

As 2007 draws to a close we see a very strong Australian economy suffering skill and labour shortages and now to be guided by a new Federal Government.

Our experience shows that any new Government quickly seeks to put its stamp on society and this new Federal Government will be no different, especially in relation to our working environment. The coming period will be interesting to say the least.

As for our part, we have enjoyed your support in 2007 but are dismayed at the speed of which time seems to pass. We look forward to being of assistance in 2008 and beyond, and trust that you enjoy the festive season.

Regards,

Ray Barrett
Barrett Walker

Family mediation a must

Since 1 July this year, new applications for parenting orders have required families to engage in family dispute resolution (FDR) before their application can be considered by the court. By the same time next year it is expected that FDR will be compulsory for all applications including those seeking changes to existing parenting orders. Exceptions do apply including for family violence, child abuse, and urgent applications.

This procedural change is part of a significant and expansive program of family law reform arising from the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) (the Act). In the context of post-separation parenting, it emphasises a commitment to protecting the best interests of children and goes further to promote alternative conflict resolution outside the courts.

Circumventing the formality of the traditional litigation process is often the best way to reduce animosity between parties and curtail the emotion that inevitably follows a family break-down. Not unlike other forms of Alternative Dispute Resolution (ADR), FDR can also facilitate more creative solutions to better suit ongoing relationships. Where children are involved, it is particularly important that healthy family relationships be preserved. While forced FDR may seem somewhat pragmatic in the family context, qualified mediators ensure the process is both professional and comfortable. A register of FDR providers has been established by the Federal Attorney-General's Department to ensure they have the necessary skills, training and experience to maximise the chance of successful mediation. The register includes private practitioners as well as government funded Family Relationship Centres,

community-based organisations, lawyers and others designated to provide FDR under the Family Law Act 1975 (Cth). All are obliged to explain the process being undertaken, outline the fees involved, clarify the rights of each party, advise on suitable parenting plans where children are involved and make clear the other services available. The process is confidential and an assessment regarding the suitability of FDR is made in each case before it is commenced.

Where FDR is unsuccessful, a certificate of compliance is issued so that families can proceed with the traditional court process.

It is expected that compulsory FDR will be fully effected by 1 July 2008, coinciding with the third and final stage of implementing changes to the Child Support Scheme; changes designed to reduce conflicts between parents and encourage shared parenting.

Early intervention measures like these are intended to provide an alternative way for parents to negotiate their post-parenting responsibilities.

In a broader context they represent a more efficient way to resolve disputes; saving on court and social welfare costs while improving the quality of settlements for families.

Property Settlement Adjustments

A settlement adjustment is an adjustment that is made between the vendor and the purchaser in relation to matters such as rates and land tax on the sale of a property.

Given the large number of GST errors in relation to 'settlement adjustments' on Business Activity Statements, it is useful to consider GST Determination 2006/3, issued by the Tax Office last year.

This determination considers whether settlement adjustments for rates, taxes and other outgoings are taken into account in determining the consideration for the supply of real property. It is useful because the legislation does not refer to 'settlement adjustments', and there is no readily available information regarding the GST implications of these adjustments. This determination seeks to help businesses by providing practical examples in relation to different settlement adjustment scenarios.

Investment Property Deductions Disallowed

In a recent decision, the Administrative Appeals Tribunal (AAT) partially disallowed rental deductions on the grounds that

the property was purchased for use as a residence and not as a rental property.

The applicant owned a rental property in Sydney for which he claimed rental deductions totalling over \$400,000 between 2001–2003. All of these deductions were offset against total gross rent of \$14,700.

The deductions were claimed on the basis that the property was available for rent during the entire period, however the property was only rented for 30 days each year in the 2001 and 2002 years, and for 8 out of 91 days in 2003.

The Commissioner argued that as the property was only rented for 8.2% of the 2001 and 2002 years, and 8.8% of 2003, the taxpayer was only entitled a deduction based on the proportion.

The AAT agreed with the Commissioner's assessment, and held that the expenses incurred by the applicant should be apportioned because:

- the applicant admitted that he purchased the property to make a capital gain;
 - based on the evidence, the property was only partially used by the applicant for the purpose of gaining assessable income by way of rental; and
 - there was no evidence that the apartment was used or available for use at any relevant time by anyone other than the applicant.
- **TIP:** where a taxpayer has a rental property as an investment, they must be able to demonstrate that the property has been available for rent for the whole of the income year. If the taxpayer cannot demonstrate this, it is likely that the rental deductions will be apportioned on a use basis.

Apportionment of Home Office Expenses Affirmed

In a recent decision, the AAT upheld the Commissioner's decision that a deduction for home office expenses should be apportioned on a floor area basis.

A taxpayer operated its business activities in an office in one of the front rooms of its directors' main residence, and used this room exclusively for business purposes. For the years ended 30 June 2003, 2004 and 2005, the taxpayer had claimed 50% of the property related expenses in its income tax return.

The taxpayer held a 50% interest in the property and the remaining 50% was held by both directors as tenants in common. The directors, along with their children, used the property as their main residence.

The taxpayer argued that since it had a 50% ownership interest in the property, it was entitled to 50% of the deductions. It argued that its use of the property did not fall within the category of a 'home office', which would limit the availability of deductions to a use basis.

The AAT rejected the taxpayer's arguments and affirmed the Commissioner's decision, which provided the expense should be apportioned on a floor area basis entitling the taxpayer to claim 10% of the occupancy expenses.

The AAT found that the taxpayer was not entitled to claim a deduction for the partnership losses, as there was no evidence that a partnership existed. In addition, there was no evidence that the liability had ever been incurred.

- **TIP:** where a taxpayer is working from home or operating a business at a

private residence, careful consideration should be paid as to whether the home is a place of business or a home office.

Corporate governance under scrutiny

Directors' duties remain in the spotlight after the filing of a wide-ranging lawsuit by the Australian Securities and Investments Commission (ASIC) against building supplies manufacturer James Hardie. If successful, the case will magnify the "care and diligence" obligations of company directors across corporate Australia.

On 15 March, ASIC launched civil action in the NSW Supreme Court against all Hardie directors for breach of the Corporations Act. The 10 directors sit accused of making misleading statements to the public regarding the company's ability to meet the demands of a compensation fund for asbestos disease victims.

The \$293 million compensation fund was set up in 2001 after James Hardie Group subsidiaries were found to be responsible for the majority of asbestos-related diseases and death in Australia, a result of asbestos products they manufactured up until 1987.

A special commission inquiry later found the compensation fund to be significantly flawed, falling more than \$1 billion short of the amount actually required. Further, during the period from 2001 and 2003, the company made a successful application to its shareholders and the NSW Supreme Court to relocate its headquarters to the Netherlands. This move was viewed by some as an attempt by the company to distance itself from its existing compensation

liabilities and that, in making the application, the company may have misled the Court. If these allegations of misleading the court can be substantiated, criminal charges may also apply to the company directors involved.

Evidence giving rise to allegations of misleading conduct by Hardie directors include a media release in 2001, approved by the company board, which gave inaccurate assurances that the compensation scheme was "fully funded". Soon after the media release came the company's relocation application. Then in 2003, a proposal to cancel \$1.9 billion in partly paid shares, held by former Australian parent company JHIL, was also signed off but not disclosed until later.

If ASIC is successful in this latest legal action, Hardie directors will face fines of up to \$200,000 for each breach of the Corporations Act. The same legislation prevents the company from paying any fines on behalf of those individuals involved.

Furthermore, ASIC can seek that bans be placed on specific directors, precluding them from future directorships in other companies.

Since legal action began, Hardie chairman Meredith Hellicar and non-executive directors Michael Brown and Michael Gillfillan have stood down from the board. Ms Hellicar has also resigned from the federal government's Takeovers Panel but maintains her positions on the boards of AMP and Southern Cross Airports Group.

Her departure came amidst praise from acting chairman John Barr for her contribution to the Amended and Restated Final Funding Agreement made with asbestos victims before the ASIC civil penalty proceedings were launched. The settlement

approved by Hardie shareholders, commits \$4 billion to a new Asbestos Injuries Compensation Fund (AICF). The first annual payment is due on 1 July 2007.

ASIC'S decision to pursue the directors of James Hardie sends a cautionary message to all the board members of corporate Australia. As the civil court case proceeds and criminal investigations continue, directors around the country will be carefully considering not only their own corporate governance responsibilities but those wider community obligations that are implied through their core business operations and activities.

Tax Office Warns of Email Scam

The Tax Office has released an announcement warning taxpayers that a fraudulent email is being circulated that claims to offer a refund from the Tax Office.

Taxpayers are warned that the email fraudulently uses the Tax Office logo, and contains subject lines of: 'Australian Taxation Office — Notification' or 'Australian Taxation Office — Please Read This'.

The email asks people to click on a link which sends them to a bogus website. This website will ask taxpayers for credit card and personal details in order to receive a refund.

Greg Farr, acting Tax Commissioner, explained that anyone who receives the email should delete it immediately.

The Tax Office has asked all taxpayers to type internet addresses directly into their internet browser rather than clicking on hyperlinks attached to emails.

This matter has been notified to relevant authorities who are investigating.

Website reviews

www.consumer.vic.gov.au (Consumer Affairs Victoria)

As reported in the second quarter issue of Client News, new legislation is due to streamline the property market by replacing Victoria's 65,000 bodies corporate with owners corporations (OCs). The Owners Corporation Act 2006 (Vic) is due to come into operation in January 2008 and the Consumer Affairs Victoria (CAV) website features a "Bodies Corporate Factsheet" that explains the changes ahead.

The Factsheet clearly defines the powers and functions of OCs, as well as record-keeping obligations, financial accountability, and the new three-tiered approach to dispute resolution involving internal mediation, CAV intervention and referral to the Victorian Civil Administrative Tribunal.

It also explains the limitations imposed on the developer's role in the OC and the registration requirements for paid managers. The enhanced regulations affect one in five Victorians who own, live in, manage or develop flats and apartments so the Factsheet will be a useful tool for this new phase in Victoria's thriving property market.

Also featuring on the CAV website are guidelines on unfair terms in consumer contracts, which aim to simplify the provisions of the Fair Trading Act 1999 (Vic) (the FTA) to give businesses and consumers a better understanding of their contractual obligations and legal rights. It is a timely publication, as the property market is inundated with a proliferation of financial-lending products targeted at low-income earners. Future consultation with regulators, industry and consumer groups will assist CAV develop final guidelines by mid-2008, which may affect further legislative change.

www.familyrelationships.gov.au (Family Relationships Online)

The family relationships website provides information and advice about family relationship issues to "help families build better relationships". It outlines the government-funded services available to families and explains the reforms to the family law system. Special regard is given to different family circumstances and the various phases of relationships from "getting together" to "building relationships", "handling changes", "separation" and "parenting after separation".

The information is easy to follow, with specific advice for children, teenagers, couples, parents, grandparents, service providers and family dispute resolution providers.

Important: This is not advice. Clients should not act solely on the basis of the material contained in this Bulletin. Items herein are general comments only and do not constitute or convey advice per se. Also changes in legislation may occur quickly. We therefore recommend that our formal advice be sought before acting in any of the areas. The Bulletin is issued as a helpful guide to clients and for their private information. Therefore it should be regarded as confidential and not be made available to any person without our prior approval.