



THE LAW SOCIETY
OF NEW SOUTH WALES

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23 May 2012

The Australian Taxation Office
Latitude East
52 Goulburn Street
SYDNEY NSW 2000

Email: damian.byrnes@ato.gov.au

Dear Sir,

Draft Taxation Ruling TR2012/D2
Income Tax: Assessability of amounts received in respect of legal costs
incurred in disputes concerning termination of employment

I am writing to you at the request of the Law Society's Employment Law Committee ("Committee").

The Committee is pleased to have the opportunity to review draft Taxation Ruling TR2012/D2 ("draft Ruling") and it commends the efforts of the Australian Taxation Office in providing this draft Ruling to assist practitioners in this area.

The Committee supports the provision of such rulings as very practical guides to practitioners and their clients in understanding the effects of, and complying with, the relevant taxation legislation. While the Committee supports the issue of the draft Ruling, it makes a number of suggestions regarding technical aspects of the examples given to further improve the utility of the Ruling.

The Committee notes that the examples included in the draft Ruling form part of the Ruling. In the Committee's view it is important that the examples are both consistent with the present employment and industrial laws, and relevant to the matters that commonly arise for practitioners in this area, namely unfair dismissal claims, breach of contract and adverse action claims.

In the Committee's view the examples provided do not sufficiently clarify the tax treatment of legal costs and in what circumstances they are deductible or of a capital nature. The examples are at times confusing and appear inconsistent with the judgments they are based upon. They also do not appear to appreciate the nature of damages and the fact that in many cases there may well be various heads of damage. It would be useful to incorporate relevant tribunal and court decisions in a precise way in the examples provided.

In all of the examples given, the Committee suggests that the distinction between expenses of a capital or income producing nature needs to be clarified expressly taking into account the principles emerging from the cases referred to in the review provided.

The Committee considers that the examples provided in the draft Ruling are not necessarily consistent with the unfair dismissal laws under the *Fair Work Act 2009* ("FW Act") or the *Industrial Relations Act 1996* (NSW) ("the Acts"). Under the Acts the maximum award for an unfair dismissal claim is six months pay, and under clause 392(5)(b) of the FW Act, the amount is capped at \$59,050.00. Costs are rarely awarded under the FW Act (and its predecessor), and only if it is found that the claim is frivolous or vexatious, or a party has acted unreasonably in not accepting an offer of settlement.

Example 3 in the draft Ruling is not consistent with current long-standing unfair dismissal laws under the present Acts and the predecessor to the FW Act.

The Committee suggests that Example 3 could be consistent with an adverse action claim under the General protections provisions under Part 3.1 of the FW Act, where the damages are not limited, and the types of damages awarded are not limited to economic loss, although loss of income is a significant component. Again it should be noted costs are not awarded in these claims except on rare occasions.

Similarly in the Committee's view, Example 4 is inconsistent with the remedies available under the Acts, such remedies having existed for many years under previous legislation. As mentioned above, unliquidated damages are not available to a litigant who brings an unfair dismissal claim and costs are only awarded in very rare circumstances.

It is important that any examples that form part of the draft Ruling are consistent with the existing employment and industrial laws. This will ensure that there is no confusion in the application of the Ruling, so that practitioners are assisted with clear and consistent guidelines as to the taxation rules that apply when settlement of termination of employment claims are reached.

Thank you for the opportunity to review the draft Ruling. Should you wish to discuss any of the matters raised in this letter please contact Gabrielle Lea, Policy Lawyer for the Employment Law Committee by email to gabrielle.lea@lawsociety.com.au or on 9926 0375.

Yours faithfully,


Justin Dowd
President