

### Budget planning for clients

Great planning opportunities exist leading up to the implementation of the Budget proposals. However, from 1 July 2007, many of these opportunities will cease.

Accordingly, it is vital that advisers meet with clients to discuss superannuation and estate planning strategies that may be implemented before 1 July 2007. A pro-active adviser can add great value in this environment.

#### *Free tool to help*

Page 3 of this newsletter is a pro-forma letter that advisers can send to their clients summarising some key planning opportunities.

This letter can also be downloaded in MS Word format and tailored for the adviser's own letterhead. The letter can be downloaded from: [www.dbabutler.com.au/download/budget\\_letter.doc](http://www.dbabutler.com.au/download/budget_letter.doc)

### Update: ATO and SMSFs

Trustees are custodians of the fund's assets and must hold and protect them from outside risks.

The ATO have repeatedly declared that assets should be in the fund's name and all trustees (be they two or more individuals or a company) should be registered as owners, typically where mum and dad act as individual trustees (eg, James and Louise Taylor) the preferred way to own investments is: 'James and Louise Taylor as trustees for the Taylor Super Fund'. This shows to all concerned that the assets are held on trust for James and Louise's fund.

Thus, if James or Louise were sued or declared bankrupt, then the assets should not be at risk to their personal liabilities; at least up to the level of protection afforded by the *Bankruptcy Act 1966* (Cth) which is currently linked to each person's pension RBL.

We understand that with the abolition of RBLs from 1 July 2007, a new system of establishing the protection limit will be implemented which may track the pension RBL (as indexed) of the person moving forward.

The ATO have stated that they have come across cases where an SMSF's assets have been seized in

debt proceedings (eg, by a trustee in bankruptcy or a liquidator or receiver acting on behalf of a corporate trustee). The ATO believe that having proper records should overcome this risk.

However, it is not always possible to have a fund or trust's name recorded on title or in the assets' legal ownership. Typically, real estate and share registers only recognise legal ownership, ie, they will only register James and Louise Taylor as joint owners, but will not recognise a trust.

[Note: trustees should be registered as joint proprietors and not as tenants-in-common. This is because on the death of one trustee, the survivor takes. In contrast, tenants-in-common is distinct title, which is dealt with under the deceased person's Will.]

In order to overcome the limitation in recognising fund ownership, the ATO have declared that a caveat, instrument or declaration of trust must be executed to clearly record the fund's ownership.

The ATO have also stated that if an asset is only in one individual trustee's name (eg, James), then supporting documentation should exist to demonstrate that the asset is in the name of the fund (eg, in trustee meeting minutes). The ATO issued a media release (NAT 2005/37) in early 2005 giving SMSFs to the end of June 2005 to comply with this directive.

It would appear that many SMSFs have not heeded the message as the ATO have repeated this directive for SMSFs to properly recognise asset ownership.

The ATO consider not having proper ownership as seriously compromising the rules which seek to protect superannuation savings for retirement. The ATO's resolve in getting compliance is very clearly gained from the warning on the penalties that can be imposed.

### What is the penalty?

#### *Trustees*

Trustees who do not comply with this requirement risk disqualification, which would also result in them being ineligible to be a trustee of any superannuation fund. The ATO would also refer the trustees to the Australian Government Solicitor for consideration for prosecution.

## Auditor

An auditor who fails to report a breach as required (to either the trustee or the ATO) is subject to a penalty of \$2,750, regardless of whether they are at fault for failing to do so. If the auditor is found to be at fault in failing to report a breach, the penalty increases to \$5,500. The auditor could also be disqualified if the breach they failed to identify is substantial.

Thus, there is need for extreme care in ensuring documentation is appropriate and in compliance with the superannuation rules. In this regard, we raise the following comments:

We generally prefer a sole purpose company to act as trustee and this largely overcomes the ATO's concerns. A trustee resolution on acquiring assets complies with the ATO's views where the fund's name is not recorded in the record of legal ownership.

A caveat is generally the best protection as it provides notice to the world that the caveator's interest needs to be dealt with before another interest can be registered on title.

It appears that an 'instrument' includes such things as trustee resolutions, purchase contracts and other written evidence. Thus, a caveat or declaration of

trust may not be required if other appropriate material exists to recognise fund ownership.

We are generally reluctant to prepare a declaration of trust without having a thorough understanding of the applicable stamp duty laws of the State or Territory involved. This is because some sizeable unwanted stamp duty liabilities can arise in declaring trusts in respect of dutiable property. Accordingly, we recommend that expert advice always be obtained before doing so.

Finally, where only one of several trustees or, indeed, some custodian or nominee is registered as owner of a trust asset, the SMSF's deed should be reviewed to ensure it expressly authorises the custodian or nominee arrangement. Appropriate documentation should also exist regarding the terms and conditions of such an arrangement to ensure it is at arm's-length and complies with applicable superannuation laws.

## Conclusion

We believe the ATO's stance on penalties is too strict given the difficulty of getting the fund's name on title. We otherwise see the ATO as seeking to remind trustees and advisers of an age old principle of trust law, that trustees should prudentially own and manage their assets. (Revised 4-2011 version).



DBA offers a range of products of services to help SMSF trustees and their advisers take advantage of the 2006 Budget.

**Pension Roll-Back Kit** (\$330):  Allocated Pension  Market Linked Pension

**Pension Kit** (\$440):  Allocated Pension  Market Linked Pension

**SMSF & Estate Planning Report** (\$90)

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For further Information please contact:

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✓ **Superannuation** ✓ **Tax** ✓ **Succession Planning**

<Date>

<Client Name>

<Postal Address 1>

<Postal Address 2>

<SUBURB> <STATE> XXXX

Dear <Client Name>

## Re: Superannuation opportunities

We are in an exciting period for superannuation. The government has recently confirmed many positive changes, with the possibility of a tax-free retirement for those who are 60 or over. Many opportunities that currently exist, however, will cease to be available from 1 July 2007. Therefore, it is important that we review your superannuation and estate planning *now*. We summarise some important planning considerations:

- **Undeducted contributions** – the government has imposed a limit on undeducted contributions with effect from 10 May 2006. However, until 30 June 2007, you can make up to \$1 million in undeducted contributions.
- **Deductible contributions** – also known as ‘employer’ and ‘pre-tax’ contributions. The rules regarding these contributions will change. This is very relevant for those with multiple unrelated employers and who are self-employed as well as receiving employer superannuation support.
- **Other contributions** – are you eligible for government co-contributions? Should you consider splitting superannuation contributions with your spouse?
- **Salary sacrificing** – are your current arrangements still appropriate?
- **Social security benefits** – until 30 June 2007, SMSFs can commence to pay pensions that are 50% assets test exempt for the aged pension. The remaining 50% of assets will also benefit from more concessional asset testing rules from 20 September 2007.
- **Transition to retirement pensions** – those in the workforce who are 55 years and older should consider the advantages and disadvantages of a transition to retirement (ie, non-commutable) pension in combination with a salary sacrifice strategy. This strategy can result in tax-free income from mid-2007 for those aged 60 or more.
- **Current pensions** – should you cease any pensions that you are currently receiving? Note that market linked (also known as term allocated) pensions can only be ceased within six months of commencement.
- **Estate planning** – does your Will and related documents need updating? Note a Will does not automatically govern superannuation – additional planning may be required for superannuation.
- **Pre-July 1983 component** – those with a pre-July 1983 component in superannuation may wish to consider methods for maximising and ‘locking in’ this component. This component will become exempt on 1 July 2007.

We would like to meet with you to discuss the above and how the 2006 Budget changes impacts upon your future plans. Please contact our office to arrange an appointment if you would like our assistance.

Yours sincerely

<Insert Name of Firm>

Note that as an <accounting/financial planning> firm we are not licensed to provide financial product advice under the *Corporations Act 2001* (Cth).