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Let's chat

General entity company and structuring considerations – January 2024

With:

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



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Topics for consideration

- Lost trust deeds
- Related party transactions
- Trusts and family law
- Base rate entity



Lost trust deeds

- Remember trust law operates separate to tax law
 - E.g. requirements to have a valid trust v stamping of a trust deed
 - E.g. income according to trust concepts v income according to tax law
- Read the deed
- Fiduciary duties imposed on trustees
 - Including knowing and complying with the terms of the trust
- Third parties becoming more stringent
 - Don't leave it for others to find out
 - Financing delay
 - Audits



Lost trust deeds - fixes

- Going to Court to confirm terms
 - Certified copy exists
 - Photocopy exists
 - No copy exists but:
 - Lawyer able to give evidence of template used at the time
 - Lawyer able to give evidence of trust deed executed as part structure set-ups
 - Lawyer gives evidence and Court agrees to vary terms of the trust deed – *Jowill Nominees Pty Ltd v Cooper* [2021] SASC 76
 - Schedule exists can Court makes orders with regards to the trust – *Mantovani v Vanta Pty Ltd (No.2)* [2022] VSC 342
- Self-correcting via a self-serving deed
 - *Beware that other parties are not bound to accept the deed
 - **Ideally requires all relevant parties to sign (i.e. original trustee at the time and settlor)



Lost trust deeds – where at

- Courts trending towards wanting to ensure trusts exist rather than be deemed to be invalid
 - Consider cases discussed recently *Re Cleeve Group Pty Ltd* and *Re Thomson* (previously discussed)
- Weigh cost of Court application v need for certainty as to terms of the trust
 - Is (say) paying \$20K worth the certainty that the trustee is complying with its terms where the trust holds > \$1m equity
 - *Advisor note* – although expensive, fixing mistakes cost money | always better to keep proper records
- Consider if having a new trust is more appropriate



Lost trust deeds – DIY beware

- Don'ts
 - Signing new deed
 - CGT and stamp duty implications
 - Ignoring the lost deed
 - Issues refinancing (?)
 - Not review the trust deed as terms may
 - Exclude former trustee as a beneficiary (changing trustee from individual to company)
 - State trustee cannot take actions or make distributions that '*would breach the Foreign Acquisition Takeovers Act*'

Lost trust deeds – look everywhere



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- Old advisors
- Law firm/website drafting the deed
- Institutions that have dealt with the trust:
 - Banks
 - Titles Office
- *Electronic copies an option moving forward?*



Related party transactions

- Evidencing what transactions are:
 - Gift
 - Loan
 - Repayment
 - Offset
- Note loans have a meaning under general law as well as tax law (expanded due to Division 7A)
- Otherwise, loans considered to be an advance of money with an obligation for its repayment
 - Lender has a *right in personam*
 - Gifts do not grant the giftor any right
- Lender bears onus of existence of loan



Related party transactions

- Journaling of transaction without reference of treatment of transaction generally not enough to establish a debt
- Exemptions depends on circumstances – i.e. transaction between two companies with the same directors
- In rare cases, a loan may arise where it is within an accountant's authority to characterise the payment – *Di Lorenzo Ceramics Pty Ltd v FCT* [2007] FCA 1006:
 - Directors did not consider and no agreement confirmed what the transaction was for (whether it was a loan or subscription for additional units)
 - No details as to the loan
 - Evidence existed that directors granted proper authority to accountant to characterise for the relevant entities



Related party transactions

- Easier to consider transactions pre-emptively or as contemporaneous as possible and include such evidence:
 - Resolution
 - Reference on a transfer statement
 - Formal agreement
- Also note the effect of loans being statute-barred in relation to interest free repayable on demand loans



Related party transactions

- Note that transactions between parents to children are usually presumed to be gifts
 - Are loans preferred - to protect from a relationship breakdown
 - Evidence now or wait 5 years for the relationship to breakdown and 'back date' (*don't do*)
 - Truth usually comes out from actions
- Clawback provisions in relation to gifts



Related party transactions

- Previously discussed that journal entries do not constitute a valid trust distribution or dividend payments or offset
- Ensure documents prepared in time



Trusts and family law

- Marital property v financial resource
- When are assets of a trust considered marital property
- *Balken & Vyner* [2020] FamCA 955:
 - Husband not sole appointor nor sole director/shareholder
 - Letter of wishes addressed to group of directors/shareholders outlining instructions
 - Controllers acted per letter of wishes based on evidence
 - Husband only in receipt of ~40% as opposed to 100% suggested by wife
 - Evidence showed role of independent director to review any decisions that the husband may have had carriage over
 - Case involved a trust dealt with as part of husband's parent's estate



Trusts and family law

- Factors to consider:
 - How are benefits distributed
 - Level of control
 - Ability for parties to borrow on trust funds
 - Ability to direct the management
 - History of how trust property treated
 - Where the trust property came from
 - Other past exercise of powers of the trust
- Will often rely on the evidence at hand



Trusts and family law

- Harder using own assets accumulated during lifetime
- More likely to be available where assets placed into trust from by other person's
- Difficult to trace through where asset split is truly discretionary



Base rate entity

- Still a great tax planning tool (?)
- Company a base rate entity if:
 - No more than 80% of its assessable income for the year of income is base rate entity passive income
 - Aggregated turnover for the year of income is less than \$50 million
- I.e. passive income of the company must be capped at 80%



Base rate entity

- ‘Passive income’ / base rate entity passive income – section 23AB *Income Tax Rates Act 1986* includes any of the following
 - a distribution by a corporate tax entity, other than a non-portfolio dividend (within the meaning of section 317 of the Assessment Act):
 - *non-portfolio dividend means a dividend...paid to a company where that company has a voting interest...amount to at least 10% of the voting power*
 - an amount of franking credit on such distribution
 - a non-share dividend
 - interest, royalties and rent
 - a gain on a qualifying security;
 - a net capital gain; and
 - an amount included in the assessable income of a partner in a partnership or of a beneficiary of a trust estate...to the extent that the amount is referable...to another amount that is base rate entity passive income
 - *that trust distributions related to passive income will be considered passive income – but if it is a non-portfolio dividend, it will not be considered ‘passive’*



Base rate entity

- LCR 2019/5:
 - *20. Where a franked dividend paid to a trustee of a trust is streamed to a beneficiary that is a corporate tax entity, it is not a non-portfolio dividend of the corporate tax entity, as the dividend is not paid to a company that has a voting interest of at least 10% of the voting power in the company paying the dividend.*
- Consider
 - Trust owns 100% shares in holding company which holds 100% shares in trading company
 - Trust owns 100% shares in bucket company and trust owns 100% shares in trading company
- Be aware apportionments where there are mixture of income
 - Benefits of simplicity

Beware other State stamp duty/land tax for trusts



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- Trust establishment duty:
 - NSW - \$500 + \$10 per additional copy
 - VIC - \$200
- Timing of duty payment
- Does not matter if Settlor in Queensland
- *We have identified trusts that have not been stamped accordingly where the deed notes certain parties as residing in other States*
- Interest/duty issues
 - More importantly, issues if a financier identifies

Beware other State stamp duty/land tax for trusts



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- Foreign stamp duty/land tax surcharges differ from QLD rules
 - Stamp duty:
 - NSW – looks at all beneficiaries but note some Countries exempted
 - VIC – looks at capital beneficiaries
 - Land tax:
 - NSW – as above
 - VIC - ‘absentee beneficiary’ is a specified beneficiary of a discretionary trust (not just a default beneficiary but includes anyone specifically named in the trust deed)
- Also note land tax:
 - NSW – no threshold
 - VIC – grouping provisions and low threshold



South Australian trusts

- Note South Australian trust legislation differs from Queensland
- *Trusts (Hague Convention) Act 1991* (Cth) and effect of such convention in relation to the interpretation of the governing location, namely:
 - Settlor may choose
 - Failing the settlor choosing, the Court must work out the proper law
 - May consider trustee address
 - *Need of clarity in drafting of the deed*
- Be wary of property law acts governing rule against perpetuity where real property held in other States – i.e. if South Australian trust holds property in a State with an 80 year perpetuity period, then trust may still need to vest within 80 years



Queensland trust law update

- Queensland trusts legislation under consideration of modernisation
- Introduced in 1973
- Current legislation did not refer to an appointor by term, but proposed bill contemplates such a position
- Proposed bill even considers what happens if there is no appointor for the trust at the time of death
- Vesting date may extend to 125 years (update in the Property Law Act if enacted)

How many trusts are really needed?



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- Rules complex
- Worth it?
- Can a company with discretionary dividend only shares work?
- Depend on the family circumstances and future intentions

Contact details

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