



CORPORATE & BUSINESS SERVICES

MACGILLIVRAYS

S O L I C I T O R S

MACGILLIVRAYS & PLANWEALTH - A SUPER TEAM

The incentive to maximise superannuation assets has never been greater, but to maximise investment returns in Australia's best wealth accumulation structure, your strategy must be considered - enter the SuperLeverage Instalment Warrant.

PLANWEALTH'S APPROACH:

Planwealth is an established financial planning practice based in Brisbane with a proven track record for developing "outside the square" solutions to meet its clients' needs. Their financial planners are Authorised Representatives of Hillross Financial Services, one of Australia's largest financial planning groups, with a network of over 115 financial planning practices Australia wide.

In association with MacGillivrays Solicitors, Planwealth has developed the **SuperLeverage Instalment Warrant** with an emphasis on the best financial and legal planning processes.

Whilst the rules at first might appear straightforward, the real complexity lies in the practical implementation of the strategy. The timing and execution of the transactions are paramount to the arrangement withstanding ATO scrutiny (already there is evidence of non-complying arrangements developed by hasty promoters).

WHAT IS THE AIM?

To maximise investment returns in a tax effective superannuation structure.

WHO ARE WE TALKING TO?

Investment savvy Self Managed Super Fund (SMSF) clients. Clients who have significant liquid assets; a desire to take advantage of investment opportunities not otherwise attainable (e.g. commercial property); where leveraged exposure is preferred; and the client understands gearing risk.

FACTS ABOUT INSTALMENT WARRANTS

The SuperLeverage Instalment Warrant is a means of providing geared exposure to super investments.

THE KEY REQUIREMENTS ARE:

- 1. Allowable asset** - The borrowed money must be applied towards the acquisition of an asset other than an asset the SMSF trustee is prohibited from acquiring directly under the super investment laws;
- 2. Acquire beneficial interest** - The asset acquired is held on trust by the SMSF trustee who holds the beneficial interest in the underlying asset;
- 3. Right to legal ownership** - The SMSF has the right (but not an obligation) to acquire legal ownership of the original asset (or its replacement) by making one or more payments after acquiring the beneficial interest; and

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Level 2, 200 Adelaide Street Brisbane Qld 4000
Phone 07 3228 5333 Facsimile 07 3221 8500

Level 9, 68 Pitt Street Sydney NSW 2000
Phone 02 9239 9400 Facsimile 02 9239 9499

Level 9, 190 Queen Street Melbourne VIC 3000
Phone 03 8622 2700 Facsimile 03 8622 2722

PO Box 2794, Nerang BC Qld 4211
Phone 07 3228 5386 Facsimile 07 5574 7722

24 Walan Street Mooloolaba Qld 4557
Phone 07 5457 9800 Facsimile 07 5478 2696

E-mail us at macgill@macgillivrays.com.au
Phone us on 1300 369 581

www.macgillivrays.com.au

MERGERS AND ACQUISITIONS IT AND EMERGING TECHNOLOGIES CAPITAL RAISINGS INTELLECTUAL PROPERTY CORPORATE RESTRUCTURINGS PROJECTS AND INFRASTRUCTURE PARTNERSHIPS JOINT VENTURES AND TRUSTS TRANSPORT CORPORATE GOVERNANCE NATIVE TITLE ENERGY AND RESOURCES OFF SHORE PROJECTS





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4. Limited recourse loan - The rights of the lender against the SMSF trustee for default on the borrowing are limited to rights relating to the underlying asset or its replacement and not any other SMSF assets.

In short, the SMSF must use the borrowings to acquire a beneficial interest in an asset but does not obtain legal ownership until further payments are made.

BENEFITS OF STRATEGY:

1. Access to investment opportunities not otherwise attainable;
2. Leveraged exposure to asset values under a super structure;
3. Magnify income and capital returns (e.g. dividends, franking credits, rents etc);
4. Tax deductions for payment of interest and borrowing expenses; and
5. Asset protection and diversification benefits.

To help illustrate the benefits of the strategy, Planwealth has developed calculation tools to provide a comprehensive risk/benefit analysis for clients.

If you wish to discuss further the SuperLeverage Instalment Warrant strategy or have concerns relating to your SMSF, please contact MacGillivrays Corporate and Business Services Partner, John McGaw on 07 3221 4550 or Daren Kingdon at Planwealth on 07 3211 1132.

BY PLANWEALTH
& JOHN MCGAW

**Partner
Corporate & Business Services**



PLEASE NOTE: This newsletter is not legal advice and our comments are of a general nature only. This document is not to be relied on as substitution for proper detailed advice. If you would like to be removed from, or added to our mailing or emailing list, contact Melinda O'Brien on (07) 3228 5333 or marketing@macgillivrays.com.au

INTELLECTUAL PROPERTY RIGHTS OF EMPLOYEES & INDEPENDENT CONTRACTORS - A CAUTION FOR BUSINESSES

The recent Federal Court decision of *Centrestage Management Pty Ltd v Riedle*¹ reaffirms the importance for businesses to have adequate protection in place for Intellectual Property rights, particularly in respect of employment agreements with employees, or agreements with independent contractors.

Under the *Copyright Act 1968* (Cth) the author or creator of a work in which copyright may subsist is generally the owner of the copyright. However, where the work is made by the author in pursuance of the terms of his or her employment under a contract of service, the employer is the owner of any copyright subsisting in the work.

In this case, a computer programmer, Mr Roberts, created a computer program for the Salvation Army, whilst he was employed by Advanced Administration Services Pty Ltd (AAS). He upgraded the program once more whilst he was still employed at AAS, however AAS subsequently was wound up.

Following this, a further upgrade of the program was required, however Mr Roberts was unable to carry out the task himself. Accordingly, as director of the Company Centrestage Management Pty Ltd, he engaged Mr Riedle to carry out the upgrade. It was agreed that Mr Riedle would carry out the upgrade in three stages, and would be paid a fee for each separate stage. Mr Roberts provided a copy of the second version of the program to Mr Riedle to enable him to carry out the task.

The first stage of the upgrade was completed, however the second and third stages did not proceed and were never completed. The parties were in dispute about the ownership of the copyright in the upgraded program. At first instance the Magistrate dismissed Mr Roberts' claim and granted an injunction restraining Mr Roberts from reproducing the source code in the program.

On appeal, the Court upheld the decision at first instance on the basis that Mr Riedle was engaged as an independent contractor, not as an employee of Centrestage Management, according to the set of indicia which would normally indicate the nature of the relationship between the parties. On this point, it was held that Mr Roberts' "business efficacy" argument that the commercial consequences for Centrestage Management and the Salvation Army of Mr Riedle owning copyright in the program were "so great as to negate any suggestion that the parties intended [Mr Riedle] to be an independent contractor" was not an appropriate factor to take into consideration and "the copyright consequences of a person being an employee or independent contractor are not one of the established indicia for determining whether a person is an employee or an independent contractor".

Further, the Court held that although there was an implied licence in favour of Centrestage Management to use the program upgrade for the Salvation Army, this did not extend to an obligation on Mr Riedle to deliver up the source code. In addition, it was noted that the first and second versions of the program were created by Mr Roberts whilst he was an employee of AAS, and accordingly, the defunct AAS owned the copyright in the first and second versions of the program. Consequently, Mr Roberts was not entitled to claim that the upgrade was an adaptation of a previous version of the program.

Companies and businesses must be conscious of the nature of their relationship with other parties who may own copyright or other intellectual property rights. It is important to ensure that any agreements with employees or independent contractors contain adequate protection for the interest of the business in intellectual property.

BY ANNELIESE SEYMOUR
**Graduate Clerk
Corporate & Business Services**

