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DOUG SPENCER'S LEGAL "POTPOURRI" – AUGUST 2008

SUPERANNUATION – ESTATE PLANNING – two important issues need to be addressed in considering superannuation as part of a client's estate planning. They are:-

(a) "***Who will be the Trustee(s) of my Super Fund?"***

(b) ***"Who will receive the 'death benefits' when both of us (husband and wife) are gone?***

The first issue is important because a trustee will normally have a fairly wide discretion as to who and how any "death benefits" will be paid upon the death of a member. Consequently, it is important to ensure that the trustee is someone who can be trusted to pay the death benefits as may be desired. This issue is also somewhat problematic because many trust deeds of small self managed super funds do not say who will be the trustee upon the death of the members (such as a husband and wife).

Who will receive the "death benefits" is also (obviously) of importance. The arrangements need to be both certain and flexible. On the one hand, it may not be desirable to pay the death benefits to the estate of the member, as this may only delay the process and add to the cost, or the estate might be insolvent or tied up in litigation (when superannuation can provide considerable protection in these circumstances). On the other hand, what happens if one of the adult children has died and has children? That is an important issue because under the superannuation legislation and most trust deeds, the death benefits can not be paid directly for the benefit of the grandchildren of a memberbecause they normally would not be within the meaning of "dependants". In that situation it is important to ensure or arrange for the death benefits to go to the estate of the member - so that they can then be dealt with under the member's will.

The way a member can make it clear as to who receives the death benefits is to give a binding or a non-binding death nomination. However, the superannuation legislation provides that such a nomination can only be given if the rules of the super fund enable the same to be done. In some trust deeds that I have seen lately, there was no such provision.

In many instances, many people need to make arrangements to specify who will be the new trustee (when they are gone) and also to put in place binding or non-binding death nominations so as to specify how and to whom the death benefits will be paid ie. to adult children or the estate etc. In some situations, the rules of the super fund need to be changed to enable such nominations to be given.

SUPERANNUATION – ASSET PROTECTION – the new superannuation regime provides very significant benefits in protecting assets against problems of bankruptcy and claims that could lead to financial ruin. Previously, the legislation provided certain benefits up to a persons reasonable benefit limit (RBL's). As RBL's have effectively been abolished, the

ceiling of protection provided to interests in a superannuation fund was removed. A person's entire interest in their superannuation fund is now protected from being divisible among the creditors. There are new provisions in the Bankruptcy Act which can claw back contributions which were made to defeat creditors (section 128B). However, the trustee in bankruptcy needs to satisfy the requirements of those provisions, which essentially turn on being able to demonstrate that the main purpose was to prevent the transferred property (contributions) from becoming devisable among the person's creditors or to hinder or delay the process of making the property available and the transfer occurred after 28 July 2006 ***–Law Society Journal – July 2008.***

JOINT TENANCY – SEVERANCE BY BANKRUPTCY – In the decision of ***Peldan –v- Anderson*** (2006) HCA48 (4 October 2006) the High Court held that the bankruptcy of one party severed the joint tenancy with the other party. This is good news for people in these difficult circumstances. The situation in this case was that a property was owned by a husband and wife and shortly after the husband was declared bankrupt, the wife died. The trustee in bankruptcy of the husband's estate claimed to be entitled to the whole of the property by survivorship. Fortunately for the wife's family (children) it was held that the bankruptcy had severed the joint tenancy and accordingly, her interest did not pass by survivorship to her husband's bankrupt estate, but rather became part of her estate. Presumably, she had made a will providing that her interest went to her family, such as her children. These facts also illustrate the importance for people in these difficult circumstances of ensuring that their wills adequately deal with the situation. If the wife had left a Will leaving everything to her husband, her interest would have become part of her bankrupt estate irrespective of the issue that was litigated to the High Court – ***Law Society Journal - July 2008.***

INDUSTRIAL RELATIONS – POACHING OF KEY EMPLOYEES AND DAMAGE CONTROL – There is an interesting article by Jo Catanzariti on the recent case of ***BearingPoint Australia Pty Limited –v- Robert Hillard*** (2008) VSC115 (18 April 2008) where the Supreme Court of Victoria examined issues that arose when an employee went and worked for a competitor after he had been put on "garden leave". It was held that the employer had not repudiated the contract by putting him on "garden leave". However, the sting was that BearingPoint failed to obtain injunctions restraining Mr Hillard from engaging in other employment during the notice period or contacting clients or perspective clients during the 180 day notice period in the contract. The Court was not prepared to impose a restraint which effectively would have been an order for specific performance of the contract. The Court also concluded that damages would be an adequate remedy and therefore an injunction was inappropriate. Furthermore, the Court concluded that the restraint was too wide as it was for a period of twelve months and reference to any client of the employer was also too vague and too wide. On those issues, the Court found that it could not vary the restraint to make any sense and therefore the restraint failed in its entirety. The case emphasizes the importance of managing terminations and also taking great care with employment contracts and restraint clauses, particularly when the employee could cause significant damage and disruption if they left and went and worked for a competitor – ***Law Society Journal - July 2008.***

INDUSTRIAL RELATIONS – MUTUAL TRUST AND CONFIDENCE IMPLIED IN EMPLOYMENT CONTRACTS – An observer could be forgiven for thinking that industrial legislation instruments comprehensively regulate the rights and obligations of employers and employees. Despite their important role, however, such issues miss the reality that the root of the employment relationship is based in contract. Contractual principals, consequently play a fundamental role. Such an implied term has been framed as a duty on the employer to "*not, without reasonable and proper cause, conduct itself in a manner calculated or likely*

to destroy or seriously damage the relationship of trust and confidence between employer and employee." The recent case of ***McDonald –v- South Australia*** (2008) SASC134 bears out these obligations. Most significantly, perhaps, it recognized that an implied term of mutual trust and confidence exists in the employment contracts, and it considered the role of such a term in providing relief for employees who are overstressed and managed poorly in the workplace. The case emphasizes that this implied term is very broad and may be used in the future in a number of ways to create new practical rights and obligations in the employment relationship ***– Law Society Journal – August 2008.***

INDUSTRIAL RELATIONS – TERMINATION FOR MISCONDUCT – there are a number of recent decisions which demonstrate what conduct has been considered valid for dismissal. In the first case involving Telstra Corporation and a Ms Streeter it was found that the dismissal was justified because her lewd behavior at a company function had been extremely offensive to other employees but also because she had been dishonest with her employer. In this case, it was found that the requirement for honesty and trust was so essential that termination was justified. In the second case, the dismissal was also found to be justified where the employee, who worked for FedEx falsified certain receipts. Although the amounts involved were not large, the conduct again destroyed the essential requirement for honesty and trust between the parties. In a further case involving a council employee, the dismissal again was found to be justified because the conduct involved dishonesty and the employee ignored requests to return council property. Again, it was held that the conduct fatally undermined the employment contract. These cases highlight that the acts of dishonesty affected the necessary trust and confidence that must exist between employers and employees – ***Law Society Journal - June 2008***.

GST FORFEITTED DEPOSTS – In a recent unanimous decision, the High Court held in ***Reliance Carpet Co Pty Limited –v- Commissioner of Taxation*** (2008) HCA22 that GST applied to forfeited deposits paid under a contract for the sale of land which involves a taxable supply. This creates some practical and legal issues regarding sales involving the use of the margin scheme, because GST will be payable on the whole of the deposit whereas GST would only have been payable on the "margin" had the transaction completed. There is also an issue in relation to the timing of the supply as the High Court has held that the vendor makes a supply of "real property" on exchange. The decision also emphasizes the importance of ensuring that the deposit on a taxable supply should be calculated so as to include any GST payable to cover the situation if the same was ever forfeited – ***Law Society Journal – August 2008.***

CORPORATIONS – STATUTORY DEMANDS – In ***Aussie Vic Plant Hire Pty Limited –v- Esanda Finance Corporation*** (2008) HCA9 (26 March 2008) the High Court held that there was no power to extend the time for compliance with a statutory demand if the time has already expired. This makes it critical to ensure that any application to set aside a statutory demand must be made within time ***– Law Society Journal - June 2008.***

MORTGAGES – FRAUD – There is a worthwhile article by Lee Aitken on the danger of all money clauses in mortgages, particularly when there is only one specific loan. In the recent decision of ***Veller –v- Permanent Mortgages Pty Limited*** (2008) NSWSC505 (28 May 2008) Young CJ in Equity struck down such a mortgage when it had been fraudulently executed by another party – ***Law Society Journal - July 2008.***