

## More on GST and Dispute Settlements

In Australia's first legal case on the Goods and Services Tax ("GST"), the Supreme Court of Queensland has ruled that the GST does not apply to court settlements.

The court dismissed an application by Interchase Corp Limited for an indemnity against any GST liability on a court settlement.

Justice Margaret White decided the company had not persuaded her that it had to pay GST on its court awarded settlement.

Interchase had been unable to get a ruling from the Australian Taxation Office on whether it would be liable to pay GST on the amount. Justice White ruled that the tax would not apply.

A GST liability arises only on taxable supplies. Her Honour stated that: "It is not easy to see how a court giving judgement, or the payment of a judgement sum, or the granting of a stay of execution could constitute a 'supply' within the meaning of ... the GST Act".

This decision exposes a flaw in the GST legislation as it was clearly intended that GST might be payable on court orders. However, the Supreme Court of Queensland has confirmed the view that it is not clear from the legislation that payments made upon court order what that supply is or even if there is a supply.

The government may have to amend the legislation.

It is understood that the Australian Taxation Office is preparing a draft GST ruling on settlements and court orders for release about 30 September 2000.

## The Law Against Fraud

Early references to fraud in common law define it as cheating or deceit. A common law cheat was one who, by false pretences, false tokens or intentionally false representations, induced someone else to part with his property or personal rights.

Fraud is considered both a crime and as grounds for civil action.

For many frauds, criminal and civil actions are both pursued in relation to the same act. Prosecutors can file a criminal complaint and the damaged parties can file a civil action for recovery of damages or property.

The basic motivation for fraud is greed. It is explained by the presence of three factors; motivation, opportunity and the absence of capable guardianship (controls). In practice fraud embraces the various means which human ingenuity can devise for a person to get an advantage over others by false suggestion or suppression of the truth. The circumstances in which fraud can exist are very diverse and include: insurance fraud, credit card fraud, superannuation fraud, securities fraud, commercial fraud, computer and telecommunications fraud, charity contribution fraud, healthcare fraud, etc. Many new scams have been facilitated by new technology.

The legal elements of fraud include (1) a material false statement, (2) made with knowledge of its falsity, (3) which is relied upon by the victim, (4) who suffers damage as a result.

The key difference between fraud and other thefts revolves around the first element – the perpetrator uses stealth or force to secure another's property.

Often civil proceedings are taken against accountants and auditors as third party defendants to a fraud.

Recent examples include:

- Max Green – who used accountants to introduce to their clients his fraudulent tax investment scheme. Did they act as reasonably prudent accountants in introducing the scheme to their clients?
- National Institute of Accountants fraud perpetrated by the internal accountant. Should the auditor have detected the fraud?
- Victorian Savings & Loan Credit Union fraud perpetuated by an agent "Kytting" cheques. Should the auditor have detected the fraud?

In the above examples, Munday Wilkinson were engaged to provide our professional opinion on the conduct of the accountant / auditor.

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## Commercial Interest to be applied to Damages for Past Domestic Services

The High Court of Australia recently considered the issue of interest on damages for past domestic services.

*Grincelis v House [2000] HCA 42 (3 August 2000)* involved a case where the appellant suffered brain damage and other serious injuries when a motor vehicle driven by the respondent collided with the appellant as he was riding his bicycle. Subsequent to his discharge from hospital, his parents provided care.

Both at the initial hearing of the Supreme Court of the ACT and on appeal to the Full Court of the Supreme Court of the ACT, it was held that no interest was payable on the award for past domestic damages.

Then on further appeal to the Full Court of the Federal Court of Australia it was held that damages for past care must be “valued by reference to commercial rates charged for its provision, regardless as to whether they were in fact provided gratuitously, by relatives or parents”. All members of the Court agreed that interest should have been allowed on the damages awarded in respect of past services rendered by the appellant’s parents. However, the Court was divided about the rate at which that interest should be allowed. The views were that the rate should be either:

- 4% pa per the decision in *MBP (SA) Pty Ltd v Gogic (1991) 171 CLR 657*; or
- at a “commercial” rate of interest.

The majority held that the “Gogic approach” should be adopted. This was then appealed to the High Court.

The majority of the High Court of Australia held that interest was payable and the Court distinguished the facts of *Gogic* wherein the pre trial non-economic loss was assessed according to monetary values prevailing at the date of the judgement.

In this matter, their Honours were of the opinion that damages were assessed by reference to costs prevailing during the period between the date of the bicycle accident and the date of judgement and that a commercial rate should apply.

Notwithstanding the above decision, the payment of interest on damages for domestic care will be subject to limitations imposed by any relevant legislation.

The assessment of loss of earnings and earnings capacity for self-employed people involved in personal injury can be complex and can involve calculations under a number of different scenarios. We have extensive experience in quantifying/reviewing earnings and economic losses in personal injury (and other) matters.

## Supreme Court of NSW Expert Witness Code of Conduct

Experts appointed in Supreme Court of NSW matters on or after 1 March 2000 must in their reports, acknowledge that they have read the Expert Witness Code of Conduct and agree to be bound by it.

The Code requires expert reports to specify:

- The person’s qualifications.
- The facts, matters and assumptions on which the opinions in the report are based.
- Reasons for each opinion expressed.
- If relevant, a statement that a particular issue falls outside of the scope of the expert’s field of expertise.
- Details of reference material and literature used in the preparation of the report.
- Any examinations, tests or other investigations on which the expert has relied and identify, and give details of the qualifications of, the person who carried them out.
- Any qualifications concerning, for example, insufficient data or research.

This code differs from the Federal Court Expert Witness Guides in two material respects.

While the Federal Court Guidelines require that all instructions given to the expert, or a written summary of any instructions given, should be included in or attached to the expert’s report, the Supreme Court of NSW Code does not require instructions to be set out in the report.

The declaration at the end of an expert’s report in a Federal Court matter should read: “*I have made all the inquiries which I believe are desirable and appropriate and no matters of significance which I regard as relevant have not, to my knowledge, been withheld from the Court.*” The declaration by an expert under the Supreme Court of NSW is that the expert has read the Code and agrees to be bound by it.

We are not aware of whether a similar Code is being considered by the Supreme Court of Victoria.

## Family Court & Expert Evidence

The Family Court of Australia is currently considering the issue of expert evidence and that this will be a follow up to its recently released “Future Directions Committee Report”. The Chief Justice of the Family Court has written to the relevant professional associations (including the Institute of Chartered Accountant’s Forensic Accounting Special Interest Group) seeking to consult with them about a code of conduct for expert witnesses.

It has been decided by the Future Directions Committee that:

- *“Subject to the outcome of the current review of the Federal Court guidelines for expert witnesses, the Family Court adopt similar guidelines to those adopted by the Federal Court;*
- *In appropriate financial cases, greater use be made of the power to order court appointed experts;*
- *Guidelines be drafted for the conduct of conferences of experts to include the conferral of experts during the preparation of the report;*
- *Further consideration be given to the issue of whether there should be provision for an expert to summarise his/her opinion before cross-examination or be allowed to directly explain his/her views other than by way of examination in chief, cross examination or re-examination;*
- *Provision be made in the Rules for two or more experts giving their evidence on the same issue at the same time, in similar terms to Order 34A of the Federal Court Rules; and*
- *Parties and the Court should consider whether an expert or experts agreed between the parties, should be appointed in a case to deal with a particular issue, and that greater use be made of a joint expert.”*

## **Expert Reports - What Should You Expect?**

An expert’s report may be in various forms including:

- verbal advice to instructing party
- explanatory report to legal counsel
- an affidavit
- a written report

The content and form of a written report depend upon the type of engagement and circumstances surrounding the engagement but typically the format could include:

- Our instructions
- List of Documents we have relied upon in forming our opinion
- List of any Assumptions made
- Background to the matter
- Disclaimer (on the accuracy of information relied upon)
- Approach Adopted and Reasons why
- Detailed Workings & Analysis
- Details of Opinions with explanations
- Details of the writer’s experience and qualifications
- Schedules and Appendices

We recognise that an Expert’s Report can play a critical role in the dispute resolution process. Our detailed reports ensure our analysis and reports present a clear and complete view that is focused on our understanding of the purpose and use of the report.

## **Munday Wilkinson**



### **Our Aim**

Munday Wilkinson is a boutique forensic accounting firm.

We offer the legal profession, and others, quality service and technical proficiency commensurate with that of the Big 5.

At the same time we are able to provide a more personalised service as we operate in a framework that enables us to be very responsive to our clients while at the same time delivering a high quality service in a cost effective manner.

### **Our Services**

The partners, Russell Munday and Bruce Wilkinson jointly have over 50 years accounting experience including over 20 years specialising in forensic accounting.

In particular both partners have extensive experience in:

- Business and company valuations
- Valuations of intellectual property
- Quantification of economic losses
- Fraud audits and investigations
- Loss of earnings assessments and reviews
- Family law investigations, valuations and tax advice on settlements
- Due diligence reviews
- Professional negligence matters concerning professional advisors
- Solvency reviews
- Expert determinations
- Expert witness services.

We look forward to being given the opportunity to provide you and your clients with an independent, quality and effective forensic accounting service.

## RECENT MATTERS

Since the establishment of Munday Wilkinson, Chartered & Forensic Accountants, in July 2000 the partners of the firm have been involved in a variety of matters including:

- Preparation of an Independent Accountant's Report as to the potential liability of an auditor and the conduct of the audit committee in a matter concerning a fraud committed by an employee of a professional accounting association.
- Provision of an expert opinion on the extent of material available that could be used as evidence of a fraud conducted by a director of a company where the director gained personal benefit as a result of the failure to invoice certain clients and redirecting payments received to his own benefit.
- Preparation of an Independent Accountant's Report concerning the role of an accountant in a failed venture including issues of conflict of interest and the financial capacity of the client at the time.
- Preparation of an Independent Accountants Report concerning the role of an accountant concerning a dispute between two former partners including the role of an accountant where one partner's drawings exceeded the other partners.
- Provision of professional opinion as to the steps necessary to commence a trading business (more particularly, an air conditioning business); and the time it would take to set up such a business to achieve the level of sales achieved by defendant in its first six months of trading.
- Preparation of an Independent Accountant's Report which reviewed the accounting and other records of the Plaintiff and Defendants and to provide a report relating to fraud allegations contained in the Statement of Claim.
- Valuations for family law purposes including valuations of an insurance agent, an insurance broker, jewellery business, a software developer, a specialised engineering business, a licensed grocer and a nursery.
- Various reports concerning estimated costs of relocation and loss of profits incurred a result of the compulsory acquisition of the businesses premises including a service station, wholesale tree nursery, a take away food store and a tyre franchise.
- Various personal injury calculations of loss of earnings and loss of earnings capacity.
- Review of warehousing / wholesaling proposal for a liquor group.
- Preparation of Independent Accountant's Report concerning the solvency of an entity conducting an insurance broking business.
- Preparation of an Independent Accountant's Report analysing various financial and other documents relevant to doctor's claim under his income protection policy, this involved consideration as to what is person exertion income and what is investment income.
- Valuation of food manufacturing business in its early stages in respect of commercial dispute concerning due to the seizure of the building premises due to landlord default to its financier and the consequential loss of facilities to the plaintiff.
- Preparation of report estimating the loss of profits and other expenses incurred by a panel beating business resulting from a business relocation due to the collapse of a wall.
- Preparation of an Independent Accountant's Report analysing various financial and other documents relevant to a charge of misappropriation of research and development funds and forming an opinion thereon.

### Disclaimer

Although all care has been taken in preparing "MW Forensic", no responsibility is accepted by Munday Wilkinson Pty Ltd for any errors or omissions. Professional advice should be sought before applying the information to particular circumstances.

## MW Crosses the Border

We are pleased to inform you that we have developed a good relationship with a Sydney based forensic accounting firm, McMahan Worth, who operate from 222 Clarence Street, Sydney.

This new relationship enables us to service matters involving both NSW and Victoria and to cross-refer work to each other. We are confident this relationship will develop further in the period ahead.

## Further Information

If you would like further information regarding this newsletter or our services, please contact either Russell Munday or Bruce Wilkinson at:

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