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THE INJURED FARMER

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The task of assessing damages for economic loss in relation to an injured farmer is a complicated one that requires an understanding of why the financial records of a farmer look the way they do.

Our experience in relation to numerous cases allows us to present some key issues for your consideration:

1. Is the farming enterprise a business or a hobby?

Generally only those operations conducted with a view to making profit or creating asset value are usually considered when undertaking an assessment of economic loss. Hobby farming activities conducted with a view to generating taxation losses to set off against other earnings will generally not give rise to a valid claim for economic loss. However circumstances may arise where a "hobby" farmer is developing and maintaining a property with a view to commencing more serious farming activities upon cessation of their main occupation. In those circumstances a claim for future economic loss may be capable of being advanced.

2. Legitimate Taxation Deductions

The most prominent reason why the financial results of a farm diverge from reality relates to the use of legitimate taxation rules to minimise taxable income and in many cases extinguish it all together. These farming tax rules are generally in addition to the concessional taxation rules available to most other non-farm enterprises. An understanding of these rules allows a proper assessment of the farmer's "real" income. Some key examples of the concessional tax rules applying to farmers include:

(i) Livestock valuation rules that effectively allow all profits on livestock to be deferred until the sale of a beast despite all costs relating to the beast being incurred over its total life on the farm.

For example upon the birth of a calf a taxation value of $20.00 is ascribed to it. Over a period of say 3 years the sale value of the beast may increase to $500.00. So a real profit of $480.00 has been generated. This profit is not taxed until the beast is sold;

(ii) Accelerated write-offs of some capital assets such as dams, water channels etc; and

(iii) The Farm Management Deposit Scheme allowing primary producers to set aside and earn interest on pre-tax income from profitable years and subsequently use the income when it is most needed (ie. in the year of a natural disaster). The mechanism works by allowing a tax deduction for farm management deposits in the financial year in which the income was derived and in the subsequent year in which the farm management deposit is withdrawn the amount is included as assessable income. This scheme is particularly important for primary producers with uneven income streams.

3. Climate

No other industry sector is as affected by climatic impacts as the rural farming sector. During periods of drought substantial losses may be unavoidable for even the best and most experienced farmer. An understanding of how regional climatic factors have affected operations is critical in arriving at a fair assessment of the impact of an accident on farming operations. Fortunately, ordinarily it is possible to obtain statistics that are useful in “normalising” the variable seasonal trading results reported by farming operations.

4. Personal Living Expenses

Another commonly occurring complication with farmer’s income tax returns is that they may be paying for personal living expenses out of the farm and claiming Income Tax deductions for those expenses. Simply stated the financial records of the farmer may include expenses not actually necessary to run the business of the farm. Some expenses clearly will fall in a “grey area” and really be both farm and personal expenses. Common examples include: home mortgage payments, home utilities (electricity and telephone), rates and taxes, insurances and motor vehicle expenses. In these circumstances it is necessary to identify and add back the personal expenses (or component thereof) to establish the “true” earnings of the farming enterprises.

5. The nature of the return

The return generated by a farmer from his efforts and expertise generally falls into two broad categories being (i) the “income return” arising from the sale of farm crops and / or livestock; and (ii) the “capital return” arising from work undertaken on the farm designed to improve its capital value. It is important to consider and, where appropriate, value both types of return. Whilst the income return will ordinarily be apparent (after relevant adjustments) from the financial records the capital return will not be recognised until the ultimate disposal of the property. This issue is further complicated by virtue of the fact that many properties are never sold but rather are passed from parent to child within the family.

6. The Farm as an Asset

In circumstances where the farmer suffers a severe injury or is killed the decision may be taken to sell the farm. If this happens the temptation arises to argue that the plaintiff or the deceased’s family is really better off because the investment return on the sale proceeds actually exceeds the reported earnings of the farm in operation. This proposition should be viewed in light of the following:

(i) Regardless of the accident / death, the farm would have been sold at some point when the farmer would have retired and the accident / death has simply led to an acceleration of the sale.

(ii) The farm may have been worth substantially more when sold in an orderly way rather than hastily following the injury to or demise of the farmer. Resolution of this issue would most commonly involve engaging an experienced rural valuer to provide an expert report.

7. Retirement Age

In almost all farming cases in which we have been involved the farmer intended (or in fact had) worked longer than the normal retirement age of 65 / 67 years. Often times three generations of the one family are working on the one farming property all at various levels of contribution and experience. Obviously the issue of other adverse health contingencies will become more important after normal retirement age but limiting calculations to age 65 / 67 may in many most circumstances significantly misrepresent the real intentions of the injured / deceased farmer.

8. Replacement Labour Approach

Quite often the appropriate manner in which to view the injured / deceased farmer's contribution to the farm is by reference to the cost of replacing his or her services. Considerable care should be exercised in arriving at this value for reasons including the following:

(i) The difficulty in replacing all the services of an experienced farmer particularly in circumstances where the accident / death removes the intellectual skill and long term experience from the farm completely;

(ii) The need to provide accommodation on-site for the replacement employee to ensure that they can deal with "farm emergencies" as and when they arise; and

(iii) The availability of farm workers willing to undertake all the duties formerly undertaken by the injured / deceased farmer.

9. Some cases of interest

We attach reference to the following cases that may be of assistance in relation to assessment of damages for economic loss / value of labour in relation to primary production activities:

- *Walden v Black [2006] NSWCA 170 (5 July 2006)*
- *Schimke v Clements & Suncorp Metway Insurance Ltd [2011] QSC 182 (22 June 2011)*
- *Kay v Murray Irrigation Ltd [2009] NSWSC 1411 (unreported)*
- *Zahra v Brown [2006] NSWCA 162 (unreported)*
- *Kerney v Mead & Anor [2011] NSWSC 518*
- *Cochrane & Anor v Hannaford [1999] NSWCA 371*

If you have any questions in relation to the content of this document please do not hesitate to contact either Mark Thompson (3228 4023) or Michael Lee (3228 4091).

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