

## 2017 SA Trusts Day Avoiding Resettlement

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SESSION 6:  
**Avoiding Resettlement**

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2017 SA Estate and Business Succession Planning Day

### Avoiding Resettlement

#### Express Trusts

- Resettlement
  - At law
  - Federal Tax
  - State Duties



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### Avoiding Resettlement

#### Why Vary

- Over 800,000 trusts in Australia
  - Social Changes
- Small Business Structures
  - Business environment and technology change
- Family Wealth Planning
  - Family relationships change

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### Variation

#### Read the Deed

- Consider the whole of the deed
  - the natural and ordinary meaning of the words used;
  - the overall purpose of the document;
  - other provisions which relate to the one you are examining; and
  - common sense

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### Variation

No inherent General Law power to vary a trust deed

No power to vary in the *Trustee Act 1936* (SA)

#### Options

- Use power of variation or amendment in the deed
- Apply to the Supreme Court under 59B or 59C

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### Power of variation or amendment

- Can be exercised on its terms
- Form
  - Do you need a deed
- Consent
  - Whose consent is required
  - For whose benefit it the consent required

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### Power of variation or amendment

must be exercised for the purpose for which it was granted

*"within the intention of the settlor as evidenced by the trust deed creating the power. If the trustee exercised the power contrary to this principle, equity holds the exercise of the power as a 'fraud on a power', that is the power has been exercised for a purpose or with an intention beyond the scope of, or not justified by, the trust deed"*

*Mercanti v Mercanti (2016) 340 ALR 290, 219 (Buss J)*

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### *Mercanti v Mercanti*

- Family business dispute
  - Father started the business
  - Structure included two discretionary trusts
    - The first settled in 1979 and the second in 1996
  - 2004 did some succession planning
    - Varied both trusts to name elder son appointor and guardian
    - Father consented to variations

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### *Mercanti v Mercanti*

- Family business dispute
  - Father removed elder son as director of trustee
  - Elder son purported to change trustee and appoint company he controlled
- If original changes of appointor were valid in 2004 the new trustees were validly appointed – were they?

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### *Blenkinsop v Herbert*

- Family dispute
  - Family unable to agree
  - Trust could not be administered
  - Supreme Court authority to change fiduciary roles
  - Protector was not a fiduciary
    - Intent that the individuals could protect their own interests under the deed

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Wording of variation clause will determine what may be varied

- Trusts
- Duties of trustee
- Rights of trustee
- Powers of trustee
- Provisions or terms of the deed

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Substratum of the trust

- *"if an arrangement while leaving the substratum, effectuates the purpose of the original trust by other means, it may still be possible to regard that arrangement as merely varying the original trust"*  
*Re Balls Settlement Trusts*
- Benefit of the beneficiaries as a whole  
- *Kearns v Hill* (1990) 21 NSWLR 107

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- *Federal Commissioner of Taxation v. Commercial Nominees of Australia Ltd* [2001] HCA 33
- *Federal Commissioner of Taxation v. Clark and Anor* [2011] FCAFC 5
  - Special leave refused with costs

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•Creation of a new trust – Statement of Principles August 2004

- TD 2012/21
  - a change causes the existing trust to terminate and a new trust to arise for trust law purposes, or
  - the effect of the change or court approved variation is such as to lead to a particular asset being subject to a separate charter of rights and obligations such as to give rise to the conclusion that that asset has been settled on terms of a different trust

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- TD 2012/21
  - Adding/ removing beneficiaries
  - Extending powers
  - Changing definitions
  - Extending vesting date
  - Restricting trustee rights

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Anti Avoidance Taskforce – Trusts

- *"changes have been made to trust deeds or other constituent documents to achieve a tax planning benefit, with such changes not credibly explicable for other reasons"*
- Private Binding Ruling Authorisation Number: 1012921290075
  - Variations which apply to some of the trust property but not all of the trust property
  - *"NOTICE: The ATO is currently considering the tax consequences of 'trust splitting' generally. For more information, please search for 'Consultation' on ato.gov.au."*

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The terms of the *Stamp Duties Act 1923*

Section 4

Duties specified in Schedule 2 are charged on instruments specified in Schedule 2

- conveyance or transfer on sale of property
- conveyance operating as voluntary disposition inter vivos

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### Section 71(3)(a) deems

- (i) a transfer of property to a person who takes as trustee; or
- (ii) a declaration of trust; or
- (iii) the creation of an interest in property subject to a trust; or
- (iv) a transfer of an interest in property subject to a trust; or
- (v) the surrender or renunciation of an interest in property subject to a trust; or
- (vi) the redemption, cancellation or extinguishment of an interest in property subject to a trust, to be conveyances operating as voluntary dispositions inter vivos

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- Provision or extension of a power of the trustee
- Amendment to the administrative terms and conditions
- Terms such as the nomination of a trust officer
- Changes in interests or potential interests of the objects
  - Income
  - Capital

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### Discretionary trusts

- Potential beneficial interest defined
  - 'the rights, expectancies or possibilities of an object of a discretionary trust in, or in relation to, property subject to the discretionary trust' s 2*
- Transfer of a potential beneficial interest
  - [is] 'chargeable with duty as if it transferred the beneficial interest in the property that the transferee would have if the discretion under the discretionary trust were so exercised as to confer upon him the greatest benefit in relation to that property that can be conferred upon him under the discretionary trust.' s 71(8)*

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### More likely exemptions

- s71(5)(g)
- s71(5)(d)
- s71(5)(ai)
- s71CC
- s71CAA

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### Unit trust schemes

- Unit holder deemed to have a beneficial interest in the underlying property
- Market value net of liabilities
- Ad valorem duty

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### Unit trust schemes

- From 1 July 2018
  - sub-sections; 71(4), (4a) and (4b) to be repealed
  - Landholder threshold also removed
  - No duty on qualifying land

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|                                  | SA   | NSW  | VIC   | QLD  |
|----------------------------------|--|--|---|--|
| Declaration or settlement (cash) | No Duty  | \$500 (\$10 per copy)  | \$200   | No Duty  |
| Change Trustee                   | No Duty<br>Subject to conditions s71(3)(d) Stamp Duties Act 1923   | \$50<br>Subject to conditions s54 Duties Act 1997  | No Duty<br>Subject to conditions s33(3) Duties Act 2000 | No Duty<br>Subject to conditions s117 Duties Act 2001  |
| Change Discretionary Object      | Dutiable: income entitlements not payable as negligible value; capital entitlements payable: s71(3)(a) Stamp Duties Act 1923<br>See also SDA.003 | No duty payable on changes to discretionary objects as considered of negligible value.<br>See also DUT 017 | Subject to duty s8 Duties Act 2000                      | Subject to Duty dependent upon the extent of the variation and also shareholdings in a corporate trustee |

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|                                  | TAS   | NT   | WA   | ACT  |
|----------------------------------|---|--|--|--|
| Declaration or settlement (cash) | No Duty from 1 July 2017                          | \$20 (\$5 per copy)  | No Duty  | No Duty  |
| Change Trustee                   | \$50<br>Subject to conditions s37 Duties Act 2001 | No Duty<br>Subject to conditions Schedule 2 Stamp Duty Act 1978  | \$20<br>Subject to conditions s119 Duties Act 2008 | No Duty<br>Subject to conditions s54 Duties Act 1999 |
| Change Object                    | Subject to duty See also s77 Duties Act 2001      | Subject to duty unless all are family members: s56BAB Stamp Duty Act 1978 NB: change in control corporate beneficiary may be assessable s56BAC Stamp Duty Act 1978 | Subject to duty s11 Duties Act 2008                | Subject to duty                                      |

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### Before undertaking a variation of trust

- do you or your client have the original deed of trust;
- what may be varied;
- who has the power to make the change;
- what procedures are needed;
- whose consent is required; and
- are any specific restrictions on the power of variation

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### Consent of the settlor

- "The parties who executed an instrument are jointly and severally liable to pay the duty charged in respect of the instrument."*


s 4 Stamp Duties Act 1923

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