Tax effective trust deeds
1. INTRODUCTION

I have been asked to discuss some specific issues which are relevant to modern trust deeds.

There are numerous different categories of trust that are recognised by the law but the most common structure utilised for investment and business purposes in Australia is what is generally described as a 'discretionary trust', although that expression is not defined in legislation or case law.

Private unit trusts are also reasonably common but, for the purpose of this presentation, I will focus mainly on features that should be included in 'smart' discretionary trust deeds.

There are a very large number of trust deed templates that are in wide circulation and it is often difficult for a client or professional adviser to assess whether a particular style of deed is adequate and up to date. The main risk factor in my view is that many trust deeds are based on a precedent that was drafted many years ago and which has not been regularly updated.

In this paper I will consider specific provisions that should be included in trust deeds and then discuss in more detail some particular issues such as income streaming powers and potential problems with deeds that have inadequate amendment powers.

2. PROVISIONS THAT SHOULD BE INCLUDED IN A SMART TRUST DEED

This section of the paper is not intended to be an exhaustive list of key provisions that should appear in trust deeds. Rather I have attempted to identify some specific provisions that my firm has dealt with in our discretionary trust deed to deal with changes in tax and trust law and reflect current practice.

Ensure trustee has discretion to determine how net income is calculated

Following the decision in Commissioner of Taxation v Bamford, it is now accepted that a trustee may have the power to determine what amounts will be regarded as being received or paid on revenue or capital account for the purpose of determining the ‘distributable income’ of the trust.

The basis on which the trustee determines the distributable income does not have to be consistent with tax or accounting principles.

This provides substantial flexibility for clients, which is one of the main advantages of utilising a discretionary trust structure. For example, in Clark v Inglis the court considered that the trustee had the power to include unrealised gains on the trust’s share portfolio in the distributable income of the trust.

However, the trustee only has discretion if the deed allows it. If the deed does not contain a power to determine what will be income or capital, the distributable income will be determined in accordance with trust law principles. If the deed has a fixed definition of income the trustee has no discretion to adopt a different approach.

In my view the trust deed should:

- contains a definition of trust income (so that trust law principles do not automatically apply);
- give the trustee discretion to adopt an alternative concept of income where appropriate; and

1  [2010] HCA 10
2  [2010] NSWCA 144
• include a general power allowing the trustee to determine what amounts are received or paid on capital or revenue account each year.

It is also important that income distribution resolutions are drafted in a way that reflects the provisions in the deed. We often see income distribution resolutions that do not reflect the provisions of the trust deed. For example, it is not uncommon to see resolutions where the trustee purports to distribute the accounting income of the trust whereas the trust deed provides that the trust income is equal to ‘net income’ as defined in section 95 of the *Income Tax Assessment Act 1936* (1936 Act), or vice versa.

This can result in significant problems. For example, it may mean that not all trust income is picked up resulting in default assessments to the default beneficiaries or the trustee (under section 99A). In extreme cases the trust resolution may simply not be effective.

The most common approach is for the deed to define the net income of the trust as being equal to ‘net income’ determined under section 95 of the 1936 Act.

There is merit in this approach (provided the trustee has the discretion to adopt a different concept of income if appropriate) but it is also important to exclude ‘notional amounts’ from the section 95 concept of net income for this approach to work in practice.

**Exclude ‘notional amounts’ from net income**

The danger of having a definition which equates trust income with section 95 ‘net income’ is that the net income determined under section 95 will often include ‘notional amounts’ that are not actually received by the trustee (e.g. franking credits attached to fully franked dividends and deemed dividends under Division 7A).

For example, if a trust receives a fully franked dividend of $70,000 the section 95 ‘net income’ will be $100,000 (being the dividend ($70,000) plus the franking credit attaching to the dividend of $30,000).

While the taxable income will therefore be $100,000, the only amount available to the trustee for the purpose of making distributions to beneficiaries is $70,000.

The best approach in our view is to provide that the net income of the trust will be equivalent to section 95 net income **excluding** any notional amounts (while allowing the trustee a discretion to adopt some alternative concept).

The ATO has also made it clear that, in its view, notional amounts such as franking credits cannot be taken into account in calculating the distributable income of the trust.³

Including notional amounts in distributable income may also result in significant non-tax related problems if there are disputes in the future about the effect of previous trust distributions and whether beneficiaries are entitled to call for payment of these notional amounts.

These potential problems are illustrated by the decision in *Thomas Nominees Pty Ltd v Thomas*⁴. In that case the trustee had purported to include franking credits in trust income and to separately distribute those franking credits. The trustee applied to the court for directions as to whether the franking credits were in fact available for distribution. The Queensland Supreme Court initially held that the franking credits could be included in distributable income but this approach was rejected by the Federal Court in *Thomas v Commissioner of Taxation*⁵ where Greenwood J said:

> The franking credits, however, were not income of the trust. They could not be streamed.⁶

---

³ TR 2012/D1 at paragraph 15
⁴ [2010] QSC 417
⁵ [2015] FCA 968
⁶ At [493]
Allow the trustee to make distributions from gross income to preserve franking credits

A beneficiary is only entitled to claim the benefit of imputation credits attaching to a franked dividend, to the extent the beneficiary is presently entitled to a share of the trust income under section 97.7

The concept of “present entitlement” is not defined in the legislation, but the authorities establish that, in order for a beneficiary to be presently entitled to a share of the income of the trust estate, that beneficiary must have an indefeasible and absolutely vested interest in the income and must be able to demand immediate payment of their share of the income from the trustee.8

The difficulty where the trust estate has positive “net income” under section 95 only because the net income includes imputation credits, is that, while there may be an amount of ‘net income’ that is subject to tax, this is a notional amount which cannot be distributed to a beneficiary and therefore they cannot be presently entitled to it.

The view of the ATO is that, if there is no income available for distribution in a year then there is no amount to which a beneficiary can be presently entitled under section 97, even though the trust itself may have a positive “net income” under section 95 because of the requirement to gross up the imputation credit.9

One option that may allow the trustee to pass on imputation credits even where the trust has no distributable net income is to include a provision in the trust deed allowing the trustee to make distributions out of gross income (e.g. by treating some expenses as being on capital account).

Section 97 only requires that the beneficiary is entitled to a share of the “income” and not the net income of the trust estate. This distinction was pointed out by Kitto J in Union Fidelity Trustee Co of Australia Ltd v FCT.10

Therefore, if the trustee has the power to make distributions out of the gross income (before calculating the distributable net income) it is at least arguable that the beneficiaries are still entitled to a share of the trust “income” under section 97 and would in turn be required to include the same proportion of section 95 “net income” (i.e. the imputation amount) in their assessable income.

It should be noted however that the ATO may take issue with such an approach given the statement in TR 2012/D1 that the ‘income of the trust estate’ must be ‘represented by a net accretion to the trust estate’11.

Does the deed have a ‘sub-trust’ clause?

Most advisers will be aware that the ATO has had a significant focus on Division 7A where trusts have distributed to corporate beneficiaries but have left the distribution amounts as unpaid present entitlements (UPEs).

Originally, the ATO view was that unpaid UPEs owing to a corporate beneficiary did not amount to financial accommodation and therefore would not trigger any deemed loan or unfranked dividend under those provisions.

However, they subsequently revised their position and, as a result, UPEs arising after December 2009 will trigger a deemed dividend under Division 7A unless the UPE is converted to a loan (repayable on terms required by Division 7A) or, alternatively, is placed on a sub-trust with an investment agreement that requires the sub-trust amount to be paid either over a seven or ten year term (depending upon the interest rate applied).

8 Harmer at page 5004.
9 Taxation Ruling TR 92/13 at paragraph 17
10 119 CLR 177.
11 At paragraph 13
The ATO position on this issue and their requirements for a valid investment agreement are set out in practice statement PS LA 2010/4 which provides that, in order for the trustee to take advantage of the safe harbours provided for in the practice statement, the UPE must be held on a sub-trust for the corporate beneficiary.

The practice statement does indicate that, if the deed does not contain a sub-trust provision, the trustee may still be able to pass a specific resolution placing the unpaid UPE on a sub-trust.\(^\text{12}\) However, this requires that the advisers are alert to the problem when the resolution is made and a much safer approach is to ensure that there is a sub-trust clause in the trust deed itself.

**Ensure trustee can make beneficiary ‘specifically entitled’ to future capital gains**

Since the GCT and dividend ‘streaming’ provisions were introduced into the *Income Tax Assessment Act 1997* (1997 Act), it is clear that trustees can stream capital gains and franked dividends to particular beneficiaries. These measures are considered in more detail later in the paper.

One of the key requirements for a capital gain to be streamed to a particular beneficiary is that the beneficiary must be ‘specifically entitled’ to the gain by 31 August following the end of the financial year in which the gain arises.\(^\text{13}\) The practical difficulty is that the actual gain may be deemed to occur in one financial year (because a contract of sale was signed in that year) but the gain itself may not crystallise until much later.

For example, under the earn-out provisions introduced in *Tax and Superannuation Laws Amendment (2015 Measures No. 6) Act*, if a CGT asset is sold and the consideration is payable over time subject to earn-out conditions, the tax return for the year in which the sale occurred is amended each time an earn out payment is actually received.

This means that, if the parties are intending to stream the capital gain, it will be important that the trustee has power to make a beneficiary specifically entitled to a gain that may not crystallise for some years after the resolution is made. Most trust deeds do not have that specific power although it may be implied in many instances.

Our view is that it is preferable to have a specific provision to eliminate any risk. For example, the deed could include an express power for the trustee to resolve to distribute net income or capital to a beneficiary prior to receipt of the proceeds from the CGT event.

**Does the trustee have power to make interim capital distributions from asset revaluation reserve?**

It is quite common for trustees of private trusts to seek to revalue assets in order to be able to make interim capital distributions to beneficiaries.

There are a number of circumstances where this can be a useful strategy. For example, if a beneficiary of a discretionary trust wants to exit, the payment of an interim capital distribution to them rather than selling or distributing assets can be very advantageous as it will not attract duty and the beneficiary will also generally not be subject to any capital gains tax on the distribution.\(^\text{14}\)

While this strategy of making interim distributions from a revaluation reserve has been reasonably common, there has been some uncertainty about exactly how effective this was for trust law purposes.

This issue has been considered in the recent High Court decision of *Fischer v Nemeske*\(^\text{15}\) where the facts were as follows.

- The only asset of the Nemes Family Trust consisted of shares in another company.

\(^\text{12}\) paragraphs 52 and 53  
\(^\text{13}\) sections 115-228 and 207-58  
\(^\text{14}\) Section 99B(2) of the 1936 Act and Taxation Determination TD 2003/28  
\(^\text{15}\) [2016] HCA 11
• In 1994 the trustee (Nemeske Pty Ltd) revalued those shares (to $3,904,300) and credited that amount to an asset revaluation reserve.

• Shortly after, the trustee resolved to make a distribution out of the asset revaluation reserve to Mr and Mrs Nemes (two of the Specified Beneficiaries of the trust).

• No amount was paid to Mr and Mrs Nemies. The amount of $3,904,300 was credited to them in the trust's accounts and the trustee granted a charge over the shares in favour of Mr and Mrs Nemes securing the payment of the distribution amount.

• Mrs Nemes died in November 2010 and Mr Nemes passed away in September 2011.

• In Mr Nemes' Will he effectively transferred control of the trust to 'the Fischers' and the residuary estate to other beneficiaries.

• The Fischers argued that the purported distribution of capital out of the revaluation reserve was ineffective and that the trust had no existing obligation to pay the amount of the purported distribution to the estate (with the consequence that the value of the residue was substantially diminished).

The High Court held (by a majority of three to two) that the resolutions to create a revaluation reserve and then make a distribution from that reserve were effective and that the trustee owed $3,904,300 to Mr Nemes's estate.

However, the majority decision did not establish any general principle that interim distributions of capital from a trust revaluation reserve would always be effective.

Rather the decision makes it clear that the efficacy of the distribution will be dependent on the terms of the trust deed and the resolution purporting to make the distribution. Each of the judges delivered a separate judgement and these provide some guidelines for practitioners who are asked to advise on or implement interim capital distributions.

The first issue is that the trustee must have power to revalue trust assets. The trust acts in the various states allow for this but subject to restrictions. For example, in Queensland, a trustee has a general power to carry out a valuation of trust assets. However, where the trustee is not personally qualified to value the property, they must consult a 'duly qualified person'.

In my view it is preferable if there is a specific power in the trust deed that allows the trustee to revalue trust assets at the complete discretion of the trustee.

This power must be wide enough to also allow the trustee to make a distribution from a revaluation reserve and create a binding obligation to pay the beneficiaries notwithstanding that no money or other property is actually distributed or set aside for the benefit of those beneficiaries.

A significant factor in the decisions of some of the majority was that the trust deed gave the trustee a power to 'advance' capital to beneficiaries and we therefore recommend that trust deeds should include a specific power to 'advance' as well as 'distribute' capital.

The judgements also illustrate that it will be critical that any resolution purporting to make a capital distribution from a revaluation reserve is carefully drafted to ensure that the terms of the resolution are consistent with the powers of the trustee under the deed. In her dissenting judgment, Kiefel J appeared to accept that it may have been possible for the trustee to make an effective ‘advance’ of capital relying on the powers in the trust deed but said that:

Neither the terms of the Resolution nor the entries in the accounts reflect an application under a power of advancement of the property and the Shares representing the capital of the trust.

16 s 51 Trusts Act 1973 (Qld)
She also indicated that while it;

…may be accepted … that an effective exercise of (the power to make an interim distribution) does not depend upon there being cash in the trustee’s hands … . However, for a conclusion that capital was applied there should be a corresponding reduction in the capital of the trust.

‘Damage control’ provisions where trustee has made family trust election17 (FTE) and then distributes to a beneficiary who is outside the ‘family group’

In our practice, we have seen a significant number of cases where trustees who have made FTEs have inadvertently made distributions to beneficiaries that are not members of the relevant family group (tainted distributions).

The consequence of making distributions outside the family group is that the trustee is assessed for ‘family trust distribution tax’ on the distribution (at the top marginal tax rate). In some cases, this may not be a totally disastrous result because the tainted distribution is then excluded from the assessable income of the beneficiary who received the distribution18.

However, this does not mean that the distribution is invalid. The beneficiary is still entitled to call for payment of the full amount (even though the trustee will be required to pay tax of approximately 50% on the distribution). This means the trustee will effectively have an obligation to pay approximately 150% of the amount distributed (being the tainted distribution plus the family trust distribution tax amount).

The problem is compounded if the original tainted distribution was made to a corporate beneficiary – for several reasons.

- If the distribution is not paid to the corporate beneficiary, it will still be a UPE which may trigger Division 7A consequences.

- If the corporate beneficiary pays a dividend to shareholders out of the tainted distribution, the dividend will be unfranked and the shareholders will pay tax on the full dividend at their marginal rate.

The net result in those circumstances (before dealing with the issue of penalties) is that:

- the trustee and shareholders will (between them) pay approximately $100,000 tax on the distribution of that amount; and

- the trustee will still owe the $100,000 to the corporate beneficiary.

Therefore, we recommend that trust deeds should include a provision that, if the trustee has made a FTE to anyone outside the ‘family group’, that distribution is invalid.

In this situation it is likely that the ‘default beneficiaries’ will be assessed on the amount of the distribution (or the trustee may be assessed under section 99A if there are no default income beneficiaries).

A practical advantage if the tainted distribution is invalid, is that the ATO have a limited time in which to issue an amended assessment to the default beneficiaries (or trustee if there are no default beneficiaries). This will usually be four years from the date of lodgement of their returns.

On the other hand, there is no time limit on when the ATO can issue an assessment for family trust distribution tax.19

---

17 Schedule 2F of the 1936 Act
18 Section 271-105 of Schedule 2F
19 Item 28 in table in section170(10) of 1936 Act
Include power to make payments to ‘CGT concession stakeholders’ if trustee applies small business CGT retirement or 15 year exemptions

Many private trusts are used for carrying on a business or may hold shares in a company that carries on a business. If the business assets or shares are sold, the trust may be eligible to claim all or some of the small business CGT concessions available under Division 152 of the 1997 Act.

In order to claim the ‘15 year’ exemption\(^\text{20}\) or ‘retirement exemption’\(^\text{21}\), the trustee must make a payment to individuals who qualify as ‘CGT concession stakeholders’. These payments are then excluded from the assessable income of the trust and are non-assessable amounts in the hands of the relevant individuals.

However, few trust deeds have any express provision giving the trustee the power to make such a payment. The trustee’s distribution powers are generally limited to distributions of trust income or capital and payments made to CGT concession stakeholders may not fit within either category.

This is an important issue for unit trusts because the only power the trustee generally has is to make distributions to unitholders who will generally not be the individuals who qualify as CGT concession stakeholders.

Therefore, our practice is to include a specific power in trust deeds allowing the trustee to make payments to ‘CGT concession stakeholders’ irrespective of whether they are beneficiaries of the trust.

Do not impose a 30 June deadline on trust distributions

Prior to the *Bamford* decision, the ATO allowed a period of two months after the end of each financial year for trustees to formally pass resolutions distributing trust income (provided the trust deed did not require resolutions to be made by 30 June).\(^\text{22}\)

However, following the decision in *Colonial First State Investment Ltd v Commissioner of Taxation*\(^\text{23}\) the ATO indicated that a beneficiary could not be ‘presently entitled’ to a share of the distributable income of a trust unless the trust distribution resolution was made by 30 June and the ‘old rulings’ have been withdrawn.

While the ATO position is that trust distributions must be made by 30 June to be effective for tax purposes, it is not necessary to insert any provision in the deed imposing this 30 June requirement and imposing such a requirement in the deed may lead to unforeseen problems.

For example, if the trust deed requires distributions to be made by 30 June and there is a dispute between beneficiaries and the trustee, the validity of prior year distributions may be challenged if the trustee cannot prove the distribution was in fact made by the due date.

If the trust deed does not stipulate that the discretion to distribute income must be exercised by 30 June then, while the ATO may challenge the tax effectiveness of post 30 June distributions, they should still be effective for trust law purposes provided that the distribution is made within a reasonable time after year end.

This was confirmed in *BRK (Bris) Pty Ltd v FCT*\(^\text{24}\) where the court held that the trustee had “a reasonable time within which to decide” how to distribute income where there was no 30 June requirement in the deed.

\(^\text{20}\) Subdivision 152-B  
\(^\text{21}\) Subdivision 152-D  
\(^\text{22}\) Taxation Rulings IT 328 and 329  
\(^\text{23}\) [2011] FCA 16  
\(^\text{24}\) 2001 ATC 4111
Should the trustee be an eligible beneficiary?

If clients do want to make distributions to the trustee, it is important to check whether the trustee is actually an eligible beneficiary and, if not, whether they can be added as a beneficiary.

Some trust deeds provide that the trustee is not and cannot be added as a beneficiary. This restriction was commonly inserted in older trust deeds to reduce the imposition of estate and succession duties.

While death duties are no longer an issue, there are some potential duty issues that may arise if the trustee is an eligible beneficiary of the trust.

For example, in New South Wales, a transfer of trust assets pursuant to a change of trustee is exempt from duty only if the trustee cannot become a beneficiary of the trust.25

In Queensland, a transfer of shares in a trustee company could be liable for “landholder duty” if the trustee holds land unless the company is excluded as an eligible beneficiary of the trust. 26

Our view is that it is better to exclude the trustee as an eligible beneficiary to avoid these potential duty problems.

Some misconceptions about limiting benefits to the settlor

The practice adopted in most discretionary trust deeds is to have a person who is not related to the client pay a nominal settlement sum to the trustee and sign the trust deed as settlor.

This practice stems from the High Court decision in Truesdale v Federal Commissioner of Taxation,27 where the court held that the trust was created by the settlor who paid the settlement sum and that

…”the words, ‘created a trust’ in s.102 are not, I think, apt to describe the payment of money to a trustee to hold under a trust already constituted.”28

Section 102 of the 1936 Act will apply if;

- the settlor has power to revoke or alter that trust so as to acquire a beneficial interest in trust income or capital; or
- trust income is payable or accumulated for the benefit of children of the settlor who are under 18.

If the section applies, the trustee will be liable for tax on all or some portion of the trust income – at the top marginal rate of tax.

Therefore, trust deeds should exclude the settlor or any children of the settlor as beneficiaries. However, most deeds go much further than this and also prohibit distributions to any trusts or companies in which the settlor has an interest.

These more extensive restrictions are not necessary to ensure section 102 does not apply and, in some cases, they may create problems of their own.

For example, discretionary trusts generally include other trusts as eligible beneficiaries if any beneficiary of the first trust is also an actual or contingent beneficiary of the second trust.

If there is any business or family connection between the settlor and the controllers of the trust, it may be that trusts that are intended to be beneficiaries may be excluded because the settlor has some contingent interest.

25 Section 54, Duties Act 1997 (NSW)
26 Section 167(3), Duties Act 2001 (Qld)
27 [1970] 120 CLR 353 at 362
3. STREAMING PROVISIONS

Why the trust deed must include streaming provisions

The explanatory memorandum that accompanied the legislation that introduced the streaming measures made it clear that trusts could only stream capital gains and franked dividends if the trust deed contained express provisions allowing this. In particular, paragraph 2.35 of the EM contained the following statement.

2.35 These amendments ensure that where a trustee has a power to stream under the terms of the trust, the streaming will be effective for tax purposes. These amendments do not in any way give trustees a power to stream where they do not already have the power to do so.

What is required to have an effective streaming provision?

Neither the legislation nor the EM provide any guidance as to what is required for an effective attribution clause but some guidance can be obtained from Taxation Ruling TR 1992/13. This ruling was withdrawn following the decisions in Bamford and Greenhatch but the following comments on what is required for an effective attribution clause are still relevant.

6. Notwithstanding wide discretionary powers being conferred on a trustee, a trustee's discretion to selectively allocate dividend income to a beneficiary to the exclusion of another may be fettered by the terms of the trust or by trust law operative in the relevant jurisdiction. The presence of a valid clause in a trust deed which expressly empowers a trustee to selectively allocate particular types of income to beneficiaries would remove uncertainty about the trustee's power in this respect.

7. In each of the situations in paragraph 5, for the allocation of, for instance, the entire amount of a dividend to one beneficiary to the exclusion of another to be effective for income tax purposes, accounting records of the trust need to be maintained. This is necessary so that each class of income derived by the trustee can be identified and traced, less expenses, into a share of the income of the trust distributed to the beneficiary (or specific class of beneficiary).

……

27. Assuming a trustee is validly empowered to allocate different components of trust income to particular beneficiaries, the exercise of a discretion to allocate franked dividend income included in the net income of the trust estate is dependent on the accumulation and allocation of different types of trust income being reflected in the accounting records of the trust.

28. If separate bank accounts are maintained for different types of trust income, amounts are debited to those accounts and are applied to meet distributions to beneficiaries (as well as trust outgoings), this will enable the amounts distributed to beneficiaries to retain the same character as they had when they were received by the trustee. This approach may, however, involve undue administrative inefficiency and inconvenience.

29. It does not matter that different types of trust income are mixed in a common bank account. The nature of an amount distributed to a particular beneficiary will be determined by debiting the amount distributed to the appropriation account corresponding to the particular income component. This procedure assumes, however, that records are maintained which separately account for different components of income, and that expenses attributable to the gaining or producing of each component are appropriately charged against the respective components.

The ATO view in that ruling can be summarised as follows.

- The trust deed should contain a clause that expressly empowers a trustee to selectively allocate particular types of income to beneficiaries.
- The accounting records of the trust must be maintained in such a way that each class of income derived by the trustee can be identified and traced... into a share of the income of the trust distributed to the beneficiary.
Taxpayers are unlikely to have any issues in applying the statutory streaming provisions if there is an express clause in the deed along the following lines:

In determining the net income or making any determination to distribute or accumulate net income, the Trustee may:

(a) identify an amount by reference to its character or description in the Tax Acts;
(b) account separately for that amount; and
(c) make a determination to pay, apply, transfer or set aside or accumulate in respect of the whole or part of that amount.

**Importance of trust distribution minutes when streaming capital gains or dividends**

In addition to having an effective attribution clause in the trust deed, trustees need to take care in drafting distribution minutes if they want to stream capital gains or franked dividends to particular beneficiaries given the statement of the ATO in TR 1992/13 that ‘each class of income derived by the trustee can be identified and traced, less expenses, into a share of the income of the trust distributed to the beneficiary’.

The approach we recommend is as follows:

- The distribution resolution should record whether the trust deed has a definition of income and whether the trustee has a discretion to apply that definition or adopt some other concept of income.

- If the trustee has a discretion, the resolution should state what concept of income is being adopted for the year in question.

- The resolution should identify the capital gains or franked dividends and the ‘net financial benefit’ from those gains or dividends (or how the net financial benefit will be calculated);

- There should be separate resolutions in relation to capital gains and franked dividends if the trustee wants to stream these to specific beneficiaries.

**Is it possible to stream classes of income other than capital gains and franked dividends?**

*Primary production income*

When the CGT and dividend streaming measures were introduced in 2011 the 1997 Act was also amended to allow a limited concept of streaming where a trust derives primary production income. The measures (to the extent they are relevant to this paper) provide as follows

392-20(1) You are taken to carry on a primary production business carried on by a trust during an income year if you satisfy the requirements in subsection (2), (3) or (4).

392-20(2) You satisfy the requirements in this subsection if:

(a) you are a beneficiary of the trust referred to in subsection (1); and

(b) you are presently entitled to a share of the income of the trust for the income year; and

(c) if you are presently entitled to less than $1,040 of the income of the trust for the income year — the Commissioner is satisfied that your interest in the trust was not acquired or granted wholly or primarily to enable your income tax to be adjusted under this Division.

The effect of these provisions is that, if a discretionary trust carries on a primary production business, all beneficiaries who are presently entitled to at least $1,040 of the trust income will be deemed to also be carrying on a primary production business.
Prior to the decision in Bamford, the ATO view was that it was possible to stream different types of income to particular beneficiaries provided the deed had an adequate attribution clause. However, as a result of the decision in FCT v Greenhatch, it is now clear that, apart from the statutory exceptions, income derived by a trust does not retain its character when distributed to beneficiaries.

4. AMENDING TRUST DEEDS – HOW FAR CAN YOU GO?

A discretionary trust deed should provide flexibility for the clients to vary the deed to deal with changes in their circumstances or in legislation effecting the trust. Therefore, unless there are specific reasons to limit the scope of the variation power, the amendment clause should be as wide as possible.

It is also imperative when amending a trust deed to carefully read the deed to ensure that the powers are wide enough and that any procedures in the deed are followed. For example, advisers need to check the provisions of the deed to ascertain:

- whether the power of variation allows amendments of all provisions in the deed (including schedules) or only limited provisions;
- who has the power to make the change (e.g. the trustee or appointor);
- the procedures for variation (e.g. by deed, minute or notice in writing);
- whether it is necessary to obtain the consent of any party such as the appointor or guardian; and
- whether there are any specific restrictions on the power of variation (e.g. prohibiting amendment of certain clauses).

A failure to comply with procedural requirements may result in a purported variation being ineffective as illustrated by the decisions in Re Cavill Hotels Pty Ltd and Idlecroft v Commissioner of Taxation.31

In Cavill the trust deed empowered the trustee to vary the provisions of the second schedule to the deed ‘by adding the name of any person’ and also ‘by deleting the name of any Capital Beneficiary’. The trustee purported to vary the deed by deleting various categories of beneficiaries (e.g. a group described as ‘Family Beneficiaries’).

The court held that the variation was invalid because, to effectively remove a beneficiary, the deed of variation had to refer to the beneficiary by name not by reference to a class of eligible beneficiaries. Williams J had this to say:

… the power to vary the beneficiaries was strictly and severely limited. The trust could not be varied “in any manner whatsoever”;… the only power the trustee had was to delete “the name” of any beneficiary. …in the circumstances of this case that could not be done by merely identifying the categories of continuing beneficiaries.33

Is the proposed amendment within the scope of the power of variation

29 Taxation Ruling TR 92/13 – paragraph 4
30 [2012] FCAFC 84
32 2004 ATC 4845
33 At 402
There are many varieties of trust deed in circulation, and the wording of the common variation powers can be significantly (or subtly) different. Some examples of common wording for variation clauses in trust deed are as follows:

Example 1

The Trustee may by Deed revoke add to release or vary all or any of the Trusts declared or any Trusts declared by any variation, alteration or addition made from time to time and may by the same or any other Deed declare any new or other trusts or powers concerning the Trust Fund but so that the Trustee shall not have any power to revoke add to or vary any of the Trusts so that the Settlor may acquire a beneficial interest in the Trust Fund or any part of it nor to effect [sic] the beneficial entitlement of any Beneficiary to any amount applied for him prior to the date of revocation or alteration and any other person or persons upon whom any power or powers so conferred on him or them. Upon this exercise of any release and revocation pursuant to this clause the power so released and revoked shall be absolutely and irrevocably determined.

Example 2

The Trustee may by Deed revoke add to release or vary all or any of the trusts or powers hereinafore declared or any trusts or powers declared by any variation, alteration or addition made hereto from time to time and may by the same or any other Deed declare any new or other trusts or powers concerning the Trust Fund or part or parts thereof but so that the Trustee shall not have any power to revoke add to or vary any of the trusts or powers hereof so that the Settlor or the Trustee may acquire a beneficial interest in the Trust Fund or any part thereof nor to affect the beneficial entitlement of any Beneficiary to any amount applied for him prior to the date of revocation or alteration and any other person or persons upon whom any power is conferred by this Trust may release and revoke any power or powers so conferred on him or them PROVIDED ALWAYS that no such addition variation or amendment shall be made whereby the Settlor or the Trustee may acquire a beneficial interest in the Income or capital of the Trust or any part thereof. Upon the exercise of any release and any revocation pursuant to this clause the power or trust so released and revoked shall be absolutely and irrevocably determined. The expression “trusts or powers” where used in this sub-clause shall be deemed to include all the provisions of this Trust Deed or of any other Deed varying or altering or adding to such Trust Deed

The first example was the variation clause in the deed considered in Jenkins v Ellett34 where the facts were as follows.

• The original Principal was George Jenkins who was also a trustee along with Luciano Menniti.

• Part 9 of the schedule to the deed provided that, on George’s death, his executor became the Principal.

• In 1999, George used his power as Principal to remove Luciano as trustee, and replaced him with Joyce Ellett.

• Then, he and Joyce (as trustees) purported to amend the deed to appoint Joyce as Principal in place of George.

The question was whether the 1999 deed appointing Joyce Ellett as Principal was valid. Douglas J held that the variation power did not authorise an amendment to the definition of ‘Principal’ in the schedule to the deed for a number of reasons.

• Although, the deed defined the term ‘this Trust’ to mean ‘the trust constituted by and comprised in this Deed and the Schedule’, the variation clause, when specifying what could be varied, did not refer to ‘this Trust’ but instead referred to ‘the Trusts declared’.

• His Honour held that the purported change of Principal was not a variation of ‘the Trusts declared’ and was invalid.

34 [2007] QSC 154
A similar outcome occurred in *Mecanti v Mercanti*[^35]. The deed in that case permitted the trustee to ‘revoke add or vary all or any of the trusts hereinbefore provided…’. The court held that the identity of the Appointor was not ‘any of the trusts hereinbefore provided’ and therefore a variation deed purporting to change the appointor was not valid.

The clause in the second example is slightly different to that in the deed for *Jenkins v Ellett* but the differences are material, in particular because of the further words that ‘define the expression ‘trust or powers’ as including all of the provisions of the deed.

Many deeds that have a variation clause similar to this also contain a further interpretive provision that stipulates the ‘deed’ includes the schedules attached to the deed – which is desirable.

Our view is that an amendment clause that is similar to example 3 below is to be preferred as it makes it clear that the trustee can vary all provisions of the deed, including the schedules.

**Example 3**

The Trustee may revoke, delete or vary all or any of the trusts, powers or provisions declared or included in this deed (including the schedules) and may at the same time declare or include any new or other trusts, powers or provisions concerning the Fund.

**How far can you go without triggering a resettlement?**

When varying a trust deed it is important to consider the broader duty and tax implications and particularly whether the proposed variation might trigger a resettlement.

However, the risk of a variation of trust or change in beneficiaries triggering a resettlement is substantially reduced as a consequence of the decision in *Commissioner of Taxation v Clark*[^36] and the subsequent release of Taxation Determination TD 2012/21.

Prior to these developments there was a good deal of confusion about what constituted a resettlement – or at least what the ATO considered was a resettlement. In *Buzza v Controller of Stamps (Vic)*[^37] Dixon J unhelpfully said, “it is notoriously difficult to define a settlement, but that does not mean that it is difficult to recognise one.”[^38]

The High Court decision in *FCT v Commercial Nominees of Australia Ltd*[^39] should have clarified the position but it concerned changes to the deed for a superannuation fund and the ATO initially refused to accept that the principles outlined in *Commercial Nominees* applied to other trusts.

In *Commercial Nominees* the High Court considered that, notwithstanding the quite dramatic changes that were made to the trust deed and the structure of the superannuation fund, the original fund “did not come to an end” but that continued as the same entity.

The fact that the original trust deed provided the trustee with the power to make the changes was a significant factor in the Federal Court decision which was appealed to the High Court.[^40]

In *Clark*, the Federal Court (both at first instance[^41] and on appeal) indicated that the principles enunciated in *Commercial Nominees* are not confined to superannuation funds and are equally applicable to other trusts. Importantly, all members of the Full Court followed the approach of the High Court in *Commercial Nominees*.

[^35]: [2015] WASC 297
[^36]: [2011] FCAFC 5
[^37]: [1951] 83 CLR 286
[^38]: Ibid at 300
[^39]: 2001 ATC 4336
[^40]: 99 ATC 5115 at 5124
[^41]: [2009] FCA 1401
Dowsett J cited the following passage from the High Court decision in *Commercial Nominees* as summarising the correct approach in determining whether there is a resettlement: 42

“The three main indicia of continuity for the purposes of Pt IX are the constitution of the trusts under which the fund (if a trust fund) operated, the trust property, and membership. Changes in one or more of those matters must be such as to terminate the existence of the eligible entity, or to produce the result that it does not derive the income in question, to destroy the necessary continuity.”

The ATO subsequently issued Taxation Determination TD 2012/21 which can be summarised as follows:

- The previous approach of the ATO ‘is not sustainable’.
- The principles in *Commercial Nominees* are relevant in determining whether there is a resettlement of an existing trust.
- An amendment will not trigger a resettlement unless the variation of the trust ‘causes the existing trust to terminate and a new trust to arise for trust law purposes’.
- *Clark* ‘is authority for the proposition that, assuming there is some continuity of property and membership of the trust, an amendment of the trust that is made in proper exercise of a power of amendment contained under the deed will not have the result of terminating the trust, irrespective of the extent of the amendments so made so long as the amendments are properly supported by the power’. 43
- However there may be some instances where, although a variation to a trust deed does not result in a resettlement, the change may result in some assets being held on a different trust. *Commissioner of State Revenue v Lam and Kym Pty Ltd*44 and *Oswal v Commissioner of Taxation*45 illustrate how this might occur.

Therefore, provided that a proposed amendment is within the powers under the deed and there is continuity of at least some of the three essential elements of the trust (as specified in *Commercial Nominees*) it is unlikely that a variation will trigger a resettlement for tax purposes.

**Can you amend a troublesome variation clause?**

A question that often arises where there is a restriction in the power of variation, is whether the deed can be amended to remove that restriction. While the answer to this question will often depend upon exactly what is the nature of the restriction that is imposed and the scope of the power of variation, the general principle appears to be that a power of variation will not generally allow an amendment removing a restriction on the exercise of that variation power.46

One argument as to why such a restriction should not be capable of amendment is that the trustee has a primary obligation to adhere to the terms of the trust deed.47

The scope of powers of amendment in trust deeds is discussed in *Thomas on Powers*.48 In that text the author makes the following comments:

> It does not follow, of course that the power of amendment itself can be amended in this way. Indeed, it is probably the case that there is an implied (albeit rebuttable) presumption, in the absence of an expressed

---

42 [2011] FCAFC 5 at paragraph 34
43 Paragraph 21
44 [2004] VSCA 204
45 [2013] FCA 745
47 O’Brien, Moore and Papadopolous, Varying trusts after Clark, Tax Institute, Victorian Division, 13 March 2013 at 14
direction to that effect, that a power of amendment (like any other kind of power) cannot be used to extend its own scope or amend its own terms.\textsuperscript{49}

There are also a number of authorities involving amendments to superannuation and pension deeds which suggest that the power of variation cannot be used to remove restrictions on that power. For example, in \textit{UEB Industries Ltd v Brabant}\textsuperscript{50} Cook P (with whom the majority agreed) held that the power of amendment in the deed did not extend to removing a restriction on the exercise of that power. These superannuation cases need to be considered in the context that superannuation and pension deeds are a special class of trust which are different from traditional trusts because they are based on a contract between the employer, trustee and employees.\textsuperscript{51}

There is also a general principle that it is not permissible to do indirectly what is prohibited directly because this might constitute a ‘fraud on the power’.\textsuperscript{52}

For example, if a trust deed prohibits distributions to a particular person, a variation that allowed the trustee to distribute to another trust of which that person is a beneficiary might be held to be void as being a fraud on the power.

A power given to a trustee under a deed can only be exercised for the purpose for which it is given and not an ulterior purpose. If the trustee attempts to exercise that power for an ulterior purpose, this may constitute a fraud on the power which means the variation would be void. This is a long-standing principle of trust law and is outlined in the House of Lords decision in \textit{Duke of Portland v Topham}:\textsuperscript{53}

\textit{[The donee of the power] shall at the time of exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view as to the real purpose and object of the power and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power.}

In determining the purpose of the exercise of a power, the court will have regard not just to the terms of the power in the deed but also the surrounding the circumstances and practical effect of the exercise of the power.\textsuperscript{54}

5. \textbf{PERPETUITY PERIOD ISSUES}

The rule against perpetuities or rule against remoteness of vesting, prevents the creation of trusts over property which are to vest at too remote a time. Under the general law this required that a trust must vest within 21 years of the date of death of a person alive at the date the trust was created (perpetuity period).

The common law rule was summarised by the Privy Council in \textit{Air Jamaica Limited v Charlton}:\textsuperscript{55}

\textit{"... no interest is valid unless it must vest, if it vest at all, within a period of a life in being, the date of the gift plus 21 years. The rule is applied remorselessly. A gift is defeated if, by any possibility, however remote, it may vest outside the perpetuity period. It is not saved by the fact that, in the event, it vests inside the period. ..."}

The rule against perpetuities also applies to the administrative trusts and powers of the trustee. Such powers must not be capable of being exercised outside the perpetuity period, and they may be void even if all trusts to which they are attached are valid. Where, therefore, there is a trust for A for life with remainder to his widow for life, then the trustees are given a power to sell or lease land comprised in the settlement,

\begin{thebibliography}{9}
\bibitem{49} at 585 to 586
\bibitem{50} (1995) 1 NZSC 40, 341
\bibitem{51} Lock \textit{v Westpac Banking Corporation} (1991) 25 NSWLR 593
\bibitem{52} A H Slater QC Amendment of Trust Instruments. STEP on-line publication, November 2009
\bibitem{53} (1864) 11 HL CAS 32 at 54; 11 ER 1242 at 1251
\bibitem{54} Re Burton [1955] CH 82
\bibitem{55} [1999] 1 WLR 1399
\end{thebibliography}
the power is void ab initio because it is capable of being exercised at any time during the widow’s life, and she may survive A by more than 21 years.\textsuperscript{56}

A significant risk factor with the general law rule was that, if when the trust was established there was any possibility the trust might vest outside the perpetuity period, it was void from inception.

These general law principles have been relaxed somewhat by statutory provisions in most states which allow the trust deed to stipulate a fixed perpetuity period that does not exceed 80 years.\textsuperscript{57} These provisions also adopt a ‘wait and see rule’ so that a trust that might vest outside the perpetuity period is not void from inception. If the trust actually vests before the end of the perpetuity period it will still be valid.\textsuperscript{58}

The position is different in South Australia, where the rule against perpetuities has been abolished by legislation.\textsuperscript{59}

The ‘disconnect’ between the approach adopted in South Australia and most of the other Australian states raises the question of whether a trust established in another state can avoid the rule against perpetuities by nominating the law of South Australia as the proper law of the trust.

A similar issue was considered by the High Court in \textit{Augustus v Permanent Trustee Co Ltd}.\textsuperscript{60} In that case, a trust that was actually established in the ACT contained a provision which gave the trustee ‘all or any powers, authorities and discretions conferred on trustees by the law of New South Wales’. The issue was whether the trust was valid because, under the law of the ACT it would have breached the rule against perpetuities whereas this was not the case under the New South Wales legislation at the time.

The court determined that the provision purporting to make the trust subject to the laws of New South Wales was enforceable and therefore the relevant gift under the trust that was in dispute was valid. The judgment was delivered by Walsh J who made the following comments:

\ldots In my opinion, there is no reason, based upon public policy, requiring a court in the Territory to refuse to give effect to the provisions of s.36, if it appears that the intention was expressed in the deed that the laws of New South Wales should be applied in deciding whether the gifts infringe the rule against perpetuities.\textsuperscript{61}

Therefore, it seems certainly arguable that clients establishing trusts with the objective that they should not vest within any set period may be able to nominate that the trust will be subject to and administered in accordance with the laws of South Australia.

However, some caution may be required in adopting this approach as subjecting the trust to the laws applicable in another state may have unforeseen consequences. Specific instructions would generally be required before adopting that approach.

In circumstances where the preferred approach is to subject the trust to the laws in the state in which the trust property is located, some flexibility can still be achieved if the perpetuity period clause is drafted to provide that the trust will not be subject to any perpetuity period if the law in that state is amended to abolish the rule against perpetuities.

\textsuperscript{56} Perpetuities Act 1984 (NSW), Property Law Act 1974 (QLD), Perpetuities and Accumulations Act 1992 (TAS), Perpetuities and Accumulations Act 1968 (VIC) and Property Law Act 1969 (WA)

\textsuperscript{57} Refer to \textit{Nemesis Australia Pty Ltd v FCT} 2005 ATC 4881

\textsuperscript{58} Law of Property Act 1936

\textsuperscript{60} [1971] HCA 25

\textsuperscript{61} At 23.
6. UTILISING THE TRUST FOR RISK MANAGEMENT

Accumulating assets in a discretionary trust can be an effective risk management and asset protection strategy because none of the beneficiaries has a defined interest in the trust assets but merely a right to have the trust administered in accordance with its terms. Therefore, if a beneficiary becomes bankrupt, the assets in the trust will be protected to some extent from claims by a trustee in bankruptcy.

The position is different if a beneficiary is involved in a matrimonial property dispute because the focus under the Family Law Act is more on who controls the assets. However, even in a family law context, assets held in a discretionary trust may be protected to some extent if the relevant beneficiary does not control the trust.

The decisions in ASIC: In the matter of Richstar Enterprises Pty Ltd v Carey No 6 and Kennon v Spry raised significant questions as to the extent to which assets held in discretionary trusts are protected against claims in the event of insolvency or in matrimonial property disputes.

In my view, while both cases are significant, the potential negative impact of the decisions has been overstated. In this paper I will not consider these decisions in detail but will focus more on subsequent decisions that support the view that properly structured trust deeds may still provide protection against claims by creditors or in a property dispute under the Family Law Act.

Richstar decision

The case involved an application by the ASIC to freeze assets held by trustees of discretionary trusts which the ASIC alleged were controlled by officers of the failed Westpoint group.

Section 1323 of the Corporations Act provides that the court can make orders effectively freezing assets of a person under investigation by the ASIC and “money, financial products and other property” held by a third party “on behalf of” the person under investigation.

French J considered that, where the trustee of a discretionary trust is “effectively the alter ego of a beneficiary”, then that beneficiary had a least a contingent interest in the assets of the trust and he extended the freeze orders to several discretionary trusts in circumstances where there were varying levels of involvement and control.

There have been several cases decided since Richstar, where the courts have “watered down” the notion that a beneficiary of a discretionary trust has an interest that should be characterised as “property”.

In Lygon Nominees Pty Ltd v Commissioner of Stamp Duties (Vic), Redlich JA held that:

“The nature of a discretionary beneficiary’s interest under a discretionary trust as a consequence of the object’s rights to have the trust properly administered, does not confer the required proprietary interest.”

Also, in Kawasaki (Australia) Pty Ltd v ARC Strang Pty Ltd, the Federal Court made the following comment in relation to the Richstar decision:

---

62 Gartside v Inland Revenue Commissioners [1968] AC 553, Kennon v Spry [2008] HCA 56 (paragraph 77)
64 [2006] FCA 814
65 [2008] HCA 56
66 Ibid at 14
67 2007 ATC 4,643
68 Ibid at 4,644
69 [2008] FCA 461
“Neither the right to due administration of the trust nor the fiduciary obligations owed by the trustee is capable of making the object of a power of appointment into a “beneficial owner” of the subject matter of the trust.

There is nothing in the reasoning of French J (in Richstar) … which doubts these principles …” 70

In Public Trustee v Smith71 the Court made the following observations in relation to the Richstar decision72:

- In Richstar “French J did not say that it followed from the defendants position as beneficiaries of discretionary trusts and their control of the trustees that this amounted to actual ownership as distinct from ‘effective ownership’.

- Richstar did not “establish that because a beneficiary of a discretionary trust controls the appointment or removal of the trustee, or controls the exercise of the trustees’ powers and can appoint trust property to himself or herself, that the holder of such a power is the beneficial owner of the trust property irrespective of the terms of the trust deed”.

Kennon v Spry

The first point which should be made in relation to the potential impact of this decision is that it related to a family law dispute with somewhat unusual facts.

Prior to this decision there were numerous instances of the Family Court making orders in respect of assets held in discretionary trusts where a party to the marriage had a degree of control over the trust and the assets73 and therefore the result in Kennon v Spry is not that surprising.

The position of the High Court can I think be summarised by the conclusion of French CJ where he said that:

the assets of the Trust, coupled with Dr Spry’s power to appoint them to his wife and her right to due consideration, were,…the property of the parties to the marriage for the purposes of S 79.74

Importantly, His Honour acknowledged that

it is difficult to put a value on…these rights though a valuation might not be beyond the actuarial arts in relation to the right to due consideration.

There have been a number of family court decisions since Kennon v Spry where the Family Court has relied on the High Court decision to make orders in respect of assets held in a discretionary trust structure.75 However, there have also been some decisions which have distinguished Kennon v Spry.

In Leader & Martin the court considered that the principles in Kennon v Spry would not be applicable where a wife was merely an eligible beneficiary of a trust established by her parents and the trust was controlled by other family members.76

In Harris & Harris77 the court similarly found that a husband did not control a trust of which he was a beneficiary and therefore, the assets of the trust were not included in the matrimonial pool. The following extract from the judgement is relevant.

64. In seeking to uphold his Honour’s decision to include the assets of the Trust in the assets of the husband, Counsel for the wife has sought to rely on the observations of French CJ in Kennon v Spry

70 Ibid at paragraphs 74 and 75
71 [2008] NSWSC 397
72 Ibid at paragraph 138
73 E.g. Ashton and Ashton (1986) 11 Fam LR 457, Goodwin and Goodwin (1990) 101 FLR 386 and In the Marriage of Davidson (No 2) (1990) 101 FLR 373
74 paragraph 81
75 Simmons v Simmons [2008] FamCA 1088; Allan v Allan [2009] FamCA 553
76 Leader v Martin Leader (No 2) [2009] FamCA 979
77 [2011] FamCAFC 245
that the term ‘property’ when used in s 79 of the Act should be given a wide meaning. However in that decision French CJ also said:

77. The beneficiary of a non-exhaustive discretionary trust who does not control the trustee directly or indirectly has a right to due consideration and to due administration of the trust but it is difficult to value those rights when the beneficiary has no present entitlement and may never have any entitlement to any part of the income or capital of the trust.

65. In the present case and on the basis of the material before us the husband appears to be no more than such a beneficiary of such a trust. He is not the appointor of the Trust nor does he hold any position in the current trustee company. On the assumption that by the use of the word “directly”, the Chief Justice was referring to the strict legal position, it therefore cannot be said that the husband “directly” controls the current trustee. Nor could it be said that he “directly” controlled the previous trustee.

66. On the assumption that the reference by the Chief Justice to “indirect” control of a discretionary trust by a beneficiary was a reference to a “puppet” situation, in the sense that the person with legal control of the trust is a puppet of the beneficiary, that could be the situation in the present case. In the sense, that is, of the mother (who is the appointor of the Trust, and one of the three directors of the trustee company holding two shares in that company with each of the other two directors holding one share each) being the puppet of the husband. This, as was made clear by Counsel’s oral submissions to us, has always been the wife’s case.

67. The difficulty, however, for the wife on this appeal is to be able to point to any evidence which would support a finding that the husband’s mother is his puppet, and that it is through her, or perhaps otherwise, that he exercises de facto control of the trustee company and of the Trust.

In Morton & Morton78, the husband and his brother jointly controlled a discretionary trust but the wife argued that the husband had de facto control of the trust and that the trust assets should be regarded as assets of the husband. Bell J determined that:

…. there is not sufficient evidence before me to convince me that the Husband has that sufficient control over the entities to which I have referred, to make me believe that they are in fact his property.79

The ‘take away message’ that emerges from these decisions is that it is still possible to protect assets held in discretionary trusts from claims by third parties (including in the context of family law proceedings). Clients who want to establish or vary a trust to secure asset protection advantages need to consider a range of issues.

Should the “at risk” client have any role at all in relation to the trust (for example, as director, trustee, appointor or beneficiary)?

If the client does want to have a role as director or appointor etc it is important that they are not the sole holder of that office and anyone else who acts in that role is not seen to always act in accordance with their wishes or directions.

In some cases, it may be desirable to appoint an independent third party as the appointor.

---

78 [2012] FamCA 30
79 Paragraph 38