

FEBRUARY 2009

## Private Client Services

As a part of **MOORESLEGAL's** extensive private client services, the complimentary annual review newsletter for **EPSS** clients and their professional advisors focuses on current review issues for estate planning and associated areas of professional practice. From this year onward, annual **EPSS** reviews also will be posted on [www.mooreslegal.com.au](http://www.mooreslegal.com.au) as soon as they are released.

### *Estate Planning*

### *Superannuation, Trusts & Tax*

### *Structuring Investments & Businesses*

#### INDEX

Domestic Relationships Other than Marriages .....	1
Instalment Warrants for SMSFs.....	2
Binding Death Benefit Nominations – non-lapsing, conditional and contingent.....	2
Restricted Account Based Pensions from SMSFs .....	2
Financial Enduring Powers of Attorney – express powers .....	3
Single Purpose – Insurance Bond Trusts .....	4
Government Commissioned Review of Special Disability Trusts.....	4
Asset Protection in the Light of a Faltering Economy.....	5
Melbourne seminar & Mornington Estate Planning Discussion Group ...	5
New <b>MOORESLEGAL</b> Publication – Estate Planning Documents .....	5
Expansion of the <b>MOORESLEGAL</b> Melbourne Office .....	5
<b>EPSS</b> Personnel.....	6

## Domestic Relationships Other than Marriages

In 2009, the most significant change for many people to consider in reviewing their estate planning may well be the legislation currently awaiting enactment in relation to domestic relationships other than marriages. The Family Court will be able to determine property disputes between parties to such a domestic relationship, whether heterosexual or same sex. The new law will also enable superannuation entitlements to be split between the parties to a relationship.

As an **EPSS** issue, the proposed new laws are relevant on 2 fronts, ie for people who are in a domestic relationship (or concurrent domestic relationships) other than a marriage and for an estate planner's intended beneficiaries such as children who might be in such relationships now or in the future. There are a variety of options for people wanting to protect assets from a family law claim involving them personally or their intended beneficiaries, eg entering into binding financial agreements, establishing capital reserved trusts by Deed or Will, preparing carefully worded parent to child loan agreements. (It should be noted that not all domestic relationships are covered by these amendments, notably relationships that don't involve cohabitation.)

Further reading on these agreements and trusts is to be found at the [Pocket Summaries](#) page at [www.MooresTraining.com.au](http://www.MooresTraining.com.au). This topic will be featured in the estate planning discussion group meeting hosted by **MOORESLEGAL** at Mornington on 26 February and in Allan Swan's Blended Families seminars – see the [Seminars](#) page at [www.mooreslegal.com.au](http://www.mooreslegal.com.au).

## Instalment Warrants for SMSFs

Over the course of 2008, the banking and finance industry became increasingly comfortable with providing limited recourse loans that enable the trustees of self managed superannuation funds (“SMSFs”) to borrow to acquire real estate. Other forms of borrowing remain prohibited for trustees of superannuation funds generally under Australian law, although instalment warrants can also be used to help fund acquisitions of other permitted SMSF investments, eg listed securities, units and shares in certain ungeared private trusts and companies and works of art.

2008 also saw members of SMSFs provide all or part of the finance for instalment warrants out of their own funds (or the funds of family companies and trusts). Warnings issued from the Australian Taxation Office (“ATO”) that the terms of a self funded instalment warrant purchase must be on a basis equivalent to those for an arm’s length purchase.

The information needed for the preparation of instalment warrant documents involving an SMSF is set out in the *Instalment Warrants Documents Fact Finder* at the [Fact Finders](#) page at [www.moorelegal.com.au](http://www.moorelegal.com.au).

## Binding Death Benefit Nominations – non-lapsing, conditional and contingent

In 2008 the ATO confirmed that a binding death benefit nomination made to the trustee of an SMSF does not need to comply with the rather restrictive rules that apply to externally managed superannuation funds. This means that such a BDBN, subject to the superannuation laws and a sufficiently up to date SMSF Deed, can be a document that is much more attune to needs of the fund member than the often inflexible nominations offered by externally managed superannuation funds. A BDBN made to the trustee of an SMSF can:

- remain in force for longer than 3 years – typically lasting unless and until revoked;
- include conditions such as allowing for alternative forms of payment if the nominee consents; and
- anticipate contingencies such as the nominee predeceasing the fund member (the inability to anticipate that the nominee may have already died is a major flaw of many of the inflexible nominations).

Further reading on BDBNs for both self and externally managed superannuation funds is to be found at the [Pocket Summaries](#) page at [www.MooresTraining.com.au](http://www.MooresTraining.com.au).

## Restricted Account Based Pensions from SMSFs

For a significant number of people, a key retirement and/or estate planning objective is to provide either:

- income to a domestic partner or surviving domestic partner and capital in the longer term to their children or other beneficiaries (rather than whoever the surviving partner might leave assets to); or
- for a child whose disability makes the child eligible to receive a tax free or lowly taxed superannuation death benefits pension or annuity, but also makes the child very vulnerable to exploitation.

In both cases the prospect of the pension being cashed in under the post June 2007 rules that place no annual maximums on account based pensions can be a major concern, eg because the superannuation funds could be quickly spent, given away or fraudulently misappropriated.

The portability rules that apply to pensions paid from externally managed superannuation funds make it difficult to set up restrictions to protect these pensions. In an SMSF, however, the portability rules do not apply and the prospect of a restricted account based pension or death benefits pension is a more realistic one, provided it is supported by appropriate documentation, eg:

- the restricted account based pension document;
- a suitable new, existing or upgraded Deed dealing with restricted account based pensions and preventing subsequent amendments to the Deed from overriding those pensions; and
- special clauses in the constitution of the company trustee.

For residuary or death benefit pensions paid to surviving domestic partners, 3 further documents are needed, ie:

- an irrevocable binding death benefit nomination to the recipients estate;
- a Will leaving the death benefits to the preferred beneficiary of the person funding the death benefits; and
- an agreement not to vary the pensioner's Will.

Further reading on restricted account based pensions is to be found at the [Pocket Summaries](#) page at [www.MooresTraining.com.au](http://www.MooresTraining.com.au). This topic will be featured in the estate planning discussion group meeting hosted by **MOORESLEGAL** at Mornington on 26 February and in Allan Swan's Blended Families seminars – see the [Seminars](#) page at [www.mooreslegal.com.au](http://www.mooreslegal.com.au).

## Financial Enduring Powers of Attorney – express powers

When a person commences to act as an attorney, the overriding duty of the attorney is to act in the best interests of the person the attorney represents. In practice, there are a number of problem areas for attorneys and increasingly attorneys are being given express directions and guidelines in the governing document as to what they can and cannot do, eg:

- make gifts, eg seasonal presents to friends and family members and gifts to charities;
- confer benefits on the attorney, eg the use of a family home, holiday house or investment property;
- confer benefits on 3<sup>rd</sup> parties – again the use of a family home, holiday house or investment property is an example; and
- make, confirm or change a lapsing or other BDBN to an externally managed superannuation fund.

For people with SMSFs, family trusts and/or private companies with dividend access shares, additional express directions and guidelines might cover:

- make, confirm or change a BDBN to an SMSF;

- use the powers and discretion given to the member in respect of an SMSF;
- use the powers and discretion given to the grantor in respect of a family, hybrid or other discretionary trust; and
- via voting shareholding in a private company, indirectly determine the benefits to be received from dividend access shares.

The information needed for the preparation or updating of a financial power of attorney is set out on page 4 of the ***Estate Planning Document Fact Finder*** at the [Fact Finders](#) page at [www.moorelegal.com.au](http://www.moorelegal.com.au).

## Single Purpose – Insurance Bond Trusts

When assets are held in a family trust, Centrelink and Veterans' Affairs are able to deem the assets in the trust and the income from the trust as being personal assets or income of a means tested pensioner who is considered to have a sufficiently close connection to the trust. Where, however, the assets of the trust are limited purely to insurance bonds taken out on the life of the pensioner, the assets are still deemed to be the pensioners, but the income is only an issue if income is paid out of the bond and into the trust. (The income of insurance bonds does not form part of the income of the owner of the bond if it is accumulated within the bond for either the balance of the lifetime of the insured or 10 years, whichever is the lesser.)

Thus sole purpose – insurance bond trusts are an option where a means tested pensioner sells a family home and moves into supported or other accommodation and the net proceeds of the sale of the home, if retained in personal ownership as an investment, would adversely affect the income to which the pensioner is entitled to receive.

The information needed for the preparation of a sole purpose – insurance bond trust is set out in the ***Sole Purpose – Insurance Bond Trust Documents Fact Finder*** at the [Fact Finders](#) page at [www.moorelegal.com.au](http://www.moorelegal.com.au).

## Government Commissioned Review of Special Disability Trusts

In 2008 the Federal Government commissioned review recommended a range of changes to the rules for means tested exempt special disability trusts. If these recommendations are adopted in whole or in part, they may not require amendments to existing Wills and Deeds that have contemplated or established these trusts, but may widen the scope for their use, particularly if a more realistic definition of “disability” is chosen.

Further reading on special disability trusts as they currently operate and on vulnerable beneficiaries generally is to be found at the [Pocket Summaries](#) page at [www.MooresTraining.com.au](http://www.MooresTraining.com.au). Allan Swan regularly presents to community groups on these topics – see the [Seminars](#) page at [www.moorelegal.com.au](http://www.moorelegal.com.au).

## Asset Protection in the Light of a Faltering Economy

In times of economic prosperity, a review of the structuring of investments and businesses from an asset protection and estate planning viewpoint is often put in a “look at it later” basket. The clawback and other anti-avoidance provisions that now apply make it extremely difficult to protect assets from creditors when a financial crisis becomes apparent or a person unexpectedly dies. The reality is the longer the forward planning for asset protection, the greater the prospect of success and the less expensive transfer costs such as CGT and state or territory duty are likely to be.

Further reading on asset protection, covering issues such as family home ownership, secured lending, separation of trading and investments assets, superannuation and testamentary trusts, is to be found at the [Pocket Summaries](#) page at [www.MooresTraining.com.au](http://www.MooresTraining.com.au).

## Mornington Estate Planning Discussion Group

The **MOORESLEGAL** Mornington office is holding quarterly estate planning discussion groups for professional advisors in 2009. The 1<sup>st</sup> quarter meeting will be held at lunchtime at Mornington on Thursday 26 February.

For bookings, see the [Seminars](#) page at [www.mooreslegal.com.au](http://www.mooreslegal.com.au)

## New **MOORESLEGAL** Publication – Estate Planning Documents

This month **MOORESLEGAL** will be releasing “Estate Planning Documents” by Allan Swan. Details of this short book of pocket summaries of a range of documents created to implement estate planning objectives will be available on the [Publications](#) page at [www.mooreslegal.com.au](http://www.mooreslegal.com.au).

## Expansion of the **MOORESLEGAL** Melbourne Office

In 2009 the Melbourne office at 10/350 Queen St will be the base of 3 **EPSS** lawyers, ie Allan Swan, Krista Fitzgerald and Jennifer Jackson, as well as continuing to provide Box Hill based lawyers with the use of a city office as and when required. Both Allan and Jennifer Jackson will still be available to see clients at Box Hill as required.

Jennifer Dixon and Philip Curtis will continue to lead the Box Hill based team. Rohani Bixler will continue to manage our Mornington office.

## **EPSS Personnel**

# **E**state **P**lanning **S**uperannuation, **T**rusts & **T**ax **S**tructuring **I**ntestments & **B**usinesses

The current **EPSS** team is as follows:

### **EPSS Principals:**

**Allan Swan, Jennifer Dixon, Philip Curtis and Andrew Simpson**

(Jennifer is an Accredited Specialist – Wills and Estates (Victoria) and Allan and Jennifer are both accredited as SMSF Specialist Advisors.)

### **Senior Lawyer:**

**Krista Fitzgerald**

### **Lawyers:**

**Louise Barbaro, Jennifer Jackson and Rohani Bixler**

(**Suhanya Ponniah** is on secondment for 2009 to the International Justice Mission, working in Uganda. Our team also includes **Edward Skilton**, a UK barrister, whom we expect to be admitted to Australian legal practice in 2009.)

### **Administrative Assistants:**

**Sarah Parker, Diane King, Rachael James, Colleen Cameron, Rachael Barnewall and Lilian Poke.**

### **Other MOORESLEGAL Private Client Services Contacts:**

- **Property:** Andrew Boer and Peter Loftus
- **Intra Business Agreements:** Andrew Scott and Cecelia Irvine-So
- **Executive Employment:** Frances Anderson and Peter Andrew
- **Personal Injuries:** Tim Adam and Tim Connor
- **Family Law:** Stephen Winspear and Peter Szabo
- **Elder Law:** Andrew Simpson and Narelle Mollet
- **Estate Administration:** Kay Larcombe and Chris Moloney
- **Estate Litigation:** Andrew Simpson and Anna Hacker
- **MOORESTRAINING:** Allan Swan

For information regarding each of these private client services areas and of the commercial and other legal services offered by **MOORESLEGAL**, see [www.mooreslegal.com.au](http://www.mooreslegal.com.au).

© Allan Swan/**MOORESTRAINING** ABN 21 164 200 916. Tel: +613 9843 2186 February 2009

**MOORESLEGAL**

9 Prospect St, Box Hill Vic 3128 PO Box 340, Box Hill Vic 3128  
Lvl 10, 350 Queen St, Melbourne 12/1140 Nepean Hwy Mornington Vic  
Telephone: (03) 9898 0000 Facsimile: (03) 9898 0333  
[info@mooreslegal.com.au](mailto:info@mooreslegal.com.au) [www.MooresTraining.com.au](http://www.MooresTraining.com.au)