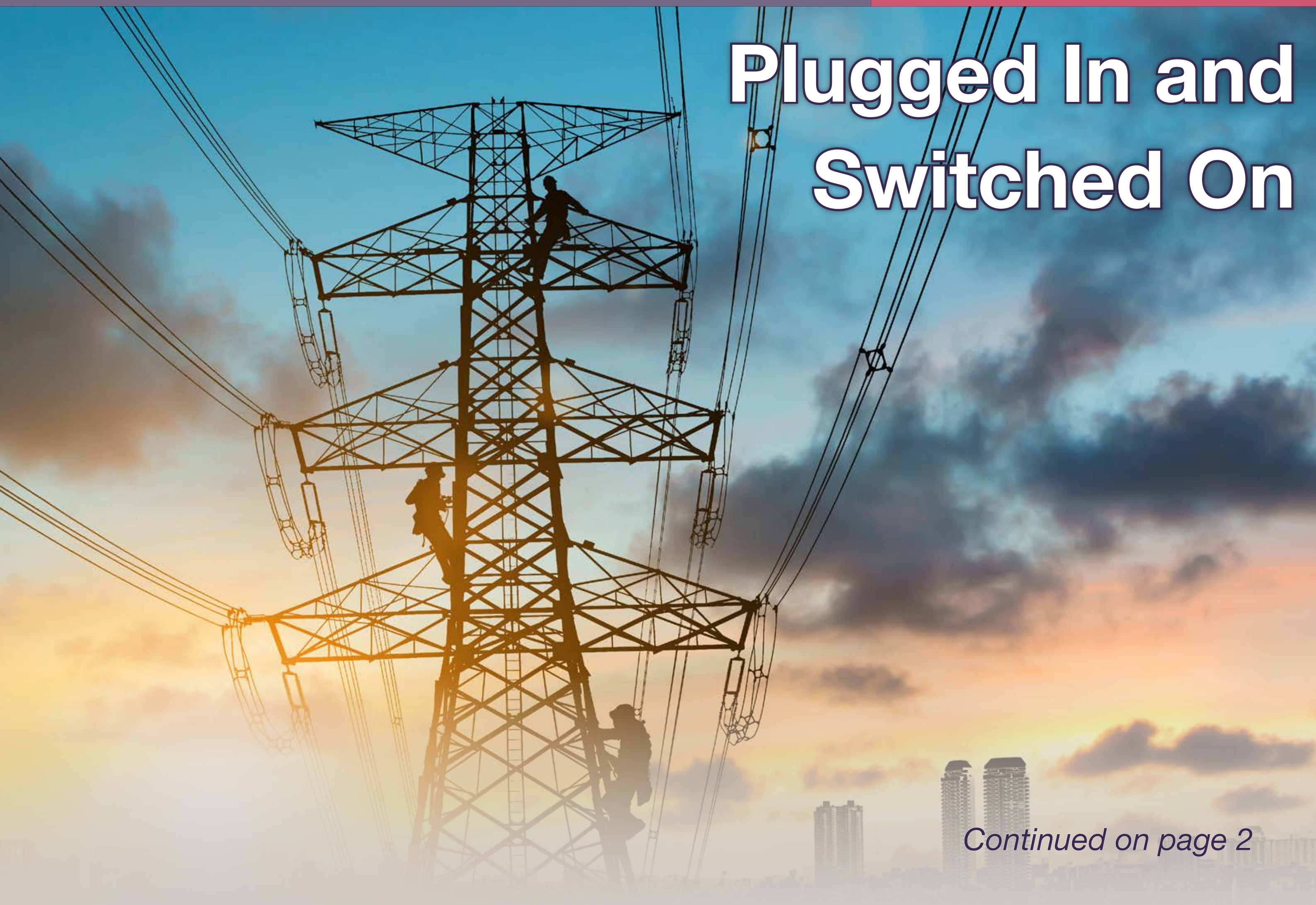
DW Fox Tucker Lawyers

2018

Spring Report



Plugged In and Switched On

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DW Fox Tucker Lawyers

L14, 100 King William Street, Adelaide, SA 5000
p: +61 8 **8124 1811** e: info@dwfoxtucker.com.au

dwfoxtucker.com.au

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CLIENT PROFILE

National Electrical and Communications Association (NECA)

When it comes to looking after an electric Australian industry, NECA is plugged in and switched on.

As a peak industry body, the National Electrical and Communications Association (NECA) plays a vital role in representing the needs and interests of electrical and communications contractors Australia wide. NECA SA/NT, the local chapter headed by 21-year veteran Larry Moore, is also kicking goals providing tailored business advice, assistance, and information to more than 500 contractors.

NECA SA has long provided support and advocacy for the electrical and engineering workforce, covering industrial relations, OH&S, government regulators and more. But as Larry points out, the NT chapter virtually existed in name only until a move from the Fair Work Commission prompted the SA team to secure a merger that has seen a resurgence in the Territory's chapter.

"The NT chapter was dormant for many years with very few members. The Fair Work Commission gave an ultimatum, use it or lose it. SA took the lead and took the NT operation under its wing. We have long-standing links with NT; there's a natural synergy. The new chapter is gaining momentum, lots of activities up there."

Apart from providing members with an extraordinary range of benefits, NECA SA/NT proactively champions the progression of industries it represents at every possible turn. One such notable initiative is its Industry Roadshow, which has gathered significant kudos over the past 15 years under Larry's stewardship. He is especially pleased with the steep trajectory of success and the influential people it reaches.

"We took over the roadshow from the industry regulator some 15 years ago. When we did, it was a little underwhelming; now we touch more than 1400 industry influencers every year. It's the only event of its kind in our industry and is welcomed with open arms by our industry sectors."

Where tradies take home rewards

Speaking of huge successes, the annual NECA SA/NT Excellence Awards night took place just prior to this report going to press. A significant event on the Electrician's social calendar, the awards promote excellence within the local electrical and communication industries across seven categories, with winners automatically entered into the national awards.

This year, top gongs ranged from Suntrix's work in creating Australia's largest and first community-funded, council-owned, floating solar system, to Electric Solutions' WOW-factor innovations in cleverly practical internal, external, feature, and emergency lighting for the quirky d'Arenberg 'Cube'.

The spark of collaboration

All great stuff and no mistake, but no events or awards will distract Larry and his team from focusing on the continued achievements across its core function: advocating on behalf of its members. As an example of NECA's proven agility in its role, Larry points to the introduction of 'Choice' of electric meters. The new metering arrangements recently rolled out nationally through blanket Federal legislation, which Larry explains caused chaos and interfered horrendously on a local state-based level in South Australia.

"The Federal legislation was modelled on Eastern States markets, which are vastly different to the SA market, making it now almost impossible to efficiently coordinate meter installations in SA, because the regulations now require a multitude of different parties in the simple process of installation of meters. In an effort to combat this chaos, we brought together a collaborative forum of National and state regulators, distributors, retailers, meter providers and installers to resolve these issue which hopefully will be finalized in the near future."

Taking the lead in training

NECA members can benefit from a wide range of training and education programs covering technical skill development in specific areas, upskilling, and management. Last year, NECA was responsible for training 4,800 apprentices and 4,000 training spots nationally.

Larry is the Chair of the national Industry Reference Committee, created by the Federal government to develop and maintain trade training packages. He's also been Chair of the SA Electrotechnology Industry Skills Board for a decade, which has provided industry intelligence to both the state government department of VET training and industry in general. Larry offers an insight into the current state of apprenticeship growth, and what needs to change in order to enhance the feed of skilled people into electrical and communications professions.

"We also recently established a new group training organization, NECA Careers and Apprenticeships, with the express aim to develop a better flow of good tradespeople for our industries. Apprenticeship numbers are lower than previous years, due to lack of opportunities, not lack of interest. It's simply down to the economy and lack of available work."

"SA Industry and Skills Minister, David Pisoni, recently announced 20,000 new apprenticeships with $200m funding. Which is great but I think it may be a challenge to fill those roles, simply because employers need to have the work first or at least have financial assistance made available to those employers to employ apprentices."

Another day, another challenge

Another big item on the whiteboard for Larry and his team is the unfair nature of contracts, and in particular the outrageous shifting of risk from builder to subcontractor, and ensuring the security of payment legislation is relevant and workable.

"In recent times NECA has joined with other industry associations to create a new association Specialist Contractors SA, who are advocating on behalf of all members across sectors to ensure reasonable terms and conditions are included across all state government contracts. NECA is approaching these issues differently by collaborating and communicating with other like organisations to achieve better outcomes collectively."

One such organisation that NECA has partnered with for many years is DW Fox Tucker. In fact Larry's association with DW Fox Tucker's Ben Duggan dates back 21 years, to when Larry was head-hunted from his position as an organizer/ industrial officer at the electrical trade union, crossing the aisle to join NECA. Ironically and somewhat amusingly, with Ben's help, at NECA Larry found himself defending the very actions he had initiated on behalf of the union.

NECA's deep association with Ben and DW Fox Tucker continues to this day. It's a very stable and rewarding connection.

FOR MORE INFORMATION ABOUT NECA:

Phone: +61 8 8272 2966

Visit: https://neca.asn.au

national electrical and communications association

FIRM NEWS

DW Fox Tucker & Bradbrook Lawyers

Two eminent employment law specialists join forces

DW Fox Tucker is delighted to announce its merger with Bradbrook Lawyers, another of Adelaide's premier employment law practices. This significant joining of forces is the result of many months of strategic discussions between the two organisations, which have profoundly similar core values, philosophies and a dedication to providing excellent service to their clients.

A client champion and a fierce competitor on the employment law circuit

Jodie Bradbrook, Bradbrook Lawyers Principal, is highly regarded in the South Australian legal profession. Known for her passion and determination in taking care of her clients, and highly valued for her integrity, straight talking and innovative legal solutions. Jodie's impressive portfolio of achievements has seen her recognised in Doyle's Guide as one of Adelaide's leading employment and WH&S law specialists.

As Jodie explains, old allegiances made her carefully considered decision much easier: *"Before starting my own practice I'd worked with DW Fox Tucker's predecessor firms Donaldson Walsh and Phillips Fox, so the move is a kind of 'coming home' for me, and I am really looking forward to working with their great people again."*

Jodie joins DW Fox Tucker's employment and workers compensation teams as a director, working alongside much-credited fellow directors Ben Duggan and Patrick Walsh, under the stewardship of one of South Australia's most respected workers compensation lawyers, John Walsh.

DW Fox Tucker directors warmly welcome new strength in employment & workers compensation capability

Joe DeRuvo, DW Fox Tucker managing director, couldn't speak more highly of Jodie or sound more excited about the opportunity this merger presents. *"Since establishing Bradbrook Lawyers in 2011 Jodie has built a brilliant practice, servicing a broad range of clients across multiple industries,"* Joe explained, *"by applying the same steadfast philosophy around client service that we employ here at DW Fox Tucker. The synergies between our organisations are substantial, so when Jodie told us the growth in her firm had reached such a point she was ready for the next step, we happily started the ball rolling. This coming together was a natural choice, and puts our firm in a strong position to continue to provide a strong, cost-effective and responsive alternative to the largest firms in SA and nationally."*

DW Fox Tucker director and head of employment and workers compensation, John Walsh, is similarly upbeat about the addition of Jodie's exceptional expertise to his already talented group. *"I've known Jodie for many years, she has a tireless work ethic in the service of her clients, finely-tuned expertise and is such a dynamic practitioner. Her innovative approach to the practice of law will enhance our reputation and highlights our perpetual push for excellence in providing first class service to our clients. It is an exciting time in the evolution of DW Fox Tucker. Our expanded employment and workers compensation capability will position us as one of the strongest, most diverse groups in the state."*

So if you're an employment law or workplace compensation client with DW Fox Tucker or Bradbrook Lawyers, you can still look forward to receiving the same excellent service, but with the added reassurance that you'll have an even deeper well of legal talent on your side.

From 19 November 2018, Jodie Bradbrook can be contacted by telephoning (08) 8124 1811 or by emailing jodie.bradbrook@dwfoxtucker.com.au.

FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:

Joseph DeRuvo Managing Director
p: +61 8 **8124 1872**
joseph.deruvo@dwfoxtucker.com.au

INSIGHT | **By William Esau**

Retirement Village Unit

Termination of Resident's Contract

A resident of a retirement village unit governed under the *Retirement Villages Act 2016* **(SA) (Act)** will sign a Resident's Contract ("Contract"), which normally provides for an occupation license for the unit to be granted to the resident in consideration of the resident making of a loan to the Operator. The loan is usually payable soon after the signing of the Contract.

A Contract will usually provide for the termination of resident's rights by the Operator in case of a breach of the contract or a certain period of notice being given. Often this period of notice is 14 days or thereabouts. In the case of a breach of the Contract by the resident, the Contract usually allows the Operator to terminate the Contract on the basis of the resident having committed a breach of the Contract or the rules. Sometimes this breach arises because the resident has been unable to pay the loan amount required to be paid under the Contract. Typically this will happen where the resident has been unable to sell a house which needs to be sold in order to pay the loan amount.

The termination of a Contract and, arising from this, the requirement for the resident to vacate the unit, will potentially be distressing for the resident. The question is, what rights does the resident have in these circumstances?

Section 44 of the Act provides that a resident in a retirement village has a right of occupation that cannot be terminated unless the resident commits a breach of the Contract or the rules and the Operator terminates the resident's right of occupation on that ground. A Contract also might be terminated where the resident acts in a manner that adversely affects the health and safety of persons working in the retirement village or that seriously disturbs the peace or comfort of other residents of the retirement village.

A failure to pay the loan amount when due would ordinarily be a breach of the Contract.

However Section 44(8) of the Act provides that the Operator's decision to terminate a resident's right of occupation is ineffective unless the Tribunal (being the South Australian Civil & Administrative Tribunal), on the application of the Operator, is satisfied on proper grounds, which are sufficiently serious to justify termination of the right of occupation, exist and confirms the Operator's decision.

If the Tribunal confirms the Operator's decision then it must fix a period of time within which the resident must vacate the residence.

Under Section 44(12) if the Operator decides to terminate a resident's right of occupation the Operator must give the resident notice:

1. Setting out the grounds of the decision;
2. Providing the resident with a copy of the Operator's dispute resolution policy;
3. Informing the resident that the decision is subject to review by the Tribunal; and
4. Informing the resident of his or her rights with regard to such a review.

A failure to follow this procedure may result in a prosecution with a maximum penalty of $10,000.

Section 45 of the Act requires an Operator to have a dispute resolution policy and it must be provided on request to the resident.

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Section 46 of the Act provides that a party to a dispute between an Operator and a resident may apply to the Tribunal for a resolution. However an application should not be made to the Tribunal unless the parties have made reasonable attempts to resolve the dispute. This means that where there is the delay in paying a loan amount it is necessary and reasonable for the Operator and the resident to try and resolve the dispute regarding the payment. A resolution of the dispute may involve the payment of interest. At a hearing the Tribunal may make such orders as it thinks appropriate including an order for the payment of the amount under the Contract or the payment of compensation for loss or injury. Alternatively the Tribunal may confirm the Operator's decision to terminate a right of occupation.

The various provisions of the Act make it clear that a retirement village Operator cannot just terminate a right of occupation where there is a delay or a breach in the payment of a loan amount on the due date. There is a process to be undertaken before the Operator can lawfully terminate a right of occupation of a retirement village unit.

DW Fox Tucker Lawyers are able to advise on resident rights and Operator rights under the Act.

FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:

William Esau Director
p: +61 8 **8124 1955**
william.esau@dwfoxtucker.com.au

INSIGHT | **By John Tucker**

Trust Splitting

Tax lawyers have a propensity for applying slickly phrased euphemisms for sets of procedures known commonly among them.

In this category are "Trust Splitting" and the previously popular "Trust Cloning".

Both procedures have been employed to achieve a common primary outcome; in summary, to divide the control of assets held under an existing trust among a selected group of existing beneficiaries thereby removing the assets from the control of other persons all without causing a CGT Event to happen nor triggering a liability for ad valorem stamp duty.

The relevant CGT Events of concern, from which the procedures sought exemption, are those known as CGT Events E1 and E2.

At the time when Trust Cloning achieved popularity, CGT Event E2 contained an exemption applicable where a transfer occurred between trusts with the same beneficiaries. This exemption was removed on the introduction of the current Section 104-60.[1] The exemption was formally contained in Section 104 60(5)(b).

The exemption required that the transfer be between trusts the beneficiaries and terms of which were both the same. Tension steadily built between the Commissioner of Taxation and taxpayers over the application of this section. From an accepting interpretation in Taxation Determination TD2004/14 the Commissioner progressively found circumstances where the exception would not apply.

Trust Cloning was particularly popular in some of the Eastern States for stamp duty reasons. In those States an exemption existed for conveyances where there was no change in beneficial interest in the property conveyed. The technique was to establish a trust in identical terms to an existing trust but with a different trustee. Assets would then be transferred from the trustee of the original trust to the trustee of its clone. Progressively the

A difference exists in the Cloning and Splitting procedures and this has consequences with respect to capital gains tax.

1 of Income Tax Assessment Act 197 (ITAA 97)

Australian Taxation Office pointed to provisions between the original trust and its clone which it said prevented exclusion even though the terms of each trust were, on their face, identical. For example, if the original trust deed excluded, or included, its trustee as a beneficiary the Commissioner argued that the existence of different trustees in the original and cloned trusts meant that the two trusts did not have identical beneficiaries. Arguments were also raised in relation to the interests of the trustee of the original trust under its rights of indemnity and it was even argued that the existence of a Family Trust Election made with respect to the original trust and not applicable to the cloned trust would mean that the terms of the original and cloned trusts were not the same.

While the Trust Cloning exemption has been removed that is not to say that Trust Cloning is a redundant strategy, particularly in the Eastern States where the Stamp Duty exemption exists. There can be circumstances where causing CGT Event E2 to happen may be of no concern. For example, there may be no gains in value of the assets to be transferred, or losses in the original trust which will shelter any gains or gains that will be made will be eligible for some form of tax shelter. Indeed, triggering eligibility for tax shelter may be an advantage, for example, if the gains are such that their individual recipient will be entitled to the small business CGT concessions[2] at the time but potentially ineligible in the future. Causing a CGT Event to happen may provide significant taxation advantages. Here, causing a CGT event to happen can be done more simply though than by Trust Cloning.

Trust Cloning did not enjoy the popularity in South Australia that it did in the Eastern States. This was because here the exemption for stamp duty that once existed for transfers where there was no change in beneficial interest had long been abolished. In its place Section 71(3) of the *Stamp Duties Act 1936* deems an instrument effecting or acknowledging, evidencing or recording a transfer of property to a person who takes as trustee to be a conveyance operating as a voluntary disposition inter vivos and consequently liable to ad valorem duty. Section 71(5)(d) however deems a transfer of property for the purpose of effectuating the retirement of a trustee or the appointment of a new trustee not to be such a conveyance subject to the Commissioner being satisfied that it is not part of a scheme for conferring a benefit, in relation to the trust property, upon the new trustee or any other person, whether it is a beneficiary or otherwise, to the detriment of the beneficial interest of any person.

This difference in Stamp Duty exemptions attracted use of the Trust Splitting procedures in South Australia in preference to Trust Cloning.

A difference exists in the Cloning and Splitting procedures and this has consequences with respect to capital gains tax. While the Cloning process relied on the former exemption for a CGT Event E2 Splitting looked to that exemption and provisions applicable to CGT event E1.

CGT Event E1 happens under Section 104-50 of ITAA 97 where a new trust is created by declaration or settlement. The note to Section 104-55(1) however states that a change in the trustee of a trust does not cause the Event to happen. The note in its current form refers to a change in the trustee of a trust not constituting a change in the Entity that is the trustee of the trust, meaning that CGT Event E1 will not happen merely because of a change in the trustee. The current reference to Entity is because in Section 960-100(2) the trustee of a trust is taken to be an Entity consisting of the person who is the trustee or persons who are the trustees at any given time.

Aside from the specific exemptions relating to the appointment of a new trustee, Trust Splitting raises the question whether the assets transferred to the new trustee, to be held on the trusts of the original trust deed, comprise a separate trust estate to that upon which the assets that haven't been transferred and remain under the control of the original trustee comprise. Is there a new trust with respect to the split assets?

The possibility for argument that there are different beneficiaries by reason of the exclusion or inclusion of the trustee for the time being among the eligible beneficiaries of the two trusts remains. Further, it is generally the case that for the split to achieve its objectives some amendment to the trust deed as it is to apply to the split assets is likely. Most notably if the trust deed contains provisions for an appointor with various controlling

2 in Division 152 ITAA 1997

continued overleaf...

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powers it is likely that the identity of the appointor, as it applies to the split assets, will be the subject of change. Also, in the process of splitting, if there are liabilities that will attach to the split assets the rights of the original trustee in respect of these assets may be sought to be modified.

Until recently the Commissioner of Taxation appeared to accept that on a simple trust split, involving the appointment of a new trustee to certain assets, including where the original trustee's rights to directly access the split assets to exonerate or indemnity itself against liabilities were modified, and the identity of an appointor changed, CGT Event E1 would not happen.

This acceptance has not however been manifested in any particular Ruling or Determination by the Commissioner. Interpretative Decision 2009/86 provided an individual response that a new trust had not been created in the circumstances that it considered but that decision has since been withdrawn. Nevertheless the Commissioner has not been seen to be active in attacking trust splits, though that position may not continue.

Historically the Commissioner has, in somewhat similar circumstances, sought to assert the creation of a new trust. On 9 June 1999 the Commissioner issued a 'Statement of Principles' in which he set out principles he claimed should guide trustees as to when changes to a trust cause the trust to end and be replaced, by way of resettlement of the existing trust, into a new trust thereby causing CGT Event E1 to happen.

The Commissioner sought to have these principles judicially endorsed through litigating two leading cases. The first of these was ***FCT v Commercial Nominees of Australia Ltd*** [2001] HCA 33 where in the High Court the Commissioner unsuccessfully argued that changes affecting superannuation fund beneficiaries had the effect of creating a new trust. The second was ***FCT v Clark*** [2011] FCA] 1455 where in the Full Federal Court the Commissioner unsuccessfully argued that changes to a trust deed made within the scope of a power of amendment denied the continuity of a trust.

As a consequence of these decisions the Commissioner issued Taxation Determination 2012/21 in which he

... the Commissioner has not been seen to be active in attacking trust splits, though that position may not continue.

accepted that amendments to a trust made in proper exercise of a power of amendment contained under the deed will not prevent continuity of a trust irrespective of the extent of the amendments made so long as the amendments are properly supported by the power.

In the same determination the Commissioner nevertheless asserted that 'even in instances where a pre-existing trust does not terminate it may be the case that assets held originally as part of the trust property commenced to be held under a separate charter of obligations as a result of a change to the terms of the trust – whether by exercise of a power under the deed (including a power to amend) or court approved variation – such as to lead to the conclusion those assets are now held on terms of a distinct (that is, different) trust'.[3]

In support of this claim the Commissioner draws on a decision of Commissioner of State Revenue the ***Lam & Kym Pty Ltd*** [2004] VSCA 204, a decision in the Supreme Court of Victoria in relation to Stamp Duty. This case involved a deed poll amending a trust to give the trustee power to transfer funds for the advancement of any of the discretionary beneficiaries. Pursuant to this power the trustee executed an instrument declaring it 'hereafter held separately in trust' property for certain beneficiaries. That exercise of the power of appointment was held to result in the property being held on a separate trust.

The case is cited by the Commissioner to illustrate the proposition that a distinct trust may arise, though he does so without further explanation.

Behind the Commissioner's withdrawn Statement of Principles lies a significant body of judicial authority supporting the concept of a new trust arising on the creation of a charter of new rights and obligations applicable to a trustee or new trustee. These authorities seem not to have left the Commissioner's mind. Recently he has warned that he has concerns about the use of Trust Splitting. In consequence the Commissioner has embarked on a course of confidential consultation with representatives of professional bodies apparently contemplating the issue of new Guidance expanding on his views in TD 2012/21. In South Australia the Commissioner for State Taxes has in practice generally accepted and argued that for both Stamp Duty and Land Tax purposes a trust split will not give rise to a new trust. Accordingly he has allowed exemption under Section 71(5)(d) for a simple trust split where assets are transferred to a new trust deed to be held upon the same

3 In paragraph 27

A trust split can, as alluded to, be a very effective way of dealing with assets held under a trust deed so as to pass their control to a different group of beneficiaries than those controlling other assets.

terms as held by the transferring trustee under the original trust deed.

Similarly the Commissioner for State Taxes has argued that a trust split does not create a separate trust such as would deny operation of the aggregation principle under section 13 of the *Land Tax Act 1936*.

A somewhat different view was taken, at the urging of Counsel for the Commissioner, by Stanley J in ***Dyda v Commissioner of State Taxes*** [2013] SASC156. He applied the reasoning of the High Court decision in ***FCT v Commercial Nominees of Australia Ltd*** to hold that by parity of reasoning it was apparent from the Court's analysis that for the continued existence of a trust there must be a continuity in the constitution of the trust under which the trust fund operates, the trust property and the membership of the trust. Changes in one or more of those matters breaks continuity and thereby terminates the trust. This was seen consistent with the position in relation to the four essential indicia of the existence of the trust; the trust deed, the trust property, the beneficiary and an equitable obligation annexed to the trust property.[4]

Elsewhere however the judgement refers to a "material change in the rights and obligations attaching to the trust property which is inconsistent with the continuity of the trust estate". This is an obviously less harsh requirement than the contemplation that a change in trustee alone would breach continuity. Further, the decision clearly rested, not on the sole, but on a combination of the changes that were discussed. While the existence of a different trust deed was pointed to as one variation indicating a new trust others were also identified.

It is not only the potential happening of CGT Event E1 that attracts attention in respect of a trust split. Reporting for both income tax and the preparation of financial statements raises the issue whether the original trust and the trust administered by the separate trustee can be reported upon separately. For income tax the Commissioner has been prepared to issue a separate Tax File Number to the new trustee in respect of the assets under its administration. This may however be more a recognition of the trustee as a separate Entity in relation to its trust.[5] A similarly pragmatic view has been accepted by accountants.

A trust split can, as alluded to, be a very effective way of dealing with assets held under a trust deed so as to pass their control to a different group of beneficiaries than those controlling other assets. Commonly this will be a selected number of existing members of a later generation of family members to those controlling the original assets of the trust. Rarely however will the split not require amendments to the trust deed, as applicable to the transferred assets, such as a change of Appointor and, collaterally, attention to the rights of the original trustee with respect to the liabilities attached to the transferred assets.

The processes associated with the evolution of the Commissioner of Taxation's views concerning lack of continuity of a trust, the creation of a new trust, his unsuccessful litigation and eventual reconsideration of Trust Splitting, up to the issue of Taxation Determination 2012/21, have been trying for taxpayers and tax practitioners alike. It is to be hoped that the Commissioner is not about to embark on a similar course in relation to trust splits which he has accepted up until now as not causing CGT Event E1 to happen. On the decisions that have considered comparable arrangements so far there appears no compelling authority to support his doing so. Presumably there will be circumstances where trust splits have been used in a particularly enterprising way to manage potential taxation liabilities and it is to be hoped that it is only these circumstances that are attracting a possible modification of the Commissioner's position through his current processes.

FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:

John Tucker Director
p: +61 8 **8124 1807**
john.tucker@dwfoxtucker.com.au

4 Referring to class case [2001] FC5 at [88]
5 Pursuant to section 960-100(2) ITAA97

NEWS & VIEWS | **By Sandy Donaldson**

ATO Raids

Roasting the Phoenix

The Phoenix according to Greek and Roman mythology is a bird that lives for centuries and then is consumed by fire and rises again. It was a benign mythology symbolising concepts such as renewal and resurrection.

The Australian Government has a different and more malign conception of a Phoenix. Our article in our Autumn Newsletter described this.[1] The "*Phoenix"* activity that the Government is concerned with is described in the ATO *Phoenix Fact Sheet:*

> *Fraudulent phoenix activity occurs where a company deliberately liquidates to avoid paying creditors, taxes and employee entitlements. They transfer the assets to a new company and continue operating the same or a similar business with the same ownership.*[2]

The ATO emphasises its view that this activity is not just resulting in tax avoidance, but results in contractors, creditors and employees losing out.[3] For those old enough to remember, the *"Phoenix"* could be the rebirth from fire of the *bottom of the harbor* schemes common in the 1970s. In its 1987 annual report, the ATO reportedly asserted that 6,688 companies had been stripped of their assets and *"sent to the bottom of the harbor"* leaving shell companies unable to pay taxes or creditors.[4]

Turning up the heat

The ATO has since 2015 been turning up the heat on suspected *Phoenix* activity, but it is not alone. A *Phoenix Taskforce* has been established with 31 Federal, State and Territory Government agencies, including the ATO and ASIC.[5]

ATO activity, beyond normal audit activity, has been increasing. The ATO reports that:

- in 2015 surprise visits were made to "*over a dozen"* sites across Sydney;[6]
- 80 officers conducted access visits without notice on two sites in Victoria in April 2017;[7] and
- on 1 August 2018 11 sites in Victoria around Shepparton were accessed by more than 250 ATO officers supported by Victorian Police.[8]

What to do if the ATO "visits"

It is something of an understatement to say that the ATO has extremely wide powers. These were the subject of an investigation by Four Corners and Fairfax Media which ABC News reported on saying that the ATO:

> *…has extraordinary powers more akin to police and law enforcement agencies. And when it makes mistakes, it can destroy small businesses and livelihoods.*[9]

The source of the ATO powers is mainly in Sections 353-10 and 353-15 of the *Taxation Administration Act*.[10] In summary, the powers in Section 353-10(1) are, for the purpose of the administration or operation of a taxation law, to:

- give the Commissioner any information that the Commissioner requires;
- attend and give evidence before the Commissioner; and
- produce to the Commissioner any documents in your custody or control.

Under Section 353-15(1) for the purposes of a taxation

1 DW Fox Tucker Autumn Report 2018, *Buried in the Budget: Directors in the Firing Line*
2 ATO *Phoenix Factsheet*, 2 March 2018
3 ATO *Illegal Phoenix Activity*, 24 July 2018
4 Wikipedia *Bottom of the Harbor Tax Avoidance*
5 ATO, *Phoenix Taskforce*, 6 August 2018
6 ATO, *ATO Swoops on Phoenix Businesses*, 11 June 2015

7 ATO, *Phoenix Taskforce Continues to put Pressure on Pre-Insolvency Industry*, 4 April 2017
8 ATO, *Coordinated Strike on Tax Agents Facilitating Suspected Phoenix Activity and Avoidance of Tax*, 2 August 2018
9 ABC News, *What the Australian Tax Office Can Do and How it Differs to Other Agencies*, 17 April 2018
10 *Taxation Administration Act 1953* (Cth)

law, the Commissioner, or an individual authorised by the Commissioner for the purposes of the section:

- may at all reasonable times enter and remain on any premises;
- is entitled to full and free access at all reasonable times to any documents, goods or other property;
- may inspect, examine and make copies or take extracts from any documents; and
- may inspect, examine, count, measure, weigh, gauge, test or analyse any goods or other property and take samples.

Section 353-15(2) does provide that an individual authorised by the Commissioner may not enter or remain on premises if the occupier has requested proof of authority and the individual does not produce the authority signed by the Commissioner.

As may be expected, non-compliance with these requirements may be an offence.

The ATO does have guidelines as to how it will exercise its wide access powers.[11] The ATO states that:

> *In most cases, we only use our access powers if we cannot obtain the documents or information we require under a cooperative approach.*

There is also a Taxpayers' Charter.[12]

So, if officers of the ATO do arrive unannounced on your doorstep, with or without State or Federal Police, some suggestions for dealing with the situation are:

- keep your cool and cooperate (offences may apply if you do not);
- ask for production of authority for each person in attendance. Make a note of these authorities (the ATO will not allow copies, it advises);
- ask if entry is pursuant to a search warrant. If the entry is pursuant to a search warrant, you should be provided with a copy;
- ask for time to consult your lawyer, and do so as quickly as possible (even if you are a lawyer, you may wish to obtain some more expert assistance);
- provide the authorised ATO personnel with a room or suitable space and bring requested documents and files to them;
- if there is any possibility that legal professional privilege may relate to documents, claim this and require that the documents to which the claim may relate are kept secure until the claim for legal professional privilege can be determined;
- determine if the Accountants Concession should be claimed. This is a special administrative concession that is granted by the ATO;[13] and
- you may wish to record the visit and conversations, either by audio or video recording. This is a complex topic depending on relevant State or Territory legislation but may be possible. Before doing so, this is definitely something that you should obtain legal advice on.

There is no doubt that ***Phoenix*** activity as described by the Government can affect more than just the collection of taxation. The Commissioner of Taxation, however, has powers that are well beyond those of other parties affected by such activity.

FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:

Sandy Donaldson Director
p: +61 8 **8124 1954**
sandy.donaldson@dwfoxtucker.com.au

11 ATO, *Our Formal Access Powers*, 16 March 2018, ATO *Scope of Our Powers*, 16 March 2018
12 ATO *Taxpayers' Charter – Fair Use of our Access and Information Gathering Powers*, 5 January 2016
13 ATO, *Guidelines to Accessing Professional Accounting Advisers' Papers*, 26 March 2018

INSIGHT | **By Debra Lane**

Engine of Luxury Yacht Burns Out

Owner incompetent - but what about the insurance?

Sheehan v Lloyds Names Munich re Syndicate Ltd. [2017] FCA 1340

Mr Sheehan bought a Sunseeker Manhattan motor yacht fitted with two diesel engines equipped with a monitoring and diagnostic system, which included liquid LCD panels with a display for each engine.

When an alarm was triggered, a visual and an audible alarm was activated; the audible alarm was very loud. The alarms could not be overridden, although they could be ignored.

Once the alarm was activated, there was a high likelihood of the engine seizing if the engine was not shut down.

The vessel was also equipped with a “limp mode” whereby the engines defaulted automatically from the usual speed of c.2,250 RPM to 1,500 RPM. This was activated in various circumstances - one of which was the activation of a “critical alarm” for low lube oil pressure or high coolant temperature.

At the time of purchasing the vessel Mr Sheehan was provided with a manual which included instructions for the alarms and warnings relating to loss of engine oil pressure. Mr Sheehan said that he had not read the manual and did not know it existed.

Mr Sheehan took the vessel out from Hillarys Yacht Club at Hillarys in Western Australia.

Within only about five minutes, the alarm activated and the speed of both engines automatically slowed when “limp mode” was automatically engaged.

He then navigated the vessel back to the marina. Part way, the starboard engine shut down. He continued to operate the port engine at low RPM back to the pen.

Mr Sheehan did not check the alarm screen or gauges to determine why the alarm had activated.

The Judge accepted Mr Sheehan’s account of events as truthful, noting that he had acknowledged that he would have turned off the engine had he known the oil pressure was low. Observing that Mr Sheehan’s conduct was undoubtedly an example of poor seamanship bordering on negligence, and noting a reasonable operator of the vessel would have read the manual, checked the analogue gauges and scrolled through the list of alarms, he found that Mr Sheehan did not observe any warning that engine oil pressure was low and thought he would be able to “limp” home without damaging the engine.

The services of a referee were utilised to resolve many of the technical and factual issues arising.

The referee’s findings were, in summary:

> “The damage to the engine occurred as a result of its continued operation after

the loss of lube oil pressure which led to overheating and seizure. If the engine had been turned off immediately when the alarm sounded the damage would not have occurred. Damage began to occur 10 to 15 seconds after the alarm sounded when the lube oil pressure reached 2.8 bar. The loss of lube oil pressure was due to the oil cooler gasket's faulty design and thus the damage could be considered to be as a result of the faulty design."

These findings foreshadowed the ultimate question for determination, being - what was the legal cause (or causes) of the damage to the starboard engine: i.e. was it the conduct of Mr Sheehan or the defective design of the gasket or both?

The vessel was covered by a Nautilus Marine Insurance Policy which provided cover for accidental loss or damage.

"Accident/Accidental" were defined synonymously as *"an event that you did not expect or intend to happen. It also includes a series of accidents arising out of the one event"*.

The insurer denied indemnity and relied on various general exclusions including one expressed in these terms:

"You are not covered for any loss or damage caused by or resulting from, or the costs incurred from or of:

…

- *inherent defects, structural faults, faulty workmanship or faulty design;*

…

- *any illegal or deliberate action by you, or someone acting with your express or implied consent;*

…

- *mechanical, structural, electrical or electronic breakdown unless directly caused by one of the insured events listed …*

…

- *a motor caused by or resulting from seizure and/or overheating unless caused by an accident which is otherwise an accepted claim under the policy …"*

Noting the wording of the last exclusion relating to seizure and overheating did not sit well with the wording of the rest of this clause, the Judge concluded that the better construction of the exclusion was that the insured was not covered for loss and damage to a motor resulting from seizure and/or overheating unless caused by an accident otherwise covered under the policy.

The first issue was whether the damage to the engine came within the policy cover for accidental loss or damage.

An *"accident"* has been variously described as an *"unlooked for mishap or an untoward event which is not expected or described"* or *"any unintended and unexpected occurrence which produces hurt or loss"*: It must involve something *"fortuitous and unexpected"*: This accorded with the definition contained in the Policy wording of *"accident/accidental"*.

The test is an objective test but incorporates the specific knowledge and experience of the person involved. Accordingly, the appropriate enquiry was whether a reasonable operator of the vessel with the knowledge of Mr Sheehan would have expected the damage to the starboard engine to have occurred.

Mr Sheehan submitted that the damage was unexpected, drawing attention to the fact the engine had been serviced that day or the previous day, had been operated for only twenty minutes and had entered "limp

A proximate cause is determined based upon a judgment as to the "real", "effective", "dominant" or "most efficient" cause, by applying the commonsense knowledge of a business person or seafarer. There does not need to be a single dominant, proximate or effective cause of loss or damage.

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mode" - which Mr Sheehan had believed was a mechanism that operated to protect the engine from damage. He mistakenly assumed that no damage would occur if the vessel was in "limp mode" and that the engine would shut down automatically if there was a possibility of serious damage.

The insurer contended that damage could not be considered as unexpected from the perspective of a reasonable person in the circumstances, who would have read the manual, known about the operation of the alarms, recognised their significance and acted reasonably when an alarm activated. In ignoring the alarm and continuing to operate the engine, Mr Sheehan's conduct was not reasonable. His failure to act upon the alarm meant that the damage was not objectively unexpected as a reasonable operator of the vessel would have been aware of the alarm system and turned off the engine.

Alternatively, the insurer argued that the damage was not accidental within the meaning of the Policy as Mr Sheehan knew of the risk of damage and deliberately chose to court that risk by failing to read the manual, ignoring the visual and audible alarms and then failing to turn off the starboard engine.

The Judge found, however, that if he did not know of the risk, Mr Sheehan could not have chosen to court it. Mr Sheehan's evidence was accepted in this regard and it was acknowledged that while his conduct demonstrated poor seamanship, that did not necessarily mean the events could not be characterised as being within the definition of *"accident/accidental"*. The fact Mr Sheehan's assumptions were incorrect did not mean the damage was not unexpected.

On this basis, it was found that the damage to the starboard engine was accidental loss or damage within the meaning of the policy.

The cause of the damage was then considered, it being noted that the causal inquiry in insurance law is directed to the proximate cause of the relevant loss or damage - which means proximate in efficiency rather than the last in time.

A proximate cause is determined based upon a judgment as to the *"real"*, *"effective"*, *"dominant"* or *"most efficient"* cause, by applying the commonsense knowledge of a business person or seafarer. There does not need to be a single dominant, proximate or effective cause of loss or damage.

In the present case, the referee made a factual finding that the loss of lube oil pressure was due to the faulty design of the gasket; however, he also found that the damage would have been avoided if Mr Sheehan had turned off the engine immediately.

Both sides submitted there was a single proximate cause of damage. Mr Sheehan submitted it was his failure to turn off the starboard engine once the alarm activated. The insurer submitted the sole proximate cause was the defective gasket owing to its faulty design which meant Mr Sheehan's claim would fail as damage caused by faulty design was excluded under the Policy.

Mr Sheehan then submitted that his actions were significantly more dominant than the design fault in bringing about the actual damage.

His Honour noted that the referee found that the faulty design of the gasket had led to the significant and rapid drop in oil pressure and continued until the engine ultimately seized and ceased operation only six minutes later and that the rapidity of the gasket failure was illustrated by the fact the damage began to occur to the engine only 10 to 15 seconds after the alarm sounded.

This rapid and significant failure of the gasket indicated that it was the dominant and, indeed, most efficient cause of the damage to the engine.

The claim was accordingly dismissed on the basis of the policy exclusion relating to faulty design.

This is an abridged version of the case report first published in Australian Insurance Law Bulletin 2018 Vol 34 No 1.

FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:

Debra Lane Director
p: +61 8 **8124 1806**
debra.lane@dwfoxtucker.com.au

DISSECTING DECISIONS | **By Sandy Donaldson & Marianna Danby**

"As Told by Hassold": A Tale of Many Wills

We were instrumental in getting this tale over the line earlier this year and now we take the time to reflect on the work required to ensure the testamentary wishes of Mr Hassold are upheld following his death.

The odds were stacked against Mr Hassold's wishes succeeding as he suffered from bouts of schizophrenia for most of his adult life even though he was a prolific writer and an intelligent man in his time.

Mr Hassold had left behind a Will and three other documents (all signed but some handwritten, some calling on the archangel for divine intervention and one only being a copy of the original). All were apparently testamentary in nature and thus the three documents were potential codicils to the Will ('**Purported Codicils**'). The order granted however was for letters of administration with the Will annexed and affirmed the validity of the Purported Codicils. The plaintiffs in the non-contentious proceedings were children of Mr Hassold's deceased brother (his '**niece and nephew**').

Proving the force and validity of the Will presented many legal issues that had to be carefully considered and presented to the Court. The issues surrounded both the validity and construction of the relevant documents, namely whether:

- the Will was valid;
- there was evidence of due execution, as both witnesses could not be found or had otherwise died;
- the niece and nephew could step in to administer the Will (and his part of the estate which passed on intestacy) as the executors appointed in the Will had either died or had no interest in the position;
- any of the Purported Codicils were valid;
- the original of the copied codicil could be located (for the record, it wasn't, notwithstanding that the Judge was satisfied that there were thorough and diligent searches and enquiries);
- Mr Hassold had the requisite testamentary capacity at the time of making and signing either his Will or any of the Purported Codicils; and
- the gift of his house to his niece and nephew came with a binding obligation to keep the house intact or whether or not it was merely a wish and they could do what they needed with it?

To throw another document in the mix, there was a letter in the Public Trustee's possession, from Mr Hassold dated 1987, in which he referred to his last will and testament being in another document dated March 1981. Had this been the case, it would have expressly or impliedly revoked the Will in consideration in these proceedings. However no such Will was ever found. His niece and nephew were very fond of Mr Hassold and had a lot to do with him in their childhood years. As many modern tales go however, Mr Hassold came from a blended family situation (as his father had a previous wife and children before marrying Mr Hassold's mother). Therefore, if the Will was found not to be valid, the estate would be divided equally between not only his niece and nephew, but also the seven other descendants on his father's side.

The estate was only small with the main asset being the house (which was in disrepair by the time the case

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was before the Courts). Although the other descendants had been previously advised that they were eligible to share in the estate, they had no interest in advocating for it. This being the case, it was still necessary to take specific steps to ensure that they were aware of their rights as people interested in the estate before the Judge felt comfortable to make a decision that would bind them all.

Due execution

It was necessary to show that the signature on the Will was Mr Hassold's, by providing comparative writings and affidavit evidence. Although we could not prove the identity of the two witnesses to the Will, Mr Hassold's niece proved to be an excellent witness when giving oral evidence at trial to attest to her uncle's handwriting and signature, and this may have given the Judge further confidence to allow the presumption of due execution to apply (as well as relying upon the surrounding context).

It was necessary to provide evidence of the searches we undertook to find who the likely signatories were that attested to witnessing the Will. It was then important to provide information about the likely whereabouts of those signatories now. We established that both signatories were now deceased.

In this case, we were to provide further evidence of Mr Hassold's writing and signature so that an ample comparison between the two could be conducted in order to satisfy the Judge that Mr Hassold had executed this document with knowledge and intent.

Testamentary capacity

The fact that the Judge was satisfied that there was due execution of the Will, gave rise to a presumption of testamentary capacity. However each of the cases before the courts in this area are very fact heavy, and the Justice turned to several authorities to guide his decision. Through providing the deceased's medical history and a timeline of his placement in and release out of different medical institutions, and when the Public Trustee was appointed as the administrator of his estate, it was established that Mr Hassold had testamentary capacity as at the date of the Will, and that it was questionable in and around the later dates when he created and signed the Purported Codicils.

His Honour observed that in particular, the Purported Codicils "are devoted in large part to an expression of the deceased's religious and musical beliefs, concerns and aspirations. They are written in quite florid language which, to the lay person, would suggest an irrational, perhaps delusional, state of mind."

His Honour stated that Mr Hassold's loyal and faithful Evangelical Lutheran religious beliefs which create elaborate parts of his Will, may make no sense to some, but may to others who 'might be sympathetic with the expressed beliefs and descriptions of religious experiences'. Therefore it was not on this alone that one could undermine his testamentary capacity.

Condition for the Glenside house

It was held that the gift of the house to the niece and nephew on the condition that it was to be kept intact was 'simply not practical and indeed not possible for the run down Glenside house to be kept in a sufficient condition and maintained to the benefit, indefinitely, for the deceased's "family". This can only have been, as the language itself strongly indicates, intended as a desire but not as the imposition of a binding legal obligation.'

Conclusion

Our clients have been put in a position where they can move forward with their lives and all the while reflect the wishes of their beloved uncle. The next steps include applying for letters of administration with Will annexed with the Probate Registry and selling the property so that new development can commence and the space can be given a second life in the neighbourhood, be properly utilised and contribute to yet another story.

FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:

Sandy Donaldson Director
p: +61 8 **8124 1954**
sandy.donaldson@dwfoxtucker.com.au

Marianna Danby Lawyer
p: +61 8 **8124 1833**
marianna.danby@dwfoxtucker.com.au

DISSECTING DECISIONS | **By Patrick Walsh & Tiffany Walsh**

Workers Compensation Case Summaries

***Return to Work Corporation of South Australia v Karpathakis; Return to Work Corporation of South Australia v Rudduck* [2018] SASCFC 45**

This decision concerned applications by two workers for approval to undergo surgery that wasn't yet recommended, but which they may have needed to undergo in the future as a result of workplace injuries, and in particular, the interaction between Sections 33(17) and 33(21) of the *Return to Work Act 2014 (SA)* ("**the RTW Act**").

It is useful to first set out a brief summary of the relevant sections of the RTW Act:

- Section 33(1) provides that a worker "is entitled to be compensated" for the cost of medical and related services reasonably incurred as a result of a workplace injury;
- Section 33(17) allows a worker to apply, in advance, to be compensated for medical and related services that they will incur as a result of a workplace injury;
- Section 33(20) places a time limit on a worker's ability to make an application under s 33(17) such that they cannot make an application once they have had no entitlement to weekly payments for a continuous period of 12 months; and
- Section 33(21) provides for exceptions to the time limit imposed by s 33(20), so that the time limit does not apply to, for instance, seriously injured workers, or a worker who has made an application (before the end of the time limit imposed by s 33(20) for pre-approval of surgery or medical services that they may require in the future.

Mr Karpathakis allegedly sustained a workplace injury in 1 December 2014, for which he lodged a claim pursuant to the Act on or about 30 March 2016. This claim was rejected, and Mr Karpathakis has filed an application in the Tribunal to have the rejection reviewed. At the time of the decision, the matter had not yet been determined by the Tribunal. On 30 June 2016, Mr Karpathakis applied, purportedly pursuant to sub-ss 33(20) and (21) of the RTW Act and r 23 of the *Return to Work Regulations 2015* (SA) ("**the Regulations**"), for pre-approval for surgery and related medical services that he may require in the future. This was treated as an application made pursuant to s 33(17) of the RTW Act, and as it did not comply with the Regulations, this application failed.

Mr Rudduck had an accepted claim for compensation for a workplace injury which he sustained on 11 March 2015. On 30 June 2016, Mr Rudduck applied, again purportedly pursuant to sub-ss 33(20) and (21) of the RTW Act and r 23 of the Regulations, for pre-approval for surgery and related medical services that he may require in the future. This application also failed.

Both workers were out of time to make another application pursuant to s 33(21) of the RTW Act, and so applied to the Tribunal for review of the decision. At first instance, both Mr Karpathakis and Mr Rudduck failed, as the Tribunal held that their applications were to be treated as applications for "pre-approval of expenses pursuant to s 33(17)", and the applications did not have the level of detail required for such an application.

Both workers appealed to the Full Bench of the Tribunal, who accepted Mr Karpathakis' and Mr Rudduck's contentions that their applications were made pursuant to s 33(21) of the RTW Act, and that

...the Court's interpretation of s 33(21) is that it allows an injured worker to put the Corporation or self-insured employers on notice that the worker may make an application in the future.

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such an application should be determined by the terms of s 33(21) only, without reference to s 33(17) or r 22.

The Return to Work Corporation of South Australia ("**the Corporation**") then appealed to the Full Court of the Supreme Court. The Full Court agreed with Mr Karpathakis and Mr Rudduck, and dismissed the Corporation's appeal. Broadly speaking, the reasons for this were as follows:

- Subsection 33(21) of the RTW Act is an entirely different type of application to that in s 33(17) and "does not, ***of itself,*** comprise an application pursuant to subsection (17)";
- all that s 33(21) of the RTW Act does is provide a range of exceptions to the time limitation prescribed in s 33(20); and
- if the Corporation were to accept an application under s 33(21), a successful worker would still be required to make an application under s 33(1) or s 33(17) when they were ready and able to make such an application, which would then be determined on the information provided at that time.

In conclusion, the Court's interpretation of s 33(21) is that it allows an injured worker to put the Corporation or self-insured employers on notice that the worker may make an application in the future. The application can then be assessed in accordance with the criteria in the Regulations at the time.

Return to Work Corporation of South Australia v Preedy [2018] SASCFC 55

This decision concerned two injuries sustained by the worker, Mr Preedy, and whether Mr Preedy was entitled to have the two injuries assessed in combination to determine his level of whole person impairment. In particular, the interaction between and proper construction of s 28(8)(c) and s 58(6) required consideration.

Mr Preedy had an accepted claim for a left shoulder injury sustained in the course of employment in 2012. In October 2013, the Corporation determined that this injury resulted in whole person impairment ("**WPI**") of 11% and, as such, Mr Preedy was entitled to compensation for non-economic loss in the amount of $21,792 in accordance with s 43 of the ***Workers Rehabilitation and Compensation Act 1986*** (SA) ("**the WRC Act**").

On 16 April 2013, while he was receiving physiotherapy treatment for his left shoulder injury, Mr Preedy sustained a fracture of the C5 vertebrae. His claim for compensation for the neck injury was accepted by the Corporation in May 2015. When determining this claim, the Corporation received medical evidence to the effect that Mr Preedy was suffering from cancer of his blood cells in bone marrow, which was the underlying cause of the C5 fracture. However, the physiotherapy was still considered to have contributed to the fracture. On 13 January 2016 the Corporation determined that the neck injury resulted in WPI of 27% and Mr Preedy was entitled to compensation for non-economic loss in the amount of $71,985 pursuant to s 58 of the RTW Act.

On 3 February 2016, Mr Preedy challenged this determination, and said that his two injuries were the same injury, or that they arose from the same cause, and so s 22(8)(c) of the RTW Act applied and the injuries should be combined to determine his WPI, which would mean a WPI of 35%.

At first instance, the Tribunal rejected Mr Preedy's claim, saying that the two injuries did not arise from

...when combining injuries or impairments for the purpose of whole person impairment, it will be necessary to adopt a different approach to determining whole person impairment pursuant to s 22 as opposed to s 58.

the same trauma and so the impairments should not be combined for the purposes of a s 58 assessment. Mr Preedy appealed to the Full Bench of the Tribunal, who held that the two impairments should be combined for the WPI assessment. The Corporation then appealed to the Full Court of the Supreme Court.

In his judgement, Justice Stanley considered the difference between s 22(8)(c) and s 58(6)(a), and summarised it as follows: ***"s 22(8)(c) prescribes the** approach to be adopted in assessing **impairments** from the same **injury** or **cause**. By way of contrast s 58(6)(a) prescribes the approach to be taken in determining an **entitlement to lump sum compensation** for non-economic loss where a worker suffers two or more **injuries** arising from the same **trauma***" (emphasis added).

Trauma is defined in the RTW Act as "*an event, or series of events, out of which a work injury arises*". Justice Stanley considered that 'impairment' and 'injury' are "*related but distinct concepts*", with impairments being the result of injuries. Therefore, the two sections make a distinction "*between causes and consequences*".

Justice Stanley decided that it was necessary for an analysis of whether Mr Preedy had "*suffered two work injuries arising from the same trauma*", or whether Mr Preedy's impairments were "*from the same injury or cause*" and so remitted the matter back to the Tribunal for a decision.

We understand that before it lists this remitted matter for decision, the Tribunal is waiting for the Supreme Court's decision in the appeal of *Return to Work SA v Mitchell* [2017] SAET 81.

In the meantime, Justice Stanley's reasoning means that when combining injuries or impairments for the purpose of whole person impairment, it will be necessary to adopt a different approach to determining whole person impairment pursuant to s 22 as opposed to s 58. Namely, that when determining whole person impairment pursuant to s 58 (in order to determine the entitlement to a lump sum payment for non-economic loss) the assessment is focused on multiple impairments from two (or more) work injuries that have arisen from the same trauma (or event). However, when determining whole person impairment pursuant to s 22 (in order to determine permanent impairment) the assessment is focused on multiple impairments that have arisen from the same injury or cause.

Justice Stanley went on to state that these two approaches are complementary, such that an injured worker now has two methods by which injuries can be aggregated for the purpose of determining whole person impairment.

FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:

Patrick Walsh Director
p: +61 8 **8124 1941**
patrick.walsh@dwfoxtucker.com.au

Tiffany Walsh Lawyer
p: +61 8 **8124 1898**
tiffany.walsh@dwfoxtucker.com.au

NEWS & VIEWS | **By Sandy Donaldson**

Parallel Universes Converge: Trade Mark Act Amendments

An act with the lengthy title *Intellectual Property Laws Amendment (Productivity Commission Response Part 1 and Other Measures) Act 2018* **[Amending Act]** was passed by both Houses of the Commonwealth Parliament on 16 August 2018 and received Royal Assent on 24 August 2018. As the name of the Amending Act implies, the primary purpose of the Act is to give effect to recommendations of the Productivity Commission and the first set of amendments in Part 1 of Schedule 1 of the Act relate to *Parallel Importation.*

The Amending Act amends the Trade Marks Act 1995 (Cth) **[Trade Marks Act]** and contains a number of other amendments in relation to Acts relating to intellectual property, but only the parallel importation amendments for trade marks are discussed in this article.

What is parallel importation?

Parallel importation of goods occurs when goods bearing a trade mark that is registered in Australia are imported into Australia from overseas. The *Explanatory Memorandum* to the Amending Act states that:

> *The Australian Government's policy position on parallel imports is that they increase competition and the Trade Marks Act was intended to allow for the parallel importation of legitimately trade-marked goods.*

The Trade Marks Act already contains Section 123 which provides that if a trade mark is used in relation to goods or services that are similar to goods or services for which the trade mark is registered, and the trade mark has been affixed to the goods or used in relation to services with the consent of the registered owner of the trade mark, this will not infringe the trade mark. In relation to Section 123, the *Explanatory Memorandum* says:

> *However, the existing Section 123 is limited in its scope and clarity, and this has permitted the use of various corporate or contractual arrangements that subvert the policy intent of allowing parallel imports. The amendments in this Part are intended to ensure that parallel imports of legitimately marked goods are not taken to infringe an Australian registered trade mark when the goods have first been brought to market by the registered owner of that mark or another person who has (or had at the relevant time) some sort of relevant commercial or contractual relationship with the registered owner.*

Amendments to the Trade Marks Act

The amendments remove the references to goods in Section 123, so that it will now only

Undoubtedly new Section 122A will have an effect in limiting actions that a registered trade mark proprietor may take in relation to parallel imports of goods.

apply to services, and a new Section **122A Exhaustion of a Registered Trade Mark in relation to goods** has been inserted.

As the *Explanatory Memorandum* indicates, the new section can apply to goods to which a trade mark has been applied either by or with the consent of a range of *relevant persons* including:

- the registered owner; or
- an authorised user; or
- a person permitted to use the trade mark by the registered owner; or
- a person permitted to use the trademark by an authorised user; or
- "*a person with significant influence over the use of the trade mark by the registered owner or an authorised user*"; or
- an associated entity of a *relevant person*.

Reasonable enquiries

The new Section 122A does not, however, apply automatically to exonerate an infringement of a trade mark by the importation of goods to which the trade mark is applied. It is necessary for a person seeking to use the section as a defence against a claim of infringement of a trade mark to make **"*reasonable enquiries"*** (Section 122A(1)(b)) and to show that:

> *at the time of use, a reasonable person, after making those enquiries, would have concluded that the trade mark had been applied to, or in relation to, the goods by, or with the consent of, a person (a **relevant person**) …"*

As noted above, this can be the registered owner of the trade mark in Australia, or other persons which the *Explanatory Memorandum* describes as having *"some sort of relevant commercial or contractual relationship"*.

Nature of consent

The nature of the consent that is required for the operation of Section 122A(c) is expanded by Section 122A(2) and includes consent subject to a condition, e.g. that goods may only be sold in a foreign country, or consent that can be reasonably inferred from conduct.

The classes of person who may give a consent are also extended in Section 122A, as a person permitted to give consent may be permitted where the permission arose directly or indirectly or **"*by way of proprietary interest, contract, arrangement, understanding, a combination of those things or otherwise"***.

Also, in considering whether a person *with significant influence over the use of the trade mark* under Section 122A(1)(c)(v) had that influence, subsection (4) requires that the manner in which the influence arose must be disregarded, for example whether it arose directly or indirectly, or by way of proprietary interest, contract, arrangement, understanding, a combination of those things or otherwise.

What will the effect be?

Undoubtedly new Section 122A will have an effect in limiting actions that a registered trade mark proprietor may take in relation to parallel imports of goods. However, some of the concepts and wording of the section may not be as clear as the *Explanatory Memorandum* confidently asserts when it states that *"the amendments also introduce greater clarity and certainty in how the provisions operate"*. A number of the concepts in the new section may not be clear, and it may be that the new provisions will require some judicial interpretation.

FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:

Sandy Donaldson Director
p: +61 8 **8124 1954**
sandy.donaldson@dwfoxtucker.com.au

INSIGHT | **By Briony Hutchens**

Passing Control of a Discretionary Trust to the Next Generation

Discretionary trusts have long been the go-to vehicle for advisors when setting up a structure for their clients. The principal reasons for this are clear – discretionary trusts give a high level of flexibility and control over both administrative issues and distribution of income while also providing asset protection benefits and access to tax concessions[1].

Given this rise in popularity, it is only natural that we are now starting to see the transition of businesses and assets held by discretionary trusts to the next generation. As the disposal of the assets themselves would trigger a taxing event, clients are keen to pass these assets to their children via passing control of the discretionary trust instead.

However, the very qualities that made a discretionary trust appealing at the time of its establishment can create a number of problems when trying to meet the expectations of both the outgoing and the incoming generations.

The following examples endeavour to draw out the most common problems and discuss possible solutions to them.

Example 1

Mr and Mrs Smith conduct their manufacturing business through a discretionary trust. The beneficiaries of the trust are Mr and Mrs Smith, their relatives, and associated companies and trusts. The trustee of the trust is Smith Co Pty Ltd, a company which Mr and Mrs Smith control. Mr and Mrs Smith are joint appointors of the trust.

The trust has unpaid present entitlements owing to Mr and Mrs Smith.

Mr and Mrs Smith want to retire and pass the business to their two sons, while realising the value that they have built up in a tax effective manner. However, they wish to retain some level of control until they are satisfied that their sons are capable of running the business themselves.

As there is significant value in the goodwill, they don't want to trigger any tax liability on a disposal of the business to their sons so instead want to pass the business via passing control of the trust.

The following issues arise in this scenario.

Control

As the trust has a corporate trustee, it is easy to transfer control of the trustee to the sons by appointing the sons as directors in place of Mr and Mrs Smith and transferring to them all of the shares in the company.

Alternatively, Smith Co Pty Ltd could be removed as trustee and a new trustee which the sons control appointed. However, as the trust carries on a business, from a commercial viewpoint the preferred option is to simply pass control of the existing trustee so as to not disturb existing arrangements with suppliers, financiers, customers contracts, employees and so on[2].

Mr and Mrs Smith will also need to appoint the sons as joint appointors of the trust in place of themselves.

The above assumes that Mr and Mrs Smith are willing to relinquish complete control. As Mr and Mrs Smith want to retain some control, however, it is not as straight forward. One option is for control of the trustee company to pass to the sons with Mr and Mrs Smith retaining their role as appointor of the trust and therefore having the ability to remove the existing trustee and appoint a new trustee if they wish.

Alternatively, the sons could be appointed as directors of the trustee company in addition to Mr and Mrs Smith, with Mr and Mrs Smith retaining their shares and role as appointor of the trust until they are willing to pass complete control to the sons.

In either situation, however, the sons are likely to want some protection against Mr and Mrs Smith exercising their powers as appointor or shareholders to take control of the trust away from the sons other than in certain agreed circumstances. This is commonly done through either a shareholders agreement or other document such as a family constitution.

Where Mr and Mrs Smith retain their position as directors of the trustee company, the agreement between the parties will also need to address how decisions of the trustee company regarding various issues, including exercise of distribution

1 Including access to the 50% general CGT discount and the small business CGT concessions as well as the ability to distribute any non-assessable amounts tax free.

2 The change of directors and shareholders will, however, mean that any personal guarantees that had been provided by Mr and Mrs Smith will have to be discharged and new guarantees given by the sons.

powers, can be exercised[3].

Distribution of income

As the sons and their relatives and associated entities would already qualify as beneficiaries of the trust, distributions of income and capital can be made between them and their entities without the need to amend the trust deed or alter the beneficiary class.

However, it would be recommended that an agreement be put in place in relation to distributions specifying what control each of the sons and Mr and Mrs Smith have over determining to who and in what amount income and capital is to be distributed.

This agreement can take the form of a shareholder agreement or company constitution or can be inserted into the trust deed itself in the form of "distributor provisions".

Payment of UPEs

To the extent that the trust has cash or surplus funds, these can be applied towards payment of the unpaid present entitlements and the trust can then borrow further funds to use as working capital in the business.

However, if there are insufficient funds in the trust to pay out the entitlements in full, a funding dilemma arises.

If the sons borrow money and lend it to the trust to fund the pay out, they will only be able to deduct interest on the borrowing to the extent that the amount of the unpaid present entitlement had previously been retained by the trustee and used in the gaining or producing of the assessable income of the trust.[4] If any part of the funds representing the unpaid present entitlements have been applied by the trust to produce exempt income or for private family purposes, interest on the borrowing will not be deductible.

...the very qualities that made a discretionary trust appealing at the time of its establishment can create a number of problems when trying to meet the expectations of both the outgoing and the incoming generations.

The same problem applies if the trust borrows the money required to pay out the entitlements directly from the bank rather than from the sons.

Realisation of asset value

Another issue is how to realise the value of Mr and Mrs Smith's interest in the assets of the trust without triggering a taxing event. Often, this is done via a revaluation of the relevant asset with the increase in value credited to an asset revaluation reserve and distributed out as a corpus distribution. However, to the extent that borrowings are required to fund the pay out of the distributions, interest on the borrowing will not be deductible.

Further, as the trust conducts a business, the majority of the value of the business will be in goodwill. As goodwill is not able to be revalued, this strategy cannot be used to extract the goodwill value. Mr and Mrs Smith may therefore not be able to realise the value of their interest in the goodwill.

Conversely, from the sons' perspective, they are inheriting a valuable asset which has no cost base and are therefore taking on an inherent tax liability for which they may wish to be compensated. Generally, this issue will only arise where the outgoing controllers are able to realise the value of their interest in the assets of the trust[5]. Where the outgoing party is unable to realise this value, as will likely be the case with Mr and Mrs Smith, then no compensation for the low cost base would be required as the incoming party gets the full benefit of the asset.

If a compensating adjustment is required to be made, this could potentially be done via an adjustment to the amount distributed to the outgoing party as a corpus distribution to reflect the tax liability that is being inherited by the incoming party or alternatively through the forgiveness of amounts owed by the trust to the outgoing parties.

Example 2

Mr and Mrs Brown are married with three children. They control a discretionary trust which holds three investment properties, all of which have unrealised capital gains. The beneficiaries of the trust are Mr and Mrs Brown, their relatives and associated companies and trusts.

Mr and Mrs Brown want to pass one property to each of their children. The children want the properties

3 For example, whether the sons will have sole authority to determine how the income of the trust is to be distributed or whether Mr and Mrs Smith need to agree to any decision for it to be a valid and binding exercise of the trustee's powers.

4 Taxation Ruing TR 2005/12.

5 as it would be unfair to the incoming party to both pay out the value of that interest in full via a tax free corpus distribution and inherit an unrealised capital gains tax liability by inheriting a low (or no) cost base in the assets.

continued overleaf...

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to remain in a discretionary trust environment so as to retain the ability to distribute income from the property amongst their family members and related entities.

In the past, the simple solution would have been to split the trust. There are various means by which this could have been done, with the end result being three separate trust estates, each comprising one of the properties. The children could then each take control of one of the trusts.

However recent scrutiny of these arrangements has cast doubt about whether this does, in fact, create separate trust estates or simply a trust and sub-trust arrangement and, if it does create separate trust estates, whether this triggers both income tax and stamp duty consequences. For this reason, a trust split is not always a feasible option.

Alternatively, each child's property could be transferred out of the trust, for example via a vesting, to a trust controlled by that child. However this will trigger a capital gains tax liability that will need to be funded and which may not be able to be streamed to Mr and Mrs Brown. Further, if the property is distributed to a trust, stamp duty will be payable on the distribution[6].

So a solution must be found which allows each child to control their relevant property while retaining all properties in the one trust.

Control

If the trustee of the trust is a company, each of the children will need to be appointed as directors and shareholders of the company. If Mr and Mrs Brown were the trustees of the trust, then either the children will need to be appointed as trustees in place of them or a new corporate trustee in which the children are all directors are shareholders will need to be appointed.

As each child will want to control the decision and activities of the trustee in relation to the relevant property allocated to him or her, an agreement will need to be entered into to deal with this, for example a shareholders agreement if the trustee is a company, or a family constitution or similar if there are individual trustees. Potentially these provisions could also be drafted into the trust deed for added protection if desired.

The children will also need to be appointed as appointors. All children will need to be appointed jointly to ensure that none of the children can take control away from the others.

Entitlement to income

As the properties are all retained in the one trust, distribution of income needs careful consideration. Given that the trust fund is essentially being administered in three separate parts (one for each property), separate accounts will need to be kept in respect of each part to determine how much of the income (if any) is attributable to each of the properties.

Specific terms setting out who is entitled to determine how the income is distributed can be drafted into an agreement such as a shareholders agreement[7].

Alternatively, or in addition to the above, "distributor provisions" can be inserted into the trust deed giving each child the power to direct the trustee as to how the income from the relevant property is to be distributed.

However, the above only works effectively if all properties are producing net income. As there is only one trust estate, if one of the properties produces a loss, then it will reduce the income available for distribution from the other properties. Unfortunately there is no obvious solution for how to deal with this situation and advisors would need to consider how to deal with this depending on their client's specific needs[8].

Realisation of asset value

An issue arises if Mr and Mrs Brown wish to realise the value of their interest in the properties when passing them to their children. In this situation, it is relatively easy to revalue each of the properties and distribute any resulting revaluation, after taking into account any adjustment for unrealised capital gains being inherited by the children, as a corpus distribution to the parents. However, as outlined above, a funding issue arises if the parties have to borrow any money in order to pay out the distribution.

Example 3

Mr and Mrs Jones conduct a business through a discretionary trust. The trustee of the trust is Jones Co Pty Ltd, a company

6 As the stamp duty exemption for transfers of property from trustee to beneficiary does not apply where the beneficiary who takes the property takes it as trustee for a further trust (s71(6) of the *Stamp Duties Act 1923).*

7 For example, these can provide that to the extent that the income represents income from a particular property, the decision of the trustee as to distribution of this amount shall be made by the child who has been allocated that property.

8 For example, it may be agreed that to the extent that any income from one property is reduced by losses from another property, that amount must be recouped from future income derived from the property that produced the loss. Alternatively, it may be agreed that any losses have to be funded by the relevant controlling person such that money is injected into the trust to cover the loss and compensate the other parties for the reduction in income from their properties.

controlled by Mr and Mrs Jones, and the appointor is Mr Jones. The beneficiary class of the trust comprises Mr and Mrs Jones, their relatives and associated entities.

Mr and Mrs Jones have three children – two of whom work in the business and one who does not, and does not intend to, work in the business. Mr and Mrs Jones don't have any other significant assets and on their death want all of their children to benefit from the business, not just the two that are working in it. Accordingly, under their will Mr and Mrs Jones leave their shares in the trustee company to their three children jointly. In addition, Mr Jones nominates all three children jointly to be appointor of the trust on his death.

Mr and Mrs Jones die unexpectedly leaving the children to administer the estate and carry on the business.

Control

As only two of the three children are working in the business, it is important to protect the interest of the non-working child. As the shares and role of appointor are left to the children jointly, this provides a level of protection provided all decisions are required to be unanimous. If decisions are required to be by majority only, then two of the children could outvote the third child, potentially cutting them out. As the non-working child is unlikely to be a director of the trustee company, this would leave that child exposed.

In this situation, an agreement such as a shareholders agreement would be required to protect the interest of the non-working child and ensure that the other two children cannot cut the third child out. How far this goes would depend on the circumstances of the parties. For example, it may be appropriate to stipulate that some major decisions such as sale of the business or incurring significant liabilities cannot be made without the agreement of all three children, even though the non-working child would ordinarily not have a say in these decisions as he or she is not a director.

Distributions

As it is the intention of Mr and Mrs Jones that all children should benefit equally, measures must be taken to ensure that the non-working child's entitlement to income is protected, given that he or she will not be a director of the trustee company and therefore would not otherwise be involved in decisions regarding distributions.

This could be addressed through the constitution of the trustee company or as part of a shareholders agreement by inserting terms stipulating that any decision of the trustee to do such things as to distribute income or corpus of the trust other than equally between the three children requires the consent of all of the children.

Alternatively, this could be addressed in the trust deed itself though the insertion of "distributor provisions" which give each child the power to direct the trustee as to how one third of the income and capital is to be distributed.

Pay out of non-working child

In the event that the children working in the business wish to buy out the non-working child, an issue arises as to how to do so. While the children jointly own the shares in the trustee company, these shares are of no value and therefore cannot be used as a means by which the non-working child could realise the value of his or her interest.

This poses the same problems as those encountered in example 1, namely how to create an entitlement to an amount of income or corpus assuming that the majority of the value of the business lies in goodwill which is unable to be valued or revalued, and if an entitlement is able to be created, how to fund the payment to the non-working child taking into account interest deductibility issues if money is required to be borrowed to fund the payment. How this can be achieved will need to be carefully determined based on the individual circumstances of the trust.

Conclusion

As can be seen from the above examples, the discretionary nature of interests in a discretionary trust, along with the desire to defer tax, can create a number of issues when transitioning these structures to the next generation. However with careful management of these issues they should not create any barrier to successfully passing control of a discretionary trust between generations.

FOR MORE INFORMATION OR ASSISTANCE PLEASE CONTACT:

Briony Hutchens Director
p: +61 8 **8124 1821**
briony.hutchens@dwfoxtucker.com.au

NEWS & VIEWS | By Amy Bishop & Brett Zimmermann

Branding for WET

The need for trade marks

When the Wine Equalisation Tax (**WET**) Act[1] was amended with effect from 1 July 2018 to introduce additional eligibility criteria to claim the WET producer rebate, amongst other things, it imposed on producers a requirement that their product be packaged for retail sale and branded with a trade mark. Whereas in the past the disposal of unbranded bulk wine could attract the benefit of the rebate (subject, of course, to other eligibility criteria being satisfied), from 1 July 2018 this is no longer the case.

These provisions were initiated to support the Australian wine industry by ensuring that wine producers who build brands are the beneficiaries of the rebate, and not wine traders and retailers.

Whilst the packaging requirements are generally understood, we do not believe that the branding requirements (potentially of economic significance) are fully appreciated by producers, in particular by new producers who, though retailing their product for retail sale under their own brand, have yet to formally register that brand by way of a registered trade mark.

WET branding requirements

In broad terms, in order for a producer to satisfy the eligibility branding requirements of the WET producer rebate,[2] the container must be branded with a trade mark that satisfies each of the following conditions, that is it:

1. is a "trade mark" within the meaning of the *Trade Marks Act 1995* (**TMA**);
2. "identifies", or is "readily associated with", the producer;[3]
3. is owned by the producer (or a connected entity of the producer); and
4. satisfies one of the following:

1 *A New Tax System (Wine Equalisation Tax) Act 1999.*
2 Remembering of course that there are other non-branding requirements which we do not address in this article.
3 It is unlikely to meet the requirement where the producer's brand is not readily visible (for example, small print on the back label). Co-branding can meet the requirements in certain circumstances, for example where the producer's brand is dominant on the packaging such as the front label.

- o is registered with IP Australia;
- o an application for registration with IP Australia has been lodged but is pending; or
- o is unregistered, but has nevertheless been in use by the producer since 1 July 2015, as evidenced by for example:
  - details of specific goods or services sold using the trade mark;
  - advertising and marketing material, photos, or signage, or other images;
  - historical context; or
  - details of any confusion or dispute about the use of the trade mark.

Therefore, ineligible trade marks include:

- a mark that is incapable of registration as a "trade mark";
- a mark not legally owned by the actual producer or an entity that is connected with the producer; and
- an unregistered mark that has only been used after 2015.

Consequently, any wine sold under a brand in any of the above situations will not attract the producer entitlement to the WET producers rebate.

...in order for a producer to satisfy the eligibility branding requirements of the WET producer rebate, the container must be branded with a trade mark...

Against this background we at DW Fox Tucker Lawyers have received multiple queries from existing (or would be) producers for clarification of the above rules and for further guidance as to registering their brands.

Trade mark requirements

A trade mark under the TMA is a ***sign*** used to distinguish goods, in this case wine, of one trader from the same or similar goods of other traders. A sign can be a word or logo or even a shape[4] and is often recognised in the trade mark sense as being a brand.

As the branding requirements of the WET rebate require the trade mark to be branded on the wine bottle, the label on the wine will guide what sign needs to be registered as a trade mark in order to satisfy the requirements. It may be the business name of the producer or a logo which identifies or is readily associated with the producer. If both appear on the wine label then either may be the subject of a trade mark registration in order to satisfy this portion of the WET producers rebate requirements. Of course, a registered trade mark also affords the owner certain protections and other benefits.[5] Thus, from a trade mark perspective, the best protection is obtained by registering both the name and the logo.

A registered business name, company name or domain name is not the same as a trade mark and having these things in place and appearing on a wine label, without having a registered trade mark,[6] will not satisfy the WET requirements. These names will also not afford the same benefits and protections which are provided by owning a registered trade mark.

Distinguishable

Importantly, in order for a sign to be registered as a trade mark it must be capable of distinguishing. This means it cannot be a phrase which describes the goods to which it relates, in this context being wine, or is in common use in relation to wine. Instead it needs to be a unique indicator of the producer of the wine. Particular to wine, there are also restrictions on use of geographical indications, grape varieties and traditional expressions, but discussion of these aspects are outside the scope of this article.

If a trade mark is descriptive or otherwise not distinguishable it will not be capable of registration. It also may not be considered to be a "trade mark" within the meaning of the TMA. For example, PREMIUM WINE is likely to be seen as descriptive of the goods, therefore not capable of distinguishing and not capable of registration by the Trade Mark Office. Accordingly, the WET producers rebate will not be available. It is therefore important to ensure a trade mark is a unique word, phrase or other sign and not obviously related to the goods or services for which it is to be used.

Conflicting trade marks

A trade mark will also not be able to be registered if it is substantially identical with, or deceptively similar to, a trade mark that has already been registered or applied for in relation to similar goods or services or closely related goods or services. These concepts have been the subject of much analysis with recent cases tending to ignore aspects of a trade mark that are not distinguishable in making a comparison. Certainly, registered trade marks that are the same or closely resemble the one being applied for will be a cause for concern, but so may those which leave an overall impression of being similar or confusing.

Demonstration of substantial prior use of the trade mark being applied for may be one way to overcome these concerns. Of course, for new trade marks, it is best to consider these issues in the development stage of the brand and choose a unique and distinctive mark from the outset.

Ownership

As mentioned above, the trade mark needs to be owned by the producer, or an entity connected with the producer. Although a registered trade mark is personal property and the person holding the trade mark registration is generally considered the owner, this is not conclusive evidence of ownership of the

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4 As an aside, a wine bottle shape if registered as a trade mark is arguably applied to the container in which the wine is placed such as to enable access to the WET rebate provided that the bottle shape sufficiently identifies the producer and the other requirements are satisfied
5 As further outlined below
6 Unless continuous use from prior to 1 July 2015 can be shown

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mark. An application for a trade mark may only be made by a person who claims to be the owner. Ownership can be subject to challenge by other persons who assert ownership of the registered, or applied for, trade mark. Ownership will ultimately be made out by demonstrating authorship and establishing first use of the trade mark.

It can be common to licence the right to use a trade mark. This often occurs between companies in a corporate group or as a way to keep intellectual property assets separate from a trading entity, such as a producer. Although it might be assumed that such an arrangement will mean the trade mark owner is an entity connected with the producer this should be thought through and confirmed. Where the relevant connection is not present, or if a producer licences a trade mark from an entirely unconnected entity, the ownership requirements will not be satisfied and the WET producers rebate will be unavailable.

Process and timing of trade mark registration

The priority date of a trade mark, when the rights attached to a trade mark commence, is generally the date of its application. Although prior use may be recognised where there is a conflict between trade marks or in support of an assertion of distinguishability, trade marks cannot be retrospectively registered. It is not possible to, upon making an application, choose an earlier date of effectiveness of the registration, as can be done, for example, with GST registration.

The trade mark registration process can be quite lengthy, with a minimum seven and a half month wait for registration to occur from the date of filing the application. An application will generally follow this course:

1. A trade mark application is made identifying the trade mark and the goods or services to which it will apply;

2. The trade mark application is examined by IP Australia, which can take three to four months. During this time the application will be pending and a producer will satisfy the branding requirements of the WET rebate;

3. If no issues are identified during the examination the application will be accepted:

    o Shortly after acceptance the trade mark will be advertised in the Australian Official Journal of Trade Marks;

    o Interested third parties will have a period of two months from advertisement to oppose the registration:

        - If the trade mark is opposed this will need to be addressed either by negotiation or, eventually, a hearing before the Trade Mark Registrar and, possibly, Court proceedings;

        - If the opposition is successful the trade mark will not be registered;

    o If there are no oppositions, or once any opposition has been dealt with or determined in favour of the applicant, the trade mark will be registered;

4. If the examiner identifies issues with the application he or she will issue an Examination Report outlining those issues:

    o The applicant will be allowed 15 months from the date of the Examination Report to respond and overcome to the satisfaction of the examiner all of the issues raised. This might be by providing evidence of the use of the trade mark, or making legal submissions about the issues raised;

    o If a response is not made the application will eventually lapse. Importantly from a WET perspective, this will change the status of the application from 'pending' to 'lapsed' meaning at this point the WET branding requirements will no longer be satisfied;

    o If the issues are not able to be overcome, the applicant may withdraw the application or request a hearing. The application may also be rejected or refused by the Trade Mark Registrar. If none of these actions are taken the trade mark will simply lapse once the time for response and a brief grace period expires;

- o If all issues can be overcome the application will be accepted and continue on the path as outlined in paragraph 3 above.

Brands used prior to 1 July 2015

It is clear that any producer that only began producing wine after 1 July 2015 will need to mark their wine with an Australian registered trade mark[7] in order to obtain the rebate.

Whilst a producer who has used a brand before 1 July 2015 may not need to actually apply to have its trade mark registered, it will still need to satisfy other eligibility branding conditions to obtain the WET producer rebate. This includes the requirement for wine bottles to be branded with a trade mark which is used to distinguish (so as to be within the defined term under the TMA) and is owned by the producer (or a connected entity).

It will also need to be in a position to evidence its continuous use of the trade mark from before 1 July 2015 to the present, or future, time and retain such evidence for this entire period. The necessity to retain evidence such as this can be cumbersome.

By making an application to register a trade mark, wine producers with brands in use from before 1 July 2015, will, upon registration, more readily be able to satisfy the Commissioner that their mark is a "trade mark" as defined (since it has been registered as such) and that they are the owner, as well as dispensing with the need to have continuously used their trade mark and to have retained substantial evidence of this. In addition, there will be less risk of infringement issues arising and, if they do, the registered trade mark can be used as a defence to such a claim as well as having better protection of the brand and other benefits of being a registered trade mark owner.

Benefits of a registered trade mark

Once a wine producer has a registered trade mark it will have the exclusive right to use and licence the trade mark. These rights can provide a competitive advantage. In addition, registered trade marks can use the ® symbol to put others on notice of the trade mark holder's rights in relation to the trade mark. It is an offence to use this symbol with an unregistered trade mark.

A trade mark owner will also have legal protection against others who, without authorisation, use the trade mark or a trade mark that is substantially identical or deceptively similar in relation to the goods to which it applies. These rights against infringement can be simpler to enforce than common law trade mark rights such as passing off because no evidence of reputation in or use of the trade mark is required; the mark as registered can simply be relied on.

A registered trade mark will also now enable a producer, in circumstances where the other requirements are satisfied, to obtain the WET rebate.

FOR SPECIFIC TRADE MARK REGISTRATION OR QUERIES, PLEASE CONTACT AMY BISHOP.

FOR MORE INFORMATION REGARDING THE PROVISION OF THE WET LEGISLATION, PLEASE CONTACT BRETT ZIMMERMANN.

Brett Zimmermann Senior Associate
p: +61 8 **8124 1826**
brett.zimmermann@dwfoxtucker.com.au

Amy Bishop Senior Associate
p: +61 8 **8124 1827**
amy.bishop@dwfoxtucker.com.au

7 As well as satisfying the other WET producers rebate conditions

SUITS OFF | **Staff Profile**

Loving the Ride

Ben Duggan Director

A look at Ben Duggan's list of legal achievements would lead you to believe he's a workaholic lawyer with little or no time for life outside the practice, but when digging a bit deeper it's clear the opposite is the case.

Somehow in between nurturing an impressive nationwide reputation in industrial relations, workplace relations, and work health and safety, Ben finds time to binge watch the latest Netflix series with his wife Amanda, be a Dad to three grown up children, a serious triathlete, a keen crab fisher and an Australian Rules footy coach.

"Actually, I've hung up my boots with the footy coaching", Ben corrects. *"But I do still dine out on the story of been a part of a Premiership in 2015, which was extra special given my son Charlie was playing for them at the time. He, despite being a Carlton supporter, still has a passion for football and plays for Payneham Norwood Union, whose senior team is currently coached by ex-Norwood legend Garry McIntosh… so I'm in esteemed company!"*

The big game in Ben and Amanda's personal life these days is for them to be around to see his kids grow into their adult world. *"It's a wonderful thing to watch"*, he says with a smile. *"They are at those ages – Charlie 17, Harry 18 and Alexandra 21 – where hanging out with mum or dad isn't very high up their agenda, but still from the sidelines it's fascinating to see these three very different personalities address the big moments in their life like their first trip overseas, first job, and first love. When the extended Duggan family comes together at Easter, Christmas and birthdays for some crabbing and surfing at Ben's parents, Kevin and Rose's, place near Middleton, getting the juicy updates on their lives is a great way to spend a few hours."*

Ben's not known to be a name dropper on the legal circuit, but it's a different story when it comes to his bike. ***"It's a 'Lapierre'"***, he proudly proclaims when asked about his triathlon pursuits. His love for Triathlon has led him to a level of performance which has seen him photographed by the Victor Harbour paparazzi and a serious contender to win his age category in the big yearly event.

"I've competed in the annual triathlon at Victor Harbour for the last 3 summers" Ben reports, *"I was stoked to take two minutes off my time this year, and next year I've set myself the target of winning my age category for the event."*

When it comes to feeling like a winner in his professional life, Ben looks to his peers for judgement on his performance. *"I have always felt that a pretty good reflection of your own skills and ability is what your peers think… after all, they are the ones who deal with you on a day to day basis. To that end I'm extremely proud to have been named in the Australian Financial Review's Best Lawyers publication, which is recognised as the leading peer-based assessment of lawyers in Australia."* Ben's huge number of referrals from right across the country is another prime example of peer-based approval, and solid proof that there's a growing number of cases and clients which will follow this detail-driven people-person, wherever he goes.

Ben's reputation for possessing an astute affinity with the legal intricacies of his field precedes him, driven by a deep desire to help Australian businesses and their workers understand, navigate and succeed within the country's complex mix of legislation around Employment Law.

"One of my main professional aspirations is to help small businesses in the face of increasingly confusing workplace law. When I started practising, workplace law was regulated by a State Act that was easy to follow, understand and comply with, but new Federal Laws changed all that. Large

companies and unions have the benefit of advisors and other experts to help them understand their obligations, but it's tough for small businesses and my passion is making sure as many as possible get the same informed guidance as the big end of town."

But what if he wasn't a lawyer? What if a few things had gone differently in life and directed him along a different path? *"Oh that's easy"*, Ben concludes. *"My other passion is history, so a career as a history professor would be my second choice to lawyering."*

Ben Duggan Director
p: +61 8 **8124 1881**
ben.duggan@dwfoxtucker.com.au

DWFoxTucker
Lawyers

DW Fox Tucker Lawyers

L14, 100 King William Street, Adelaide, SA 5000
p: +61 8 **8124 1811** e: info@dwfoxtucker.com.au

dwfoxtucker.com.au

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