

# TAX TALKS

Australia's Tax News Podcast - The Podcast for Australian Tax Professionals

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## 156 | Trust 101 - Part II

Here is Part II of Paul Goldin's overview of simple mistakes that are easy to avoid but even easier to make – Trust 101 Part II.

### Trust 101 – Part II

In this episode Paul Goldin of [Vectigal](#) in Melbourne covers the second part of his overview of the most common mistakes encountered around trusts.

*To listen while you drive, walk or work, just access the episode through a podcast app on your mobile phone.*

Here is what we learned but please listen in as Paul Goldin explains all this much better than we ever could.

#### Practical Issues

In Part I Paul Goldin covered the first three common issues.

- 1 – Existence of a Trust or Sub-Trust
- 2 – Beneficiaries
- 3 – Trustee

In this Part II Paul Goldin will cover the other three common issues.

- 4 – Family trust Group
- 5 – Distributions
- 6 – Appointor

If you haven't listened to Part I yet, please first listen to Part I. It will put this episode into a better context.

#### # 4 Family Trust Groups

When a family has several trusts, you have a family trust group. These trusts might have different perpetuity periods, causing an issue within the group, especially if the head trust has vested or is about to vest.

Minor variations in beneficiary classes can cause major problems.

Did the trust make a legally valid family trust election? And does such an election make sense?

Did a legally valid interposed entity election happen? And did this make sense?

Important court cases are *Cadell v Palmer (1883) 6 ER 956* as well as *Nemesis Australia Pty Ltd v FCT [2005] FCA 1273*.

## # 5 Distributions

There are a range of potential issues around the distributions from a trust.

Do the distributions of income or capital comply with the trust deed?

Does the trust deed define net income?

Is the distribution actually a unit redemption (CGT C2) or an advance of capital (CGT E4)?

What does the deed require to create a present entitlement? Using vague, imprecise and ambiguous language like “distribute” can cause issues. It is important to use the exact terminology used in the trust deed. And the use clear terms like “pay, apply or set aside”.

Is there an ability to make interim distributions, for example of unrealised gains, like in *Fischer v Nemeske Pty Ltd [2016] HCA 11*?

What is the administrative practice in the eyes of the ATO, which was an issue in *Colonial First State Investments v FCT (2011) 192 FCR 298*?

What powers does the trustee have to reclassify, stream or categorise income?

Are there any distribution restrictions or reserved powers?

Are there special requirement on the exercise of a power? For example does it require a specific consent by the appointor or others? Does the exercise of power need to be in writing?

Is this a fixed trust as per Practical Compliance Guide PCG 2016/16? And as was an issue in *Colonial First State Investments Ltd v COT [2011] FCA 16* and *Kafataris v DCT [2008] FCA 1454*?

## # 6 Appointor

The responsibilities and duties of an appointor depend on the deed. The nature of an appointor is not property but an office, as found in *Dwyer v Ross (1992) 34 FCR 463*.

It is not a fiduciary role but the appointor has to act in the interests of beneficiaries as was found in *Wily v Burton and Ors (1994) 126 ALR 557*.

Other important cases are *Fordyce v Ryan & Anor [2016] QSC 307*, *Berger v Lyster Pty Ltd [2012] VSC 95* and *Blenkinsop v Herbert [2017] WASCA 87*.

A big issue is who will succeed the appointor when they die, especially if the deed is silent on this issue. In *Monique Verhelst v Tondelier Pty Ltd 2015 QSC 68* the son replaced the mother.

In *Harris v Rothery [2013] NSWSC 1275* it came down to the interpretation of trust deeds and contracts.

*Reschke v Reschke 2017 SASC 192* had to deal with an ineffective appointment, while this could have easily been fixed during lifetime.

And in *Blenkinsop v Blenkinsop Nominees Pty Ltd As Trustee for the Blenkinsop Family Trust [No 2] [2016] WASCA 61*, the UK court refused to remove the appointor.

**MORE**

[Trust 101 – Part I](#)

[Deceased Estate](#)

[Life and Remainder Interest](#)

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