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scoop

entertaining the law

commercial
taxation
private client

Dequetteville Chambers
1 Dequetteville Terrace
Kent Town South Australia 5067
phone +61 8 8132 5000
facsimile +61 8 8363 1633
admin@baggiolegal.com.au

EOFY entity run out…

Don't buy a lemon!

Chances are that you will be asked by clients to establish a number of new entities in the lead-up to 30 June.

At Baggiolegal, we regularly review our entity documentation to reflect current law and practice. We are happy to discuss structures with you before any order is placed. We are pro-active about entity selection and, very often, draw attention to issues and consequences that have not been thought through and need to be. We add value to your practice and your clients by doing so.

Our Information Gatherers and Price Lists for entities are available at www.baggiolegal.com.au/forms.htm and www.baggiolegal.com.au/pl.htm. Provided an order is received by midday, we can issue paperwork – by courier or email – on the same day as the order.

When you choose a structure or make an order this June, bear in mind the following tips and traps:

- Don't register companies in SA
  Absent compelling reasons (e.g. licensing, etc), new companies should not be registered in South Australia. This is because our State still charges stamp duty on (non land-rich) share transfers. It's as easy as ticking a box on the ASIC form! We typically register our new companies in Victoria – where there is no such stamp duty. Even if the actual duty to be paid is nominal, the administrative hassle and cost of lodging documentation and financial accounts at RevenueSA is best avoided.

- Where is a fixed trust when you need one?
  Most unit trust deeds 'off the shelf' do not establish a *fixed trust* as defined under the trust loss provisions (and, consequently, for the 45-day franked dividend holding period requirement). These provisions require unit issuances/ redemptions to occur at a price determined by the trust net asset valuation according to Australian Accounting Principles. Any other method of issuance/ redemption or valuation means that the trust will not be a *fixed trust*. Is the fixed trust you ordered really a fixed trust?

- Use a company constitution
  Many service providers either rely upon the replaceable rules or provide a sub-standard constitution - both of which are hopelessly inadequate in stormy weather.

- Don't re-cycle an old company
  There is no reason to risk burdening a client with the liabilities and other skeletons that might lurk in an old company. Add to this the risk of director

scoops

From 1 July 2011, the transitional provisions regarding the deductibility of TPD insurance premiums for superannuation funds (including SMSFs) is sunsetting.

Do your insurance policies comply with TR 2010/D9?
Are your superannuation clients exposed?

Andrew Baggio
LLB MTax BA GCLP FTIA

William Chau
LLB BCom(Corp. Fin.) GDLP

EOFY entity run out…

penalty notices for new directors and the low cost of establishing a new company, why would you ever re-cycle a company for a client?

- Special purpose superannuation trustee companies
  A company established for the sole purpose of being a superannuation trustee is entitled to a discounted annual review fee ($40 compared to $212 for ordinary companies). Don't forget to specify this requirement on our incorporation form if required. Also, if established for this purpose, ensure that this company does not undertake any other activities (whether personally or as trustee for another trust).

- Trading trusts - avoid individual trustees
  Great pains and expense are often suffered to establish a defensive trust structure from an asset protection perspective - only to be undermined entirely by the choice of an individual as a trustee (remember that individual trustees are personally liable for *all* liabilities of a trust).

- Don't use the same company as a trustee of 2 trusts
  The assets of one person or trust are not typically available to the creditors of another person or trust. But determining the ownership of an asset is difficult when the legal owner is the same company – particularly in the absence of any other title documentation or where creditors are circling.

- Don't use a trustee to act in its own capacity also
  You have established a trust for asset protection reasons – but the trustee is pregnant with assets of its own. This might even be a UPE or loan account. You have just undone all that good asset protection structuring!

- Discretionary trust deeds – how appropriate is yours?
  Not all deeds are created equal! Most deeds that we review have not addressed the *Bamford* decision. Many are also deficient in terms of standard powers and also refer to the laws of other States. What is the standard of your supplier's discretionary trust deed? When was it last reviewed critically?

- Vesting dates and restrictions on distributions
  Are you establishing trusts to distribute to, or receive distributions from, other trusts? Do the vesting dates and definitions of all these trusts align so as to permit these distributions?

New entity service providers are myriad. There is no regulation, mandatory insurance regime or approval process to operate in this market. Service providers operate across states and by web, fax and telephone order. Barriers to entry are low and end-consumers, generally speaking, don't understand the product.

It really is a *caveat emptor* market.

Your usual service provider might be a South Australian law firm, expert in structuring, State/ Federal taxes, company, trust and SMSF laws that updates its precedents regularly… Or maybe not.

How compatible are your service provider's standards to yours?

For more information please contact us.