

MILLER NOYCE

LAWYERS

MILLER NOYCE HOUSE, THIRD FLOOR, 45-47 HUNTER STREET, HORNSBY 2077

Tel: (02)9987 4855 Facsimile: (02) 477 7107 Email: auslaw@millernoyce.com.au

DOUG SPENCER'S LEGAL POTPOURRI – MAY 2007

TRUST DEEDS – It is not uncommon to find that the original Family Discretionary Trust Deeds go missing. Many Trusts were established years ago and the original document often gets mislaid. This can create a possible stamp duty problem if a new deed is required and it cannot be proved that stamp duty was originally paid on the deed. It is worth remembering that when these Trusts are set up the original deed can be registered at Land & Property Information in the General Deeds Register. This would then overcome the problem if the original deed is subsequently misplaced. – *Law Society Journal October 2006.*

INDUSTRIAL RELATIONS – EMPLOYEES – There is a worthwhile article by Joe Catanzariti on what appears to be the current extent to which Courts will restrain former employees. The recent cases confirm that employers can protect **confidential information** and **customer connection**. Also noteworthy is the strengthening of an employer's right to restrain former employees from **soliciting its employees**. Much will depend upon the position held by the former employee and the nature of the information that they may be able to use.

Confidentiality restraints will very much depend upon the nature of the alleged “*confidential*” information. However, if the information is “*confidential*” then the Courts will certainly be willing to enforce a restraint.

A non solicitation restraint is legitimate when the former employee represents the employer and is thus able to control/influence its business. Although an employer cannot be protected from mere competition, it can be protected from unfair competition in which the former employee exploits the customer connection they have built up with the company's clients.

The duration of any restraint must be reasonable and depends on how long a reasonably competent **replacement employee** would take to establish rapport with customers.

The article is a useful summary of the current position. – *Law Society Journal October 2006.*

ESTATES – COMMISSION – The decision of *Watters Re Estate of Dibbs [2006] NSWSC 1277* is a Judgment of Windeyer, J and is worth reading. It deals with current principles in commission applications including whether an executor should be allowed commission on Estates transferred to one Executor, where the commission should be by way of percentage or lump sum, and whether commission could be apportioned to particular executors. – *Law Society Journal October 2006.*

TAXATION – EMPLOYMENT/SERVICE AGREEMENTS – There is a worthwhile article by Robert Richards in which he highlights the importance of clarifying, and if necessary making it clear in any agreement who will pay any additional taxes, such as fringe benefit tax, particularly in arrangements that may involve salary sacrifice.

He also makes some worthwhile comments in relation to arrangements concerning contractors. In those situations, both the employer and the employee desire to avoid many

of the obligations that arise in an employment situation, including the obligations in respect of PAYG installments etc. Whether or not there is an “*employment*” arrangement depends upon the facts. He makes the point that if in reality there is an employment situation, the employer will be liable for PAYG installment deductions (*if they have not been made*). However, there should be no exposure if the actual employee is engaged by his company and the obligation or liability should rest with that company and not the employer.

Also, in a situation where an employee wants to alienate his or her personal services income to some other person or entity, the law contains provisions designed to prevent certain persons from doing so. The risk attached to an alienation arrangement not being successful lies with the individual who provides the services and not the payer who pays for the services. However, the alienation of income rules do not apply where a “*results test*” is meant. The results test means that if a payment is made to an entity for the production of a result, the entity provides all the tools necessary for the production of the result, and the entity is liable for the cost of rectifying any defect in the work performed, the alienation of personal services rules will not apply to that payment. Persons entering into agreements with entities might be able to help individuals avoid the alienation of personal services rules by ensuring that the agreement provides that the entity is responsible for all the above listed criteria. – ***Law Society Journal February 2007.***