

Article

TAX

Amending Trust Deeds

By John Tucker

The capital gains consequences of the exercise of a power of amendment of a Trust Deed were a subject of concern for advisors during the course of the litigation of the proceedings between the Commissioner of Taxation and David Clark¹.

The concern lay with the Commissioner's contention that amendments made to a Trust Deed which affected more than the administrative provisions of the deed amounted to a resettlement of the Trust and consequently caused CGT event E1 or E2 to happen.

This concern was largely relieved by the High Court's refusal of the Commissioner's applications for special leave to appeal against the decision of the Full Federal Court.

Then on 2 October 2012 the Commissioner issued Taxation Determination TD 2012/21 in which he accepted that in most cases these events will not happen if the terms of a Trust are changed pursuant to a valid exercise of an existing power of amendment contained within the Trust Deed, or with the approval of the Court, unless the variation terminates existing trusts or causes trust CGT assets to be held on a separate charter of rights and obligations.

1 [2011] FCAFC 5

In making amendments within the scope of those that will not cause CGT events E1 or E2 to happen it remains important however to ensure that they are authorised by powers within the Trust Deed and the powers are properly exercised.

An example of the sensitivities in the interpretation of powers of amendment is contained in the recent decision of Le Miere J of the Western Australian Supreme Court in *Mercanti v Mercanti*². The case arose from a dispute amongst the second generation beneficiaries of two family Trusts, the MMF Trust and the FW Trust, in the course of which amendments were made to remove the existing Appointor and appoint a new Appointor of each Trust.

The power of amendment in the MMF Trust Deed was, relevantly, to 'revoke, add to or vary all or any of the Trusts, terms and conditions hereinafter contained and declare any new or other Trusts, terms and conditions concerning the trust fund or any part or parts thereof'.

After articulating the principles of construction to be applied to the interpretation of the amending clause Le Miere J held that the natural and ordinary meaning of the words in the

2 [2015] WASC 297

amending power was that the Trustee may vary the terms and conditions of the Trust Deed including the person who was the Appointor.

Arguments against this interpretation were unsuccessfully advanced based on the decision of Douglas J in *Jenkins v Ellett*³ where a power to vary 'all or any of the trusts declared... was held not to amend 'the Trust comprised in this Deed and the Schedule' only the Trusts declared in the Trust Deed itself.

In that case the difference between the singular and plural reference to the word 'Trust' was considered significant. The reference to 'Trusts declared' was not considered to extend beyond Trusts declared in clause 2 of the Deed containing the words declaring the Trusts.

In contrast to the power in the MMF Trust the amendment power for the FW Trust Deed provided that 'the Trustee may vary the Trusts hereinbefore provided'. Le Miere J held this clause to be confined to the earlier provisions of the Deed and not to extend to the identity of the Appointor, as this appointment was not to be found in these earlier provisions.

continued overleaf...

3 [2007] QSC 154

A distinction was drawn between the expression 'the Trust' and 'the Trusts, powers and provisions'.

This notwithstanding that the definition clause in the FW Trust Deed defined 'Trust' to mean 'the trusts, powers and provisions as constituted by this Deed of Settlement'.

The power of amendment was noted to refer to varying 'the trusts hereinbefore provided' not 'the Trust'. The declaration of the Trusts was found to distinguish between 'the Trusts' and 'the powers and provisions in the Trust Deed'. Also the Deed was noted elsewhere to distinguish between the 'Trusts' and 'authorities, powers or discretions' of the Trust Deed.

The consequence of the amendment being beyond power was that the amending Deed was void.

Powers of amendment in Trust Deeds, particularly those that were written longer ago, often contain restrictive provisions that also need to be carefully considered in determining whether amendments to the Trusts can be lawfully made.

In making amendments within power heed needs also to be taken of the Commissioner's warning that amendments may result in the Trust terminating or the CGT assets commencing to be held under a separate charter of rights and obligations such as to lead to a conclusion that they are now held on

terms of a distinct (ie different) Trust, as this will cause CGT event E1 or E2 to happen.

The approval of the amendment to the MMF Trust to change the Appointor also highlights that in the drafting of Trust Deeds careful attention must be given to the potential impact of amending provisions and to the extent to which the Settlor or other persons establishing the Trust require them to apply. Unfortunately many Deeds are procured from web sites or sources who do not address adequately, or possibly at all, the potential impact of very wide powers of amendment.

For further information or for assistance, please contact a member of DW Fox Tucker's Tax team.



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