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What the Trust? – June 2021

With:

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



Topics

- The nature of discretionary trusts
- FIRB legislation provisions
- Payroll tax grouping
- Landholder duty risks



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The nature of discretionary trusts



'Interest' in a discretionary trust

“[n]o object of a discretionary trust has, as such, any legal right to or in the capital. His sole interest, if it be an “interest” within the scope of these provisions is with regard to the income: he can require the trustee to exercise, in bona fide, their discretion as to how it shall be distributed, and he can take and enjoy whatever part of the income the trustee choose to give him”

- *Gartside v Inland Revenue Commissioners* (1986) AC 553 at 606



Discretionary beneficiary

“[A] discretionary beneficiary has no proprietary interest, vested or contingent, in the assets of a trust but only an expectation...a discretionary beneficiary, is not entitled as of right to disclosure of that which could be properly described as ‘trust document’”

- *Kestenberg v Kestenberg* [2020] VSC 84 at 7



Discretionary beneficiary

“taker in default of appointment is ordinarily regarded as having a vested interest in the property to be taken, though liable to be divested by an exercise of the trustee’s power to appoint elsewhere: Hardingham & Baxt Discretionary Trust (2nd Ed). The interest although vested, is defeasible”

- *Ramsden v FCT* [2005] FCAFC 39 at [37]



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FIRB legislative provisions



FIRB approval

- Foreigners need to go through the Foreign Investment Review Board in order to acquire certain assets in Australia
- Generally, property now, however, for a period of time, Australian businesses also required FIRB approval if a foreign acquired an interest in them
- There are thresholds that need to be met before the FIRB application process needs to be followed through
- However, to acquire residential property, there is no minimum threshold value – that is, any residential property bought by a foreign requires the FIRB approval
- Relevant legislation – *Foreign Acquisitions and Takeovers Act 1975* (Cth)



Foreign person

- (a) an individual not ordinarily resident in Australia; or
- (b) a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or
- (c) a corporation in which 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest; or
- (d) **the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or**
- (e) the trustee of a trust in which 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest; or
- (f) a foreign government; or
- (g) any other person, or any other person that meets the conditions, prescribed by the regulations.



Not ordinarily resident

- Section 5 elaborates ordinarily resident to include:

(1) An individual who is not an Australian citizen is ordinarily resident in Australia at a particular time if and only if:

(a) the individual has actually been in Australia during 200 or more days in the period of 12 months immediately preceding that time; and

(b) at that time:

(i) the individual is in Australia and the individual's continued presence in Australia is not subject to any limitation as to time imposed by law; or

(ii) the individual is not in Australia but, immediately before the individual's most recent departure from Australia, the individual's continued presence in Australia was not subject to any limitation as to time imposed by law.



Not ordinarily resident citizen

- Note that FIRB has some exemptions for Australian citizens not ordinarily resident
- Changes depending on guidance notes reviewed
- Don't keep consistently updated to ever changing guidelines so if client resides overseas, then steps need be taken to review guidelines in existence at appropriate time



Substantial interest

- Definition of substantial interest is 20%
- Definition of aggregate substantial interest is 40%
- Section 18(3): *(3) For the purposes of this Act, if, under the terms of a trust, a trustee has a power or discretion to distribute the income or property of the trust to one or more beneficiaries, each beneficiary is taken to hold a beneficial interest in the maximum percentage of income or property of the trust that the trustee may distribute to that beneficiary.*



State legislation not the same

- New South Wales adopts FIRB definition but altered confirming Australian citizen and New Zealand citizen under special category visa are considered as residing in Australia
- Victoria looks at if a foreign person holds a substantial interest in the capital of the trust
- Queensland looks at whether foreign persons hold a 'trust interest'
- South Australia considers whether a foreign person holds a power to appoint under the trust
- Western Australia considers if it is controlled by foreigners (being a person in a position to influence, either directly or indirectly, the vesting of the whole or any part of the capital of the trust fund...)
- Also note the OSR guidelines for NSW and VIC



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Payroll tax grouping



Payroll tax grouping provisions

- Payroll tax payable on wages exceeding \$1.1million
- Anti-avoidance measures introduced being the grouping provisions
- Grouping of Corporations
- Common Employees
- Common Controllers



Deemed control

- Section 71(6) Payroll Tax Act QLD – ‘any person who **may benefit** from a discretionary trust as a result of the trustee exercising a power or discretionary (for example a trustee exercising their power to appoint income or capital in favour of a beneficiary) or failing to exercise a power or discretionary, is taken to be a beneficiary of the trust in respect of more than 50% of the value of the interests in the trust
- In other words, any *potential* beneficiary of a discretionary trust will be deemed to have a controlling interest in that discretionary trust



Cases

- Cessnock Tyres Pty Ltd v Chief Commissioner of State Revenue [2018] NSWCATAP 147
- Beaumont Constructions Pty Ltd & Ors v Commissioner of State Revenue [2020] QCAT 52
- Latitude North Hotels Pty Ltd v Commissioner of State Revenue [2021] QCAT 16



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Potential solutions

- Renunciation
- Disclaimers
- NB not the same, and also different from amending
- De-grouping applications (but difficult)



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Landholder duty risks



Landholder duty

- Duty applies on transfer of shares in a company (relevant acquisitions) where the company is a 'landholder'
- Duties Act 2001 (Qld)
- Landholder is an entity that has land-holdings in Queensland, the unencumbered value of which are \$2,000,000 or more – section 165
- Relevant acquisition occurs where a person acquires a significant interest (or other variations where once related party interests are aggregated they exceed in a significant interest) – section 158
- Significant interest defined to mean 50% or more for a private landholder – section 159



What is land-holdings?

- Section 167
 - The entity's interest in land, and anything fixed to the land that may be separately owned from the land (whether or not the entity has an interest in the thing fixed to the land), **other than**:
 - A security interest; or
 - An interest in a trust;
 - Rights held by the entity that relates to the entity's land;
 - An interest in land, and anything fixed to the land that is subject to a purchase agreement or sale agreement made by the entity.
- Also includes:
 - Land-holdings held by the entity for a partnership of which the entity is a partner
 - Land-holdings held by a subsidiary of the entity



Who is a subsidiary?

- Section 166(2)

*‘Also, each of the following is a **subsidiary** of the holding entity – a trustee of a trust, if the holding entity or a subsidiary of the holding entity, whether under this or another subsection, is a beneficiary of the trust*



Other States

- Other States, similar rules
- ACT, Western Australia, South Australia, Northern Territory, Tasmania and Victoria all have provisions where the Commissioner may override the broad deeming rule



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A reduced beneficiary class?



Beneficiaries

- Should the beneficiary class of a discretionary trust be more tailored?
- Perhaps should it include:
 - The Primary Beneficiary;
 - Immediate family members; and
 - Charities?
- In order to include other trusts and companies, then the trustee would be required to make a conscious determination to include that entity as a discretionary beneficiary?
- Still include a blanket 'no foreigner' to benefit clause?

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