

Update: 1 October 2008

The risk of pre-dated trust distributions



Fleming Muntz
Solicitors



Summary

A recent advice we were asked to prepare highlights the importance of following to the letter trust deed provisions about when and how distributions of income can be made.

What were the facts?

Our advice was based on a 1991 decision of the Supreme Court of New South Wales – *Nicholls v Louisville Investments Pty Ltd*.

The trust deed considered by the Court said that the trustee had to resolve, “prior to 5.00 pm on 30 June each year” how to make its usual annual distribution of income to beneficiaries. While the minutes prepared each year were always dated before 30 June, there was clear evidence that the meetings in fact took place much later – generally around December.

What was the decision?

The Court decided that the purported resolutions distributing income were ineffective because they were not made in the way that the trust deed required. This meant that the income was instead deemed to be distributed according to default provisions in the deed, benefitting an entirely different set of beneficiaries.

What are the lessons?

We know from experience that the facts in this case are not unusual. Indeed the judge acknowledged that it will often be difficult, if not impossible, to determine the dollar value of the income of the trust fund prior to 30 June.

However, a court will not accept the date of a resolution at face value if there is evidence to the contrary. Any distribution that does not comply with the deed – however difficult it is – will be ineffective and a default beneficiary would be very well placed to challenge those distributions.

How can Fleming Muntz help?

Fleming Muntz lawyers have experience working with accountants preparing workable distribution provisions. We can provide advice on the alteration of existing trust deeds or on the extent of any exposure for past purported distributions.

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.

We resent unwanted email as much as anyone – if you would prefer not to receive any further updates, please telephone us on (02) 6021 2222 or email to fmlaw@flemingmuntz.com.au.

For more information, please contact:



Ian Byles
B Sc LLB (hons) LLM
Notary Public
Accredited Specialist Business Law
Telephone: (02) 6021 2222
Email: Ian.Byles@flemingmuntz.com.au

Solicitors for New South Wales and Victoria

568 Kiewa Street
Albury New South Wales
Australia

PO Box 910
Albury NSW 2640

fmlaw@flemingmuntz.com.au
www.flemingmuntz.com.au

Facsimile (02) 6041 1804

Telephone (02) 6021 2222



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