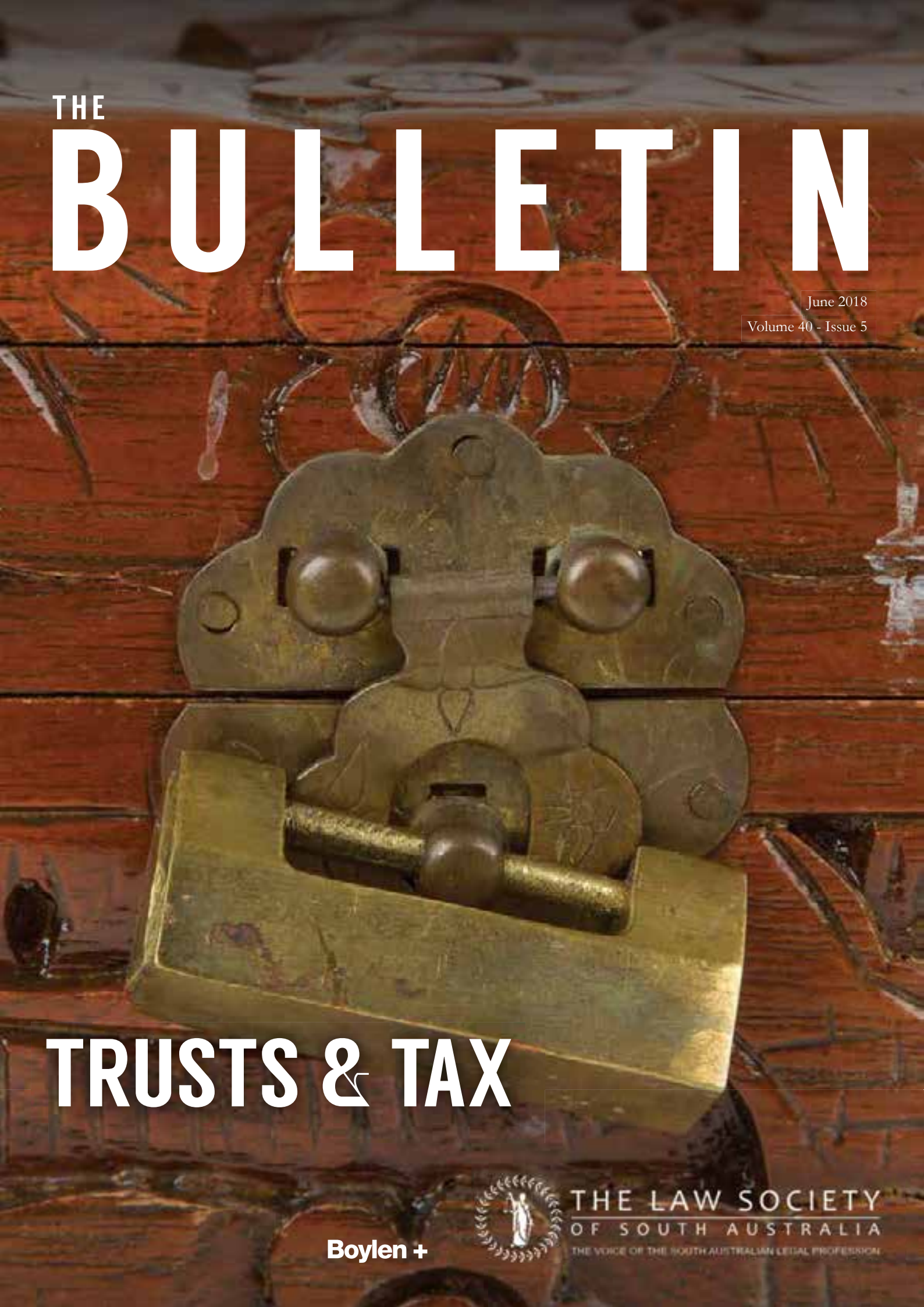


# THE BULLETIN

June 2018
Volume 40 - Issue 5

# TRUSTS & TAX

Boylen +

THE LAW SOCIETY OF SOUTH AUSTRALIA
THE VOICE OF THE SOUTH AUSTRALIAN LEGAL PROFESSION

# The future awaits.

The future has many unknowns. Yet, at Pulteney, we remain absolutely certain of one thing – that boundless opportunities await every student. With infinite possibilities ahead, Pulteney teaches students the skills needed to adapt with confidence and find their place in the world, wherever that might be. At Pulteney, we take pride in helping all students and their families to be ready for whatever the future holds.

**Call to book a personal tour on 8216 5555 or visit pulteney.sa.edu.au**

**PULTENEY**
**FORWARD THINKING**

This issue of The Law Society of South Australia: *Bulletin* is cited as (2018) 40 (5) LSB(SA). ISSN 1038-6777


# CONTENTS

## TRUSTS & TAX



## FEATURES



## REGULAR COLUMNS






**KEY LAW SOCIETY CONTACTS**

**Chief Executive**
Stephen Hodder
stephen.hodder@lawsocietysa.asn.au

**Executive Officer**
Rosemary Pridmore
rosemary.pridmore@lawsocietysa.asn.au

**Chief Operations Officer**
Dale Weetman
dale.weetman@lawsocietysa.asn.au

**Member Services Manager**
Michelle King
michelle.king@lawsocietysa.asn.au

**Director (Ethics and Practice)**
Rosalind Burke
rosalind.burke@lawsocietysa.asn.au

**Director (Law Claims)**
Geoff Thomas
gthomas@lawguard.com.au

**Manager (LAF)**
Annie MacRae
annie.macrae@lawsocietysa.asn.au

**Programme Manager (CPD)**
Natalie Mackay

**Programme manager (GDLP)**
Desiree Holland



**THE BULLETIN**

**Editor**
Michael Esposito
bulletin@lawsocietysa.asn.au

**Editorial Committee**
D Barnfield, S Kljun, P Wilkinson, E Belperio, B Grant, E Moran, T Shueard, E Olsson, R Earles, S Errington, A Siow, A Bradshaw, J Napier

**The Law Society Bulletin is published monthly (except January) by:**

The Law Society of South Australia,
Level 10-11, 178 North Tce, Adelaide
Ph: (08) 8229 0200
Fax: (08) 8231 1929
Email: bulletin@lawsocietysa.asn.au
All contributions letters and enquiries should be directed to
The Editor, The Law Society Bulletin,
GPO Box 2066,
Adelaide 5001.





**PUBLISHER/ADVERTISER**

**Boylen**
Level 3, 47 South Terrace,
Adelaide SA 5000.
Ph: (08) 8233 9433 Fax: (08) 8212 6484
Email: admin@boylen.com.au
Studio Manager: Madelaine Raschella
Layout: Henry Rivera

**Advertising**
Email: sales@boylen.com.au

**Printer**
Lane Print Group
101 Mooringe Ave,
Camden Park SA 5038.
Ph: (08) 8376 1188

# Two certainties in life: the desire to forestall death and minimise tax

TIM MELLOR, PRESIDENT

This month's Bulletin had me musing on the eternal. Underpinning the somewhat arid topics of trusts and taxes are notions of mortality, and a world which survives us beyond the veil – and I don't just mean the corporate veil.

It is time to trot out Benjamin Franklin's pithy but clichéd phrase: "in this world nothing can be said to be certain except death and taxes".

Our profession for hundreds of years has spent much time and intellectual energy in trying, at least, to mitigate the axiomatic truth of that phrase. One of the principal devices in that endeavour is the law of trusts. The complexities and technicalities of the law in this area are extensively examined in a number of learned articles appearing in this edition.

I confess that at University, the law of equity was, for me, one of the more challenging members of the Priestley 11. That strangely sacramental sounding term, of course, only came into use after the 1992 determination of the Priestley Committee, but the subject (then called Trusts and Succession at Adelaide University) was a large part of my third-year syllabus.

Equity did seem to offer a number of positive things. It seemed like a breath of fairness and justice in the instant case, after the intractable application of precedent in the common law. It had its own range of almost Confucian sounding maxims about what equity would and wouldn't do, with whom and for whom. There was also the fascination of the Lord Chancellor's foot fetish*. All colourful stuff after the monochrome world of the common law.

It was not too surprising that the law of equity would develop a notion of separation of legal and beneficial ownership, for the general satisfaction and advantage of all involved.

It was not too surprising that the law of equity would develop a notion of separation of legal and beneficial ownership, for the general satisfaction and advantage of all involved.

The trust has, to a degree, if not vanquished, then forestalled death. The trust could roll on, doing the work intended by its founders, long after they had gone to their grave. True – the rule against perpetuities constituted a complication, however it was still possible to push off to a far distant time, the need to deal with the messy process of vesting. In trust deeds which I read early in my career, obedience to the rule against perpetuities, of course, required vesting before the expiration of "*a life in being plus twenty one years*". This was sometimes accomplished by specifying by reference a "Royal lives" clause, that the "*life in being*" was to be defined as the last living descendant of the British Monarch who happened to be alive at the time when the trust was created. Her Majesty Queen Elizabeth, at age 92, is likely to keep an industry of Royal Watchers active for decades in advising as to which of the last of her minor descendants are then still in action.

In most jurisdictions the term of a trust was ultimately fixed at 80 years – still a pretty substantial period. In sunny South Australia we went one better when, in 1996, the rule against perpetuities was abolished.

We then move to the certainty of taxes. A major attack on that certainty has also come by means of a trust. The discretionary trust (testamentary or otherwise) has provided the potential taxpayer, when placed in the fiscal cross-hairs, with options and flexibilities to manage the bite of the tax-collector.

The articles this month show us just how alive and vital is the law relating to trusts and taxes. The intellect and energy of our profession continues to be engaged in this complex world. I fear that my musings might suggest a lack of depth in my knowledge on these topics. I do feel like Andrew Marvell, who told "His Coy Mistress" that "*at my back I always hear Time's wingèd chariot hurrying near*".

The law may not have been able to eliminate the certainty of death or taxes but we have given them a run for their money. B

* 'Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a Chancellor's foot; what an uncertain measure would this be? One Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in a Chancellor's conscience' - ***John Selden (1584 – 1654) – 'Table Talk'***

# Federal Budget fails to deliver for justice system

MICHAEL ESPOSITO, EDITOR

With most of the Federal Budget analysis focusing on the "what does it mean for me?" angle, it's easy to miss some of the measures that will have a significant impact on the legal profession and the thousands of Australians requiring legal assistance.

The general view of key stakeholders seems to be that the 2018-19 Budget is a wasted opportunity to improve access to justice for Australians.

The Law Council of Australia reports that there is no additional funding for community legal centres or Aboriginal and Torres Strait Islander legal services. Both sectors play a crucial role in providing access to justice for some of the most vulnerable people in the community.

The Law Council also reported that there was no new funding for legal aid, despite calls for the Australian Government to lift its share of legal aid funding to 50%, which would amount to $190 million.

The Federal Government currently contributes just 32% of legal aid funding, with the States making up the rest.

Law Council President Morry Bailes said: "Lives are being ruined because people who encounter legal problems cannot afford a lawyer to present their case effectively. Legal aid funding is now so scarce that being below the poverty line may not be enough."

The Law Council President's comments came after the Australian Senate passed a motion on 10 May to reverse the downward trend in legal aid funding.

National Aboriginal & Torres Strait Islander Legal Services (NATSILS), criticised the failure of the Budget to financially support the implementation of recommendations from the Law Reform Commission's report into Indigenous incarceration rates and the NT Royal Commission. There also appeared to be nothing in the Budget for the overhaul of the Closing the Gap strategy, justice reinvestment, or Aboriginal justice targets.

Instead, as NATSILS reports, the Government has introduced measures to deduct welfare payments from people with unpaid fines and outstanding warrants.

NATSILS Chair Cheryl Axleby said: "All governments around Australia should immediately abolish imprisonment for unpaid fines, nor deduct welfare payments from people who are already oppressed by the system. This will likely have a huge impact on Aboriginal and Torres Strait Islander communities."

Some positive Federal Budget provisions include:

- $22 million to establish an Elder Abuse Knowledge Hub, a National Prevalence Scoping Study, and a National Plan to combat elder abuse
- $47.7 million over four years from 2017-18 for legal support services for survivors engaging with the Commonwealth Redress Scheme of survivors of institutional child abuse
- $3.6 million over four years for establishment of an Anti-Slavery Unit

The Federal Government will this month begin reviews of the National Partnership Agreement on Legal Assistance Services and the Indigenous Legal Assistance Program. The reviews will help inform funding for community and ATSI legal services into the future.

With no additional core funding for community legal centres and uncertainty about funding beyond 2020, it will be up to representatives of the legal profession and other community organisations to agitate for a much stronger commitment to legal assistance across Australia.

And with the State Government due to hand down their first Budget in September, the Law Society will be making the case for a greater investment in our institutions of justice. B

# A roundup of recent Society meetings & conferences

ROSEMARY PRIDMORE, EXECUTIVE OFFICER, THE LAW SOCIETY OF SOUTH AUSTRALIA

## 24 APRIL, 2018

**Uniting Communities**

The President, Tim Mellor, Chair of the Justice Access Committee, Josh Simons, and the Policy Coordinator, Anna Finizio met with David Ferraro and Martine Welfare. The meeting was convened at the instigation of the Justice Access Committee, to obtain an update on the work being done by Uniting Communities subsequent to the restructure of community legal services that occurred as at 1 July, 2017. Of particular interest was the focus being applied by Uniting Communities to matters involving social security payments by Centrelink; mediation services (which can now only be offered to vulnerable and disadvantaged clients); and financial counselling to those involved in consumer credit issues. Uniting Communities have had a 60% reduction in funding for generalist services such as family and criminal law.

## 24 APRIL, 2018

**CEO & General Counsel of the Aboriginal Legal Rights Movement**

Matters discussed at a meeting Tim Mellor and Rosemary Pridmore (Executive Officer) had with the CEO (Cheryl Axleby) and General Counsel (Chris Charles) of the ALRM included: a request for the President to advise the Society's nominee to the ALRM's Board Appointments Committee; the ALRM's wish to be exempt from paying transcript fees in a similar manner to which the Legal Services Commission is exempt to avoid the time consuming and inconvenient requirement that the ALRM make an application on each occasion transcript is required; the expiry in 2020 of the (Federal) Indigenous Legal Assistance Program which provides funds to the ALRM; the review of the Family Law Act; and "best interests of the child" in the context of Aboriginal child placements.

## 26 APRIL, 2018

**Joint Rules Advisory Committee**

Tim Mellor, Nick Anderson (Chair of the Civil Litigation Committee) and Philip Adams represented the Society at a meeting of the Joint Rules Advisory Committee. The meeting focussed on a collaborative study of pre-action protocols with the University of Newcastle, a draft report having been provided for discussion.

## 30 APRIL, 2018

**Meeting with Chief Magistrate**

Matters discussed at a meeting Tim Mellor and Stephen Hodder (Chief Executive) held with Her Honour Judge Hribal included a draft Guideline, prepared by the Society for legal practitioners, relating to appearances by law clerks and PLT/GDLP students; a proposal by the Country Practitioners' Committee that there be a resident Magistrate in Port Pirie; the increasing effectiveness of AVL in country areas; changes to the Sentencing Act; Major Indictable Reform; the review of the Family Law Act (as to the impact of any changes that would bring work to the local Courts); and the workload of the Court (being particularly heavy in relation to family violence matters).

## 2 MAY, 2018

**Building Communities Forum**

The Deputy Chair of the Planning, Environment and Local Government Committee, Paul Leadbeter represented the Society at a Forum convened by the Shadow Minister for Local Government and Planning, the Honourable Tony Piccolo MP.

*Please note: The Society's advocacy work is reported to Members via the Advocacy Notes e-newsletter.*

# Cyberbullying app 'Out of Bounds' updated

The Law Society and University of Adelaide are pleased to report that updates to the "Out of Bounds" app have been completed. "Out of Bounds" is an educational app about the laws relating to cyberbullying, sexting and age of consent.

The updates were made possible by a $1,716 (plus GST) grant provided by the Law Foundation of SA. The Law Foundation has generously provided financial support for the development of the app since its inception.

Several functional improvements have been made to the app, including easier navigation of the quiz section, updated links to external resources, and a re-formatted cyberbullying section that highlights image-based abuse as the most topical and urgent issue relating to cyberbullying and young people. Minor improvements and corrections have also been made to the content of the app. Furthermore, technical improvements were made to ensure the app was compatible with newer versions of Apple and Android operating systems.

The app also includes a new resources section, which outlines the support provided by organisations including the e-safety Commissioner, Kids Helpline, and legal services. It also explains how to make a cyberbullying complaint.

Install the app by searching for "Out of Bounds" in your device's app store. For more information about the app, visit: **https://www.lawsocietysa.asn.au/LSSA/LSSA/Out_of_Bounds_App.aspx**

# St Aloysius College

## NEXT SCHOOL TOUR

## Tuesday 26 June 2018, 10am

### ELC to Year 12 City School for Girls

- Hear about our outstanding academic record and exceptional pastoral care.
- Visit our city school with its easy access to Adelaide's educational resources.
- Meet our teachers and hear how they provide engaging, contemporary learning experiences for young people.
- Tour our facilities which include a gymnasium, two full-sized indoor basketball courts and a heated swimming pool.
- Come and see our new Chemistry laboratory, and hear about our success in encouraging girls to pursue STEM pathways at school and beyond.

**53 Wakefield Street, Adelaide SA 5000 | Tel: 8217 3200**
**registrar@sac.sa.edu.au | www.sac.sa.edu.au**

St Aloysius
*A Ministry of Mercy Education Ltd*

# Testamentary Trusts: The Basics

ANDREA MICHAELS, MANAGING DIRECTOR, NDA LAW

A testamentary trust is a trust structure that has been created by a Will. When the estate is administered, the beneficiaries of the estate will receive the assets in a trust structure which is established at the time of the testator's (Will-maker's) death.

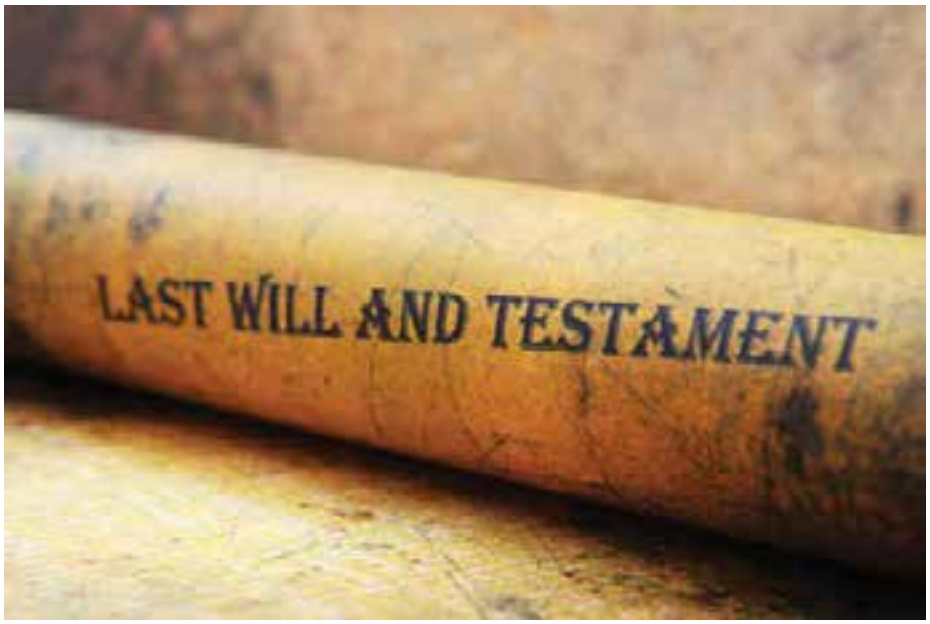
## WHY USE IT?

There are two main benefits of testamentary trusts, namely asset protection and tax.

As the assets are held by a trustee on trust for one or more beneficiaries as opposed to being gifted to a particular beneficiary, if the beneficiary is sued in their personal capacity, the trust assets are protected. This benefit is particularly appealing to clients that have beneficiaries in high risk occupations or are at risk of bankruptcy.

Once established, discretionary testamentary trusts enable the trustee to distribute income and capital in much the same way as a standard inter vivos discretionary trust (subject to any specific requirement of the testator in relation to the income and capital provisions). The trustee, who is ordinarily the principal beneficiary him- or herself, may distribute the income to a wide range of beneficiaries with different marginal tax rates. The income distributed to the beneficiaries is taxed in the hands of the beneficiary. So, if a person has a spouse or child that does not have any other taxable income, they can distribute $18,200 tax free to the spouse or child because that is the individual's tax-free threshold. Testamentary trusts have an additional tax advantage over standard inter vivos discretionary trusts as minor beneficiaries are taxed at normal adult rates.[1] In a standard inter vivos discretionary trust, any amount between $416 and $1,307 that is distributed to a minor beneficiary will be taxed at 66% (and at 45% for amounts above $1,307).

Testamentary trusts are a useful planning tool. The testator can tailor the control provisions, income distributions and the capital distribution provisions of the trust.




Ordinarily, the beneficiary is in control of their own trust when it is created on the testator's death, however the testator can specify another time at which a beneficiary will gain control. Typically, clients choose the age of 25 or 30 before a young beneficiary can control their own trust. In the meantime, the testator can appoint someone else to act as the trustee. Normally this situation arises when a person has children who may be too young or not be financially responsible enough to control the trust and until that time they must ask the appointed trustee (which could be the parent or sibling of the beneficiary, for example) if they want access to the capital or income within the trust.

The ability to tailor the control mechanisms of a trust are particularly useful for beneficiaries who have a disability or are financially irresponsible (usually in the opinion of the testator!). Clients may raise this issue due to beneficiaries who are simply "hopeless with money" or alternatively suffer from something like a gambling or drug dependency. The control mechanisms in these cases are a very attractive proposition for clients looking to protect their wealth rather than leaving assets directly to a beneficiary who will "enthusiastically" spend it. In all cases, clients will vary in degree as to how much they want to "rule from the grave" and control what happens to their money when they pass away.

A common concern for clients with adult children is protecting their assets from their child's spouse should they divorce. Although the best plan is to make sure those children have binding financial agreements in place, that doesn't always happen. An alternative potential solution is to exclude spouses as potential beneficiaries in the testamentary trust. This will avoid the situation where the spouse builds up large unpaid present entitlement

against the trustee. Any ex-spouse with a savvy family lawyer is going to claim for any unpaid present entitlement amount to be paid out of the trust.

Whether the testamentary trust itself is open to attack in Family Court proceedings is an interesting question. Unfortunately, there is no definitive answer. The Family Court has incredibly broad powers under the *Family Law Act* to bring into play property that it thinks should form part of the pool of assets that should be considered in a property settlement, either to be divided amongst the parties as an asset of the marriage or dealt with as a financial resource of one of the parties. Most cases dealing with trusts in the Family Court have been about inter vivos discretionary trusts however we can draw on some general principles from those cases that we can apply to testamentary trusts. In *Kennon v Spry,*[2] the High Court ultimately held that the husband's legal ownership of the assets as sole trustee combined with the wife's interest as beneficiary of the trust was a proper basis for the Family Court to decide that the assets of ICF Spry Trust could be treated as property of the parties. Although that is probably the most well-known Family Court case on trusts, the circumstances were quite unique with Mr Spry, a barrister, perhaps making some poor choices in his conduct which has since been generally accepted as significantly contributory factor to the outcome.

Since then, the cases really are looking at three main areas:

1. Control of the trust;
2. Purpose of the trust being established, including the range of potential beneficiaries; and
3. Source of the trust assets.

Practically it is a balancing act between setting up testamentary trusts that are useable and flexible versus doing everything we can to keep control outside the parties to a marriage. We certainly recommend that where a parent is concerned about a child's potential relationship breakdown, spouses are excluded as potential beneficiaries (giving up some potential tax benefits). This should help to point to the trust being a financial resource rather than a marital asset.

Ultimately, advisors need to consider whether these benefits outweigh the ongoing compliance costs involved with trust structures, including the accounting costs each year.

## HOW DOES IT WORK?

Testamentary trust terms are generally inbuilt into the Will. In other words, when the testamentary trust is created, that portion of the Will containing the terms of the trust becomes the trust deed. Failure to establish a testamentary trust at the outset in a person's Will will preclude the beneficiary from setting up a testamentary trust structure on the testator's death or at least one that properly deals with income splitting and asset protection.

An effective testamentary trust should operate in the same way as a standard inter vivos discretionary trust. The types of clauses that you should see in a testamentary trust include:

- Income provisions – Does the trustee have the power to distribute income including streaming provisions and default income clauses? Does the client want to restrict this to a certain percentage, certain beneficiaries or certain age limits?
- Capital provisions – Does the trustee have the power to distribute capital, both interim distributions and on vesting? Does the client want to restrict the age at which certain beneficiaries obtain the capital of the trust fund? Is it important to the client that a particular property stay within the bloodline and cannot be sold?
- Control provisions – What happens when the primary beneficiary passes away? Who takes control of the trust and how do you pass that control on to the next generation? What happens if the trustee becomes incapacitated, passes away or is declared bankrupt? How do these control provisions work for beneficiaries that might not be capable of being trustee or where it is not appropriate?
- Standard trustee powers – Each deed should contain as a minimum a standard set of trustee powers. These include the power to carry on business, borrowing or lending money, providing guarantees, opening bank accounts, dealing with negotiable instruments, registering security interests, creating sub-trusts and trust splitting. These will be identical to the standard trustee powers that you will find in a standard discretionary trust. It is best to keep these powers broad as they often allow for maximum flexibility in the general running of the trust fund as well as dealing with unforeseen circumstances.
- Eligible beneficiaries – Who is entitled to receive distributions? Does the client only want it to be bloodline family? Restricting the definition of eligible beneficiaries may have control or asset protection benefits (in other words who are they trying to keep out?) but it also alters the tax benefit (the wider the eligible beneficiaries' definition, the more tax effective possibilities there are).
- Variation Power – Is there a power to vary the terms of the trust deed. Is there any restriction on that power?

When taking instructions from clients about their estate planning affairs, a legal practitioner would ordinarily use the standard testamentary trust provisions as a starting point and then address changes to particular clauses that may need to be made for the client's particular circumstances. B

**Endnotes**

1 *Income Tax Assessment Act 1936* (Cth), section 102AG(2)(d)(i).

2 [2008] HCA 56.

# THE DOWNSIDE OF BEING A TRUST BENEFICIARY

ANDREW SHAW, SHAW LAWYERS

For tax purposes, being a person named or described as a "beneficiary" of a trust is not necessarily the pot of gold it might appear to be. Here are a few downsides of being a "beneficiary":

## PROBLEM 1: EXTENDED PERIOD FOR ATO TO AMEND YOUR INCOME TAX ASSESSMENTS

The Commissioner of Taxation may amend an individual's assessment within two years after the day on which the Commissioner gives notice of the original assessment. However, if the individual is a "beneficiary" of a trust estate at any time in the relevant year of income, then the two-year limitation is replaced by four years (unless the trust is a small business entity or full self-assessment taxpayer).[1]

The extended power to amend is not limited to income related to the person's position as a "beneficiary". It is a general power to amend the assessment in any way.

In *Yazbek v Commissioner of Taxation*[2] the Federal Court held that an individual taxpayer (Mr Yazbek) was indeed a "beneficiary" of a trust, notwithstanding that he received no income from the trust in the relevant year. The Court made the following observations:

- a "beneficiary" is any person for whose benefit a trust is to be administered and who is entitled to enforce the trustee's obligation to administer the trust according to its terms (*Kafataris v FCT* [2008] FCA 1454);
- a beneficiary is not simply a person who, as a matter of fact, obtains some practical benefit from the existence of a trust. The word "beneficiary" reaches beyond a person who has a beneficial interest in respect of trust property (*CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic.)* [2005] HCA 53);
- the relevant provisions do not require that the person be presently entitled to a share of income or capital of the trust, or that trust property be appointed to that beneficiary;
- the extended assessment period of four years is not limited to a person's status as a beneficiary. The fact that the income in question was unrelated to the trust was irrelevant to determining the permitted period for amendment;
- as Mr Yazbek was a "beneficiary" of a trust during the 2005 income year, the amendment period for his 2005 assessment was four years, not two.

## CONCLUSIONS ABOUT EXTENDED AMENDMENTS

1. Many individuals are beneficiaries of trusts and may therefore be subject to a four-year amendment period, even though they may have never received a trust distribution. They may not even be aware of the existence of the trust.
2. The amendment period for individuals may be uncertain. As the taxpayer contended in *Yazbek*, the timeframe for amendment depends on whether the Commissioner can locate a trust of which the taxpayer is a potential beneficiary (by name or description).
3. Modern discretionary trust deeds typically define a wide range of beneficial objects – for example, "*each shareholder of a company in which the Primary Beneficiary is a shareholder*". If the Primary Beneficiary were to acquire 100 shares in BHP, then every other shareholder in BHP would instantly become a "beneficiary" of that trust. The amendment period for every individual BHP shareholder would potentially be open to the four years extension.
4. The ATO cannot pick and choose whether to apply a two or four-year amendment period to a particular person. The amendment periods are mandatory and prescribed by the Act.
5. An individual may cease to be a beneficiary of a trust by disclaiming his or her interest in the trust. A disclaimer may operate retrospectively (*Ramsden v FCT* [2005] FCAFC 39). This may be an appropriate course for a beneficiary faced with an extended amendment period, assuming, of course, that the beneficiary is content to forego its interests as an object of the trust, and that the disclaimer is made promptly after the beneficiary first becomes aware of its interest in the trust. A renunciation of interests in a trust may also have stamp duty and capital gain tax consequences.

## PROBLEM 2: YOU ARE TAXED ON YOUR SHARE OF TRUST INCOME EVEN IF YOU DIDN'T KNOW ABOUT IT

Broadly, a beneficiary who is "presently entitled" to a share of the income of a trust (and is not under a legal disability) is assessable to tax on its share of the net income.[3]

A beneficiary is "presently entitled" to trust income if the beneficiary has an indefeasible, absolutely vested (not contingent), beneficial interest in the income.[4]

Where a trustee has discretion to pay or apply trust income to or for the benefit of a beneficiary, a beneficiary in whose favour the trustee exercises discretion is deemed to be "presently entitled" to the amount so paid or applied (even if the beneficiary has not received actual payment of that amount).[5] The effectiveness of a trustee's resolution to exercise its discretion to distribute net income of the trust is therefore critically important.

A trust deed may contain a default clause (a vesting clause that operates in default of an effective exercise of the discretion to distribute income). The beneficiaries specified in the default clause will be "presently entitled" to the trust income, and therefore assessable to tax, if the trustee fails to make an effective distribution.[6]

## PROBLEMS FOR THE BENEFICIARY

A beneficiary may be "presently entitled" to a share of income of a trust, and therefore liable to tax on that income, without being aware of that obligation.

Such was the case in *Alderton v Commissioner of Taxation*.[7] A de facto husband was the trustee of a trust. He gave his de facto wife a debit card to use, which happened to be linked to the trust's bank account. She was able to access the account using the debit card in the trust's name. After the relationship ended, the husband (as trustee of the trust) lodged a tax return disclosing trust income of $79,000 said to have been distributed by the trust to the wife in FY2009. The ATO issued a default assessment to the wife in 2014 assessing her for tax on the basis that she had been "presently entitled" to all income of the trust in FY2009, plus a 75% penalty for failing to lodge her tax return disclosing that amount as assessable income. The wife sought to disclaim her interest as a beneficiary of the trust. The wife was aware of the trust, but knew nothing of its affairs and was unaware of any dealings beyond using the debit card to access funds that she thought were provided to her by the husband.

Nonetheless, the wife's lack of knowledge of the trust was of no consequence for tax purposes. Until disclaimer, a beneficiary's entitlement to income under a trust is operative from the moment it arises, notwithstanding that the beneficiary has no knowledge of it.[8] The trust deed permitted the husband, as trustee, to validly distribute income by making a determination in writing "*or by paying the same in cash to or for the benefit of the beneficiary*". The wife had an interest in the trust income that was both vested in interest and possession (because she spent the income using the debit card). She was therefore "presently entitled" to that share of income, and it formed part of her assessable income for tax purposes, even if she did not know that the source of the funds was a distribution to her of income from the trust. Her later attempt to disclaim her interest as a beneficiary was ineffective because, having had the use and benefit of the distribution, it was no longer able to be disclaimed.

## CONCLUSIONS ABOUT BEING TAXED AS A BENEFICIARY

- A beneficiary may be liable to tax on amounts paid or made available to it, even if the beneficiary is not informed, or is unaware, that the amounts represent distributions of income from a trust.
- Administrative penalties apply to a tax shortfall as a result of a beneficiary failing to include trust distributions in its assessable income (although clearly grounds exist for remission of penalties in cases such as *Alderton*).
- There may be a difference between the calculation of trust income and tax income, which can lead to a beneficiary being assessed for tax on a share of income that is higher than the amount actually distributed to the beneficiary under the trust deed.
- A beneficiary may be left liable to pay tax on a share of trust income even though the income has not been paid to the beneficiary. What if the trustee has dissipated the income for other purposes, leaving the beneficiary with a tax bill and a claim against an insolvent trustee for payment of the distribution to which the beneficiary is "presently entitled" for tax purposes?

## PROBLEM 3: YOU ARE GROUPED FOR PAYROLL TAX

A payroll tax liability arises when wages paid by an employer (or a "group" of employers) exceed the tax-free threshold of $600,000 in any financial year (the 'deduction amount'). Payroll tax is imposed at 4.95% of total wages in excess of the deduction amount.[9]

### *Grouping Provisions*

Grouping provisions add together wages of two or more "businesses".[10] Where two or more businesses form a "group", the wages of those businesses are aggregated. Only one member of the "group" is entitled to the deduction amount, rather than each business receiving its own deduction amount.

The result is higher payroll tax for every member of the "group" (other than the single entity entitled to the deduction amount).

If a person or a set of persons has a "controlling interest" in each of two businesses, the persons who carry on those businesses constitute a "group".

In the case of a business carried on under a trust, a beneficiary of the trust is deemed to have a "controlling interest" if the beneficiary "*has more than 50% of the value of the interests*" in the trust. A person who may benefit from a discretionary trust as a result of the trustee or another person exercising, or failing to exercise, a power or discretion is taken to be a beneficiary "*in respect of more than 50% of the interests in the trust*".[11]

Therefore, every beneficiary of a discretionary trust who is capable of benefitting (in any way) from the trust is deemed to have a "controlling interest" in that trust.

This is problem for beneficiaries (and trustees) of discretionary trusts. A person who is a beneficiary of two or more

discretionary trusts is deemed to have a "controlling interest" in all of those trusts. The trustees of those trusts are automatically grouped. Their wages are aggregated for payroll tax purposes.

### *Smaller Groups Subsumed into Larger Group*

If a person is a member of two or more groups, then *all the members of all the groups* together form a single large group. If two or more members of that large group have together a controlling interest in another business, then *all members of the group* constitute a larger group with the persons carrying on that business.

In effect, smaller groups are subsumed into a large group which grows voraciously until it incorporates every smaller group.[12]

### *Example*

An incorporated legal practice (LegalCo) has four directors and four shareholders. Each shareholder is a family trust controlled by the relevant director. Each trust is a standard discretionary trust whose beneficiaries include a wide range of people and entities by reference to the director, family members and related entities such as companies in which the trust holds shares.

LegalCo (as a beneficiary of each family trust) is deemed to have a "controlling interest" in each family trust. LegalCo and all the family trusts are "grouped". Their wages are aggregated for payroll tax purposes (including wages that each family trust may pay to the spouse and children of the director). No deduction amount is available to the family trusts. The family trusts must pay payroll tax on every dollar of wages paid by them.

### *Automatic grouping & penalty tax*

Grouping occurs automatically. It does not depend upon a determination by Revenue SA that a group exists. The Commissioner of State Taxation has discretion to exclude members of a group (i.e. to "de-group"), but that requires the Commissioner to make an order in writing after taking into account the factors listed in the legislation.[13] Until then, the entities are grouped. Their failure to lodge payroll tax returns and pay payroll tax calculated on a "group" basis constitutes an automatic tax default and an automatic liability for penalty tax and interest.[14]

Harsh indeed. Being a beneficiary of a trust is not all beer and skittles. B

**Endnotes**

1 s.170(1) of the *Income Tax Assessment Act 1936* (C'th) ('**1936 Act**').
2 [2013] FCA 39. Also ATO Decision Impact Statement, 7 August 2013.
3 s.97(1) of the 1936 Act.
4 *Commissioner of Taxation v Bamford* [2010] HCA 10.
5 s.101 of the 1936 Act.
6 *Case X40* (1990) 90 ATC 342; *FCT v Marbray Nominees Pty Ltd* (1985) 85 ATC 4750.
7 [2015] AATA 807.
8 *FCT v Ramsden* [2005] FCAFC 39; *Vegners v Commissioner of Taxation* (1991) 21 ATR 1347.
9 Division 1 of Part 2 of the *Payroll Tax Act 2009* (S.A.).
10 Part 5 of the Payroll Tax Act. A "business" includes a profession or trade, any other activity carried on for fee or reward, the carrying on of a trust, and other activities – see s.67.
11 s.72(6) of the Payroll Tax Act.
12 s.74 of the Payroll Tax Act.
13 s.79 of the Payroll Tax Act.
14 s.30 of the *Taxation Administration Act 1996* (S.A.).

# How not to file a document: lessons in what can go wrong

GRANT FEARY, DEPUTY DIRECTOR, LAW CLAIMS

Time limitation problems sometimes arise because practitioners are unaware of relevant time limitations. A good place to start in this regard is the recently updated Limitation Schedule which is available in the Law Society website. Sometimes, however, the time issue arises not because the practitioner doesn't know about the time limit but because practical difficulties mean that what should be done is not done in time.

An acute and almost Kafkaesque example of this can be found in the recent case of *Street v Arafura Helicopters Pty Ltd [2018] NTSC 15*. In this case, the solicitor, Mr Jones, was instructed to make a claim for personal injuries suffered by his client. Mr Street was involved in a helicopter accident which occurred in the Northern Territory (NT) on 12 November, 2013. The legislation applicable to aviation accidents – the *Civil Aviation (Carriers Liability) Act 1959 (Cth)* – provides for, in effect, a two year limitation period. Mr Jones was aware of this (rather unusual) time limit and had, sometime prior to 11 November, 2015, drafted what he thought were the relevant documents necessary to commence Mr Street's claim against the helicopter in the Alice Springs registry Supreme Court of NT. He prepared a Form 5A/Writ and another document entitled "*Originating Process*" which contained the pleading of Mr Street's claim. These documents were intended to be in compliance with the NT Supreme Court Rule but were not in a number of respects. There should have been only one document, properly endorsed, with the pleading/Statement of Claim contained as part of the document. This was Mr Jones' first mistake.

Mr Jones sent the documents to a process-server in Alice Springs and instructed the process server to file the documents at the Registry and then serve them on the defendant. The forms in the Court Rules provided however that the document should have been filed by Mr Street's solicitor (i.e. Mr Jones) or by "*town agent*" (being an Alice Springs solicitor) retained by Mr Jones. This was Mr Jones' second mistake.

The process-server promptly attended at the Registry on 11 November, 2015 and the documents were received by the Registry Staff. He went back when the Registry opened on 12 November, 2015 (the last day for filing) and was told that the documents were still with the Registrar but that there was a filing fee of $2,320 which needed to be paid. Not knowing or not letting the process server know about this fee was Mr Jones' third mistake.

At 10.07am on 12 November, 2015 the Registrar sent an email to another member of the Registry asking her to return the documents to the process server because they were not in an acceptable form (and pointing out the defects) and noting that town agents needed to be instructed. The process server informed Mr Jones about these matters. This led to Mr Jones instructing Ms Morley, a solicitor in Alice Springs to file the documents, but he did not properly inform her about the defects in the documents: he said that the only problem was that he didn't have a town agent. This was his fourth mistake.

Ms Morley then attempted to file the same (defective) documents. Mr Jones then rang the Registry and managed to pay the fee on his personal credit card. Needless to say the documents were not sealed by the Registry on 12 November, 2015.

Mr Jones' firm faxed and emailed unsealed copies of the documents to the defendant on 12 November, 2015. On 16 November, 2015 another member of the Registry staff noted that the documents still did not comply with the Rules and on 17 November informed Ms Morley that they had again been rejected. On 18 November, 2015 Ms Morley had a conversation with a Registry staff member and was told that as the payment of the filing fee had been processed and that once a document in the correct format had been received it was common practice for the Registry to back date the documents to the date they were first received.

Mr Jones had another go at getting the form of the documents right on 19 November, 2015 but still fell short of what was required. This was his fifth mistake.

In December, 2015 Mr Jones instructed new town agents and they (finally) filed a document which was compliant with

the Rules. The Registry backdated the documents to 12 November, 2015.

By reason of the fact that the defendant had been provided with the non-compliant documents on 12 November, 2015 it must have known something was amiss when it did not receive a properly sealed document (in a different form) until much later. The defendant sought to have the claim dismissed on the ground that its liability had been extinguished on 12 November, 2015.

Southwood J found that the defendant's liability had been so extinguished because no proceedings had in fact been brought within the relevant time limit. Not only that, his Honour also found that the practice of the Registry to backdate documents which had not been formatted correctly was *ultra vires* and should not have been done.[1]

Don't think that these sorts of issues won't happen to you or will only arise in unfamiliar jurisdictions: it is Law Claims' experience that problems of this nature regularly arise for SA practitioners and SA Courts.

So, what lessons can be learnt from the travails of Mr Jones?

- never leave things until the last minute. You never know what issues might arise. You need to give yourself enough time to sort out whatever problems might arise **before** the time limit expires.
- whenever you are dealing with matters in an unfamiliar jurisdiction make sure you get expert assistance from an agent who can help you get things right.
- pay close attention to the requirements for the filing of documents set out in the relevant Court rules.
- make sure that you know about any relevant fees and have arrangements in place for the payment of those fees.
- when dealing with issues raised by the Court make sure you pay close attention and get it right the second time so you don't have to try a third time.
- never rest until the task has been properly completed.

**Endnotes**

1 Could Mr Jones somehow rely on this mistake by the Court to retrieve the position? In my view any such argument would not succeed, not the least because by the time the Court backdated the documents the time period had already run.

# Challenging cancer

Cancer Council SA

## Bowel Cancer Screening Month

**LINCOLN SIZE, CHIEF EXECUTIVE, CANCER COUNCIL SA**

June marks Bowel Cancer Screening Month and is the perfect opportunity to learn about the several crucial ways you can reduce your bowel cancer risk.

Up to 90 per cent of bowel cancers are treatable if caught early, and the best way to detect early changes is by doing a simple but life-saving Faecal Occult Blood Test (FOBT).

The test is free, painless and you don't even have to leave your home. As part of the National Bowel Cancer Screening Program, free screening kits are sent to eligible people aged 50-74 via the post around the time of their birthday.

In 2018, people turning 50, 54, 58, 60, 62, 64, 66, 68, 70, 72 and 74 will all receive a kit, and if you haven't received your kit, or need more information, you can call 1800 118 858 during business hours to learn when your kit will be sent to you.

While there are some risk factors for bowel cancer that we cannot change, such as age or family history, there are several crucial things that we can change to reduce our bowel cancer risk.

To reduce your risk:

- do a bowel cancer screening test every two years from age 50;
- get at least 30 minutes of vigorous or 60 minutes of moderate physical activity per day;
- maintain a healthy body weight;
- eat a well-balanced diet;
- avoid processed meats such as bacon and salami, limit red meat intake to no more than 455g per week;
- limit or avoid alcohol; and
- be smoke-free.

It's also important to see your GP if any common bowel cancer symptoms develop, including blood in your stools, unusual bowel habits, abdominal pain or bloating, unexplained weight loss or loss of appetite, and tiredness, weakness or breathlessness.

You might also like to have a discussion with your GP if you have a family history of bowel cancer as that can also increase your risk.

If you have any questions, or need any more information, remember we're always here to help. You can contact Cancer Council 13 11 20 to find out more information and receive support about bowel cancer symptoms and treatment. Let's have the conversation and all work together to reduce the bowel cancer rates across South Australia.

# Discretionary Trusts and Asset Protection: How safe are they?

JOHN GOLDBERG, CONSULTANT, COWELL CLARKE

Discretionary trusts, also known as family trusts, have four major benefits.

As long as the taxable income is fully distributed each financial year, the beneficiary to whom the income is distributed pays tax at the beneficiary's personal rate. This leads to tax efficiency which of course is a euphemism for tax minimisation. This is of limited benefit for infants[1] because after an exemption for the first $416, trust income distributed to an infant is assessed at 66 cents in the dollar up to $1,307 and thereafter at 45 cents in the dollar.

They are a useful device for succession planning. Upon the basis that the assets in a discretionary trust are not the property of any of the beneficiaries, on the death of a beneficiary they do not form part of his or her estate. This allows succession to occur outside of the estate which can be of assistance if the will is potentially subject to challenge under Inheritance Family Provision laws.

Discretionary trusts, in common with individuals and other trusts, are eligible for CGT discounts which are not available to a company.

Finally, and the topic of this paper, they are generally regarded as a safe haven for assets. This is not because of any specific statutory protection but because the assets held in a discretionary trust are not regarded as the property of any individual beneficiary under bankruptcy law.

The term discretionary trust does not have a precise meaning and rather than making an assumption about what a discretionary trust is, it is necessary in all cases to look to the trust deed. Nevertheless, there have been a number of attempts at judicial definition. It has been described as a trust "where the entitlement of beneficiaries to income, or to corpus, is not immediately ascertainable".[2]

Importantly, it is a trust where the trustee is given a power of selection which is discretionary. It might be a discretion as to whether or not to make a distribution at all and, if one is made, a discretion as to which beneficiary or beneficiaries benefit. This was described by Gummow J as a purely discretionary trust[3]. The discretion might be more limited in the sense that if the trustees do not exercise it, there is a default provision in the trust deed and default beneficiaries will become automatically entitled to the trust income for that financial year. The significance of all of this is that although the class of people and entities to whom income and capital may be distributed are described as beneficiaries, a language purist might say that they only become beneficiaries when the discretion is exercised in their favour. Until that time they are mere objects of the trust or discretionary objects. Judges have tended to use the words beneficiaries and objects interchangeably, but it makes a difference when one considers issues of property and ownership.

To get to the nub of the matter, if the controller of a discretionary trust, either as a trustee or as the director of a corporate trustee, is also a beneficiary, can it be said that the property of the trust is the property of the controller? This is a matter that has excited some judicial and academic attention and its importance cannot be understated. Were the controller of a trust who is also a discretionary beneficiary to go bankrupt, if the property of the trust is regarded at law as his or her property, it will pass to the trustee in bankruptcy.[4]

Conventional jurisprudence says that notwithstanding that the controller might be a discretionary object, the property of the trust is not the property of the controller.

That makes sense because the controller of the trust owes a duty to the discretionary beneficiaries of due consideration, that is, in each financial year before making a determination about distribution of income, the controller is obliged to consider the potential beneficiaries. Why would that duty exist if the property of the trust was the beneficial property of the controller? This traditional view of the law was espoused by Heydon J in his dissenting judgment in the High Court in *Kennon v Spry*.[5]

> ***"The position of an object of a bare power.***
> *The proposition asserted by Lords Reed and Wilberforce in Gartside v Inland Revenue Commissioners was that the object of a bare power of appointment out of assets has no proprietary interest in those assets, but only has a mere expectancy or hope that one day the power will be exercised in that object's favour. In that case it was asserted in an estate duty context. It has been asserted many times and in many contexts. Thus the settlement of an 'interest whether vested or contingent' does not capture a payment of money pursuant to a bare power of appointment. The object of a bare power of appointment cannot assign the 'rights' the object has. An injunction restraining a defendant from removal of 'assets' was not contravened by transactions causing the defendant to cease to be an object of a bare power of appointment. The 'interest' of the object of a bare power of appointment did not fall within the following definition of 'property' in the Corporations Act 2001 (Cth):*
>
> *'any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action.'" (Citations omitted)*

## Conventional jurisprudence says that notwithstanding that the controller might be a discretionary object, the property of the trust is not the property of the controller.

An appropriate analogy for the object of an expectancy (a discretionary beneficiary) might be someone who has acquired or been given a ticket in a lottery that has not yet been drawn. Does that person have a beneficial interest in the prize pool? The answer is no. That position might change when the numbers are drawn, but unless it does the only right of the holder of the ticket is to have the lottery administered according to its rules.

But consider if you not only held a ticket in the lottery but you had the right to draw the lottery and not only that, you had the right to select the numbers on your ticket. That is analogous to the position of a controller of a discretionary trust who is an object of that trust.

In 2006 French J, when a Justice of the Federal Court, considered this matter in the context of the definition of property under section 1323 of the *Corporations Act*.[6] Although French J stated that a beneficiary of a discretionary trust would not in the ordinary case have an equitable interest in the property of the trust, he went on to say that where a discretionary trust is controlled by trustee who is in truth the alter ego of a beneficiary, then at the very least a contingent interest may be identified because, to use the words of Nourse J, "it is as good as certain" that the beneficiary would receive the benefits of distributions either of income or capital or both.[7]

Somewhat similar reasoning was applied by French CJ, the then Chief Justice of the High Court in *Kennon v Spry*.[8] One of the questions asked was whether the assets of a discretionary trust could be treated as the property of a party or parties to a marriage. French CJ concluded that the assets of the discretionary trust, coupled with the trustee's power to appoint them to a party to the marriage and the equitable right of that party to the marriage to due consideration should be regarded as property for the purposes of the *Family Law Act*. Gummow and Hayne JJ in their separate joint judgment came to the same conclusion based on similar reasoning. As a matter of interest, the definition of property in the *Family Law Act* is no wider than the definition of property in the *Bankruptcy Act*. Nevertheless, Courts have stressed that their interpretation of these definitions is based upon looking at the Act as a whole.

In a recent judgment in the Supreme Court of Queensland[9], Jackson J stated that with the exception of the *Family Law Act*, Richstar has not been followed or applied subsequently and has been criticised academically.

Nevertheless, a conclusion that can be reached is that an excessive concentration of power in the hands of an individual controller might pose a risk to the underlying assets of a discretionary trust on the basis that the judicial door is very slightly ajar.

Notwithstanding the above, there are numerous other areas of vulnerability for discretionary trusts. Available space only permits me at this stage to list them without elaboration.

- Change of trustee by the Supreme Court pursuant to section 36 of the *Trustee Act*. This is a discretionary power and the Court is not required to find fault or inadequacy on the part of the existing trustees. Orders such as these are, however, normally made following actual or alleged maladministration. The Rinehart litigation is an instructive case in point.
- Borrowing by the trustee secured by trust assets.
- Obligation by the trustee to meet unpaid present entitlements.
- The trustee's right of indemnity from trust assets either by way of exoneration or recoupment.
- Ownership of shares in a corporate trustee. This is a matter of real concern because shares are property and can pass to the Trustee in Bankruptcy. From there, theoretically, the Trustee in Bankruptcy could appoint new directors and make a distribution from the trust to the bankrupt. That may or may not be treated by the Court as a fraud on the power but it is a contingency that is best avoided.

In summary, discretionary trusts can still be safe, not necessarily in the Family Court and it depends on how well managed they are. **B**

**Endnotes**

1 Except if it is a testamentary discretionary trust, where infants are generally taxed as adults. See ITA 1936 sect 102AG.
2 *Commissioner of Taxation (Cth) v Vegners* (1989) 90 ALR 547 at 551.
3 At 552.
4 *Bankruptcy Act* 1966 (Cth) s. 5, 558.
5 *Kennon v Spry* [2008] HCA 56 at para 160.
6 Re *Richstar Enterprisers Pty Ltd: ASIC v Carey (No 6)* (2006) 153 FCR 509.
7 At 520-521.
8 *Kennon v Spry* [2008] HCA 56.
9 *Fordyce v Ryan and Quinn* [2016] QSC 307.

# Trusts Symposium

MICHAEL FOX, COMMITTEE MEMBER, STEP SOUTH AUSTRALIA

STEP South Australia Chair Rodney Luker (left) with the Hon. Tom Gray QC


The Hon. Justice Malcolm Blue delivers his address on derivative actions in trusts

The 2018 STEP South Australia/Law Society of South Australia Trusts Symposium continued its traditional journey with excellent speakers providing analysis of contemporary or leading edge legal issues surrounding trusts and equity.

What follows is the impression of one who is not a lawyer!

Several overseas visitors (from Singapore, New Zealand and the United Kingdom) added a perspective to the corridor discussions over the breaks and drinks on the evening of the event.

Chair of STEP South Australia, Rodney Luker TEP welcomed the delegates, and the Honourable Tom Gray QC officially opened the event, continuing his support for STEP.

David Wright TEP explored the issue of a trust existing without property, providing an insightful, well-argued analysis. He confronted *Jacobs' Law of Trusts in Australia* "there can be no trust without property. That is fundamental" and did so thoughtfully, clearly engaging the audience.

Other speakers spoke of the notable work, deliberately staying safe by expressing support for the respected text.

In the morning, other speakers examined some very fundamental trusts issues dealing with commercial and practical matters in Australian business; matters influenced by the scope of the papers.

David Marks QC TEP challenged the basis of many taxation orientated legal practitioners' (and tax accounting professionals') use of partnerships of trusts as preferred structures for investment and enterprise. Whilst acknowledging the relevant advices concerning tax law, the audience was left comprehending the complexities of partnerships of discretionary trusts.

A foundation of knowledge was provided for those trust and estate practitioners advising on commercial and investment structuring.

The depth of analysis went further when Dr Campbell Rankine presented "Sub trusts – what are they?" True to his comprehensive knowledge in this area, Campbell gave an in-depth paper with insightful interpretation of the taxation law areas where there appears to be a divergence of interpretation between the administration of taxation law (by the Australian Taxation Office) and cases on equity; and he suggested a better interpretation. Campbell's paper should be considered by any practitioner facing controversy in this area.

The David Haines QC Memorial Lecture was presented by the Honourable Justice Malcolm Blue, providing the audience with a profound insight into derivative actions in trusts. This was a scholarly review.

A delightful addition to the day's proceedings was an address by Ms Patricia Wass (STEP Worldwide Chair) on the organisation's activities. She presented a STEP Employer Partnership Programme Plaque to Michael Perkins of Nexus Legal.

The post lunch panel "Are trusts ill-suited for commercial enterprises?" provided an intriguing analysis of the practical issues confronting practitioners when advising in respect of a typical multi-generation family farm scenario. The insights on the adviser's dilemmas were significant. Sashi Maharaj QC and the Honourable David Bleby QC gave reminders of an adviser's obligations and responsibilities in these scenarios. With profundity, Milton Shaw TEP presented a detailed summary of tax issues exposed by the case study. The panel was moderated by the Honourable Tom Gray QC with the case study created largely by Dr Campbell Rankine.

Professor John Glover presented the Honourable Christopher Legoe QC AO Lecture on "Express trusts, inexplicit contracts and the mutual intention problem". Whilst acknowledging the perspective presented by David Wright, Professor Glover stayed with the more settled perspectives (found in Jacobs) whilst providing guidance on the topic's implications - a paper worthy of a further read.

Facing the last shift, and admitting to being a barrier to drinks, Carolyn Sparke QC TEP entertained us all with a thought provoking and humorous presentation on recent family provision and estate cases.

In summary, the 2018 event was a classic Trusts Symposium where attendees were able to hear authoritative speakers provide well thought out and sometimes challenging perspectives on an array of leading trust and equity issues. B

# Confessions of a Young Tax Practitioner

LISA CHRISTO, LAWYER, NDA LAW

Tax law is an extremely interesting, detailed and rewarding area of law. For one, you build a great sense of resilience in dealing with the nonplussed looks that you receive when you tell people that you're interested in a career in tax. For many people, tax law is synonymous with "boring", until of course it dawns on them they you may be able to help them implement their plans to claim a greater percentage of deductions in their tax returns.

I've been asked to reflect on what it is like as young practitioner working in the area of tax. Generally speaking, if I could go back in time and give myself one piece of advice before my first day of work, it would be: do not underestimate how little you know. Tax law is very interesting (despite what everyone tells you) but it is also difficult. It takes an enormous amount of effort to understand what experienced practitioners consider to be the basics. The volume of law and explanatory materials is both a blessing and a curse. It is wonderful that there is sufficient commentary on a subject to allow young practitioners to understand the workings of a provision, but it also presents an overwhelming sense of ignorance when each article that you read introduces a further concept that you need to consider, and inevitably don't understand.[1]

The difficulty for many young lawyers is the juxtaposition between law school and real working life. Law school teaches you to problem solve and be critical. It also teaches you to be competitive and do well at all times, to enable you to have the more impressive CV, which will lead to the more impressive job (or in fact, a job at all). You develop a habit of striving for excellence and complete understanding. These sound like good qualities to have and in many respects, they are. However, when you begin working, and in particular in an area of law like tax, you are confronted with a situation where you consistently don't know what is going on and feel like you are falling short of what is expected of you.

It is at this point that you may consider that I am unhappy working as a tax lawyer. Indeed, it is the opposite. The intricacies of tax keep me engaged and give me a sense of achievement. It is an area of law that I hope I can continue to work in for many more years. That is because I have had the luxury of more experienced practitioners telling me what I needed to hear. Namely, it is OK that you don't understand everything. It takes several years before you feel like you fully understand what is going on. It is OK to sometimes feel overwhelmed by the volume of material. It is OK to ask questions. It is OK that you sometimes make mistakes.

For all young lawyers, we devote so much of our time to progressing our careers that we can forget to check in on our mental health. Strong mental health will sustain you and keep you driven, so take care of yourself, and check on others. Feeling anxious that we are not grasping concepts quickly enough is completely normal but keep an eye out for when those feelings become too much.[2]

Tax law is fun. Yeah, I said it. Embrace and enjoy the challenge. Be aware of when you need to ask for help and don't be afraid to do so. Understand that your ignorance is normal, and work hard to overcome it. And most importantly, rely on others if you feel overwhelmed.

**Endnotes**

1 Trust loss rules, I'm looking at you.

2 Of course, if you are finding that your anxiety and stress levels are becoming unmanageable, do not be afraid to seek professional help. If you can, discuss your concerns with a colleague. The Law Society website has a number of resources for practitioner support and a wellbeing programme which is great for general education. Alternatively, you can contact Beyond Blue on 1300 224 636 (www.beyondblue.org.au/getsupport) or Lifeline on 13 11 14 (www.lifeline.org.au).

# Tax and the Young (Non-Tax) Lawyer

ADAM OSBORN, LAWYER, TINDALL GASK BENTLEY

As early career lawyers, we may have graduated law school having avoided any whiff of tax law (intentionally or otherwise). We may have now gained employment in an area of law which appears at first glance to be free from any tax issues.

However, sooner or later we will likely encounter clients whose legal affairs are impacted by the broad-ranging scope of tax law. It is important for a young legal practitioner in any area to be aware of the tax issues that may arise, and how these can affect the advice that we give our clients.

As a Wills and Estates lawyer, I frequently have to raise with my clients the tax implications of their decisions. However, it is important to differentiate between the issues we are equipped to advise on and those where the complexities of tax law stretch beyond our expertise. This article explores some of the issues I have encountered in my practice.

When discussing a client's Will and estate planning, they may want their superannuation to pass to their children and other assets to pass to their spouse. However, if the children are adults, it is important to flag that there will likely be a surprising amount of tax to pay, reducing the amount that will ultimately pass to the children. This would not be the case if the superannuation instead passed to the spouse or young children, both of whom would be considered "death benefit dependants" for tax purposes.

Capital Gains Tax (CGT) considerations are also important at the instruction stage, and can impact assets that will form part of the estate. The effects of CGT depend on the type of asset in question (e.g. real property; collectables and personal use assets), when the asset was acquired by the deceased, and how it ends up in the hands of a beneficiary. The consequences may be favourable or unfavourable to a beneficiary, and it may be that a CGT liability to be paid later reduces the real financial value of an asset.


One CGT consideration to be aware of is the Main Residence Exemption. If a "dwelling" was the deceased's main residence immediately before death, and the property is disposed of by a beneficiary or legal personal representative within two years of the date of death, a capital gain or a capital loss can be disregarded upon that disposal. However, there are many layers of complexity behind this apparently straightforward concept (for instance, a "dwelling" can include the deceased's caravan or houseboat). Books have been written on this exemption alone, and so it may be best for the client to seek specialist advice.

A different consideration at the Will-making stage is a potential claim being made under the *Inheritance (Family Provision) Act 1972* (the Act) if an individual feels they have not received adequate provision from the estate. How assets are held by the deceased can make an enormous difference as to whether the asset is vulnerable to such a claim.

Two people who own real property together may hold the asset as "tenants in common" or "joint tenants". In the former case, upon the death of one owner, the deceased's share in the property becomes part of the estate able to be distributed by the Will or claimed upon under the Act. In the latter case, upon the death of one owner, the deceased's share in the property will pass automatically to the other by survivorship.

Because of the different consequences for estate planning, a couple who own real property together may wish to change the mode of holding to achieve their desired outcomes. Ordinarily, a conveyance of land would attract Stamp Duty. However, a mere change in tenancy can be exempt from Stamp Duty – and where the property in question is the couple's shared principal place of residence, the Stamp Duty exemption can also extend to cover

an adjustment in the proportions they each hold (as long as the necessary paperwork is lodged). Knowledge of this exemption is clearly crucial to advising clients who wish to make such changes for estate planning purposes.

Taxes don't come to an end upon death. When assisting a client to obtain a grant of Probate or Letters of Administration, if the deceased has not kept up with the filing of their income tax returns it is important to advise the client that they are responsible for the filing of the returns. Importantly, tax may be payable by the estate. The client should therefore be cautioned against distributing the assets until all necessary tax returns have been completed, or least until the client has obtained an estimate of any tax payable. Otherwise, the client as executor or administrator may be personally liable for the tax debt themselves. This may mean having to potentially pursue the beneficiaries after assets have been distributed, to seek reimbursement for the tax paid. It is crucial to advise the client to make investigations into the income tax status of the deceased, to avoid issues such as these.

Further income tax returns may also need to be filed on behalf of the estate when the assets earn income after the date of death, such as an investment property generating rental income or money held at the bank earning interest.

In the case of an estate dispute, where the deceased's superannuation falls into the estate it is again important to remember the earlier remarks about different tax treatment for different individuals. A party who is classed as a "death benefit dependant" will be taxed differently to a party who is not, and this should obviously be borne in mind when negotiating. Such taxes could erode an otherwise substantial figure.

This article flags just some of the tax issues encountered by a Wills and Estates practitioner. No doubt practitioners in other areas of law encounter different tax issues in their practice.

There are two important, counterbalancing principles to bear in mind for those of us who are not tax specialists.

Firstly, we ought to know as much as we can about how tax issues might affect our clients, and be mindful of these issues in the giving of advice. It is imperative that we are able to point out to our clients any potential risks or advantages that may affect them. Secondly, we ought to know the limits of our knowledge and not attempt to give specialist tax advice, but rather flag the potential issues and direct our clients towards those of our professional colleagues who have the necessary expertise.

**In the latter case, upon the death of one owner, the deceased's share in the property will pass automatically to the other by survivorship.**

# Justice Judy Hughes: Nurturing a love of the law & problem solving

CAITLIN HARTVIGSEN-POWER, DEPUTY CHAIR, WOMEN LAWYERS' COMMITTEE

The Honourable Justice Hughes was appointed to the Supreme Court and as President of the South Australian Civil and Administrative Tribunal (SACAT) on 4 July, 2017. There is no doubt that the role of President of SACAT, being a relatively new tribunal, is both diverse and expanding.[1] However, Justice Hughes is no stranger to taking on big challenges - she was formerly the Crown Solicitor for South Australia, after having worked for the Office for 18 years in total over two periods, where she oversaw more than 280 employees. Additionally, at 31 years of age she became Deputy Commissioner for Consumer and Business Affairs. Upon taking on this role Justice Hughes set herself the challenge to closely know all 40 Acts and the associated regulations administered by the Office of Consumer and Business Affairs[2] (OCBA) within six months. Justice Hughes admits that this was quite an ambitious goal and five years later, when finishing her time at the OCBA, she said that despite knowing 39 Acts inside out, she still felt she could have spent longer considering the *Co-operatives Act 1993*![3]

Of her time as Deputy Commissioner, Justice Hughes said it was extremely interesting from the beginning, especially in the wake of the collapse of HIH Insurance and the withdrawal of one of the two remaining providers of building indemnity insurance in South Australia. Justice Hughes helped develop legislation designed to ensure the continued viability of the building indemnity insurance scheme in South Australia. Justice Hughes says she was struck by how utterly important the work of the Office was to every person in the community, whether in respect of education programmes, giving advice to consumers and traders, monitoring business activities and licencing schemes, producing fair trading guidelines, births, deaths and marriages or conciliating disputes between consumers and traders. It was in this role that she first grappled with reaching out to migrant and Indigenous communities and encountered the importance of financial counsellors to those affected by pay-day lending schemes.

The Honourable Justice Hughes

From the perspective of a legal practitioner Justice Hughes says her time at OCBA taught her how to exercise prosecutorial discretions as a model litigant, and what it was like to be a client of the Crown Solicitor's Office, which she would later go on to lead. Justice Hughes cites her experience as Deputy Commissioner as having taught her how valuable a multi-disciplinary team can be, and what such a team, with mutual respect for one another, can achieve. In terms of team work, Justice Hughes says her approach is collaboration and respect for each person's expertise. She says sometimes it is as simple as conceding that Times New Roman point 12 is not always the most eye-catching font for public reports!

Justice Hughes joined the Crown Solicitor's Office (CSO) after having spent her first year of practice at a small and nearly all-male civil litigation firm.

Justice Hughes recalls when she joined the CSO in 1993 there were women in senior positions, including her manager. Whilst overall women practitioners were not in equal numbers in management, there were more junior women than men at the CSO. She says that both male and female practitioners were equally encouraged and supported. Justice Hughes says that she believes a supportive workplace is crucially important for young practitioners, referencing the challenges of learning as a lawyer in the adversarial environment of civil litigation. Justice Hughes says having a supportive workplace assisted her during some challenging moments as a junior solicitor when more senior opposing solicitors or counsel went beyond the usual cut and thrust of adversarial practice to exploit the power imbalance between junior and senior practitioners, an issue which she believes could be better addressed within the profession. When Justice Hughes was in her late twenties and early thirties this was a very busy period for her. She was developing her expertise in administrative law as well as managing the large file load of an experienced practitioner who was not yet a manager, but no longer junior. Justice Hughes says that at this time of her life her work was a very central and important part of her life and she is very fortunate to have found a close group of peers who provided support and encouragement through the busy and sometimes stressful times. She now observes that stress does not necessarily increase with responsibility, and that wellbeing programs for staff may need to focus on groups that management may not perceive as having the greatest burden.

As Justice Hughes progressed through her career she says that she developed a strong feeling of wanting to use her skills and experience to help prevent problems from occurring. With her knowledge and experience as a government lawyer specialising by this time in administrative law, she obtained a policy role in the Department of Environment and Heritage. This involved work in procurement, preparing briefings for Ministers, developing legal risk audit processes, and providing advice to the Chief Executive. Justice Hughes said this experience gave her invaluable insight into how government works, what is involved in public policy development, and what it feels like to be a client. After two years in this role, Justice Hughes then spent six months in the Attorney-General's office. She came to appreciate the significant workload of Ministers. Justice Hughes says that now having worked for several Attorneys-General that she found them all to be extremely hardworking and knowledgeable. During Justice Hughes' time in the Attorney-General's office, the Attorney-General was the Honourable Trevor Griffin who was a member of the Legislative Council. It was also her first role managing a team and she says that it was an eye-opening experience in how dealing with people as their manager meant that professionally she received far less feedback than she had in the lawyer-client relationship. However, Justice Hughes says that she derived great personal satisfaction from the way that she could be instrumental in her team's collaboration.

After returning to the CSO, Justice Hughes celebrated the birth of her daughter. At the CSO there were a lot of part-time employees with family commitments and this culture meant that she never felt that having a family was an impediment to her career. She also said that she felt very comfortable managing the demands of legal practice as well as having a child because she was at a point in her career where she had established herself as being able to independently contribute to the CSO. She believes that this was one of the reasons why she had a smooth transition taking and returning from parental leave. Justice Hughes returned to part-time work when her daughter was one and working full-time the following year when she and her partner shared caring and parental responsibility.

Five years ago, Justice Hughes became a single parent on the death of her partner and says that the work/life juggle became very tight at this point. It coincided with what she refers to as an acknowledgment that the traditional business hours are now defunct. For Justice Hughes this meant that she would arrive at work after dropping her daughter at school, leave work at 6pm to pick up her daughter, and then resume work for a couple of hours after her daughter went to bed. Justice Hughes considers that technology was very useful in facilitating such an arrangement. This can be beneficial in facilitating greater flexibility for employees but safeguards are needed to ensure that it does not simply mean that employees are available to their employers and clients 24/7. During her time in the CSO Justice Hughes worked towards fostering a culture of client service excellence, and a healthy and fulfilled workforce.

Of her new role as President of SACAT, Justice Hughes says that it is another opportunity for her to continue nurturing her love of the law and to make a contribution to the community through high quality decision-making in matters of importance to citizens, and by bringing her experience managing a workforce and effecting cultural change to a relatively new organisation which still has much to achieve.

*Justice Hughes will be the guest speaker at this year's Margaret Nyland AM Long Lunch on 22 June 2018 at the National Wine Centre. I am grateful to Justice Hughes for taking the time to sit down with me for this interview.* **B**

**Endnotes**

1 https://www.agd.sa.gov.au/newsroom/full-time-sacat-president-appointed.
2 now Consumer and Business Services.
3 repealed by s 24 of *Co-operatives National Law (South Australia) Act 2013* on 22 May 2015.

# Trusts Without Property

DAVID WRIGHT, SENIOR LECTURER, ADELAIDE LAW SCHOOL

The following article is an abridged version of a paper delivered by David Wright at the Trusts Symposium

Property is now a requirement for a valid trust. My argument here is, this is wrong. There are trusts without property. As if this wasn't difficult enough, I'll do it by criticizing that great trust book *Jacobs' Law of Trusts in Australia* by Heydon and Leeming.

## TEACHING TRUSTS

In teaching, a person must start with small steps. The common approach is to start simply and then become complex. In the teaching of Trusts, the three certainties have a very useful role to play. They are nice and simple. Discussing the certainty of subject matter requirement, *Jacobs* states "the subject matter of the trust must be certain, that is, it must be clear what the property is upon which the trust is to operate. There can be no trust without property. That is fundamental". In their defence, they could say they are only talking about express trusts. This is accurate. But even earlier, the authors have a brief, introductory chapter. Introductory chapters are dangerous. The very first chapter in the book is entitled "The Nature of a Trust". In the very first paragraph of the first chapter in this magnificent book, the authors provide a definition of a trust. The authors then divide this description up, so as to provide a list of what they call "The Essential Elements of a Trust". The authors state:

> *"There are four essential elements present in every form of trust: the trustee, the trust property, the beneficiary or charitable purpose …., and the personal obligation annexed to property".*[1]

Obviously, all trusts are included. And just as obviously, this statement is wrong.

## VARIOUS LEGAL DOCTRINES TO SUPPORT THE NO PROPERTY THESIS

**1. Estoppel**

In *Giumelli*, Gleeson, McHugh, Gummow and Callinan recognised that:

> *"The trust institution usually involves both the holding of property by the trustee and a personal liability to account in a suit for breach of trust for the discharge of the trustee's duties. However, some constructive trusts create or recognise no proprietary interest. Rather there is the imposition of a personal liability to account in the same manner as that of an express trustee. An example of a constructive trust in this sense is the imposition of personal liability upon one "who dishonestly procures or assists in a breach of trust or fiduciary obligation" by a trustee or other fiduciary".*

**2. Accountability as principal for breach of fiduciary duty.**

A fiduciary who gains by reason of her or his position may be liable to account for that gain through the imposition of constructive trusteeship regarding the moneys or property the subject of the gain: per the High Court in Chan v Zacharia. The terminology "constructive trust" here should not, however, be construed as necessarily conveying an interest in property. Rather, it is often used to explain the court's jurisdiction to award relief of a non-proprietary nature corresponding to the gain, such as an account of profits. This is because the constructive trust in the proprietary sense, as the most extensive form of equitable relief, is imposed only where it is necessary to achieve a just remedy.

**3. Third Party liability (Barnes v Addy Liability)**

**a. Introduction to Third party Liability**

In law, it is unusual to make a third party liable. However, in Equity, via the constructive trust, it makes a third party liable on three occasions and they all involve trusts without property.

**b. Trustee De Son Tort**

Strangers to the trust who act as trustee without appointment will be personally liable for any loss caused by their intermeddling. This is because the stranger is understood to have voluntarily assumed the office of trustee and its consequent responsibilities. It is important to note, however, that a trustee de son tort need not, and commonly does not, have actual title to the trust property, per Ecurie Topgear v Kerr.

**c. First Limb Liability-Recipient liability**

One of the most important aspects of first limb liability, is the impact of the void/voidable distinction upon the constructive trust. The full Federal Court held in *Grimaldi v Chameleon Mining*[2] held:

> *"As Australian law now stands, even if the third party recipient falls within the knowing receipt limb of Barnes v Addy, the company will not ordinarily be able to bring a proprietary claim against the recipient as distinct from a personal one, unless and until the transaction itself has been avoided".*

This rule was recently used in *Thomas v Arthur Hughes Pty Limited.*[3]

Turning to another area where there is first limb liability; What about where the third party knowingly received the property but hasn't retained it? In *Grimaldi v Chameleon Mining* talking about the first limb of *Barnes*, the Full Federal Court held:

> *"In knowing receipt cases, the recipient can be required to pay compensation for loss arising from the misapplication of the trust property, or to account for gains made from it. These liabilities do not depend upon the third party retaining any part of the property received (or its traceable proceeds) in his or her hands... But in the usual case, as Lewison J observed in Ultraframe (UK) Ltd v Fielding, the personal remedy "is needed precisely where the recipient has not retained the property.""*

**d. Third Parties who knowingly assist-Second Limb Liability**

Third persons who assist a trustee or other fiduciary with knowledge of a "dishonest and fraudulent design" on the part of the trustee or fiduciary are liable as constructive trustees for any resultant losses, and accountable as constructive trustees in respect of any resultant gains, to the relevant fund. When I studied Equity in the early eighties, my

lecturer for this part of the course stressed the constructive trust here often involved no property, but was still a constructive trust.

**4. Subrogation**

The most recent High Court decision on subrogation is *Bofinger v Kingsway Group*.[4] Their Honours quoted Justice Crennan in *Jones v Southall & Bourke,* where her Honour said that the authorities indicated that:

> *"a constructive trust may give rise to either an equitable proprietary remedy based on tracing or, whether based on or independently of tracing, an equitable personal remedy to redress unconscionable conduct. The equitable personal remedies include equitable lien."*[5]

## CONCLUSION

It may be obvious that trusts do not need property. In 2008 Justice Leeming gave a paper to STEP entitled "What is a Trust?". His Honour's conclusion was:

> *"to emphasise that an easily understated aspect of that answer is that it is impossible to speak of the law of trusts in isolation, because it exists as an interacting part of the legal system as a whole, which in turn may be invoked at all levels, from the most abstract to the most practical, of legal analysis."*[6]

With respect, this must be correct. But it is not complete. It should also state that absolutes tend to mislead and generalisations are only generally correct. One absolute that tends to mislead in Trust law is the essential requirement of property. This lecture is not arguing at all that property has no role to play with trust law. All it is arguing is that property is not and should not be an essential element of trust law. Of course, it should be noted that property is usually involved in a trust. It is arguing that the presence of property is merely descriptive and should never be prescriptive.

What is a trust? A trust can either involve an obligation connected to property or an obligation not connected to property. However, as the High Court has pointed out, property itself is an obligation, not a thing. So, the usual form of trust involves an obligation connected to property. But property itself is an obligation. So the usual trust has two obligations, while the unusual trust has only one obligation.

I could leave it there but I won't. "Words matter, Harmeless", "Almost harmless". B

**Endnotes**

1 *Jacobs* at [1-04].
2 [2012] FCAFC 6 at [254].
3 (2015) 107 ACSR 443.
4 (2009) 239 CLR 269.
5 (2004) 3 ABC (NS) 1 at 17.
6 (2008) 31 *Australian Bar Review* 211.

# Passing control of a discretionary trust to the next generation

BRIONY HUTCHENS, DW FOX TUCKER LAWYERS

Discretionary trusts have long been the go-to vehicle for advisors when setting up a structure for their clients. The principal reasons for this are clear – discretionary trusts give a high level of flexibility and control over both administrative issues and distribution of income while also providing asset protection benefits and access to tax concessions[1].

Given this rise in popularity, it is only natural that we are now starting to see the transition of businesses and assets held by discretionary trusts to the next generation. As the disposal of the assets themselves would trigger a taxing event, clients are keen to pass these assets to their children via passing control of the discretionary trust instead.

However, the very qualities that made a discretionary trust appealing at the time of its establishment can create a number of problems when trying to meet the expectations of both the outgoing and the incoming generations.

The following examples endeavour to draw out the most common problems and discuss possible solutions to them.

## EXAMPLE 1: MR & MRS SMITH

Mr and Mrs Smith conduct their manufacturing business through a discretionary trust. The beneficiaries of the trust are Mr and Mrs Smith, their relatives, and associated companies and trusts. The trustee of the trust is Smith Co Pty Ltd, a company which Mr and Mrs Smith control. Mr and Mrs Smith are joint appointors of the trust.

The trust has unpaid present entitlements owing to Mr and Mrs Smith.

Mr and Mrs Smith want to retire and pass the business to their two sons while realising the value that they have built up in a tax effective manner. However, they wish to retain some level of control until they are satisfied that their sons are capable of running the business themselves.

As there is significant value in the goodwill, they don't want to trigger any tax liability on a disposal of the business to their sons so instead want to pass the business via passing control of the trust.

The following issues arise in this scenario.

### Control

As the trust has a corporate trustee, it is easy to transfer control of the trustee to the sons by appointing the sons as directors in place of Mr and Mrs Smith and transferring to them all of the shares in the company.

Alternatively, Smith Co Pty Ltd could be removed as trustee and a new trustee which the sons control appointed. However, as the trust carries on a business, from a commercial viewpoint the preferred option is to simply pass control of the existing trustee so as to not disturb existing arrangements with suppliers, financiers, customers contracts, employees and so on[2].

Mr and Mrs Smith will also need to appoint the sons as joint appointors of the trust in place of themselves.

The above assumes that Mr and Mrs Smith are willing to relinquish complete control. As Mr and Mrs Smith want to retain some control, however, it is not as straight forward. One option is for control of the trustee company to pass to the sons with Mr and Mrs Smith retaining their role as appointor of the trust and therefore having the ability to remove the existing trustee and appoint a new trustee if they wish.

Alternatively, the sons could be appointed as directors of the trustee company in addition to Mr and Mrs Smith with Mr and Mrs Smith retaining their shares and role as appointor of the trust until they are willing to pass complete control to the sons.

In either situation, however, the sons are likely to want some protection against Mr and Mrs Smith exercising their powers as appointor or shareholders to take control of the trust away from the sons other than in certain agreed circumstances. This is commonly done through either a shareholders agreement or other document such as a family constitution.

Where Mr and Mrs Smith retain their position as directors of the trustee company, the agreement between the parties will also need to address how decisions of the trustee company regarding various issues, including exercise of distribution powers, can be exercised[3].

### Distribution of income

As the sons and their relatives and associated entities would already qualify as beneficiaries of the trust, distributions of income and capital can be made between them and their entities without the need to amend the trust deed or alter the beneficiary class.

However, it would be recommended that an agreement be put in place in relation to distributions specifying what control each of the sons and Mr and Mrs Smith have over determining to whom and in what amount income and capital is to be distributed.

This agreement can take the form of a shareholder agreement or company constitution or can be inserted into the trust deed itself in the form of "distributor provisions".

### Payment of UPEs

To the extent that the trust has cash or surplus funds, these can be applied towards payment of the unpaid present entitlements and the trust can then borrow further funds to use as working capital in the business.

However, if there are insufficient funds in the trust to pay out the entitlements in full, a funding dilemma arises.

If the sons borrow money and lend it to the trust to fund the pay out, they will only be able to deduct interest on the borrowing to the extent that the amount of the unpaid present entitlement had previously been retained by the trustee and used in the gaining or producing of the assessable income of the trust.[4] If any part of the funds representing the unpaid present entitlements have been applied by the trust to produce exempt income or for private family purposes, interest on the borrowing will not be deductible.

The same problem applies if the trust borrows the money required to pay out the entitlements directly from the bank rather than from the sons.

**Realisation of asset value**

Another issue is how to realise the value of Mr and Mrs Smith's interest in the assets of the trust without triggering a taxing event. Often, this is done via a revaluation of the relevant asset with the increase in value credited to an asset revaluation reserve and distributed out as a corpus distribution. However, to the extent that borrowings are required to fund the pay out of the distributions, interest on the borrowing will not be deductible.

Further, as the trust conducts a business, the majority of the value of the business will be in goodwill. As goodwill is not able to be revalued, this strategy cannot be used to extract the goodwill value. Mr and Mrs Smith may therefore not be able to realise the value of their interest in the goodwill.

Conversely, from the sons' perspective, they are inheriting a valuable asset which has no cost base and are therefore taking on an inherent tax liability for which they may wish to be compensated. Generally, this issue will only arise where the outgoing controllers are able to realise the value of their interest in the assets of the trust.[5] Where the outgoing party is unable to realise this value, as will likely be the case with Mr and Mrs Smith, then no compensation for the low cost base would be required as the incoming party gets the full benefit of the asset.

If a compensating adjustment is required to be made, this could potentially be done via an adjustment to the amount distributed to the outgoing party as a corpus distribution to reflect the tax liability that is being inherited by the incoming party or alternatively through the forgiveness of amounts owed by the trust to the outgoing parties.

## EXAMPLE 2: MR & MRS BROWN

Mr and Mrs Brown are married with three children. They control a discretionary trust which holds three investment properties, all of which have unrealised capital gains. The beneficiaries of the trust are Mr and Mrs Brown, their relatives and associated companies and trusts.

Mr and Mrs Brown want to pass one property to each of their children. The children want the properties to remain in a discretionary trust environment so as to retain the ability to distribute income from the property amongst their family members and related entities.

In the past, the simple solution would have been to split the trust. There are various means by which this could have been done, with the end result being three separate trust estates, each comprising one of the properties. The children could then each take control of one of the trusts.

However recent scrutiny of these arrangements has cast doubt about whether this does, in fact, create separate trust estates or simply a trust and sub-trust arrangement and, if it does create separate trust estates, whether this triggers both income tax and stamp duty consequences. For this reason, a trust split is not always a feasible option.

Alternatively, each child's property could be transferred out of the trust, for example via a vesting, to a trust controlled by that child. However this will trigger a capital gains tax liability that will need to be funded and which may not be able to be streamed to Mr and Mrs Brown. Further, if the property is distributed to a trust, stamp duty will be payable on the distribution[6].

So a solution must be found which allows each child to control their relevant property while retaining all properties in the one trust.

**Control**

If the trustee of the trust is a company, each of the children will need to be appointed as directors and shareholders of the company. If Mr and Mrs Brown were the trustees of the trust, then either the children will need to be appointed as trustees in place of them or a new corporate trustee in which the children are all directors are shareholders will need to be appointed.

As each child will want to control the decision and activities of the trustee in relation to the relevant property allocated to him or her, an agreement, for example a shareholders agreement if the trustee is a company or a family constitution or similar if there are individual trustees, will need to be entered into to deal with this. Potentially these provisions could also be drafted into the trust deed for added protection if desired.

The children will also need to be appointed as appointors. All children will need to be appointed jointly to ensure that none of the children can take control away from the others.

**Entitlement to income**

As the properties are all retained in the one trust, distribution of income needs careful consideration. Given that the trust fund is essentially being administered in three separate parts (one for each property), separate accounts will need to be kept in respect of each part to determine how much of the income (if any) is attributable to each of the properties.

Specific terms setting out who is entitled to determine how the income is distributed can be drafted into an agreement such as a shareholders agreement[7].

Alternatively, or in addition to the above, "distributor provisions" can be inserted into the trust deed giving each child the power to direct the trustee as to how the income from the relevant property is to be distributed.

However, the above only works effectively if all properties are producing net income. As there is only one trust estate, if one of the properties produces a loss, then it will reduce the income available for distribution from the other properties. Unfortunately there is no obvious solution for how to deal with this situation and advisors would need to consider how to deal with this depending on their client's specific needs[8].

**Realisation of asset value**

An issue arises if Mr and Mrs Brown wish to realise the value of their interest in the properties when passing them to their children. In this situation, it is relatively easy to revalue each of the properties and distribute any resulting revaluation, after taking into account any adjustment for unrealised capital gains being inherited by the children, as a corpus distribution to the parents. However, as outlined above, a funding issue arises if the parties have to borrow any money in order to pay out the distribution.

## EXAMPLE 3: MR & MRS JONES

Mr and Mrs Jones conduct a business through a discretionary trust. The trustee of the trust is Jones Co Pty Ltd, a company controlled by Mr and Mrs Jones, and the appointor is Mr Jones. The beneficiary class of the trust comprises Mr and Mrs Jones, their relatives and associated entities.

Mr and Mrs Jones have three children – two of whom work in the business and one who does not, and does not intend to, work in the business. Mr and Mrs Jones don't have any other significant assets and on their death want all of their children to benefit from the business, not just the two that are working in it. Accordingly, under their will Mr and Mrs Jones leave their shares in the trustee company to their 3 children jointly. In addition, Mr Jones nominates all 3 children jointly to be appointor of the trust on his death.

Mr and Mrs Jones die unexpectedly leaving the children to administer the estate and carry on the business.

**Control**

As only 2 of the 3 children are working in the business, it is important to protect the interest of the non-working child. As the shares and role of appointor are left to the children jointly, this provides a level of protection provided all decisions are required to be unanimous. If decisions are required to be by majority only, then 2 of the children could outvote the third child, potentially cutting them out. As the non-working child is unlikely to be a director of the trustee company, this would leave that child exposed.

In this situation, an agreement such as a shareholders agreement would be required to protect the interest of the non-working child and ensure that the other 2 children cannot cut the third child out. How far this goes would depend on the circumstances of the parties. For example, it may be appropriate to stipulate that some major decisions such as sale of the business or incurring significant liabilities cannot be made without the agreement of all 3 children, even though the non-working child would ordinarily not have a say in these decisions as he or she is not a director.

**Distributions**

As it is the intention of Mr and Mrs Jones that all children should benefit equally, measures must be taken to ensure that the non-working child's entitlement to income is protected, given that he or she will not be a director of the trustee company and therefore would not otherwise be involved in decisions regarding distributions.

This could be addressed through the constitution of the trustee company or as part of a shareholders agreement by inserting terms stipulating that any decision of the trustee to do such things as to distribute income or corpus of the trust other than equally between the three children requires the consent of all of the children.

Alternatively, this could be addressed in the trust deed itself though the insertion of "distributor provisions" which give each child the power to direct the trustee as to how 1/3 of the income and capital is to be distributed.

**Pay out of non-working child**

In the event that the children working in the business wish to buy out the non-working child, an issue arises as to how to do so. While the children jointly own the shares in the trustee company, these shares are of no value and therefore cannot be used as a means by which the non-working child could realise the value of his or her interest.

This poses the same problems as those encountered in example 1, namely how to create an entitlement to an amount of income or corpus assuming that the majority of the value of the business lies in goodwill which is unable to be valued or revalued, and if an entitlement is able to be created, how to fund the payment to the non-working child taking into account interest deductibility issues if money is required to be borrowed to fund the payment. How this can be achieved will need to be carefully determined based on the individual circumstances of the trust.

## CONCLUSION

As can be seen from the above examples, the discretionary nature of interests in a discretionary trust, along with the desire to defer tax, can create a number of issues when transitioning these structures to the next generation. However with careful management of these issues they should not create any barrier to successfully passing control of a discretionary trust between generations. B

**Endnotes**

1 Including access to the 50% general CGT discount and the small business CGT concessions as well as the ability to distribute any non-assessable amounts tax free.

2 The change of directors and shareholders will, however, mean that any personal guarantees that had been provided by Mr and Mrs Smith will have to be discharged and new guarantees given by the sons.

3 For example, whether the sons will have sole authority to determine how the income of the trust is to be distributed or whether Mr and Mrs Smith need to agree to any decision for it to be a valid and binding exercise of the trustee's powers.

4 Taxation Ruing TR 2005/12.

5 as it would be unfair to the incoming party to both pay out the value of that interest in full via a tax free corpus distribution and inherit an unrealised capital gains tax liability by inheriting a low (or no) cost base in the assets.

6 As the stamp duty exemption for transfers of property from trustee to beneficiary does not apply where the beneficiary who takes the property takes it as trustee for a further trust (s71(6) of the *Stamp Duties Act 1923*).

7 For example, these can provide that to the extent that the income represents income from a particular property, the decision of the trustee as to distribution of this amount shall be made by the child who has been allocated that property.

8 For example, it may be agreed that to the extent that any income from one property is reduced by losses from another property, that amount must be recouped from future income derived from the property that produced the loss. Alternatively, it may be agreed that any losses have to be funded by the relevant controlling person such that money is injected into the trust to cover the loss and compensate the other parties for the reduction in income from their properties.

THE LAW SOCIETY
OF SOUTH AUSTRALIA

# 2018 LEGAL PROFESSION DINNER

## FRIDAY 10 AUGUST

7pm for 7.30pm – 12 midnight
Adelaide Town Hall
Black Tie

**GUEST SPEAKER**

## PROFESSOR PETER GRESTE

**RSVP & ENQUIRIES:**
Amelia Garreffa (Member Services)
Phone: (08) 8229 0264 Email: mcs@lawsocietysa.asn.au

# 2018 LEGAL PROFESSION DINNER

Friday, 10 August 2018
7pm for 7.30pm – 12 midnight
Adelaide Town Hall (The Auditorium)

## REGISTRATION FORM

Contact Name | Firm / Organisation

Email | Telephone

**PLEASE BOOK SEATS FOR THE FOLLOWING GROUP:** (alternatively book online at members.lawsocietysa.asn.au)

Table Name

| Full Name | YL | PM | M | NM | DIETARY REQUIREMENTS |
|---|---|---|---|---|---|
| Guest 1 | ☐ | ☐ | ☐ | ☐ | |
| Guest 2 | ☐ | ☐ | ☐ | ☐ | |
| Guest 3 | ☐ | ☐ | ☐ | ☐ | |
| Guest 4 | ☐ | ☐ | ☐ | ☐ | |
| Guest 5 | ☐ | ☐ | ☐ | ☐ | |
| Guest 6 | ☐ | ☐ | ☐ | ☐ | |
| Guest 7 | ☐ | ☐ | ☐ | ☐ | |
| Guest 8 | ☐ | ☐ | ☐ | ☐ | |
| Guest 9 | ☐ | ☐ | ☐ | ☐ | |
| Guest 10 | ☐ | ☐ | ☐ | ☐ | |

## LEGAL PROFESSION DINNER TICKET PRICES:

| | | |
|---|---|---|
| YL : | Young Lawyer Member & partner | $129 per person |
| PM: | Platinum Member & partner | $165 per person |
| M : | Member & partner | $185 per person |
| NM : | Non Member & partner | $245 per person |

## PAYMENT

**Total Amount Payable $_____**

**Payment must be received with the Registration Form to confirm the booking.**

Please find a cheque enclosed for $_____ (Cheques payable to the Law Society of SA)

or Payment by Credit Card (please tick) ☐ VISA ☐ MASTERCARD

Credit Card Number | | | | | | | | | | | | | | | | |

Expiry Date | Signature

Name on card

**PLEASE RETURN REGISTRATION FORM AND PAYMENT BY FRIDAY, 27 JULY, TO:**

Law Society of SA, GPO Box 2066, Adelaide SA 5001 or DX 333 or Fax 8231 1929.
For phone enquiries or payments please contact Amelia Garreffa on 8229 0264 or email mcs@lawsocietysa.asn.au
Cancellations advised in writing five days prior to the event or more will be refunded in full or a replacement may be nominated.

MAJOR SPONSOR OF THE LAW SOCIETY OF SOUTH AUSTRALIA

bankSA

LEGAL PROFESSION DINNER SPONSORS

MAJOR SPONSOR timg SPONSORS notable imprint winedirect.com.au

# The Way of the Mindful Lawyer

NICOLA LIPSCOMBE. KEYNOTE SPEAKER. WRITER. MINDFUL EXECUTIVE COACH

Lawyers are trained on how to *apply* their minds. They are rarely trained on how to *look after* their minds.

The greatest asset a lawyer has is their mind. An ideal legal mind is one that can remain clear thinking, objective and wise under enormous pressure. Given that the nature of legal practice immerses lawyers in competition, conflict and tight deadlines, this is not an easy task.

Add to this that most clients engage a lawyer in times of distress. Dealing with unhappy, distressed and even hostile individuals takes its toll. Lawyers are not robots. They are humans first, with the full range of emotions, fears, feelings and limitations too. An ideal legal mind is, thus, also one that can navigate heightened emotions whilst maintaining their own equanimity.

So, what can lawyers do to look after their greatest asset? In one word: mindfulness

## WHAT IS MINDFULNESS?

Mindfulness is a state of awareness that arises through attention training of the mind.

Whilst not exclusive to Buddhism, it has been researched and developed for more than 2,500 years in the Buddhist tradition.

In its simplest form it requires us to stop and give our full undivided attention to the present moment. This can be done through focusing on the breath or using any of our senses as an anchor for our attention. Contrary to popular belief, one does not have to be seated on a mountain top or even seated to be mindful. We can practise mindfulness whilst washing the dishes, brushing our teeth, eating breakfast, walking the dog, or by sitting still and listening to sounds or following the breath. Every time the mind wanders, the aim is to gently notice and bring it back to the present moment. Sounds simple. But the results can be profound.

## BENEFITS OF MINDFULNESS

Mindfulness training has been shown to improve focus, attention, working memory, emotional regulation, emotional intelligence and resilience. It has also been shown to reduce stress, anxiety, depression and interpersonal conflict. Let's take a deeper look at the effects on focus, stress and anxiety.

### Mindfulness Improves Focus

Research has demonstrated that our minds wander up to 47% of our waking lives.

We spend inordinate amounts of time hooked into our internal world, ruminating over the past, and worrying about the future.

Our minds are also easily hooked and distracted by our external experiences, particularly by technology. For example, even when committed to a particular task; as soon as the phone vibrates, lights up or plays *Eye of the Tiger* we automatically tend to reach and look.

Mindfulness gives us power over this habit of distraction. We are aware we are ruminating about last week's trial and can quickly refocus on today's appeal. We can feel irritation arise along with a strong desire to talk over a client and choose to stay present and listen instead. We are not a slave to technology, noticing the desire to check our phone or Facebook yet able to resist.

Imagine having up to 53% more of your mind's attention available to you.

### Reduced stress and anxiety

Much of our interpersonal stress and anxiety is self-inflicted. Our Inner Critic or Inner Judge love to make us feel worse. There is a parable in Buddhism that illustrates this beautifully. The parable goes that any time we suffer misfortune there are two arrows aimed at us. The first arrow is the actual misfortune (eg. we lost the case, were publicly criticised) which does cause pain. The second arrow represents

suffering and is optional. It is how we now choose to respond emotionally to the event. With mindfulness we may have no control over the event, but we have the awareness to see it for what it is, and not to heap further negative thoughts and suffering on ourselves.

Mindfulness has also been shown to change the structure of the brain. In particular mindfulness shrinks the size of the amygdala, the part of the brain that initiates the stress response and is responsible for fear, anger and anxiety.

Mindfulness has also been shown to increase grey matter in the pre-frontal cortex, the area responsible for executive decision making. Hence, with mindfulness one becomes less emotionally reactive in the moment with greater access to rational thought processes.

Imagine making a (minor) mistake with a client that triggers a tirade from one of the Partners in the practice. Now imagine if you could remain calm in the moment and respond assertively. And furthermore, imagine if you could walk away from that encounter feeling somewhat shaken, but able to rebalance; skipping the usual two weeks' worth of stress, guilt and anxiety.

This is what mindfulness offers.

It is not a silver bullet and it requires diligent practice. But by looking after our minds with mindfulness, the ability to harness and apply our minds for wise counsel grows.

# Is Your Unit Trust a "Fixed Trust"?

PAUL INGRAM, PARTNER, MINTER ELLISON

References to "fixed trusts" or "fixed entitlements" are popping up in many parts of the tax legislation, including:

- the Trust Loss Provisions (Schedule 2F of the ITAA 1936);
- the Company Loss rules;
- the Dividend Imputation rules; and
- the Consolidation Regime.

The fixed trust concept will also be relevant to the Labor Party's proposed reforms to trust taxation (as "fixed trusts" will be excluded from the proposed minimum 30% tax rate for discretionary trust distributions).

It is therefore important to understand whether a trust will (or will not) be a "fixed trust" for tax purposes.

## DEFINITION

Under section 995-1 of the ITAA 1997, a trust is a "fixed trust" if entities have "fixed entitlements" to all of the income and capital of the trust. A similar definition is found in section 272-65 of Schedule 2F of the ITAA 1936.

Both of those definitions rely on the concept of "fixed entitlement" set out in section 272-5 of Schedule 2F to the ITAA 1936, which provides as follows:

## "SECTION 272-5 FIXED ENTITLEMENT TO SHARE OF INCOME OR CAPITAL OF A TRUST

272-5(1) If, under a trust instrument, a beneficiary has a vested and indefeasible interest in a share of income of the trust that the trust derives from time to time, or of the capital of the trust, the beneficiary has a fixed entitlement to that share of the income or capital.

Case where interest not defeasible

272-5(2) If:

a. a person holds units in a unit trust; and
b. the units are redeemable or further units are able to be issued; and
c. if units in the unit trust are listed for quotation in the official list of an approved stock exchange – the units held by the person will be redeemed, or any further units will be issued, for the price at which other units of the same kind in the unit trust are offered for sale on the approved stock exchange at the time of the redemption or issue; and
d. if the units are not listed as mentioned in paragraph (c) - the units held by the person will be redeemed, or any further units will be issued, for a price determined on the basis of the net asset value, according to Australian accounting principles, of the unit trust at the time of the redemption or issue;

then the mere fact that the units are redeemable, or that the further units are able to be issued, does not mean that the person's interest, as a unit holder, in the income or capital of the unit trust is defeasible.

**Deemed fixed entitlement**

252-5(3) If:

a. a beneficiary with an interest in a share of income that the trust derives from time to time, or of the capital of a trust, does not have a fixed entitlement to the share; and
b. the Commissioner considers that the beneficiary should be treated as having the fixed entitlement, having regard to:
   i. the circumstances in which the entitlement is capable of not vesting or the defeasance can happen; and
   ii. the likelihood of the entitlement not vesting or the defeasance happening; and
   iii. the nature of the trust;

the beneficiary has the fixed entitlement."

But it is important to note that (at least according to the Commissioner) the concepts of "fixed entitlement" referred to in:

- former sections 160 APHL (11) to (15) of the ITAA 1936 (which still have some relevance to the holding period rule for dividend imputation purposes); and
- section 295-550(4) of the ITAA 1997 (nonarm's length rule for superannuation funds),

may have slightly different meanings (and significantly, are <u>not</u> dealt with in PCG 20/6/16, which is discussed in detail below).

## THE PROBLEM

The reality is that most unit trusts that we see in practice will **not** qualify as "fixed trusts", as their deeds will contain a number of powers which are seen as making the rights of unitholders to income and/or capital defeasible.

A good illustration of this came in *Colonial First State Investments Ltd v FCT* [2011] FCA 16. In that case, the taxpayer was the trustee and responsible entity of a managed investment scheme which had invested in a wholesale fund. One of the issues for the Federal Court was whether that wholesale fund was a "fixed trust". The Commissioner argued that it wasn't, essentially due to the wide power of amendment that the trustee had under the trust deed. The Federal Court held that this power was curtailed to some extent by section 601GC(1) of the *Corporations Act 2001*, which provides as follows:

> *"The constitution of a registered scheme may be modified, or repealed and replaced with a new constitution:*
>
> *(a) by special resolution of the members of the scheme; or*
>
> *(b) by the responsible entity if the responsible entity reasonably considers the change will not adversely affect members' rights.'*

The Commissioner argued that under paragraph (b), the trustee's power of amendment was still potentially wide enough to be used to defeat a unitholder's rights to income or capital. However, the Federal Court felt that it did not have to decide this point, instead holding that the existence of the unitholders' power to amend (by special resolution, under paragraph (a) of the section) was enough to prevent the wholesale fund from being a fixed trust.

The practical effect of this decision was not lost on the Commissioner, who issued a Decision Impact Statement on the case which includes the following passage:

> *"The decision confirms the ATO view that very few trusts satisfy the definition of "fixed trust" in section 272-65 of Schedule 2F in the absence of the exercise of the Commissioner's discretion…"*

Much discussion followed, and it appeared that there was momentum building for a legislative solution:

- in August 2009, the Board of Taxation recommended that the provisions be reviewed, suggesting there was a clear need to increase certainty and reduce compliance costs;
- in November 2011, the Treasury issued a Discussion Paper, *Modernising the Taxation of Trust Income – Options for Reform*, which included some further discussion of the fixed trust problem; and
- in July 2012, a more detailed Treasury Discussion Paper was released – *A More Workable Approach for Fixed Trusts*.

However, reform then stalled. The treatment of capital gains and franked dividends in trusts was reformed, but nothing was done about the concept of "fixed trusts".

## PRACTICAL COMPLIANCE GUIDELINE PCG 2016/16

Some relief finally came in the form of Draft Practical Compliance Guideline PCG 2016/D16, issued on 26 October, 2016. This was eventually finalised as PCG 2016/16 on 13 September, 2017 (the PCG).

The PCG does four broad things:

- sets out the Commissioner's view as to what "fixed entitlements" are;
- discusses the "savings rule" in section 272-5(2);
- prescribes some "safe harbours" which allow trustees to treat their trusts as fixed trusts without having to seek an exercise of the Commissioner's discretion; and
- explains the factors that the Commissioner will consider when deciding whether to exercise his discretion under 272-5(3), where it is sought.

But this article will only look at the first and third of those matters.

### What are "fixed entitlements"?

As set out in section 272-5(1), the crucial issue is whether the interests of unitholders in the income and capital of the trust are "vested and indefeasible". In this regard, the PCG makes the following key points:

- an interest is "vested" if it is vested in interest or vested in possession;
- an interest is "defeasible" if it can be defeated by the actions of one or more persons, or by the occurrence of one or more subsequent events;
- in looking at the above matters, you focus on the trust deed, but you can look at other documents that restrict the trustee's powers. Paragraph 11 of the PCG reads as follows:

> *"For these purposes, the Commissioner accepts that a 'trust instrument' includes a deed or constitution as supported by documentation such as a Product Disclosure Statement, Investment Memorandum or other document that modifies or supplements the terms of the trust set out in the deed or constitution."*

And in a recent Webinar on the PCG, the ATO speaker expressly referred to Unitholders Agreements in this context.

Paragraph 16 of the PCG then lists a number of powers that will cause a unitholder's interest to be defeasible:

- broad powers to amend the trust instrument;
- powers to issue new units after the trust is settled, or to redeem existing units;
- powers to reclassify existing units so that they do not all have equal rights to receive the income and capital of the trust;
- powers to classify receipts as being on income or capital account, where the units that have been issued do not all have the same rights to receive the income and capital of the trust (and although this is not mentioned expressly in the PCG, this is likely to include powers of accumulation, where there are differing rights to income and capital);
- powers to appoint a beneficiary's interest in the income or capital of the trust to another beneficiary;
- powers to settle or appoint any part of the corpus of the trust to a new trust with different beneficiaries; and
- powers to enforce the forfeiture or cancellation of partly-paid units due to the non-payment of a call except where such partly paid units would be *void ab initio*.

**The Safe Harbours**

The most important part of the PCG is the series of six "safe harbours" that allow trustees to manage their tax affairs as if the Commissioner has exercised his discretion to treat entitlements as fixed.

Paragraphs 51 to 53 of the PCG read as follows:

> "*51. The trustee of a trust that satisfies the conditions for one of the categories below can manage its tax affairs as if the Commissioner had exercised the discretion to treat the beneficiaries as having a fixed entitlement to the income and capital of the trust for the purposes of section 272-5.*
>
> *52. Accordingly, other than ensuring that a trust satisfies the relevant conditions of the category relied upon, the Commissioner will not allocate compliance resources to determine whether beneficiaries have fixed entitlements in cases where one of the categories below is met. A safe harbour only has application during the period in which the conditions for the relevant category are satisfied. A trustee that requires certainty as to whether or not the beneficiaries of the trust have fixed entitlements in relation to a future time must request the exercise of the Commissioner's discretion.*
>
> *53. Taxpayers should maintain relevant records that support their claim that they meet the relevant conditions being relied upon.*"

There are six different safe harbours provided for. The first five are essentially for the "big end of town", covering:

- listed trusts;
- registered Managed Investment Schemes;
- certain widely held trusts;
- unregistered Managed Investment Schemes that satisfy licensing requirements;
- certain specific single interest holder trusts.

But for SMEs (and their advisers), the most relevant safe harbour will be number 6, which reads as follows:

*"The trust complies with all of the following conditions:*

- *the trust must have a trust instrument*
- *all beneficial interests in the income and capital of the trust are vested*
- *all beneficial interests have the same rights to receive the income and capital of the trust (see paragraph 17 of this Guideline)*
- *all beneficial interests in the income and capital of the trust can be expressed as a percentage of the total income and capital of the trust*
- *the trust is not a discretionary trust or a trust with default income or capital beneficiaries – that is, no beneficial interest in the income or capital of the trust is capable of being defeated, partly or wholly, by the exercise of a power of appointment of income or capital by the trustee or other donee*
- *a trustee or manager has never exercised a power capable of defeating a beneficiary's interest in the income or capital of the trust, and*
- *an arrangement has not been entered into which would result in:*
  - *section 272-35 having application*
  - *the trafficking of the tax benefit of a tax loss, bad debt deduction or debt/equity swap deduction, or*
  - *fraud or evasion."*

In practice, this will mean that you need:

- one class of units, with each unitholder having equal rights to income and capital; and
- no discretion in the trustee to pay income or capital other than to the unitholders *pro rata* to their holdings.

However, it appears that you can have a power to stream different categories of trust income, as long as (overall) each unitholder gets its *pro rata* share. So, for example, if you have:

- a unit trust with two equal unitholders; and
- the trust earns interest of $100 and dividends of $200 (so income totalling $300),
- the trustee can give:
- the first unitholder all of the interest, plus $50 of dividends = $150; and
- the second unitholder $150 of dividends,

without creating any problems under the Safe Harbour. In other words, the requirement for entitlements to be fixed applies to the trust income as a whole, and not to each and every category or class of income within that whole.

Some of the so-called "problem powers" (referred to earlier) will also be acceptable, as long as they have never been exercised, or at least never exercised to defeat a unitholder's interest in income or capital. So, for example, the existence of a wide power of amendment is potentially acceptable and will remain so if it is only used to make mere procedural changes. But once it is used to affect entitlements to income or capital, the benefit of Safe Harbour 6 is lost.

However, it appears that discretions as to the payment of income or capital cannot be saved in this way, even if they have never been exercised. This will satisfy one condition of Safe Harbour 6, but not one of the others. Accordingly, the existence of such a discretion appears to require the trustee to apply to the Commissioner under 272-5(3). **B**

# TAX & OTHER IMPLICATIONS OF TRUST SPLITTING

JOHN TUCKER, DIRECTOR, DW FOX TUCKER LAWYERS

Tax lawyers have a propensity for applying slickly phrased euphemisms for sets of procedures known commonly among them.

In this category are "Trust Splitting" and the previously popular "Trust Cloning".

Both procedures have been employed to achieve a common primary outcome, in summary to divide the control of assets held under an existing trust among a selected group of existing beneficiaries thereby removing the assets from the control of other persons all without causing a CGT Event to happen nor triggering a liability for ad valorem stamp duty.

The relevant CGT Events of concern, from which the procedures sought exemption, are those known as CGT Events E1 and E2.

At the time when Trust Cloning achieved popularity, CGT Event E2 contained an exemption applicable where a transfer occurred between trusts with the same beneficiaries. This exemption was removed on the introduction of the current Section 104-60[1]. The exemption was formally contained in Section 10460(5)(b).

The exemption required that the transfer be between trusts the beneficiaries and terms of which were both the same. Tension steadily built between the Commissioner of Taxation and taxpayers over the application of this section. From an accepting interpretation in Taxation Determination TD2004/14 the Commissioner progressively found circumstances where the exception would not apply.

Trust Cloning was particularly popular in some of the Eastern States for stamp duty reasons. In those States an exemption existed for conveyances where there was no change in beneficial interest in the property conveyed. The technique was to establish a trust in identical terms to an existing trust but with a different trustee. Assets would then be transferred from the trustee of the original trust to the trustee of its clone. Progressively the Australian Taxation Office pointed to provisions between the original trust and its clone which it said prevented exclusion even though the terms of each trust were, on their face, identical. For example, if the original trust deed excluded, or included, its trustee as a beneficiary the Commissioner argued that the existence of different trustees in the original and cloned trusts meant that the two trusts did not have identical beneficiaries. Arguments were also raised in relation to the interests of the trustee of the original trust under its rights of indemnity and it was even argued that the existence of a Family Trust Election made with respect to the original trust and not applicable to the cloned trust would mean that the terms of the original and cloned trusts were not the same.

While the Trust Cloning exemption has been removed that is not to say that Trust Cloning is a redundant strategy, particularly in the Eastern States where the Stamp Duty exemption exists. There can be circumstances where causing CGT Event E2 to happen may be of no concern. For example, there may be no gains in value of the assets to be transferred, or losses in the original trust which will shelter any gains or gains that will be made will be eligible for some form of tax shelter. Indeed, triggering eligibility for tax shelter may be an advantage, for example, if the gains are such that their individual recipient will be entitled to the small business CGT concessions[2] at the time but potentially ineligible in the future. Causing a CGT Event to happen may provide significant taxation advantages. Here causing a CGT event to happen can be done more simply though than by Trust Cloning.

Trust Cloning did not enjoy the popularity in South Australia that it did in the Eastern States. This was because here the exemption for stamp duty that once existed for transfers where there

was no change in beneficial interest had long been abolished. In its place Section 71(3) of the Stamp Duties Act 1936 deems an instrument effecting or acknowledging, evidencing or recording a transfer of property to a person who takes as trustee to be a conveyance operating as a voluntary disposition inter vivos and consequently liable to ad valorem duty. Section 71(5)(d) however deems a transfer of property for the purpose of effectuating the retirement of a trustee or the appointment of a new trustee not to be such a conveyance subject to the Commissioner being satisfied that it is not part of a scheme for conferring a benefit, in relation to the trust property, upon the new trustee or any other person, whether it is a beneficiary or otherwise, to the detriment of the beneficial interest of any person.

This difference in Stamp Duty exemptions attracted use of the Trust Splitting procedures in South Australia in preference to Trust Cloning.

A difference exists in the Cloning and Splitting procedures and this has consequences with respect to capital gains tax. While the Cloning process relied on the former exemption for a CGT Event E2 Splitting looked to that exemption and provisions applicable to CGT event E1.

CGT Event E1 happens under Section 104-50 of ITAA 97 where a new trust is created by declaration or settlement. The note to Section 104-55(1) however states that a change in the trustee of a trust does not cause the Event to happen. The note in its current form refers to a change in the trustee of a trust not constituting a change in the Entity that is the trustee of the trust, meaning that CGT Event E1 will not happen merely because of a change in the trustee. The current reference to Entity is because in Section 960-100(2) the trustee of a trust is taken to be an Entity consisting of the person who is the trustee or persons who are the trustees at any given time.

Aside from the specific exemptions relating to the appointment of a new trustee, Trust Splitting raises the question whether the assets transferred to the new trustee, to be held on the trusts of the original trust deed, comprise a separate trust estate to that upon which the assets that haven't been transferred and remain under the control of the original trustee comprise. Is there a new trust with respect to the split assets?

The possibility for argument that there are different beneficiaries by reason of the exclusion or inclusion of the trustee for the time being among the eligible beneficiaries of the two trusts remains. Further, it is generally the case that for the split to achieve its objectives some amendment to the trust deed as it is to apply to the split assets is likely. Most notably if the trust deed contains provisions for an appointor with various controlling powers it is likely that the identity of the appointor, as it applies to the split assets, will be the subject of change. Also, in the process of splitting, if there are liabilities that will attach to the split assets the rights of the original trustee in respect of these assets may be sought to be modified.

Until recently the Commissioner of Taxation appeared to accept that on a simple trust split, involving the appointment of a new trustee to certain assets, including where the original trustee's rights to directly access the split assets to exonerate or indemnity itself against liabilities were modified, and the identity of an appointor changed, CGT Event E1 would not happen.

This acceptance has not however been manifested in any particular Ruling or Determination by the Commissioner. Interpretative Decision 2009/86 provided an individual response that a new trust had not been created in the circumstances that it considered but that decision has since been withdrawn. Nevertheless, the Commissioner has not been seen to be active in attacking trust splits, though that position may not continue.

Historically the Commissioner has, in somewhat similar circumstances, sought to assert the creation of a new trust. On 9 June, 1999 the Commissioner issued a "Statement of Principles" in which he set out principles he claimed should guide trustees as to when changes to a trust cause the trust to end and be replaced, by way of resettlement of the existing trust, into a new trust thereby causing CGT Event E1 to happen.

The Commissioner sought to have these principles judicially endorsed through litigating two leading cases. The first of these was FCT v Commercial Nominees of Australia Ltd [2001] HCA 33 where in the High Court the Commissioner unsuccessfully argued that changes affecting superannuation fund beneficiaries had the effect of creating a new trust. The second was FCT v Clark [2011] FCA] 1455 where in the Full Federal Court the Commissioner unsuccessfully argued that changes to a trust deed made within the scope of a power of amendment denied the continuity of a trust.

As a consequence of these decisions the Commissioner issued Taxation Determination 2012/21 in which he accepted that amendments to a trust made in proper exercise of a power of amendment contained under the deed will not prevent continuity of a trust irrespective of the extent of the amendments made so long as the amendments are properly supported by the power.

In the same determination the Commissioner nevertheless asserted that "even in instances where a pre-existing trust does not terminate it may be the case that assets held originally as part of the trust property commenced to be held under a separate charter of obligations as a result of a change to the terms of the trust – whether by exercise of a power under the deed (including a power to amend) or court approved variation – such as to lead to the conclusion those assets are now held on terms of a distinct (that is, different) trust".[3]

In support of this claim the Commissioner draws on a decision of Commissioner of *State Revenue v Lam & Kym Pty Ltd* [2004] VSCA 204, a decision in the Supreme Court of Victoria in relation to Stamp Duty. This case involved a deed poll amending a trust to give the trustee power to transfer funds for the advancement of any of the discretionary beneficiaries. Pursuant to this power the trustee executed an instrument declaring it "hereafter held separately in trust" property for certain beneficiaries. That exercise of the power of appointment was held to result in the property being held on a separate trust.

The case is cited by the Commissioner to illustrate the proposition that a distinct trust may arise, though he does so without further explanation.

Behind the Commissioner's withdrawn Statement of Principles lies a significant body of judicial authority supporting the concept of a new trust arising on the creation of a charter of new rights and obligations applicable to a trustee or new trustee. These authorities seem not to have left the Commissioner's mind. Recently he has warned that he has concerns about the use of Trust Splitting. In consequence the Commissioner has embarked on a course of confidential consultation with representatives of professional bodies apparently contemplating the issue of new Guidance expanding on his views in TD 2012/21. In South Australia the Commissioner for State Taxes has in practice generally accepted and argued that for both Stamp Duty and Land Tax purposes a trust split will not give rise to a new trust. Accordingly he has allowed exemption under Section 71(5)(d) for a simple trust split where assets are transferred to a new trust deed to be held upon the same terms as held by the transferring trustee under the original trust deed.

Similarly The Commissioner for State Taxes has argued that a trust split does not create a separate trust such as would deny operation of the aggregation principle under section 13 of the Land Tax Act 1936.

A somewhat different view was taken, at the urging of Counsel for the Commissioner, by Stanley J in Dyda v Commissioner of State Taxes [2013] SASC 156. He applied the reasoning of the High Court decision in *FCT v Commercial Nominees of Australia Ltd* to hold that "by parity of reasoning it was apparent from the Court's analysis that for the continued existence of a trust there must be a continuity in the constitution of the trust under which the trust fund operates, the trust property and the membership of the trust." Changes in one or more of those matters breaks continuity and thereby terminates the trust. This was seen consistent with the position in relation to the four essential indicia of the existence of the trust; the trust deed, the trust property, the beneficiary and an equitable obligation annexed to the trust property.[4]

Elsewhere however the judgement refers to a "material change in the rights and obligations attaching to the trust property which is inconsistent with the continuity of the trust estate." This is an obviously less harsh requirement than the contemplation that a change in trustee alone would breach continuity. Further, the decision clearly rested, not on the sole, but on a combination of the changes that were discussed. While the existence of a different trust deed was pointed to as one variation indicating a new trust, others were also identified.

It is not only the potential happening of CGT Event E1 that attracts attention in respect of a trust split. Reporting for both income tax and the preparation of financial statements raises the issue whether the original trust and the trust administered by the separate trustee can be reported upon separately. For income tax the Commissioner has been prepared to issue a separate Tax File Number to the new trustee in respect of the assets under its administration. This may however be more a recognition of the trustee as a separate Entity in relation to its trust.[5] A similarly pragmatic view has been accepted by accountants.

A trust split can, as alluded to, be a very effective way of dealing with assets held under a trust deed so as to pass their control to a different group of beneficiaries than those controlling other assets. Commonly this will be a selected number of existing members of a later generation of family members to those controlling the original assets of the trust. Rarely however will the split not require amendments to the trust deed, as applicable to the transferred assets, such as a change of Appointor and, collaterally, attention to the rights of the original trustee with respect to the liabilities attached to the transferred assets.

The processes associated with the evolution of the Commissioner of Taxation's views concerning lack of continuity of a trust, the creation of a new trust, his unsuccessful litigation and eventual reconsideration of Trust Splitting, up to the issue of Taxation Determination 2012/21, have been trying for taxpayers and tax practitioners alike. It is to be hoped that the Commissioner is not about to embark on a similar course in relation to trust splits which he has accepted up until now as not causing CGT Event E1 to happen. On the decisions that have considered comparable arrangements so far there appears no compelling authority to support his doing so. Presumably there will be circumstances where trust splits have been used in a particularly enterprising way to manage potential taxation liabilities and it is to be hoped that it is only these circumstances that are attracting a possible modification of the Commissioner's position through his current processes. B

**Endnotes**

1 of Income Tax Assessment Act 197 (ITAA 97)
2 in Division 152 ITAA 1997
3 In paragraph 27
4 Referring to class case [2001] FC5 at [88]
5 Pursuant to section 960-100(2) ITAA97

# Vesting Dates: Can they be amended or deleted?

PAUL TANTI, PARTNER, THOMSON GEER

Most discretionary trusts contain a vesting date which generally marks either the date by which the trust must end or the date on which the relationship between the trustee, the trust property and the beneficiaries changes.

As many vesting dates are approaching, the issue of whether they can be amended or deleted is becoming more common.

The reason for the existence of the vesting date is to ensure that trusts do not infringe the common law rule against perpetuities. The rule reflects the public policy that assets, in particular land, should not be tied up in trusts forever.

In South Australia, the rule against perpetuities was abolished in 1996 by section 61 of the *Law of Property Act 1936*. In other States, the rule has been amended, not deleted.

Even in South Australia, the rule is still relevant when considering whether a trust deed can be amended. Many amending clauses in trust deeds prohibit any amendment which would breach the rule against perpetuity. Therefore, even if the rule no longer exists, the terms of the trust deed must be complied with.

The most common reasons for the vesting date to be amended or deleted is to allow the trust to continue to ensure that:

- no adverse tax, in particular capital gains tax, consequences arise; and
- the beneficiaries do not access the assets of the trust and they remain under the control of the trustee.

Despite what are commonly considered to be the consequences of the vesting date passing, adverse tax consequences do not necessarily arise nor does control of the assets of a trust automatically pass to the beneficiaries upon the vesting date being reached.

It is essential that the terms of the trust deed are considered to determine what the consequences of the vesting date being reached are and what the ongoing obligations, duties and rights of the trustee and the beneficiaries are following the vesting date.

The Commissioner of Taxation has released Taxation Ruling TR 2017/D10 which sets out his view of the consequences of amending the vesting date of a trust.

Essential to the reasoning in TR 2017/D10 is the Commissioner's draft ruling Taxation Ruling TR 2004/D25 which sets out the Commissioner's view of the meaning of "absolutely entitled". The meaning of this phrase has caused much difficulty for tax and other practitioners and apparently for the Commissioner, as the draft ruling has not been finalised despite being issued some 14 years ago.

This uncertainty creates issues if the vesting date of a trust is to be amended or deleted.

One issue which has been resolved and is generally accepted to have been resolved, is that the vesting date cannot be extended once it has been passed. This is clearly set out in TR 2017/D10 and the counsel's opinion upon which the draft ruling was based (opinion from Dominic O'Sullivan QC and Michael O'Meara dated 31 October, 2016).

Therefore, it is essential that trustees are aware of the vesting date because, once the vesting date has passed, the consequences which arise under the trust deed cannot be ignored or reversed.

If the vesting date has not yet passed, the vesting date can potentially be amended or deleted. However, whether this can in fact be achieved in a particular circumstance will depend on a variety of issues which need to be considered.

Firstly, the trust deed must be examined to ensure the trustee has the power to amend the vesting date. Many trust deeds will give the trustee the power to amend some, but not all, of the provisions of the trust deed. Care needs to be taken to ensure the vesting date is a provision which can be amended.

Also, amending provisions in trust deeds often contain a prohibition against amendments which breach the rule against perpetuities. Notwithstanding that the rule no longer exists in South Australia (but does continue to exist in other States), if the trust deed prohibits an amendment which breaches the rule, the vesting date may not be able to be amended or deleted.

If the trust deed does not contain the power of amendment, an application can be made to the Supreme Court under the South Australian Trustee Act, for the trust deed to be amended. Traditionally, Courts have been reluctant to amend trust deeds if the purpose of the amendment was to provide a tax benefit or concession. However, in some recent decisions[1], Courts have been more willing to amend trust deeds if the trustee and beneficiaries agree to the amendment and the purpose is to provide a relief from adverse tax consequences. However, the Court's view will depend on the terms of the Trustee Act in the relevant State and the terms of the trust deed.[2]

Despite what is often thought to be the case, adverse capital gains tax consequences do not automatically arise on the vesting date being reached.

In TR 2017/D10, the Commissioner states that upon the vesting date being reached, CGT Event E1 (a trust being created over an asset) does not necessarily occur. This CGT Event (commonly referred to as a resettlement) may not automatically occur on the vesting date being reached. Whether it will occur will depend on the terms of the trust deed. Care should be taken with some specific purpose trusts, in particular testamentary trusts, where the vesting date may have been determined for a particular reason. In these circumstances, CGT Event E1 may occur.

The most common CGT event which potentially occurs (or is thought to occur) on the vesting date being reached is

CGT Event E5, which occurs when a beneficiary becomes absolutely entitled to a trust asset as against the trustee.

Whether this actually occurs on the vesting date being reached will depend on the terms of the trust deed itself.

The difficulty which arises is the meaning of the term "absolutely entitled". There have been numerous cases which have attempted to define what "absolutely entitled" means and how the term is to be interpreted in practice. The Commissioner's views are set out in TR 2004/D25. Some of the consequences which arise from the Commissioner's views in TR 2004/D25 are reflected in the reasoning and examples in TR2017/D10. Some of the examples (and their underlying reasoning) appear fundamentally inconsistent with recent Court decisions regarding the meaning of "absolutely entitled". For example, the trustee's right of indemnity has been held to result in the beneficiaries not being absolutely entitled as against the trustee.[3] However, TR 2017/D10 appears to draw the opposite conclusion.

Given both rulings are still drafts, care should be taken if relying on the draft rulings when assessing the potential tax consequences of the effect of the vesting date being reached and whether an amendment to the vesting date is required.

Even if the trustee's right of indemnity does potentially prevent the beneficiaries being absolutely entitled to the trust's assets in some circumstances, this may not always be the result. The correct outcome will depend on the nature and extent of the trustee's liabilities and assets.

The potential consequences of amending the vesting date of a trust must also be taken into account if the proper law of the trust is the law of another jurisdiction (i.e. not South Australia) or if the trust has assets in other jurisdictions.

Attempting to relocate a trust to South Australia by changing the provision in the trust deed specifying the governing law or the location of the trustee may not necessarily be effective.

Even if an existing trust can be relocated to South Australia or a new trust is established with the settlor, trustee and the management of the trustee situated in South Australia, the position may be complicated if the trust owns assets, in particular land, in other jurisdictions. If a dispute arises in relation to that trust property, it is unclear whether the proper law of the trust for purposes relating to that particular asset would be that of the jurisdiction in which the land is located or South Australia. If the proper law is that of the other jurisdiction, query the effect of the trust breaching the rule against perpetuities, either by the vesting date being deleted entirely or by being extended so that it breaches the perpetuity period of the original trust deed.

In summary, amending the vesting date after it has passed cannot be done. Any purported amendment would be void and the consequences of the vesting of the trust must be determined by reference to the terms of the trust deed. If the vesting date has not yet passed, it can potentially be amended or deleted. However, the tax and commercial consequences of doing so should be properly considered prior to any amendment being made. B

**Endnotes**

1 Barry v Borias Pty Ltd & Others [2012] NSWSC 831 and re Arthur Brady Family Trust, re Trekmore Trading Trust [2014] QSC 244

2 See the discussion in 'Vesting of Trusts: CGT Implications and TR 2017/D10 by Mia Clarebrough 21 March 2018

3 Chief Commission of Stamp Duties v Buckle [1998] HCA 4

# Constructive Trusts and Stamp Duty

BERNARD WALRUT, MURRAY CHAMBERS

The *Stamp Duties Act 1923* (SA) (SDA) has long imposed ad valorem stamp duty on most conveyances on sale and conveyances operating as voluntary dispositions *inter vivos*. Prior to the amendments made to section 71(4) in December, 1980[1] there were a number of exemptions in that section for conveyances operating as voluntary dispositions *inter vivos*. One of those exemption was for a conveyance[2] made to a beneficiary by a trustee or other person in a fiduciary capacity under a trust (whether expressed or implied) or on the appointment or retirement of a trustee (express or implied).[3] Generally, this exception was broad enough to exempt most conveyances from a trustee to a beneficiary under a constructive trust or change of trustee.[4]

Since the amendments in December, 1980 there appears to have been little consideration given to the impact on constructive trusts, implied or resulting trusts of the broad trust provisions adopted and regularly amended since. This article endeavours to primarily consider some relief that may be available for conveyances to beneficiaries or back to a trustee under a constructive trust from 1 July, 2018. From then stamp duty will be limited to residential land, primary production land and interests in companies and unit trusts[5] holding such land (dutiable property).

## CONSTRUCTIVE TRUSTS: A BRIEF DISCUSSION

Constructive trusts arise by operation of law often without reference to the intentions of the parties concerned[6] and often contrary to the desires and intentions of the constructive trustee. They differ in essential respects from both express trusts[7] and resulting trusts. They differ from resulting or implied trusts as the courts presume that a trust was actually intended and in the face of evidence to the contrary, may conclude that the presumption has been rebutted.[8] In the case of constructive trusts, the enquiry is usually less about actual or presumed intentions of the parties, but as to whether, according to the principles of equity, it would be wrong for the party in question to deny the trust.[9]

Matthews attempts one categorisation of constructive trusts, as follows:[10] trusts created by statute;[11] where a trustee passes property to a successor trustee; where an express trustee pockets trust property; void distributions to beneficiaries; where trust property is alienated in breach of trust to a person who is not a bona fide purchaser for value of a legal estate without notice; fruits of trust property; tracing into proceeds of express trust property; property which a trustee has a duty to obtain for the trust; property which a trustee has a duty not to obtain for himself; specifically enforceable arrangements[12] for the transfer of property; mutual wills; proprietary estoppel; and common intention constructive trusts.

As Matthews acknowledges, in the case of the second to the fifth of those examples, the trust continues in relation to the asset rather than a new (constructive) trust being imposed on the property.[13] In the case of the sixth to the ninth examples, property that was never the subject of any express trust becomes subject to a trust, and in the remaining examples property belonging to someone is claimed from that person or his successor by reason of obligation-generating conduct on his behalf or that of a predecessor.[14]

Another aspect that is relevant to this discussion, is a finding when the trust interest arose. In the case of the second to fifth examples, there are differing views as to whether it is the same trust or a new trust.[15] If it is a continuing trust then the trust arose when initially created. If it is a new trust then it is likely that it arose when the conduct causing the constructive trust to arise occurred.

In the case of specifically enforceable contracts, the interest may be distinguished between contracts where the purchase price has been paid and not paid. The accepted view is that once the purchase price is paid, in most situations, the vendor becomes a bare trustee, or for these purposes, a constructive trustee, until the transfer is effected.[16] Prior to the payment of the purchase price, the purchaser may simply have an equitable interest commensurate with the ability to obtain specific performance.[17] If the property at contracting, is not owned by the vendor then the trust arises when the property is subsequently acquired by the vendor.[18]

Another example of a specifically enforceable situation, is where the gift is incomplete at law, it may, in some situations be completed under the principle of equitable estoppel.[19] It would appear that until the Court completes the gift the trust interest does not arise.[20] Also, where, by way of example, a statute provides that upon a certain event occurring property will vest in another person and there are obstacles to completing that vesting at law, a constructive trust may arise at that point.[21]

In some situations, a judicial order that one person must transfer a certain interest in property to another person, can create in that other person, an equitable interest in the property before the transfer is made.[22] The effect is that the person who has to transfer the interest in the property is left with a bare title as a constructive trustee until that transfer is perfected[23] and the trust appears to arise on the order being made.[24]

In the case of mutual wills, under what is described as a normal mutual will arrangement, the interest appears to arise on the death of the first contracting party, rather than when the arrangement is first entered into.[25] This appears to be case, because until one of the contracting parties dies, the arrangement may be varied or discharged by them.

The last two of Matthews' examples can overlap. Generally, the requirements to establish a common intention constructive trust and proprietary estoppel are similar, if not identical.[26] The difference is said to be that in the case of a common intention there must be a real common intention or understanding whereas an estoppel claim is based on the inducement by one person of another person to rely on an assumption or expectation. One suggested difference is that proprietary estoppel is the obvious doctrine to apply where the intended recipient expected to obtain an immediate or more immediate interest in the property and a constructive trust deals with the situation of benefitting a person in the future.[27]

The common intention category can include a number of different situations. One is where there is an informally manifested intention on the part of the owner that another person should have an interest in the property and on the faith of that statement of intention the other person acts to their detriment.[28] In this situation the Court may impose a constructive trust on the owner so as to carry out the informal intention, which in many of these situations, therefore does not arise until the Court's determination.

Another is where a relationship formed by parties has failed and property referable to the relationship has been acquired usually in the name of one of them, but sometimes both, without any expression, formal or informal, of an intention to dispose of it or how to deal with it in the event of a relationship failure. In the simple situation, where the non-owner has contributed to the acquisition, improvement or maintenance of the property, the Court has an equitable jurisdiction to apportion the property between the parties. In some situations, even where there are common owners, the contributions may have been unequal and so the Court may adjust the interests.[29]

A third common intention situation may arise because it involves a family relationship, or from a failure to comply with some statutory requirement. In these situations, the intention is that if one of the parties does some act to their detriment then they will gain certain rights, therefore if they so act it would be unconscionable not to enforce performance of the arrangement. In some situations it may be broader than simply a common intention and extend to a situation where the registered proprietor attempts to use the title to defeat the beneficial interest of another person.[30] In many of these situations, the trust does not arise until the Court's determination of its existence and its extent.

Ford suggests some other situations. One that looks like a common intention situation, but it is not, is the jurisdiction of a court of equity to impose a constructive trust based on the legal owner's unconscionable reliance on legal title where it is based on established equitable principle (e.g. such as partnership property in the name of one partner). This trust appears to arise when determined by the Court.[31] Another is the stolen property held by a thief and any property that the proceeds may be traced into. This constructive trust is said to arise as soon as the thief takes the property or money.[32]

A further situation is where there is a payment by mistake. The payer will be entitled to personal restitution from the payee in a common law action for money had and received. It is suggested that a constructive trust of such money or property arises in respect of such payment from when the recipient of the money became aware of its payment by mistake.[33]

Another is where a person who feloniously kills a person succeeds to property whether under a will, by intestacy, survivorship or by some acceleration of a right to receive property.[34] Commonly, the felon will not obtain a transfer of the property. However, if the felon does obtain the property then the felon would appear to hold the property under a constructive trust from the instant the felon obtains it.[35]

A trustee who loses office but continues to hold the trust property is also described as a constructive trustee. This may occur where the trust instrument provides for a loss office on the trustee being wound up or declared bankrupt.[36] Another situation that Ford describes is where a disponor of property was at a disadvantage at the time of a disposition of property and the disponee unconscionably took advantage of the disponor. Where the remedy in this situation is a constructive trust, it arises when the Court makes its determination.[37]

## COMMISSIONER'S GUIDE AND A DECISION

In considering the dutiability of a transfer in a constructive trust situation there is a practice of the Commissioner and the decision of the Supreme Court that should also be kept in mind. In the *Stamp Duty Document Guide (Opinions)*,[38] the Commissioner indicates that in respect of a conveyance of land from a trustee to a beneficiary where there is no stamped document effecting, acknowledging, evidencing or recording the trust arrangement then copies of letters and correspondence between the parties and evidence of payment of the purchase funds by the beneficiary should be provided. The inference is, if the Commissioner is satisfied that there was a trust arrangement from the outset and that the purchase price was paid by the beneficiary, the Commissioner may exempt the transfer to the beneficiary from duty.

In Dadeeton the Appellant was the trustee of a family trust. A third party had entered into an arrangement with a former trustee of the family trust to acquire an abalone licence on trust for that family trust. The former trustee of the family trust subsequently sold the abalone licence to the third party. In an action some years later, the Court was satisfied that the abalone licence had been purchased by the third party in breach of trust at an under value and the appellant (as successor trustee of the family trust) was in effect entitled to recover the abalone licence. The Court ordered inter alia that the purchase by the third party was void and of no effect, the third party held the abalone licence as trustee from some time after the void transaction for the appellant and that the third party should transfer the abalone licence to the appellant subject to the refund of the purchase price. The Commissioner assessed the transfer with ad valorem duty. At first instance Doyle CJ upheld the Commissioner's assessment.

On appeal, a majority[39] allowed the appeal. Debelle J held that the argument that what was transferred was a bare legal estate with no value[40] need not be considered because of section 71(3)(b) and section 71(10). Debelle J also held that the transfer was made for a purpose that included effectuating the retirement of a trustee and therefore within the exemption in section 71(5)(d).[41] Section 71(6) was also held to have no application in the circumstances.[42]

Gray J in dissent held that equity may require that the setting aside of a voidable transaction to have retrospective effect. In this matter that was not the case. The purpose of the transfer was to give effect to the Court order and dissolve the third party trust, not retire the trustee, so section 71(5)(d) did not apply. He also held that section 60A(4b) applied.[43] Doyle CJ had held that section 71(5)(d) had no application as it was unrelated to the replacement of a trustee.[44] Section 71(5)(e) did not apply because the relevant interest in the abalone licence arose under the Court order not under an instrument that was duly stamped.[45] The Court order had not been stamped, though the Commissioner may have been entitled to stamp it.[46] He also held that section 60A(4b) may apply.

## STAMP DUTY & CONSTRUCTIVE TRUSTS

The foregoing describes how some constructive trusts may arise. One group are those described by Matthews and a second group described by Ford. The following discussion endeavours to describe the possible stamp duty consequences on a conveyance of dutiable property by the trustee to a former trustee or to a beneficiary of the constructive trust and sometimes both.

The following discussion considers on some occasions the potential for section 71(9) to apply, namely to an instrument acknowledging, evidencing or recording a transaction where an instrument is brought into existence after 1 July, 2018 in respect of property that was dutiable at the time of a transaction, that occurred prior to that date. The section deems such an instrument to have been executed by the parties to the transaction at the same time as the transaction. In effect the instrument may be dutiable based on the facts and circumstances applicable at the time of the transaction, including the value of the property. Its use does raise the possibility of penalties and interest.

The first type of constructive trust described by Matthews is a trust created by statute. I have, so far, not identified examples of this situation that involve a stamp duty consequence. The second, where a trustee passes property to a successor trustee, section 71(5)(d) is likely to apply to any conveyance to the successor trustee. In some situations, the vesting declaration in an appointment instrument may constitute a conveyance and require stamping relying on the exemption. There are some limitations on section 71(5)(d) applying, but in most constructive trust situations, those limitations should not create a practical issue.[47]

Where a trustee pockets the trust property or in respect of land, treats it simply as his own and ignores the trust, a Court is likely to simply declare that the person remains the trustee and the property is still held on the original trusts. In such a situation the Court is likely to appoint a new trustee. Section 71(5)(d) is likely to apply to any conveyance of property to a successor trustee. If the Court order contains a vesting declaration then that instrument may constitute a conveyance that also requires stamping. If the property is to be transferred to a beneficiary then it will be necessary to consider the specific exemptions. If the trust property can be traced into dutiable property, it is possible that section 71(5)(e) will be satisfied as the trust existed at the acquisition and ad valorem duty paid on the acquisition of the property by the constructive trustee.[48]

A conveyance to correct a void distribution of dutiable property may create issues. Section 107 deals with conveyances to correct an error. The Commissioner gives that provision a narrow interpretation, usually limited to errors in the instrument rather than an underlying fundamental error.[49] It is unlikely the Commissioner will apply it to this situation. As it is arguable that the trust still subsists in respect of the property and the recipient of the void distribution holds it as trustee, a transfer back to the trustee of the trust is arguably for the purpose of the retirement of the existing trustee and exempt under section 71(5)(d), relying on Dadeeton.

Where trust property has been alienated in breach of trust to a person who is not a bona fide purchaser for value of a legal estate without notice and there is to be a transfer back to the trustee or to another person of that dutiable property there are likely to be issues. Some of these issues are highlighted by Dadeeton. It appears to be authority for the proposition that, subject to the terms of the Court order, what is occurring is simply the replacement of the trustee. Where Dadeeton is not applicable, section 71(5)(e) is unlikely to provide any relief unless the trust arose at the point of acquisition by the constructive trustee and the ad valorem duty paid on the acquisition is regarded as the ad valorem duty required by section 71(5)(e). Depending on the circumstances, it may be possible to obtain relief under another specific relief provision in the SDA.

A conveyance of the fruits of the trust property that is dutiable property raises much the same issues, as does a conveyance of dutiable property acquired with the proceeds of wrongly applied express trust property and the subject of tracing. Once again Dadeeton may provide the relief subject to the terms of the Court order. Depending on the circumstances, it may be possible to obtain relief under a specific relief provision in the SDA. The same appears to be the case in respect of a conveyance of dutiable property that a trustee has a duty to obtain for the trust and property which a trustee has a duty not to obtain for himself. In these situations, if Dadeeton is not applicable and specific relief is not available, if the trust arose at the point of acquisition and ad valorem duty is paid by the constructive trustee on the acquisition, then section 71(5)(e) may be available.

In the case of specifically enforceable contracts, as described above, this category may be distinguished between contracts where the purchase price has not been paid and those where it has been paid.[50] Where the purchase price is paid but a conveyance is not taken then a number of issues may arise. The Commissioner appears to take the view that section 71E applies, but that view may be questioned in light of *Trust Company of Australia Ltd v Commissioner of State Revenue*.[51] Another issue for such a transferee is that the subsequent conveyance may be assessed on the value of the land at the date of the conveyance not the purchase price.[52] If the dutiable property is an interest in a landholder, those provisions can be triggered by the acquirer being beneficially entitled to or controlling the exercise of the rights attached to such share or unit, before a transfer.[53]

In the case of mutual wills, the foregoing suggests that the trust is impressed on the property the subject of the arrangement on the death of one of the parties to the arrangement. A subsequent transfer to give effect to such an arrangement under the terms of the will is likely to be exempt under section 71(5)(h).[54] If there are transfers to persons under the arrangement but not pursuant to the will of the deceased, then it will be necessary to consider any other specific relief or whether the situation fits into another category described in this article. Unless that is the case, in many situations relief will be unavailable as section 71(5)(e) will not be satisfied.

As described above, the proprietary estoppel and the common intention constructive trusts can overlap. In most of these situations it will be necessary to consider the specific facts and any specific relief. One example is the promise that the farm will be passed to the son who stays on it and works for little, in some situations the specific relief in section 71CC may be available. In many situations there are unlikely to be any specific exemptions available and it is also likely that there is no duly stamped instrument and no ad valorem duty paid, so section 71(5)(e) will be unavailable. In those situations where the interest arose at some time earlier, if section 71(9) applies and there is now an instrument, it may now be dutiable and liable to be stamped on the basis of the transaction at that earlier time, under section 71(9). If the instrument is stamped because of the application of section 71(9) then there may be an instrument that satisfies section 71(5)(e).

The Ford examples of unconscionably relying on the legal title, stolen property held by a thief and a mistaken payment are rarely likely to involve a conveyance of dutiable property by the wrongdoer. Also, a situation where a felon wrongly succeeds to dutiable property is also likely to be very rare. Once again, in most of these situations it will be necessary to consider any specific relief. If the trust arose at the time of the acquisition of the dutiable property and ad valorem duty was paid by the constructive trustee then section 71(5)(e) may be satisfied. If not and the trust arose at some time after the acquisition but earlier than the Court order, then section 71(9) may apply, if there is now an instrument. In that situation it may now be dutiable and liable to be stamped on the value at the time of the transaction under section 71(9) and section 71(5)(e) may be satisfied. Where the trustee ceases office automatically, any subsequent conveyance to the new trustee should be exempt under section 71(5)(d). Where there is a conveyance back to a person who was taken advantage of, if there is no specific relief available, section 71(5)(e) is unlikely to be available, unless on the acquisition, ad valorem duty was paid by the person who became the constructive trustee and that payment of ad valorem duty is sufficient to satisfy section 71(5)(e).

## CONCLUDING COMMENTS

The foregoing highlights that in many constructive trust situations there may be no particular relief from stamp duty for a transfer of property from the person holding the property to the beneficiary under the constructive trust or back to the trustee of the original trust. With stamp duty being limited from 1 July, 2018 to dutiable property there will likely be few stamp duty issues. Where they do arise, they will be unwelcome, and it will often be necessary to explore the specific exemptions, the possible application of Dadeeton, the application of section 71(5)(e) and whether section 71(9) may otherwise enable section 71(5)(e) to be satisfied at some lesser cost. B

**Endnotes**

1 *Stamp Duties Act Amendment Act 1980* (SA).
2 In this article conveyance and transfer will be used interchangeably.
3 There was a question as to whether implied trusts had a technical meaning was to be broadly construed.
4 Ibid.
5 Landholders.
6 This is an oversimplification; what is common, is that constructive trusts derive their authority from the order of the court, see H Ford and W Lee *The Law of Trusts* (Online Edition) [22.600] and [22.740] (as at 24 April 2018) (**Ford**).
7 See Ford as to the view on the changing meaning of express trusts [22.740].
8 See Ford [22.760].
9 Adapted from J Heydon and M Leeming *Jacobs' Law of Trusts in Australia* (7th ed) [1301].
10 P Matthews "The Words which are not there: A partial history of the Constructive Trust" (**Matthews**) in C Mitchell ed *Constructive and Resulting Trusts* (2009) (**Mitchell**) (Location 1178 Kindle Edition). Ford states that constructive trusts do not lend themselves to such classification [22.120].
11 The example is joint ownership of land under sections 34 and 36 of the *Law of Property Act 1925* (UK). Ford applies it to a mortgagee who exercises a power of sale in respect of any surplus funds [22.600].
12 Mathews uses the word "contract". Ford also includes incomplete gifts and transfers.
13 See Ford [22.280] for a discussion of the different views. Also see C Mitchell and S Watterson "Remedies for Knowing Receipt" in Mitchell.
14 Matthews also suggest that cases arising from fraud and innocent misrepresentation may also involve a constructive trust (Matthews, location 1212 Kindle edition).
15 See Mathews and footnote 13.
16 *Trust Company of Australia Ltd v Commissioner of State Revenue* [2007] VSC 451 [19]-[40], [61]; Ford [22.2120].
17 *Road Australia Pty Ltd v Commissioner of Stamp Duties (Qld)* [1999] QCA 328, [2001] 1 Qd R 327.
18 *Palette Shoes Pty Ltd v Krohn* [1937] HCA 37, (1937) 58 CLR 1; *Booth v FCT* [1987] HCA 61, (1987) 164 CLR 159.
19 Ford [22.2020] and [22.2220].
20 Ford [22.2220].
21 Ford [22.2320].
22 *Dadeeton Pty Ltd v Commissioner of State Taxation* [2002] SASC 372 [52] (**Dadeeton1**).
23 Ford [22.2360].
24 *Dadeeton Pty Ltd v Commissioner of State Taxation* [2004] SASC 88 (**Dadeeton**).
25 Ford [22.2520].
26 Ford [22.4350]-[22.4420].
27 Ibid.
28 Ford [22.4020].
29 Ford [22.4020] and [22.4080]. This ignores married, divorced or domestic partner rights.
30 Ford [22.4220]-[22.4350].
31 *Baumgartner v Baumgartner* [1987] HCA 59, (1987) 164 CLR 137; Ford [22.4620]-[22.4680].
32 Ford [22.6020].
33 Ford [22.6040].
34 E.g. under say a trust.
35 Ford [22.6060].
36 Ford [22.6080].
37 Ford [22.6100].
38 https://www.revenuesa.sa.gov.au/taxes-and-duties/stamp-duties/stamp-duty-document-guide-opinions as at 24 April 2018.
39 Mullighan and Debelle JJ with Gray J dissenting.
40 I.e. the beneficial interest that passed on the order being made.
41 [2004] SASC 88 [27]-[33].
42 Ibid [34]-[39].
43 Ibid [70].
44 Dadeeton1 [43]-[45].
45 Ibid [46]. Also see *Commissioner of Stamp Duties v Yeend* (1929) 43 CLR 235.
46 Ibid [46] and [52].
47 See *Dyda Pty Ltd v Commissioner of State Taxation* [2013] SASC 156.
48 It may not apply to duty paid on a landholder acquisition, because section 71(5)(e) does not expressly contemplate such duty.
49 See Information RevenueSA Information Circular 101 *Transfer of Property to Correct an Error*.
50 Under the SDA if there is a written contract it is necessary to consider the application of section 31 and whether it or only the transfer is dutiable.
51 [2007] VSC 451.
52 Section 60A. However, see *Vopak Terminals Australia Pty Ltd v Commissioner of State Revenue* [2004] VSCA 10; *Commissioner of State Revenue (Victoria) v Pioneer Concrete (Vic) Pty Ltd* [2002] HCA 43; (2002) 209 CLR 651.
53 See definition of hold in section 91(1).
54 The look through provisions in section 102F provides relief.

GE Dal Pont
LexisNexis Butterworths 2018
PB $162

## LAW OF ASSOCIATIONS

Abstract from LexisNexis

*Law of Associations* serves as an accessible guide for legal practitioners, regulators and associations. *Law of Associations* is a comprehensive commentary on the law in Australia governing associations. It covers both incorporated and unincorporated associations in the context of their creation, rules, management and termination. Including references to recent case law and developments in legislation spanning each State and Territory, as well as counterpoints from other common law jurisdictions.

Contact LexisNexis: 1800 772 772
customersupport@lexisnexis.com.au
store.lexisnexis.com.au/store/au

---

N Seddon
6th ed The Federation Press 2018
HB $174.99

## GOVERNMENT CONTRACTS

Abstract from The Federation Press

*Government Contracts* 6th edition is the new edition of a work that has now been in existence for some twenty-one years. It is Australia's definitive legal text on all levels of government contracting. It focuses on the legal issues that may arise in connection with government contracts and which have no parallel in the private sector.

It explains the law in a manner that government contract managers, and their private sector counterparts doing business with government, will find indispensable. Presented in plain English, it is equally accessible to lay readers and lawyers. Law students will also benefit from the up-to-date case law, relevant policy developments and legislation relating to government contracting, including procurement and outsourcing.

Authoritative and respected, *Government Contracts* has been referred to in State and Federal court cases, in the High Court and in government policy documents.

Contact Federation Press: 02 9552 2200
info@federationpress.com.au
www.federationpress.com.au

---

N Rees, S Rice & D Allen
3rd ed The Federation Press 2018
PB $130.00

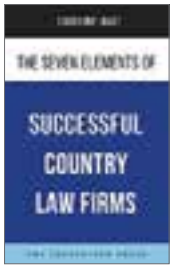
## AUSTRALIAN ANTI-DISCRIMINATION & EQUAL OPPORTUNITY LAW

Abstract from The Federation Press

This new edition of Australia's most comprehensive book on anti-discrimination law has been fully revised and updated, re-written and reformatted to enhance its accessibility. It continues to offer both a substantial text for a specialist audience, and a powerful critique of anti-discrimination law in Australia. The authors support their analysis and explanation of legislation and case law with carefully selected extracts from a broad range of decisions, law reform reports, and academic writers and commentators.

Contact Federation Press: 02 9552 2200
info@federationpress.com.au
www.federationpress.com.au

---




C Hart
The Federation Press 2018
PB $130.00

## THE SEVEN ELEMENTS OF SUCCESSFUL COUNTRY LAW FIRMS

Abstract from The Federation Press

Caroline Hart provides insights for creating a successful country law firm through her interviews with over 40 practice owners who generously share their experiences – good and bad. The remarkable lessons they provide are distilled into seven elements of success.

The book is comprised of chapters covering critical areas such as governance, leadership, information technology, human resources and succession planning. Each chapter concludes with a Masterclass or Lessons Learnt section which gives readers a framed summary that will help them navigate the challenges and opportunities facing their own practice.

Practical and engaging, this book provides a valuable insight into the real lives of owners of country law firms. It reveals what it takes to ensure profitable practices, maintain productive client relationships, retain highly motivated staff, and ultimately ensure the longevity and success of a country law firm.

Contact Federation Press: 02 9552 2200
info@federationpress.com.au
www.federationpress.com.au

# 3 April 2018 – 3 May 2018

A MONTHLY REVIEW OF ACTS, APPOINTMENTS, REGULATIONS AND RULES COMPILED BY MELLOR OLSSON'S ELIZABETH OLSSON.

## Acts Proclaimed

Nil

## Acts Assented To

Nil

## Appointments

**Youth Court of South Australia.**
**Magistrate**
*for a term of 1 year*
Oliver Rudolf Gerhard Koehn
**Ancillary judiciary**
**Magistrate**
Cathy Helen Deland
Gazetted: 19 April 2018, No. 27 of 2018

**Auxiliary Judge of the Licensing Court of South Australia**
*for a period commencing on 3 May 2018 and expiring on 2 May 2019*
His Honour William David Jennings
Gazetted: 3 May 2018, No. 30 of 2018

## Rules

**Magistrates Court Rules 1992**

Amendment 66
Commencement: 30 April 2018
Gazetted: 26 April 2018, No. 28 of 2018
30 April 2018, No. 29 of 2018

## REGULATIONS PROMULGATED (3 APRIL 2018 – 3 MAY 2018)

| REGULATION NAME | REGULATION NO. | DATE GAZETTED |
|---|---|---|
| *Motor Vehicles Act 1959* | 49 of 2018 | 19 April 2018, Gazette No. 27 of 2018 |
| *Rail Safety National Law (South Australia) Act 2012* | 50 of 2018 | 19 April 2018, Gazette No. 27 of 2018 |
| *Road Traffic Act 1961* | 51 of 2018 | 19 April 2018, Gazette No. 27 of 2018 |
| *Health Care Act 2008* | 52 of 2018 | 19 April 2018, Gazette No. 27 of 2018 |
| *Southern State Superannuation Act 2009* | 53 of 2018 | 3 May 2018, Gazette No. 30 of 2018 |

KEARNS
AUCTIONS + VALUATIONS

# VALUATIONS

MATRIMONIAL
DECEASED ESTATES
INSURANCE
TAX REALIGNMENT
INSOLVENCY

FURNITURE
ANTIQUES, COLLECTIONS
BUSINESS ASSETS
MACHINERY
MOTOR VEHICLES
CARS, BOATS, PLANES

## CITY & COUNTRY

## ROGER KEARNS

**Ph: 08 8342 4445**
**FAX: 08 8342 4446**
**MOB: 0418 821 250**
**E: auctions@senet.com.au**

Certified Practising Valuer NO.346
Auctioneers & Valuers Association of Australia

---

## Family Law - Melbourne

## Marita Bajinskis

**formerly of Howe Martin & Associates is a Principal at Blackwood Family Lawyers in Melbourne**

Marita is an Accredited Family Law Specialist and can assist with all family law matters including:

- matrimonial and de facto
- property settlements
- superannuation
- children's issues

3/224 Queen Street
Melbourne VIC 3000
**T:** 03 8672 5222
Marita.Bajinskis@
blackwoodfamilylawyers.com.au
**www.blackwoodfamilylawyers.com.au**

BLACKWOOD
Family Lawyers

---

# CONSULTING ACTUARIES

*Brett & Watson*
PTY. LTD.

For professional actuarial advice on

- economic loss
- workers compensation
- all superannuation issues

**Contact**
Geoff Keen or Bruce Watson
Phone 08 8232 1333
Fax 08 8232 1324

Ground Floor
157 Grenfell Street
Adelaide SA 5000

---

## Andrew Hill Investigations AHI

**Investigating:**

- inappropriate workplace conduct including bullying
- fraud
- unprofessional conduct
- probity

**Support services:**

- forensic computing analysis
- transcription services
- information sessions, particularly for HR practitioners on the investigative process
- policy development.

**t.** +61 8 431 80 82
**m.** +61 401 712 908
**e.** ahi@andrewhillinvestigations.com.au

---

Outback
BUSINESS SERVICES

Licensed Investigation Agents & Process Servers

Servicing the Mid North, Yorke & Eyre Peninsula`s and Outback of South Australia with:

- Process Serving
- Property Lockouts
- Investigations
- Missing Persons

**OUTBACK BUSINESS SERVICES**
P.O. Box 591,
PORT AUGUSTA. 5700
P: 0418 838 807
info@outbackbusinessservices.com.au

---

THE LAW SOCIETY OF SOUTH AUSTRALIA

## LITIGATION ASSISTANCE FUND

The Litigation Assistance Fund (LAF) is a non-profit charitable trust for which the Law Society acts as trustee. Since 1992 it has provided funding assistance to approximately 1,500 civil claimants.

LAF receives applications for funding assistance from solicitors on behalf of civil claimants seeking compensation/damages who are unable to meet the fees and/or disbursements of prosecuting their claim. The applications are subjected to a means test and a merits test. Two different forms of funding exist – Disbursements Only Funding (DOF) and Full Funding.

LAF funds itself by receiving a relatively small portion of the monetary proceeds (usually damages) achieved by the claimants whom it assists. Claimants who received DOF funding repay the amount received, plus an uplift of 100% on that amount. Claimants who received Full Funding repay the amount received, plus 15% of their damages. This ensures LAF's ability to continue to provide assistance to claimants.

LAF recommends considering whether applying to LAF is the best course in the circumstances of the claim. There may be better methods of obtaining funding/representation. For example, all Funding Agreements with LAF give LAF certain rights including that funding can be withdrawn and/or varied.

**For further information, please visit the Law Society's website or contact Annie MacRae on 8229 0263.**

---

THE LAW SOCIETY OF SOUTH AUSTRALIA

# LawCare

**The LawCare Counselling Service is for members of the profession or members of their immediate family whose lives may be adversely affected by personal or professional problems.**

If you have a problem, speak to the LawCare counsellor Dr Jill before it overwhelms you. Dr Jill is a medical practitioner highly qualified to treat social and psychological problems.

The Law Society is pleased to be able to cover the gap payments for two consultations with Dr Jill per patient per financial year.

All information divulged to the LawCare counsellor is totally confidential. Participation by the legal practitioner or family member is voluntary.

**To contact Dr Jill 08 8110 5279 8am-8pm, 7 days a week LawCare is a member service made possible by the generous support of Arthur J. Gallagher**

confidential
*professional*
counselling

---

Nexia Edwards Marshall

# Business valuations

**Simple, clear, unbiased advice, without fear or favour.**

**Hugh McPharlin FCA**
d +61 8 8139 1130
m +61 419 841 780
e hmcpharlin@nexiaem.com.au
w nexiaem.com.au

---

## *Consulting Engineers*

Australian Technology Pty Ltd
for expert opinion on:

- *Vehicle failure and accidents*
- *Vehicle design*
- *Industrial accidents*
- *Slips and falls*
- *Occupational health and safety*
- *Statistical analysis*

W. Douglass R. Potts
MAOQ, FRAI, FSAE-A, FIEAust, CPEng, CEng, FIMechE
*8271 4573*
*0412 217 360*
*wdrpotts@gmail.com*

---

O'Loughlins

**Need legal assistance in Italy?**

Studio Legale Panarese (SLP) can offer legal advice on:

- SUCCESSION and probate law
- Corporate and COMMERCIAL matters and disputes
- PROPERTY and estate matters in Italy
- MATRIMONIAL disputes between Australian Italians

**Contact: Alfio Macolino**
**O'Loughlins Lawyers**
**T: (08) 8111 4000**
**Fabio Panarese, SLP**
**E: fabio.panarese@fmplegal.it**

---

## VALUER

**Commercial & Residential Real Estate**
**Matrimonial**
**Deceased Estates**
**Rentals etc.**
**Experienced Court Expert Witness**

GAETJENS REAL ESTATE

Liability limited by a scheme approved under Professional Standards Legislation

**JANET HAWKES**
**Cert. Practising Valuer, AAPI**
**0409 674 122**
**janet@gaetjens.com.au**

# JAMES MICHAEL
HOMES

## CONCEPT TO CONSTRUCTION

# Turn your dream into a reality.

Celebrate your lifestyle with a beautifully crafted home.
Envisage a new living experience created as an expression of your individuality.

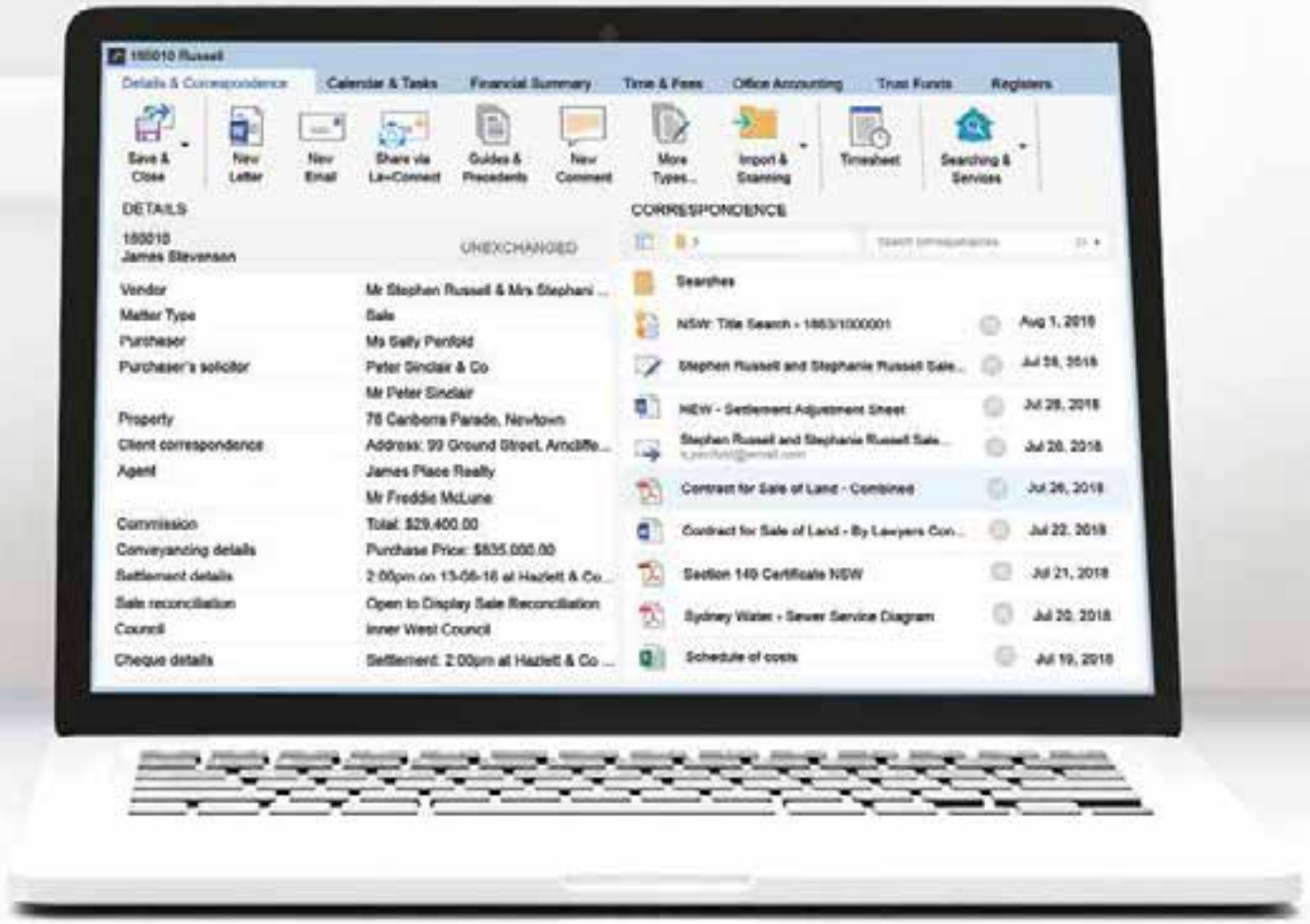
**CALL NOW TO ARRANGE A PERSONAL VIEWING OF OUR LATEST CREATION.**

jamesmichaelhomes.com.au info@jamesmichaelhomes.com.au (08) 8357 6984

LEAP

# The complete legal software solution for small law firms.

**One centralised system for all areas of law.**




## EOFY OFFER

Commit to LEAP by 22 June 2018 for FREE Installation and Training*

**1300 886 243 | sales@leap.com.au | www.leap.com.au/switch**

**Invest in LEAP for $239 per user per month (plus GST).**

***You must have LEAP installed within 3 months to qualify for free installation and training.**