

TAX matters

May 2008

Ground Floor, 38 Colin Street, WEST PERTH WA 6005

Telephone: (08) 9481 8311 Fax: (08) 9481 8322 E-mail: taxlaw@nortonsmailes.com.au

In this Issue

- ◆ **Corrective Action for Division 7A - Time is Running Out** Page 1
- ◆ **Superfunds can now borrow – but be careful** Page 1
- ◆ **Changes to the Wills Act 1970(WA) – Divorce revokes your Will**.....Page 2

Corrective Action for Division 7A - Time is Running Out

Last year the ATO released PS LA 2007/20 setting out the circumstances in which taxpayers are not required to make a written request to the Commissioner to exercise his discretion to disregard a deemed dividend that arises under Division 7A. PSLA 2007/20 effectively provides taxpayers with an ability to “self-assess” compliance with the Commissioner’s discretion contained in section 109RB of the Income Tax Assessment Act 1936, making it easier and cheaper to comply.

The ‘offer’ as set out in PS LA 2007/20 applies to Division 7A mistakes made for the 2001/02

year up to and including 2006/07.

One of the requirements for PSLA 2007/20 to apply to disregard a Division 7A deemed dividend is that the relevant taxpayer must take specific “corrective action” to put themselves in a position that complies with the present Division 7A requirements. This corrective action must be taken before 30 June 2008, a date which is rapidly approaching!

Therefore, taxpayers wishing to take advantage of the concession contained in PSLA 2007/20 that have not taken corrective action as yet will need to do so on or before 30 June 2008. Before disregarding any Division 7A deemed dividend taxpayers will need to exercise caution by ensuring that the other conditions in PSLA 2007/20 are also met.

If no corrective action is taken by taxpayers on or before 30 June 2008, a taxpayer may still request that the Commissioner exercise his discretion to disregard a Division 7A deemed dividend, however the request must be made in writing.

Contact: Richard Norton or Rachael Munro.

Superfunds can now borrow – but be careful

In what has been described as the “instalment warrant revolution”, from 24 September 2007 changes to the *Superannuation Industry (Supervision) Act 1993* (“SIS Act”) mean that superannuation funds (“Fund”) can now borrow, subject to certain restrictions.

Significantly, the changes to the SIS Act permit a Fund to borrow outside of ‘traditional’ share instalment warrant arrangements, provided the requirements of the Act are met.

Broadly, the new section 67(4A) of the SIS Act permits a Fund to borrow in circumstances where:

- (a) the monies borrowed are used to acquire an asset which the Fund is not otherwise prohibited from acquiring;
- (b) the asset acquired (or a replacement asset) is held on trust so that the Fund receives a beneficial interest in the asset;

- (c) the Fund has the right to acquire the legal ownership of the asset (or, if applicable, a replacement asset) by making one or more payments after acquiring a beneficial interest; and
- (d) under the arrangement, the rights of the lender against the Fund are limited in recourse to the asset acquired (or the replacement asset, if applicable) – that is the lender cannot have the right to recover monies through recourse to the Fund's other assets.
- (b) the money borrowed is guaranteed by a third party, particularly where the third party is a member or a related party of the Fund;
- (c) the recourse of the lender against the Fund includes recourse against assets of the Fund other than the asset acquired under the borrowing arrangement; and
- (d) the asset acquired is one that a Fund trustee is prohibited under the SIS Act from acquiring directly (for example, acquiring residential property, which is not business real property, from a related party).

The changes to the SIS Act provide new investment opportunities for Fund trustees. However, care should be taken to avoid the potential pitfalls which may arise, depending on the type of arrangement entered into.

Borrowing arrangements which have been identified as giving rise to potential pitfalls by commentators practising in this area and by the Australian Taxation Office in its recent Taxpayer Alert TA 2008/5 issued on 4 April 2008, include arrangements where:

- (a) the money borrowed by the trustee of the Fund is at a rate of interest less than or greater than a commercial rate of interest, particularly where the lender is a related party;

A borrowing arrangement which breaches the requirements of the SIS Act can potentially give rise to civil and criminal penalties and may result in a Fund being deemed non-complying and taxed at the top marginal rate.

Particular issues surrounding the limited recourse and arms-length requirements can arise where a member or relative is a lender or a member or third party gives a guarantee in relation to a Fund's borrowing.

Accordingly, specialist taxation and superannuation advice should be sought prior to any borrowing arrangement being entered into. Particular care should be taken to ensure that the appropriate documentation is put in place to meet all of the requirements of the legislation.

If you would like to discuss any of the matters outlined above, or if you require the appropriate documentation to enter into a Fund borrowing arrangement, please contact Chris Smailes or Daniel Fry.

Changes to the *Wills Act 1970 (WA)* - Divorce Revokes your Will

From 9 February 2008 there were significant changes to the *Wills Act 1970 (WA)*.

These include:

- A Will is now revoked by divorce. In other words where a marriage is terminated by a divorce order under the Family Law Act 1975 (Cth) a Will is automatically revoked. Please note this does not apply to the termination of a de facto relationship.
- A Will may now be evidenced by video recording, tape recording or other form of electronic recording or map, plan, drawing or photograph or other symbolic representation. The Supreme Court may now have regard to such evidence, although such evidence may not be conclusive of testamentary intention.
- The Court may upon certain criteria being satisfied, make an order authorising the making or alteration of a Will or

the revocation of a Will, on behalf of a person who lacks testamentary capacity.

These significant changes highlight the need for a properly prepared estate plan and regular review to ensure an estate plan is up to date.

Contact Craig McKie, Daniel Fry or Chris Smailes.

Note: Look out for our “Tax Matters” for upcoming amendments to the *Inheritance (Family and Dependents Provision) Act 1972 (WA)*.

Norton & Smailes

We advise on:

- income tax, GST, capital gains tax, FBT
- superannuation and superannuation deeds
- stamp duties, payroll tax and other State taxes
- wills, estate planning and business succession planning
- trusts and trust deeds
- objections and appeals
- tax and commercial litigation
- commercial law

Standard Documents (24 hour turnaround)

The following is a summary of our charges (excluding GST and disbursements) for the provision of final documents in duplicate and attending to stamping:

Deeds

• **Trust Deeds**

Discretionary Trust Deeds are \$240, and Unit Trust Deeds are \$295.

• **Superannuation Fund Deeds**

We provide Superannuation Fund Deeds for \$395. This includes supporting minutes, member information statements and APRA documentation.

Other Documents

• **Enduring Power of Attorney**

An Enduring Power of Attorney is \$150, and a General Power of Attorney is \$220.

• **Wills**

We also provide Wills, including Testamentary Trusts where required. Estimates of fees can be provided.

• **Buy/Sell or Business Succession Agreements**

Estimates of fees can be provided.