

## **Changing trustees of trusts – Simple in theory ... not so simple in practice**

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The decision in *Balcaskie Investments Pty Limited v Chief Comr of State Revenue* [2017] NSWCATAD 19 ("**Balcaskie**") was reported at 2017 WTB 4 [120].

The case is a timely reminder of the critical issues that can arise from a revenue perspective in relation to the superficially simple area of changing the trustee of a trust.

The starting point for any change of trusteeship is always the terms of the trust deed. In this regard, the 'read the deed' mantra has been regularly highlighted in this *Bulletin* (see for example 2013 WTB 38 [1642] and 2014 WTB 43 [1426]).

Assuming the trust deed creates the relevant power and the change of trustee documentation follows the procedure mandated by the trust instrument, there are 2 key revenue issues to be aware of, namely:

- Capital gains tax ("CGT");
- Stamp duty provisions in the relevant jurisdiction (in the case of *Balcaskie* – NSW).

Each of these issues is considered in turn below.

### **CGT consequences**

Arguably the most commonly triggered CGT event is the disposal of a CGT asset (being CGT event A1).

A question that regularly arises, particularly in estate planning and asset protection exercises, is whether a change of trustee triggers CGT event A1.

Relevantly, s 104-10 of the ITAA 1997 provides as follows:

- CGT event A1 happens if you dispose of a CGT asset; and
- you dispose of a CGT asset if a change of ownership occurs from you to another entity, whether because of some act or event or by operation of law. However, a change of ownership does not occur:
  - if you stop being the legal owner of the asset but continue to be its beneficiary owner;
  - merely because of a change of trustee.

Therefore, it is generally accepted that CGT event A1 does not occur as a result of a change in the trustee and the ATO acknowledges this position in Tax Determination TD 2001/26.

Similarly, there are numerous private binding rulings ("PBRs") that confirm the same outcome, such as PBR 1011623239706.

### **Stamp duty consequences**

Unfortunately, while there are generally no stamp duty consequences for changing a trustee, the rules to gain access to the relevant exemption are different in each state.

Generally however, an exemption should be able to be accessed to mirror the revenue neutral CGT position, with the requirements likely to include at least the following:

- the dutiable transaction was undertaken for the sole purpose of giving effect to a change of trustee;
- the transaction is not part of an arrangement:
  - involving a change in the rights or interests of the beneficiary of the trust;
  - terminating the trust; and
- transfer duty has been paid on all trust acquisitions for which transfer duty is imposed for the trust before the transaction.

It is important to note that each state adopts its own approach in this area, and (for example) in New South Wales, additional requirements must be met including that the new trustee cannot be a beneficiary of the relevant trust.

Section 54(3) of the *Duties Act 1997* (NSW) limits the nominal duty exemption for a change of trustee to trust deeds that contain provisions ensuring that:

- none of the continuing trustees remaining after the appointment of a new trustee are or can become a beneficiary under the trust;
- none of the trustees of the trust after the appointment of a new trustee are or can become a beneficiary under the trust; and
- the transfer is not part of a scheme for conferring an interest, in relation to the trust property, on a new trustee or any other person, whether as a beneficiary or otherwise, to the detriment of the beneficial interest or potential beneficial interest of any person.

This prohibition is relevant for trusts established in NSW obviously. It is however also relevant in other jurisdictions as well because many trust deed providers are based in NSW, or rely on precedents originally sourced from NSW.

In addition, the NSW requirements will need to be satisfied where a trust which has been established in another jurisdiction owns dutiable property in NSW.

As noted in *Balcaskie*, prior to the case, there had not been a reported decision interpreting the way in which the stamp duty exemption on changing a trustee under the NSW rules operates.

The trust deed in *Balcaskie* had a specific clause (inserted by a deed of variation some years after the deed was originally settled) that required any change of trustee to comply with the NSW stamp duty rules to ensure access to duty relief.

In particular, the relevant clause stated –

*"The Original Trustee and the New Trustee and any future and past trustees are absolutely prohibited from being a beneficiary under the Trust Deed or from otherwise directly or indirectly benefiting under the Trust Deed and this clause will not be capable of amendment or revocation."*

The separate power of variation clause in the trust deed was very widely crafted, and on the reading adopted by the NSW Office of State Revenue ("OSR"), created the power for the trustee to amend (and potentially remove) the above mentioned prohibition.

This apparent power of variation meant (in the view of the OSR) that the duty exemption on changing the trustee was not available.

The NSW Civil and Administrative Tribunal decided the conflict solely on the basis of a fundamental rule of construction.

That rule being that a specific provision must be read as prevailing over a provision of general import.

In this case, the rule meant that the specific prohibition had priority over the general power of variation. In turn, the OSR was therefore required to grant the duty exemption on the change of trusteeship.

The case may also impact on the OSR's interpretation of the law in other areas – for instance, the NSW OSR has historically adopted the view that a trust will not qualify as a 'fixed trust' for land tax purposes if there is a power for the trustee to amend the trust deed in a manner which alters the fixed entitlement. The *Balcaskie* decision arguably means the OSR should be considering the terms of the fixed trust deed as they exist at a particular point in time, regardless of any power the trustee may have to subsequently amend those terms.

#### **Conclusion – always start by reading the deed**

As explained regularly in this *Bulletin*, given the range of significantly adverse consequences that can result where a purported change to a trust is subsequently found to be invalid, advisers should proactively invest in processes and systems to minimise the risk of such an outcome.

Invariably, best practice dictates that the starting point must be to read the trust deed.

There must then be a methodical analysis of all potential revenue consequences.