified duties, it would be to their financial disadvantage as it would require them to essentially create a role that did not exist. However, His Honour Deputy President Judge Hannon found that the employer hadn’t established that it was not reasonably practicable to provide suitable employment in accordance with Section 18(1) of the Act.

His Honour then went on to find that it was not unreasonable for the employer to provide employment to the worker, and there were no grounds for him to exercise his adjudicative function to determine otherwise, and so ordered that the employer provide employment to the worker for which he was fit, and which as far as reasonably practicable was the same as, or equivalent to, the employment in which he was working before his injury.

It is also important to note in this dispute that His Honour considered that the fact that the worker’s

*continued overleaf...*

...from previous page

employment had been terminated did not preclude him from seeking a remedy under Section 18.

***Oldman v Department for Education and Child Development [2018] SAET 225***

In *Oldman v Department for Education and Child Development [2018] SAET 225*, the worker was employed as a teacher before her injury, and sought an order under Section 18 of the Act that her employer provide her with suitable employment as a school counsellor.

The worker accepted that this would, in effect, constitute a promotion (and was also a position for which the employer argued selection was merit based), but argued that she had previously worked as a school counsellor while filling in for a colleague who was on leave. She had also previously applied for several school counsellor positions, but was not successful in obtaining them.

His Honour President Judge Dolphin considered whether the worker was “suited” and “fit” for the role of school counsellor, coming to the conclusion that her physical restrictions and limitations were inconsistent with the requirements of the role. Accordingly, His Honour found on this basis alone, it would be unreasonable for the employer to provide the worker with a school counsellor position.

His Honour went on to consider whether the position of school counsellor was, as required by Section 18(1) of the Act, “equivalent” to the position of teacher. He found that there was lack of equivalence between the two positions, in particular in the salary structure, the fact that the position of school counsellor would constitute a promotion, and the fact that there is a more “*formal and school level determined path*” to become a school counsellor, than a teacher.

As His Honour had found that the worker was not suited and fit for the position of school counsellor, and

the position was not equivalent to her pre-injury role, he found that it was not reasonably practicable for the employer to provide the worker with employment as a school counsellor, and so declined to make the order sought by the worker.

***Puhara v Return to Work SA (Flinders Adelaide Container Terminal) [2019] SAET 3***

In *Puhara v Return to Work SA (Flinders Adelaide Container Terminal) [2019] SAET 3*, the worker, after suffering a compensable injury, sought an order for suitable employment pursuant to Section 18 of the Act, after having previously identified a variety of duties which he considered he was capable of performing.

Her Honour Deputy President Judge Farrell considered the medical evidence and what each of the duties proposed by the worker comprised. She was satisfied that the duties that the worker sought to be provided with would not put him at risk of re-injury, or of aggravating his injury such that it would prevent the order for suitable employment to be made. Further, given the range of duties that the worker was capable of performing, and the size of the employer’s operation, there were no operational reasons why the employer couldn’t provide suitable duties to the worker, and so it was reasonably practicable for the employer to provide suitable employment to the worker.

Accordingly, Her Honour found that it was not unreasonable for the employer to be ordered to provide the worker with suitable duties, and ordered the employer to provide employment to the worker.

***Papaefstratiou v Department for Education and Child Development [2019] SAET 32***

Finally, in *Papaefstratiou v Department for Education and Child Development [2019] SAET 32*, the worker suffered a compensable upper back injury in 2002.



*... when it comes to disputes concerning Section 18, much will turn on the specific facts of the case, the employer's organisation (for example, size, structure, and flexibility), and the role sought by the worker as compared to their pre-injury role.*

Immediately before the worker was injured in 2002, she typically worked two days per week in a contract role, and two days per week in a temporary relief teaching (TRT) role.

In 2015 the worker was engaged in contract work at Forbes Primary School and, as well as experiencing an increase in her back pain, was diagnosed with a psychiatric condition. She lodged a claim for compensation for the psychiatric condition – which was rejected – and sought another contract position that was not at Forbes Primary School. Since 2015, although the employer had offered – and the worker had undertaken – an average of two days of TRT work per week, the employer had not made any offers of contract positions to the worker. Accordingly, the worker sought an order that she be provided *“with contract teaching work, not at Forbes Primary School, within her medical restrictions of four days per week in a stable teaching classroom with continuity of teaching...”*

The employer argued that the worker was no longer incapacitated as a result of her 2002 injury, and as such the obligation to provide her with suitable duties was not enlivened. However, His Honour President Justice Dolphin accepted the medical evidence that the worker remained partially incapacitated for her work as a teacher as a result of the injury sustained in 2002. As such, Section 18(1) of the Act obliged the employer to provide the worker with suitable employment, and His Honour found that the worker had “discharged the onus of demonstrating” herself to be suitable and fit for the employment she sought.

His Honour then looked at the work that the worker sought, and the work she had been engaged in immediately prior to her injury in 2002. His Honour considered that given who the employer was, there was no issue in providing the worker with employment at a location that was not Forbes Primary School and, further, whether or not the worker taught all of her classes in one classroom could be discussed and decided between the school and the worker's doctors, based on the circumstances of the school and the worker's medical restrictions.

Accordingly, His Honour was satisfied that it was *“not unreasonable for the [employer] to provide suitable employment to [the worker]”*, and, given that the worker had continued to be provided with two days per week TRT work, and the work she had been deprived of was two days per week contract work, ordered that the suitable employment being two days per week contract teaching work be provided.

#### Comment

These cases demonstrate that when it comes to disputes concerning Section 18, much will turn on the specific facts of the case, the employer's organisation (for example, size, structure, and flexibility), and the role sought by the worker as compared to their pre-injury role.

On the face of it there is also a divergence in the Tribunal as to whether Section 18 can require an employer to provide a combination of suitable duties for an indefinite period, or whether it only requires an employer to provide suitable employment by way of a substantive role the same as, or equivalent to, the injured worker's pre-injury role.

**FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:**



**Patrick Walsh** Director  
p: +61 8 8124 1941  
[patrick.walsh@dwfoxtucker.com.au](mailto:patrick.walsh@dwfoxtucker.com.au)



**Tiffany Walsh** Lawyer  
p: +61 8 8124 1898  
[tiffany.walsh@dwfoxtucker.com.au](mailto:tiffany.walsh@dwfoxtucker.com.au)

NEWS &amp; VIEWS | By Ben Duggan

# FWC Proposes the Introduction of Additional Requirements for Award Based Annualised Wage Arrangements



The Fair Work Commission (**FWC**) handed down its interim decision regarding Annualised Wage Arrangements as part of its four yearly review of Modern Awards on 27 February 2019.

A key change to the current Annualised Wage Arrangements proposed by the interim decision is the move towards two model clauses for such arrangements that will introduce the following requirements for the first time:

- A record keeping obligation for employers; and
- The need for employers to conduct a reconciliation each year.

The FWC invited further submissions from interested parties in response to its interim decision which have been submitted during April 2019 such that it is anticipated that a final decision regarding Annualised Wage Arrangements will be handed down shortly.

We discuss the proposed key changes to Annualised Salary Arrangements as contained in the interim decision of the FWC below.

## The statutory framework

A modern award may include a

number of terms that are identified in the *Fair Work Act* (Cth) 2009 (**FW Act**), including:

Annualised wage arrangements that:

- have regard to the patterns of work in an occupation, industry or enterprise;
- provide an alternative to the separate payment of wages and other weekly entitlements; and
- include appropriate safeguards to ensure that individual employees are not disadvantaged.

The FWC is, in turn, required to conduct a four yearly review of the terms of modern awards in accordance with Section 156 of the FW Act.

## Current annualised wage arrangements

A total of 19 modern awards, including key awards such as the Private Sector Clerks Awards and the Manufacturing Industry Award, contain a term which regulates Annualised Wage Arrangements.

The Annualised Wage Arrangements clause which is contained in the

Private Sector Clerks Award which is similar, in effect, to the same clause found in other modern awards and is as follows:

### 17.1 Annual salary instead of award provisions

(a) An employer may pay an employee an annual salary in satisfaction of any or all of the following provisions of the award:

- clause 16—Minimum weekly wages;
- clause 19—Allowances;
- clauses 27 and 28—Overtime and penalty rates; and
- clause 29.3—Annual leave loading.

(b) Where an annual salary is paid the employer must advise the employee in writing of the annual salary that is payable and which of the provisions of this award will be satisfied by payment of the annual salary.

### 17.2 Annual salary not to disadvantage employees

(a) The annual salary must be no less than the amount the

employee would have received under this award for the work performed over the year for which the salary is paid (or if the employment ceases earlier over such lesser period as has been worked).

(b) The annual salary of the employee must be reviewed by the employer at least annually to ensure that the compensation is appropriate having regard to the award provisions which are satisfied by the payment of the annual salary.

### 17.3 Base rate of pay for employees on annual salary arrangements

For the purposes of the NES, the base rate of pay of an employee receiving an annual salary under this clause comprises the portion of the annual salary equivalent to the relevant rate of pay in clause 16 minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

#### New current annualised wage arrangements

In its four yearly review of modern awards, the FWC has sought, where possible, to introduce model clauses across modern awards.

As such, the FWC's proposal to introduce two model Annualised Wage clauses (the form of which is set out overleaf in Model Clause 1 & 3) across those modern awards that contain such clauses should not be a surprise.

Employers Groups are disappointed with the form of the two model clauses that propose the introduction of new requirements, in particular record keeping and reconciliation requests, that will increase the compliance requirements on employers who utilise Annualised Wage Arrangements.

The FWC rationale for the proposed introduction of a reconciliation requirement was that a number of Annual Salary Arrangements clauses in existing model awards were not drafted in such a manner as to ensure that employees were not disadvantaged as required by section 139(1)(iii) of the FW Act.

A reconciliation requirement was thought to be the most effective means of ensuring that there was no employee disadvantaged by an Annualised Wage Arrangement entered into under a modern award.

The FWC also concluded that a record keeping requirement was a necessary incident of the requirement to conduct an annual reconciliation.

An opportunity was, as discussed, provided for interested parties to lodge further limited submissions in relation to the proposed introduction of these new requirements.

The AiG, the ASU and several other interested parties have made further submissions during March and April 2019 that deal with several issues, in particular, the need for and nature of transitional provisions.

#### Comment

A number of private sector employers use annual salary arrangements for the award based employees in their business. This is primarily for administrative and payroll convenience.

The FWC's interim decision that there is a need to introduce additional requirements, in particular, a reconciliation requirement for annual salary arrangements will increase the administrative burden of these arrangements for employers.

Employers are likely to continue with annual salary arrangements despite these proposed additional requirements diminishing some of the advantages to employers in entering into such arrangements.

**TO OBTAIN ADVICE AS TO YOUR COMPLIANCE OBLIGATIONS IN PREPARATION FOR THESE ADDITIONAL REQUIREMENTS FOR ANNUAL SALARY ARRANGEMENTS FOR AWARD BASED EMPLOYEES (WHICH CAN BE EXPECTED TO BE INTRODUCED BY THE FWC LATER THIS YEAR) PLEASE CONTACT:**



**Ben Duggan** Director  
p: +61 8 8124 1881

[ben.duggan@dwfoxtucker.com.au](mailto:ben.duggan@dwfoxtucker.com.au)

*continued overleaf...*

...from previous page

# Model Clause 1

## **X. Annualised wage arrangements**

### *X.1 Annualised wage instead of award provisions*

(a) An employer may pay a full-time employee an annualised wage in satisfaction, subject to clause X.1(c), of any or all of the following provisions of the award:

- (i) clause X – Minimum weekly wages;
- (ii) clause X – Allowances;
- (iii) clause X – Overtime penalty rates;
- (iv) clause X – Weekend and other penalty rates; and
- (iv) clause X – Annual leave loading.

(b) Where an annualised wage is paid the employer must advise the employee in writing, and keep a record of:

- (i) the annualised wage that is payable;
- (ii) which of the provisions of this award will be satisfied by payment of the annualised wage;
- (iii) the method by which the annualised wage has been calculated, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation; and
- (iv) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount in excess of the annualised wage in accordance with clause X.1(c).

(c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified pursuant to clause X.1(b)(iv), such hours will not be covered by the annualised wage and must separately be paid for in accordance with the applicable provisions of this award.

### *X.2 Annualised wage not to disadvantage employees*

(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or if the employment ceases earlier over such lesser period as has been worked).

(b) The employer must each 12 months from the commencement of the annualised wage arrangement or upon the termination of employment of the employee calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 14 days.

(c) The employer must keep a record of the starting and finishing times, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement for the purpose of undertaking the comparison required by clause X.2(b). This record must be signed by the employee each pay period or roster cycle.

### *X.3 Base rate of pay for employees on annual salary arrangements*

For the purposes of the NES, the base rate of pay of an employee receiving an annual salary under this clause comprises the portion of the annual salary equivalent to the relevant rate of pay in clause X—Minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

# Model Clause 3

## X.1 *Annualised wage instead of award provisions*

(a) An employer and a full-time employee may enter into a written agreement for the employee to be paid an annualised wage in satisfaction, subject to clause X.1(c), of any or all of the following provisions of the award:

- (i) clause X – Minimum weekly wages;
- (ii) clause X – Allowances;
- (iii) clause X – Overtime penalty rates;
- (iv) clause X – Weekend and other penalty rates; and
- (v) clause X – Annual leave loading.

(b) Where a written agreement for an annualised wage agreement is entered into, the agreement must specify:

- (i) the annualised wage that is payable;
- (ii) which of the provisions of this award will be satisfied by payment of the annualised wage;
- (iii) the method by which the annualised wage has been calculated, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation; and
- (iv) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount in excess of the annualised wage in accordance with clause X.1(c).

(c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified in the agreement pursuant to clause X.1(b)(iv), such hours will not be covered by the annualised wage and must separately be paid for in accordance with the applicable provisions of this award.

(d) The employer must give the employee a copy of the agreement and keep the agreement as a time and wages record.

(e) The agreement may be terminated:

- (i) by the employer or the employee giving 12 months' notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or
- (ii) at any time, by written agreement between the employer and the individual employee.

## X.2 *Annualised wage not to disadvantage employees*

(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or if the employment ceases or the agreement terminates earlier, over such lesser period as has been worked).

(b) The employer must each 12 months from the commencement of the annualised wage arrangement or, within any 12 month period upon the termination of employment of the employee or termination of the agreement, calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 14 days.

(c) The employer must keep a record of the starting and finishing times, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement agreement for the purpose of undertaking the comparison required by clause X.2(b). This record must be signed by the employee each pay period or roster cycle.

## X.3 *Base rate of pay for employees on annual salary arrangements*

For the purposes of the NES, the base rate of pay of an employee receiving an annual salary under this clause comprises the portion of the annual salary equivalent to the relevant rate of pay in clause X—Minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

NEWS & VIEWS | By Ben Duggan

# Fair Work Rejects ‘Living Wage’ Argument of the ACTU in Minimum Wage Review Decision



The Fair Work Commission (**FWC**) in handing down its minimum wage review decision has rejected the ACTU’s push for a ‘living wage’ as part of its broader Change the Rules campaign.

A summary of the key wage increases that will apply from 1 July 2019 is as follows:

- the national minimum wage rate and modern award minimum wage will increase by 3%;
- the national minimum weekly wage will be \$740.80, an increase of \$21.60 per week; and
- the national minimum hourly rate will be \$19.49, an increase of \$0.56 per hour.

We discuss some of the key aspects of the minimum wage review below.

The statutory framework of the Fair Work Commission’s minimum wage review

A requirement of the *Fair Work*

*Act* (Cth) 2009 (**FW Act**) is that the FWC conducts a review of the national minimum wage (NMW) and minimum wages in modern awards each financial year.

The FWC conducts each review within the statutory framework of the FW Act which includes consideration of the following:

- the objects of the FW Act (Section 3);
- the modern award objective (Section 134); and
- the minimum wages objective (Section 284).

In the context of a review both the modern award objective and the minimum wage objective require the FWC to take into account a range of specific considerations including:

- various economic considerations;
- relative living standards and the needs of the low paid; and
- promoting social inclusion

through increased workforce participation.

The modern award objective also includes ‘the need to encourage collective bargaining’ (Section 134(1) (b) of the FW Act).

In the absence of any primacy or weighting being attributed to these three objectives the FWC’s task is an evaluative task by the Federal Court.

The FWC has summarised the practical application of its task in its 2014-2015 minimum review decision in the following manner:

“In taking into account available economic and social data, the (FWC’s) approach is broadly to assess the changes in these data from year to year and determine how they inform the statutory criteria. Put another way, and consistent with the ACCI’s submission, if there were no change in the relevant considerations from one year to the next then, all other things being equal, a similar outcome would result.”<sup>1</sup>

<sup>1</sup> Paragraph 57 of the Annual Wage Review 2017-2018 decision (C2018/1).





Importantly, the FW Act also establishes procedural fairness requirements for the minimum wage review that ensure that all interested parties are provided with a reasonable opportunity to contribute by making submissions to the review.

**The submissions as to the proposed minimum wage adjustment that should be made by the Fair Work Commission's minimum wage review**

A number of parties lodged submissions with the FWC containing proposals in response to the minimum wage review.

The ACTU's submission, consistent with its position under its broader Change the Rules campaign, sought a significant minimum wage adjustment such as to establish a modern day 'living wage'.

In essence, the argument was that the needs of the worker do not get the attention they warrant in the deliberations in the annual wage review and that balance can be restored by focusing more on assessing the income that a working family requires to purchase the basic commodities and services that they require for a civilised existence in contemporary Australia.

The ACTU also argued that a move towards a 'living wage' would help mitigate widening income inequality helping to restore social mobility and once again allow Australians to believe they live in a country where everyone gets a 'fair go'.

To achieve its goal of a 'living wage' it was proposed that the FWC should set the national minimum wage rate at a level which lifts a

single earner couple<sup>2</sup> above the 60% relative poverty line which required the following:

- an initial 6% increase in the national minimum wage which would result in an increase of \$43 per week as part of the current minimum wage review; and
- a further 5.5% increase in the national minimum wage as part of next years minimum wage review.

Bill Shorten's Federal Labor opposition supported this aspect of the ACTU's Change the Rules campaign committing to introduce the concept of the 'living wage' into wage setting principles for future minimum wage reviews of the FWC as part of its comprehensive workplace relations policy that it took to the Federal election.

A table was produced by the FWC in its minimum wage review decision<sup>3</sup> of the wage adjustments proposed by the various parties who made submissions which is reproduced overleaf.

### Conclusion

The FWC was greatly influenced by the continued positive prevailing economic conditions.

A slightly lower increase was determined to be appropriate this year than that awarded for last year (being 3.5%) having regard to several factors:

- the recent fall in GDP growth;

- the decrease in inflation; and
- the tax transfer changes.

The FWC was satisfied that the increase determined upon would not lead to an adverse inflationary outcome or a measurable negative impact upon employment whilst providing an improvement in real wages for those reliant on minimum award wages (and the NMW).

In rejecting the ACTU's submission for a significant increase to move towards a 'living wage' as part of its Change the Rules campaign the FWC found that such a proposed increase would if implemented:

"run a significant risk of dis-employment and adversely affect the employment opportunities for low skilled and young workers."

The FWC concluded for these reasons a more modest increase of 3% was appropriate.

**FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:**



**Ben Duggan** Director  
p: +61 8 8124 1881

[ben.duggan@dwfoxtucker.com.au](mailto:ben.duggan@dwfoxtucker.com.au)

*continued overleaf...*

<sup>2</sup> Either without children or with one or two children.

<sup>3</sup> Appendix 3 of the Annual Wage Review 2018-2019 decision (C2019/1).

...from previous page

Submission	Proposal		
	National minimum wage	Modern award minimum wages	Exemption/ deferral sought
Australian Government	No quantum specified		
Queensland Government	3.5 percent (\$25.17 pw)	No quantum specified	
South Australian Government	No quantum specified		
Victorian Government	Increased to \$20.00 ph	No quantum specified	
Western Australian Government	No quantum specified		
Federal opposition	No quantum specified, however, proposes a real increase		
Australian Council of Trade Unions	6.0 per cent, applicable to all		
Australian Industry Group	2.0 per cent, applicable to all		
Australian Chamber of Commerce and Industry	Not exceed 1.8 per cent, applicable to all		
Australian Council of Social Service	No quantum specified		
Australian Catholic Bishops Conference	\$40.80 pw	C10 and below: \$31.00 pw above C10: 3.7 per cent	
Australian Business Industrial and the New South Wales Business Chambers	No more than 2.3 per cent, applicable to all		
Australian Retailers Association	No more than 1.8 per cent	No quantum specified	
Chamber of Commerce and Industry Queensland	No more than 1.8 per cent		Natural disaster affected small businesses across give local government areas a deferral to the NMW and the modern awards for 6 months (effective 1 July 2019)
Chamber of Commerce and Industry of Western Australia	No quantum specified		
Housing Industry Association	No quantum specified		
Master Grocers of Australia	No more than 1.2 per cent, applicable to all		
National Farmers' Federation	No quantum specified		
National Retail Association	No more than 1.8 per cent		
Restaurant & Catering Industrial	No increase		
South Australian Wine Industry Association Incorporated	A flat dollar increase no higher than inflation (\$12.95)		
Australian Workers' Union	6.0 per cent, applicable to all		
National Union of Workers and United Voice (joint submission)	6.0 per cent	No quantum specified	
Retail and Fast Food Workers Union	All award wages, including those paid to employees such as young workers, apprentices, trainees, workers on supported wages and workers on lower classifications, increase to a level of at least 60% of median full-time earnings		
Council of Single Mothers and their Children	No quantum specified		
The Benevolent Society	No quantum specified		
Lee, Walter	No quantum specified		
Pastalatzis, Nick	No quantum specified		

NEWS & VIEWS | By Sandy Donaldson & Amy Bishop

# Registration of Everything (Commonwealth) Bill

## Business names and trading names on the ABR

Two events have or will affect the registration requirements for business names and a host of other matters requiring registration. These are:

- the expiration of the transitional period for recording of unregistered business names or “trading names” on the Australian Business Register (**ABR**) on 31 October 2018; and
- the Commonwealth Registers Bill 2019 (**Registers Bill**) providing for the introduction of a new registration regime for Commonwealth Acts that require registers to be kept.

### Business names and trading names

On 28 May 2012, the National Business Names Register was introduced by ASIC. Prior to that the Registrar of the ABR had an obligation to record, as well as business names registered under a State or Territory law, unregistered business names or “trading names” that were used by an entity prior to 28 May 2012. New names were not collected or displayed. This obligation continued until 31 October 2018. From November 2018 unregistered trading names have been removed and only registered business names are displayed.

If businesses continue to use unregistered trading names in the conduct of their business, there is an obligation to register these as business names. This is a requirement of the *Business Names Registration Act (Commonwealth)* 2011. This is the case irrespective of whether the name was previously used without registration, including names which may be registered as trade marks.

Registration of a trade mark which is used as a business name does not negate the requirement for registration of the name as a business name. Conversely, registration of a business name does not afford the name the same protection as that of a registered trade mark. Accordingly, consideration should be given to whether an application should be

made for registration of a business

name as a trade mark (if it can satisfy the conditions for registration of a trade mark) to gain the additional protection that is afforded by a registered trade mark.

### Commonwealth Registers Bill

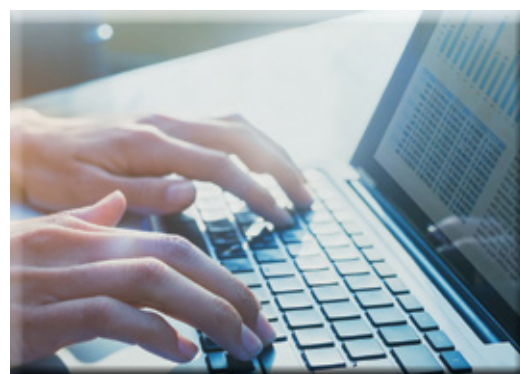
The Government has now introduced the Registers Bill into Parliament. The object of the legislation, when passed, will be to establish a new Commonwealth business registry regime intended to simplify and “provide a modern approach” to managing Commonwealth registers and to provide “more user-friendly and streamlined registry services”. Initially the focus is to be on registers kept by ASIC as well as the ABR, which is kept by the Commissioner of Taxation.

There are 35 registers which have been identified for inclusion in the new regime, but there could be more. There will not be one single register, nor will there be a single registrar. The requirements for each register will continue to be dictated by the legislation which establishes the register. The Explanatory Memorandum for the Bill says that “*the rules applying to these registers are prescriptive and are not uniform, technology neutral or governance neutral*”.

The new legislation will provide for uniform provisions for the functions of each registrar including data standards and the manner in which information may be given to the registrar. There will also be uniform requirements for disclosure and protection of confidentiality.

The registrar for a particular register must be a Commonwealth body, such as ASIC or the Commissioner of Taxation.

The registers in the table overleaf (from the Explanatory Memorandum) have been identified as those to be brought initially into the new regime:



*continued overleaf...*

...from previous page

No.	Current provision(s)	Register
<b>Entity name/identifier/information registers</b>		
	Section 24 of the ABN Act	Australian Business Register
	Section 118, 601DB and 1378 of the Corporations Act	ACN Register
	Section 22 of the Business Names Act	Business Names Register
	Section 601CB of the Corporations Act	Australian registrable bodies register – Australian bodies
	Section 601CE of the Corporations Act	Australian registrable bodies register – Foreign companies
	Section 152 of the Corporations Act	Reserved names register
	Section 601EB of the Corporations Act	Managed investments scheme register
	Part 10.13 of the Corporations Act (preserving the operation of the repealed Chapter 2K of that Act)	Company charges register*
	Section 213 of the Credit Act and subregulation 29(1) of the Credit Regulations	Credit registers – Licensees
	Section 213 of the Credit act and subregulation 29(3) of the Credit Regulations	Credit registers – Credit representatives
	Section 213 of the Credit Act and subregulation 29(4) of the Credit Regulations	Credit registers – Registered persons
	Section 213 of the Credit Act and Regulation 30A of the Credit Regulations	Credit register of unlicensed carried over instrument lenders
<b>Registers of banned or disqualified persons</b>		
	Section 1274AA of the Corporations Act 2001	Register of disqualified company directors and other officers
	Section 92AA of the Corporations Act and subregulation 7.6.06(1) of the Corporations Regulations	Register of banning orders under Division 8 of Part 7.6 of the Corporations Act
	Section 92AA of the Corporations Act and subregulation 7.6.06(2) of the Corporations Regulations	Register of disqualification orders under Division 8 of Part 7.6 of the Corporations Act
	Regulation 10.2.96 of the Corporations Regulations	Banned securities representatives register
	Regulation 10.2.96 of the Corporations Regulations	Banned futures representatives register
	Section 213 of the Credit Act and subregulation 30(1) of the Credit Regulations	Credit register of persons against whom a banning order is made
	Section 213 of the Credit Act and subregulation 30(2) of the Credit Regulations	Credit register of persons against whom a disqualification order is made
	Section 213 of the Credit Act and subregulation 30(3) of the Credit Regulations	Credit register of persons who are banned under a law of a State or Territory
	Section 128K of the SIS Act	Register of Disqualified self-managed superannuation fund (SMSF) auditors
<b>Professional registers</b>		
	Section 922A of the Corporations Act and subregulation 7.6.05(1) of the Corporations Regulations	Register of financial services licensees
	Section 922A of the Corporations Act and subregulation 7.6.05(2) of the Corporations Regulations	Register of authorised representatives of financial services licensees
	Section 922Q of the Corporations Act	Register of financial advisers
	Section 1285 of the Corporations Act	Register of auditors

	Section 15-1 of Schedule 2 to the Corporations Act	Register of liquidators
	Section 283BCA of the Corporations Act	Register relating to trustees for debenture holders
	Section 128J of the SIS Act	Register of approved SMSF auditors
	Section 1274 of the Corporations Act and regulation 7.6.02AGA of the Corporations Regulations	Carbon registrants register
	Regulation 10.2.96 of the Corporations Regulations	Register of futures licensees*
	Regulation 10.2.96 of the Corporations Regulations	Register of licence holders*
	Regulation 10.2.96 of the Corporations Regulations	Register of securities representatives*
	Regulation 10.2.96 of the Corporations Regulations	Register of foreign insurance agents*
	Regulation 10.2.96 of the Corporations Regulations	Register of general insurance brokers*
	Regulation 10.2.96 of the Corporations Regulations	Register of life insurance brokers*

\*Historical register. The registrar holds the information contained in the register and may exercise any functions and powers preserved by transitional arrangements.

It remains to be seen whether the new registration regime will achieve the objective, as stated in the Explanatory Memorandum, *“to facilitate a modern government registry regime that is flexible, technology neutral and governance neutral and that facilitates timely and efficient access to information (including, where appropriate, on a real-time basis) by regulators and other users of the information”* and whether the end result will be a benefit or burden to businesses.

### Status of the Bill

The Registers Bill lapsed on the dissolution of the Federal Parliament prior to the recent election. As the Government has now been returned as a result of the election, it may be anticipated that the Bill will be reintroduced, but this may not be a priority of the Government.

### Director Identification Number

The Registers Bill, when introduced to Parliament has been “bundled” with the *Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019* to legislate for the introduction of a *Director Identification Number* (see our article in this Report).

### FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:



**Sandy Donaldson** Director  
p: +61 8 8124 1954  
[sandy.donaldson@dwfoxtucker.com.au](mailto:sandy.donaldson@dwfoxtucker.com.au)



**Amy Bishop** Senior Associate  
p: +61 8 8124 1827  
[amy.bishop@dwfoxtucker.com.au](mailto:amy.bishop@dwfoxtucker.com.au)

DISSECTING DECISIONS | By Briony Hutchens &amp; Joanne Cliff

# Offloading Tax Liabilities Between Spouses

## High Court decision of the Commissioner of Taxation v Tomaras



With property division between separated spouses, it has always been the position that the tax liability of one spouse is taken into consideration as part of the settlement as a liability of the marriage. However, as a result of the High Court decision of the *Commissioner of Taxation v Tomaras* [2018] HCA 62 handed down on the 13th of December 2018, the situation has advanced to where one spouse can actually substitute for the other spouse in terms of a liability owing to the Australian Taxation Office. Will this open the flood gates for one spouse to avoid paying tax at the expense of the other spouse?

### Background

Mr and Mrs Tomaras married in July 1992. They separated 17 years later in July 2009.

During the marriage, the Commissioner of Taxation issued various assessments to Mrs

Tomaras requiring her to pay, amongst other things, income tax, the Medicare levy, penalties and a general interest charge.

Mrs Tomaras failed to make any payments as assessed and furthermore did not lodge any objections to the assessments. The Commissioner obtained a default judgement for payment of the debt on 12 November 2009 which, at the time of the application, remained unpaid and was accruing a general interest charge.

On 5 November 2013, Mr Tomaras was declared bankrupt. About six weeks later, on 20 December 2013, Mrs Tomaras commenced proceedings in the Federal Circuit Court against the husband seeking an alteration of their property interests and an order that the husband be responsible for all income tax assessed on income received or deemed to have been received by the wife for the income tax year ending 30 June 2009 to

the date of payment. At this stage the wife's liability to the ATO stood at \$256,787.32. An order was also sought that the husband sign all documents to release the wife from and indemnify her against any present or contingent tax and bank liabilities.

The matter proceeded to trial and in February 2016 a Trial Judge granted the Commissioner of Taxation leave to intervene in the proceedings in relation to these orders sought.

The Trial Court referred the matter to the Full Court of the Family Court on the question of law as to whether the Trial Court (Federal Circuit Court of Australia) had power under

*... there is the power now to make an order for the more financial spouse to take on a tax debt or penalty ...*

Section 90AE(1) or (2) of the *Family Court Act 1975* to order that the husband be substituted for the wife in relation to a taxation debt owed by the wife to the Commonwealth of Australia.

#### Legislation - Sections 90AE(1) and 90AE(2) of *Family Law Act 1975* (as amended)

In proceedings under Section 79 (property division between two spouses) a debt owed by a party to a marriage is treated as property.

Section 90AE(1) allows, amongst other things, for an order binding the creditor to substitute one party for both parties in relation to a debt owed to the creditor and an order binding the creditor to substitute the other party or both parties to the marriage in relation to the debt owed to the creditor.

Section 90AE(2) allows, amongst other things, for an order that alters the rights, liabilities or property interests of a third party in relation to the marriage.

The Commissioner for Taxation argued that the Federal Circuit Court lacked the power to make such an order because the power of the Court did not extend to taxation debts owed by one or other of the parties to a marriage to the Commonwealth. Furthermore, the Commissioner argued that the *Family Law Act* was not binding on a Crown entity such as the ATO as usually a section in legislation would specifically state that it is binding on the Crown.

The Full Court of the Family Court held that the Court did have power to make the orders sought by the wife, but only on the basis that the *Family Law Act* confers power

*... it seems probable that the orders will only be considered in situations where one spouse is in a much better financial position than the other and could afford to discharge the debt ...*

to direct the Commissioner to substitute one party for another in relation to a debt owed to the Commissioner.

The Commissioner appealed the decision of the Full Court of the Family Court to the High Court of Australia.

#### High Court Decision

The High Court held that Section 90AE of the *Family Law Act* did bind the Crown and concluded that the Trial Court did have the power under Sections 90AE(1) or (2) to order that the husband be substituted for the wife in relation to the tax debt owed by the wife to the Commonwealth of Australia.

The High Court, however, added a considerably important proviso to the question of law stated by the inferior Court. Specifically the High Court referred to Section 90AE(3) which provides that the Court may only make an order for substitution if (amongst other things):

- a. the making of the order is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage;
- b. if the order concerns a debt to a party to the marriage - it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full; and

- c. the court is satisfied that, in all the circumstances, it is just and equitable to make the order.

In other words, the Section states that the Court should not make an order for one party to the marriage to be substituted for the other in payment of the debt if it means that the tax would never be paid in full OR if it would not be just and equitable to do so. This proviso is pertinent to the facts of the case because the husband had been made bankrupt and therefore, on the face of it, the effect of substituting the husband would be that the tax debt would never be paid in full. As many of the judges pointed out, this fact alone should then dictate that the order is not made in this case.

In addition, one of the other arguments put forward by the Commissioner as to why the Court's powers under s90AE should not extend to tax debts was that substitution of the party to a tax debt would impede the Commissioner's powers under both the *Income Tax Assessment Act 1936* and the *Taxation Administration Act 1953* as to amendment of the assessment, recovery of any unpaid amount and imposition of general interest charge, as well as deny the party who becomes liable under the substitution the right to exercise any objection, review and appeal rights under the *Taxation Administration Act 1953* in respect of the assessment.

*continued overleaf...*

...from previous page

## ... it appears that parties are now able to consider substitution of tax liabilities as an option when drafting orders sought or negotiated settlements in property disputes ...

While no conclusion was made by the Court as to whether the substitution would, in fact, impede the Commissioner's powers and deny the taxpayer objection and appeal rights, the Court concluded that all of these factors would need to be taken into account in determining whether it is just and equitable to make the order. In doing so, the Court commented that the scope for s90AE to apply to substitute the person liable for a taxation debt would be limited.

### Effect of Decision

With the Trial Court now having the power to make the order, the question will be: should the order be made, bearing in mind the husband's bankrupt status? Therefore, it may be that Mrs Tomaras' victory is short-lived, as the Trial Court may decide, because of the particular circumstances of this case, that to make the order would avoid the payment of the debt so refuse to make the order.

In situations however where bankruptcy of one party is not an issue, then there is the power now to make an order for the more financially sound spouse to take on a tax debt or penalty, provided the order does not result with debts not being paid and it is just and equitable to make the orders. As pointed out by the High Court, the uncertainty as to the effect of a substitution on the Commissioner's powers of recovery, etc and the taxpayer's rights of objection and appeal could, in itself, be enough for a court to determine that a substitution order in relation

to a tax liability is not just and equitable.

In any event, it seems probable that the orders will only be considered in situations where one spouse is in a much better financial position than the other and could afford to discharge the debt and where there is unlikely to be any dispute in relation to the amount payable under the assessment.

It must also mean that if one party to the marriage is ordered to pay the debt of the other party, there will be an adjustment of property interests to reflect that the tax liability has been shifted from one spouse to the other. In other words, there should be an adjustment of property interest in favour of the spouse paying the debt.

Of particular note is the required wording for the orders. Often orders sought by parties are on the basis that one party be solely responsible for the debt, with the order requiring one party to either pay the debt or to indemnify the other party in respect of the debt. However an order on these terms will not be sufficient to substitute the other party under s90AE. Instead, the order has to be termed to direct the Commissioner of Taxation to substitute one party for the other.

### Conclusion

In summary, therefore, it appears that parties are now able to consider substitution of tax liabilities as an option when drafting orders sought or negotiated settlements in property disputes, provided the wording of

the order allows only substitution of one party to the marriage for the other.

However, given the reservations expressed by the High Court as to whether the impact of the substitution would adversely affect the rights and powers of both the Commissioner and the taxpayers in relation to, amongst other things, disputing the assessment and recovering the amount of the debt, it is likely that there will only seldom, if ever, be occasion for the court to actually exercise the power.

**FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:**



**Briony Hutchens** Director

p: +61 8 8124 1821

[briony.hutchens@dwfoxtucker.com.au](mailto:briony.hutchens@dwfoxtucker.com.au)



**Joanne Cliff** Director

p: +61 8 8124 1803

[joanne.cliff@dwfoxtucker.com.au](mailto:joanne.cliff@dwfoxtucker.com.au)



INSIGHT | By Patrick Cook

# Crowd-Sourced Funding for Private Companies

Crowd-sourced equity funding (**CSF**) is now available for proprietary companies. Up until recently, CSF was only available to qualifying unlisted public companies. As the vast number of companies registered in Australia are proprietary companies, the CSF regime was largely ineffectual.

We have previously published articles on how the CSF regime works in Australia. You can access those articles by visiting our website and checking out the 2016 Summer and 2017 Winter Reports.

Just to refresh your memory, in this article we will first give you a brief summary of what CSF is, and then summarise how CSF works differently for a proprietary company.

## What is CSF?

Crowd-sourced equity funding is a type of fundraising facilitated on-line that allows a large number of individuals – the crowd – to make small financial contributions towards a company in exchange for an equity stake in the company.

CSF is an alternative way to raise funds, especially for innovative and early-stage or growth-stage companies that may not have access to debt funding or traditional equity funding.

The level of disclosure required for companies to make CSF offers to the crowd is significantly less onerous than typically required in a prospectus and generally not prohibitively expensive.

The CSF regime kicked off in Australia in September 2017 but only applied to unlisted public companies. That meant that a proprietary company that wished to access CSF had to first convert from a private company to a public company. That all changed with the passing of the *Corporations Amendment (Crowd-sourced Funding for Proprietary Companies) Act 2018*, and now private companies can access CSF capital.

## CSF for proprietary companies

CSF works a bit differently for proprietary companies. Here is a summary of some key features:

- **Shareholder limits:** the standard 50 non-employee

shareholders limitation still applies, but shareholders that hold shares issued under a CSF offer do not count towards this shareholder cap.

- **Two directors:** the company must have at least 2 directors, a majority of whom ordinarily reside in Australia.
- **Takeover provisions:** the exemption from the *Corporations Act 2001* (Cth) takeover provisions continues to apply for so long as the company is eligible to make a CSF offer.
- **Related party transactions:** shareholder approvals are required for any related party transactions under Chapter 2E of the *Corporations Act 2001* (Cth).
- **Audit:** once more than \$3 million from CSF offers is raised, the company must have its financial statements audited.
- **Financial statements:** financial and directors' reports must be prepared in accordance with accounting standards.
- **Company registers:** more comprehensive company registers must be maintained, including details about the CSF offer to shareholders as part of the company registers.

## WHAT SHOULD I DO?

IF YOU WOULD LIKE TO FIND OUT MORE ABOUT CSF OR DIFFERENT FUNDRAISING OPTIONS AND STRATEGIES AVAILABLE TO YOUR BUSINESS, PLEASE CONTACT:



**Patrick Cook** Senior Associate  
p: +61 8 8124 1805  
patrick.cook@dwfoxtucker.com.au

SUITS OFF | Staff Profile

# Managing Director. Master Litigator. Fervent Family Man.

**Joe DeRuvo** Managing Director

With a wife who is a fellow lawyer, you might think that dinner talk at Joe DeRuvo's dining table would revolve around the law. And with Joe specialising in 17 different areas of dispute resolution, and his wife running a nutraceuticals manufacturing and distribution company (the science of food as medical treatment), no doubt there would be some very intriguing conversations and debates. But despite Joe's love of the mental challenge presented by his multifaceted job, work life balance wins the day at the DeRuvo home so they leave business behind to enjoy downtime as a family.

One regular topic of conversation at the table is the couple's 11-year-old daughter, who attends Immanuel College, doubling as a diligent, successful student and talented, passionate athlete in pursuit of perfection. *"She is a state champion race walker, trained by an ex-Olympic coach with a number of state titles under her belt"* boasts the proud Dad, *"and it's fair to say I'm fervently involved in her progress on and off the field."*

In fact, Joe admits that balancing his responsibilities at DW Fox Tucker, along with the demands of his daughter's hectic academic and athletic schedule, has led to a drop of the ball when it comes to his

own fitness regime. Until recently he religiously rode his bike to work and worked out in the gym regularly. *"I've fell out of the habit"*, he says with a wistful, slightly guilty expression, *"and I've got to get back onto it"*.

**Clients & colleagues agree: Joe's at the top of his game**

As a seasoned and successful dispute resolution lawyer, Joe thrives on developing strategies that help to reduce his clients' exposure to liability. The keen insights derived by Joe from his years of practice, enables him to devise difficult to formulate arguments and strategies to mitigate risk. When litigation becomes unavoidable, Joe's formidable skills in the courtroom come to the fore.

Last year Joe was rewarded for his prowess in a vote by his peers and added to the prestigious "Best Lawyer" listing, in the category of Alternative Dispute Resolution. The pride he feels at inclusion in this list is clear: *"To be regarded as one of the best among 3200 lawyers across 370 Australian law firms is a true privilege"*, Joe says with a modest smile.

In 2016 Joe was included in *Doyle's Guide* as a



*... if I could wave a magic wand, we'd all be living on the sand in the Maldives and scuba diving every single day.*

"Leading Litigation & Dispute Resolution Lawyer", a particularly treasured recognition which comes from both colleagues and clients. He quips, *"One of the big things I relish about this job is that I get to meet lots of different people from many walks of life, so it's good to know they like me as much as I like them!"*

*The art of being steps ahead in legal success.*

Joe is known for saying that the art in his area of expertise is being three steps ahead, and it's a tactic which has worked extremely well for his clients. In a highly distinguished 30+ year career Joe has achieved success in many milestone cases, scoring big wins for private firms, public companies, multinational corporations and government bodies alike at all levels of court, including the High Court. Many of these cases involved high-profile companies with complex and protracted proceedings, with millions or sometimes hundreds of millions of dollars in settlements or savings for his clients.

In one case, which happens to be the longest running such proceeding in Australian civil history, Joe conducted a successful appeal in the High Court to wipe off \$86 million in damages for his client. It was a two year trial, but the client considers it time very well spent. Joe says simply, *"Sometimes slow and steady really does win the race"*.

Another notable litigation involved a point of law passing through the three stages of the South Australian Supreme Court to a High Court appeal in just four weeks. The decision in this landmark case resulted in the High Court rewriting the law of causation and foreseeability in negligence cases.

Other career highlights include involvement in one of the largest price fixing investigations by the ACCC, and one of the most significant insolvent trading claims in Australia.



*The magic, the Maldives & scuba diving*

As you can see, you don't have to look far for reasons why Joe DeRuvo is so firmly at the forefront of his profession. But perhaps more impressive than his ability in tackling tricky legal disputes, is the simplicity of his philosophy about what's important in life ... because his pipe dream does not take place on a global legal stage, nor does it involve professional fame or notoriety.

*"As a family we love to travel together, especially to beach destinations. So, if I could wave a magic wand, we'd all be living on the sand in the Maldives and scuba diving every single day"*.

We haven't got an office in the Maldives. If we ever do, Joe will be the first to know.



**Joseph DeRuvo** Managing Director  
p: +61 8 8124 1872  
[joseph.deruvo@dwfoxtucker.com.au](mailto:joseph.deruvo@dwfoxtucker.com.au)

# DW FoxTucker

Lawyers

## DW Fox Tucker Lawyers

L14, 100 King William Street, Adelaide, SA 5000  
p: +61 8 **8124 1811** e: [info@dwfoxtucker.com.au](mailto:info@dwfoxtucker.com.au)

[dwfoxtucker.com.au](http://dwfoxtucker.com.au)



COMMERCIAL | CORPORATE | DISPUTES | FAMILY | INSOLVENCY | TAX | HOSPITALITY | IP | PROPERTY | ENERGY | RESOURCES  
EMPLOYMENT | WORKERS COMPENSATION | SELF INSURANCE | RISK MANAGEMENT | INSURANCE | WILLS | ESTATE PLANNING

DW FoxTucker