

Issues: new and old



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Tax Avoidance Taskforce - Trusts

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- Targets higher risk trust arrangements
- Targets promoters
- Focus on high wealth private groups
 - Complex distributions
 - Trust and taxable income mismatches
 - Cross border
 - Avoidance and evasion



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An Australian Issue

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- RMIT Research Paper 2018
- *Current Issues with Trusts and the Tax System*
 - expect over 1 million trusts by 2022
 - Australian trust taxation not comparable to international
- Australian use of trusts as business entities



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RMIT Research Paper

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- Identified 4 main issues
 - Chains of trusts – interlinking and circular distributions
 - Questionable present entitlements – loss or exempt entities giving/lending back distributed amounts
 - Exploiting trust law/ tax law income differences
 - Recharacterisation of income – different tax consequences
- Difficulty meeting international obligations
- Unauthorised legal practice



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Discretionary Trust – Benefits

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Why we use them

- Flexibility
- Asset protection
- Succession planning
- Taxation



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Discretionary Trust – Disadvantages

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Why not

- Specific Legislation
 - PSI
 - R & D
 - Franking credit rules
 - Loss making enterprise
- Complex legal requirements
- ATO changing views



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99B

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Assesses beneficiary on amounts applied

- Enacted 1978
- Renewed interest 2006 with Project Wickenby
- 2012 Howard v Commissioner of Taxation
- 2016 draft determinations
- Audit Activity
- 2017 determinations finalised



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Unforeseen

- Interim legislation in 2011 interaction
- TD 2017/23
- TD 2017/24
- Capital gain from overseas trust is 99B income
 - No character flow through
 - No discount
 - No ability to apply capital losses



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Excludes

- Income taxed under 97, 98, 99 or 99A
- Income attributed under 102AAZD
- Corpus
- Not assessable if received directly



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2019 Campbell AAT

- Amounts received from NZ Trust
- AUSTRAC
- Assessable under 99B
- Absence of evidence
- Records kept by NZ accountants
- Loans or distributions



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99C

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When amount is applied for beneficiary

- Benefits accrued
- Loans
- Increase the value of property or rights held for
- Power to obtain the benefit
- Assigned to another person
- No need
 - Present Entitlement
 - Rights at law
 - Rights in Equity



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Broader Applications

- Nothing in legislation limits to non-resident trusts
 - *Layala Enterprises* 1998
- Applied for
 - Non assessable distributions
 - Use of trust property
 - Interest free (low interest) loans
 - Guarantees

'[Does the] extreme width of s.99B and associated sections require it to be read down having regard to the obvious legislative purpose in enacting it'

Traknew Holdings Hill J



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99B

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- Ensure client awareness
- Contact with overseas advisors
- Keep copies of documents on file
- Watch for indications of changing views



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- Anti-avoidance provision
- Enacted 1978
- No limitation period
- Requirements
 - Present entitlement person 1
 - Reimbursement Agreement
 - Required purpose
 - Benefit person 2



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- Not if under legal disability
- Not if entitled as trustee of another trust
- Not if ordinary family or commercial dealing



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- *East Finchley* 1989
- *Prestige Motors* 1998
- *Idlecroft* 2005
- *Raftland* 2008



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- 2009 Mark Konza
- 2014 Fact Sheet
- 2015 'attracting attention'
- 2018 Drafting Tax Ruling
- 2021 Draft Ruling expected
 - Purpose of eliminating or reducing tax
 - Ordinary family or commercial dealings



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- 2014 Fact Sheet examples
- Testamentary trust for grandchild until he turns 25 - family
- UPE on 109N terms- commercial
- Loan to beneficiary at interest – commercial
- UPE to company paid before lodgement date and on distributed – not commercial



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- Is there a dichotomy
 - Family
 - Commercial
- Family Business
 - Elements of both



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- Trustee conducts business
 - Amounts distributed to beneficiaries
 - Cash retained by the Trustee
 - invest
 - fund working capital
 - Purpose increase future benefit to beneficiaries
- Is this an ordinary commercial dealing?
- Most examples relate to another person benefiting not the trustee



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- Any trust may make FTE
- Family Group defined
 - generally more limited than trust beneficiary provisions
- Variety of reasons
 - access to franking credits
 - small business restructure rollover
 - ability to access tax losses
 - enable distributions to another trustee with tax losses
 - access losses derived by associated company



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- Unlimited Amendment Period
- Example Trust
 - Parent and two children
 - One over 18
 - One under 18
- Would 100A apply



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Practice Risk

Have the conversation
Document that you had the conversation



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Questions

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