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## October 2005 Newsletter

*This newsletter deals with living wills, superannuation splitting between spouses and creditors statutory demands.*

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### **PERSONAL PLANNING LIVING WILLS**

Generally, the suite of documents available to cover all of your personal affairs is:

- a Living Will, being a directive to medical staff as to when medical intervention should cease if there is no realistic prospect of survival;
- a Last Will and Testament which governs the distribution of your assets upon your death;
- a Statement of Wishes – this will cover matters not caught by the traditional Will such as the ongoing distribution of income from a trust;
- Enduring Guardianship to appoint a person to make care decisions for you in the event you become temporarily or permanently incapacitated. This could affect a fit or young person struck down temporarily by an accident; and
- Enduring Power of Attorney to manage your financial affairs whilst incapacitated.

A "Living Will" is more of a power of attorney than a will, but this term is now being used for a document which gives directives to another person to make decisions about life support in future years where you lack the capacity to give those directives. This article deals with "Living Wills". Our next newsletter will address "Enduring Guardianship" and the benefits of having a statement of wishes.

Most people have a Will, which becomes operative upon their death. However, increasingly people are taking the time to make what is generally known as a Living Will. With medical and technological advancements, doctors can prolong and sustain life even where a person is not likely to recover from a persistent vegetative state. Some people do not want this. Ethical and legal issues often arise about humane treatment of the dying, and sparked by the euthanasia debate, the right to determine how one dies has become as pertinent as the right to live.

You have the right to direct medical staff as to when medical treatment and life support must stop. If you lack capacity, you cannot give consent or oppose treatment unless you have specified your wishes before losing capacity. This is the function of the Living Will.

A Living Will is not currently legally enforceable in NSW unless part of an appointment for enduring guardianship, but can be persuasive to those making decisions including the Guardianship Board. In NSW a fully competent adult patient still has the right to refuse medical treatment. Once you have lost competency, the Living Will can speak for you.

You also have the option to appoint a Medical Agent, being a nominated person authorised by you, to give or refuse consent to proposed medical treatment.

A decision made by you could unburden your spouse or family from a traumatic decision at a difficult time in the event of tragedy or final stages of illness when there is no realistic possibility of recovery or any quality of life. It could be distressing for your family particularly if they are uncertain about what you would want.

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## SUPERANNUATION

### SUPERANNUATION SPLITTING BETWEEN SPOUSES

In the 2005–06 Federal Budget, the Government confirmed its election promise to allow spouses to split contributions. On 12 October 2005, the following was released:

- *Taxation Laws Amendment (Superannuation Contribution Splitting) Bill 2005 ("the Bill")*; and
- *Superannuation Industry (Supervision) Amendment Regulations 2005* in draft form ("*Draft Regulations*").

From a tax point of view, the *Bill* proposes to give the following potential tax benefits:

- access to two tax-free thresholds for a non-working spouse (for the year ended 30 June 2006, \$129,751) rather than one tax free threshold where a lump sum payment is made.
- potential access to two eligible termination payments ("ETP") rather than one ETP; and
- access to two reasonable benefit limits ("RBL") rather than one RBL. This is particular relevant where a member is close to funding an amount up to the lump sum or pension RBL or has already funded accumulated benefits in excess of his or her lump sum or pension RBL.

However, caution has to be exercised in relation to the following:

- where a contribution is rolled over to the spouse, the "eligible service period" is deemed to be zero days. This means that the spouse can never have a pre 1 July 1983 component; and
- where a deduction is claimed by an "eligible person" (typically, a self employed member), the notice to the trustee to claim the deduction must be first lodged before requesting of the contribution split.

The Draft Regulations outline what are, essentially, "splittable contributions". In essence, a "splittable contribution" is a contribution where:

- it is made to the trustee of a fund on or after 1 January 2006; and
- the member of the superannuation fund has applied to the trustee of the fund in the financial year after the financial year in which the contribution has been made to transfer or allot the contribution for the benefit of the member's spouse.

It should be noted that it is not compulsory for the trustee of the fund to accept an application to transfer contributions to the member's spouse. Most superannuation trust deeds do not allow a member to make application to a trustee to transfer his or her contributions to the member's spouse. Accordingly, most superannuation trust deeds (including the Parry Carroll superannuation trust deed) will require amendment.

There is little doubt that the Bill and the Draft Regulations, once enacted, will cause a substantial rethink of contribution and retirement strategies.

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## INSOLVENCY LAW

### CREDITORS STATUTORY DEMAND

A Statutory Demand is a notice issued by a creditor to a debtor company making demand for payment within 21 days of an outstanding debt for a sum of at least \$2,000.

A Statutory Demand is issued in a prescribed form with the legal force, effect and consequences of Section 459 of the *Corporations Act 2001*.

Where there is no judgment debt, the Statutory Demand is accompanied by an Affidavit setting out the basis of relevant facts relating to the debt. The Statutory Demand can only be issued against a corporation. It can only apply in circumstances where there is no genuine dispute as to the existence of the debt such as by reason of poor workmanship, products that failed to comply with requirements or any offsetting claim.

A company receiving a Statutory Demand must pay the sum demanded in full or as otherwise agreed with the creditor within 21 days failing which a presumption of insolvency arises. Alternatively, the debtor company may file proceedings in the Supreme or Federal Court seeking to set the Statutory Demand aside on any of three grounds:

- (1) because of a defect in the demand;
- (2) there is genuine dispute about the existence of a debt or an off-setting claim; or
- (3) there is some other reason why the Statutory Demand should be set aside.

The High Court has held in the case of *David Grant & Co Pty Ltd v Westpac Banking Corporation* that the 21 day period for filing the application to set aside the Statutory Demand cannot be extended and that in the event that the demand remains unsatisfied at the expiry of the 21 day period, the presumption of insolvency arises.

A creditor is then at liberty to issue proceedings for the winding up of the company and the appointment of a liquidator. The only way the debtor company can defeat those proceedings is to rebut the presumption of insolvency. It is a very costly process for a debtor company to provide to the Court sufficient evidence to prove a company is solvent i.e. able to pay all of its debts as and when they are due and payable. This will often come down to a valuation exercise. Even if successful, it is likely that the debtor company will be required to pay all of the creditor's costs of any such proceedings.

I recently acted on a case where a relatively small debt owed to a workers compensation insurer was ignored and resulted in the winding up of the company. This ultimately cost a clearly solvent and viable company in excess of \$150,000 in insurer's, company's legal and insolvency practitioners fees to have the liquidation terminated.

Accordingly, if you fail to act in a timely manner, your company could be lost, the company's assets could be sold off below market value and any funds realised applied to the payment of a liquidator's expenses. Furthermore, directors are potentially exposed to personal liability for insolvent trading and other recoveries which the liquidator has power to bring or loss of necessary licences such as a builders licence.

If the debtor company appoints an administrator and a Deed of Company Arrangement is ultimately approved by the creditors, the statutory demand will be defeated with only an agreed cents in the dollar return for all creditors including the party that issued the Statutory Demand.

Once the proceedings for the winding up of a company have been commenced by reason of the failure to comply with the Statutory Demand, it is very difficult even with the appointment of an administrator to have those proceedings stayed or otherwise defeated, unless you act very quickly.

From the perspective of the creditor, however, the Statutory Demand is a cheap and effective tool to ensure payment of outstanding debts in a timely manner. As a creditor, you should keep a watchful eye on debts which have been outstanding for a considerable period of time and consider the issue of a Statutory Demand. It is a far cheaper and more effective method of enforcing payment of an outstanding debt than commencing proceedings in a court of competent jurisdiction.

If you have any queries in relation to the issue of Statutory Demands, the underlying force and effect of a Statutory Demand or insolvency issues generally, you should seek immediate legal advice.

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