

NEWSLETTER

Legal Up-Date

February 2006

WHO GETS YOUR SUPERANNUATION WHEN YOU DIE?

Many people are surprised to learn that the person or people who will receive their superannuation death benefits when they die is not determined by their Will. Rather, it is in the discretion of the trustee of their superannuation fund to determine who will receive their superannuation death benefits and whether the benefits are paid in a lump sum or by some other means such as by way of an allocated pension.

The trustee of your super fund will normally choose from a range of your "tax dependants". Most superannuation trust deeds define a dependant as the deceased member's spouse (including a defacto spouse), children (including stepchildren, ex-nuptial children and adopted children) or any other person who was wholly or partially dependant on the deceased member at the date of death.

A number of superannuation funds permit members to make a binding death benefit nomination. If a valid nomination is in place at the time of death, the trustee of the superannuation fund no longer has discretion about who to pay the superannuation entitlements to, but is bound by the nomination. However, it is important to be aware that many public, industry and government funds do not permit binding death benefit nominations.

The legal requirements for a binding death benefit nomination are:

1. a binding nomination must be signed and dated in the presence of two witnesses. A witness can be any person who is over the age of 18 years and who is not a nominated beneficiary; and
2. all binding death benefit nominations last a maximum of 3 years. Therefore, you must up-date your binding nomination at least every 3 years.

Sometimes it might be necessary to up-date your binding nomination before the 3 year time limit. Failure to document the change of nominated beneficiary will leave the trustee of the fund no alternative but to pay the benefit to an unintended beneficiary. Further, if a binding nomination is not up-dated, it may lead to adverse tax consequences. For example, if payment has to be made under a binding nomination to a person who is no longer a "tax dependant", tax of up to 35.1% may be payable in respect of the payment.

When dealing with your superannuation, you should be aware of two critical estate planning issues, namely:

1. who gets your superannuation when you die; and
2. whether the payment of your superannuation death benefit attracts tax, and if so, at what rate. The definition of "dependant" under tax legislation does not always correspond with the definition of "dependant" under superannuation legislation. For example, a child over 18 years may be considered dependant under superannuation legislation but not under tax legislation.

If you wish to discuss your superannuation or any other issues concerning your estate planning, please do not hesitate to contact Norbert Schweizer of our office.

RECENT DECISIONS ON THE ISSUE OF PERSONAL SERVICES INCOME

A recent decision in the Administrative Appeals Tribunal (the "AAT") disallowing deductions claimed as *personal services income*, is important for many consultants and contractors.

Vivi PC Supplies and IT Consultants Pty Ltd ("Vivi") provided the services of 4 consultants to four separate firms in the 2002 income year, and to three separate firms in the 2003 income year. Vivi derived income from these contracts and paid salaries to the individuals concerned.

The ATO issued amended Notices of Amended Assessment, disallowing deductions claimed by Vivi and stating that 100% of the income was to be attributed to each of the 4 consultants leaving no profit in Vivi. The objections to the Notices lodged by a director of Vivi were disallowed.

In reaching its decision, the AAT held that:

1. Vivi was not a personal service business;
2. Vivi did not satisfy the 'results' test – there being no evidence that it is customary for entities providing the services of IT personnel to be paid on the basis of a specific result;
3. Vivi did not supply the tools of trade needed to perform the work nor was it liable for the cost of rectifying any defects in the work performed; and

4. The director of Vivi was not taken to be conducting a personal services business as he derived 100% of his income from one source.

The 2005 decision of *Metaskills Pty Limited and Commissioner of Taxation* also upheld the Commissioner's decision to refuse an application by a company for a Personal Services Business Determination. The decision was essentially that:

1. The contract was between the individual and the customer for the individual's services – the fact that the individual's company, Metaskills Pty Ltd, rendered invoices did not enable it to argue that the individual was acting as agent in entering into the contract. Accordingly, the income belonged to the individual and not his company;
2. Payment was for services and not to produce a specific result;
3. There was no contractual requirement for Metaskills to provide tools to perform the work (the fact that it did is irrelevant);
4. Metaskills did not have separate business premises at the relevant time; and
5. Metaskills did not satisfy the unrelated clients test and unusual circumstances referable to that test as 80% or more of its work was for the one customer.

If you require advice as to whether your income is "personal services income" and/or your business falls within the definition of a "personal services business" and is therefore eligible for the relevant tax deductions, please contact us.

RETAIL LEASES AMENDMENT ACT 2005

Further amendments to retail leases legislation have become effective from 1 January 2006.

The *Retail Leases Act 1994* applies generally to retail shops of less than 1000 square metres (whether located on a street corner, in a strip of shops, in a shopping centre, in a mall, in a court or in an arcade). The calculation of the area of the shop does not include carparking or unattached storage areas.

The *Retail Leases Amendment Act 2005* (the "Act") has introduced the following major changes to the *Retail Leases Act 1994*:

Pre-lease Stage

- landlords must give a copy of a retail tenancy guide, developed by the NSW Government as well as a copy of the proposed lease, to any prospective tenant as soon as negotiations begin.
- The Act now applies to a tenancy comprised of successive short-term leases whose total terms exceed 12 months unless a waiver of the right to a five year lease term is given by the tenant.

- If a tenant has agreed to a shorter term than five years and the lease is extended to a five year term, the landlord may change the rent from the date of commencement of the additional period.
- Various amendments to the mandatory inclusions in the Disclosure Statement have been made.

Other amendments

- With effect from 1 July 2005, lessors no longer have the right to recover from lessees, legal costs incurred in the preparation or renewal of a retail lease except in limited circumstances – effectively lessors are only entitled to reasonable costs associated with making an amendment **requested by the lessee**. Further, the amendment must not insert or vary the particulars of the lessee, the rent or the term; remedy a failure by or on behalf of the lessor to include or omit a term that was agreed between the lessor and the lessee at the time or communicated before the lessor was given a lessees' disclosure statement.
- The establishment of a government facility and system for the collection, management and refund of cash retail shop security bonds.
- An increase in the monetary jurisdiction of the Administrative Decisions Tribunal to \$400,000 calculated on a net basis (after setting off each party's claims against the other) and expanding its functions in various ways including allowing a party to apply for a decision that a valuation be reviewed by two other valuers.
- Lessors are no longer required to provide outgoing expenditure reports every six months.
- The amended provisions dealing with market review of rent during the term of a lease include that the level of experience required for *specialist retail valuers* in certain circumstances is increased and parties are able to make submissions to the valuer to assist in the valuer's consideration.

For specific advice on whether (and if so how) your business is affected by the amendments to the *Retail Leases Act 1994* please contact Norbert Schweizer of this firm.

YOUR FEEDBACK

If you have any comments about this newsletter, suggestions for improvement or would like to see any particular areas of law which interests you covered, please drop us a line at:

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