

Adviser warning with backdating trust distribution resolutions

By Keeli Cambourne, Deputy Editor, SMSF Adviser and Matthew Burgess, Director, View Legal

A number of court rulings have highlighted that sole director companies can only make distributions by way of resolutions, a legal specialist said.

Matthew Burgess, director of View Legal, said generally, for trust distributions, this means that a sole director must not only determine how distributions are to be made but also record by way of resolution the decision by no later than 30 June in the relevant income year."

In contrast, for individual trustees or trustee companies with more than one director, any decisions (subject to the terms of the relevant trust deed) can be made up until 30 June and then later documented by way of a minute of meeting," Burgess said.

"Again, subject to the trust instrument, where a trust has derived a capital gain and it will be streamed, it should be possible to delay any decision at all until 31 August immediately following the end of the relevant financial year pursuant to provisions under the Tax Act."

Burgess continued that there are a number of recent high-profile examples from reported decisions of failed trust distributions and that the trust adviser's mantra to "read the deed" is a "shorthand reminder" that, particularly in relation to discretionary trusts, details matter.

"The critical nature of many trust-related principles is highlighted by the apparent tendency of aggrieved third parties to agitate the validity of attempted trust distributions," he said.

Some of the more high-profile decisions include *Owies v JJ Nominees Pty Ltd* [2022] VSCA 142 - where beneficiaries who had not benefited from distributions to their favour were able to demonstrate a failure of the trustee to discharge its duty in exercising its discretion.

Furthermore, Burgess said, the decision in *Re Estate of Stagliano* [2025] VSC 39 centred on the failure to properly identify potential beneficiaries and *Benaroon Pty Ltd v Larmar & Ors* [2020] QCA 62 involved distributions from a discretionary trust over many years to recipients who were not in fact valid beneficiaries of the trust.

"There is also *Doma ACT Pty Ltd v LN Sydney Pty Ltd* [2024] ACTSC 270 where limitations in the software package generating the trust distribution resolution saw the wrong entity listed as a recipient that (but for a court application) would have triggered excess tax on a \$10 million distribution," he said.

"Additionally, *The Trustee for the Whitby Trust and Commissioner of Taxation (Taxation)* [2019] AATA 5637 dealt with multiple failures to comply with basic governance and trust deed provisions saw attempted distributions held to be invalid."

Burgess said that from a tax perspective, it is understood that trustees of discretionary trusts must make a valid income distribution resolution by 30 June in the relevant tax year - or earlier if mandated by the trust deed.

"Subject to an effective default provision under the relevant trust deed, a failure to ensure a valid distribution by 30 June will mean the trustee is taxed under section 99A of the Tax Act. That is, the trustee is taxed on undistributed income and capital gains, at the top marginal rate; with no access to the CGT discount regime (subject to the Tax Office not being out of time)," he said.

"Trustees in this situation can claim imputation credits as a tax offset, subject to the integrity rules, however they are ineligible for a refund of excess imputation credits."

A more recent decision in *The Trustee for Goldenville Family Trust A/C Xiangming Huang and Commissioner of Taxation (Taxation) [2025] ARTA 1355* provides an example of revenue authorities that can leverage technology to help substantiate an argument that documentation is other than what it purports to be.

“The focus in the case was on purported trust distribution resolutions - with the threshold question being whether the resolutions relied on by the trustee were effective,” he said.

“In rejecting the validity of the resolutions the tribunal confirmed that claims by the taxpayer that the relevant trustee director decision was made and resolution signed on 30 June were inherently unlikely. It stated ... anyone with any taxation experience knows that it is commonplace for documents to be dated 30 June in a year, but for the meeting or decision they record to have taken place on an entirely different date.”

Burgess added that the court also confirmed the evidence of the key parties is important in how the documentation being relied on will be interpreted when under review, particularly when it is oral evidence rather than proper records retained in the course of business, before a court or tribunal.

“Furthermore, here almost all evidence was not accepted by the tribunal, and specifically in relation to the date of signing of the relevant resolutions was held to be 'quite fanciful',” he said.

“It was not helped by the fact that the appointed director of the trustee company was found to have essentially no involvement with the trust at all, and instead the company was controlled by what appeared to be a shadow director, being a person in accordance with whose instructions or wishes the appointed director always acted (see *Ho v Akai Pty Limited (in liquidation) ACN <tel:001%20500%20714> [2006] FCAFC 159*).”

He said the court found that the integrity of the resolutions was particularly undermined by factors such as an estimated distribution figure in a resolution claimed to have been signed on 30 June happened to precisely match the figure in the finalised income tax return prepared many months later, once all the transactions for the year had been reviewed and the financial statements prepared.

“In one year there were three signed copies of a resolution dated 30 June, with the signature on the first and second of these documents clearly different from that on the third - with no explanation provided,” he said.

“Moreover, the original word document of the 2016 resolution (signed and dated on 30 June 2016), had metadata records showing it was not in fact created until May 2017.”

A separate taxpayer claim that the nature of the trust income received was interest was similarly rejected outright by the tribunal for a range of reasons, including a lack of formal documentation, although it was accepted that a loan contract may be formed orally and without explicit discussion of all relevant details.

“Financial accounts also failed to document the claimed arrangements and there were numerous inconsistencies in evidence,” Burgess noted.

“The court stated there was implausibility that a party would elicit a substantial loan from a person barely known. That is, the claimed loan was to be a 'reconstruction of the arrangement ... which came about after (the taxpayer) became aware of the favourable tax treatment of interest income distributed offshore'.”