

June 2011

## Legislation for Trust Distributions - Trust Deeds should be reviewed

The Government has released legislation containing provisional measures to govern the taxation of distributions from trusts. If enacted, the proposed amendments are to apply to the taxation of trusts for 2010/2011 and later income years until the Treasury finalises its rewrite of the Trust provisions.

If trustees want to stream capital gains or franked dividends to particular beneficiaries they need to review their trust deeds before preparing their distribution minutes for the 2010/2011 tax year to ensure they have the ability to stream and also look at how the trust deed deals with the categories of income and capital gains and whether capital gains are included in the income of the trust as these will determine how the distribution statement is to be prepared.

The proposed amendments are contained in *Tax Laws Amendment (2011 Measures No 5) Bill 2011* and are designed to overcome some but not all of the problematic issues identified by the High Court's decision in the Bamford Case. That decision favoured the proportionate approach to the taxation of trust distributions, which resulted in uncertainty about the taxation effect of streaming specific types of income categories to beneficiaries. The legislation generally codifies some of the Australian Tax Office's administrative concessions in Taxation Ruling TR 92/13 and Practice Statement PSLA 2005/1 GA by providing for a mechanism to allow the streaming of franked dividends and capital gains to specific beneficiaries.

This Tax Flash summaries the effect of the proposed law if it is passed into legislation.

### APPLICATION OF NEW RULES

The proposed rules are intended to apply to the 2010-11 and later income years. The Bill was introduced into parliament on 2 June 2011 and it is hoped it will receive Royal Assent before 30 June 2011. However, in case it is not passed by 30 June 2011 the ATO has released guidelines on the administrative treatment of these trust issues for the year ended 30 June 2011 as below.

The proposed streaming changes will only affect trusts that make a capital gain or receive a franked distribution for 2010-11 or a later income year.

While the proposed changes apply from the 2010-11 income year, the trustee of a trust with an early balancing date can choose to apply these changes for the 2010-11 income year. Details on making this choice are contained in the Bill.

The new streaming rules will have no practical effect in the following situations:

- If a trust makes no capital gains or receives no franked distributions for the current income year.
- If a trust makes capital gains or receives franked distributions but no beneficiary is made specifically entitled to any capital gain or franked distribution. In this situation the changes should produce a similar result to the existing law.
- Managed Investments Trusts (MITs), unless they have elected to apply the new rules (see below).
- Early balancers for the 2010-11 year, unless they have elected to apply the new rules (see below).

### METHODOLOGY

The legislation introduces a prescriptive methodology to deal with the taxation of the trust distributions. There are essentially two tiers to this methodology. Within those tiers there are other methodologies governing the calculation of relevant amounts at both beneficiary and trust level.

Essentially, the proposed amendments advocate a:

1. Streaming of capital gains and franked dividends, based on a specific entitlement even if the beneficiary is not presently entitled to any of the 'income of the trust'; and
2. Taxing the distribution of the remaining distributable trust income based on a proportionate approach.

As the taxation of the capital gain will be based on the beneficiaries' entitlement to the capital gain there will be no need to reclassify the capital gain as 'income of the trust'.

It is important to note that these changes do not solve all of the problems in relation to the taxation of trust distributions and the trust deed will have to be reviewed before the trustee makes its 30 June 2011 distributions to ensure the trust distributions can be taxed appropriately.

There will also be limited anti-avoidance provisions relating to distributions to tax exempt beneficiaries, such as charities.

## Example

The AB trust has three beneficiaries Mr Abernathy; Ms Bethany and AB Pty Ltd. The AB trust has the following income and gains for the 2011 tax year:

- \$1,000 capital gain (eligible for the general CGT discount);
- \$700 franked dividend;
- \$500 rental income; and
- \$300 interest income.

The trust deed contains streaming provisions allowing specific types of income and gains to be streamed to particular beneficiaries (this is a necessary condition in the draft legislation to allow streaming).

The trustee resolves to make the following distributions:

Beneficiary	% of Certain Type of Income Category	\$ Amount
Mr Abernathy	100% capital gain	\$1,000
Ms Bethany	100% of franked dividends 100% of rental income	\$700 \$500
AB Pty Ltd	100% of interest income	\$300

## New Rules

Under the new rules the tax effect of the distributions is as follows:

Beneficiary	Type of Distribution	Taxable Distribution	Entitlement to Franking Credits	Entitlement to CGT discount
Mr Abernathy	Capital gain	\$1,000	0%	100%
Ms Bethany	Franked dividends	\$700	100%	0%
	62.5% of remainder	\$500	0%	0%
AB Pty Ltd	37.5% of remainder	\$300	0%	0%

## Current Rules

Under the current rules the tax effect of the distributions would be as follows (without any ATO administrative concessions):

Beneficiary	Proportionate Entitlement	\$ Amount Distributed	Entitlement to Franking Credits	Entitlement to CGT discount
Mr Abernathy	40%	\$1,000	40%	40%
Ms Bethany	48%	\$1,200	48%	48%
AB Pty Ltd	12%	\$300	12%	0%
<b>TOTAL AMOUNT DISTRIBUTED</b>				<b>\$ 2,500</b>

Under the current law, streaming is not possible and each beneficiary would be taxed on their proportionate share of the total net income of the trust, with a proportionate share of the tax attributes of the franked dividends and capital gain flowing to all of the beneficiaries irrespective of whether they were entitled to the capital gain or franked dividends.

After the amendments, the ability to stream franked dividends and capital gains will, for tax purposes, result in the whole \$1,000 discount capital gain going to Mr Abernathy together with all of the entitlement to the 50% CGT discount. The entire \$700 worth of dividend income could be streamed to Ms Bethany as well as the entire amount of the attached franking credits.

The remaining \$800 income of the trust, comprising the \$500 rental income and \$300 interest income, would be distributed (for tax purposes) in proportion to each beneficiary's present entitlement to the remaining trust income. That is, \$500 (62.5%) to Ms Bethany and \$300 (37.5%) to AB Pty Ltd.

The above example deals with a simple situation. The new rules can get complicated in some circumstances, for example, where beneficiaries are not specifically entitled to all of the capital gains of the trust. You should discuss your own situation with your PKF Tax Adviser.

## No Streaming of Other Income

The new rules only allow streaming of franked dividends and capital gains. Other income, such as interest, foreign income, rent, royalties and so forth, are taxed on a proportional basis. Assume in the example above that AB Pty Ltd was a non-resident company and the trustee intended to distribute the \$300 interest income to AB Pty Ltd in order to take advantage of the 10% withholding tax rate. Even after the proposed amendments, the streaming of the interest income would not be totally effective as only 37.5% (\$112.50) would be subject to the 10% withholding tax and the balance of \$187.50 would be taxed at the 30% corporate rate.

## OPERATION OF NEW RULES

### 1. Streaming of Franked Dividends and Capital Gains

The ability to stream franked dividends and capital gains will not be determined by Division 6. Instead it will be dealt with under the specific parts of the Tax Act dealing with capital gains and franked dividends. Accordingly, the legislation contains amendments to the imputation credit provisions (207-B of the ITAA 1997) and capital gains tax (CGT) provisions (Division 115-C of the ITAA 1997) to ensure beneficiaries will be appropriately taxed on these streamed amounts.

Beneficiaries who are specifically entitled to the capital gain and/or franked distributions derived by the trust will be taxed on the taxable capital gain and franked dividends along with their particular tax attributes (e.g. franking credits and CGT discounts). The associated tax attributes will flow to that beneficiary regardless of whether part or all of the amount is included in the 'income of the trust estate'.

The rest of the net income of the trust will be assessed on the proportionate basis.

In order for a beneficiary to be specifically entitled to the streamed capital gain or franked dividend, the trustee must have the power or obligation to distribute the capital gain or franked dividend to a particular beneficiary as a specific entitlement (most modern trust deeds give trustees this power or obligation but the trust deed would have to be reviewed to see if it needs to be amended). In addition, the trust accounts must record that the relevant beneficiaries have these 'specific entitlements'.

#### What is a Specific Entitlement?

These amendments introduce the concept of 'specific entitlement' to ensure a beneficiary's 'share' of the trust's capital gains and franked distributions (including attached franking credits) reflects their entitlement under the trust deed.

That is, beneficiaries can only have capital gains and/or franked dividends streamed to them if they are 'specifically entitled' to those streamed amounts.

There are two requirements which must be fulfilled for a beneficiary to be 'specifically entitled':

1. The first requirement is the beneficiary must 'receive, or reasonably be expected to receive' an amount equal to the 'net financial benefit' referable to the capital gain or franked distribution in the trust.

The requirement to 'receive, or reasonably be expected to receive' means the amounts a beneficiary is not presently entitled to may still be taxed under these provisions. For example, a beneficiary will be considered to have 'received an amount' when the amount has been credited or distributed to them (including under a re-investment agreement), or paid or applied on their behalf or for their benefit.

A beneficiary can 'reasonably be expected to receive an amount' if they have a present entitlement to the amount, a vested and indefeasible interest in trust property representing the amount, or the amount has been set aside exclusively for the beneficiary.

A 'net financial benefit' refers to the financial benefit or actual proceeds of the trust. Financial benefit is itself defined to mean anything of economic value including property and services. This is a broad concept and includes a receipt of cash or property, an increase in the value of units in a unit trust, the forgiveness of a debt obligation of the trust or any other accretion of value to the trust.

This 'benefit' amount is then reduced by trust losses or expenses. These reduction amounts are ascertained according to prescriptive rules which vary depending on whether the streamed amount is a capital gain or a franked distribution:

- When determining a beneficiary's fraction of the net financial benefit of a capital gain, the gross financial benefit referable to that gain is reduced by the expenses/costs incurred in relation to the asset, as well as capital losses.
- When determining a beneficiary's fraction of the net financial benefit referable to a 'franked distribution', the gross financial benefit is reduced by directly relevant expenses only, e.g. interest expenses, management fees.

This first requirement does not require 'equitable tracing' of the actual proceeds. The amounts can be re-invested during the year. What is important is that the beneficiary receives or can be expected to receive an amount equivalent to their share of the net financial benefit.

It should also be noted that a 'specific entitlement' can be created through a chain of trusts. This is provided the requirements of a 'specific entitlement' are replicated each time the amount is passed from one trust to a beneficiary that is the trustee of another trust.

2. The second requirement is the entitlement must be recorded in its character in the accounts or records of the trust.

The economic benefit the beneficiary has received or can reasonably be expected to receive must be recorded in its character as referable to the capital gain or franked distribution in the accounts or records of the trust.

The accounts or records of the trust would include the trust deed itself, statements of resolution or distribution statements, including schedules or notes attached to, or intended to be read with them. A record merely for tax purposes is insufficient.

There are also rules about timeframes in which the amounts must be correctly recorded as follows:

- For capital gains, a beneficiary's entitlement must be recorded no later than two months after the end of the income year.
- For franked distributions, a beneficiary's entitlement must be recorded by the end of the income year.

The Explanatory Memorandum (EM) lists the following resolutions or trust entitlements as satisfying the second requirement:

- Under the trust deed, a beneficiary is entitled to all of the capital gains of the trust.
- The trustee resolves to distribute all of the dividends of the trust to a beneficiary.
- Under a trust deed that includes capital gains as income (either by default or because the trustee exercises a power to re-characterise the amount as income), a beneficiary is entitled to all of the profits made on or derived from an asset.
- Under a trust deed that does not include capital gains as income, the trustee resolves to advance capital representing profits from the sale of a property equally to the beneficiaries.

### What is not a Specific Entitlement?

There are a number of allocations or entitlements that are incapable of rendering a beneficiary 'specifically entitled' to the amounts in question. In some cases, it is because they cannot fulfil the requirements of being a financial benefit, or are not adequately recorded.

For example:

- Capital gains from the application of the market value substitution rule: A beneficiary cannot be specifically entitled to the part of a tax capital gain that arises because of the market value substitution rules. In these cases, the amount of specific entitlement is limited to what the (tax) capital gain would have been if the market value substitution rules did not apply.
- Notional or zero amount: It is not possible to stream tax amounts to beneficiaries when the gross benefit has been reduced to zero by losses or directly relevant expenses (this is because there is no net financial benefit in the trust - see below).
- Deemed/notional capital gains: A beneficiary cannot be specifically entitled to a purely notional gain i.e. a deemed capital gain such as arises (for example) from a trust ceasing to be a resident trust. However, this is a question of fact and some deemed gains, e.g. from CGT event E5 (where a beneficiary becomes absolutely entitled to a trust asset), may give rise to a 'reasonable expectation' of receiving a related financial benefit.
- Franking credits: A beneficiary cannot be specifically entitled to franking credits. Nor is it possible to separate streamed franked distributions and franking credits.
- Entitlement to unspecified amounts: A beneficiary cannot be specifically entitled to unspecified amounts or shares, for example 'the balance' of trust income, 'all of the trust income', 'half of the trust income' or '\$100 of trust income' etc.

## 2. How are Beneficiaries Taxed on the Streamed Amounts?

Once it has been ascertained whether a beneficiary has received a specific entitlement, the next step is to work through the methodology to ascertain the basis for taxing the streamed amounts to the beneficiaries. This is not done under the Division 6 trust provisions, but rather the specific divisions dealing with capital gains (Division 115-C) and the imputation provisions (Division 207-B).

### Streamed Capital Gain

Division 115-C of the CGT provisions will be amended to ensure beneficiaries that are specifically entitled to a capital gain of the trust will be assessed on the taxable portion of that capital gain. This can be the case even where there is no 'income of the trust' for trust under trust law. The taxable capital gain distributed to the beneficiaries will be grossed up for any CGT discount and small business concessions,

and the beneficiaries can then apply any capital losses, CGT discount and/or small business concessions if they are eligible to do so. This is regardless of whether part or all of the capital gain is included in the 'income of the trust estate'.

It will not be possible to deal separately with the taxable component and the discount component. That is, if a trustee applies a discount to a capital gain and distributes the taxable component to one beneficiary and the discount amount to another, each beneficiary will be treated as having a proportionate capital gain of both the taxable and discounted amount.

Also, where a trust has a discount capital gain that it wants to distribute to a specific beneficiary but the trust deed defines the income of the trust as the same as net income of the trust for tax purposes (under section 95 ITAA 1936), the trustee will have to make sure the discount proportion is also distributed to that beneficiary as a capital distribution, otherwise the other beneficiaries or the trustee will be taxed on part of the gain.

### Streamed Franked Dividends

Division 207-B of the Imputation provisions will be amended to ensure beneficiaries that are specifically entitled to receive a franked dividend will have the appropriate share of the franking credit included in their assessable income and will be entitled to the appropriate share of the franking offset in relation to the dividend received by the trust.

In relation to franked dividends it should be noted that if there is no 'income of the trust estate' then it will not be possible to stream franked distributions (and associated franking credits) to a beneficiary (consistent with the current regime).

### 3. Taxing the Distribution of the Remaining Distributable Trust Income

After the identification of the capital gains and/or franked distributions that have been specifically streamed to specific beneficiaries, the next step will be to determine the remaining distributable trust income and the taxable amount for the remaining beneficiaries.

To do this, the first thing is to recalculate the distributable income and net income (taxable) to take into account the amounts that have already been streamed.

The legislation inserts new Division 6E into the ITAA 1936, which will exclude, from the Division 6 calculations, the capital gain and franked dividends specifically distributed to beneficiaries (and trustees if relevant). This is to ensure the streamed capital gain and franked dividends will be removed from the

calculation of the income of the trust and net income of the trust so the balance of the net income of the trust can be taxed using the proportionate approach.

New Division 6E will also require re-calculating each beneficiary's 'present entitlement to income of the trust estate'. This will be done by reducing the amount of a beneficiary's present entitlement by their specific entitlements to any of the capital gain or franked dividends. This will prevent double taxation on capital gains and franked distributions.

## ANTI AVOIDANCE PROVISIONS

The legislation includes anti-avoidance rules to prevent the use of tax exempt entities, such as charities, to 'shelter' taxable income. Note, these anti-avoidance provisions do not apply to MITs (or a like trust), even if they have opted into the new streaming regime introduced by the legislation.

### 1. Distribution to exempt entities must be paid

Firstly, within two months after the end of the income year, the trustee must notify the exempt entity that they are entitled to an amount distributed by the trustee **or** that amount must be paid to the exempt entity within those two months. This requirement applies whether or not there is any tax avoidance purpose to the distribution to the exempt entity.

### 2. Specific Anti-avoidance Provision

In addition, where an exempt entity would otherwise be assessed on a disproportionate share of a trust's net income relative to their actual entitlements to the 'net taxable accretions to the trust' (whether 'income' or 'capital'), a specific anti-tax avoidance provision in proposed section 100AB of the 1936 Act will apply. This will counter tax avoidance through distributions to tax exempt entities where the amount of the actual distribution to the exempt entity is less than the adjusted net income distribution for that exempt entity. The 'adjusted net income' is, in effect, the taxable income of the trust less amounts that do not represent 'net accretions of value to the trust' as well as streamed capital gains and franked distributions. This takes into account notional tax amounts included in the taxable income e.g. franking credits, Division 7A deemed dividends, CGT market value substitution amounts etc.

There is already an anti-avoidance provision in section 100A that could apply in some cases like this but it requires that there be a reimbursement agreement in relation to the distribution to the exempt entity, which would not always be easy to prove.

The operation of the specific anti-avoidance provision in section 100AA is illustrated in the following example:

*ABC Family Business and Investment Trust had three beneficiaries: Mr Abcot, Mrs Abcot and the Stray Cats Home, which is an income tax exempt charity. For the 2010/11 tax year the trust earns \$1,000 in trading income and \$100 in interest income. The trust deed contains an income re-classification clause. This allows the trustee to exclude particular types of income categories as income of the trust estate and instead to treat it as capital of the trust estate.*

*The trustee (using the re-classification clause) resolves to reclassify the trading income as capital of the trust estate. This means the income of the trust is only \$100 interest income.*

*The trustee then resolves to distribute the \$100 income of the trust to the Stray Cats Home.*

*Without the anti-avoidance rules, as the Stray Cats Home would be entitled to 100% of the 'income of the trust' (\$100), it would be assessed on 100% of the \$1,000 taxable income of the trust (unless section 100A applied). However, as the Stray Cats Home is exempt from income tax none of the trust income would be taxed. The \$1,000 trading income could either remain in the trust or be lent out to Mr and Mrs Abcot.*

*The effect of the anti-avoidance rules will mean the trustee is taxed on the \$1,000 of the net income of the trust that has been 'sheltered' by the above arrangement. The trustee will be taxed on the amount at top marginal rates plus Medicare i.e. 46.5%.*

## Commissioner's Discretion

The Commissioner will have a discretion to disregard both these anti-avoidance provisions where he considers its operation unreasonable.

## TRUSTEE TAXED

The new legislation outlines a number of circumstances where the trustee will be taxed on certain trust amounts as follows:

- Anti-avoidance provisions breached - where the specific anti-avoidance rules apply or the two month reporting and payment rule is not met, the trustee will be assessed and taxed at 46.5% for the amount that would otherwise be 'sheltered'.
- Streamed capital gains of a non-resident beneficiary or a beneficiary under a legal

disability where those beneficiaries have a 'specific entitlement' to those amounts.

- The trustee has a share of the capital gain - generally this will only occur if there is no beneficiary with a specific entitlement; and
  - there is a share of net trust income to which no beneficiary is presently entitled; or
  - there is no trust income.
- The trustee chooses to be taxed on a streamed capital gain - a trustee of a resident trust can choose to be assessed on the capital gain of a trust if no trust property referable to that gain is paid or applied to a beneficiary during the income year, or within two months of the end of the year. This allows the trustee to pay tax on behalf of:
  - an income beneficiary who cannot benefit from the gain; or
  - a capital beneficiary who cannot immediately benefit from the gain.

## MANAGED INVESTMENT TRUSTS

MITs and certain trusts treated like MITs have been given the choice as to whether to apply the streaming changes for the 2010-11 and 2011-12 income years. That is, the new rules will not apply unless an MIT chooses to do so. This is in recognition of the fact that MITs (and certain trusts treated like MITs) generally do not 'stream' capital gains or franked distributions and instead distribute all of their trust income proportionally.

If a MIT chooses not to apply the new rules, it can use the current 'proportional approach' in Division 6 until the Government's new MIT regime commences on 1 July 2012.

If the trustee of these trusts chooses to opt into the amendment, the trustee must make a valid election for the 2010-11 or 2011-12 income year. It should be noted if the MIT makes the election for the 2010-11 year it will automatically apply for the 2011-12 year (i.e. the election is effectively irrevocable).

The trustee must make this choice in writing before the end of the two months and after the later of either the:

- commencement date of the amendments; or
- end of the year in relation to which the choice is made.

If the law is enacted by 30 June 2011, the election must be made by 31 August 2011.

## Early Balancers

The amendments can apply to early balancers for the 2010-11 income year but only if they make a choice for the amendments to do so.

The trustee must make this choice in writing before the end of two months after the commencement of the amendments.

Early balancers have been given this choice so they are not disadvantaged by the introduction of these amendments after the end of their 2011 income year. For instance, this means an early balancer whose 2011 year end is 31 December 2010 will be able to apply the amendments in relation to capital gains or franked amounts distributed during the year ended 31 December 2010.

## ATO ADMINISTRATIVE TREATMENT

In case the law is not enacted by 30 June 2011 the ATO has provided comments about the administrative treatment in such situations.

### Trustee Resolutions

The ATO advises trustees they should be aware the changes will not allow for trustee resolutions made on or before 30 June 2011 to be amended to take account of the law if it is enacted after that date. Therefore in framing a resolution, a trustee may like to consider its tax effect should the law not be enacted or not be enacted as proposed.

### ATO Treatment of Lodgements

As it is currently uncertain when the amendments will actually be enacted, the ATO has provided guidance of how it will treat taxpayers who either lodge according to the law as it stands, or those who apply the new rules.

#### **Taxpayers who chose to apply the existing law**

If a taxpayer lodges a return on time and in accordance with the existing law at the time of lodgement, and an amendment is needed because the law is amended retrospectively, which results in an increase in tax liability then:

- No tax shortfall penalties will apply.
- Any interest attributable to a shortfall will be remitted to nil up to the date of enactment of the new law. Interest will also be remitted for taxpayers who actively seek an appropriate amendment within a reasonable time after the enactment of the new law.

If the taxpayer does not request an amendment within a reasonable time, full interest may apply from the date of enactment. The ATO will consider what is a reasonable time on a case by case basis.

Where the amendment results in a reduction in tax liabilities, interest will be paid by the ATO on the overpayment of tax made by the taxpayer.

#### **Taxpayers who chose to apply the proposed new law and it is not enacted as proposed**

If a taxpayer lodges a return on the basis of the anticipated changes to the law and an amendment is needed because those changes are not enacted as anticipated, which results in an increase in tax liability, then:

- No tax shortfall penalties will apply on the basis it was reasonable for the taxpayer to follow an announced government policy and that the existence of the announcement represents special circumstances for remission.
- Any interest accrued in respect of the amendment will be remitted to the base interest rate up to the date of enactment of the new legislative measure. In addition, the interest, in excess of the base rate, will be remitted for taxpayers who actively seek an appropriate amendment within a reasonable time after the enactment of the new law.

If the taxpayer does not lodge an amendment request within a reasonable time then any interest may revert to the full rate from the date of enactment.

This approach will be conditional on the taxpayer having acted reasonably when lodging the original return or activity statement.

Where the amendment results in a reduction in tax liabilities, interest will be paid by the ATO on the overpayment made by the taxpayer.

#### **Taxpayers who chose to apply the proposed new law and it is not enacted**

If a taxpayer lodges a return on the basis of the anticipated changes to the law and an amendment is needed because those changes are not ultimately enacted, which results in an increase in tax liability, then:

- No tax shortfall penalties will be applied.
- Any interest accrued in respect of an amendment will be remitted to the base interest rate if the sole reason for the amendment is the measure not going ahead. The remittance is for a reasonable period of time following the public announcement by the ATO that the measure is not going ahead.

- Where the amendment results in a reduction in tax liabilities, interest will be paid by the ATO on the overpayment of tax made by the taxpayer.

## CONCLUSION

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These proposed new rules appear to solve some of the main problems highlighted in the Bamford decision but there are still issues that need close consideration and it will be important to review the trust deed for each trust to ensure it operates appropriately.

In particular, the two month requirement for the payment of distributions to exempt entities appears too restrictive. This period should have at least been extended until the lodgement date for the trust tax return for the relevant income year. PKF has made this point in a submission to Treasury, but it was not accepted.

The above comments are only a summary of the proposed amendments. If you have any questions please contact your PKF Tax Adviser.

Should you require assistance or additional information, please contact your PKF Tax Adviser  
Lance Cunningham | Director of Taxation, PKF Australia Limited  
02 9240 9736 | lance.cunningham@pkf.com.au  
Level 10, 1 Margaret Street | Sydney | New South Wales 2000 | Australia

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