Lost trust deeds

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Abstract: The ongoing maintenance of any trust structure is critical for all advisers working in the area. In particular, the starting point for all trust-related matters is ensuring trustees understand the exact terms and rules of a trust. However, when a trust's rules are uncertain due to the loss of the original deed, there is a threshold issue of a likely breach of the trustee's duty to ascertain the terms of the trust. This can have serious implications for the beneficiaries, as well as impact the trustee's future ability to administer the trust from a tax perspective. This article explores a number of pathways and issues that trustees and advisers should consider when a trust deed has been lost or misplaced. This article also provides a summary of the key advantages and disadvantages for each of the main pathways explored.

Introduction

The ongoing maintenance of any trust structure is critical for all advisers working in the area. Arguably, however, external environment factors such as legislative changes, tax cases and family law decisions must always be considered in the context of internally driven trust-related issues. While the range of internal issues is similarly vast, at least in a practical sense, few are as important as the trustee (and third parties) knowing the exact terms of the trust.

Where a trust's rules are uncertain due to the loss of the original deed, there is a threshold issue of a likely breach of the trustee's duty to ascertain the terms of the trust. This can, in turn, have a significant impact on the trustee's future ability to administer the trust, particularly from a tax perspective.

This article explores a range of issues in relation to the lost trust deeds.

Trustee duties – the starting point

Trustees have a wide range of fundamental fiduciary duties. Of particular relevance in relation to trust deeds are the following duties:

- keep the documents of the trust safe;
- familiarise themselves with the terms of the trust;
- act in accordance with the terms of the trust;[1]
- act in the best interests of the beneficiaries and not profit from their position; and
- exercise their duties at least to the standard of that of an ordinary prudent business person.[2]

Losing a trust deed is at minimum a breach of the duty to keep the documents safe and, depending on how long the trust deed has been lost, potentially a breach for failing to act in accordance with the terms of the trust. A breach in this regard can potentially mean a trustee is personally liable without any recourse to trust assets, including an account of profits, losses, tax costs and compensation.[3]

As discussed elsewhere in this article, if the trustee seeks directions from the courts and follows those directions, they will be deemed to have discharged their duty and will not be personally liable. However, this will likely only be the case if the court is satisfied that the trustee has acted diligently and promptly in seeking directions.

Reasonable search

In the context of the duties owed by a trustee, if a trust deed has been lost or misplaced, the optimal outcome is undoubtedly to find the original, or, alternatively, to at least locate a full (ideally certified) copy of the original trust deed.

If there was an obligation on the establishment of the trust for it to be stamped by an Office of State Revenue, any copy of the trust deed that a trustee is intending to rely on should ideally also have been stamped at a time contemporaneous with the original establishment of the trust. In this regard, it is important to note that the rules in relation to stamping trust deeds have in many respects been different in each Australian jurisdiction and have also changed relatively regularly.

From time to time, state revenue authorities have generally adopted one of four approaches, namely:

(1) stamping of a trust deed in accordance with a flat duty impost of, for example, $500 (this is still the case in New South Wales, and $200 Victoria);[4]

(2) requiring a deed to be stamped, but only imposing a nominal duty cost of, for example, $1.50 or $50 (as is the case in Tasmania);[5]

(3) allowing a trustee to decide whether to lodge the document for duty assessment and then stamping that document to nil (for a period of time, this was the case in Queensland); and

(4) not stamping a document at all and, indeed, refusing to stamp documents that are lodged (as is currently the case in Queensland).

Unlike many other areas of the law where there are statutory bodies that are responsible for maintaining registers of original documents, there is no similar approach in relation to trust deeds. This means that, in a practical sense, the types of searches most likely to be successful in

relation to locating a lost trust instrument include:

- former and/or present banks, as trust deeds are often required to be produced to open accounts or enter into finance arrangements;
- past and present lawyers, including the lawyer who prepared the deed, as they will often keep an original or copy of the trust deed for their own records;
- accountants, past and present for similar reasons as lawyers, they may have access to at least a copy of an original trust deed;
- in some states, if the trust has ever owned real property, it can be useful to contact the Land Titles Office in that jurisdiction. It may be that the department will have retained a full copy of the trust instrument on the initial acquisition of the property. This particular alternative is, however, not available in all jurisdictions. For example, New South Wales prohibits the disclosure of the existence of a trust relationship on title, so there will never be trust instruments with that department. The approach is also dependent on the exact practices from time to time of the relevant department;
- where none of the above pathways prove successful, there can be benefits in contacting the original settlor of the trust, particularly if they were not directly associated with the law firm that established the trust. Alternatively, other parties that have had any dealings with the trust from time to time should also be contacted. For example:
  - a beneficiary that is known to have historically received a distribution (or close relatives of deceased beneficiaries who are known to have received a distribution);
  - a former trustee; and
  - parties who have held a position of authority with the trust, for example, appointors, principals, guardians or nominators.

Even if the original trust deed cannot be found, any of the parties listed above may have:

- a full photocopy of the signed, or unsigned, original trust deed;
- an original, that is unsigned;
- enough secondary evidence to reconstruct the trust deed from a precedent; or
- other particulars such as file notes, deed of variations or financial returns,

that may provide a framework for developing some of the other alternatives dealt with in this article.

Trusts Act powers

The Trusts Acts in each Australian state provide a series of core powers to trustees regardless of the terms of any trust instrument which can be relied on by trustees as powers of last resort where the terms of a trust deed are unknown.[6]

Generally, the statutory powers for trustees will include the ability to:

- lend money;
- borrow money;
- deal with trust property;
- carry on a business; and
- otherwise conduct investments in accordance with prudent best practice.

On any test, the trustee's powers contained in the relevant Trusts Acts are at best limited in comparison to the powers generally provided by a modern trust deed. Importantly, the powers do not include an ability for a trustee to amend the terms of the trust arrangement.

Some of the key powers that a trustee would generally seek to rely on that are not available under the statutory powers include:

- the ability for a trustee to contract with themselves;
- avoidance of the rules around conflicts of interest;
- virtually all standard powers required by financiers;
- the ability to perform a trust "split" or trust "clone";
- automatic disqualification of the trustee on certain, potentially adverse, triggering events;
- the power to amend the terms of the trust, including the vesting day; and
- the ability to comprehensively deal with distributions of income and capital in a manner that will satisfy the requirements of the relevant taxation legislation and the ATO.

Where no other practical pathway is available, the powers under Trusts Acts do provide a, very limited, safety net to trustees. However, the residual powers will rarely be sustainable for an ongoing trust and are inadequate comparative to the asset protection and tax effective planning opportunities modern trust deeds provide.

Evidence of the trust terms where there is an uncertain document trail

In order to prove that there was a trust in existence, any party wishing to do so must demonstrate that the original trust was validly created and fully constituted. In this context, a trust will be held to have been created where there is:

- a legal owner of property (the "trustee")
- who held the property ("trust property")
- for the benefit of others (the "beneficiaries") and
- pursuant to certain terms or rules ("trust deed").

Importantly, as a trust is simply a legal relationship, it is not a separate legal entity. Ultimately, in order to prove the existence of a trust, there must be certainty of intention to create the trust, certainty of beneficiaries and certainty of object (the "three certainties").

Although the civil standard of proof is ordinarily the balance of probabilities, when proving the existence of a trust from secondary sources, the case law confirms that there is a need to show "clear and convincing proof, not only of the existence of the trust, but also of the relevant contents of the writing".[7]

While there is no legal requirement for a trust to be documented in writing, significant compliance-related issues arise where there are no written terms. Practically, the vast majority of modern trusts are governed by a formal written trust deed. In particular, where a trust purports to deal with real property, writing is generally essential.

The trust document will generally set out how the trust must be run, the trustees' powers and duties and define who the beneficiaries are. Primarily, because of the flexibility offered by trusts, they have become ubiquitous in Australia for tax planning, asset protection and succession purposes.

Due to the widespread use of discretionary trusts, often, even where a trust instrument is otherwise misplaced, a party may be able to access a template document via the lawyer or trust deed provider who initially drafted the relevant document.

Access to a template document does, however, presuppose that the trustee of the trust is able to identify with some level of

accuracy the date, or at least the year, that the trust deed was adopted.

The older the trust deed, the more likely it is that the firm's current trust precedent is radically different to the original trust terms. Depending on the firm, most law firms keep historical copies of their precedents, which may assist in establishing the true terms of the lost trust deed.

When to go to court

If, following a comprehensive search, an original trust instrument cannot be located, it is possible to make an application to the court. The court has the power through its inherent jurisdiction to deal with trusts, or more commonly through the statutory expediency jurisdiction provided for by the Trusts Acts in each state and territory.[8]

There are a range of issues that should be considered before proceeding with a court application, including:

- legal and court costs;
- the overriding duty of the trustee to ascertain the terms of the trust and the potential liability of the trustee for failing to ascertain the terms of the trust in a timely manner;
- strength of the evidence available;
- the size and nature of the trust estate;
- any commercial ramifications, including the risk that a beneficiary, disgruntled former spouse of a beneficiary or third party (such as a financier or revenue authority) may take issue with the inability to produce an original trust instrument; and
- that the trustee should act personally and not allow the beneficiaries or a third party dictate how the trustee should conduct itself.

The courts have the power to provide trustees with guidance and advice in relation to non-adversarial matters.[9]

In this regard, one of the advantages of a trustee seeking advice from the courts, from a liability perspective, is that the trustee will not be personally liable if they follow the court's directions because they are deemed to have discharged their duties. This is the case under the Trusts Acts of most states,[10] and also the common law position which applies in the Northern Territory and Tasmania.[11]

Depending on what evidentiary material has been located, a trustee can normally expect to be able to apply to court and successfully seek a declaration that one of the following be adapted as a replacement for the original lost trust deed:

- a full photocopy of the signed, or unsigned, original trust deed;
- an original, that is unsigned; or
- a reconstructed copy of the trust deed (based on, for example, the template likely to have been used when establishing the trust), so long as there is sufficient supporting evidence about the accuracy of the proposed deed.

The key advantage of a court declaration is that it does not alter legal rights of the parties, rather, it simply gives effect to existing rights.[12] This means that there is minimal prospect that the trust will be resettled by the creation of the replacement deed.

As noted above, however, before the courts will exercise their discretion to grant a declaration, there must be "clear and convincing proof" of the existence of the trust.

> *"... there is minimal prospect that the trust will be resettled by the creation of the replacement deed."*

Practically, this requirement is likely to mean for most formal trusts (particularly discretionary trusts, where the deed will normally be dozens of pages in length) that unless a template precedent from the same firm and same era is available to reconstruct a lost document, it is unlikely that a court application will succeed.

In particular, to varying degrees, each of the leading cases confirm that:[13]

- supporting documentation, while not of itself enough to establish the existence of a trust, will be critical to the prospects of success in any court application;
- in many respects, the more relevant ancillary documentation available, the more likely that a court application will be successful;
- if the supporting documentation indicates at least how the capital and income of the trust are dealt with, the court may advise the trustee to administer the trust according to those documents; and
- similarly, the more evidence that a trustee can bring demonstrating that it has discharged all duties in relation to a trust, other than ensuring security of the trust deed, the more likely that the court application will be successful.

Reconstituting a trust deed via a deed of confirmation

Full copy of trust deed

If an original trust deed cannot be located, but a signed, dated and (where applicable) stamped copy of the deed has been found, then a "deed of confirmation" and statutory declaration can often be prepared. Effectively, the combination of these documents means that the trustee "re-adopts" the terms of the copy of the deed on the basis that they are the same as the original missing deed.

Generally, this approach should be sufficient to ensure that the instrument is valid for trust law purposes, acceptable to third parties and not cause revenue consequences, such as stamp duty or a tax resettlement. This said, if complete certainty is required in relation to any of these issues, a court declaration is required.

Template copy of "likely" deed

Historically, while a full copy of a deed for each client may not have been retained, many law firms and trust deed providers would produce their documents based on one template trust deed. There would then be the insertion of a schedule at the end of the document setting out the particular terms that were different for each particular client. Indeed, many trust deed providers still adopt this drafting approach, despite significant advances in document automation.

Where a "likely" or probable template copy of the deed can be located, practically, a reconstituted deed is often seen as sufficient. This approach may, however, not be acceptable for trust law purposes, or to third parties and is likely to cause potential revenue consequences, such as stamp duty or a tax resettlement.

In these situations, where evidence can be obtained confirming the date of establishment of the trust and the firm that was responsible for drafting it, it may be possible to have that firm provide a full copy of their template deed and then simply complete the schedule in accordance with the evidence that can otherwise be obtained from third parties.

Practical approach

Particularly for firms that were involved in establishing trusts before computers and document automation became commonplace and, indeed, before comprehensive version control became an industry standard, it may be necessary to refer to trust instruments provided to other clients from time to time, rather than any "centralised" precedent.

The conservative approach, particularly given the trustee duties outlined above, would be to ensure that all known beneficiaries of the trust be a party to the deed of confirmation. All parties should also be given the opportunity to seek independent advice in relation to the consequences of the deed of confirmation.

Reconstituting a trust through a deed of variation

Overview

As set out above, trustees have no inherent or statutory power to vary the terms of a trust. In order to effectively reconstitute a trust deed, any deed of variation would need to recite precisely the words of the lost trust instrument.

Practically, therefore, where it is possible to recite the variation clause, a "deed of variation" adopting a new deed will essentially be the same as a deed of confirmation, assuming all the terms of the original trust instrument (not just the variation power) are known.

If the terms of the variation power are unknown, in most cases, a court application will be required and (as set out in the case summaries above) the success of such an application will depend on the quality of evidence available.

Beneficiary consent

Where the terms of a trust deed are unknown, but all beneficiaries can be identified with certainty, a deed of variation without court approval may be available in limited circumstances, as highlighted in the case of *Re Bowmil Nominees Pty Ltd*.[14] In this case, the sole member of a self-managed superannuation fund (SMSF) passed away and the rules of the fund required death benefits be paid as a lump sum.

The death benefit beneficiaries wished to receive the payments as multiple pensions and sought to execute a deed of variation to allow their preferred payment method. In order to implement the variation, the existing governing rules of the SMSF required the approval of the "principal employer", as defined under the deed.

The principal employer refused to approve the variation of the trust deed and the trustee of the SMSF applied to the court to vary the trust deed by deleting the provision requiring the principal employer's consent. The court concluded that, where all potential beneficiaries agree to a variation, there is no need for the court to interfere.

The decision is, to a large extent, based on the rule in *Saunders v Vautier*,[15] and is seen to primarily only be of utility in relation to trusts such as SMSFs, fixed or unit trusts, where all of the potential beneficiaries are clearly identifiable.

The judgment has been interpreted as meaning that, where a beneficiary who has attained the age of 18 has a vested and indefeasible interest in a trust asset, they can issue a call to the trustee requiring the trust of the asset to them. Having such an interest means that, in the context of a trustee adopting a new trust deed when the original instrument is lost, the beneficiaries will have the necessary authority to allow the trustee to act.

In the context of SMSFs and other forms of fixed trusts with a narrow range of known beneficiaries (who can be proved via other evidence), a court application for adopting a new trust deed is therefore unlikely to be necessary from a trust law perspective. However, the federal court decision in *Kafataris v DCT*[16] highlights that, even for trusts with an ostensibly narrow range of potential "beneficiaries", care must be taken. In that case, a husband and wife established separate SMSFs appointing themselves as sole members. They declared a property owned by them as property of their respective SMSFs.

When considering who the "beneficiaries" of each SMSF were, Lindgren J held that, on construction of the SMSF deeds, the class of beneficiaries was broader than each single member. This was because the trust deed allowed the trustee to pay benefits to the member's dependants and even relatives (if there were no dependants, as defined under the superannuation legislation) of the member. As such, the potential class of beneficiaries included 21 different people.

Best practice therefore dictates that each person who can enforce the due administration of the trust should be a party to and sign a deed of variation that seeks to implement a replacement deed.

Beneficiary consent and discretionary trusts

If a full copy of a discretionary trust deed cannot be located, it will rarely be appropriate for a trustee to prepare a deed of variation adopting what is assumed would be a template example of the original deed, even with the consent of all potential beneficiaries. This is because:

- as there is no evidence of the trust terms, the ATO will likely adopt the position that the variation is a resettlement;
- the obtaining of consent of all potential beneficiaries will be, at best, an educated guess; and
- furthermore, even if the "educated guess" were correct, practically it will be virtually impossible for all potential beneficiaries to consent due to the exceptionally wide range of beneficiaries in standard instruments.

Resettlement risks

The tax resettlement of a trust is an area that continues to be potentially important. Generally, whenever a trust instrument is proposed to be varied, and particularly in the case of a lost trust deed, where a trustee purports to reconstitute the trust deed, the risk of resettlement should specifically be considered. The consequences of a tax resettlement include:

- all assets are treated as having been disposed of by the original trust and settled on the new trust (ie CGT event E1 occurs); and
- any losses in the trust are forgone and cannot be carried forward to offset income in the "new" trust.

The ATO has confirmed that, unless variations cause a trust to terminate, there will be no resettlement for tax purposes.[17]

It seems that the conservative approach is to assume that the ATO will proceed on the basis that any steps taken to create

a new trust deed where there is no copy of the original terms available will cause a resettlement for tax purposes.

Particularly given the emphasis that the ATO (based on case law) has placed on the terms of a trust deed in the context of determining whether there has been a continuum of the trust, if a trust instrument is lost, it will in all likelihood be very difficult for a trustee to rebut a conclusion that a resettlement has been triggered.[18]

For these reasons, complete certainty, both in relation to the validity of the proposed terms of the trust and that there will be no tax resettlement, can only be achieved via the court. A declaration from the court should ensure that there is no tax resettlement because it confirms the terms of the trust that are to apply from the commencement of the trust.

Where there is a high level of certainty as to the terms of a lost trust deed, for example, a complete photocopy of the original deed or a precedent trust deed and significant supporting ancillary details have been found, then it should be possible to adopt a trust document without causing a resettlement.

It should not constitute a tax resettlement because the adoption of a deed of confirmation is a procedural and administrative change which does not alter the rights of any beneficiaries in respect of the trust property. As such, there is a clear continuum of property and membership of the trust.

Where, however, there is only ancillary material supporting the existence of a trust or, for example, a trust instrument that is based on the trustee's "best guess" as to the likely template used on creation of the trust, it is likely that the ATO would, on reviewing the situation, conclude that a resettlement has been triggered. This is because it will be impossible to show the required continuum of the terms of the trust — while the adopted terms will be certain, the terms of the original instrument will effectively be unknown.

Even for an SMSF (where it is likely that all beneficiaries should be able to be identified), the conservative view is that a trustee adopting a new deed without any evidence as to the original terms will amount to a resettlement. Ultimately, then, in situations where there is limited certainty about the terms of a lost trust deed, it is generally recommended that one of the following two approaches are adopted, assuming that maintaining the trust without any trust deed is not commercially appropriate, namely:

(1) wind up the trust. This would be partly driven by the fact that the resettlement would cause the same tax outcomes as a winding-up in any event; or

(2) proceed with a court application.

Furthermore, as set out above, even where there is significant certainty about the terms of the trust deed (for example, a full certified copy of the original document), the conservative approach would be to adopt one of the above two approaches or (perhaps) explore concepts such as trust cloning (which are outside the scope of this article).[19]

> *"Any vesting of a trust is likely to trigger a range of revenue consequences …"*

Stamp duty

Generally, a variation of a trust deed that amounts to a "resettlement" will be dutiable.[20] This said, however, given the legislation varies across all states and territories, the amount of duty payable, and under which head of duty, will be different. In most states, the duty impost arises due to the concept of a trust resettlement effectively creating a new trust. However, there may be situations where a variation of a trust, which does not cause a resettlement at law, will still be subject to duty. For example, duty may be payable where a trust deed was validly reconstituted but there is a "trust acquisition" or "trust disposal".

Where a trust deed has been validly reconstituted, the deed may need to be stamped in accordance with the normal stamping rules.

In some states, such as New South Wales and Tasmania, nominal duty of $50 is payable on replica trust deeds (assuming a full copy of the original instrument can be provided).[21] While, in New South Wales, nominal duty of $10 is payable on duplicate deeds,[22] in Tasmania, no duty will be payable on duplicates,[23] and in other states, such as Queensland and Victoria, the Commissioner has discretion to stamp no duty payable on replica deeds.

Western Australia does not have an equivalent provision. However, where a trust deed is lost, the Commissioner has discretion to stamp a replica, if it can be demonstrated the original was duly stamped.

In relation to SMSF deeds, most states have a concessional regime that any variation of a trust deed (even if it causes a resettlement) will be liable for only nominal stamp duty.

Winding up the trust

A trust can vest because the relevant perpetuity period has expired or as a result of a positive determination by the trustee to end the trust and distribute the assets to the beneficiaries.

If the trust deed cannot be found, commercially it can often be the case that the most responsible approach is for the trustee to wind up the trust. Indeed, there may be disgruntled beneficiaries or third parties that essentially force a trustee to adopt this course, particularly where none of the other pathways explored in this article are available.

Any vesting of a trust is likely to trigger a range of revenue consequences, particularly taxation and stamp duty. These revenue consequences normally arise where a positive determination is made by the trustee to vest a trust, the trustee will usually resolve to make one or more beneficiaries absolutely entitled to the assets (or specific assets) of the trust.

While not intended to be an exhaustive list, the revenue-related ramifications of a trust vesting can include:

- CGT being payable on the increase in the value of any assets being transferred since the date they were acquired;
- income tax being payable on non-capital assets, such as plant and equipment and trading stock;
- stamp duty being payable on the transfer of the assets, to the extent they comprise dutiable property in the relevant jurisdiction;

- additional tax, stamp duty and commercial costs being incurred to subsequently transfer the assets out of the name of the recipient beneficiary (if they want the assets then re-routed to a trust environment);
- asset protection exposure for the beneficiary receiving the assets in the event they subsequently commit an act of bankruptcy;
- considering the impact of the rule against perpetuities (which effectively prevents a distribution to another trust if this causes the assets to remain within a trust environment for more than 80 years); and
- where an individual receives the assets, the need to update their estate plan to reflect the additional assets owned in their personal name.

If the vesting of a trust is being anticipated by the parties, many of the consequences above can be adequately managed through appropriate planning.

Practical considerations

In the case of winding up the trust due to a lost trust deed, some of the considerations a trustee should generally take into account include:

- Should the trust property be sold with the net proceeds of sale then distributed to the beneficiaries?
- What level of certainty does the trustee have that they have identified all potential beneficiaries and adequately discharged their obligations to all such beneficiaries?
- Should assets be transferred to beneficiaries as they are (that is, as an in specie distribution)?
- What are the revenue consequences (particularly tax and stamp duty) of each distribution alternative?
- Have all loan accounts and unpaid present entitlements with beneficiaries been satisfied (if known)?
- Which beneficiaries will receive the distributions?
- Have all legal, accounting, tax and statutory requirements of both the trustee and the trust itself been complied with?
- How will the records (if any) of the trust be stored following vesting?
- Will all beneficiaries indemnify the trustee for the actions taken by the trustee in historically administering the trust and for the wind-up itself?

A trustee has a duty to keep accurate records. As such, it is important that the decision to vest a trust is appropriately recorded in the form of trustee minutes.

The trustee is also responsible for ensuring that the assets are actually distributed to the beneficiaries and should do so in a timely way. Whether this be by forwarding a cheque to the beneficiaries if their entitlement is cash, or by arranging documentation to give effect to the in specie transfer of assets such as real property or shares.

Table 1

Approach	Advantages	Disadvantages
Do nothing (ostrich/ head in the sand)	(1) Simple (2) Cost-effective (superficially, ie only if nothing goes wrong) (3) Commercially pragmatic	(1) Significant risks (revenue, trustee duties, beneficiaries) (2) Potential for significant future costs
Trusts Act	(1) Simple (2) Cost-effective (superficially, ie only if nothing goes wrong) (3) Commercially provides a “base” position	(1) Significant risks (revenue, trustee duties, beneficiaries) (2) Potential for significant future costs
Wind up trust	(1) Relatively simple (2) Commercially “brings closure”	(1) Likely costly (at least in relation to revenue consequences) (2) Court approval required to reduce risks in relation to trustee duties (3) Assets protection risks (as assets will likely need to pass to individual beneficiaries)
Template deed	(1) Relatively simple (2) Relatively cost-effective (3) Provides a commercial solution that will likely be satisfactory to many third parties	(1) Court approval required to ensure no risks (revenue, trustee duties, beneficiaries) (2) Limited protection without court approval (3) Court approval depends entirely on evidence available
Full copy of unsigned original deed	(1) Simple (2) Cost-effective (assuming no court approval) (3) Strong commercial solution (not complete)	(1) Court approval likely required to ensure no risks (revenue, trustee duties, beneficiaries) (2) Court may not be satisfied with evidence
Full copy of signed original deed	(1) Simplest approach (2) Cost-effective (assuming no court approval) (3) Virtually complete commercial solution	(1) Best practice is to obtain court approval to manage risks, particularly revenue risks (2) Ultimately still an inferior outcome compared to locating original signed deed

The trustee should also obtain a receipt from each beneficiary to confirm they have received their entitlement and (as noted above) an indemnity.

Conclusion

While it is possible to reconstitute the terms of a lost trust deed, the process is generally time consuming, commercially difficult and costly. As with many similar areas, despite the potential triteness of the statement, when considering the implications of lost trust deeds, prevention is the best cure.

Practically, steps should be taken to create multiple original deeds on establishing a trust, storing the copies in at least two separate secure storage locations, and ensuring that full digital copies are maintained securely. For any existing trusts, steps should be taken on a yearly basis to audit the location of the original instrument as part of the annual compliance regime.

Table 1 provides a summary of the key advantages and disadvantages for each of the main pathways explored in this article.

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2 *Re Speight* (1883) 22 Ch D 727.

3 *Re Dawson* (dec'd) [1966] 2 NSWR 211.

4 S 58 of the *Duties Act 1997* (NSW); s 37 of the *Duties Act 2000* (Vic).

5 S 42 of the *Duties Act 2001* (Tas).

6 Pt 5 of the *Trusts Act 1973* (Qld); Div 2, Pt 2 of the *Trustee Act 1925* (NSW); Pt 2 of the *Trustee Act 1958* (Vic); Pt 2 of the *Trustee Act 1936* (SA); Pt 4 of the *Trustees Act 1962* (WA); Pt 2 of the *Trustee Act 1983* (NT); Div 2.2, Pt 2 of the *Trustee Act 1925* (ACT).

7 *Maks v Maks* (1986) 6 NSWLR 34 at 36.

8 S 96 of the *Trusts Act 1973* (Qld); s 63 of the *Trustee Act 1925* (NSW); s 91 of the *Trustee Act 1936* (SA); s 92 of the *Trustees Act 1962* (WA); r 54.02 of the *Supreme Court (General Civil Procedure Rules) 2005* (Vic); r 54.02 of the *Supreme Court Rules* (NT); s 63 of the *Trustee Act 1925* (ACT); the right still exists at common law, see specifically *Re Permanent Trustee Australia Ltd* (1994) 33 NSWLR 547 at 548.

9 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42.

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