

# Lost trust deed?



**SOMETIMES THE MOST APPROPRIATE RESPONSE IS TO DO NOTHING AND RELY ON THE TRUSTEE ACT.**

## INTRODUCTION

Despite execution of multiple original trust deeds upon the establishment of the trust, it is not uncommon that over time all original trust deeds and copies are lost. While accounting and legal firms document management systems aspire to minimise this risk, trust deeds are often lost in transit between the client and their advisers, between advisers and between current and successor advisers and financial institutions during transactions.

While the trust relationship will continue, administering the trust will be difficult and uncertain. Without a trust deed, it will be difficult for the trustee to discharge the trustee's obligations to administer the trust in accordance with the trust deed, carry on a business, obtain finance and defend any revenue authority audit or assessment.

A thorough search may find an original or signed and stamped copy of the trust deed. If an unsigned execution copy of the trust deed is found or can be reconstituted from the trust deed provider's files and precedents, the trust deed can likely be reinstated by court order.

Less formal action to reinstate the trust deed such as the settlor, trustee and/or beneficiaries executing a "restatement deed" is likely to be ineffective and may have adverse taxation consequences if it constitutes the establishment of a new trust or resettlement.

This article discusses the options and risks associated with those options in dealing with lost trust deeds.

## INVESTIGATIONS

### Obligation

A trustee has the duty to ascertain the terms of the trust.<sup>1</sup> Accordingly, the trustee is at least obliged to take all reasonable action to ascertain the trust's terms when a trust deed is lost. For practical purposes, the trustee will usually seek to do this to assist the trustee in properly administering the trust.

### Possible enquiries

The trustee should undertake extensive investigations to locate an executed and stamped original or copy of the trust deed. Usually, the enquiries include contacting:

- all current and former trustees and directors of corporate trustees;
- the settlor and any appointors and guardians;
- the trust deed provider;
- all adult relatives of the clients;
- all adult primary and default beneficiaries;
- any legal personal representatives of the above;
- all current and former accountants and lawyers of the trust and adult beneficiaries;
- all current and former financiers and brokers who may have obtained a copy of the deed as part of any finance application.

Documentation of those enquiries and responses is essential to establish a proper audit trail.

### Copy trust deeds

If an executed and stamped copy of a trust deed is located, that copy (and copies of that copy) will constitute adequate evidence of and stand as a sufficient substitute for a lost original trust deed for most purposes (including litigation).<sup>2</sup> In jurisdictions not subject to uniform evidence statutes, to use a copy document it is necessary to establish the loss of the original trust deed and the conduct of full investigations using a proper audit trail.

Often investigations will find an unsigned copy of the execution copy of the trust deed prepared by the trust deed provider. Alternatively, the trust deed provider may be able to provide a copy of the trust deed precedent that was current at the date of establishing the trust. The application form, file notes or other contemporaneous documents or the recollection of relevant persons may be sufficient to reconstitute the terms of the precedent trust deed. Such copy trust deed may be sufficient to reconstruct the terms of the trust.

### Class of beneficiaries

For fixed and unit trusts, the class of beneficiaries can likely be identified from collateral documents such as unit certificates.

For discretionary trusts, the past pattern of distributions disclosed in minutes and tax returns will identify some of the beneficiaries within the class of beneficiaries (if one assumes the valid appointment of the beneficiary). This may be sufficient for the continued operation of the trust where future distributions can be restricted to that identified but limited class.

The greatest uncertainty in reconstituting the terms of a trust is establishing the correct class of income, capital and default beneficiaries.

Below is a discussion of how to use that reconstituted or collected information.

## MINIMUM RESIDUARY TERMS

### Introduction

Where the trust deed is lost, trust law and the Trustee Act<sup>3</sup> in each jurisdiction will provide minimum obligations on and limited powers to a trustee. Although the enactments of the Trustee Acts were to provide powers in the absence of alternate or adequate powers in a trust deed, those powers are an effective default position when the trust deed is lost. Accordingly, where the trust deed has been lost, the trustee's powers will effectively be limited to those provided under the relevant Trustee Act.

The operation of each Trustee Act differs between each jurisdiction. In relatively passive trusts with passive investments such as shares and rental properties, the Trustee Act's restricted powers are likely to be sufficient to enable the continued operation and administration of the trust in the absence of a trust deed. However, for trusts carrying on business, the restricted powers will invariably be inadequate.

### Common law duties

A trustee's duties include the following:

- the duty to ascertain the terms of the trust;
- the duty to avoid conflict between the trustee's duty to the trust and personal interest which may impose an obligation on the trustee to account for profits or personally compensate the trust for any loss; and
- the duty to act fairly between the beneficiaries entitled to income and those entitled to capital.

In a modern deed, the trust deed often modifies or abrogates these duties to provide the greatest flexibility. In the absence of a trust deed, normal intra-family dealings may be restricted or unauthorised decreasing the flexibility of the trust. Where a particular dealing may constitute a breach of these duties,

often the beneficiaries can consent to and authorise the breach.<sup>4</sup> Alternatively, the beneficiaries who together are absolutely entitled under the trust and none of whom are under a legal disability may authorise and permit the trustee to depart from the terms of the trust.<sup>5</sup>

However, the above is often a high-risk strategy as an errant beneficiary may frustrate the necessary consents. Further, without a trust deed it will be impossible to identify all the beneficiaries that must provide their consent. The court can excuse a breach where the trustee has acted honestly and reasonably and ought fairly to be excused for the breach.<sup>6</sup>

### Trustee Act statutory powers

The Trustee Acts variously provide powers to assist in the administration of a trust. The particular Trustee Act may not provide a power or may impose restrictions or caps on a power. This article does not undertake a detailed comparison of the Trustee Acts.

In respect of general administration, the more important powers include:

- All jurisdictions provide the power to give receipts.<sup>7</sup>
- All jurisdictions provide the power to compound liabilities.<sup>8</sup>
- All jurisdictions provide the power to insure trust property.<sup>9</sup>
- All jurisdictions (except SA and Tasmania, which rely upon common law) provide the power to employ agents.<sup>10</sup>
- All jurisdictions provide the power to delegate trusts.<sup>11</sup>
- All jurisdictions have dispensed with prescribed investments and now provide general powers of investment and varying investments.<sup>12</sup>
- All jurisdictions provide the power to permit the trust to purchase retain and maintain a dwelling house for a beneficiary.<sup>13</sup>
- All jurisdictions provide the power to permit the trustee to apply capital for a minor's maintenance, education, advancement and benefit.<sup>14</sup>
- All jurisdictions (except Tasmania) provide the power to permit the trustee to apply income for a minor's

maintenance and to accumulate income during minority.<sup>15</sup>

In respect of land, the more important powers include:

- All jurisdictions provide the power to sell trust property by public auction or by private contract.<sup>16</sup>
- All jurisdictions (except Tasmania) provide the power to sell trust real property on deferred payment or instalment terms.<sup>17</sup>
- Queensland and WA provide the power to exchange and partition land.<sup>18</sup>
- All jurisdictions (other than Tasmania) provide the power to repair, maintain and renovate trust property using income and capital.<sup>19</sup>
- All jurisdictions (other than SA and Tasmania) provide the power to effect improvements and in all jurisdictions (other than NSW, SA and Tasmania) provide the power to pay rates, premiums, insurance premiums and other outgoings.<sup>20</sup>
- All jurisdictions (except Tasmania) provide the power to grant leases and subleases and surrender onerous leases.<sup>21</sup>
- All jurisdictions (except Victoria) provide a separate power to renew leases.<sup>22</sup>

Accordingly, depending on the assets and investment profile of the trust, it may be possible to continue the administration of the trust relying on trust law and the relevant Trustee Act without remedial action.

### Trusts conducting a business

A trust is only entitled to carry on a business where the trust deed or will expressly or impliedly permits.<sup>23</sup> Only Queensland and WA provide restricted rights to carry on a business of the settlor or testator creating a trust in respect of a business for a period of up to two years for the purpose of winding up the business.<sup>24</sup>

Accordingly, the trustee of a trust carrying on a business will have little option but to take remedial action to reinstate the trust deed.

### Tax administrative powers

The statutory powers do not include the traditional tax administration powers such as:

- classification and reclassification of income, capital and outgoings;
- allocation and reallocation of income, capital and outgoings;
- streaming classes of income and capital and related tax attributes;
- discretion whether or not to recoup income or capital losses.

For income tax purposes, a person is deemed to be in receipt of dividends, passive income, interest and other sources of income where the person derives the amount of income as a beneficiary in a trust estate and the amount of income can be attributed directly or indirectly to that type or source of income.<sup>25</sup>

This deeming specifically provides a mechanism to pass through or separately attribute different classes of income to a beneficiary. However, the provision does not pass through the tax attributes associated with a class of income. Other provisions contained within the relevant divisions do this. The operation of Div 115-C ITAA 1997 is illustrative. The Taxation Institute's writers have discussed these provisions.<sup>26</sup>

Accordingly, even in the absence of streaming provisions in a trust deed, it is likely that the Commissioner will consider that tax attributes attached to a class of income can be streamed to beneficiaries.

### Expedient transactions

Where the trustee does not have the power to enter into a transaction under a trust deed (for example, because the trust deed is lost) or statute, the court may authorise the trustee to enter into that transaction.<sup>27</sup> Such court proceedings are relatively expensive. Accordingly, where possible, it would be more cost effective to reinstate the trust deed by court orders.

## RECONSTITUTING THE TRUST DEED

### Memorandum of terms

Where investigations have found reliable evidence of the terms of the lost trust deed, it is appropriate to consolidate those terms and any explanation in a non-binding memorandum for ease of reference. Those

terms can include the trust law principles and statutory powers under the relevant Trustee Act creating a virtual trust instrument. The trustee and the trustee's advisers will then have a clear document stating the powers of the trustee in administering the estate.

There is no implied or inherent trust law or statutory power vested in the trustee to amend the trust deed in the absence of an expressed power in the trust deed.<sup>28</sup> An invalid amendment,<sup>29</sup> appointment of a trustee<sup>30</sup> or appointment of a beneficiary<sup>31</sup> is void *ab initio* (from its start). Without a copy of the trust deed or a variation deed that recites the exact wording of the variation power, any attempt at reconstructing the trust deed that legally binds the trustee and the beneficiaries is likely to be ineffective.

### Restatement deeds

To avoid court costs of reinstating the trust deed by court order, some commentators and advisers have suggested that a combination of the settlor, the trustee and beneficiaries should execute a legally binding restatement deed recording the identified or assumed terms of the lost trust deed as a substitute for the lost trust deed. This is likely to be ineffective or have adverse taxation consequences.

Even if the relevant persons can execute a legally binding restatement deed, this is unlikely to be effective for tax purposes. It is incorrect to assume that the Commissioner is required to levy tax in accordance with a restatement deed under the principles that the tax law operates in accordance with and subject to the position at law and equity<sup>32</sup> and in accordance with the taxpayer's actual activities.<sup>33</sup> Although the parties may agree amongst themselves on their contractual rights and obligations, such agreement does not bind third parties such as the Commissioner.<sup>34</sup>

Further, the onus will be on the taxpayer to show that the terms of any restatement deed are sufficiently similar to the terms of the trust deed that there is no creation of a new trust or resettlement.

In the absence of a signed and stamped copy trust deed, the trustee should not attempt to create a replacement trust deed as this will likely constitute the creation of a new trust or resettlement of the trust. Even where an unsigned execution copy or precedent copy of the trust deed is

obtained from the trust provider, execution or adoption of that trust deed by the trustee is likely to constitute a new declaration of trust.<sup>35</sup>

### Court proceedings

Where an unsigned execution copy of the trust deed is located or is reconstructed from the trust deed provider's file, the court can order that the unexecuted or reconstructed copy of the trust deed stand as the terms of the trust in place of the terms of any deed or other document expressed to contain those terms.<sup>36</sup>

The trustee as plaintiff initiates the originating motion and the settlor (if alive) should consent to the application. It is good practice for the principal beneficiaries of the trust to also be plaintiffs.

Affidavit material by the settlor (if alive), the trustee or the original and current directors of a corporate trustee, and the principal beneficiaries is prepared and filed in support of the originating motion. The matters dealt with in the affidavit material will likely include evidence of:

- the due and valid establishment of the trust;
- the terms of the trust;
- the continued administration of the trust;
- the assets that constitute the trust fund;
- the purpose of the trust and how the proposed orders will give effect to that purpose;
- the enquiries undertaken to locate the original trust deed; and
- any explanation for the loss of the original trust deed.

A successful court order will reinstate the terms of the trust in a form that provides certainty for the administration of the trust.

### Conclusion

Informal reinstatement of the trust deed by executing a "restatement deed" is likely to be ineffective or have adverse taxation consequences. For small estates or estates with passive investments, it may be appropriate to accept a degree of restriction and administrative uncertainty and to administer the trust in accordance with trust law and the relevant Trustee Act.

However, for larger and more complex trusts where there is an unsigned execution copy or reconstructed copy of the trust deed, it is appropriate to apply for a court order that the unsigned execution copy or reconstructed copy of the trust deed stands in place of the terms of the original trust deed.

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**Reference notes:**

- 1 *Hallows v Lloyd* (1888) 39 Ch D 686.
- 2 The common law "best evidence rule" in respect of copy documents has been abolished or modified in many jurisdictions – for example ss 47 and 48 Evidence Act 1995 (Cth).
- 3 *Trustee Act 1925 (ACT); Trustee Act 1893 (NT); Trustee Act 1925 (NSW); Trust Act 1973 (QLD); Trustee Act 1936 (SA); Trustee Act 1898 (TAS); Trustee Act 1958 (VIC) & Trustees Act 1962 (WA).*
- 4 *Walker v Symonds* (1818) 3 Swans 1 at 64; 36 ER 751 at 774.
- 5 *Plimsoll v Drake* (1995) 4 Tas R 334 at 339.
- 6 Section 85 TA 1925 (NSW); s 76 TA 1973 (QLD); s 56 TA 1936 (SA); s 50 TA 1898 (TAS); s 67 TA 1958 (VIC) & s 75 TA 1962 (WA).
- 7 Section 48 TA 1925 (NSW); s 43 TA 1973 (QLD); s 27 TA 1936 (SA); s 23 TA 1898 (TAS); s 18 TA 1958 (VIC) & s 41 TA 1962 (WA).
- 8 Section 49 TA 1925 (NSW); s 44 TA 1973 (QLD); s 28 TA 1936 (SA); s 24 TA 1898 (TAS); s 19 TA 1958 (VIC) & s 42 TA 1962 (WA).
- 9 Section 41 TA 1925 (NSW); s 47 TA 1973 (QLD); s 25 TA 1936 (SA); s 21 TA 1898 (TAS); s 23 TA 1958 (VIC) & s # TA 1962 (WA).
- 10 Section 53 TA 1925 (NSW); s 54 TA 1973 (QLD); s 28 TA 1958 (VIC) & s 53 TA 1962 (WA).
- 11 Section 64 TA 1925 (NSW); s 56 TA 1973 (QLD); s 17 TA 1936 (SA); s 25AA TA 1898 (TAS); s 30 TA 1958 (VIC) & s 54 TA 1962 (WA).
- 12 Section 14 TA 1925 (NSW); s 21 TA 1973 (QLD); s 6 TA 1936 (SA); s 6 TA 1898 (TAS); s 5 TA 1958 (VIC) & s 17 TA 1962 (WA).
- 13 Section 14DA TA 1925 (NSW); s 28 TA 1973 (QLD); s 12 TA 1936 (SA); s 12 TA 1898 (TAS); s 11 TA 1958 (VIC) & s 24 TA 1962 (WA).
- 14 Section 43 TA 1925 (NSW); s 61 TA 1973 (QLD); s 33 TA 1936 (SA); s 37 TA 1958 (VIC) & s 58 TA 1962 (WA).
- 15 Section 44 TA 1925 (NSW); s 29 TA 1973 (QLD); s 33A TA 1936 (SA); s 29 TA 1898 (TAS); s 38 TA 1958 (VIC) & s 59 TA 1962 (WA).
- 16 Section 26(2)(c)TA 1925 (NSW); s 34(1) TA 1973 (QLD); s 20(1) TA 1936 (SA); s 16(1) TA 1898 (TAS); s 13(1) TA 1958 (VIC) & s 31(1) TA 1962 (WA).
- 17 Section 28 TA 1925 (NSW); s 37 TA 1973 (QLD); s 23A TA 1936 (SA); s 17 TA 1958 (VIC) & s 34 TA 1962 (WA).
- 18 Section 32(1)(b) TA 1973 (QLD) & s 27(1)(b) TA 1962 (WA).
- 19 Section 82A TA 1925 (NSW); s 33(1)(a) TA 1973 (QLD); s 25A(1)(a) TA 1936 (SA); s 35 Property Law Act 1958 (VIC) & s 30(1)(a) TA 1962 (WA).
- 20 Section 82A TA 1925 (NSW); s 33(1)(b) TA 1973 (QLD); s 58 Property Law Act 1958 (VIC) & s 31(1)(c) & (g) TA 1962 (WA).
- 21 Section 36 TA 1925 (NSW); s 32(1)(e) TA 1973 (QLD); s 25C TA 1936 (SA); s 35(1) and 40 TA 1958 (VIC) & s 27(1)(e)TA 1962 (WA).
- 22 Section 19 Trustee Act 1893 (NT); s 37 TA 1925 (NSW); s 39 TA 1973 (QLD); s 26 TA 1936 (SA); s 22 TA 1898 (TAS) & s 36 TA 1962 (WA).
- 23 *Southwell v Martin* (1901) 1 SR (NSW) Wq 32; *In re Smith* [1896] 1 Ch 171.
- 24 Section 57 TA 1973 (QLD); & s 55 TA 1962 (WA).
- 25 *IT 2328 (capital gains), TR 92/13 (dividend income), IT 2680 (dividend, interest and royalties) and IT 2555 (foreign tax credits).*
- 26 "Trusts – flow through of capital gains", *Taxation in Australia*, Vol. 36, No.1, July 2001, pages 16-19.
- 27 Section 81TA 1925 (NSW); s 94 TA 1973 (QLD); s 59B TA 1936 (SA); s 47 TA 1898 (TAS); s 63 TA 1958 (VIC) & s 89 TA 1962 (WA).
- 28 *R Meagher & W Gummow, Jacobs' Law of Trusts in Australia* (6<sup>th</sup> ed 1997) [1704].
- 29 For example, *in re Cavill Hotels Pty Ltd* [1998] 1 Qd R 396.
- 30 *H Ford & W Lee, Principles of the Law of Trusts* (Loose-leaf) at [9050].
- 31 For example, *Ramsden v FCT* [2005] FCAFC 39; *BRK (Bris) Pty Ltd v FCT* 2001 ATC 4111.
- 32 *MacFarlane v FCT* (1986) 67 ALR 624;86 ATC 4477; (1986) 17 ATR 808; (1995) 129 ALR 484; 95 ATC 4251; (1995) 30 ATR 412.
- 33 *Tweddle v FCT* (1942) 180 CLR 1; (1942) 2 AITR 360; (1942) 7 ATD 186.
- 34 *Davis v FCT* (2000) 171 ALR 654; 2000 ATC 4201; (2000) 44 ATR 140; *Hawley Partners Pty Ltd v CSD* (Qld) 96 ATC 4847; (1996) 33 ATR 430.
- 35 For example, refer to the broad construction of a declaration of trust in *CSR (Vic) v Lam & Kym Pty Ltd* [2004] VSCA 204; (2004) 58 ATR 60.
- 36 In Victoria, the appropriate originating motion is pursuant to Order 54.02 of the Supreme Court Rules.