

---

Family Law

Tax Issues in Family Trusts

1 March 2023

---

Hadi Mazloun – Victorian Bar, Tax Bar Association

## TABLE OF CONTENTS

<b>A. OVERVIEW</b>	<b>3</b>
<b>B. THE TAX LEGISLATION</b>	<b>6</b>
Interface with the FLA	6
Patent pre-existing tax liabilities	6
Latent pre-existing tax liabilities	7
Future tax liabilities (eg existing division 7A loans, ultimate realisation of assets retained in the trust)	7
Tax liabilities arising from family law orders	8
Other issues	11
Ongoing income – section 97	11
Ongoing capital gains and franked distributions	12
Capital distributions – section 99B	12
Carried forward losses and net capital losses	12
<b>C. DEALING WITH THE COMMISSIONER</b>	<b>13</b>
Disclosure options	13
Voluntary disclosure	13
Private rulings	13
Settlements	13
Tax indemnities	13
The Commissioner as a party	14
Payment of unpaid tax	14
Access to documents and the <i>Harman</i> undertaking	15
<b>D. DUTIES ACT 2000 (VIC)</b>	<b>17</b>
The section 36A exemption	17
Landholders	17
Landholders – section 72	17
Discretionary trusts – section 76	17
Linked entities – section 75	18
Other provisions	18

## A. Overview

1. Taxation issues will regularly arise in the family law context, especially in those cases that involve the division of property. Providing the correct advice to clients at the earliest opportunity is crucial to ensuring that the outcome that the client is expecting to receive at the conclusion of a family law dispute is not railroaded by taxation issues that were not foreseen or properly dealt with from the outset. This presentation will deal with the impact on Family Law proceedings of income tax issues resulting from the use of trusts to acquire assets or carry on business.
2. Testamentary trusts have been commonly used for centuries to hold assets the income from which is distributed to one or more beneficiaries, such as a surviving spouse or children, during their lifetimes, and the corpus or capital subsequently to others. The last half of the twentieth century saw an explosion in the use of inter-vivos trusts to hold assets and carry on businesses.
3. Since a trust is a relationship under which the owner of property (the trustee) holds it subject to fiduciary obligations in favour of others, the beneficiaries,<sup>1</sup> there is enormous flexibility in determining the nature and extent of those obligations. In commercial contexts two broad categories of trusts have evolved:<sup>2</sup>
  - (a) the discretionary trust under which the trustee owed obligations to a class of persons (which frequently included other trusts and companies), none of whom had any proprietary interest in the income or capital (or whose interest might be defeased by the trustee's exercise of a power of appointment). The principal attraction of these trusts is the flexibility in the allocation of income or capital between the beneficiaries over the life of the trust and are commonly used by a family to hold assets or carry on businesses (hence the frequently used term, Family Trust) or where the family derives income from businesses or assets it controls, either alone or in conjunction with outside parties.

---

<sup>1</sup> *Aussigolfa Pty Ltd v Commissioner of Taxation* [2018] FCAFC 122, [138-139] and [203-206].

<sup>2</sup> There are also variants such as hybrid trusts (which are essentially unit trusts where the trustee has a power of appointment over income or capital which it can exercise in favour of entities which are not unit holders (but are generally related to unit holders)).

- (b) the unit trust in which the obligations of the trustee to the beneficiaries are fixed by reference to the number and type of units they hold in the trust.
4. It is not uncommon for families for asset protection reasons, to establish separate, generally discretionary, trusts for each business and property they acquire and, where there are third party interests, separate unit trusts the units in which will be held by separate trusts. These discretionary trusts are often beneficiaries of each other so that income and capital can readily flow between them (eg a trust with deductible losses may become presently entitled to the income of another trust so as to enable those losses to be offset against the assessable income).
  5. Not surprisingly the use of trusts gives rise to numerous issues. These include the rights of particular beneficiaries to capital or income (or more particularly the control that particular persons may have over that income or capital – for eg by controlling the trustee), the application of legislation, such as the *Family Law Act 1975* (the **FLA**), taxing legislation, superannuation legislation such as the *Superannuation Industry (Supervision) Act 1993* and the *Corporations Act 2001* to the income or capital of the trust.
  6. Whilst there has been some standardisation in drafting, each trust ought to be treated as unique and its terms individually ascertained. As is frequently put – “Read the Deed”. Once the relevant provisions have been ascertained, the second task is generally to construe the legislation to determine precisely to what it applies and then apply it to the ascertained rights or other aspects of the trust.<sup>3</sup> As cases such as *Kennon v Spry*<sup>4</sup> and *Re Richstar Enterprises Pty Ltd*<sup>5</sup> demonstrate concepts such as “property” or an “interest in property” may have very different ambits depending on the particular statute.
  7. In the Family Law context, the most frequent issues involving trusts concern the distribution of trust property or the conferral on one party of control of a trust which retains property. The trust may own the property or be a beneficiary of any number of trusts (or chains of trusts) which own property and the tax issues may arise in relation to: (1) previously accruing tax debts, (2) tax which be subsequently assessed in relation to previous periods, (3) the transfer of trust

---

<sup>3</sup> *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98.

<sup>4</sup> (2009) 238 CLR 366.

<sup>5</sup> (2006) 233 ALR 475.

property and (4) the unwinding of existing arrangements, such as loans, which may have tax consequences.<sup>6</sup>

8. These issues are complex and, especially in the case of large numbers of related trusts and companies may be highly specific to the particular family group. There is not sufficient time to canvass them in detail but, instead this presentation merely paints a landscape of the issues that practitioners need to consider from the outset to determine how best to protect their client's interests, identify existing and potential tax issues and determine the best way to deal with property held by trusts.
9. In particular this presentation will discuss:
  - (a) the interaction between Section 79 of the FLA and various taxation provisions;
  - (b) dealing with the Commissioner of Taxation (the **Commissioner**) and the ability of the Commissioner to intervene in family law proceedings; and
  - (c) issues that may arise pursuant to the *Duties Act 2000* (Vic) for trusts in family law disputes.

---

<sup>6</sup> There are also other issues beyond the scope of this presentation. These include the division of superannuation entitlements of each party (and the transfer of assets between superannuation funds), the ability of the Family Court to take into account property of a trust of which a party is a mere object or controls (*Spry*) in determining the division of the parties' property (including trusts which were established by the party's parents, grandparents or others) and section 106B of the FLA which allows the Court to set aside transactions designed to circumvent the operation of that Act ie effectively to rewrite history.

## B. The Tax Legislation

### Interface with the FLA

10. The Court's power to make orders in relation to the property of the parties is to be found in s 79 of the FLA, subsection (2) of which requires the division of property to be just and equitable. The Court does not however determine any tax issues which may need to be taken into account.<sup>7</sup> In essence the Court will take into account the quantum of the tax, the circumstances under which it arises, the likelihood of the tax ever being payable in allowing it as a deduction as a debt in determining the net value of the parties' property or in taking it into account in determining each party's fractional interest in the property.<sup>8</sup> The parties each need to consider what tax issues need to be ventilated in the family law proceedings as a means to resolve the family law dispute and how this can be done.
11. Division 6 of Part III of the *Income Tax Assessment Act 1936 (ITAA 1936)* and subdivisions 115-C and 207-B of the *Income Tax Assessment Act 1997 (ITAA 1997)* set out the statutory scheme for the taxation of the 'net income of a trust estate'.
12. The net income (excluding net capital gains, franked distributions and franking credits) is assessed to the trustee under s 99A (or in a limited range of cases, s 99) save to the extent that it is included in the assessable income of a beneficiary under s 97 of the ITAA 1936 (or, if the beneficiary is under a legal disability, to the trustee under s 98).
13. Capital gains and franked distributions are also assessed to the trustee save to the extent that they are assessed to the beneficiaries under s 115-225(2) (capital gains) and s 207-35 (franked distributions and franking credits) of the ITAA 1997.
14. **Patent pre-existing tax liabilities**
  - 14.1 The question of pre-existing tax liabilities ought to be relatively simple to deal with. Provided that the obligation of disclosure is properly being complied with by the

---

<sup>7</sup> Although pre-existing tax disputes before the Federal Court may be cross vested in the Family Court we know of no cases where this has been done and, in any event, tax disputes only become apparent as a result of the Family Court proceedings.

<sup>8</sup> *Rodgers v Rodgers* [2016] FamCAFC 68; *Rosati v Rosati* (1998) FLC 92-804 (**Rosati**).

parties, then the quantum of these liabilities should be readily ascertainable. Whether they are regarded as liabilities pertaining to one party to the marriage or whether they are a joint spousal liability will be dictated by family law principles and authority.<sup>9</sup>

## **15. Latent pre-existing tax liabilities**

- 15.1 Pre-existing tax liabilities that have not crystallised because of the failure to lodge tax returns fully disclosing the taxpayer's assessable income are more problematic. Since the Commissioner will generally not be time barred in issuing assessments (or amended assessments under s 170 of the ITAA 1936), it is essential for each party to do its due diligence at the outset of the family law dispute so as to ascertain that all taxation assessments have been issued, or in the event they have not, for all documentation to be lodged with the ATO so that any tax payable may be accounted for. Failure to do this may mean that either or both parties may be subject to significant tax liabilities (including penalties and 'interest') not taken into account in determining the division of the property.
- 15.2 Frequently the trusts are controlled by only one of the parties. It is therefore in the best interests of the other to have the tax position ascertained possibly by an audit. It is also in the interest of the other party because not only is he/she under an obligation to make full and true disclosure of the relevant financial circumstances but also because any tax debts will reduce the net value of the property (and hence the amount that he/she may be ordered to pay).

## **16. Future tax liabilities (eg existing division 7A loans, ultimate realisation of assets retained in the trust)**

- 16.1 Since the corporate tax rate, 27.5% for "base rate entities" (and 30% for passive income), is less than the maximum individual tax rate, 45% (including levies), companies are often presently entitled to the income of a trust. Often this entitlement is not actually paid to the company but is retained by the trust as an unpaid present entitlement or a loan. Not surprisingly division 7A of the ITAA 1936, a long standing provision, which assesses de facto dividends paid in the form of payments, loans or the forgiveness of debts, to shareholders and their associates

---

<sup>9</sup> See, eg, *Johnson v Johnson* (unreported) 31 March 1999 at para 20.5 to 20.7; (1999) 26 Fam LR 475; [1999] FamCA 369 (Ellis, Kay and Dessau JJ).

(including trusts) as dividends may apply to loans (including financial accommodation) provided by companies to trusts.

- 16.2 However, division 7A won't apply if the loan satisfies the requirements of section 109N (which provides for payments of interest and principal). Hence such loans are common. However, especially in the case of loans or financial accommodation by corporate beneficiaries, interest and principal need to be paid and, in the absence of other sources of funds, this is generally done by the company paying a dividend to the trust. As in *Rosat* if one party retains the trusts and companies there may be a future liability to tax in respect of that dividend. Alternatively, there may be an immediate liability if the structure is wound up as part of the property orders.
- 16.3 The capital gains tax (**CGT**) regime contained in Parts 3.1 and 3.3 of the ITAA 1997 includes any capital gain made by a taxpayer when a CGT event happens to a CGT asset in its assessable income. Gains and losses made on CGT assets acquired before 19 September 1985 are disregarded. In the case of trusts the capital gain is included in the assessable income of the beneficiaries to which it is attributed or assessed to the trustee under sub-division 115-C of the ITAA 1997. A CGT event will probably happen at some time to each CGT asset retained by the trust.
- 16.4 A party may also make a capital gain if he/she disposes of an interest in a trust. In this regard whilst the interest of an object of a power of appointment may not be an interest in a trust for some purposes,<sup>10</sup> it is still a CGT asset and its renunciation may give rise to a capital gain. The better view is that it would not because, in the circumstances of a property settlement its value is nil (because there is no real expectation that the trustee would exercise its discretion in favour of that beneficiary).

## **17. Tax liabilities arising from family law orders**

- 17.1 Orders made by the Court resulting in the making of payments or the transfer of property may result in a capital gain or otherwise being assessable. The negative tax implications have been ameliorated by the rollover provisions contained in subdivision 126-A of the ITAA 1997 but these provisions do not apply where the payment or payment would be otherwise assessable, for example if made by a

---

<sup>10</sup> TD 2003/28.



company, either as a dividend or deemed dividend under section 44 or division 7A respectively of the ITAA 1936.<sup>11</sup>

17.2 In the case of distributions made by trusts:

17.2.1 the trustee may make a capital gain or capital loss if it disposes of an asset; and

17.2.2 the recipient, if a beneficiary, may be assessable under section 99B of the ITAA 1936. Alternatively, the other party may be assessable under this section if the payment or transfer satisfies an obligation imposed on him/her. Subdivision 126-A provides a rollover if as a consequence of a Court Order either party or a trust or company would otherwise make a capital gain on transfer of a CGT asset to a party. In essence the capital gain is disregarded and the cost base of the transferor becomes the cost base of the transferee. Its effect is to defer any capital gain until a CGT event happens to the asset in the hands of the recipient (which is a potential tax liability that ought to be addressed before Orders are made).

17.3 The application of the rollover where the transferee is a company or trust has been considered by the Full Court of the Federal Court in *Ellison v Sandini*.<sup>12</sup>

17.3.1 In that case, the Husband was ordered to transfer some shares to the Wife. After the orders were made but before the transfer was effected, the Wife asked the Husband to transfer the shares to a trustee company of hers. The Husband agreed to do so.

17.3.2 The majority (Siopsis and Jagot JJ) decided that the rollover didn't apply whilst the trial judge and Logan J decided that it did. An application for special leave to the High Court was rejected, not because the High Court thought this was an issue that did not need to be determined, but because the way the case was run meant that it wasn't the appropriate vehicle for so doing.

17.4 A corollary of such a transaction is that if the transferee is a trust and the asset is the main residence of the party controlling the trust he/she will not be entitled to the

---

<sup>11</sup> Prior to 2014 it was generally accepted that payments made by a company pursuant to a Court order were excluded from Division 7A by section 109J. However the Commissioner changed his attitude in Taxation Ruling TR 2014/5. The issue has yet to be judicially determined.

<sup>12</sup> *Ellison v Sandini Pty Ltd* [2018] FCAFC 44.

main residence exemption when the trust subsequently sells the asset.<sup>13</sup> In the recent case of *Mingos v FCT*,<sup>14</sup> the Court decided the question as to whether a discretionary beneficiary of a trust had an ownership interest in a dwelling owned by the trust.

- 17.4.1 The taxpayer and his family lived in the dwelling in question for many years. It was originally held on trust for the taxpayer, but in 2006 it was transferred into his name and he then transferred it to his wife. A few years later the marriage broke down. As part of the divorce settlement, the Federal Magistrates Court ordered the taxpayer to pay just over \$2m to his wife, in return for the transfer of the dwelling to the taxpayer “or his nominated entity”. The property was in fact transferred to a nominated entity, a company (Lemnian) that was the trustee of a discretionary trust (the Lemnian Trust). The company was controlled by the taxpayer and his brother. The transaction was financed by a bank loan secured by a mortgage over the property.
- 17.4.2 When the property was later sold, the capital gain was distributed to the taxpayer who was a beneficiary of the Lemnian Trust. The taxpayer contended he was entitled to the CGT main residence exemption as he had an ownership interest in the property. He argued that title to the property had been transferred to Lemnian solely in order to obtain the bank loan and that the property was owned by him beneficially pursuant to a sub-trust. The ATO disagreed.
- 17.4.3 The primary judge held that the taxpayer did not have an ownership interest in the property. The taxpayer’s appeal was unanimously dismissed by the Full Federal Court.
- 17.4.4 The evidence was against the taxpayer. Emails showed that the bank was prepared to advance the funds on the basis of the property remaining in the taxpayer’s name (subject to obtaining a mortgage over the property) and that it was the taxpayer’s former accountant and tax agent who instructed that title to the property should be in the name of the Lemnian Trust. There was also evidence, including signed

---

<sup>13</sup> *Mingos v Commissioner of Taxation* [2019] FCAFC 211.

<sup>14</sup> [2019] FCAFC 211.

accounts and the trust's tax return, showing that the property was treated as an asset of the trust.

17.4.5 The Full Federal Court also held that the lower Court's order in the family law proceedings did not confer upon the taxpayer a full equitable interest in the property; and the taxpayer did not have an absolute entitlement to the property as against Lemnian (if he had an absolute entitlement, s 106-50 of the ITAA 1997 would have deemed the sale of the property to be done by the taxpayer).

## Other issues

### 18. Ongoing income – section 97

18.1 Property Orders may not be made for a number of years after the marriage has broken down. During that time the family group will frequently be controlled by one party and, whilst assets will be valued, there may be a difference between the valuation dates and the final division of the property. In the meantime, the trusts will derive income and the issue will be who is entitled to that income and how will it be taxed.

18.2 The amounts to be assessed to a beneficiary under s 97 or s 98 of the ITAA 1936 are determined by reference to its "present entitlement" to the income of the trust estate (other than franked distributions and capital gains) as at 30 June.

18.3 A beneficiary will be presently entitled to a share of the income of a trust estate to the extent that it has an indefeasible, absolutely vested, beneficial interest in possession in that income and must be able to demand immediate payment of it.<sup>15</sup>

18.4 If the income of the trust is less than its net income (calculated under s 95 of the ITAA 1936) the amount to be included in the assessable income of the presently entitled beneficiary will be more than the amount payable to him/her by the trustee.

---

<sup>15</sup> *FCt v Whiting* (1943) 68 CLR 199. Care must therefore be taken to ensure a tax free maintenance payment is not replaced by an assessable present entitlement.

## **19. Ongoing capital gains and franked distributions**

19.1 Like income, these need to be taken into account under subdivision 115-C and 207-D of ITAA 1997 respectively (especially where the capital gain or franked distribution results from Orders made by the Family Law Court).

## **20. Capital distributions – section 99B**

20.1 Section 99B of the ITAA 1936 provides that any distribution from a trust which is not otherwise assessable is assessable unless it falls within a limited range of exclusions. The most important of these are capital distributions (unless made out of amounts which would not be assessable if derived by a resident taxpayer) and amounts which have been included in the assessable income of the beneficiary or assessed to the trustee.<sup>16</sup> It is arguable that this section could apply to distributions paid out of the discount component of capital gains attributed to other beneficiaries or retained by the trustee. The better view is that it ought not to be but obviously care must be taken with the precise orders made.

## **21. Carried forward losses and net capital losses**

21.1 Trusts within a group may have current year or carried forward losses which, subject to the operation of Schedule 2F to the ITAA 1936, may be deductible or capital losses or net capital losses which may offset capital gains made by other trusts in the group and thereby reduce the amount of tax payable. These need to be taken into account but the value to be attributed to them will depend on factors such as when they are likely to be taken into account, if at all.

---

<sup>16</sup> It is an incredibly broad provision see *Traknew Holdings Pty Ltd v Commissioner of Taxation* 91 ATC 4272; *Howard v Commissioner of Taxation* [2012] FCAFC 149.

## C. Dealing with the Commissioner

### Disclosure options

#### 22. Voluntary disclosure

22.1 If a transaction your client has entered into or any part of their affairs attracts tax consequences that have not been properly reported, an option may be for your client to make a voluntary disclosure to the ATO. This will clarify your client's tax liability so that it can properly be taken into account when deciding how the matrimonial pool is to be divided amongst the parties. Making a voluntary disclosure to correct mistakes or omissions made in the past will usually attract interest and penalties, but these are likely to be reduced as a result of your client coming forward.

#### 23. Private rulings

23.1 If there is uncertainty as to whether and how a tax liability applies to a set of facts and circumstances, your client can apply to the ATO for a private binding ruling (**PBR**). The PBR is not law but it does bind the Commissioner as to how to treat a certain transaction for tax purposes.

23.2 Your client is not obliged to agree with the PBR and can treat a transaction differently for tax purposes. This is likely to lead to audit activity by the ATO, however, given the transaction will have been placed on the ATO's radar and deviating from its conclusions is unlikely to go unnoticed.

#### 24. Settlements

24.1 Your client should also consider whether any settlement entered into will have any tax consequences. The main areas of concern in this regard are capital gains tax (**CGT**) and GST. One should give particular attention to the relevant rollovers in the CGT regime and to ensure that any transfer of property from one party to another is framed in such a way so as to have the relevant rollover apply.

#### 25. Tax indemnities

25.1 It is almost certain that orders in s 79 proceedings will contain indemnities in one form or another, including tax indemnities. A tax indemnity is a promise to pay or to look after a debt whether known or, more commonly, not yet crystallised.

Indemnities should ensure they contain the obligation to both indemnify and pay. Indemnities may be an effective way to protect a party's interests in the face of uncertainty.

- 25.2 Indemnities are not foolproof and should be supported by security or the retention of funds in escrow pending the resolution of tax issues to mitigate the difficulties in collection or the risks of bankruptcy. Given the often adversarial nature of family law proceedings, consideration should also be given to joint indemnities so as to give the receiver of an indemnity a disincentive to engage in unwarranted whistleblowing behaviour to the Commissioner.

## The Commissioner as a party

### 26. Payment of unpaid tax

- 26.1 The Commissioner can intervene in family law proceedings if he is a creditor to a party to the marriage so that he can protect his interests in recovering his debt.<sup>17</sup> The ultimate question for your client is: do you invite the gorilla in or do you wait for him to come knocking?
- 26.2 Another scenario that may arise is that one spouse might whistleblow on the other spouse to the Commissioner which might then lead to intervention by him. The Court can also refer cases to the Commissioner if it is obvious that there is an unresolved tax issue. Remembering that the parties have to swear to a financial statement that lists all assets and liabilities which should include an estimate of any potential tax liability.
- 26.3 A recent trend has emerged where the Commissioner is more likely to intervene in family law proceedings if one or both of the parties to the marriage have a tax liability. The reason for that is simple – the powers the Family Court has and the breadth of orders it can make means that the Commissioner can recover his debt more quickly in that forum. As a party to the proceedings the Commissioner is entitled to apply for any order which the Court is empowered to make in the proceedings.<sup>18</sup>

---

<sup>17</sup> *Family Law Act* s 79(10), 92.

<sup>18</sup> *Dougherty v Dougherty* (1987) 163 CLR 278 at 296 (Brennan J). For a recent case where the Court decided that the Commissioner can press ahead with his s 79 application even if the Husband and Wife purport to abandon their own, see *Cao v Trong* [2018] FamCA 460.

- 26.4 The Commissioner will have visibility of what the matrimonial assets are and he will argue that the tax debt should be paid first and then after that is done, if there is anything left, the parties can fight over who gets what.
- 26.5 This is based on a line of authority that suggests that even if the tax debt is owed by one party to the marriage, insofar as the parties were living together when the tax debt arose, then both parties should share in the responsibility of paying it. This is more commonly known as “taking the good with the bad”.<sup>19</sup>
- 26.6 Sometimes, the party that owed the tax debt might support the Commissioner’s involvement in the case. Take the following example: Husband and Wife in property proceedings in the Family Court. Husband owes tax debt. Assets are all in the Wife’s name.
- 26.6.1 Scenario A: Commissioner doesn’t intervene. Court orders that the Wife retain 60% of the assets, and the Husband 40%. The Husband knows he is liable to a tax debt and that the Commissioner is going to come knocking soon. Has to pay any tax from the 40% he received and any other money he makes in the future.
- 26.6.2 Scenario B: Commissioner intervenes. The Court orders that before any property is divided, the tax debt is to be paid. The Husband has succeeded in indirectly making the Wife responsible for paying a big chunk of the tax debt.
- 26.7 Payment of tax to be assessed to the current or previous years of income
- 26.7.1 It is important to ascertain the relevant income year to which any tax liability applies. It may be relevant in determining the division of property between parties and be relevant in weighing up what a party is entitled to when taking into account income that a party receives in the relevant year.

## **27. Access to documents and the *Harman* undertaking**

- 27.1 The Commissioner has wide powers to obtain information and evidence. However, insofar as the Commissioner wishes to rely on information or evidence that has

---

<sup>19</sup> Eg *Zdravkovic and Zdravkovic* (1982) FLC 91-220; *Kowaliw and Kowaliw* (1981) FLC 91-092 at [76,644-4] (Baker J); *Trustee of the Property of G Lemnos, a Bankrupt & Lemnos* (2009) FamCAFC 20 at [242], [244], [246] (Thackray and Ryan JJ); *Bowne v Green* [1999] FamCA 148 at [41], [44] (Full Court); *Johnson v Johnson* (unreported) 31 March 1999 at para 20.5 to 20.7; (1999) 26 Fam LR 475; [1999] FamCA 369 (Ellis, Kay and Dessau JJ).

been adduced in family law proceedings for the purposes of raising assessments and/or for any other proceedings, then he is limited by the rule known as the *Harman* undertaking.<sup>20</sup>

- 27.2 The *Harman* undertaking prevents documents produced in litigation from being used for any purpose other than the litigation. A key rationale for the *Harman* undertaking is the desirability of encouraging full and unreserved discovery of documents before trial.
- 27.3 That being said, a party can apply for release from the *Harman* undertaking. As the undertaking is given to the court, only the Court may release a party from its obligation pursuant to it.<sup>21</sup> Special circumstances will need to be shown by the party seeking release from the undertaking, which the authorities have said would include 'the likely contribution of the document to achieving justice in the second proceeding',<sup>22</sup> competing consideration of public interest and the interests of justice.<sup>23</sup> It is likely that the Commissioner will succeed in an application for release from the *Harman* undertaking given he is fulfilling a public function (the protection of the revenue) which is very much in the public interest.<sup>24</sup>

---

<sup>20</sup> *Hearne v Street* (2008) 235 CLR 125 at [96].

<sup>21</sup> *Crest Homes Plc v Marks* [1987] AC 829, 854; *Holpitt Pty Ltd v Varimu Pty Ltd* (1991) 29 FCR 576.

<sup>22</sup> *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217, 225.

<sup>23</sup> *Minister for Education v Bailey* (2000) 23 WAR 149.

<sup>24</sup> See, eg, *Deputy Commissioner of Taxation v Karas* [2012] FCA 258.



## D. *Duties Act 2000 (Vic)*

### The section 36A exemption

28. The transfer of property in Victoria from one person to the next will often result in a liability to pay stamp duty on the transfer. This would include a transfer from a trust to a beneficiary of the trust if certain conditions are not met.
29. In simple terms, s 36A of the *Duties Act 2000 (Vic)* (***Duties Act***) creates an exemption to liability to pay duty if the duty resulting from the original transfer of the property to the trust has been paid (or the Commissioner is satisfied will be paid) and the beneficiary to whom the property is transferred was a beneficiary at the time of the original transfer to the trust or became a beneficiary after this time by reason of becoming a spouse or a child of an existing beneficiary. The transfer must also be for no consideration and must be made to the beneficiary absolutely. If the beneficiary is a company, all shareholders of the corporation must be natural persons who were beneficiaries of the trust at time of the original transfer to the trust.
30. Alternatively, s 44 of the *Duties Act* which excludes transfers made as solely because of a breakdown of a marriage may apply. These provisions are, like section 36A, limited and generally strictly construed.

### Landholders

#### 31. **Landholders – section 72**

- 31.1 If your client acquires an interest (eg shares or units) in a company or unit trust scheme that has land holdings in Victoria of at least \$1 million, they may be liable to stamp duty.
- 31.2 A landholder is defined as any company or unit trust scheme that has land holdings in Victoria with an unencumbered value of \$1 million or more.

#### 32. **Discretionary trusts – section 76**

- 32.1 Under section 76 of the *Duties Act*, a company or unit trust scheme (including a landholder and linked entity) that is a beneficiary of a discretionary trust may be deemed to own or to be otherwise entitled to 100% of the land that is the subject of the trust even though at law it may not have a present entitlement to any part of such property.

32.2 A company or unit trust scheme will be a beneficiary of a discretionary trust, pursuant to s 76, if the capital of the trust may be applied in its favour, either upon the exercise of a power or discretion conferred under the trust, or in circumstances where a discretion conferred under the trust is not exercised.

### **33. Linked entities – section 75**

33.1 In determining whether a company or unit trust scheme is a landholder, the land holdings of a company or unit trust scheme will not always be limited to land directly held by the company or on behalf of a unit trust scheme. In certain circumstances, it may include land held by linked entities and discretionary trusts.

33.2 A linked entity is defined in s 75 of the *Duties Act* to mean any person or body, corporate or unincorporated, that may hold property in its own right or for the benefit of any person. The definition includes a trust but does not include a natural person.

33.3 Pursuant to s 75 of the *Duties Act* a company or unit trust scheme will not be taken to be entitled to land held by a linked entity or chain or web of linked entities unless it has an entitlement to at least 20% of the land on the winding up of all the relevant linked entities

33.4 However, section 89D provides that no duty is payable if no ad valorem duty would have otherwise been payable.

### **34. Other provisions**

34.1 There are also a number of other provisions such as economic entitlement (section 81) and change in control (section 82) which need to be taken into account.

34.2 It could be argued that these provisions in relation to landholding are unlikely to apply because they are not addressed to arrangements following marital breakdown or that the better view is that they are protected by section 89D.