

### Good news on trust cloning

On 28 June 2006, the Commissioner issued Taxation Ruling TR 2006/4. This ruling provides clarity and insight on the ATO's position regarding trust cloning.

#### What is trust cloning?

Trust cloning involves setting up a trust that is identical to (ie, a 'clone' of) the original trust. Assets are then transferred from the original trust to the cloned trust.

Usually, transferring an asset from one trust to another triggers a CGT event. However, if the beneficiaries and terms of both trusts are the same – that is, the second trust truly is a 'clone' – no CGT event is triggered. The ruling confirms this position.

#### Will this apply to SMSFs?

Yes, the ruling can apply to SMSFs provided certain criteria are satisfied.

#### Why clone?

##### *SMSFs*

Often, an SMSF is set up for small to medium enterprises with two business partners and their respective spouses as members of the one SMSF.

The four member limit on SMSFs means that these SMSFs provide limited planning opportunities for the members, particularly if they want to provide for their children to become members or ensure that the surviving spouse has a 50% control of the fund in the event of the death of a member.

Having separate funds for each family is also desirable where the business partners want to go their own way on the break-up of the business (which may not be amicable).

##### *Discretionary trusts*

There are many families that would prefer to separate their discretionary trusts from a succession and asset protection viewpoint.

For example, where three adult children become beneficiaries of a testamentary trust, the children may prefer to each have their own trust rather than always having to agree with their siblings regarding the management of a shared trust.

### Traps to watch out for

#### *Family trust elections and interposed entity elections*

Special care needs to be taken where the trust being cloned has made a family trust election and/or an interposed entity election.

#### *Member entitlements in SMSFs*

Two SMSFs are not considered to be clones if the member entitlements are not the same in the new SMSF (just after the asset transfer) as in the old SMSF (just before the asset transfer).

#### *Stamp duty and land tax*

Care is needed to ensure no adverse state tax issues arise.

#### *Identical wording may not be enough*

Even though two deeds may be identically worded, those words may not have the same 'meaning and effect' and thus the trusts would not be proper clones.

DBA Butler regularly advises on the cloning of complex SMSFs and other types of trusts.

### Asset protection and discretionary trusts

As part of the continued fall out from Westpoint, a decision of the Federal Court handed down on 29 June 2006 has called into question the extent of asset protection afforded by discretionary trusts.

In determining whether the assets of a discretionary trust were subject to receivership orders, the judge asked whether the defendant was the 'effective controller' (ie, was the trust no more than the defendant's 'alter ego').

One of the defendants in the case was a beneficiary of a discretionary trust and the director and secretary of the corporate trustee. His wife was the appointor of the trust. The judge held that the defendant had effective control of the assets of the trust, thereby amounting to effective ownership of the trust property. The property of the trust was therefore open to review by the receivers who could access considerable information.

Although discretionary trusts are still an effective vehicle, you may have clients whose structures should be reviewed in light of this decision (especially in relation to the identity of the appointor).

## Cost of companies fell \$400

On 1 July 2006, the cost of registering a new company with ASIC fell \$400. This is part of the government's measures to encourage small business to incorporate.

Naturally, DBA will be passing on this saving in full to our clients ordering new companies.

### Change of trustee

In light of the fall in the cost of a new company, it is now a good time to consider using companies as the trustee of your clients' SMSFs.

We generally recommend that an SMSF have a company act as trustee, rather than individuals. There are longer-term benefits of having a company act as trustee. These benefits include:

- *Continuous succession* – on the death of a member, there is no need to worry about changing the SMSF trustee.
- *administrative efficiency* – a change of trustee does not need to be prepared upon admission/exit of an SMSF member.
- *lump sums and pensions* – an SMSF with a corporate trustee can pay member benefits as pensions and lump sums.

For more details of the advantages of a company acting as the trustee of a super fund, see [www.dbabutler.com.au/index.php?p=IND](http://www.dbabutler.com.au/index.php?p=IND)

Note that a company that acts exclusively as trustee of a super fund pays a reduced annual ASIC fee (\$40 instead of \$212).

## Contribution splitting in FY06 – a window of opportunity

We have received a number of queries recently from advisers with clients who wished to split contributions made in the 2006 financial year. However, the clients' SMSFs had old trust deeds that did not allow this.

An SMSF member may apply in the 2007 financial year to have their 2006 contributions split. This is the case even if at the time of the contribution the trust deed did not allow for contributions splitting. So long as the deed is amended before the contributions actually are split, this will be sufficient.

The DBA SMSF deed allows for contributions splitting. For more information about amending deeds, see [www.dbabutler.com.au/index.php?p=SDV](http://www.dbabutler.com.au/index.php?p=SDV)

Note that even under the proposed 2006 Budget changes, contributions splitting is still relevant where, for example, a member accesses their benefits between ages 55 and 59.

## Caught by the 2006 Budget?

*DBA provides documentation for the roll-back of pensions*

The bombshell that was the 2006 Budget undermined many strategies that were in place. DBA now offers pro-forma documentation to roll-back pensions.

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I want to order a Pension Roll-Back Kit (\$330):  Allocated Pension  Market Linked Pension

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For further Information please contact:

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