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Keep bare trust arrangements separate

by Jason Spits and Matthew Burgess

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Practical rather than legal considerations are the key reason to avoid using a single bare trustee for multiple trust structures.

SMSF trustees can use the same bare trustee for multiple bare trusts with no legal barriers, but are likely to find many practical hurdles to doing so that make the idea unappealing, View Legal founder Matthew Burgess has stated.

Speaking during a presentation yesterday hosted by The Auditors Institute, Burgess said the "strict legal position" is there are no risks at all with such a plan, but he has seen a number of parties create resistance to such a strategy, as well as raising the potential for the fund to pay more tax.

"Firstly, the ATO might agitate and say they don't like it. I don't think it would necessarily be basing that view on anything other than the vibe of it, but I have certainly seen them say that is an issue they are not comfortable with," he said.

"The second point I would make is often an external financier will mandate they don't want it that way either. If it is already in place, I suspect that is not going to be an issue because, in theory, the financier has already signed off on it.

"Practically, it can lead to confusion as to which bare trust are we talking about in terms of which role [does the trustee play], so that would be another reason to maybe shy away from it.

"The final issue is that in some states it will guarantee that there is an aggregation of land tax liabilities.

"The counterfactual of that is in those states, by having separate bare trustees for each of the limited recourse borrowing arrangements, you will potentially have a land tax planning opportunity.

"This would in year one already justify the cost of having a couple of extra companies set up to segregate those roles.

"So, in one sentence I don't think there is anything that prohibits it at law, but there are at least three, if not four, practical reasons that would probably encourage the trustee to find a different pathway."