

Trusts Demystified



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Express Trusts

2

Relationship recognised and enforced by the courts

- Three certainties
 - Subject matter
 - Beneficiaries or purpose
 - Intention
 - *Byrnes v Kendle* (2011) 279 ALR 212



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Trusts

3

- Discretionary
 - not all entitlements of the beneficiaries to income or corpus are immediately ascertainable
 - no constant, fixed normative meaning
- Unit Trust
 - ≠ fixed trust
 - Unit is property - subject to deed can be transferred



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Trusts

4

- Family Succession
 - Keeping it in the family
 - Separate income and corpus beneficiaries
 - Limit definition of income and corpus
 - Restrict variations
 - Family Court



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Trusts

5

- Class Trust
 - Two or more distinct classes of beneficiaries
 - Each defined in relation to a given person
 - Fixed as between classes
 - Discretionary within classes



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Trusts

6

- Protective Trust
 - Assistance in managing financial affairs
 - Trusted family or independent trustee
 - Permanent need or during minority
 - May be Special Disability Trust
 - Frequently testamentary



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Trusts

7

- Farm Land Trust
 - 71cc Stamp Duties Act
 - Otherwise any of the above
- Testamentary Trust
 - Any of the above settled by will
 - Variation



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Roles

8

- Settlor
 - Unrelated professional/ administrator
 - *Application by South Melbourne Continental PL* [2008] VSC 398
 - Intention
 - *Byrnes v Kendle* (2011) 279 ALR 212
 - Consents
- Trustee
 - The archetypal fiduciary
 - Duties and powers
 - Single trustee



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Roles

9

- Appointor / Guardian
 - No normative meaning – depends on deed
 - Appoint and remove a trustee
 - Consent to distributions
 - Consent to introduction or removal of beneficiaries
 - Consent to significant transactions
 - Fiduciary? *Blenkinsop v Herbert* [2017] WASCA 87



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Roles

10

- Distributor / Property Appointor
 - Meaning per deed
 - Usually some power to direct trustee distributions
 - Fiduciary?
- Beneficiary
 - Rights under deed
 - Due administration
 - List or class



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Benefits

11

- Flexibility
- Asset Protection
 - Trustee
- Succession
- Taxation
 - Federal
 - State



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Drafting Deeds

12

- Client needs
 - Clarity
- Powers
 - Fraud on a power
- Control
 - Who and how – succession
- Perpetuity
 - 80 years, life in being or discretion of the trustee



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Drafting Deeds

13

- Beneficiaries
 - Definitions
 - Time to change those very broad classes
 - Foreign Trusts
 - Payroll Tax
- Distributable income
 - Definitions
 - Capital or income determination
 - *Forrest v Commissioner of Taxation* [2010] FCAFC 6



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Variation

14

- Power of variation or amendment
 - Must be in deed
 - Can be exercised on its terms
- Form
 - Do you need a deed
- Consent
 - Whose consent is required – is it fiduciary



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Variation

15

- Variations
 - Adding/ removing beneficiaries
 - Extending trustee powers
 - Streaming capital gains and franked dividends
 - Changing definitions
 - Restricting trustee rights
 - Changing appointors or fixing succession



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Variation

16

- Supreme Court
 - Authorise an 'advantageous dealing'
 - Section 59B
 - Vary or revoke all or any of the trusts
 - Section 59C
 - Not to avoid tax
 - Could extend vesting date
- Cost



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Variation

17

- Extending vesting
 - Is the power of variation adequate
 - Is a consent required
 - Law against perpetuities
- Trustees that just keep on and on and on and on
 - *Clay v James* [2001] WASC 18



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Advising

18

'consider what a reasonable person having the knowledge of the settlor at the time of the settlement would have understood the language in the document to mean'

Andtrust v Giovanni Andeatta [205] NSWSC 38

'this document is what we rely on to determine the construction of the trust'

Byrnes v Kendle (2011) 279 ALR 212



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Advising

19

'Consult your own understanding, your own sense of the probable, your own observation of what is passing around you'

Jane Austen Northanger Abbey



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Advising

20

- Trust Splitting
 - Appoint a new trustee over only one or some assets
 - Does the deed allow
 - What are the consequences
 - Tax file numbers
 - Changes to the separate trusts
 - Restricting the indemnity of each trustee
 - ATO views – to the extent available



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Advising

21

- Capacity
 - Corporate Trustee
 - s 201F *Corporations Act 2001*
 - Individual Trustee
 - Appointor
 - Provisions in Deeds
 - Powers of Attorney



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Advising

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- Trustee Duties
- Honestly and in good faith
 - to learn the terms of the trust
 - to comply with the terms of the trust
 - to preserve and protect trust property
 - to exercise care
 - not to delegate
 - to keep accounts



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Advising

23

- Record Keeping
 - Trustee Regulations 2011
 - Corporate Law
 - Beneficiaries' rights to information
- Lost Deeds
 - Execution
 - Provisions
 - Reasonable efforts



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Vesting

24

- Distribution
 - Power or duty
 - Accumulation
 - Within the class
- Vesting
 - Need assets be distributed
 - Assets not distributed – dealing with income
 - Tax consequences



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Questions

25

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