

Not so HEAVY DUTY

The Queensland Government's 2008/09 State Budget announced some significant changes to various State taxes. Here are the main highlights for business and property owners.

STUART O'NEILL



BUSINESS OWNERS

Transfer Duty

- Duty payable on the transfer of non-realty business assets will be reduced by 50% from 1 January 2010 and will be completely abolished from 1 January 2011. This will create substantial savings on

the cost of most business purchases.

- From 1 July 2008 there will be a reduction in the amount of duty payable on the purchase of all properties, other than homes, valued up to \$590,000. This will include commercial properties valued up to that threshold.

Payroll Tax

- From 1 July 2008, businesses with taxable wages between \$1 million and \$5 million will benefit from the extension of the payroll tax deduction, such that businesses with eligible wages of up to \$5 million, (previously \$4 million) will receive payroll tax cuts from extending the current phase-out of the payroll deduction.
- There is, however, a mooted extension of payroll tax on employers to cover payments to labour only independent contractors as well as certain dividend payments to owners of privately-held companies. The building and construction industry, in particular, has strongly opposed these developments.

PROPERTY OWNERS

Mortgage Duty

- Mortgage duty is scheduled to be fully abolished from 1 July 2008 (instead of 1 July 2009 as indicated in the 2005/06 Budget). This will reduce the cost of mortgaged secured finance for borrowers and make mortgage secured vendor finance more attractive in trade sales.

Transfer Duty

- From 1 July 2008 first home buyers can expect to save up to \$1,650, as the transfer duty exemption threshold is increased from \$320,000 to \$350,000. The threshold is due to increase to \$500,000 by September 2008, representing further savings.

- The transfer duty rate structure will be simplified, which will reduce transfer duty on the purchase of homes valued between \$320,000 and \$1 million.

Land Tax

- Changes to the land tax rates schedule for resident individuals and companies (and trustees and absentees) will come into effect from 1 July 2008. These changes will provide relief to approximately 88% of resident individual land tax payers and approximately 17,500 companies, trustees and absentees.



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BORROWING BY SELF MANAGED SUPERANNUATION FUNDS

MICHAEL KLATT

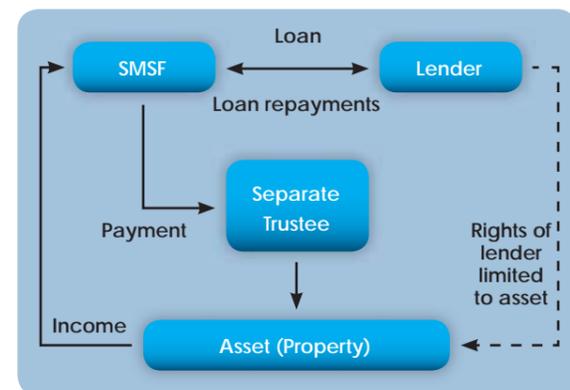


Self Managed Superannuation Funds (SMSFs) can now borrow monies to acquire an asset (except where otherwise prohibited under the legislation) with the following limitations:

- The asset must be held in Trust for the superannuation fund so the superannuation fund has a beneficial interest in the asset.

- The superannuation fund must have a right to acquire legal ownership through payment of instalments.
- The lender's recourse against the fund Trustee is limited to rights against the asset acquired.

Typical arrangement for borrowing



The monies borrowed by the SMSF from the lender are paid to the Trustee of the asset Trust, perhaps with other monies from the superannuation fund. The Trust is effectively a bare Trust. There should be no stamp duty or capital gain consequences in respect of this transfer.

The superannuation fund receives the income related to the asset and will be responsible for any ongoing costs, including borrowing fees and interest. The superannuation investment rules still apply.

The superannuation fund cannot borrow against existing assets, only against assets being acquired. Commercial premises used by a member could be acquired from the member, but this must be at market value. The fund would be unable to purchase residential property from a member under this arrangement. The asset also needs to be one which generates income. Vacant land to be developed will not qualify.

There doesn't seem to be any impediment to the fund borrowing from a member. However the interest rate paid to the member must be at a commercial rate. Interest on borrowing cannot be capitalised. The ATO has expressed concern on whether a personal guarantee can be provided by a member to the lender to support the borrowing by the superannuation fund.

The superannuation fund must ensure it does not breach the legislation. If it does, it may become a non-compliant fund. Tax is then payable at the Trustee rate on income and Trust assets rather than at 15%. The Trustee of the fund can also be fined. There is recourse available to the Trustee of the fund if they have relied upon financial or legal advice in relation to compliance of the borrowing which turns out to be wrong. **Ensure you seek the right advice.**

WATCHDOG CAN'T STOP PETROL PRICES FROM BITING

ANDREW NICHOLSON



Most Australians are feeling the effect of steadily increasing petrol prices, which continue to hit record highs with the promise of worse to come. Media reports suggest that motorists are abandoning their cars in droves and turning to public transport amid suggestions of upward (inflationary)

pressure on the economy and collusion in the industry around the setting of petrol prices. The Government and the Australian Competition and Consumer Commission (ACCC) have been criticised for failing to take sufficient action to address the situation.

Of course, increasing petrol prices can have a two-tiered effect on the economy, as consumers feel the impact not only of the increase in price at the bowser, but also of the incidental increase in the cost of transporting goods for sale. Those increased transport costs affect everything from groceries to high end luxury items. There is additional concern that a small number of large players now dominate the industry and have greater control over price movements.

What then can the Government or the ACCC do? Their roles are slightly different in that the Government has wider economic considerations while the ACCC is concerned to ensure competition in the various petrol markets (both wholesale and retail).

The *Trade Practices Act* is the primary tool of the regulator in ensuring consumer protection. There are a number of provisions of the Act which regulate the conduct of business in dealing with consumers, including in relation

to setting prices for their goods and services. The restrictive trade practices provisions of the Act are aimed at deterring practices by firms which are anti-competitive and which restrict free competition. This part of the Act is enforced by the ACCC. There are particular provisions of the Act which are relevant to petrol pricing. However, many of the provisions of the Act also have general application to most businesses.

Relevantly, the Act prohibits:

- Most price agreements (including cartel conduct and price-fixing under section 45). Whilst there have been some examples of service stations communicating their prices to each other or agreeing to fix prices (Geelong fuel sellers), the ACCC completed a report in December 2007, which

concluded that many in the industry followed price 'leaders' and set their prices accordingly. Although that conduct is not presently prohibited, the regulator has suggested that the Act be amended; and

- Misuse of market power (under section 46). Most businesses would be familiar with the notion of taking advantage of substantial market power, for prescribed purposes which may include preventing a person from entering a market, or eliminating or damaging a competitor.

There are also particular provisions which apply under Part VIIA of the Act in relation to prices surveillance, notification, and monitoring. These provisions enable the ACCC to examine the prices of selected goods

and services, including petrol. The ACCC's functions under this part include holding price inquiries, examining proposed price rises on 'notified' goods and monitoring the prices, costs and profits of an industry or business. Pursuant to those provisions, the Assistant Treasurer, Chris Bowen, directed the ACCC to commence formal price monitoring of unleaded fuel prices. The ACCC cannot set the price of petrol under the Act.

Sections 45 and 46 of the Act remain hot topics for the regulator. Whilst it will be interesting to see whether there are any changes to the regulatory landscape as a result of the present situation with petrol pricing, business should also remain vigilant to ensure they are not caught by the Act and any changes to it.



NATIONAL EMPLOYMENT STANDARDS

NIGEL INGLIS



The new National Employment Standards (NES) were released by the Prime Minister, Kevin Rudd, and the Minister for Employment and Workplace Relations, Julia Gillard, on 16 June 2008.

The NES contained details of the ten minimum conditions that will apply to Australian employees. The

NES apply whether or not an employee is covered by an award or workplace agreement.

The NES are minimum conditions. They form the foundation for Australian employees' entitlements. The ten NES are:

1. Maximum weekly hours of work
2. Request for flexible working arrangements
3. Parental leave and related entitlements
4. Annual leave
5. Personal/carer's leave and compassionate leave
6. Community service leave
7. Long service leave
8. Public holidays
9. Notice of termination and redundancy pay
10. Fair work information statement.

The NES will be mandatory. The new modern awards currently being developed by the Australian Industrial Relations Commission (AIRC) must not exclude the NES.

The NES are billed as a key element of the Rudd Government's new modern workplace relations system and will come into effect on 1 January 2010.

The NES will apply to all employees in the federal system regardless of industry, occupation or income.

Legislation is expected to be introduced into Parliament later this year to give effect to the introduction of the NES.

You may have already noticed how contentious some of the NES may be, including the new option allowing employers to *require* employees to work more than the maximum 38 hour week, depending on the needs of the enterprise concerned.

As well, a request for flexible working arrangements can be made by employees. Examples include reduced hours, varying start or finish times, home working arrangements or other changes in patterns of work or changes in location of work.

A Fair Work Information Statement will also be required to be given to new employees.

In relation to redundancy, new provisions are made for employers who employed less than 15 employees at the time the employee is given notice of termination or immediately before the termination. Any employees with more than 12 months' service will now have a redundancy entitlement.

The extent of how much industry-specific detail from the NES will be included in modern awards remains to be seen.

We will keep clients informed of how this progresses as updates from the Government and the AIRC become available.



PAT MULLINS
EDITORIAL

This issue of Mullins Report focuses on financial issues that impact on the Australian economy. Prophets of doom and gloom abound at the moment, but Stuart O'Neill (whom we welcome as a new partner in business services) has some good news about reductions in stamp duty and payroll tax. Personal legal services partner, Michael Klatt writes about the advantages of using a self managed superannuation fund. Partner Andrew Nicholson (our trade practices and intellectual property expert) contributes articles on the ACCC and petrol prices. New associate Nigel Inglis' piece is on the Commonwealth's new National Employment Standards and Ines Edwards has some good practical advice for anyone having a night out on the town.

The recent appointment of Justice Robert French as the new Chief Justice of the High Court has engendered a lot of discussion in legal circles and the press. The Courier Mail called him 'difficult to pigeon-hole'. The reality is he has been a Justice of the Federal Court since the 1980s, has vast experience, and headed the Native Title Tribunal from its inception. He has written widely and is a regular speaker at legal conferences. He has the respect of fellow Judges and the practicing legal profession as a whole. His appointment is a welcome one.

Partner Bob Lette recently retired from the partnership and has become a consultant. Bob was a partner for sixteen years and made a significant contribution to the firm's growth and development over that time. Bob is a director of a number of public companies in the building, construction and infrastructure spheres. He will continue his directorships through which he is making a significant contribution to the economic growth and development of South-East Queensland. We thank Bob for his loyalty and energy, and look forward to our continued association with him as a consultant at Mullins Lawyers.

MAKE SURE YOUR DIVISION 7A LOAN AGREEMENTS ARE IN PLACE

MICHAEL KLATT

Non-compliance with requirements of Division 7A of the *Income Tax Assessment Act 1936* can have serious tax consequences. Non-compliance with these formal requirements may see the ATO deem payments to be dividends, and therefore considered assessable income of the shareholder.

It is common to find that private companies have made loans or payments to shareholders or their associates with the intention of delaying payment of full tax by shareholders on dividends, without complying with the strict requirements of Division 7A of the *Income Tax Assessment Act 1936*.

In August 2007, the ATO provided business owners with a once-off opportunity (until 30 June 2008) to self-correct past mistakes regarding payments and loans from their private companies - to avoid penalties under Division 7A. This applied to honest mistakes and inadvertent omissions made in the 2001/02 to 2006/07 income years.

Loans are not deemed to be dividends where a loan is made under a written agreement that is in place before the company's tax lodgement day. The agreement needs to identify the parties, set out the essential terms (including the loan amount required to be repaid, interest rate, and term of the loan) and be signed and dated by the parties. The minimum interest rate is a

the agreement would link the repayment amount to that defined in the *Income Tax Assessment Act 1936* as amended on occasion. Otherwise, the loan agreement is usually on standard commercial terms.

From the 2006/07 year, loans can be refinanced so an unsecured loan can be converted to a secured loan. The loan term can be extended

Failure to comply with Division 7A may result in significant tax consequences for shareholders

benchmark rate published annually by the ATO. The maximum term of the loan is 25 years (if the loan is secured by a mortgage over real property). Otherwise the maximum term is no more than seven years.

With the abolition of stamp duty on mortgages in Queensland from 1 July 2008, secured loans will be more attractive.

There is a formula for the minimum yearly loan repayments. Generally

to up to 25 years (less the term already expired). A secured loan can be converted to an unsecured loan, with the maximum term being reduced.

It is possible to substitute security for a Division 7A loan when a property is to be sold.

Failure to comply with Division 7A may result in significant tax consequences for shareholders - **so be sure loans are compliant.**

CONSIDER A CAB AFTER A NIGHT OUT DRINKING!

INES EDWARDS



Many of us have found ourselves at one point or another as an intoxicated passenger in a motor vehicle. On many of these occasions we have been socialising and/or drinking with the driver, whether it be at a restaurant, nightclub or at an afternoon barbeque.

If a motor vehicle accident were to occur on the way home, what are the implications for an injured passenger?

The Queensland case of *Hawira v Connolly* investigated this issue.

Facts

The Claimant was a front seat passenger in a motor vehicle that was involved in a single vehicle accident. The Claimant brought a claim for damages against the driver and the driver's insurance company for the injuries he suffered.

Despite the Claimant denying knowledge of the driver being intoxicated and the driver also denying this, the Court found the Claimant and driver were both intoxicated at the time of the accident. The driver and Claimant were drinking at a hotel prior to the accident.

The Claimant bought jugs of VB full strength beer and was

continually topping up the driver's glass. The Claimant had purchased four jugs of beer throughout the afternoon.

They had arrived at the hotel at approximately 3.00pm and stayed at the hotel until approximately 5.45pm.

On the way home, the driver and Claimant were involved in a verbal dispute with each other. Their evidence of the subsequent events is somewhat different. The driver alleged the accident was caused by the Claimant pulling the steering wheel. The Claimant had no recollection of the accident. The Court rejected the driver's evidence because her version of the accident was inconsistent with the Claimant's version and also other evidence. The Court found the driver's negligent operation of the vehicle caused the accident.

Outcome

The impact of this case is that the injured passenger had his damages reduced by 50% given both he and the driver of the vehicle were intoxicated at the time of the accident even though the driver ran off the road and caused the accident.

Sections 47, 48 and 49 of the *Civil Liability Act 2003* were applied in the assessment of contributory liability.

Accepting a lift with a drunk driver can have dire consequences.

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