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## December 2003 Newsletter

*This newsletter deals with the new "land rich" provisions of the Duties Act, proposed changes to the bankruptcy laws in relation to assets held by related parties and the dangers of standard arbitration clauses.*

### STAMP DUTY NEW NSW "LAND RICH" PROVISIONS

On 14 November 2003, the existing "land rich" provisions of the *Duties Act 1997* (NSW) were repealed with new provisions inserted.

The salient features of the new "land rich" provisions are as follows:

- as with the old "land rich" provisions, the provisions only apply where there is a "relevant acquisition". Unlike the old provisions, this requires the acquisition of a "significant interest" in a "landholder".
- what is a "significant interest" depends on the entity in question. In the case of a "private unit trust scheme", a "significant interest" is an entitlement to 20% or more of the corpus of that unit trust. In the case of an entity other than a "private unit trust", it is an entitlement to 50% or more of the capital of that entity;
- a "landholder" is "land rich" if:
  - it has "land holding" in NSW with an unencumbered value of \$2m or more; and

- its "land holding" in all places whether within or outside of Australia, comprises 60% or more of the unencumbered value of all its property.

- who is an "associated person" (for the purposes of aggregation) has remained very much the same. The amendments made late last year to the old provisions as to the ability to aggregate interests in a "landholder" between non-associated parties where there are transactions that are "substantially one arrangement" are also replicated in the new provisions.

Where there is an acquisition of shares in a company or units in a unit trust and those entities have underlying real property (the provisions allow a tracing through interposed entities), advice will have to be sought as to whether such acquisitions fall within the ambit of the new "land rich" provisions. As with the previous provisions, the obligation is on the person who makes the "relevant acquisition" to pay the stamp duty. Substantial penalties may be imposed for failure to pay such stamp duty.

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## ASSET PROTECTION PROPOSED AMENDMENTS

High income earners who try to use bankruptcy to avoid paying their tax and other debts are being targeted by proposed changes to the bankruptcy laws announced by the Attorney-General, Philip Ruddock. Mr Ruddock said the changes would mean high income earners who become bankrupt would not be able to shield their real assets from creditors.

The changes will enable the trustee in bankruptcy to recover assets held in the name of the bankrupt's spouse, or a company or trust, where the bankrupt has paid for and uses the asset.

Other proposed changes include:

- clarifying the rights of the parties when family law and bankruptcy issues need to be resolved;
- giving the trustee stronger powers to collect income contributions during bankruptcy; and
- preventing bankrupts from putting their assets beyond the reach of creditors by transferring them under a family law financial agreement.

The changes are based on the recommendations contained in the Joint Taskforce Report on the Use of Bankruptcy and Family Law Schemes to Avoid Payment of Tax.

Changes are also proposed that will clarify the existing powers of bankruptcy trustees to set aside certain transactions. In particular, the changes will include a specific clawback provision that will give bankruptcy trustees the power to recover 'excessive' personal contributions prior to bankruptcy above an annual limit of \$5,000 made by bankrupts from after-tax money, and the power to recover superannuation contributions made with an intention to defeat creditors. The amendments follow the High Court decision

in *Cook v Benson* which was to the effect that bankruptcy trustees are powerless to recover such contributions.

We will, of course, keep you informed of further developments.

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## CONTRACT LAW THE DANGERS OF STANDARD ARBITRATION CLAUSES

Many contracts contain standard clauses requiring a dispute to be submitted to arbitration, rather than the Court system. A typical example of this is in a building contract where the arbitrator is to be the President of the Master Builders Association or his or her nominee.

The only qualification that the nominees are required to have is membership of the Institute of Arbitrators. They may be experienced builders, architects, quantity surveyors or engineers but it is not considered necessary for the arbitrator to have any specialist knowledge of legal principles or legal training.

A lack of legal training may not be a disadvantage where the dispute does not involve complex questions of law. Where an arbitrator's lack of legal knowledge may become a problem is in any one of the following circumstances:

- where the parties agree that the rules of evidence are to apply;
- the dispute involves complex legal matters eg interpretation of a contract clause;
- in the determination itself which the arbitrator is compelled to make according to law; or
- in making a decision on costs where the circumstances are unusual.

The rights of appeal from the decision of the arbitrator are limited. Parties can agree to exclude their appeal rights altogether. If you do this, you cannot change your mind. This is a dangerous course if the arbitrator gets it wrong. You must live with the outcome.

If the arbitrator gets it wrong, there is no automatic right of appeal. If one party decides to appeal, it needs leave. Courts are reluctant to overturn an exercise by the arbitrator of his/her discretion unless it is clearly wrong.

In view of the above, it is recommended that all arbitration clauses in contracts be carefully reviewed.

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***WISHING YOU A SAFE AND HAPPY  
FESTIVE SEASON.***

***THE OFFICE WILL REOPEN ON 5  
JANUARY 2004***