1 Why a Trust deed should be reviewed

Issue	***Why it matters?***
Establishment and historical errors	There are certain procedures that must be followed when creating or making changes to a trust. Failure to follow such procedures may result in delays when dealing with third parties (e.g. such as banks) or inadvertent consequences on who can benefit from the trust (e.g. inadvertently excluding an intended person as a beneficiary).
Lifespan of the trust	Trusts usually last 80 years. However, this is not a guarantee and their lifespan (particularly from trusts created in the 1980's and 1990's) can often be reduced to a shorter period of 20 to 50 years. If a trust's lifespan has already ended without you knowing, then it is crucial to understand the trusts and tax law consequences of this.
Flexible tax provisions	The laws surrounding the taxation of trusts in Australia remain some of the most complex around the world. If the clauses in the trust deed are not flexible enough to contemplate different ways in distributing the trust income and assets, then either: adverse tax consequences may arise; or the income and assets are unable to be distributed to the intended persons.
Who are the beneficiaries	Discretionary trusts are often called 'family trusts'. This informal term can cause issues to arise when it is assumed that a family member can benefit from the trust. Unfortunately, not all trust deeds are created with the same persons listed as beneficiaries and some even go as far as to exclude certain persons from benefiting (this is particularly due to the rise of 'foreigner' taxes on property in Australia), even if they are related to the family. If distributions are made from the trust to non-beneficiaries, then there may be adverse tax consequences. Our review will list out the classes of people (including whether companies and charities can benefit) who can benefit and the people who cannot benefit.
Flexible succession planning provisions	The assets of a trust do not form part of a person's Will. It is therefore critical for anyone controlling a trust to understand how those assets pass upon certain persons passing away. If the trust deed does not contain flexible provisions relating to passing control of the trust, then either unintended persons may control the trust, or you would be limited in deciding who can control the trust in the future.
Appropriate 'asset protection' provisions	A large advantage of a trust is the fact that they offer 'asset protection' from creditors of people related to the trust. This is partially due to trusts law, but also due to certain clauses in the trust deed. Failure for a trust to have those certain clauses may result in the assets held in a trust to be open to attack from a potential creditor.
Modern trustee powers	The modern discretionary trust in Australia has been around since the 1900s. This means that the transactions contemplated at the of creating a trust may be significantly different from those possible today. It is worth considering if some of the more common modern transactions are contemplated in the trust deed. If a trust deed does not consider these modern transactions, then this may result in delays when dealing with third parties.
Unusual clauses	Very few trusts from different providers are identical. Each provider will often add their own preference and ideology to their own trust deeds. As a result, odd and unusual clauses can occasionally appear. Whilst some of these clauses can be seen as beneficial, others often add a layer of complexity and limitation that is not often considered. Failure to identify these clauses can result in trust decisions being void, which could potentially have adverse tax consequences as well.
Structure of the trust	In addition to considering the terms of the trust deed, we will also briefly consider whether the structure of a trust is appropriate for its use. Specifically, there are various areas of tax law (such as stamp duty, land tax and payroll tax) that are impacted (directly or indirectly) from the structure of a trust depending on the trust's use. Whilst intentions may change over time, we will look to inform you of various tax issues to be wary of.

2 A reminder on why Trust deeds should be reviewed prior to 30 June distributions

2.1 Let's compare the following extracts of two deeds.

2.2 One from 1989 and another from 1993. Both deeds are from the same well-known provider.

1989 Deed – Schedule

- 21 -

PRIMARY BENEFICIARIES:

(a) [redacted]

(b) [redacted]

(c) The children of [redacted] and [redacted] whether born at the da[redacted]rior to the [redacted]

SECONDARY BENEFICIARIES:

(a) The grandchildren of [redacted] and [redacted] whether born at the date hereof or prior to the perpetuity date.

(b) The spouses of the children and grandchildren of [redacted] and [redacted] whether born at the date hereof or prior to the perpetuity date.

(c) The brothers and sisters of [redacted] and of [redacted] and their spouses present or future

(d) The children of the brothers and sisters of [redacted] and [redacted] whether born at the date hereof or prior to the perpetuity date.

TERTIARY BENEFICIARIES:

(a) Such persons appointed from time to time by the Principal under Clause 6 hereof or by the Trustee under Clause 9.2 hereof.

(b) Any Corporation incorporated under the Associations Incorporation Act 1981 of Queensland or any Act in amendment of or replacing the same.

(c) Any Church or Religious Institution selected by the Trustee.

(d) Any Charitable or Benevolent Institution selected by the Trustee

(e) Subject to Clause 13 and subject to the laws against perpetuities and without limiting Clause 5.3:

(i) Any Corporation in which any of the Beneficiaries is registered as the holder of at least one share or has a beneficial interest in at least one share:

(ii) The Trustee of any trust at least one beneficiary of which (as the term beneficiary is described or defined in such trust) is a Beneficiary of this Trust.

1993 Deed - Schedule

PAGE 1 OF THE SCHEDULE HEREINBEFORE REFERRED TO

DATE OF DEED:	JULY 6,1993
SETTLOR:	AUSTRALIAN COMPANIES PTY.LTD.
TRUSTEE:	[redacted]
THE SETTLEMENT SUM:	$ 10.00
NAME OF TRUST:	[redacted]
PRIMARY BENEFICIARIES:	The following persons and their spouses, including spouses within a defacto relationship, and whether married or not at date hereof or prior to the Perpetuity Date, widows of the following persons and the following corporations or trusts (if any); [redacted]
SECONDARY BENEFICIARIES:	Any person who is the parent, brother, sister, child, stepchild, grandchild, niece or nephew of a Primary Beneficiary and the spouses of those persons.
TERTIARY BENEFICIARIES:	(a) Any corporation in which any of the beneficiaries is registered as the holder of at least one share or has a beneficial interest in at least one share;
	(b) the Trustee of any Trust at least one beneficiary of which (as the term beneficiary is described or defined in such Trust) is a beneficiary of this Trust;
TERTIARY BENEFICIARIES:	(c) The Trustee of any charitable Trust and of any person, officer or governing body acting as Trustee,Officer or Governor of any Society, Authority, Institution, church, religious group or entity which at the time of distribution or income or capital from the Trust is to be made is exempt from income tax under the provisions of the Income Tax Assessment Act 1936 or if at such time a gift of money thereto is deductible against assessable income of the donor by virtue of the Income Tax Assessment Act 1936;
	(d) Such persons appointed from time to time by the Principal under Clause 6.

1988 Deed

13. EXCLUSION FROM BENEFITS

It is hereby declared that the Settlor and his estate, the Trustee and any former Trustee and any corporation or Trust in which the Settlor or his estate or the Trustee or any former Trustee has any actual or contingent beneficial interest are specifically excluded from all or any benefits whatsoever under this Trust except the Trustee in respect of its fees, charges and remunerations under sub-clause 8.3 hereof.

1993 Deed

13. EXCLUSION FROM BENEFITS

It is hereby declared that the Settlor and his estate and any corporation or Trust in which the Settlor or his estate has any actual or contingent beneficial interest are specifically excluded from all or any benefits whatsoever under this Trust.

Other random provisions

(b) No distribution of capital or Income of the Trust of or derived from Australian urban land shall be made in favour of any Beneficiary or class of Beneficiary excluded from acquiring an interest in Australian urban land under the *Foreign Acquisitions and Takeovers Act 1975* and *Foreign Acquisitions and Takeovers Regulation 1989* without the prior approval of the Foreign Investment Review Board. The Beneficiaries and classes of Beneficiaries excluded in this clause are specifically excluded from any subsequent nomination or appointment or assignment. Despite anything contained in clauses 9, 10 and 11 of this Trust Deed the Trustee or Appointor shall not have the power to amend the intention of this clause 3(b) that the Trustee at all times comply with the *Foreign Acquisitions and Takeovers Act 1975* and *Foreign Acquisitions and Takeovers Regulation 1989* as amended from time to time.

PROVIDED THAT THE FOLLOWING SHALL NOT BE GENERAL BENEFICIARIES NOTWITHSTANDING THAT THEY FALL WITHIN ONE OR MORE OF THE ABOVE CATEGORIES.

1.9.6.7 The Settlor.

1.9.6.8 Any trust under which the Settlor has a beneficial interest.

1.9.6.9 Any person or class of persons or any trust or corporation which the Trustee has declared in writing at any time (as it is empowered to do) to be incapable of being or to cease to be a General Beneficiary permanently or temporarily. The Trustee is also empowered to declare in writing that any person or class of persons or any trust or corporation shall be incapable of being or cease to be a General Beneficiary in relation to any distribution exceeding thirty-nine percent (39%) (or whatever other percentage the Trustee may from time to time determine) in relation to income and capital (or either of them) of the Trust.

15. EXCLUSION OF BENEFICIARIES

15.1 A person is an Excluded Person if:

(a) an election made by the Trustee for the Trust to be treated as a family trust for the purposes of the Tax Act is in force;

(b) the person is not a member of the relevant family group for the purposes of the election; and

(c) a distribution of income or capital from the Trust to the person would give rise to a liability to pay family trust distribution tax for the purposes of the Tax Act.

15.2 Any person being a Beneficiary may by oral or written declaration recorded in the minutes of the Trustee at any time exclude himself from any class of Beneficiaries and no further income or capital sums shall be distributed to such Beneficiary provided that such notice shall not affect the beneficial entitlement to any amount to which such Beneficiary is entitled at the date of such notice.

15.3 Any income or capital of the Trust Fund paid to, applied or set aside for the benefit of, any Excluded Person shall be returned to the Trustee.

23. EXCLUSION OF CERTAIN PERSONS

Notwithstanding anything in this Deed:

(a) the Trust Fund and the income thereof shall be held to the entire exclusion of and of any benefit to any person who is at that time a recipient of a means-tested Centrelink and/or Veterans' Affairs income support payment and their Associate (as the term "Associate" is defined under the Corporations Act) whether by contract or otherwise howsoever;

(b) no part of the capital or income of the Trust Fund shall be paid or lent to or applied whether by way of remuneration or otherwise for the benefit either directly or indirectly of any person who is at that time a

recipient of a means-tested Centrelink and/or Veterans' Affairs income support payment or their Associate in any manner or in any circumstances whatsoever; and

(c) no power vested in the Trustee by this Deed or by reason of anything done pursuant to this Deed or by law shall be capable of being exercised and no provision contained in the Deed shall operate in such manner that any person who is at that time a recipient of a means-tested Centrelink and/or Veterans' Affairs income support payment or their Associate will or may become entitled either directly or indirectly to any benefit in any manner or under any circumstance.

...ing on the termination day.

(b) Subject as hereinafter provided "beneficiaries" means -

(i) The Class A beneficiaries as hereinafter defined;

(ii) The Class B beneficiaries as hereinafter defined;

(iii) the beneficiaries of any trust under which any Class A or any Class B beneficiary has any interest whether vested or contingent or as beneficiary under a discretionary trust;

(iv) any person or persons declared by the Trustee to be additional beneficiaries of the trusts of this Deed in pursuance of a declaration made under the provisions of Clause 7 of this Deed (hereinafter referred to as additional beneficiaries); and -

(v) any charitable institution in Queensland being an institution the income of which is exempt from income tax under any income tax law for the time being in force;

PROVIDED:

(a) no person who is trustee of the trusts of this Deed may be a beneficiary under this Deed during the time which he is trustee of it; and -

Trustee must not exercise certain powers until Appointor has been given notice

5.12 The Trustee may exercise any of the following powers where it has given the Appointor at least three day's written notice of the exercise of the power, including specific details of how the power is to be exercised:

5.12.1 The power to Distribute capital.

5.12.2 The power to resolve in writing how capital is to be Distributed on the Vesting Day.

5.12.3 The power to Distribute Income or accumulate it.

5.12.4 The power to resolve in writing how Income is to be Distributed.

5.12.5 The power to choose a person to whom capital or Income is to be Distributed.

5.12.6 The power to create a sub-trust.

3 Trust review checklist

Establishment and historical errors

3.1 Although uncommon, trust deeds may have been executed incorrectly.

3.2 A consequence of failing to execute a trust deed correctly could result in the Trust having never been established.

3.3 Further any subsequent changes to the Deed, if improperly made, could be deemed invalid.

3.4 As such, the terms in relation to the establishment of the Trust must be reviewed to ensure there were no issues on establishment. Any purported changes to the Trust must also be reviewed to ensure any subsequent documentation entered into has been effective.

3.5 If any errors are identified in relation to the establishment or changes to the Deed, then a document fixing the errors should be prepared to reduce any potential for a dispute in the future regarding the terms of the Deed, between parties to the Deed. Conservatively, such a 'fix' in the errors should be sought by the Courts, however, a self-correcting document has been considered by the Courts to be effective if prepared correctly. That said, it has also been accepted that third parties such as revenue authorities are not bound to accept such self-correcting documents, and that they are only bound by Court-corrected orders.

Issue	***Comments***
Has the Deed been executed correctly (including witnessing requirements)?	
Has the Deed been dated?	
Has the Deed been stamped, if required?	
Are there any missing pages to the Deed?	
What is the jurisdiction of the Trust?	
Are there any relevant documents affecting the terms of the Deed (i.e. deeds of variations, trustee minutes appointing beneficiaries)?	
If so, have the relevant documents been properly executed and a trustee's power validly exercised?	
Is there any discrepancy between the date of the Deed and the establishment of the Trust?	
What was the settlement sum?	
Are there are incomplete definitions or 'Schedule' items? If so, what is the impact on the Deed?	
Is there inconsistent spelling of roles throughout the Deed?	

Who was the original trustee?	
Who is the current trustee?	
Have there been other trustees appointed?	
Have any of the change of trustees been ineffective? If so, what is the impact on the Deed?	
Are there any other roles in the trust (i.e. appointor, principal, guardian, nominee etc)	
What power do these roles have?	
Who was the original person in the relevant role/s?	
Who is the current person in the relevant role/s?	
Have there been other persons appointed in the role/s?	
Have any of the change of persons in the relevant role/s been ineffective? If so, what is the impact on the Deed?	
Recommendation	

Vesting Date

3.6 Is it critical to understand when the Trust will end and the consequences of such an ending (i.e. who is entitled to the assets of the Trust).

3.7 Whilst it is common for Trusts to last up to 80 years from being established, there are providers that may include a shorter term (even as low as only lasting 20 years from establishment).

3.8 The Deed should therefore be reviewed to confirm when the Trust ends and if possible, whether the ending date (also known as the vesting date or perpetuity date) can be extended as far into the future as possible under law.

Issue	***Comments***
What is the vesting date or perpetuity date of the Trust?	
Does the trustee have the power to change the vesting date for the Trust?	
What happens to the Trust assets on vesting?	

Recommendation	

Beneficiaries of the Trust

3.9 Understanding who may benefit from the Trust is important in that the Trust cannot distribute the income generated, or underlying assets of the Trust to someone who is not a beneficiary of the Trust.

3.10 This is important as trust deeds can vary in terms of who are defined as beneficiaries and who are explicitly excluded.

3.11 Further, given changes to various tax legislation across the Country, it may be preferable in certain circumstances to restrict the potential beneficiaries of the Trust to 'non-foreigners'.

3.12 Our review below will provide clarity on who are considered beneficiaries for the Trust, but also outline who is explicitly excluded.

3.13 Steps can then be taken at a later date to decide whether beneficiaries should be added or removed from the class.

Issue	***Comments***
Who are the named beneficiaries (also commonly called the 'Primary Beneficiaries')?	
Does the definition for beneficiaries include wider family?	
Does the definition for beneficiaries include trusts and companies?	
Does the definition for beneficiaries include charities, DRG recipients, not-for-profits and/or public benevolent institutes?	
Are there limits in relation to who can be beneficiaries of the Trust?	
Can beneficiaries be added?	
Can beneficiaries be removed?	
Is there a definition for spouse (if applicable)? If so, is the definition broad enough to include 'same-sex' couples?	
Is there a definition for children? If so, does the definition include 'step-children' and 'adopted children'?	
Is the term 'issue' or 'remoter issue' used? If so, is such a term defined?	

Has a family trust election been made, or an interposed entity election been made?	
Who is the settlor?	
Is it obvious whether the settlor is related to the beneficiaries?	
Has the settlor been excluded from being a beneficiary?	
Are there other persons excluded from being a beneficiary (i.e. the trustee or persons who have contributed to the trust fund)?	
Consider whether an excluded person has received a benefit?	
Does the Trust hold assets that could have surcharges imposed on the Trust? For example, real property may impose additional stamp duty or land tax in certain States if the beneficiary class could include 'foreigners'.	
Who are the persons who receive the income if no trust distribution is made (known as the 'default income beneficiary')?	
Who are the persons who receive the capital on vesting if no trust distribution is made (known as the 'default capital beneficiary')?	
Recommendation	

Trust distribution and tax related provisions

3.14 Just as it is important to understand who can benefit from the Trust, it is critical to ensure the Trust contains sufficient powers to enable assets or income of the Trust to be distributed to a beneficiary in a tax effective manner.

3.15 Whilst there are many ways that income and assets of a trust can be distributed out, it is important to appreciate some of the methodology must be tailored according to the strict rules of the trust deed when drafting the trust distribution resolution.

3.16 This is not always considered, and therefore having broad flexible provisions allows for a more relaxed approach in making trust distribution resolutions.

Issue	***Comments***
What 'income' can be distributed from the Trust (I.e. what is distributable income)?	

Is there sufficient power to determine what distributable income is?	
Is there sufficient power to categorise trust receipts on revenue or capital account?	
Is there sufficient power to categorise trust expenses on revenue or capital account?	
Is there discretion to categorise and account income received as separate classes of income, specifically capital gains or franked distributions?	
Is there discretion to categorise and account expenses against separate classes of income?	
Can classes of income be grouped (I.e. can all franked distributions be grouped under one class)?	
Is there a power to accumulate income?	
Is there a discretion to distribute income of the trust in such a manner as the trustee determines?	
Is there discretion to enable separate classes of income to be and distributed to different beneficiaries in such proportion as the trustee decides?	
Is the trustee's power to distribute income broad enough to allow beneficiaries to be presently entitled, but not paid?	
Are there limitations on how the trustee may distribute income (e.g. a 39% cap on distributions)?	
Is consent or notice required when making income distributions?	
When must income distributions be made by? If not stated in the Deed, the Australian Taxation Office has adopted the practice that distributions must be made by 30 June.	
Can distributions be orally recorded? It is best practice, regardless of whether the Deed	

allows it, to subsequently document oral distributions in writing.	
Is there a power to carry forward losses (i.e. the trustee is not required to utilise losses if not suitable)?	
Is there a power to offset income with previous year losses?	
How are unpaid present entitlements treated?	
Are unpaid present entitlements automatically converted into a loan?	
Are Division 7A sub trusts automatically created?	
Can unpaid present entitlements be mingled with the trust fund?	
Can unpaid present entitlements be placed on a sub-trust for the relevant beneficiary?	
Can the trustee make capital distributions prior to vesting?	
Are there restrictions on making capital distributions?	
Recommendations	

Succession planning provisions

3.17 Assets and activities conducted through your Trust can not directly be governed under your Will.

3.18 This is because assets forming part of a trust are not considered yours to deal with as part of your Will.

3.19 As such, it is important to understand who takes control of the Trust on certain events occurring to people in control.

3.20 It is common for a trust deed to outline what happens to certain roles, as well as allow for the relevant person in control to also (subject to there being sufficient power) nominate successors.

3.21 Having these powers are important in a robust estate plan, and any amendments to update the provisions will provide the flexibility for you to nominate (through a separate document or Will) a successor controller for the Trust on events such as death and loss of capacity..

Issue	***Comments***

Can the trustee retire and appoint their own successor?	
Are there any conditions before a trustee can retire and appoint their successor?	
Are certain persons excluded from being the trustee?	
Are there other restrictions on how the trustee can appoint their own successor?	
Is the trustee automatically retired on certain events occurring?	
Who replaces the trustee if they are automatically removed?	
Is there an explicit power to appoint a successor trustee by Will?	
Is there flexibility to outline the conditions on appointing a successor trustee?	
Can separate trustees be appointed over particular assets of the trust?	
Are there any restrictions on how a trustee may retire (i.e. other consent required, or there needs to be a minimum of at least two individual trustees)?	
Can the trustee explicitly be a sole individual or corporation?	
Is there anyone else who may replace the trustee (i.e. the **controller**)? If so, what is the term used for that role.	
Are there any conditions before the trustee can be replaced by the controller?	
Is the controller automatically retired on certain events occurring? If so, what events are these?	
Who replaces the controller if they are automatically removed?	
Is there an explicit power to appoint a successor controller by Will?	

Is there flexibility to outline the conditions on appoint a successor controller?	
Can separate controllers be appointed over particular assets of the trust? It is not recommended to exercise such a power, if available, or to at least obtain specialist tax advice prior to doing so.	
Recommendations	

Asset protection provisions

3.22 *Australian Securities and Investments Commission In the Matter of Richstar Enterprises Pty Ltd v Carey (No 6)* [2006] FCA 814 remains as a reminder that arguments to ignore the trust structure for asset protection has been held by the Court as valid. The argument relies on the notion that a trust is the 'alter-ego' of the 'controller' and therefore assets of the trust should be deemed to be assets of the controller.

3.23 Despite various cases since deciding to the contrary, it would be prudent for a trust deed to include provisions automatically removing persons in control in the event of bankruptcy.

3.24 A similar rationale as also been considered in relation to family law breakdowns, however, the Courts in those circumstances are more likely to ignore such a clause in the trust deed and consider trust assets as forming part of property able to be split pursuant to a subsequent Court order.

Issue	***Comments***
Is the trustee automatically removed on bankruptcy/insolvency?	
Who replaces the trustee if they are automatically removed?	
Is the controller automatically removed on bankruptcy/insolvency?	
Who replaces the controller if they are automatically removed?	
Recommendations	

Miscellaneous provisions

3.25 Are any clauses that may cause the trustee to fail in complying with the terms of the Deed.

3.26 Such clauses can include unusual or special restrictions on the decisions the trustee may make, or limitations.

Issue	***Comments***

Are there any 'non-standard' provisions identified in the Trust?	
Are there any structuring concerns identified based on the information currently known?	
Recommendations	

Variation power

3.27 If the Trust is to be varied, it is important to review the clause enabling such a change.

3.28 Whilst it is common for most clauses to be broad in power, the precise nature of the wording may cause complications and impose restrictions on how a document may vary the Trust.

Issue	***Comments***
Is there a power to vary the trust deed?	
What is the extent of the variation power?	
Are there restrictions or limits on what can be amended?	
Is anyone's consent required for the trustee to exercise the power to vary?	
Can the deed be varied orally, or does it need to be varied in writing?	
Recommendations	