

LATEST UPDATE – December 2012

Welcome to the last edition of our newsletter for 2012. Our office will be closed from 2.00pm on Friday 21 December 2012 and will reopen on Wednesday 2 January 2013.

Please note that on Monday 17 December 2012 we will experience a telephone black out for a few hours as we upgrade our current phone system. If you need to contact us during this time please email us on admin@corporateexpress.com.au and we will return your call.

The team at Corporate Express takes this opportunity to wish all our clients a safe and happy festive season.

Custodian Deeds

As many of you are aware the Custodian Deeds we supply to our clients are drafted and updated by BinetterVale Lawyers.

Currently we have versions which have been accepted by NAB and St George/Westpac.

If your client's super fund is financing through a bank the Custodian Deed will be scrutinized by the bank's panel solicitors. Some banks have more than one law firm on their panel. It appears that different law firms have their own requirements as to the content of the Custodian Deed.

For instance the version of the Custodian Deed which we supply for St George/Westpac has been accepted by one of their panel law firms however there is no guarantee that another law firm on their panel will not want amendments to that very same Custodian Deed.

Given these issues, BinetterVale proposes that on the initial set up of a Custodian Deed, the cost will include any amendments required by the relevant bank (provided the correct Deed has been chosen). The amendments will be undertaken by BinetterVale.

If however a client then refinances with another lender, and that other lender requires amendments, then BinetterVale would charge separately for those amendments and their quote would depend on the extent of and the particular amendments requested.

We have amended our order form to provide for a choice of Deed depending on your client's lender. Please ensure that you thoroughly canvas your client's plans in this regard before ordering the Deed.

Changes to Australia's charitable and not for profit sector

The first stage of the reform will see the creation of the Australian Charities and Not-for-Profit Commission (ACNC). One of the roles of the ACNC will be to maintain a public register of charitable and later not for profit organisations.

Many of these organisations will be companies that are currently registered with ASIC.

Over the next 6 to 18 months the oversight of these companies in respect of financial reporting and corporate governance will move from ASIC to the ACNC.

One immediate impact is that requests that the word 'limited' be removed from

the name of a company limited by guarantee can only be made after the company has registered as a charity with the ACNC.

Registration with the ACNC however is voluntary but only charities registered with the ACNC will be eligible to apply for tax and other concessions offered by the Commonwealth.

We will keep you informed of further ASIC changes and the time table as they come to hand.

The following article has been provided by BinetterVale Lawyers.....

Converting your discretionary trust into a fixed trust for NSW land tax purposes

Discretionary trusts (including hybrid trusts) which hold NSW land are not entitled to the benefit of the tax-free threshold for NSW land tax purposes. This is a disadvantage since being able to claim the tax-free threshold saves money. Currently a trust which can claim the benefit of the tax-free threshold can save up to \$6,480 in land tax a year.

If your client holds NSW property in a discretionary trust and the total unimproved value (being the valuer general's value) of such NSW property is less than \$2M, and they want to be able to claim the benefit of the tax-free threshold for NSW land then they should consider varying the terms of that trust such that it becomes a fixed trust for NSW land tax purposes. A fixed trust for NSW land tax purposes can claim the benefit of the tax-free threshold.

Whenever the terms of a trust are varied it is necessary to consider whether such a variation triggers capital gains tax or stamp duty liabilities. Provided that the value of the NSW property held by the discretionary trust is less than \$2M and the deed of amendment varying the terms of the trust is drafted appropriately, then there is a reasonable argument that no capital gains tax or

stamp duty liabilities should be triggered by the changing the terms of the trust such that it becomes a fixed trust for NSW land tax purposes. This is on the basis that the Full Federal Court decision of *FCT v Clark* [2011] FCFAFC 5 suggests that such a variation will not trigger a resettlement of the trust.

It is noted that *Clark* was an income tax case and did not consider the issue of resettlement for stamp duty purposes, however, the argument is that no resettlement should occur for stamp duty purposes for the same reasons as for income tax purposes.

BinetterVale Lawyers can draft an appropriate deed of amendment to convert a discretionary trust to a fixed trust for NSW land tax purposes if your client wishes.

The concept of a "fixed trust" for NSW land tax purposes is complicated defined term and the NSW Office of State Revenue's view of what constitutes a fixed trust for NSW land tax has changed over time. The deed of amendment drafted by BinetterVale Lawyers would be based on the law and the NSW Office of State Revenue's administrative practice at the time of drafting.

Whether or not a client wishes to convert their discretionary trust to a fixed trust for NSW land tax purposes will involve weighing up the benefit of obtaining the tax-free threshold against the loss of discretionary income and capital powers under the trust (since the trust will become a fixed trust with fixed entitlements to income and capital).

The conversion of the trust into a fixed trust for NSW land tax purposes means that you will have to decide which particular beneficiaries will, from the conversion onwards, have fixed entitlements to income and capital of the trust. You will no longer be able to vary income and capital distributions from year to year to take advantage of different beneficiaries' different marginal

tax rates. That is, you will lose the benefit of income splitting.

Another consequence of converting the trust to a fixed trust for NSW land tax purposes is that there will be capital gains tax consequences if the trust later distributes a capital or non-assessable amount to a beneficiary. A discretionary trust can distribute capital/non-assessable amounts to beneficiaries without triggering tax for such beneficiaries. A fixed trust for NSW land tax purposes cannot.

Disclaimer

The information provided in this document is for your general information only. It is not intended that anyone rely upon or adopt this information in respect of their personal circumstances without first seeking professional advice.