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Esplins Law Report

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Directors' obligation can be onerous Particularly for PAYG deductions

Company directors are faced with many responsibilities and obligations and are exposed to many liabilities. Before anyone accepts an appointment as a director they should be satisfied that the company has, and will continue to comply with its statutory obligation to deduct tax instalments from employees' wages and to pay those deductions to the Australian Taxation Office.

Directors have a clear obligation to ensure that a company does not continue trading whilst it is insolvent. If directors allow a company to continue trading in these circumstances they can be personally liable for debts incurred by the company.

If a company fails to pay to the Tax Office any PAYG amounts deducted from employees' wages, the Tax Office will issue a Director Penalty Notice to each director of the Company. The Director Penalty Notice imposes on each director a penalty in an amount equal to the unpaid PAYG instalments. The penalty will only be remitted if, within 21 days, the company discharges the PAYG liability, or the company is placed in administration or the liquidation of the company commences.

If the penalty is not remitted in the above circumstances then each director is personally liable for the penalty and the directors will be pursued by the Tax Office. The only defence a director can then have is if he/she can establish that he/she took <u>all reasonable steps</u> to either ensure the company paid its PAYG amounts or to place the company into liquidation.

The courts have been very strict in their interpretation of whether a director has taken <u>all reasonable steps</u>. In a recent case where, following receipt of Director Penalty Notices, a director was unsuccessful in getting his fellow directors to agree to place a company into administration or liquidation after it had failed to pay its PAYG instalments, the Court found that the director had not taken all reasonable steps.

The Court found that even though the director was unable to convince his fellow directors to liquidate the company the director should have sought legal advice sooner about what steps he could take to ensure the company paid its PAYG or was placed into liquidation. In certain circumstances this could involve the director incurring legal expenses and applying to the Court for an order that the company be wound up.

The Court said that the failure of the director "*to obtain early advice meant that he was never in a position to confront his co-directors with a correct statement of the choices facing them or to chart a course which, had the others agreed, would have led to compliance with ……….[the relevant PAYG section]. Given that the onus of proving the defence lay on …… [the director], he had to negate, on the balance of probabilities, the conclusion that professional advice would not have had that result. This he did not do.*"

Therefore, be careful before agreeing to be a director of a company and if you are a director be vigilant.

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LEGAL UPDATE
Obligations of a Witness to a Real Property Act Dealing

On 1 November 2011 new legislation was enacted which requires a person who witnesses execution of a Real Property Act dealing (i.e. Transfer, Lease or Caveat) to certify that he/she is an eligible witness and that he/she was present at the time the dealing was executed. An eligible witness must be someone who is over 18 years of age, is not a party to the dealing and has either known the person executing the dealing for at least twelve (12) months or, in the event the witness has not known that person for at least twelve (12) months, the witness must take reasonable steps to confirm the identity of the person executing the dealing. If the witness is required to take reasonable steps to confirm the identity of the person executing the dealing he/she must sight either one (1) original photographic identification document in respect of the person executing the dealing or two (2) original non-photographic identification documents prior to witnessing execution of the dealing.

A photographic identification document can include a current Australian or overseas driver's licence, current Australian Passport or an Australian Passport expired within the last two (2) years. An expired driver's licence is not acceptable as a photographic identification document. A non-photographic identification document includes documents such as a Medicare card, credit card or bank card. A witness could incur a penalty if he/she falsely or negligently certifies that he/she is an eligible witness and was present at the time of execution of the dealing. Any person who suffers any damage or loss as a result of the false or negligent certification by the witness can sue the witness.

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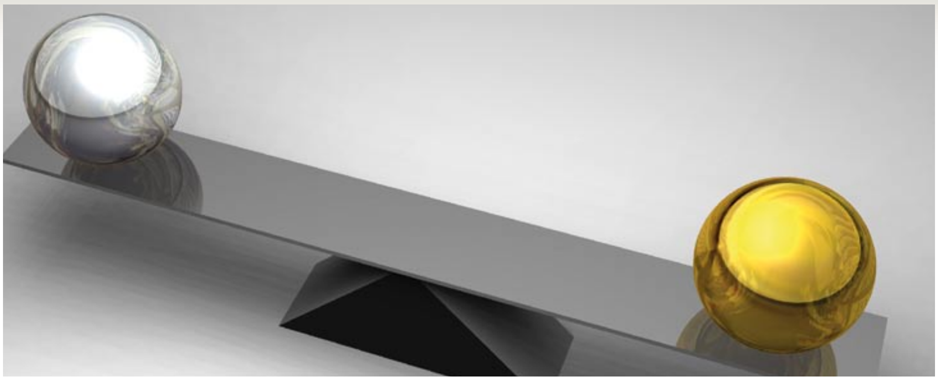

Pitfalls of Personal Wealth Management

There have been a number of developments during this financial year which may have serious consequences for those of you who operate a self-managed superannuation fund ("SMSF") or a discretionary family trust. You may have received advice from your accountant to update your SMSF Trust Deed to reflect changes to the superannuation laws, for example the transition-to-retirement pension provisions introduced several years ago.

We have found that many accountants suggest the purchase of an "off-the-shelf" SMSF trust deed which can be purchased through legal or business stationers for a small fee. These "off-the-shelf" trust deeds can be an efficient way for a person to keep the regulation of their SMSF as up to date as possible and especially with the regular changes to superannuation laws. However, one must be careful when varying a trust deed that you do not resettle the trust which can trigger significant tax and stamp duty liabilities.

Commonly the "off-the-shelf" trust deeds contain a statement along the lines that the trustee "declares that" on the signing of the deed of variation the funds held within the trust will be held on the new terms set out in that deed of variation. Arguably this may mean the trust assets have been transferred to the new varied trust and may lead to the Australian Taxation Office or the New South Wales Commissioner of State Revenue finding that you have resettled your trust and that capital gains tax and ad valorem duty will apply. It is therefore very important that you obtain legal advice as to whether your "off-the-shelf" super fund trust deed does what it is intended to do and varies the terms of the trust and does not resettle the trust.

The second issue which has arisen is the little mentioned withdrawal of Australian Tax Office Ruling No. IT328 which gave trustees up to 2 months after the end of the financial year to decide how distributions to beneficiaries should be made. This grace period allowed trustees to determine whether beneficiaries were presently entitled to a share of trust income at the end of the income year so that they could include it in their assessable income. However, under Notice of Withdrawal IT328W, effective from 1 September 2011, the ATO withdrew that tax ruling meaning that trustees will now have to make sure that the decision regarding distributions to beneficiaries is made prior to the end of the income year. Whether this can be viewed as statement by the ATO that they intend to crack down on lax or lazy administration by trustees is yet to be seen. However, it is clear that the ATO intends to take a strict interpretation of when a beneficiary is entitled to trust income and that any distribution on entitlement by resolution is made "within the relevant tax year" and not some time later.

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Spousal privilege does not exist

Australian Crime Commission v Stoddart [2011] HCA 47

A recent High Court decision sent shockwaves through the married demographic when it handed down a startling majority judgment that found spousal privilege – that is, the right of a spouse to remain silent when sought to be questioned about their partner – did not exist at common law.

The facts of the case are quite straightforward; Ewan Stoddart was a self employed accountant carrying on a practice at several locations in Queensland. His wife of more than 20 years, Louise Stoddart, provided part-time secretarial services in the practice for a few years before Mr Stoddart ceased his practice in 2006.

In early 2009, the Australian Crime Commission ("ACC") was investigating Mr Stoddart for "federally relevant criminal activity" under the Australian Crime Commission Act 2002 (Cth) ("ACC Act"). The ACC summoned Mrs Stoddart to give evidence during which she refused to answer certain questions claiming "the privilege of spousal incrimination" based on her marriage with Mr Stoddart.

The Federal Court at first instance and the Full Court of the Federal Court on appeal, both supported her claim. However, on appeal to the High Court the majority of judges found that Mrs Stoddart could not rely on spousal privilege to avoid testifying against her husband.

The High Court highlighted the distinction between the concepts of competence and compellability of a witness on the one hand, and testimonial privilege on the other. A witness must be both competent and compellable at law in order to be able to testify. Conversely, testimonial privilege is an avenue of protection to a competent and compellable witness to not answer particular questions.

The High Court stated that at most, a spouse might seek a ruling from the Court that he or she not be compelled to give evidence against the other spouse. In this particular case, Mrs Stoddart was a competent witness who was compelled to give evidence under the ACC Act.

In his dissenting judgment Justice Heydon said that the concept of spousal privilege was akin to a human right which fosters human dignity and immunity from the "great intrusive powers of the state."

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New scheme for registration of business names and ABNs

A new scheme for the registration of business names, which will operate on a national level, was introduced by the Business Names Registration Act 2011 (Cth) ("the Act") and is expected to come into force at the end of May 2012.

The Act enables and requires the registration of business names of individuals and entities, which carry on or wish to carry on business in Australia, on a nationally established register of business names. The register will be maintained by ASIC as opposed to the departments of fair trading in each state and territory which currently maintain the relevant registers. The objects of the Act are to simplify the process and save costs on the registration and to remove the inconvenience of registering a business name in each state in which an entity intends to conduct a business. Similar to the current scheme of the registration of business names, misleading or inappropriate business names or business names that are identical or nearly identical to existing business names will be refused registration. It is advisable before applying for the registration of a new business name to ensure that identical or nearly identical name is not registered as a trade mark nationally or internationally to avoid the infringement of the trade mark.

Together with the national registration of business names, the new scheme provides for the national registration of Australian Business Numbers for new entities in a single integrated online registration service.

The existing business names currently registered with the departments of fair trading in Australian states and territories will be automatically transferred into the national register of business names when the national scheme becomes operational. Renewals of currently registered business names will be issued and administered by ASIC.

It is important to remember that the registration of a business name does not entitle an entity to claim the proprietary rights in the business name. Accordingly, if it is necessary for your business to maintain a monopoly of its business name used by your entity, it will be prudent to register that business name as a trade mark.

Esplins Solicitors can advise you on the impact of the new scheme on your business. To familiarise the public with the new scheme, ASIC and NSW Department of Fair Trading have published relevant information on their websites.

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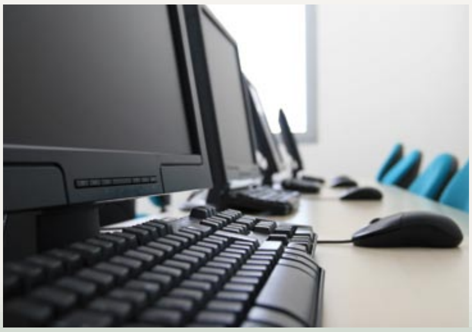

Updates on Restraint of Trade Clauses in Employment Contracts

Red Bull Australia v Stacey [2011] NSWSC 1212

Key Points

> *Employers and employees should note that courts may uphold the terms of a restraint of trade clause even when there is a very short period of time before the clause expires.*

> *Employees should be aware of the terms of the employment contract to ensure that they comply with them strictly, especially in relation to restraint clauses.*

From the employer's perspective, one of the best advantages of a 'restraint of trade' clause in employment contracts is that it prevents former employees working for competitors without the onerous need to prove what exactly the former employee is doing for the competitor.

In a recent Supreme Court of NSW decision, the employment contract of company executive contained a restraint clause which stated that the employee could not work for a competing company in the next 12 months. The former employer was a well-established manufacturer of energy drinks.

After 11 months, the former employee was appointed as a director of a newly-formed company that had not yet launched its line of energy drinks. The appointment of the former employee occurred while the 12-month restraint period was still on foot. The former employer sought an injunction to restrain the former employee from taking up his directorship at the new company.

The former employer argued that the former employer made representations that the restraint clause in his employment contract no longer applied. Furthermore, he argued that the area of competition between the companies was quite limited. For example, the new company was manufacturing energy drinks based on natural (as opposed to artificial) ingredients, and that the new company was targeting a different segment of consumers.

The former employer argued that the restraint period was not unreasonable due to the senior position held by the former employee. The Court decided that the former employer had a strong case for breach of contract against their former employee, and that the new company (although it was a new entrant in the market) could be considered a competitor even though the competition would be marginal.

The Court acknowledged their decision was a fine balancing exercise and that requiring the former employee to give up his new position could be a significant detriment for him and the new company. However, the Court held that there was no reason according to the evidence that the former employee would not be re-engaged as a director after the expiry of the restraint period.

The Court also took into account the fact that the former employee was a very senior employee who was paid significant remuneration under his employment contract with his former employer. The Court therefore held that the restraints were part of the bargain and should be upheld. The former employee had to give up his new job until the restraint period formally ended.

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Insolvency Update: New ASIC website to go live on 1 July 2012

On 1 July 2012, ASIC is expected to launch a new website where people can publish all insolvency and deregistration notices. It will replace the current requirement to publish insolvency-related notices in state or territory newspapers or in the ASIC Gazette, with the aim of saving money for insolvency stakeholders.

ASIC's new website is also intended to be a single access point for easily searching the many notices relating to the external administration and deregistration of companies.

Although they will no longer be required to advertise notices in the newspaper, insolvency practitioners will pay a fee to upload each notice to the new website.

The proposed website advertising fee for notices (previously published in the ASIC Gazette) will be $64, while other fees will cost $400 per notice.

The documents that one will need to publish on ASIC's new website include all notices that insolvency practitioners are currently required to advertise for the purposes of the Corporations Act 2001 (Cth). Depending on the search functions, ASIC's new website could make it much easier for lenders to keep track of corporate borrowers.

The intention is that if all notices relating to corporate insolvency are to be published on the new website, lenders will be in a better position to act quickly in response to any attempts to place company borrowers into liquidation.

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