

## **QUARTERLY NEWSLETTER**

**SEPTEMBER 2012**

### **Unfair Dismissal High Income Threshold Increase**

Under s 382 of the *Fair Work Act 2009* (Cth) an employee is eligible to make an unfair dismissal claim if at the time they were employed any of the following applied:

- (i) The person is covered by a modern award;
- (ii) The person is covered by an enterprise agreement; or
- (iii) The person's annual rate of earnings, and such other amounts (if any) is less than the high income threshold.

An employee who is covered by an Award or enterprise agreement and earns above the high-income threshold can make an unfair dismissal claim. By contrast, any employee who is not covered by a modern Award or enterprise agreement and earns above the high-income threshold, is not eligible to make an unfair dismissal claim under the *Fair Work Act*.

From 1 July 2012, the high-income threshold for employees who are entitled to make unfair dismissal claims increased from \$118,100 to \$123,300. This amount is calculated and indexed on an annual basis. It also means that the maximum compensation for an unfair dismissal increased to \$61,650.

An employee's income includes wages, monies paid on their behalf such as superannuation top-ups or salary sacrifice, agreed non-monetary benefits, including lap tops and mobile phones. However, it does not include payments that are unknown in advance such as bonuses or overtime (unless guaranteed overtime), reimbursements and compulsory

superannuation contributions by an employer.

This change is likely to increase the number of unfair dismissal claims. To reduce the risk of unfair dismissal claims, employers should ensure they follow the correct procedure under the *Fair Work Act 2009* before dismissing an employee.

### **Duties of Directors in Managing the Financial Performance of their Company**

Darrell Lea entering into voluntary administration serves as a reminder to directors of Australian companies that they have a duty to prevent insolvent trading.

Under the *Corporations Act 2001* (Cth), directors and officers have a duty not to continue trading while their company is insolvent and to maintain proper financial records. This includes a duty to prevent insolvent trading (section 588G). There are severe penalties for not complying with these obligations. Other duties include the duty to act reasonably and diligently, acting in the best interests of the company, not to misuse your position as director or misuse information about your company for your own or another person's advantage and not to act to the detriment of the company.

Voluntary administration is an insolvency procedure, whereby the directors of a company in financial difficulty, appoint an external administrator called a "voluntary administrator". A voluntary administrator is usually appointed by a company's directors, after the directors determine that the company is insolvent or likely to become insolvent.

There are several advantages of entering a company into voluntary administration including, directors avoiding personal liability and exposure to trading while the company is insolvent.

Directors of companies experiencing financial hardship should give serious consideration as to whether or not their company should enter into voluntary administration, in order to satisfy their duties as directors.

### **Can Directors be Liable to Creditors?**

In *McCracken v Phoenix Constructions (QLD) Pty Ltd* [2012] QCA 129, the Queensland Court of Appeal overturned the decision of the Queensland Supreme Court which interpreted section 1324(10) widely, as empowering the court to award damages to "*anyone whose interests have been affected*" by a director breaching section 182(1) of the *Corporations Act 2001* (Cth).

Section 1324(10) provides a Court with the power to grant an injunction against a person and also "*either in addition to or in substitution for the grant of the injunction, order that person to pay damages to any other person*".

Under section 182(1) a director must not use their position to gain an advantage for themselves or someone else.

The Court of Appeal found that section 1324(10) does not entitle creditors to claim damages for loss suffered by a breach of section 182.

The creditors of a company should not therefore rely on section 1324 to seek damages from directors.

## **SEMINARS\***

### **Venue for all Seminars**

MLB Lawyers & Associates,  
Level 1, 441 South Road,  
Bentleigh Victoria

### **IP Rights – Trademarks, Copyright, Design Rights, Patents, Confidential Information**

ABSTRACT: This seminar provides an overview of intellectual property rights, including trademarks, copyright, design rights, patents, confidential information and ways of protecting such rights.

DATE: 19 September 2012

TIME: 6:30 – 7.30PM

### **Purchasing a Business**

ABSTRACT: This seminar provides essential information on choosing the right business for you and on successfully maintaining and building your new business.

DATE: 21 November 2012

TIME: 6:30 – 7.30PM

*\*All dates and times of our seminars are subject to change depending on numbers of participants attending.*

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