

# MILLER NOYCE

## LAWYERS

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### DOUG SPENCER'S LEGAL "POTPOURRI" – MARCH 2008 (1)

**SUPERANNUATION, WILLS AND TESTAMENTARY TRUSTS** – Entitlements payable upon, the death of a member of a superannuation fund can be paid tax free to the members spouse or a dependent (such as children under 18 years and dependent). However, if those benefits are not paid directly to them or into an estate where the Will then specifies that those benefits go specifically to them, there will be tax payable on the benefits paid. On the other hand, if the benefits are paid to non-dependants, such as adult children, there is no taxation difference between paying it directly to them or paying it to them through the estate of the deceased member. If a person is considering establishing a testamentary trust under their Will, it is important to bear in mind that the death benefits from the superannuation should not be included in the part that forms the assets of the testamentary trusts as they would then be subject to tax - which if they were left directly to the spouse or for the benefit of the dependent children would not be subject to tax.

**ONLINE CONTRACTS** – When there is offer and acceptance via a so called "auction" online, an enforceable contract is created. Similarly, quite a number of suppliers (such as Telstra) are establishing arrangements whereby customers can confirm contracts or renewals online. It is important to realize that contracts can be made in this way – *Law Society Journal February 2008*

**CONTRACTS – TERMINATING CONTRACTS AT COMMON LAW** – When determining whether or not a person is entitled to terminate a contract at common law, the following steps should be taken:-

- Consider whether common law termination rights have been excluded (such as by the inclusion of express termination provisions). The general presumption is that common law rights have been preserved;
- Identify the conduct of the other party that is said to justify termination;
- Where that conduct is said to constitute repudiation, apply the relevant test (namely, whether the conduct of one party is such as to convey to a reasonable person, in a situation of the other party, repudiation either of the contract as a whole or of a fundamental obligation under it);
- Where that conduct consists of breach of a term of the contract, (in addition to considering repudiation) construe the contract to determine whether the term is a condition, warranty, or an intermediate term. This would involve identifying the common intention of the parties (as determined objectively from their conduct) and applying the test of essentiality (namely, whether the innocent party would have entered into the contract unless he or she was assured of performance of the obligation);
- Whether the term is intermediate, consider whether the breach goes to the root of the contract and deprives the innocent party of a substantial part of the benefit for which it contracted;
- If a right to terminate prima facie exists, consider whether any relevant circumstance restricts that right – *Law Society Journal March 2008*