

Gifts as easy as ABC now?

There will be gifts galore from 1 October 2011 and no gift duty! As easy as ABC? Not necessarily. The potential scale of gifts which might be made following the removal of gift duty leads to the possibility of big risks for professionals.

If you are:

- Helping to prepare a deed of gift;
- Recommending a restructuring involving a gift;
- Witnessing a signature on a deed of gift,

Beware! It would pay to put yourself in the shoes of the donor (the gift **giver**) before you do anything.

Brainwave or dumb idea?

It also pays to remember that the donor is making an irrevocable gift to a third party. Under the new gift duty rules, we could be talking about considerable sums of money. Give some thought to the big picture and some key issues such as:

- Is the donee (the **recipient**) of the gift a person the donor can rely on for support if needed in the future?
- What is the situation of the donee – will the gift simply be swallowed by the donee's creditors?
- Where the donee is a family trust, does the gift giver (donor) have a power of appointment and removal of trustees, and is trustee voting unanimous?
- Is it **necessary** to make the gift immediately given the fairly low risk of repeal of the law in the short to medium term?

In a nutshell, is the asset lost forever to a party over which the donor has no influence let alone control?

Relying on good relationships to protect you after making a gift is risky

There are some situations where gifting is clearly highly advantageous—strategic creditor protection is one typical example. Prudent estate planning is another.

But if the price of that strategic protection or estate planning is permanent loss of control of a significant asset (which is the result of a gift), or the loss of a potential revenue stream in the form of interest, the professional adviser who is overseeing the gifting proposal should be calling for a time-out and reviewing all of the implications of making the gift with the donor.

Understanding the consequences of making a gift

So, a good approach to a gifting proposal would be to review the following in detail :

- The "commercial" and "strategic" reason for the gift.
- The permanent loss of ownership and control that occurs when a gift is made.

- The state of the donor's relationship with the donee and the risk of a change in the future.
- The implicit or explicit assumptions the donor is making about access to the funds and income after the gift is made, including the ability to call on the trustees of a donee which is a family trust to look after the donor, the ability of the donor to appoint and remove trustees and the ability of the donor to have influence over the trustees (both during a de facto relationship or marriage, and after divorce).
- In the case of a family trust, **how** the gifted moneys will be controlled/applied/distributed after divorce or death, and how other family members (children especially) will be treated after the death of any trustee appointed by the donor.

Clawbacks

Remember that gifts made can be clawed back in some cases. These include provisions under the Property Law Act where a gift has been made with the intent to defeat creditors or under the Property (Relationships) Act where the intent is to defeat a spouse. Consideration might also be given to retaining the present \$27,000 annual permitted level of gift for purposes of rest home subsidy asset testing. Gifts above that level are not accepted for that purpose.

Acting as professionals – Independent advice needed in some cases

We recommend a due diligence enquiry before gifts are made – focused on the big picture and the niceties of who controls or influences **the donee** of the gift, which will often be a family trust.

To fulfil professional responsibilities, an adviser should give a donor written advice on the risks and implications, and where applicable, insist on the donor getting independent legal advice before a gift is made.

Speakman Law's familiarity with trusts, as well as estate and tax planning generally, means we are well placed to assist those of you who offer advice in this area.