




Trust Update

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Partner


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Role of Settlor

- Usually an unrelated party
 - Section 102
 - Truesdale v FCT - 70 ATC 4056
 - Cannot be a beneficiary - an urban tax myth?

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Role of Settlor

- Section 102
- Applicable if
 - Settlor can unilaterally acquire interest in trust
 - Settlor's under age children receive income
- Not applicable merely because settlor is eligible beneficiary


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Distributing to Trustee

- Check deed before distributing
- Many deeds still exclude trustee
 - Stems from estate and death duty issues
- May become more common – Richstar – [2006] FCA 814
- Particular issue in New South Wales


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Change in Beneficiaries

- Failure to follow deed can be fatal
 - BRK (Bris) Pty Ltd v FCT (2001 ATC 4111) – excluded beneficiary
 - Idlecroft v FCT (2004 ATC 4845) – incorrect party signing deed
- Who has power?
- What are the procedures?
- Who has to consent?

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Adding/Removing Beneficiaries

- Limited stamp duty risk – except for default beneficiaries
- Resettlements no longer subject to stamp duty
- Exemptions for “family” trusts – s118

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Change in Beneficiaries

- Beneficiary can disclaim
 - Vegners v FCT (91 ATC 4213) & Ramsden v FCT (2005 ATC 4136)
- Must be absolute rejection
- Must disclaim within reasonable time after becoming aware of entitlement
- If discretionary and default beneficiary – can disclaim either/both
- Stamp Duty

Change in Beneficiaries

- Tax resettlement Issues
- Buzza v Comptroller of Stamps (83 CLR 286)
- Fundamental change to essential nature of trust that creates a new trust (SOP 2001)
- FCT v Commercial Nominees (2001 ATC 4336)
- ATO position questionable
- Can get ruling

Income v Net Income

- Section 95 – “net income”
- Section 97 – “income”
- Proportionate approach adopted
 - Davis v FCT (89 ATC 4377)
 - Zeta Force Pty Ltd v FCT (989 ATC 4681)
- Issue for mid-year departures

Income v Net Income

- Value of deeming clauses?
 - Direct descendant trusts
 - Testamentary trusts
- On balance – reduce risk
- Exclude franking credits (s207-20(1))

Income v Net Income

- ATO undecided – PS LA 2005/1 (GA)
- Richardson v FCT (2001 ATC 4058) & Cajkusic v FCT (2006 ATC 4752)

Distribution Resolutions

- Template resolutions risky
- Does resolution have to be made by 30 June?
 - ATO allows two months – IT 328 and 329
 - But depends on trust deed
 - BRK (Bris) Pty Ltd v FCT – deed allowed reasonable time
 - FCT v Ramsden & Pearson v FCT (2006 ATC 4352) – 30 June was critical

Distribution Resolutions

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- Problem where client uncertain if amount is income or capital gain
 - If capital gain – distribute to individuals to get 50% discount
 - If ordinary income – distribute to corporate beneficiary
- Rely on
 - Richardson & Cajkusic
 - PS LA 2005/1 (GA)

Attribution Clauses

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- Essential
- Allow trustee to distinguish between different categories of net income
- TR 92/13
 - Trustee must have power to account for and distribute different categories of income
 - Attribution clause not essential but “removes uncertainty”
 - Trust records must separately identify different categories of trust income

PS LA 2005/1 (GA)

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- Do nothing
 - Proportionate approach applied
- Capital beneficiary/trustee approaches
 - Beneficiaries/trustee must agree in writing within 2 months of year end
- Useful where beneficiary redeeming interest mid-year

Testamentary Trusts

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- Taxation Laws Amendment (2007 Measures No 3) Act
- Relevant where income beneficiary not entitled to capital gain – e.g. life tenant
- Trustee can elect to pay tax on capital gain instead of income beneficiary – s 115-230
- Will section 99 or 99A apply
- If section 99A – no 50% discount (s 115-225)

Trust Cloning

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- Amendments to deed required
 - If different settlors - ID 2006/318
 - To avoid mis-match of tertiary beneficiaries
- Check trustee powers
- Family trust elections

Trust Cloning

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- Risk with sub-division EA if corporate beneficiary has unpaid entitlement
- Transfer of property to new trust will be a “payment” (S109C(3)(c)).
- Payment must necessarily be attributable to unrealised gain on asset (S109XA(7))

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- Application for “freeze order” – s1323 Corps Act
- In “ordinary case” – beneficiary does not have equitable interest
- Not an “ordinary case” if beneficiary controls trustee powers
 - Has something akin to ownership

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- Freeze order granted in cases where person under investigation was:
 - director had been appointor
 - trustee and joint appointor with wife
 - co-director with spouse
 - appointor

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- Does not mean trust property available to creditors on bankruptcy
- S 1323 of Corps Act
 - interim “holding” order
 - does not vest any interest in property
- S 116 of Bankruptcy Act requires that property is owned or vested in bankrupt

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- CORPORATIONS ACT 2001 – SECT 9
- “property” means 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
- BANKRUPTCY ACT 1966 – SECT 5
- “property” means real or personal property of every description, whether situate in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property


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Post Richstar

Property divisible among creditors [s16 – Bankruptcy Act]


- all property that belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy;
- the capacity to exercise, and to take proceedings for exercising all such powers in, over or in respect of property as might have been exercised by the bankrupt for his or her own benefit at the commencement of the bankruptcy;

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Post Richstar

- Some precautions
 - Should at risk person/trustee be excluded as a beneficiary?
 - Should at risk person be trustee/director/appointor?
 - Should third party be appointed as trustee/director/appointor?

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