

## May 2003 Newsletter

*This newsletter deals with superannuation aspects of certain unit trust type structures, the ramifications of the failure to properly document transactions entered into by directors or members of a company and the short-term retail shop lease trap.*

### **SUPERANNUATION**

#### **UNIT TRUST STRUCTURES**

The trustee of a superannuation fund may hold units in a unit trust that were acquired prior to 11 August 1999 or units in a unit trust that is a “non-g geared unit trust” which satisfies the requirements of Division 13.3A of the Superannuation Industry (Supervision) Regulations. The other units in the unit trust may be held by parties which are related to the trustee of the fund.

In many cases, the unit trust structure was established on the basis:

- Deductible and/or undeducted contributions would be made each year to the trustee of the fund;
- the trustee of the fund subscribes for further units in the unit trust; and
- the trustee of the unit trust uses the subscription monies to redeem the units in the unit trust held by the related party.

The question arises whether such a strategy still works.

From a superannuation point of view, two issues must be addressed: firstly, whether the new units in the unit trust are an “in-house asset” in terms of the

Superannuation Industry (Supervision) Act (SIS) and, secondly, whether the trustee of a fund is purchasing an asset from a “related party” in breach of Section 66 of SIS.

In relation to the first issue, if the original units held by the trustee of the fund were acquired prior to 11 August 1999, there are a number of rules that allow the trustee of the fund to subscribe for further units in the unit trust without the further units being “in-house assets”. The “non-g geared unit trust” exception may also apply.

In relation to the second issue, the question is whether the anti-avoidance provision of sub-section 66(3) of SIS applies.

In *Lock v Commissioner of Taxation* (2003) FCA 309, Goldberg J of the Federal Court held that sub-section 66(3) of SIS applied to a scheme where the members of a fund owned property, the property was transferred to the trustee of a unit trust and the trustee of the superannuation fund subscribed for units in that unit trust. What appears to be of importance in that case is that the trustee of the fund held all the units in the unit trust which, in terms of the unit trust

deed, entitled it to receive the assets of the unit trust. The Court did not have to deal with the question of whether sub-section 66(3) applied to the trustee of the unit trust using subscription monies to redeem the units held by a related party.

In view of the ramifications of breaching either the “in-house asset” rules or Section 66, it would be prudent for the trustee of a fund to seek advice before subscribing for further units in a unit trust.

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## **COMMERCIAL**

### **CLAYTON MEETINGS**

In *Malos v Malos* [2003] 44 ACSR 511 a nephew and his uncle were the only shareholders of Malos Holdings Pty Ltd. The nephew had little knowledge of the company’s affairs, which were managed by the uncle.

Following inquiries made by the nephew’s solicitor into the company’s affairs, the nephew became aware of documents purporting to be minutes of general meetings of the company, which showed the nephew as having attended these meetings. The nephew claimed not to have attended and not to have been notified of those meetings. The minutes recorded resolutions purporting to elect the uncle and his wife directors, to declare dividends (which the nephew claimed never to have received), and to approve both the payment of directors’ fees to the uncle and his wife as well as a buy-back of shares.

The nephew argued that the affairs of the company had been conducted in a manner which was oppressive to him as a member

of the company (in contravention of Section 232 of the Corporations Act 2001). The uncle opposed the making of those orders and sought an order to wind up the company. The nephew opposed the winding up of the company.

The Court held that it was appropriate to make a winding-up order given the complete breakdown in the business relationship between the shareholders and their inability to communicate. The appointment of a liquidator would also result in a full investigation of the alleged payments of directors’ fees and dividends and the purported buy-back of shares.

Although an extreme case, *Malos* is a timely reminder of the need to be careful in documenting transactions entered into by directors or members of a company. Minutes of a meeting asserting that a meeting took place on a particular date and at a particular place, when no such meeting took place, should not be prepared or signed as a correct record. The Section 251A of the Corporation Act obligation (to maintain minutes of meetings) can generally be satisfied by a suitably prepared memorandum of resolutions passed by directors (or members) which is signed by each director (or member) with the date of signature set out below the signature.

Companies should keep a suitably prepared precedent memorandum of resolutions of directors (and members), which can be utilised (subject to limitations) where a formal meeting of directors (or members) cannot conveniently be held.

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## LEASING

### BEWARE THE SHORT TERM RETAIL SHOP LEASE TRAP

Section 16 of the Retail Leases Act 1994 (RLA) states that the term for which a retail shop lease is entered into (including any option of renewal) must not be less than 5 years. If a lease is entered into in contravention of the Section, the term of the lease is extended “by such period as may be necessary to prevent the lease contravening the section”. However, the Section does not apply to a lease if a lawyer, or a licensed conveyancer, explains Section 16 to the relevant tenant and gives a sub-section 16(3) certificate to this effect.

In *Classic International Pty Ltd v Lagos* [2002] NSWSC 1155, the parties entered into a lease agreement for a 1+3 lease of retail shop premises without a sub-section 16(3) certificate being given. The result was that the 1+3 lease became a 2+3 lease under Section 16. Evidence was given that the tenant wanted only a one year initial term whilst the landlord was primarily interested in selling the property as soon as possible, so that the parties would never have agreed to enter into the agreement for lease had they known the effect of the RLA.

Palmer J held that what had happened was a case of common mistake. Had the landlord and tenant known of the substantial variation which the RLA would impose upon the lease agreement, they would not have entered into it. Accordingly, the landlord could rescind the lease agreement despite Section 16. Although on the facts of *Classic* this was a sensible outcome, it is contrary to the strict wording of Section 16 that *requires* a 5 years term.

Even if a landlord or a tenant agrees to a lease shorter than 5 years (including any option period) but longer than 6 months, it is prudent to obtain a sub-section 16(3) certificate. The “common mistake” finding in *Classic* may not be available in different circumstances.

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