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Trust bushfires and learnings from the past year – August 2021

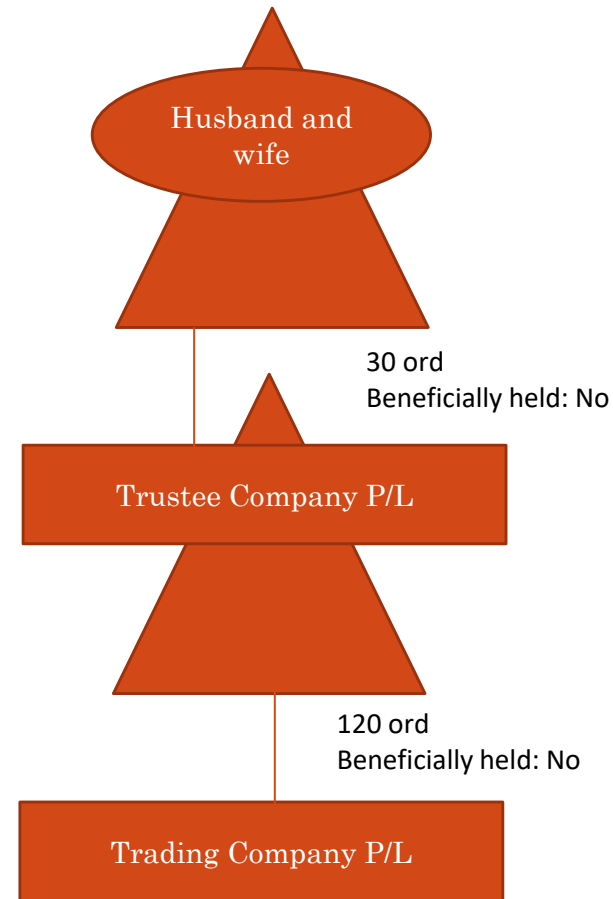
With:

Darius Hii – Tax and estate planning lawyer; Chartered Tax Advisor; and Director at Chat Legal

Information provided is general in nature; precise application depends on specific circumstances



Getting the structure right





Getting the structure right

- The problem?
 - Only one trust
- Documents:
 - Trust deed dated 4 February 2017 listing Husband and Wife as Trustees and Appointors
 - Deed of resignation of trustee and appointor dated 17 June 2016 removing Husband as Trustee and Appointor
 - Trust distribution resolution dated 30 June 2018 confirming Wife as sole Trustee
- Trust deed not properly executed and one Trustee witnessed Settlor
- Deed of resignation of trustee and appointor signatories not witnessed



Getting the structure right

Property Law Act 1974 (QLD)

45 Formalities of deeds executed by individuals

(1) Where an individual executes a deed, the individual shall either sign or place the individual's mark upon the same and sealing alone shall not be sufficient.

(2) An instrument expressed—

(a) to be an indenture or a deed; or

(b) to be sealed;

shall, if it is signed and attested by at least 1 witness not being a party to the instrument, be deemed to be sealed and, subject to section 47 , to have been duly executed.



Getting the structure right

- Share transfer in Corporate Trustee P/L
- Rectifying original trust deed and deed of resignation of trustee and appointor
 - Resettlement issues?
 - Effective today or before?
 - Mistake
 - Evidence
- Deed of resignation of trustee dated 17 June 2016
- ASIC historical search of Trading Company P/L shows:
 - Husband and Wife original members (non beneficially)
 - Corporate Trustee P/L (non beneficially) on 27 October 2016



No trust (technically at law)?

- Knight v Knight (1840) 3 Beav 148 at 160
- Paraphrased – a discretionary trust requires certainty in relation to three matters:
 - certainty of intention (ie the settlor intended to create a trust over their property);
 - certainty of subject matter (ie the property of the trust must be specified with certainty); and
 - certainty of object (ie the beneficiaries or objects of the trust must be sufficiently identifiable).
- Key question – what does certainty of object mean?



No trust (technically at law)?

- Generally, discretionary trusts provide the trustee with the discretion to determine which beneficiaries may be entitled to the income or capital of the trust fund.
- This is important, as it is these people, where certainty is required.
- It is there people in which the trust exists for:
“Where there is a mere power of disposing and it is not executed, the Court cannot execute it; but wherever a trust is created and the execution of that trust fails by the death of the trustee or by accident, the Court will execute the trust.”
Farwell, CJW, assisted by Archer, FK, A concise treatise on powers, Stevens & Sons, 3rd ed, 1916.



No trust (technically at law)?

3.2 DEFAULT DISTRIBUTION

While paragraph 1.4.1 of the definition of “income” in clause 1.4 applies, if the Trustee shall not by the thirtieth day of June have exercised its discretion to pay apply set aside or accumulate the whole or any part of that income, then, subject to any lawful subsequent determination of the Trustee, the Trustee shall hold the income not so paid set aside or accumulated for that year in trust for such of the Primary Beneficiaries as are then living or in existence absolutely, and if more than one as tenants in common in equal shares; and if there are no Primary Beneficiaries then living or in existence, for such of the Secondary Beneficiaries as are then living or in existence absolutely, and if more than one as tenants in common in equal shares; and if there are no Secondary Beneficiaries then living or in existence, for such of the Tertiary Beneficiaries as are then living or in existence absolutely, and if more than one as tenants in common in equal shares; and if there are no Tertiary Beneficiaries then living or in existence, for such of the General Beneficiaries as are then living or in existence absolutely, and if more than one as tenants in common in equal shares.



No trust (technically at law)?

- 1.4 "General Beneficiaries" means the person or persons named or described as General Beneficiaries in the Schedule;
- 1.5 "income" or "the income of the Trust Fund" means:



No trust (technically at law)?

4.2 CONSEQUENCES OF VESTING

On that termination and vesting the Trustee shall pay and assign the whole of the Trust Fund to such one or more of the Primary Beneficiaries and the Limited Beneficiaries then living or in existence (whether to the exclusion of some of them or not) and in such proportions as the Trustee shall decide.



No trust (technically at law)?

- Solutions?
 - Don't use the trust
 - Ensure capital distributions effective
 - But, note, not automatically failed
 - *Property Law Act 1974 (Qld)* – Section 210

(1) Where apart from the provisions of this section and of section 213 a disposition would be void on the ground that the interest disposed of might not become vested until too remote a time the disposition shall be treated until such time (if any) as it becomes established that the vesting must occur, if at all, after the end of the perpetuity period as if the disposition were not subject to the rule against perpetuities, and its becoming so established shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise.

Distribution resolution gone wrong



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1 Terms of Trust Deed

1.1 The 'Primary Beneficiaries' of the Trust are relevantly defined in the Schedule to the Trust Deed and are as follows:

- No Schedule
- No defined term of Primary Beneficiary
- Definition of Beneficiary specifically named the key beneficiary

Distribution resolution gone wrong



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1.2 The 'General Beneficiaries' of the Trust are relevantly defined in clause 1.18 of the Trust Deed as follows:

"General Beneficiaries" means:

subject to clauses 9 and 10, any and all of the following in their personal capacity and in their capacity as trustee of any other trust (unless otherwise stated) at any time and from time to time:

(a) the Primary Beneficiaries;

...

(d) an Eligible Company

...

- No such clause existed – it only went up to clause 1.2(j)

Distribution resolution gone wrong



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Income of the Trust	The Chair noted that under clause 5 of the Trust Deed the Trustee must determine the income of the Trust Fund for each Accounting Period.
Determination of income under the Trust Deed	The Chair proposed in accordance with clause 5.1 of the Trust Deed that the income for the Accounting Period be calculated in the same manner as net income is calculated under the <i>Income Tax Assessment Act 1936</i> (Cth) and the <i>Income Tax Assessment Act 1997</i> (Cth) (Tax Acts), provided that where, in calculating the net income under the Tax Acts, it is necessary to:

5. Amounts set aside for the Beneficiaries

Any amount set aside for any Beneficiary or held for a Beneficiary pursuant to this Deed shall not form part of the Trust Fund but shall upon such setting aside or upon 30 June be held by the Trustee as a separate Trust Fund upon trust for such Beneficiary absolutely with power to the Trustee pending payment over to such Beneficiary to invest or apply for the benefit of such Beneficiary or deal with such fund or any resulting income there from or any part thereof in the manner provided for in this Deed in relation to the Trust Fund.

Distribution resolution gone wrong



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- (m) *income and income of the Trust Fund* shall mean the net income of the Trust Fund as calculated under the Tax Act, but including all of the Capital Gain, unless the Trustee exercises its discretion under clause 10;
- (c) *Capital Gain* means net capital gains according to ordinary concepts;

10. Determination whether receipt or outgoing on income or capital account

The Trustee shall have power to determine in its absolute discretion whether any receipt, profit or gain or payment, loss or outgoing or any sum of money or investment, or notional amount, in any Financial Year, or any revenue or capital loss carried forward from a prior Financial Year, is or is not to be treated as being on income or capital account.

Distribution resolution gone wrong



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- Resolution purported to redefine income
- No powers provided in prior clauses
- Wouldn't ordinarily be an issue other than capital gains were meant to be streamed that income year to a particular individual
- Solution:
 - Vary the terms of the trust deed to provide appropriate powers
 - Updated trust resolution



DIY amendments

DEED OF VARIATION OF DISCRETIONARY TRUST

THIS DEED OF VARIATION is made on 25th February 2021.

PARTIES

individual name

1. [REDACTED] (ACN [REDACTED]) of [REDACTED]
[REDACTED] (the 'Trustee').

RECITALS

- (A) By deed of settlement made 30th January 2021 between Darius Qing Yin Hii as settlor and [REDACTED] as the trustee (the 'Trust Deed') a discretionary trust was established known as the [REDACTED].
- (B) The Trustee was appointed trustee of the [REDACTED] by the Trust Deed and has continuously held such office up to and including the date of this deed.
- (C) Clause 9 of the Trust Deed permits the Trust Deed to be amended and states: Variation
The Trustee may, by deed, with the written consent of the Appointor vary any of the trusts,
powers, terms, provisions or schedule of this Trust or document with retrospective effect,
provided that such variation does not:
 - (a) result in the Excluded Beneficiaries acquiring a share, benefit or interest from the Trust Fund;
 - (b) breach the rule against perpetuities; or
 - (c) vary a beneficial interest of any beneficiary in respect of any income directed by the Trustee up to the date of the exercise of that power..



DIY amendments

- Problems:
 - Trustee was a Company, not an individual
 - Appointor was required to consent and was not listed as a party
 - More technically, the variation didn't state where the amended clause was inserted (just jumps straight into the clause):

1. Variation of Trust Deed

The Trustee declares that the Trust Deed is varied as follows:

Generally to exercise or concur in exercising all the

Miscellaneous trust establishment issues



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- Settlor must provide Settlement Sum (have had a case where Settlor never provided money to Trustee – and the Settlor was a law firm)
- Parties must execute in 'wet ink' (other than perhaps during 2020 where potential exceptions were allowed due to COVID)
- Trustee must execute trust deed (have had a case where Trustee never executed)

Raising FIRB before buying property



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- Confusion between accountants and conveyancers
- Read original deed and all variation documents
- 3 properties acquired between 2017 and 2020
- Trust distributions made in favour of overseas relatives in until 2019
- Whose responsibility?
- Also: *'You don't have to pay the distribution to your overseas relatives'*



Raising FIRB issues

- ii. "General Beneficiaries" means:-
 - A. the party as set out in the SIXTH SCHEDULE hereto, his/her spouse or domestic partner as the case may be, their grandparents, parents, brothers and sisters, children, grandchildren and remoter issue of the parties as set out in the SIXTH SCHEDULE hereto;
 - B. the Trustee or Trustees of any other trust (howsoever created) the capital or income of which is or may be held in whole or in part (and whether absolutely contingently or otherwise) for either or both of the parties as set out in the FIFTH SCHEDULE and/or for a child or grandchild or remoter issue or stepchild or foster child of the parties as set out in the FIFTH SCHEDULE hereto provided that no part thereof is or may be held for the settlor;
 - C. any company nominated in writing by the Trustee to be a beneficiary, being a company in which or which is related to or associated with a company in which a share or beneficial interest in a share is held by either or both of the parties as set out in the FIFTH SCHEDULE hereto;
 - D. any Superannuation Fund of which any of the parties set out in the FIFTH SCHEDULE are members;



Raising FIRB issues

1. The Trust Deed is varied by amendment to the definition of “General Beneficiaries”, by replacement of sub-clauses 1(e)ii.A. and 1(e)(ii)B. with the following :
 - A. *the party as set out in the SIXTH SCHEDULE hereto, and the spouse or domestic partner as the case may be, grandparents, parents, brothers and sisters, children, grandchildren, remoter issue, stepchildren, foster children, uncles and aunties, nieces and nephews, and cousins of the parties as set out in the FIFTH SCHEDULE and SIXTH SCHEDULE hereto;*
 - B. *the Trustee or Trustees of any other trust (howsoever created) the capital or income of which is or may be held in whole or in part (and whether absolutely contingently or otherwise) for either or both of the parties as set out in the FIFTH SCHEDULE and SIXTH SCHEDULE and/or for a child, grandchild, remoter issue, stepchild, foster child, uncles and aunties, nieces and nephews, and cousins of the parties as set out in the FIFTH SCHEDULE and SIXTH SCHEDULE hereto provided that no part thereof is or may be held for the settlor;*

Relying on the stamp duty restructure exemption



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- Public Ruling DA000.16.2 ADMINISTRATIVE ARRANGEMENT—DUTY EXEMPTIONS FOR ELIGIBLE SMALL BUSINESS RESTRUCTURES
- 7(c) if the small business entity is a discretionary trust—a dutiable transaction that is the transfer or agreement for the transfer of small business property directly held by the trustee of the trust, the dutiable value of which is not more than \$10 million, from the trustee to a newly registered unlisted corporation or an unlisted corporation that has been dormant since its registration, of which all beneficiaries of the trust are shareholders
- 8. For paragraph 7(c), a beneficiary, of a discretionary trust, is a taker in default of an appointment by the trustee, other than a last taker in default of appointment that is a person decided under the Succession Act 1981 or a charitable institution

Relying on the stamp duty restructure exemption



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6. Primary beneficiaries

~~_____~~ and ~~_____~~ the both of
~~_____~~ and the children and remoter
issue of each of them.

5.4 Default distributions of income if no effective determination made

The Trustee will hold so much of the income of each Income Period as is not before 11:30pm on the last day of the Income Period the subject of a valid and effective Distribution upon trust for those Primary Beneficiaries who are 18 years of age or more and who are living at 11:30pm on the last day of that Income Period in equal shares as tenants in common unless

6.5 Default distribution of capital if no effective determination made

In the absence of any Capital Distribution, the Trust Fund is to be held on trust in equal shares for such of the Primary Beneficiaries who are living at the Vesting Day as tenants in common unless any one or more of the Primary Beneficiaries who are deceased at that time have left Children in which case the share of the Trust Fund to which that Primary Beneficiary would otherwise have been entitled is to be held upon trust for those Children in equal shares

Relying on the stamp duty restructure exemption



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- 7(d) if the small business entity is a discretionary trust—a dutiable transaction that is the transfer or agreement for the transfer of small business property directly held by the trustee of the trust, the dutiable value of which is not more than \$10 million, from the trustee to a newly registered unlisted corporation or an unlisted corporation that has been dormant since its registration, of which the trustee is the sole shareholder and the rights and interests of the beneficiaries of the trust immediately before the transaction are the same immediately after the transaction
- 8. For paragraph 7(c), a beneficiary, of a discretionary trust, is a taker in default of an appointment by the trustee, other than a last taker in default of appointment that is a person decided under the Succession Act 1981 or a charitable institution
- 9. For paragraph 7(d), a beneficiary, of a discretionary trust, is a beneficiary under paragraph 8 as well as a person entitled to trust income or trust property upon appointment by the trustee (discretionary beneficiary).

Relying on the stamp duty restructure exemption



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- Example 7—small business entities that are discretionary trusts The trustee of a discretionary trust directly holds small business property and carries on a business.
- There are two beneficiaries that are discretionary beneficiaries—A and B—and one beneficiary that is a taker in default—C.
- The trustee registers a new company, with the trustee as the sole shareholder.
- The trustee then transfers the small business property to the company. There is no alteration to the trust deed for the trust with the rights and interests of the beneficiaries of the trust immediately before the transfer being the same immediately after the transfer.
- Assuming the transaction is an eligible transaction, transfer duty will not be imposed on the full dutiable value of the small business property.

Relying on the stamp duty restructure exemption



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- Example 8—small business entities that are discretionary trusts
- The same facts apply as for Example 7, with the exception that the transaction is part of an arrangement involving a change to add an additional beneficiary that is a taker in default—D.
- The transaction is not an eligible transaction as the rights and interests of the beneficiaries of the trust that existed immediately before the transaction are not the same immediately after the transaction.
- Transfer duty will therefore be imposed on the full dutiable value of the small business property



Other weird quirks

- Trustee not exercising power in good faith (?) One year ago, trustee mentioned recalling father's intention and now does not wish to honour
- Transferring trusteeship and appointor-ship of a trust to a third-party
- Relinquishing control of a trust before heading overseas

12.1 No distribution to settlor

- (a) Income or capital of the Trust must not be paid or transferred beneficially to or applied for the benefit of the Settlor, other than as remuneration properly paid for professional services.
- (b) No discretion or power conferred under this Deed is to be exercised to confer a direct or indirect benefit in or out of the Trust to the Settlor or former Trustee other than as remuneration properly paid for professional services.

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