

[1642] Read the deed - another reminder re invalid distributions

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Practitioners will be aware, from many previous articles in this Bulletin (and elsewhere), of the critical importance that trust deeds should be read before making any distribution of income or capital. While the "read the deed" mantra should be indelibly etched in practitioners' minds, regular reminders of the dangers of not doing this are not out of place.

One example of a family law case of *Harris v Harris* [2011] FamCAFC 245 where the range of potential beneficiaries was critical was profiled in our article at 2012 WTB 39 [1586].

In that case, the trial judge in a family court matter noted that the recipient of trust distributions (being a company), who was being challenged, was not in fact an eligible beneficiary of the relevant trust. If the company had been simply nominated as a potential beneficiary, then the distributions would have most likely been valid.

A more common example of where difficulties with invalid distributions arise, however, relates to where particular potential beneficiaries are in fact expressly excluded by the trust deed. The most common example in this regard is the exclusion of the trustee, be that the current, former or even a future trustee, from being a beneficiary of a trust.

These types of clauses are often found in deeds prepared by New South Wales advisers. This is primarily because s 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.

An example of a clause adopting an approach that ensures access to the stamp duty relief is as follows:

"The Trustee for the time being of the Trust can not be a beneficiary of the Trust. None of the continuing Trustees remaining after the retirement of a Trustee is or can become a beneficiary under the Trust, and none of the Trustees of the Trust after the appointment of a new Trustee is or can become a beneficiary under the Trust."

New South Wales is the only Australian jurisdiction that has this type of restriction on accessing the duty concessions for a change of trustee and, understandably, clauses drafted in this manner are extremely prevalent with deed providers or lawyers based in New South Wales.

In many instances, however, there may in fact be no other connection with New South Wales for anyone associated with the trust.

The risks created by this drafting approach will, therefore, often be less than obvious. Anecdotally, there would seem to be an

increasing number of situations where invalid distributions are being discovered that stretch back over many years and involve significant levels of invalid distributions.

The exact ramifications of this type of situation will depend on a range of issues, including how any default provision under the relevant trust deed is crafted. This said, an embracing by all advisers involved with the administration of the trust of the mantra "read the deed" would avoid the issue ever arising in the first place.

Organisations Mentioned: court; trustee; port; trial; Act

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