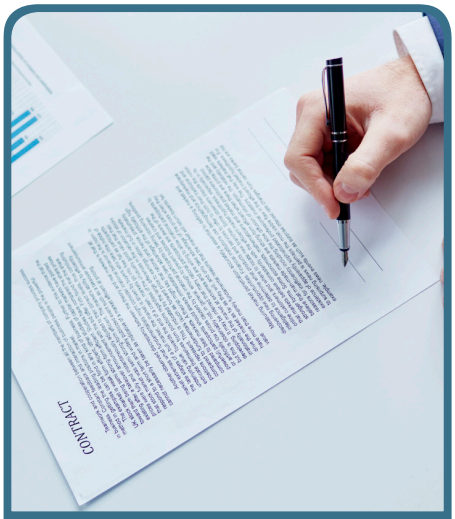
Q2 2016

BUSINESS MATTERS

Strategies for managing your business



INSIDE:

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Unfair contract terms for businesses

New laws will provide greater protection to small businesses from unfair contract terms. These changes will provide the same protection currently enjoyed by consumers in standard form contracts.

A standard form contract is a contract that has been prepared by one party to the contract and is not subject to negotiation between the parties. In other words, it is offered on a 'take or leave it' basis.

Standard form contracts are nothing new; small businesses enter into them regularly for financial products and services. Contracts for business loans and credit cards, for example, are types of standard form contracts.

The law will apply to standard form contracts entered into or renewed on or after 12 November 2016, where:

- the contract relates to the supply of goods or services or the sale or grant of an interest in land
- at least one party to the contract is a small business (employs fewer than 20 persons)
- the upfront price payable under the contract does not exceed $300,000, or $1,000,000 if the contract duration is no longer than 12 months

Businesses should review their standard form contracts to remove any terms that could be considered unfair before the law comes into effect on 12 November 2016. Examples of terms that may be unfair, include:

- terms that enable one party (but not another) to avoid or limit their obligations under the contract
- terms that enable one party (but not another) to terminate the contract
- terms that penalise one party (but not another) for breaching or terminating the contract
- terms that enable one party (but not another) to vary the terms of the contract

Ultimately, if a court or tribunal finds that a term is 'unfair', the term will be void and non-binding on the parties. However, the remainder of the contract will continue to bind the parties if it is capable of operating without the unfair term.

Business owners should identify any terms in affected contracts which might be at risk, for example, those which cause a significant imbalance in the rights to the parties, to ensure compliance.

To determine whether any of your existing contracts are likely to be affected:

- identify those contracts which are at risk of being considered 'standard form', for example, contracts which typically involve very little negotiation.
- know the size of the party you are entering into the contract with - not only at the time of entry into the contract, but also at each renewal.
- calculate the upfront price payable under each contract to identify those which are valued at less than $300,000 or $1,000,000 if the contract extends for more than 12 months.

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Preparing for the FBT year-end

With the end of the fringe benefits tax (FBT) year fast approaching, business owners need to be aware of the FBT and gross up rates when preparing for their FBT return.

The FBT rate increased from 47 per cent to 49 per cent from 1 April 2015. The rate increase was due to the introduction of the Temporary Budget Repair Levy imposed on individuals for a two year period (1 April 2015 to 31 March 2017).

Consequently, the gross up rates were increased from 1 April 2015 to 2.1463 for Type 1 benefits (GST-creditable benefits), and 1.9608 for Type 2 benefits (no entitlements to a GST credit).

The FBT rate will return to 47 per cent from 1 April 2017, as a result of the discontinuation of the Temporary Budget Repair Levy. The gross up rates from 1 April 2017 will be 2.0802 for Type 1 benefits and 1.8868 for Type 2 benefits.

Whether the benefits provided to the employee are type 1 or type 2, only the lower gross-up rate is used for reporting on employees' payment summaries.

New rules when paying car allowances

Last year's changes to tax law have made claiming car expense tax deductions for individuals much simpler.

Before July 1, 2015, there were four methods available to employees for claiming car expenses:

- cents per kilometre (capped at 5000 business kilometres)
- logbook (unlimited kilometres)
- 12 per cent of original value
- one-third of actual expenses

Now, the cents per kilometre and logbook methods are the only two available to use.

Cents per kilometre method

The cents per kilometre method was changed to use a standard rate of 66 cents per kilometre, irrespective of the car engine's size for the 2015-16 income year. These rates were previously based on a car's engine size and whether the car had a rotary or non-rotary engine.

The ATO set the PAYG (Pay-As-You-Go) withholding rate for cents per kilometre car allowances at 66 cents per kilometre from July 1, 2015. Failing to withhold any amount over 66 cents for all future payments of a car allowance may result in an employee having a tax liability when they lodge their tax return.

The ATO has also stated that employers who have already paid employees a car allowance at a higher rate should discuss with the employees if they want the employer to increase the withholding amount for the rest of the financial year to make up for the shortfall.

Logbook method

Under the logbook method, claims are based on the business-use percentage of the expenses for the car, such as running costs and decline in value. Capital costs like the car's purchase price and improvement costs are not included.

To determine the business-use percentage, taxpayers need a logbook and odometer readings for the logbook period (which is a minimum, continuous 12 week period).

Revisiting super basics for employers

For many employers, it can be easy to forget the responsibility of managing your superannuation obligations amidst the busy lifestyle of operating a business.

However, those who fail to meet their super obligations risk facing severe and even damaging liabilities.

Employers who pay their workers $450 or more before tax in a calendar month must pay superannuation on top of the employee's wages. If an employee is under the age of 18 or is a private or domestic worker, they must work for more than 30 hours per week to qualify. The minimum an employer must pay is called the super guarantee (SG).

The SG is current 9.5 per cent of an employee's ordinary time earnings, and must be paid at least four times per year. Employers who fail to pay the SG on time may have to pay a super guarantee charge (SGC).

Employees can choose the fund you pay their super into. However, if an employee is not eligible to choose or does not make a choice, the employer must pay their contributions into an employer-nominated or default fund.

The employer-nominated or default fund must be a complying fund (meets specific requirements and obligations under super law) and be registered by the Australian Prudential Regulation Authority (APRA) to offer a MySuper product.

Some super funds may ask that an employer becomes a 'participating employer' before they can pay contributions to them. Participating employers may have to make super payments more frequently; such as monthly instead of quarterly.

Employers can claim a tax deduction for super payments they make for employees in the financial year they make them. Contributions are considered to be paid when the employee's super fund receives them.

Missed payments may attract the SGC (superannuation guarantee charge). While the SGC is not tax-deductible, employers can use a late payment to reduce the charge or as pre-payment of a future super contribution (for the same employee), which is tax-deductible.

The difference between deeds and agreements

The decision on whether to use a deed or an agreement can make a significant difference to the success of a transaction or project.

An agreement (otherwise known as a contract) must meet the following pre-conditions to be valid and enforceable:

- each party must have the intention to be legally bound
- there must be an offer from one party that is accepted by the other party
- consideration must flow between the parties

For a deed to be considered valid and enforceable, it must:

- be in writing
- be signed
- be witnessed by a person who is not a party to the deed
- use wording that indicates that the document is a deed i.e. 'this deed' or 'executed as a deed' and 'signed, sealed and delivered' should be used in the execution clauses. The wording in the document must be consistent.
- be provided to the other party or parties
- be supported by evidence that the parties intended the document to be a deed and are bound by it

The main difference between an agreement and a deed is that there is no requirement for consideration to make a deed binding. This is because of the idea that a deed is intended, by the executing party, to be a solemn indication to others that they truly mean to do what they are planning to do or are doing.

A deed is considered to be binding on a party when they have signed, sealed and delivered the deed to the other parties, even if the other parties have not yet executed the deed document.

In terms of determining whether a document is a deed or agreement, it depends on whether the person executing the deed intends for the document to be immediately binding on that person. In this circumstance, the document is more likely going to be interpreted as a deed rather than an agreement.

Each state in Australia has specific legislation regarding the period of time in which claims or actions can be lodged following the breach of an agreement or deed.

A claim following a breach of an agreement must be submitted within 6 years of the breach occurring. The period is longer for those who make a claim following a breach of the terms of a deed.

Since the length of time usually depends on the law of each state, it is important to have a jurisdiction clause in your deed or agreement.

New CGT rules when selling or buying a business

Recent changes were made to the CGT treatment on the sale and purchase of businesses involving 'look-through earnout' rights.

On 25 February 2016, a new law was enacted to deal with the tax treatment of earnouts for vendors and purchasers.

An earnout is an arrangement, usually entered into on the sale of an asset or business, where rights to future financial benefits are linked to the performance of an asset or assets on sale. It is commonly used where the parties cannot agree on the value of an asset or business.

Not all earnout arrangements will qualify for the CGT look-through treatment under the new law.

The ATO considers a right as a 'look-through earnout right' if:

- it is created on or after 24 April 2015
- the right is to future financial benefits, which cannot be reasonably ascertained at the time the right was created
- the right was created under an arrangement involving the disposal (CGT event A1) of a CGT active asset of the seller
- all financial benefits under the right are provided within five years, from the end of the income year in which the CGT event occurred
- the financial benefits are contingent and relate to the future economic performance of the CGT asset or a business for which it is expected that the CGT asset be an active asset

Under the new law, the changes to CGT treatment of 'look-through earnout rights' include:

- capital gains and losses arising in respect of look-through earnout rights are disregarded;
- for the purchaser, any financial benefit provided (or received) under a look-through earnout right increases (or decreases) part of the cost base or reduced cost base of the underlying asset; and
- for the vendor, any financial benefit received (or provided) under the look-through earnout right increases (or decreases) the capital proceeds for the underlying asset.
- the arrangement must be dealt with on an arm's length basis.

It is important to note that this new law does not apply to earnout arrangements entered into prior to 24 April 2015. However, transitional protection is provided to taxpayers that have reasonably and in good faith anticipated the changes to the tax law in this area as a result of the announcement by the former government.

The new law also has implications for entitlements to the small business CGT concessions as they can now be revisited as and when payments under the earnout are received.

CGT relief when restructuring your business

Small businesses will soon be able to change the legal structure of their enterprise without incurring a capital gains tax (CGT) liability. Instead, the CGT liability can be deferred until eventual disposal.

'Tax Laws Amendment (Small Business Restructure Roll-over) Bill 2016' will apply from July 2016, providing an optional rollover for small business owners who change the legal structure of their business when transferring assets from one entity to another.

The effect of the rollover is that the tax cost of the transferred asset/s is rolled over from the transferor to the transferee, providing greater flexibility for the small business. Rollovers will apply to any gains and losses which occur from the transfer of active assets that are:

- CGT assets
- Depreciating assets
- Trading stock
- Revenue assets

Businesses that qualify for the rollover are ongoing businesses who transfer asset(s) as part of a genuine restructure.

Whether a restructure is "genuine" is determined by the facts and circumstances of the restructure, such as:

- Whether a bona fide commercial arrangement is undertaken for the purpose of enhancing business efficiency
- Whether the transferred assets will continue to be used in the business
- Whether or not it is a preliminary step to facilitate the economic realisation of assets

To be eligible for the rollover, each party to the transfer must be either:

- a "small business entity" with less than $2 million in turnover for the income year during which the transfer occurred;
- an entity that has an "affiliate" that is a small business entity for that income year;
- "connected" with an entity that is a small business entity for that income year; or

- a partner in a partnership that is a small business entity for that income year.

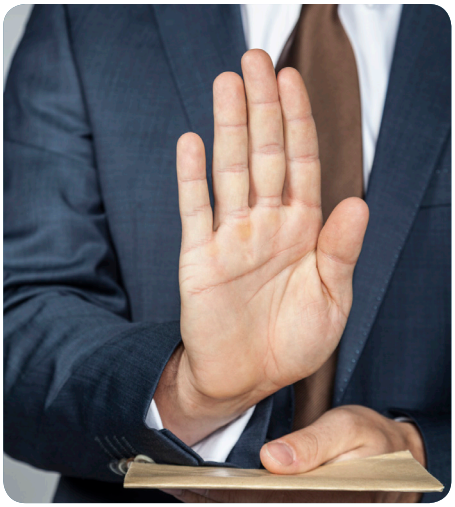
Since the new rules are rather technical in nature, obtaining professional advice may be in a small business's best interest to ensure they can take advantage of the restructure rollover.

Understanding unfair dismissal

The number of unfair dismissal applications lodged last year suggests that employers are still struggling with unfair dismissal laws.

Around 14,800 unfair dismissal claims were filed in 2015, keeping the Fair Work Commission (FWC) very busy. And while most cases were settled before a formal hearing, they do create an unproductive distraction for employers.

Australia's unfair dismissal jurisdiction does not cover all workers; employees that earn over $133,000 per year cannot access unfair dismissal laws unless they are covered by an award or enterprise agreement. Casual employees, on the other hand, who have worked on a regular and systematic basis for more than six months can access unfair dismissal.



For an employee to be covered by the unfair dismissal laws they must be employed for either six months (for most employers) or 12 months (for small businesses).

An employee's termination is considered to be unfair if it is 'harsh, unjust or unreasonable'. The FWC considers the following factors when determining whether the termination was unfair:

- If an employer has a valid reason based on the employee's conduct or capacity
- If an employee was notified of that reason and provided an opportunity to respond before a decision was made to terminate
- If the reason for dismissal is unsatisfactory performance, whether the employer gave any warning about it

While the majority of employers understand that there must be a valid reason for the dismissal of an employee, it appears that they fail to realise that a termination can be considered harsh even when a valid reason exists.

Employers must be able to demonstrate that they have taken careful consideration of an individual incident and any surrounding or mitigating circumstances before dismissal.

Important tax dates

21 APRIL

March 2016 monthly activity statement – due date for lodging and paying.

28

Quarterly activity statement,Q3, 2015–16 – due date for lodging and paying.

Quarterly instalment notice (form R, S or T), Q3, 2015–16 – due date for payment.

Super guarantee contributions for quarter 3, 2015–16 – employers must make contributions to the fund by this date.

21 MAY

April 2016 monthly activity statement – due date for lodging and paying.

28

Eligible quarterly activity statement, Q3, 2015–16 – due date for lodging and paying.