

## NEWSLETTER – FEBRUARY 2003

### 'VILLA BELVEDERE' QUESTIONNAIRE COMPETITION

**We congratulate each of the following winners**

John Brimacombe	Kelly & Co
Chris Brooks	St Anns College
Malcolm Montgomery	Montgomery Lawyers
Greg Howe	Howe King & Associates
David Gardiner	Allianz Australia
Ester Huxtable	Hume Taylor & Co
Tanya Salter	Beach Petroleum NL
Dr David Sare	Medical Clinic Millicent
Mr Ian Witton	IOOF SA Ltd
Chris Wellington	Wallmans
Peter Britten-Jones	Cowell Clarke
Peter Fisher	Norman Waterhouse
Bernadette Irwin	Craftsouth
Greg & Rae Crafter	Greg Crafter Consultants
Sarah Nelson	North East Electrical
Janet Ryan	
Graham Inns	TXU Australia Pty Ltd
Phillip Mills	Commonwealth Bank of Australia Limited

Thank you to all who participated in our competition.

### NEW STAFF MEMBERS

We welcome the following staff who have been appointed since our last newsletter.

#### BLAKE WILLIAMS



Blake was educated at Prince Alfred College before completing a Bachelor of Commerce degree at Adelaide University. In 1998, he completed the Institute of Chartered Accountants Professional Year programme and was dux of South Australia

in his ethics module.

Blake worked for Moore Stephens Priestley & Morris in Business Advisory Services for 5 years, before embarking on a few years travel including 5 months backpacking in

Asia and 5 months travelling through Europe in his campervan. When not taking 'extended holidays', Blake completed project work for CGNU Europe (Insurance) and Amerada Hess (Oil & Gas Exploration) as well as 1.5 years as a Revenue Analyst for Discovery Networks Europe (Media).

He has now returned to settle in Adelaide and will be practicing in the areas of litigation and corporate finance. He enjoys a wide range of activities including tennis, sailing, golf, painting and generally enjoying the relaxed lifestyle and great food and wine of Adelaide.

#### MARK JEFFRESON



Mark was educated at Prince Alfred College and has a Bachelor of Economics from the Flinders University of South Australia and a Bachelor of Arts in Accountancy from the University of South Australia. He expects to undertake the Graduate Certificate in

Forensic Studies (Accounting) at Monash University later this year.

Mark is an associate member of the Institute of Chartered Accountants in Australia, and will be working as a manager in the areas of taxation, management accounting, forensic accounting and superannuation.

His personal interests include golf, skiing, travelling, and occasional attempts at gourmet cooking armed with a glass of wine.

### ASIC REFORMS IN THE PIPELINE

As of 1 July 2003 the Federal Government plans to introduce simplified lodgement and compliance procedures for companies and managed investment schemes. They are essentially designed to reduce the time and cost to small business of fulfilling ASIC's lodgement and reporting requirements.

#### Annual Returns to be Replaced

Annual returns will be abolished and replaced by an annual statement that will be

issued on the anniversary of the company's registration date each year, the 'review date'. The statement will include a 'statement of details' that must be reviewed by the directors of the company, and an annual review fee payable to ASIC within two months of the 'review date'. If the 'statement of details' are correct, no documents will need to be lodged.

### Streamlining Forms

The number of forms used to notify ASIC of changes will be reduced. One form, Form 484, will be used to notify ASIC of a range of changes to a company. These include:

- the registered office address,
- the principle place of business address,
- officer details,
- members,
- share structure, and
- the ultimate holding company.

There will be new reporting requirements for proprietary companies in regard to issued shares, members and ultimate holding companies.

### R & D START PROGRAMME - REOPENED FOR NEW APPLICATIONS

The Minister for Industry, Tourism and Resources, Mr Ian Macfarlane has announced that AusIndustry has reopened application for R & D Start grants and loans following their suspension in April 2002.

Companies that had previously submitted applications for R & D Start will need to resubmit. Applications should be updated to incorporate any changes in the company circumstances or R & D projects, but no other changes are required and companies in this position should discuss their applications with their Customer Service Manager of AusIndustry.

### TAXATION OF DISCRETIONARY TRUSTS: AMENDMENTS ANNOUNCED

On 12 December 2002, the Treasurer announced that the Government will legislate to introduce new provisions dealing with distributions from trusts.

Since the early 1990s, the Government has amended the law dealing with planning opportunities involving trusts a number of times, including a review of:

- non-resident trusts;
- access to trust losses;
- tracing distributions to ultimate beneficiaries;
- personal service income; and
- social security means testing.

In the Government's August 1998 statement A New Tax System (ANTS), a proposal was announced to tax all trusts like companies. However, in February 2001, the legislation was withdrawn by the Treasurer with further review required in order to "*protect legitimate small business and farming arrangements whilst addressing any tax abuse in the trust area*".

In the most recent announcements at the end of 2002, the Treasurer said the Board of Taxation has recommended 4 measures in their report. The first two confirm that there is no intention to tax trusts like companies.

- "*The Board considers that there are no compelling arguments for broad based reform to more closely align the tax treatment of discretionary trusts and companies and that the Government should retain the current flow-through treatment of distributions of non-assessable amounts by discretionary trusts.*"
- "*The Board considers that, in light of the implementation of trust integrity measures over several years, concern about the use of trusts for tax planning does not of itself warrant fundamental change to the tax treatment of discretionary trusts.*"

Having concluded that fundamental change in the current taxation treatment of

## NEWSLETTER – FEBRUARY 2003

discretionary trusts is not warranted, the Board then considered whether the tax treatment of trusts could be improved.

The Board identified the following 2 issues as warranting consideration and clarification.

- *“The Board recommends that the Government consider options for amending the income tax law to improve the effectiveness and fairness of provisions intended to prevent individuals who are trust beneficiaries with high marginal tax rates accessing, without further tax liability, funds that have been taxed only at the company tax rate.”*

The income tax law currently includes rules under s109UB intended to prevent individuals using discretionary trusts to access income at the company tax rate without paying ‘top-up’ tax equal to the difference between the company tax rate (30%) and their personal marginal rate (up to 48.5%).

The Board identified the possibility of amending or repealing section 109UB.

Section 109UB could be amended to involve Div7A debit loan account rules and to remove the unfairness of the section, to provide that a ‘loan’ that is repaid within 12 months after it is made is not caught.

Alternatively, section 109UB could be replaced with a section dealing with trustee distributions to companies, which are not paid. The consequences could be either that:

- the trustee would be assessed on the amount of the income as if there had been no distribution; or
- the company would have to pay a top-up tax up to an additional 18.5%.

The Board also made the recommendation that:

- *“...the Commissioner of Taxation clarify and publish his views about the deductibility interest on borrowings used to finance non-assessable distributions to beneficiaries of discretionary trusts.”*

At this stage, no legislation has been passed, however we will be keenly watching these issues and keeping you informed.

*Source: Treasurer's press release No 81, 12 December 2002*

### DIY Super Under the Spotlight

On 1 February 2003, the Australian Taxation Office (ATO) began auditing Do-It-Yourself (DIY) superannuation funds.

Around 800 superannuation funds will be included in the compliance audit programme with a focus on such issues as record keeping, regulatory returns, compliance with contribution rules, controls, payments of benefits, superannuation surcharge obligations and investment restrictions.

For a self-managed superannuation fund (SMSF) to qualify for taxation concessions, it must comply with all aspects of the Superannuation Industry (Supervision) Act 1993 (SIS Act) and the Superannuation Industry (Supervision) Regulations 1994 (SIS Regulations).

There are a wide range of penalties if a fund contravenes the superannuation legislation, these include:

- Loss of its concessional tax status if a fund is declared to be non-complying which means the fund will have income and in certain instances assets, taxed at the top marginal tax rate of 47%;
- The assets of the fund can be frozen; and
- The trustee(s) can be prosecuted under the Civil Penalty provisions of Part 21 of the SIS Act. The maximum penalties which may apply under Part 21 are \$220,000 (civil proceedings) and/or 5 years imprisonment (criminal proceedings).

### Access to Preserved Superannuation

The Australian Taxation Office (ATO) has advised that it is presently examining arrangements advertising that they can arrange for early access to an individual's superannuation prior to retirement for personal uses (eg holidays).

Arrangements along these lines can take a number of forms including:

- Providing the promoter with details of your superannuation fund with the promoter promising to arrange for your superannuation to be paid to you.

## NEWSLETTER – FEBRUARY 2003

- Promoter assisting you to establish your own superannuation fund having your existing superannuation rolled over into this fund and then;
- Having your superannuation paid directly to you from the fund or;
- Arranging for the fund to invest in another (perhaps off shore) entity associated with the promoter, with the promise that all or part of the fund's investment will then be returned to the individual in the form of an interest free or low interest loan and the money can then be used for personal purposes by the individual.

Australia has legislative rules in place restricting access to superannuation prior to retirement. Early access to superannuation is only allowed in very limited circumstances where the individual is considered to be in severe financial hardship or there are strong compassionate grounds for allowing release.

Taxpayer Alerts are issued to be an 'early warning' of significant new and emerging tax planning issues that the ATO has under risk assessment. As such, we recommend all our clients think carefully and seek appropriate professional advice before embarking on any tax planning arrangements.

### **MARRIAGE BREAKDOWN AND SUPERANNUATION - OBLIGATIONS OF EMPLOYERS & TRUSTEES**

Under the Family Law Act parties are now able to provide for splitting of future superannuation payments by agreement or by court order. This legislation came into affect 28 December 2002.

The new laws allow "eligible persons" to obtain certain information about a member's superannuation entitlements without the consent or knowledge of the member.

Eligible persons include:

- A member of the fund;
- A married spouse of a fund member - but not a defacto;
- A person intending to enter a "superannuation agreement" with a fund member. This could include a person who is intending to marry a fund member and

wishes to put in place a pre nuptial agreement that deals with superannuation assets.

To obtain information the eligible person must supply a written declaration in the form prescribed by the legislation and pay a fee that is associated with processing the information request. The information that can be made available is quite detailed and includes:

- A members superannuation benefit which is already subject to a split;
- Date membership commenced and the eligible service date of the member; and
- Detailed information related to the current value of the members benefit, including preservation and tax components.

The information must be supplied in writing to the eligible person within a reasonable time.

An important component of the new rules are the controls regarding the disclosure to various parties for information requests. Importantly, under no circumstances can the member be informed that an eligible person has made an inquiry and under no circumstances can the eligible person be informed of the member's address.

It is important that systems for inquiries relating to superannuation are formalised and kept tight. The trustee will need to ensure that adequate privacy controls are put in place to ensure the confidentiality of all requests made to the trustee and that due processes are strictly adhere to.

The employer is under no obligation to disclose information to the inquiring party and should not disclose any information that would contravene the Privacy Act.

Please note - this newsletter is for the general information and exclusive benefit of clients and associates of Kennedy & Co. It contains brief comments not intended to be the basis for decision making nor to be taken as a substitute for specific advice. Please contact this firm to discuss any matters that may be relevant to your individual situation.

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