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November 2006 Newsletter

This newsletter deals with an update on asset protection, the post Budget superannuation announcement and infringement of trademarks on the internet.

INSOLVENCY LAW

A BRIEF UPDATE ON ASSET PROTECTION

There have two recent attempts by the Courts to overcome asset protection that create issues worthy of consideration. The full ramifications of these cases are not yet known.

1. Discretionary trusts – safe no more?

Briefly, the facts of *Australian Securities & Investments Commission; Re: Richstar Enterprises Pty Ltd* were that the relevant person and his family members were the beneficiaries of a discretionary trust. The relevant person was also the director of the corporate trustee and the appointor. The question was whether the property held by the trustee of the discretionary trust could be treated as property of the relevant person.

Justice French of the Federal Court held that property of a person includes property held by the trustee of any trust of which that person is a beneficiary. In particular, his Honour stated:

“The beneficiary who effectively controls the trustee’s power of selection [of who to distribute income and capital to] because he is the trustee or one of them and/or has the power to appoint a new trustee has something approaching...ownership of the trust property”.

The Court held that if the trust is really the “alter ego” of or under the effective control of a person (either personally or as a director of a corporate trustee), property of the trust can be

treated as property of the person for the purpose of a receiver appointed under s.1323 of the *Corporations Act 2001* in exercising control over the trust property. As such, the receiver was able to take possession of the trust property and use it to satisfy the beneficiary’s secured creditors.

The effect of this decision is to pierce most discretionary trust’s ability to be used as a means of asset protection. The decision could also be applied to a myriad of other circumstances including tax, family law, debt recovery etc. To avoid any doubt, the person seeking to be protected should not be the trustee, a director of the trustee company or the appointor of the trustee. However, in handing over effective control of the asset, that very act itself may also be putting the asset at risk.

I will continue to monitor this situation and include any updates in future newsletters.

2. Bankruptcy law – your wife may be forced to leave you

Cummins Case involved a barrister who didn’t pay tax for 45 years. Mrs Cummins argued that the property held in joint names was held on trust for her in a much greater portion than the title indicated. The argument, if successful, reduced the bankrupt’s share and the amount available for the bankrupt’s creditors.

The trustee in bankruptcy was able, in the High Court, to defeat the wife’s assertion of title over the property.

As a result of *Cummins*, if you put your family home or investment properties in the name of your wife as a means of asset protection, it will be hard to argue that the non-bankrupt spouse who provided the whole of the purchase price has more than 50% of the equity in the property.

On the other hand, there is also a presumption that where a husband contributes a much greater percentage of the purchase price, he intended the difference to be a gift to his wife. This displaces the normal presumption that she holds this property on trust for the person who paid for it.

The High Court stated:

“It is often a pure accidental circumstance whether money of the husband or of the wife is actually used to pay the purchase price to the vendor, where both are contributing by money or labour to the various expenses of the household.”

The Court then went on to say:

“..it may be inferred that it was intended that each of the spouses should take a half interest in the property regardless of the amounts contributed by them.”

The *Cummins* decision has rewritten the law of presumptions but only as between married couples.

If the wife solely owns the property, ordinarily the bankrupt’s trustee has no claim against the property. Even under the most recent changes to the *Bankruptcy Act*, at best the trustee can potentially claim payments made during the past 4 years eg. mortgage payments.

However, under *Cummins*, the wife is presumed to hold the whole of the matrimonial property on trust for herself and her husband as to one half share. The trustee in bankruptcy will now be able to recover one half of the property. The wife may be forced to sell to realise the bankrupt’s share.

Alternatively, if the property was in the sole name of the husband, it would vest in the trustee in bankruptcy in accordance with s.58 of the *Bankruptcy Act* and the wife would receive nothing. The only way the wife could overcome this position would be to leave the husband and commence property settlement proceedings in the Family Court of Australia.

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SUPERANNUATION POST BUDGET ANNOUNCEMENT

(a) Treasurer's announcement

In the May 2006 newsletter, I outlined the Budget superannuation proposals. Part of those proposals was the placing of a limit of \$150,000 per year for undeducted contributions with it being noted that consideration was being given to allow, on a "one off" basis, an undeducted contribution of \$450,000 for a three-year period.

On 5 September 2006, the Treasurer announced the following transitional arrangements:

- subject to any applicable work test, members of a fund will be able to make, up to 30 June 2007, \$1m undeducted contributions to the trustee of a fund; and
- the \$150,000 undeducted contribution limit per member per annum will apply from 1 July 2007, with members less than 65 being able to bring forward two years of contributions, so that such members can make undeducted contributions of \$450,000 in one year with no further contributions being made for the next two years.

(b) Superannuation planning opportunities

The Treasurer's announcement means there is a "one off" opportunity for a member of a superannuation fund to make an undeducted

contribution of \$1m to the trustee of a superannuation fund on or before 30 June 2007. In fact, in the typical "self managed" two member fund, total undeducted contributions of up to \$2.9m can be made calculated as follows:

- \$1m undeducted contribution for each of the members for the year ended 30 June 2007;
- upfront undeducted contribution of \$450,000 for each of the members for the year ended 30 June 2008 covering that year of income and the years ended 30 June 2009 and 30 June 2010.

Given the fact that:

- members' benefits, whether paid by way of a lump sum or pension, will be tax free when the member is over the age of 60; and
- if the trustee of a fund is funding a pension, the income derived by the trustee on assets funding the pension will also be tax free,

the above represents a "one off" opportunity to place significant funds in a vehicle, which will provide considerable tax benefits.

Therefore, serious consideration should be given to members making large undeducted contributions to the trustee of their self-managed fund. Such undeducted contributions can be funded by:

- the sale of business real property held by the members to the trustee of the fund with the members claiming various capital gains tax ("CGT") concessions;
- the sale by the members of their shares in the family company to the trustee of a discretionary trust with the trustee of the discretionary trust borrowing the required monies. The members claim the various CGT concessions;

- company or trustee selling assets of a business claiming one or more of the CGT concessions with the sale proceeds being distributed to the members to make the requisite undeducted contributions;
- bringing forward retirement so that the employer can make a large payment to the employee with the employee then making the undeducted contribution to the trustee of the fund.

Obviously, any of the above courses of action require careful consideration of what asset should be sold and the tax consequences. In many cases, it will be necessary (for tax purposes) to wind up the entity that sold the asset to access the available cash.

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INTELLECTUAL PROPERTY LAW INFRINGEMENT OF TRADE MARKS ON THE INTERNET

One only has to look at the recent purchase for over \$2b of the "Youtube" website and name by Google, to see the value that can attach to brand names, particular when combined with the internet. The growth of the internet requires further consideration of brand name protection strategies.

Whilst the domain name registry will generally require business name registration or company name registration to register a website name in Australia, the obtaining of a business or a company name registration or even the obtaining of a website domain name registration cannot mean that one can continue that use without challenge.

Where the use of a brand or name infringes the rights or reputation of another party, the infringer can be required to cease using the name and the internet registration can be removed. The infringer can also be required to

pay damages and account for their profits made.

To try and avoid disputes and the expense of rebranding, it is common to seek trademark registration, since the registered trademark holder will have a presumptive right to the relevant name in the country of registration.

We now have the complication that by using a name on the internet, an Australian business enters the global market place. Registration of a trademark in Australia does not get protection from infringement of a similar trademark or name overseas.

If you offer goods or services for sale via the internet into a country where someone else owns the trademark, you can be sued for infringement.

The lesson from this is that in addition to seeking to register and maintain trademark rights in Australia, companies should carry out searches in Australia and overseas before launching a new brand, and they should consider applying for registration of their trademark overseas using the “Madrid Protocol”.

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Professional Staff

Parry Carroll is pleased to announce the addition of Nitij Pal to our professional staff. Nitij has wide ranging experience in commercial and regulatory law and practice, including drafting and advising on contracts and government relations. He has previously worked as a trade analyst and as a lawyer with the New Zealand Ministry of Health. He admits to being an All Blacks supporter.