

IN BRIEF >>>

LEGAL ANALYSIS: WILL SUPER BE SAFE?

Superannuation is no longer used just as a nest egg for retirement, but savvy business people are now using superannuation as a financial and estate planning mechanism to secure a better future for themselves and their family. "The aim of financial and estate planning is to deliver on the promise of looking after a client's family, while minimising any future legal disputes," said Sandra Conceicao, wills and estate lawyer at msl-michael sing lawyers. This is relevant from a business perspective and filters through to the employee as well.

"There are many preconceptions about superannuation that need to be corrected," said Ms Conceicao. One particular misnomer is that you are able to leave superannuation through your will, which is not the case. When joining a super fund you are asked the question "would like to nominate a beneficiary for your death benefit?" However, this simple question can turn into a bigger legal battle. The presumption is that when you nominate with your designated fund,

this is classed as a 'preferred' nomination, not a binding one.

The view of most super funds is that unless a valid binding death nomination is made, the trustee of the fund will make a decision on the distribution of the death benefit.

Generally, the benefit is paid to the partner of the deceased's member, which has caused great angst particularly with regards to blended families. This problem has recently arisen in a recent case where the deceased and his second wife were directors of the trust deed. The executors of the will were the second wife and the deceased's daughter from his first marriage. A letter was written by the deceased prior to his death addressed to the Director of the Trustee, advising the balance of the super fund was to be paid to the executors to be included into the estate.

The question arose as to whether the letter constituted a binding or non-binding death benefit nomination. The court held the letter was in fact non-binding and the deceased mem-



Sandra Conceicao.

ber of the super fund cannot validly nominate a beneficiary for the death benefit payment unless it meets the requirements of the relevant trust deed and statutory regulations.

"It is for these reasons that it is imperative to talk to a financial planner and a lawyer in regards to your estate planning," Ms Conceicao said.

"On-going involvement with these advisors, particularly for businesses, is the best way to ensure your assets are protected for the future." www.mslawyers.com.au ■

Watch super strategy well

By Andrew Buchan

As with every Federal Budget the 2009 Budget produced winners and losers. In particular, a key change may affect your superannuation savings strategy and retirement planning.

Take heed of concessional super contributions: The concessional super contributions cap was halved from July 1, 2009. This type of contribution includes employer contributions (including contributions made under a salary sacrifice arrangement) and personal contributions claimed as a tax deduction by a self employed person.

Clients under age 50 will have their annual contribution limit halved from \$50,000 to \$25,000 (indexed each year). Clients age 50 and over will have their annual contribution limit for the transitional arrangements halved from \$100,000 to \$50,000 until June 30, 2012 (non-indexed).

Employer super guarantee (SG) contributions are also included in the concessional cap. You should review any salary sacrifice arrangements and personal deductible super contribu-

tions to ensure that they do not exceed the new contribution caps. If you are using a salary sacrifice strategy with a transition to retirement (TTR) pension, you may need to reduce the amount you sacrifice and may also see a reduction in benefits.

Excess concessional contributions are subject to 46.5 percent tax and also count towards your non-concessional contributions cap. Thus to increase one's superannuation for retirement, an investor will have to consider smarter strategies, for example leverage – borrowing for investment purposes.

The law now allows a superannuation fund to borrow through what is known as an 'instalment warrant' arrangement. In very brief terms, these instalment warrant arrangements (which can more accurately be described as 'limited recourse loan arrangements') permit borrowing on certain strict conditions (*see www.businessacumen.biz for details*).

Borrowing through your superannuation fund, particularly a self managed super fund, is not a difficult process.

A Complying Superannuation Loan has four parties – the lender loaning

the money to the super fund, the super fund itself, the vendor selling the property to the super fund and the Custodian Trustee who will hold the asset on trust for the super fund.

The asset is not confined solely to property and can include other asset classes like shares, but the predominate example has been property. The property must be a property that the super fund could otherwise invest in if bought outright, and must comply with the in-house assets rule and sole purpose tests. So the fund could purchase commercial property from either a related party or non related party, or residential property from a non related party. Both related parties and unrelated parties can lend money to the super fund via a Complying Loan.

Superannuation is the investment structure for retirement savings. We all need to plan our contribution savings pattern, as you can no longer dump large amounts of money in upon retirement, nor along the way with the recent budget changes. ■

• *Andrew Buchan is a partner in Financial Planning with HLB Mann Judd in Brisbane.*