

BusinessPlus+ Newsletter



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Issue – February 2019

Employment Laws Changes Update

1. OH & S Penalties Changes

Western Australia now has the highest work health and safety penalties in the country. The increase in penalties highlights the importance of maintaining a safe workplace. There have recently been some significant landmark workplace accident cases determined by the Courts that highlight the very high risks that can arise for a business if appropriate policies, procedures and risk management measures are not implemented. Directors and other individuals can be personally liable in certain instances, depending upon the factual circumstances of a matter. Workplace Health and Safety (WHS) also referred to as Occupational Health and Safety (OH&S) laws require employers to manage workplace risks in order to protect the health, safety and welfare of workers and others who might be at risk. Creating a safe work environment is a legal requirement, it is an employer's responsibility to implement health and safety practices in the workplace.

Penalties

Penalties for breaches of Western Australia's WHS laws increased substantially as of 3 October 2018 when the State Government announced significant increases to fines and jail terms for businesses who commit safety offences.

Although it may cost to implement safe practices and install safety equipment, the effect of not taking action can be severe and costly. Complying with WHS requirements can prevent you from being prosecuted and fined, and help you retain skilled staff.

Examples for a first offence by a company are;

- Level 1 penalties increase from \$50,000 to \$450,000
- Level 4 penalties increase from \$500,000 to \$2.7 million

What you need to do

Workers compensation and public liability does not cover you for the fines and penalties imposed under this legislation. You should talk to your business Insurance Broker about **Management Liability Insurance** as this policy will provide protection to managers/directors and the company for legal costs, fines and penalties.

If you do not have an insurance broker, please contact us so we can suggest some appropriate brokers to meet with to discuss your needs and perhaps get a business insurance risk review undertaken too.

2. A New Entitlement under the Fair Work Act

With effect from 12 December 2018, all employees covered by the *Fair Work Act 2009* (Cth) (Act) will be eligible to take up to five days of unpaid family and domestic violence leave in a 12-month period. Family and domestic violence leave entitlements have featured in modern awards since July 2018. Now, all employees covered by the Act will be able to access the entitlement if they experience family and domestic violence and need time off work to deal with the impact of that violence.

Whilst family and domestic violence leave is unpaid, it is available for immediate use by any casual, part-time or full-time employee; **it does not accrue over time nor does it roll-over from year to year. It is a “use it or lose it” entitlement.** The new leave entitlement can be taken in full and at once (five days in a row) – or, in separate periods of one or more days. By agreement, the entitlement may be taken in single periods of less than a full day (such as by the hour).

Employees are eligible to take this leave if:-

- they, or a close relative of theirs, is experiencing family and domestic violence; and
- they need to do something to deal with the impact of the family and domestic violence (i.e. attending court or the police); and
- it is impractical for the employee to do that thing outside the employee’s ordinary hours of work.

Tips for Employers

Set out, below, are a few quick tips on this new employee entitlement:-

- Employees who need to access this type of leave may not know it exists. Communicating with staff about family and domestic violence leave may present its challenges but is important; it is timely that employers review and update their leave policies and forms to reflect the recent legislative changes.
- Remember, employees who experience family and domestic violence may not always display physical symptoms.
- Whilst employers should adopt a best practice approach, the purpose of this leave is to afford employees the time to attend to matters they are unable to get to before or after work.
- New record keeping for this type of leave will need to be introduced into your leave/payroll system too;

If you as a business are unsure of your obligation in this area, we suggest you talk to a competent employment lawyer to clarify your position and obligations. We can introduce to some appropriate Solicitors if you require assistance.

Banking Industry New Code of Practice & SME's

The Australian Bankers Association released its new and improved **Code of Banking Practice** in mid- 2018 before the Royal Commission investigations were finalised. So it is perhaps important to review the implications of this new code separately to the foreshadowed recommendations from the Hayes Report that has just been released. Collectively these should have overall positive implications for SME businesses, that may not be apparent.

What is a Small Business for the ABA Code?

One of the most contentious issues has been the definition of a small business. ASIC and Kate Carnell, the Australian Small Business & Family Enterprise Ombudsman (ASBFEO), have argued that **the threshold should be \$5m in total borrowings** but ASIC eventually rolled over on this and has agreed with the banks preferred threshold of \$3m. So note the Code is based on total borrowings, whilst for income tax purposes, the relevant threshold for determining a small business is based on total revenue turnover – generally \$10M annual turnover.

The new ABA Code will not come into force until July 2019. Banks can now work on delivering on their commitments and customers are now in a better position to hold them to account.

The code sets standards of good banking practice when dealing with individual and SME customers and their guarantors. It covers obligations for banks in areas including the offer of banking services, information and disclosure, complaints handling, customers with special needs and customers experiencing financial difficulty. The 60 page document includes 215 specific commitments which all 26 ABA member banks will be required to commit to and the code will form part of the banks’ contractual relationships with their customers.

Commitments for SME's

The new code incorporates a number of specific commitments to SMEs which will help redress the massive power imbalance which currently exists between the banks and their small business borrowers. **Here are just some examples of these new commitments:**

- **Banks will tell SMEs the information they require** and after they have received all the information they will advise how long it will be before they are likely to make a decision. The lack of certainty as to when a decision might be forthcoming is one of the biggest bugbears of small business owners.
- **If the bank does not approve a small business loan it will**, if appropriate, give the general reason why the loan was not approved. Whilst "appropriateness" is at the discretion of the bank, if this information was provided in a timely and accurate manner it would be helpful in assisting the borrower obtain finance elsewhere.
- **If a borrower is in default**, the bank will give 30 days' notice before they either require repayment of the loan in full or take enforcement proceedings and if the default is remedied during this period the bank will cease enforcement action. There are exclusions where banks may give a shorter notice period such as if in the bank's reasonable opinion, it is necessary to act to manage an immediate risk. And if the loan is by way of an overdraft or on demand facility, the bank may not be required to give any notice about when they require repayment.
- **If a borrower has met all loan payment terms**, banks will not take action based on non-monetary defaults unless the situation falls within twelve exclusions such as the loan is used for a purpose not approved by the bank or financial information is not provided as required under the agreement.
- **Banks will not include a general material adverse change clause as an event of default** in any standard form small business lending contract. But for some kinds of standard form loans e.g. loans for property development and margin lending, banks may include financial indicator covenants or special covenants tailored to the particular nature of these loans as a trigger for default based action.
- **If a borrower is not in default**, and the principal owing on a loan is not due to be fully repaid at the end of its scheduled term by regular periodic repayments, banks will give notice of their decision not to extend the loan at least 3 months before it is due to be repaid in full.
- **Banks will provide copies of property valuations and instructions except when** enforcement action has already commenced. The code is silent as to whether SMEs will receive a copy of any Investigating Accountants report they pay for.

What does all this mean for SME's?

So before SMEs have their next significant encounter with their bank, they should read the Code so they know what to expect. And if they believe the bank has not acted in accordance with the code, they should do something about it.

SMEs now have enshrined rights and avenues of redress.

All banks have internal dispute resolution people SMEs can talk to. And if they're not happy with this, they are able to go to the ABA's external dispute resolution service which is run by relatively independent experts. From November this year SMEs will also have access to the new Australian Financial Complaints Authority and Kate Carnell (ASBFEO) and other advocates are also there to support small business owners.

Where does this leave SMEs?

It has already become harder for SMEs to access credit from banks and it is taking longer to get decisions. Additionally, it has become particularly difficult for those SMEs who pledge residential property as security for their business loans because banks now delve into personal financial spending patterns, as well as assessing the capacity of the business to service and repay debt.

For the short term at least, whilst the banks are adjusting to life after the Royal Commission, SMEs are not going to find it any easier to access bank credit nor will decision making times improve.

Do the banks want to lend or not?

The banks say they are open for business and the reason why lending is flat is that businesses just aren't applying to borrow.

Rather than there being an absence of demand for bank credit, an alternative proposition is that some SMEs are no longer bothering to approach banks. This could be due to the belief that the process is too onerous and elongated.

These businesses sometimes use trade creditors and the ATO (*both not recommended*) to fund their working capital needs or alternatively turn to family and friends. Others are prepared to pay more to borrow from alternative lenders because they are easier and quicker to deal with.

According to a recent business survey, the unmet demand for SME credit is estimated to be in excess of \$80b. This provides the incentive for the establishment and growth of a myriad of non-bank lenders who aim to fill this lending gap.

If you need assistance with your business loan facilities, please contact Lyall Bear our Business Advisory contact at CBSW.

Understanding your Business Pricing Strategies

We all know that discounting can be rife in certain industries, for example in Retail generally, but are the consequences fully understood and when can such an approach be reasonable. Let's review this area that has significant implications on the business profitability position.

Think carefully before you consider cutting prices either to try to gain a competitive edge or to match other similar businesses pricing. Customers shop only on price if that is the only distinguishing feature they can discern between you and your competitors. If your business is not pitched as cheap, you will need to do some serious work on your Unique Selling Proposition (USP) linked ideally to your differentiated capabilities (three to six are ideal to identify).

The table below shows just how costly discounting can be if that becomes the new norm for your business month in month out.

	If the Current Business Gross Profit Margin (derived from P & L Statement) is:-							
Gross Profit Margin	20%	25%	30%	35%	40%	45%	50%	60%
Price Discounted By	<i>To produce the same Gross Profit as before the price discount, you would need to increase your Sales Turnover (excluding GST) by the following %'s without affecting overall profitability:-</i>							
-2%	11	9	7	6	5	5	4	3
-4%	25	19	15	13	11	10	8	7
-6%	43	32	25	21	18	15	12	11
-8%	67	47	36	30	25	22	17	15
-10%	100	67	50	40	33	29	22	20
-12%	150	92	67	52	43	36	28	25
-16%	400	178	114	84	67	55	41	36
-20%		400	200	133	100	80	57	50
-25%			500	250	167	125	83	71

So as we have illustrated above, discounting pricing can be very costly for a business.

On the flipside, boosting pricing selectively as supported by your businesses differentiated capabilities, has significant benefits when approached strategically.

The table below shows the amount the business turnover would have to decline after a price increase, before your gross margin is reduced below its pre-price increase position.

	If the Current Business Gross Profit Margin (derived from P & L Statement) is:-							
Gross Profit Margin	20%	25%	30%	35%	40%	45%	50%	60%
Price Increase	<i>To produce the same Gross Profit as before the price increase, you could decrease your Sales Turnover (excluding GST) by the following %'s without affecting overall profitability:-</i>							
2%	9	7	6	5	5	4	4	3
4%	17	14	12	10	9	8	7	6
6%	23	19	17	15	13	12	10	9
8%	29	24	21	19	17	15	13	12
10%	33	29	25	22	20	18	15	14
12%	38	32	29	26	23	21	18	17
16%	44	39	35	31	29	26	23	21
20%	50	44	40	36	33	31	27	25
25%	56	50	45	42	38	36	31	29

So it is clear that a well-constructed pricing strategy linked to a powerful USP, which is supported by clear customer engagement practices that add and enhance real perceived value for them, will make a big difference to the business profitability and returns on shareholder funds.

We can quickly show you the specific effects of a particular pricing strategy you might be considering for your business, so please contact our business advisory consultant Lyall Bear to discuss the matter further.

Refundable Franking Credits & Dividends – Some thoughts

The possible change to the current legislative position with the prospect of non-refundable franking credits for taxpayers who derive (directly or indirectly) fully franked dividends, that has been flagged as a policy change by Labor, is very complex. So it is only possible to provide generalised commentary on this subject.

In addition, we have the added complication that some taxpayers with connections to business operations may have dividends that are fully franked with a 27.5% franking credit whilst other say public company or passive private investment company dividends will still be franked with a 30% franking credit.

Key Assumptions

So in summary form, here are some of the key things to be aware of for the implications of the timing and quantum of dividends to be considered for the current and future financial years, based fundamentally on the following assumptions:-

- The current personal resident tax scales will continue to apply;
- A 2.0% income tax surcharge will be re-introduced by Labor effective from the 2020 financial year and apply to all taxable income that is over the \$180,000 threshold;
- The changes to the legislation are made confirming any excess franking credits cannot be refunded to individual taxpayers (amongst others) effective from the 2020 financial year;

Some Possible Strategies arising from a Policy Change

- a) Bringing forward Fully Franked Dividends in isolation of other strategic objectives generally would not seem to be advantageous even for lowest MTR taxpayers. However the quantum of tax refunds foregone in the future does need to be considered on a case by case basis. For example if only in receipt of fully franked dividends at the 30% rate, then a taxpayer could derive up to about \$97,000 of cash dividends and not pay any tax and not waste any franking credits. Depending on the amount of any special advance dividend and the amount of any other assessable income of a taxpayer, then the extra dividend may also result in top-up tax being payable.

- b) Depending upon the ability of the taxpayer to generate other assessable income that could absorb otherwise non-refundable franking credits that would arise from a legislative change, then other appropriate strategy changes may need to be considered at the same time, if available to the taxpayer. For example – investing in different asset classes (with appropriate advice from a financial planner) that generate a different class of income. Alternatively, where appropriate and applicable special trust distributions and dividends may be suitable. These may assist with any Division 7A loan repayment obligations, thus reducing interest and associated taxation costs annually.
- c) Higher cash dividends that fit within the overall optimal dividends caps of \$78,500 for 27.5% franked dividends or \$97,000 for 30% franked dividends, could provide other benefits including personal cashflow that may have other personal benefits - for example paying off private loans more quickly.
- d) There may be other strategic advantages to be derived from bringing forward dividend payments too. These could include assisting with Succession & Ownership changes in business structures that provide other net benefits to all Parties, but particularly in family businesses with inter-generational changes that may be in play.
- e) Given the already announced proposal to have the general company tax rate for all such entities at a 25% rate by the early 2020's, there additionally may be merit in pushing out dividends at the current higher franking rates. This may be prudent (subject to the broad guidelines set out above) because there will otherwise be a permanent erosion in the franking credits – reducing from either 30% to 25% or from 27.5% to 25% - which are both significant decreases.
- f) The level of refundable franking credits potentially at risk, will vary for each individual taxpayer in receipt of fully franked dividends. On our analysis the lost credit refunds may be as much as about \$6,000 pa reducing down from there depending upon the mix and amount of assessable income and available allowable deductions.

Crowd Sourced Funding Equity Raising has commenced!

The Crowd Sourced Funding Equity Raising Scorecard indicates that \$18.3 million has already been raised by 22 Australian companies. The following is a summary identifying the companies with a brief description on their business activities and the amount of capital that they have raised to date. Completed capital raisings that details have been extracted from some of the intermediary's websites:

- Xinja Bank – 100% Digital Bank - \$2.4M
- Manrags – Premium Socks and Underwear - \$363,250
- Choovie – Digital platform that matches moviegoers with empty seats - \$294,500
- The West Wind Gin – Australian Champion Gins - \$932,000
- Memo Bottle – Flat water bottle designed to fit into your bag - \$383,238
- Bausele – Timekeeper luxury brands with Australian inspired crowns - \$294,928
- Pliikan – Global currency App and pre-paid Visa card that you can use anywhere - \$248,930
- Orderup – Investment in a gaming brand - \$361,394
- Park – Leading soccer brand – balls, clothing - \$316,035
- Sash – an Australian take on modern Japanese fusion - \$184,321
- Greenfields Exploration Ltd – Mining Incubator and Project Initiator – \$1.2 million

These companies represent a fairly wide cross-section of Australian businesses. If you are interested in understanding more about crowd sourced funding equity raising as it applies to small proprietary companies and small unlisted public companies please do not hesitate to contact us. Some of the company's currently attempting to raise capital include:

- Endeavour Brewing Co – craft beer manufacturing
- DHF Surf – surfboard design
- Direct Injection Technologies – technology to supplement livestock
- Purahealth – health supplements
- Australian Boutique Spirits – manufactures and marketers of Australian made spirits
- Mobiltech – travel solutions
- Edutech – cloud enabled student tutoring
- Medical Services Group – multi venue medical services business
- Industrial Tech – patented safety device seeking capital after first sale
- Internet Gaming – established company seeking funds to expand into new networks and markets

- Black Hops Brewery – craft beer and wine
- HUTT – tomorrows house today – delivering the future of zero carbon housing
- Dreamcity – an immersive theme park combining education with fun
- Oscar Razor – Australian premier shave club
- Your Mates – craft beer and wine
- Picaluna – network of professional funeral planners and celebrant

What this list of companies illustrates is that any type of business operating in Australia, which has a good business case, has a reasonable chance of being able to raise capital, thus avoiding loans together with the associated security requirements, personal guarantees and monthly principal and interest repayments.

If you would like to have a discussion with us relative to the assistance that we can give your company to get you started on the capital raising journey, please do not hesitate to contact us.

To assist you to self-assess as to whether your company might be eligible to raise capital as a Crowd Sourced Funding Company we are attaching a self-assessment checklist. If you are interested in understanding your company's potential eligibility for Crowd Sourced Funding Equity Raising we invite you to complete the self-assessment form and, if it indicates that you are potentially eligible, please contact us for a discussion. ([Click here](#) and complete - Crowd Sourced Funding Eligibility Matrix Form - BAS5004).

Co-Ownership Agreements are Important

The best time to finalise an agreement which relates to disputes, sale of the business, major capital expenditure, policy on the treatment of profits, decision-making, restraint of trade and many other issues is when the business is being formed, not months or years later when the same level of enthusiasm and friendship, that was there at the beginning of the business, may not be as evident.

Going into business with someone else is a big event, so the key reasons to have a co-ownership agreement is to have set the "rules" before you start playing the business game in which your business entity envisages being involved. It's important to consider setting the clear expectations of everyone involved as a partner, unitholder or shareholder right from the beginning.

Items to consider include:

- Is every partner, unitholder or shareholder required to work full-time in the business? (Called a principal)
- The principals should agree on the decision-making processes to be implemented within the business.
- Restraint of Trade – consideration should be given at the very beginning as to what would happen if one of the principals wanted to do "private work" or wanted to leave the business at some future date. There are various types of restraint of trade clauses and consideration should be given as to which type of restraint clauses should be included in the agreement.
- Working Capital Contributions – the agreement should summarise the founding principals' intentions relative to the funding of working capital for the business:
- The founding principals need to determine a policy relative to the treatment of profits.
- Sale of equity to third parties – will there be a prohibition on any one selling their equity to a third party?
- What will be the rules that have been agreed to by all of the founders relative to a forced exit from the business?
- A formula for the methodology to be utilised for the calculation of an exit value held by a principal in the business.
- An agreement relative to a "Buy-Sell Agreement". Consideration of wording and the formula to be utilised for the calculation of the exit value.
- Dispute resolution procedures relative to a dispute that cannot be agreed on from normal negotiations
- Consideration relating to the inclusion of a "drag-along rights" within the agreement. (A right that enables a majority shareholder to force minority shareholders to join in the sale of the company)
- Consideration relating to the inclusion of a "tag-along rights" within the agreement. (If the majority shareholder sells their stake the remaining minority shareholders have the right to join the deal and to sell their shares on the same terms and conditions as the majority shareholder).

Whilst it is preferable that a co-ownership agreement is negotiated at the beginning of an entity's life there is no reason that a co-ownership agreement cannot be agreed to at any time during an entity's existence.

If you would like to have a discussion with us relative to the creation of a co-ownership agreement or a shareholder's agreement for your business entity, please do not hesitate to contact us.

Grants Update

The following grants are all targeted at small/medium enterprise businesses:

Employers Support Payment Scheme

Provides financial assistance to eligible employers of reservists and self-employed reservists when the reservist is absent from their workplace on eligible periods of defence service. Payments for full-time employees is \$1,567.90 per week – pro-rata payments may be made for a part-time employee. Employers must have an Australian Business Number and can include partnerships, companies, trusts and trustees of trusts.

Small Business Export Loan

A loan to meet the specific needs of small business exporters who need finance to support their export transactions and their bank is unable to help – the Export Finance Insurance Corporation (EFIC) may be able to provide the company with the necessary funds to satisfy their cashflow needs. Loans are available from \$20,000 to \$350,000 secured by directors' guarantees. Interest rates are approximately 13% per annum. In the first instance the business must apply to their bank for financial assistance and they are only eligible for the small business export loan if the company's bank is unable to assist. The company's turnover must be between \$250,000 and \$10 million in the previous financial year and have been established for at least 2 years.

Assistance for SMEs Accepting Work in the Defence Industry

The Centre for Defence Industry Capability's administers a program providing advisory and facilitation services to defence sector small to medium enterprises to improve business management, skills development, innovation and access to export initiatives and international and domestic supply chains.

The program also provides grants to defence sector SMEs to implement recommendations from advisory and facilitation services.

Eligible applicants must be a company or an incorporated trustee on behalf of the trust. Businesses are not eligible to apply if they are an individual, partnership or trust (however an incorporated trustee may apply on behalf of a trust).

If an applicant is successful they will be assigned a business advisor or facilitator who will work with the applicant to complete the advisory or facilitation service and produce a report with recommendations. Funding of \$5,000 to \$250,000 is available for successful applicants to implement the recommendations that have been made in the advisory or facilitation process.

If you are interested in having a discussion about any of these grants or for that matter any Australian, State or Territory grants, please do not hesitate to contact us.

Stop Press: Single Touch Payroll to cover all Businesses from 1 July 2019

The extension of Single Touch Payroll ("STP") to employers with 19 or less employees has finally passed both Houses on 12th February 2019, after amendments were tabled late last year.

This will mean that employers with 19 or less employees will have to report under STP rules from 1 July 2019. Businesses with 20 or more employees began reporting from 1 July 2018.

There are approximately 782,000 businesses with 19 or less employees in Australia. That's about 36.8 per cent of Australian businesses, according to ABS data. Broken down, microbusinesses with 1–4 employees account for 585,000 of that total, and the remaining 197,000 are businesses with 5–19 employees.

ATO Commissioner Chris Jordan has also pledged to ease micro businesses into the STP regime, stating that they will not be forced into purchasing payroll software, with a number of alternate options set to be available, including the option of allowing their registered tax or BAS agent to report quarterly, rather than each time they run their payroll.

Exemptions to STP reporting will also be available to businesses that have no internet or an unreliable connection.

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