


scoop

entertaining the law



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Legal Structures Get it right!

So much can turn upon the choice of legal structure for a business or investment.

The choice impacts directly upon tax, stamp duty, liability/ risk, financing and estate planning issues to name a few.

Chances are that you will be asked by clients to establish a number of new entities in the lead-up to 30 June 2012.

When you choose a structure 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 easily avoided by ticking the box.
- **Beware of different share classes**
Did you know that companies with different classes of shares owned by different shareholders typically will not meet the requirements for the CGT small business concessions! Think carefully before issuing that dividend access share - it could be costly!
- **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 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?
- **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 trustees are personally liable for *all* liabilities of a trust).

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The existing State based business names registration framework changes on 28 May 2012 due to the new Commonwealth *Business Names Registration Act 2011*. Nationwide business name registration will now be the default position. There will be teething issues upon commencement due to conflicting state registrations. Watch out for a Scoop on this topic soon.



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- 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?
- 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 (\$42 compared to \$226.50 for ordinary companies). Also, if established for this purpose, ensure that this company does not undertake any other activities (whether personally or as trustee for another 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! Many deeds that we review still 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?

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.

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.

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