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PAY SECRECY CHANGE TO FAIR WORK ACT

COREY MCGOWAN
Partner, Audit & Assurance
ADELAIDE

Many small to medium businesses have existing employment contracts that restrict their employees from discussing their salaries with co-workers.

Previously, this was an acceptable practice however it has become apparent that in some workplaces the practices were very much the opposite.

In an attempt to close the gender pay gap, the Federal Government has introduced the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*, which prohibits pay secrecy clauses in employment contracts.

What does this mean for employees?

Under the change, employees now have the right to:

- Share information, if they choose to, about their pay and conditions of employment with other employees
- Ask other employees about their pay and conditions of employment.

Although an employee's right to disclose has changed, it does not mean they can be forced to share this information if they don't want to.

Employees are not obliged to keep this information confidential even after they leave their employment.

What does this mean for employers?

It is unlawful for employers to include pay secrecy clauses in employment contracts from 7 December 2022. From 7 June 2023, if pay secrecy clauses that are inconsistent with the new workplace rights are included in employment contracts that have been entered into, on or after 7 December 2022, those clauses will have no effect and employers could face penalties for enforcing them.

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For pre-existing employment contracts that do contain a secrecy clause, these clauses will remain in effect until such a time the contracts are varied. This means that employees employed under pre-existing contracts that have a secrecy clause are still bound by it, and it can be enforced by an employer.

Once a contract is changed (a new contract) these clauses will no longer have effect and can't be enforced. The pay secrecy clause should not appear in the contract in relation to any new employees commencing after 7 December 2022.

Employers should use the six-month grace period to review employment contracts and ensure that any employment contracts entered into on or after 7 December 2022 are consistent with the new workplace rights. That is, they do not contain a secrecy clause restricting an employee's rights to disclose information about their pay and conditions of employment.

There is also a six-month grace period for employers before they can be exposed to penalties for including pay secrecy clauses in new contracts entered into on or after 7 December 2022.

Contact the author: cmcgowan@hlbsa.com.au

GOVERNMENT UNDERTAKES MODERN SLAVERY ACT REVIEW

JOELLE TABONE
Partner, Business Advisory Services
MELBOURNE

The Australian Government is currently undertaking a statutory review of the operation and effectiveness of the *Modern Slavery Act 2018* in the first three years since commencement.

The Modern Slavery Act came into force on 1 January 2019. The Act established a national Modern Slavery Reporting Requirement for large businesses and other entities in the Australian market with annual consolidated revenue of at least $100 million.

The Act was introduced to address the risk of modern slavery practices in the operations and supply chains of Australian organisations by increasing awareness of modern slavery risks, and support entities to identify, report and address the risks.

The key issues in the review of the Modern Slavery Act include:

- Has the Modern Slavery Act had a positive impact?
- Are the Modern Slavery Act reporting requirements appropriate?
- Are additional measures required under the Modern Slavery Act adequate?
- Are public sector reporting requirements under the Modern Slavery Act adequate?
- Does the online Modern Slavery Statements Register adequately support scheme objectives?
- The administration of the Modern Slavery Act, and the role of an Anti-Slavery Commissioner
- Future review of the Modern Slavery Act.

Company boards, directors, and executive management should continue to understand the Modern Slavery Act compliance and reporting obligations and how their business is exposed to modern slavery risks.

Modern slavery can occur in every industry and sector and describes situations where offenders use coercion, threats or deception to exploit victims and undermine their freedom. It is estimated there are over 40 million people in modern slavery conditions worldwide.

The Modern Slavery Statement is designed to outline the risks of modern slavery in business operations and supply chains, and actions taken to address those risks. The Act applies to a wide range of entities, including companies, superannuation funds, not-for-profit entities and trusts.

The Modern Slavery Statements are publicly available on the Modern Slavery Statements Register. The register indicates that over 5000 mandatory and nearly 700 voluntary statements have been lodged. Entities are required to submit modern slavery statements within six months after the end of their reporting periods.

Contact the author: jtabone@hlbvic.com.au

ESTATE PLANNING 101

ANDREW BUCHAN
Partner, Wealth Management
BRISBANE

Many of us naturally put off thinking about our own mortality. But estate planning – legally laying out what happens to your assets after you've gone – can free you up to get on with life.

The basic elements of estate planning are electing a Power of Attorney, finalising a Will, superannuation and, if applicable, a testamentary trust incorporated in your Will. This will enable your wealth to remain in a family and protect beneficiaries.

These are challenging ideas to contemplate but having the appropriate legal structures in place will provide peace of mind for you and your loved ones.

Step one: Powers of Attorney

According to the Australian Bureau of Statistics, 12.6 per cent of people who live to 85 or over have dementia/ Alzheimer's disease as their main long-term health condition.

That's a pertinent reminder that for many of us there will come a time when we have difficulty making decisions about our own health or finances. A Power of Attorney can help ensure that someone with your best interests at heart can make those decisions on your behalf.

There are different types of Power of Attorney and they vary by jurisdiction within Australia. Powers of Attorney can also ensure that someone who cares about you has the legal right to make important decisions on your behalf.

Step two: a valid Will

One of the simplest things people often overlook is writing a Will. This document is the bones to any successful estate plan and must be updated regularly to ensure any major life changes are accounted for. This can include anything from getting married or having children, to selling the family home.

A Will also sets out your wishes as to what happens to your assets when you're gone.

A lawyer can help with drafting a Will. Don't do it yourself. As the NSW Trustee and Guardian points out, poor drafting of a Will can tie up your estate in legal complexities and disputes.

Also involve your accountant to ensure you have a good understanding of structures, assets and liabilities including tax.

Step three: superannuation and trusts

You may be surprised to learn that your super can't be 'managed' by your Will, or at least by your Will alone. That's because it's held in trust in your superannuation fund and in legal terms, it's your super fund trustee who decides how it's disposed of upon your death.

Similarly, a trustee cannot be managed by your Will alone.

However, you can help ensure that it goes to the people you want to give it to by creating a Binding Death Benefit Nomination through your super fund and thereby directing your super fund to pay your super to a specific person, or into your estate. At that point, your Will can determine how your super is disposed of.

Step four: testamentary trusts

Some people choose to pass their wealth to their intended beneficiaries via a testamentary trust rather than leave all their assets directly to them.

One of the main benefits of testamentary trusts is they enable your wealth to remain in your bloodline. They also enable wealth to pass in a manner that protects beneficiaries who may be vulnerable due to marriage or a relationship breakdown, or due to their profession or a business they operate.

In other cases, testamentary trusts can simply preserve wealth by ensuring it's not misspent by beneficiaries on poor lifestyle choices or investment decisions.

These trusts, which are written into the Will when planning your estate affairs can have significant tax benefits. For example, if a beneficiary receives their inheritance under their personal name, they may be liable to pay additional tax on investment earnings or capital gains at their personal marginal tax rate. However, if they take the inheritance through a testamentary trust, particularly where the beneficiary has a high personal marginal tax rate, they may not be liable for as much tax.

Powers of Attorney, Wills, superannuation and testamentary trusts are just some elements of an estate plan, and once you have amassed a reasonable level of assets, you should be considering a plan (if not already).

Contemplating your own death or disability may not be fun, but ensuring your loved ones are cared for in accordance with your wishes should be addressed sooner rather than later.

Contact the author: abuchan@hlbqld.com.au

2022 A YEAR OF TWO HALVES FOR IPO MARKET

MARCUS OHM
Partner, Audit & Corporate Services
PERTH

The second half of 2022 saw the number of initial public offerings (IPOs) drop significantly, with just 28 listings between July and December compared to 59 in the first half of the year.

The latest HLB Mann Judd IPO Watch Australia Report analysed IPO activity over the past 12 months on a number of key metrics, including listing volumes, share price performance, industry spread and overall trends, as well as a review of the pipeline for the remainder of 2023.

As a result of the drop in the second half of the year, the total number of IPOs in 2022 was down 54 per cent on the previous year (87 in 2022 compared to 191 in 2021), with the volatility in the broader market significantly impacting the IPO market.

Macroeconomic and geopolitical issues, coupled with rising inflation, resulted in the RBA lifting interest rates for the first time in twelve years, significantly impacting the stock market and subsequently IPOs.

The first half of 2022 recorded a healthy level of IPO activity, with 59 new listings, however the second half of the year saw the IPO market all but dry up.

As a result, the amounts raised through IPOs fell 91 per cent in 2022, with just $1.07 billion raised compared to the record-breaking amount raised in 2021 of $12.33 billion. The amounts raised were also significantly below 2020 ($4.98 billion) and 2019 ($6.91 billion).

Consistent with the trend seen in previous years, weaker market conditions resulted in the IPO market being dominated by small cap companies. Typically, during periods of market volatility, large cap companies avoid a public listing while small cap companies continue to come to market.

Of the 87 listings during the year, 78 were small cap companies (those companies with a market capitalisation less than $100 million), representing 90 per cent of the total number of listings. In contrast, small caps made up 76 per cent of 2021 listings and 58 per cent of 2020 listings.

Small cap entrants raised 54 per cent of total funds in the year, a considerably higher portion of total funds than the 11 per cent contributed by small caps in 2021.

The ongoing market volatility is unquestionably impacting on the current pipeline of IPO activity, with any improvement dependent upon a reduction in the macroeconomic and geopolitical factors impacting markets.

Contact the author: mohm@hlbwa.com.au

ESG A KEY PRIORITY FOR MORE THAN HALF OF GLOBAL LEADERS

KATELYN ADAMS
Partner, Corporate Advisory
ADELAIDE

More than half of global company leaders are looking to redefine ESG goals and become more purpose led.

This is just one of the findings revealed in a recent survey of business leaders by HLB International. The HLB Survey of Business Leaders 2023 collected 575 survey responses from business leaders across 60 countries and a range of industry backgrounds between September and November last year.

15 per cent of respondents said their businesses already identified as purpose-led businesses and a further 37 per cent said they attempted to meet wider stakeholder expectations in their ESG goals.

This reflects the increasing need for business leaders to recognise that investors, customers and employees are demanding strong ESG principles.

However, there remains work to be done, as the survey shows. 40 per cent of respondents indicated they only complete the ESG actions required by regulators, rather than treat the wider themes of sustainability as an opportunity for innovation. A further eight per cent do not have any established ESG goals at all.

While ESG commitments can be overlooked amid ongoing market turmoil, it is important that companies remember that sustainability and profitability aren't mutually exclusive.

Wider commitments to ESG practices, social welfare, and good governance can actually help leaders weather disruption and emerge stronger from it with a more sustainable and profitable business model.

Many investors for example are finding companies that have strong ESG practices in place more attractive. A company that can clearly communicate its ESG objectives demonstrates a commitment to acting as a good corporate citizen.

The survey also highlighted the challenging period ahead which has been deemed the 'permacrisis', defined as an extended period of instability and insecurity and identifies eight major risks facing global businesses.

Over half of respondents now feel acutely concerned about the impacts of inflation (82 per cent), economic uncertainty (79 per cent), geopolitical risks (74 per cent), rising resource costs (71 per cent), rising interest rates (64 per cent), access to talent (61 per cent), exchange rate volatility (60 per cent), and cybersecurity issues (60 per cent). Climate risks and social instability were also of concern, at 58 per cent and 49 per cent respectively.

In terms of the technologies that will be of most importance to business over the next five years, artificial intelligence was the highest ranked at 50 per cent, followed by cloud computing at 47 per cent, and renewable energy technologies at 40 per cent.

Contact the author: kadams@hlbsa.com.au

ATO POWERS PUTTING TAXPAYERS, ADVISERS ON NOTICE

JOSH CHYE
Partner, Tax Consulting
MELBOURNE

A renewed focus from the Australian Taxation Office (ATO) on those seeking to migrate funds from overseas highlights the need for prudent tax planning prior to transferring.

The ATO recently issued an alert effectively putting people on notice that if they wish to transfer funds into Australia, they will need to pay the appropriate level of tax on the transfer. As Australia continues to attract strong levels of investment, particularly in respect to real estate, the alert serves as a timely reminder.

In 2014, the ATO provided a one-off amnesty under Project DO IT to allow eligible taxpayers to disclose omitted offshore income, capital gains and over-claimed deductions for reduced penalties as well as protection against criminal offences.

However, the intervening period, the tax office has significantly more information-gathering powers than it did during the time of the amnesty, increasing its level of resourcing and entering into tax information exchange treaties with other jurisdictions.

One of the more common errors is claiming the funds being transferred are a loan from an unrelated party, or masking it through family members or other structures.

Should the transferring party indicate the funds are a loan, the ATO will speak with the person providing the money. There are provisions in Australian law which can be applied unexpectedly that can treat a loan from overseas as income; if shareholders take money from the company as a loan, but it's not documented properly, for example, it can be treated as income.

Australia's tax law system is unique in its administration compared to many neighbouring countries, and there can be some hesitation for new entrants to engage in tax planning upfront. However, investing in tax advice – which is tax deductible – will save time and money.

If a taxpayer is unsure about whether their existing affairs are compliant, a review is recommended to understand and explain any risk areas, and consider appropriate tax planning strategies including sourcing further evidence and/ or making a voluntary disclosure to the ATO. This can mitigate against substantial penalties, time, cost and angst of a protracted ATO review or audit.

Contact the author: jchye@hlbvic.com.au

"One of the more common errors is claiming the funds being transferred are a loan from an unrelated party, or masking it through family members or other structures."

INHERITING THE FUTURE: HOW TO SET UP THE NEXT GENERATION FOR SUCCESS

ANDREW ASH
Director, Business Advisory Services
SYDNEY

Inheritances and gifts have more than doubled since 2002 and could rise four-fold in real terms between now and 2050*. That's an estimated $3.5 trillion dollars changing hands in the next 27 years!

This transfer of wealth will have wide reaching implications for those inheriting the wealth, the people leaving it behind, and their businesses. It will also have a profound impact on the future of the Australian economy more broadly.

The great wealth transfer may sound like a windfall, and it is for many, but it is also carries the burden of responsibility. The incoming generation will have a responsibility to their family, the businesses they control and those that rely on them to use it wisely.

This could mean they feel an obligation to carry on a family business, even it is not what they enjoy doing, and the responsibility to not squander the wealth that has been given to them.

So, how can the next generation set themselves up for success?

Discover your legacy

The first thing that you should contemplate is the legacy you want to leave behind. Get clear on what you want for your business, for your family and for yourself. How do you want to be remembered? What is important to you? Should your succession plan be implemented while you are still here? What do you want for your children? What do you want for your business and all of those that it supports? How will your estate be split?

Set up a structure that can stand the test of time

Structure your affairs appropriately. If it is not structured correctly, it can lead to family conflict, result in excessive taxes being paid, and could even threaten the long-term viability of your business and your family wealth.

This step is not always straight-forward, so you will need the right advisors and governance structure in place to support you.

Communicate and document everything

Communication should be at the heart of your planning process. Whatever the vision that you have for your business and your family, it's important to know and understand if this vision is shared with your successors and the family.

Often times conflict arises from a lack of communication and misunderstanding. Talk to your successors often and make a point of including them in the process. Does your family know what your wishes are? Does your family know what the plan is for your succession? Do you speak with your successors regularly about these matters?

Prepare the next generation to succeed

Wealth can do strange things to people. It's important that your successors are prepared to handle the responsibility that comes with significant wealth.

To assess this, you should first conduct a review of your successors preparedness to handle the transition. Consider how money and responsibility may affect them and their lives. If there is a family business, consider if there are any knowledge gaps in respect to the business.

Every family is different, and every transition is unique. However, if you can go through the above steps, then you can drastically increase the chance of a successful transition.

**Source: The Productivity Commission*

Contact the author: aash@hlbnsw.com.au

APPOINTMENTS

The HLB Mann Judd Australasian Association has recently announced two new partner appointments within the network, including:

Alexander King
Partner, Sydney

Alexander has been appointed as partner within the Sydney firm's tax consulting division. Mr King has extensive experience in corporate taxation, including advising funds management and private equity firms. He is a qualified Chartered Accountant, a member of the Taxation Institute of Australia, and is treasurer and a member of the Executive Committee for the Property Funds Association of Australia.

Caine Barends
Partner, Brisbane

Caine has been appointed partner in the business advisory services division of the Brisbane-based firm. Mr Barends has more than 25 years' experience working with businesses on matters relating to restructuring, asset protection, franchising and performance improvement. He is a qualified Chartered Accountant and a member of the Taxation Institute of Australia.

HLB Mann Judd firms are members of HLB International, the global and advisory accounting network.

CONTACT

The HLB Mann Judd Australasian Association comprises a number of independent accounting firms in Australia, New Zealand and Fiji.

MEMBER FIRMS

ADELAIDE
T: (0)8 8133 5000
E: mailbox@hlbsa.com.au

AUCKLAND
T: +64 (0)9 303 2243
E: hlb@hlb.co.nz

BRISBANE
T: (0)7 3001 8800
E: mailbox@hlbqld.com.au

FIJI
T: +679 670 2430
E: info@hlbnadi.com.fj

MELBOURNE
T: (0)3 9606 3888
E: mailbox@hlbvic.com.au

PERTH
T: (0)8 9227 7500
E: mailbox@hlbwa.com.au

PERTH INSOLVENCY WA
T: (0)8 9215 7900
E: mailbox@hlbinsol.com.au

SYDNEY
T: (0)2 9020 4000
E: mailbox@hlbnsw.com.au

WOLLONGONG
T: (0)2 4254 6500
E: mailbox@hlbw.com.au

REPRESENTATIVE FIRMS

HOBART / LORKIN DELPERO HARRIS
T: (0)3 6224 4844
E: mail@ldh.com.au

LISMORE / THOMAS NOBLE AND RUSSELL
T: (0)2 6621 8544
E: enquiries@tnr.com.au

NEWCASTLE / CUTCHER & NEALE ASSURANCE
T: (0)2 4928 8500
E: cnmail@cutcher.com.au

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2022 CLIENT CHOICE AWARDS

ATO ISSUES GUIDANCE ON TRUST ARRANGEMENTS

PETER BEMBRICK
Partner, Tax Consulting
SYDNEY

The Australian Taxation Office (ATO) has provided final guidance on the tax treatment of common trust distribution arrangements.

The guidance follows a period of public consultation and feedback from professional accounting bodies and financial advisers.

In order to address concerns held by many about the possible retrospective nature of its draft guidance, the ATO indicated the following:

- They will stand by previous guidance for arrangements entered into between 1 July 2014 and 30 June 2022 where taxpayers have relied on it
- In most cases, they will only apply the anti-avoidance rule in Section 100A within four years of a trustee lodging its tax return and will not review arrangements entered into prior to 1 July 2014 other than in exceptional circumstances.

Importantly, low-taxed beneficiaries such as adult children will not be adversely treated if it can be shown they receive or otherwise enjoy the benefit of their entitlement to trust income.

The ATO is primarily targeting arrangements where it was never intended that the beneficiary would receive their entitlement, but rather the distribution was made to save tax.

This is illustrated by a range of "green-zone" examples, and includes scenarios where the trustee retains the relevant funds to use in the working capital of a business carried on by the trust, or to acquire additional investment assets.

The level of risk is reduced where it can be seen that the beneficiary will receive the benefit of their entitlement, such as if the entitlement is paid to an individual beneficiary within two years, or a corporate beneficiary enters into an interest-bearing loan agreement with the trust on commercial terms.

The ATO has also provided similar guidance in relation to "red-zone" scenarios, including the distribution to a low-rate beneficiary, such as an adult child, that is supposedly in satisfaction of expenses incurred on their behalf before they turned 18.

It is clear that any such arrangements are not acceptable under the current guidance and are a clear illustration of "what not to do" going forward.

As part of the updated guidance, the ATO has also, removed the confusing "blue-zone" category. This means that arrangements will either fall within the green zone, which the ATO has indicated they will not generally review, or within the red zone, which the ATO has indicated they are likely to review and potentially take further action.

The greatest remaining area of uncertainty is the question of when an arrangement would be an "ordinary commercial and family dealing", which would take a taxpayer's trust arrangements outside the scope of Section 100A.

While taxpayers using family trusts must take great care when making decisions on the allocation of entitlements to trust income, the updated ATO guidance has provided much-needed clarity.

Contact the author: pbembrick@hlbnsw.com.au

"The ATO is primarily targeting arrangements where it was never intended that the beneficiary would receive their entitlement, but rather the distribution was made to save tax."