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DOUG SPENCER'S LEGAL POTPOURRI – 5TH SEPTEMBER 2007

SUPERANNUATION

With the increasing amount that is invested in superannuation funds, it is becoming more and more important to consider how entitlements will be dealt with upon the death of a member. They will not automatically form part of a deceased estate and therefore may not be subject to the terms of a Will. This raises the importance of Binding Death Nominations. It is also often important to arrange for any death benefit to be paid to an Estate so that the entitlements can then be the subject of the Will. Binding Death Nominations generally need to be renewed every three years, and the large organisations generally do not let you know when they need to be renewed.

JOINT TENANCY

It is also important to consider the implications of holding property as joint tenants. In many cases this is what is desired, ie that upon the death of one the other's share will automatically pass to the survivor. However, this is not always appropriate, such as in a situation of second marriages etc.

It is also becoming important to consider whether the joint tenancy of a property or asset should be severed so as to try and avoid the interest of the deceased automatically passing to the survivor. This is becoming important even in the classic situation of elderly parents, where it may not be desirable to see the interest simply pass to the survivor, thereby increasing the value of their individual assets which can then have a bearing upon the cost of nursing care and accommodation bonds etc.

EXISTING USE RIGHTS – A regulation was recently passed which dramatically restricts existing use rights. It is likely to lead to a decrease in the value of properties that are subject to such rights. Existing uses are ones which were lawfully commenced, but have since been prohibited under an environmental planning instrument. Prior to the amendment (*29th March 2006*) an application could be made to change an existing use to another use that would otherwise be prohibited. The recent amendment only permits an existing use to be enlarged, expanded or intensified; or altered or extended; or rebuilt; or changed to another use but only if that other use is a use that may be carried out with or without development consent under the Act. It is **no longer possible** to apply to a consent authority for a change of existing use to **another prohibited use** – *Law Society Journal May 2006*.

ENVIRONMENT AND PLANNING – RESTRICTION ON COMMUNITY APPEALS – An amendment last year of the Environmental Planning & Assessment Act has severely limited the grounds for and the circumstances in which concerned individuals or community groups can seek merit or judicial review of significant developments. In effect, Part 3A of the Act dramatically reduces the involvement of the community in the original decision making

process and seeks to reduce the risk of individuals or groups delaying or preventing significant development by limiting the grounds on which, or the circumstances in which, they can seek merit or judicial review. Instead the Minister for Planning and the Director General, Department of Planning, maintain the power to make all key decisions regarding significant development, with advice from “*expert panels*”, limited input from other key agencies and little opportunity for effective criticism where the bureaucracy “*gets it wrong*” – ***Law Society Journal May 2006.***

TRADE PRACTICES – MISLEADING CONDUCT – The Full Federal Court, in an unanimous judgment, reversed every one of the trial Judge’s previous rulings in a case involving representations made as part of a real estate transaction. The case reiterates that intention is not an element in misleading or deceptive conduct. Accessorial liability requires only participation in the making of a representation and knowledge of the facts involved in the making of the representation. This was a case involving the sale of the Lawson Hill Winery at Mudgee. The Full Court held that both of the owners were liable (*even though one of them was merely a partner in the business and not one of the proprietors of the land*). The Court further held that the agent was not liable and was merely passing on information from the vendor about the vine area, without taking responsibility for its accuracy. In addition, the Court held that another party, who previously had issued an invoice for drilling work, was not liable for the erroneous statement in the invoice, as it was not a certification of volume which he should reasonably have understood would be communicated to others. – ***Law Society Journal April 2006 and CCH Buying and Selling Businesses – Personal Property Reporter March 2006.***

INCOME TAX – PART 4A – The ATO has issued a practice statement highlighting factors which indicate that a scheme may be struck down by Part 4A. However, of interest, the ATO appears to have backed away from attacking husband and wife partnerships, even though one of the parties may perform most of the work. These sort of partnerships are often a fairly effective way of spreading the income between the two parties. Nevertheless, the ATO appears to have accepted that such partnerships are often established for reasons other than simply income splitting. – ***Lawyers Tax Companion April 2006.***

GST – ENTERPRISE – The ATO has recently issued a draft ruling (MT2005/DI) which considers the concept of an “*enterprise*” generally but, more particularly in relation to the concept of “*in the form of an adventure or a concern in the nature of trade*”. This departs from the earlier draft ruling. In short, an adventure or concern in the nature of trade includes a commercial activity that does not amount to a business but which has the characteristics of a business deal. Such transactions are of a revenue nature. However, the sale of the family home, car and other private assets are not, in the absence of other factors, adventures or concerns in the nature of trade. Where land is sold that was purchased with a view to resale at a profit, the ATO considers these activities to be an enterprise. This would be so whether the land was sold, as it was when it was purchased, or whether it was subdivided before sale. This is because the activities are business activities or activities in the conduct of a profitmaking undertaking or scheme, and therefore an adventure or concern in the nature of trade. Significantly MT2005/DI abandons the “*rule of thumb*” that was put forward in the previous draft ruling that a subdivision of less than 10 blocks with only minimal activities to meet council requirements and to sell the subdivided land would not be an enterprise. – ***Lawyer’s Tax Companion April 2006.***

BANKRUPTCY – VOID TRANSFERS – SEVERANCE OF JOINT TENANCY – In ***Anderson v Peldan [2005] FCA 1179*** the Federal Court of Australia held that the transfer between a husband and wife to sever their joint tenancy by mutual agreement (so that it left them holding the property as tenants in common) was not a void transfer under the Bankruptcy Act. www.finlaw.com.au/cases

LAND TAX – UNIT TRUST AMENDMENTS – Amendments have been made which received Royal Assent on 2nd November 2006. Broadly, under the amendments, if a trust satisfies relevant criteria, the beneficiaries of the trust will be taken to be owners of the land and, accordingly, the trust will be taken to be a fixed trust and entitled to the land tax free threshold. In short, the trust deed must specifically provide that the beneficiaries are “presently entitled” to the income (subject only to the payment of the trustee’s proper expenses), and are “presently entitled” to the capital. The amendments allow a unit trust that is restructured to comply with the relevant criteria before 1 January 2008 to be treated as a fixed trust in respect of the land tax year commencing 1 January 2006 and subsequent land tax years.

Consideration should be given to terms of Unit Trust Deeds to see if they need amendment to ensure compliance with these provisions. – ***Lawyers Tax Companion December 2006***