

TAX matters

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New Appointments - Daniel Fry and Craig McKie

Norton & Smailes is delighted to announce the appointment of Daniel Fry as a Partner and Craig

McKie as a Senior Associate of the firm, effective as and from 1 July 2006.

Daniel has been with the firm for 7 years. He has a broad range of experience in corporate taxation and superannuation.

With extensive industry experience, Craig is the focus of the estate and succession planning practice within the Norton & Smailes business.

Small Business CGT Concessions – Simpler, Clearer and Fairer

On 9 May 2006, the Federal Treasurer announced that the Government would be amending the small business CGT concessions to make them simpler, clearer and fairer.

Of the changes announced, the most significant is the proposal to improve access to the concessions by replacing the current controlling individual 50 per cent test with the new significant individual 20 per cent test that can be satisfied either directly or indirectly through one or more interposed entities.

Currently there is a limit of two controlling individuals or one controlling individual and their spouse who has an interest in the business. The new significant individual test would, according to the Treasurer, “enable up to eight taxpayers to benefit from the full range of concessions instead of the current limit of two controlling individuals”.

However, it appears that there will still be problems in respect of access to the CGT concessions for companies or trusts which hold interests in a company or trust that conducts a business, and the CGT asset being sold is the shares in the company or the interests in the trust conducting the business. This is because of the requirement that the taxpayer must be a CGT concession stakeholder, and only an individual (i.e. a “natural person”) can be a CGT concession stakeholder.

Accordingly, as companies or trusts which hold interests in a company or trust are not CGT concessions stakeholders, they will not be able to benefit from the CGT concessions in relation to the sale of their interests in the company or trust conducting the business.

Although this change has not yet been enacted, it is proposed that, upon enactment, it will apply from **1 July 2006**.

Another important proposed change to the concessions is the increase in the maximum net asset value test from \$5 million to \$6 million. However, that change is only proposed to come into effect from **1 July 2007**.

The above measures have the potential to expand the availability of CGT small business relief to individuals.

Contact: Chris Smailes, Daniel Fry or Alan Krawitz

Asset Protection: Care Required in Structuring a Discretionary Trust

A decision of the Federal Court in the Westpoint litigation has followed the recent trend found in certain legislation to look to the control of assets rather than ownership of assets (ie Family Law Act 1975 and recent amendments to the Bankruptcy Act 1966).

The Federal Court has held that a person who is the trustee, appointor and a member of the class of beneficiaries of a discretionary family trust, has “at least a contingent interest in the property of the trust, if not a general power which approaches ownership”.

Such property may fall to a receiver under s 1323 of the *Corporations Act* 2001. (“the Act”)

In the recent decision of *ASIC in the matter of Richstar Enterprises Pty Ltd v Carey (No 6)* [2006] FCA 814 the Federal Court addressed whether a beneficiary’s interest under a discretionary trust could fall within the definition of property under s 9 of the Act and thus be subject to receivership under s 1323 of the Act.

French J ruled that although such interests would not normally be described as property, an exception would be if the beneficiary was not at arms length from the trustee, so as to have effective control of the trust property. In certain circumstances, the beneficiary’s interest could be described as property and subject to receivership under the Act.

This is an important decision for trusts used for asset protection purposes. Care may be required as to the identity of trustee, appointor and guardian, having regard to the members of the class or classes of beneficiaries.

Contact: Craig McKie or Alan Krawitz

Payment of Superannuation Death Benefits – a Key Estate Planning Tool

The payment of superannuation death benefits can be a key estate planning tool, particularly in light of the government’s proposals to amend the superannuation laws to allow a fund member aged 60 years and over to receive all of his or her superannuation savings tax free and, on the member’s death, the member’s tax dependant(s) to receive all of the member’s superannuation tax free.

Under the proposed changes, the payment of superannuation to a dependant through a binding death benefit nomination will ensure that the tax dependant receives the deceased member’s superannuation tax free. Importantly, not all family members are tax dependants; for example adult children who are self-sufficient will normally not be tax dependants, so nominations in their favor may not be tax efficient.

The payment of superannuation through a binding death benefit nomination will also be a key tool of estate planning where a member believes their estate may be subject to legal challenge via the *Inheritance (Family and Dependants Provision) Act* 1972 (for example by a disaffected child). This is so as in the normal course, superannuation death benefits do not form part of a deceased’s estate.

To effectively implement this strategy the member’s superannuation trust deed must be up to date and allow binding death benefit nominations. The binding death benefit nomination should be prepared correctly and the strategy must fit with the rest of the member’s estate planning objectives.

Prudent advice could make a significant difference to the amount your intended beneficiaries receive in the case of a legal challenge, and how much tax your beneficiaries pay on any amounts they receive.

Contact: Craig McKie or Alan Krawitz

Self Managed Superannuation – Allowable Roll-Over on Marriage Breakdown

Section 66(1) of the *Superannuation Industry (Supervision) Act* 1993 (“SIS Act”) prohibits trustees of self managed super funds from acquiring assets from a related party of the fund.

There are three existing exceptions to this rule:

- Listed securities acquired at market value;
- Business real property acquired at market value; and
- In-house assets acquired at market value (up to the in-house asset limit).

The Australian Taxation Office has recently published a determination under section 66(2)(d) of the SIS Act to provide a fourth exception to the prohibition. In simple terms, the “*Self-managed Superannuation Funds (Assets Acquired on Marriage Breakdown) Determination 2006*” allows the trustee of a self managed super fund to acquire all or part of the relevant member’s interest in another fund, or all or part of the member’s spouse’s (or former spouse’s) interests in another fund where the roll-over occurs as a result of a member’s marriage breakdown.

This determination has a commencement date of 28 December 2002 to cover all roll-overs occurring as a result of the changes to part VIII B of the *Family Law Act* (which allow

superannuation entitlements to be split as part of a property settlement on a relationship break-down).

Contact: Chris Smailes or Daniel Fry

Self Managed Superannuation Fund: Transfer of Afforestation Arrangements Disallowed

A recent ATO Interpretative Decision 2006/261 states that the purchase of rights under an afforestation arrangement from a related party of the fund will be a breach of subsection 66(1) of the *Superannuation Industry (Supervision) Act 1993* (“SIS Act”). This new interpretative decision is in contrast to the previous ATO ID 2002/987 which stated that the purchase of an afforestation arrangement by a self managed super fund came within the definition of business real property and therefore within the exception for related party acquisitions under subsection 66(5) of the SIS Act.

The new ID states that business real property is defined in subsection 66(5) of the SIS Act to require real property to be used wholly and exclusively in one or more businesses.

The new ATO ID states that “*the interest in the afforestation arrangement is not just the interest in the real property. The afforestation arrangement involves the interest in the real property and an agreement with another entity with respect to the management of the property, the planting of the trees, their maintenance and the eventual harvest and sale. The interest in the real property cannot be assigned separately from the agreement with the other entity. As a result the afforestation agreement is not business real property*”.

Where it would have been attractive for high income earners

nearing retirement to transfer their interest in afforestation arrangements to their self managed super fund before the schemes began to produce income, and to take advantage of the CGT small business provisions, this strategy will now be unavailable under the new ID.

Contact: Chris Smailes or Alan Krawitz

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