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ENDURING POWERS OF ATTORNEY - Victoria

A new form for Enduring Powers of Attorney ('EPOA') commenced in Victoria on 1 April 2004.

An EPOA authorises one or more persons ('Attorneys') to undertake any legal or financial transaction on behalf of the person making the power ('Donor'). The power is enduring as it continues even though the Donor loses legal capacity. However, it ceases on the Donor's death.

The new EPOA has a number of important features compared to an EPOA made under the former legislation. Broadly, these features allow the Donor to limit the Attorney(s) powers.

A Donor may appoint a single Attorney; two or more joint Attorneys; or two or more joint and several Attorneys.

If joint Attorneys are appointed, then all of the Attorneys must agree on any decision. This means that on the death of one of the joint Attorneys, the EPOA is revoked.

A joint and several appointment means that the Attorneys can either act together or any of them can act alone.

An alternative Attorney can also be appointed for an Attorney. The alternative Attorney generally only acts in the event of the legal incapacity of the relevant Attorney.

A Donor can specify that certain powers can only be exercised from a specified date or circumstance, eg, when the Donor has lost their legal capacity.

The Donor can also include special conditions and limitations in relation to the exercise of any power, eg, the Attorney can only enter into a particular property transaction.

Each Attorney must sign and date a statement of acceptance which includes an undertaking to act with reasonable diligence to protect the Donor's interests. An EPOA is not effective until this step is taken.

This edition of DBA News includes:

- New Enduring Powers of Attorney - Vic
- Withdrawal & Recontribution
- Expenses as Contributions
- Defined Benefit Pensions Update

Enduring Powers of Attorney (Cont.)

At least one witness must be a person who is entitled to take statutory declarations. Both witnesses must be satisfied that the Donor understood the nature and importance of the EPOA and signed it without compulsion.

Attorneys must now keep and maintain appropriate records.

An EPOA made prior to 1 April 2004 will still continue to operate and there is no need to convert to the new form if the old power remains current.

Louise Barbaro

WITHDRAWAL & RECONTRIBUTION

The ATO has recently confirmed (Media Release 2004/58) that straight forward withdrawal and recontribution strategies are not caught by the general anti-avoidance provisions (ie, Part IVA of the *Income Tax Assessment Act 1936* (Cth)).

In particular, the ATO confirmed that the following transactions would not be caught:

- where an ETP is withdrawn from a fund and the amount is then recontributed to the same fund for the purpose of commencing a pension with a tax-free undeducted purchase price; and
- where a person makes an undeducted contribution to their fund before they receive an ETP to reduce the amount of tax payable.

This announcement clarifies an area that has been clouded by uncertainty for many years. Advisers should nevertheless not become complacent as the ATO will still closely scrutinise contrived arrangements. A draft public ruling should soon be issued and hopefully clarify what is meant by 'straight forward' and 'contrived' arrangements.

Daniel Butler

EXPENSES AS CONTRIBUTIONS

The ATO has changed its view on the tax treatment of an expense payment made on behalf of a superannuation fund (that is picked up, by journal entry, as a contribution).

The ATO had previously issued a fact sheet that outlawed this practice for SMSFs from mid 2003. Accordingly, the ATO's position in draft Taxation Ruling MT2004/D2 dated 25 August 2004 is a complete turn around and is great news.

The ATO will also accept an expense paid by an eligible person (entitled to a deduction under s 82AAT ITAA1936) on behalf of a fund as a valid contribution. MT2004/D2 confirms:

- the expense paid by the employer or eligible person is deductible to the fund under the normal deduction provisions provided it is recognised in the fund's accounts as a taxable contribution;
- the expense payment is treated as though the employer or eligible person had made the payment directly to the fund and the fund had separately paid an equal amount to the third party, eg, accounting fees or a tax liability;
- the expense payment made by an employer will count for SGC purposes;
- the expense payment is treated as a taxable contribution to the fund and is also subject to the superannuation surcharge (subject to the surcharge threshold limits);
- the expense payment will be exempt from FBT; and
- the employer or eligible person is not entitled to a GST input tax credit ('ITC') in respect of the expense payment. However, the fund may be entitled to an ITC if it is registered for GST and has a valid tax invoice in its name. Invariably, the tax invoice in these situations is issued directly to the employer or eligible person and needs to be changed.

Daniel Butler

Forthcoming DBA Seminars

The *DBA Network* will be holding a ½ day workshop at the Savoy Hotel, Melbourne on the mornings of **17 September** and **19 November 2004** covering SMSFs & and estate planning. Refer to www.dbabutler.com for details.

DEFINED BENEFIT PENSIONS UPDATE

The Economics Legislation Committee released its findings in August 2004 on the defined benefit pensions ('DBP') changes in the *Superannuation Industry (Supervision) Amendment Regulations 2004 (No. 2)* ('Regulations').

In its report, the Committee stated that the Regulations should apply temporarily until the Government's announced review is finalised (due April 2005). New regulations should then be drafted to allow SMSFs adequate flexibility to provide a range of pensions while at the same time more acutely targeting the potential abuse.

In August, the Australian Labor Party tabled a notice of disallowance ('NoD') of that part of the Regulations which prohibit small superannuation funds from providing DBPs. Note, the status of the Regulations will not be known until some time after the Federal Election. When Parliament resumes, there will then be a 15 sitting day period that must expire before the status of the NoD will finally be determined.

The Government is still in consultation with the superannuation industry regarding the provision of DBPs by small superannuation funds. This report is expected to be issued in April 2005.

People wishing to take a DBP are therefore largely reliant on the 25 June 2004 transitional relief, which ends on 30 June 2005.

SMSFs also need to ensure that they do not jeopardise the fund's potential ability to pay a DBP under the 12 May 2004 transitional relief by upgrading their deeds via a supplier who is not an expert in SMSFs and taxation.

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