

Update 5 September 2007: Fixing flawed trust deeds



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Summary

A 2006 decision of the NSW Supreme Court highlights a useful way to change trust deeds that were poorly drafted.

What's changed?

The NSW *Trustee Act* has always contained a provision that allows the Supreme Court to give a trustee powers that are "expedient" for administering the trust. However, the decision in *Stein v Sybmore Holdings Pty Ltd* involved the Court exercising this power in circumstances where many trust lawyers had assumed it would not apply.

What are the benefits?

The deed in *Stein* stated that the trust had to vest in 2007 after only 29 years – well under the 80 year statutory maximum. If it vested, there was evidence that tax of some \$690,000, together with stamp duty of \$620,000, would be payable.

The Court ordered that the vesting date stated in the trust should be extended to allow it the full 80 year lifespan.

Clearly, this deferred a significant tax and stamp duty liability. Pre-CGT assets in the trust also retained that status.

This represents a wider operation for the *Trustee Act* power than had previously been understood. In particular, the Court made the order even though it affected the interests of existing beneficiaries.

What are the problems?

Clearly there will be limits on what is "expedient" for the administration of a trust.

In this case, there was evidence that the settlor had intended to make provision for future grandchildren and none had yet been born. All current beneficiaries, the trustee and principal/appointor supported the application and the order required was a relatively simple one.

If any of these circumstances had been different, the Court may have been reluctant to intervene.

How can Fleming Muntz help?

Fleming Muntz has experienced trust lawyers who have dealt with many flawed trust deeds. They can provide rigorous, practical advice on strategies for achieving the desired result.

In particular cases, taxation and stamp duty savings - or simply certainty for the trustee - may be well worth the cost of an application to the Court.

Important fine print

This update is for general information only. It is not a complete guide to the area of law. Competent advice should be obtained before taking any action.

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