

Trusts and life insurance for business succession



DESPITE HOPE OF CLARIFICATION, PR 2010/18 CONFIRMS THAT “ABSOLUTE ENTITLEMENT” REMAINS A FUNDAMENTAL ISSUE IN DETERMINING WHETHER A TRUST SHOULD OWN A LIFE INSURANCE POLICY.

LIFE INSURANCE POLICIES AND TRUSTS

One of the fundamental reasons for entering into a buy-sell agreement is to address succession of the underlying ownership in a business-owning structure — in particular, to deal with the circumstance of the death of an interest holder and the resulting treatment of the interest of the deceased interest holder. Linked with this issue, it has become common for buy-sell agreements to include provisions regarding the holding of life insurance policies and the application of the proceeds of same to fund the acquisition of the interest of the deceased in the business-owning entity. The requirement to hold such life insurance policies ensures that funding issues that may arise in relation to the unexpected acquisition of the deceased's interest in the business-owning entity are reduced, if not removed, as the proceeds of the life insurance policy will be available to assist in the acquisition of the deceased's interest.

The inclusion of obligations regarding life insurance policies in buy-sell agreements has led to the need to consider the numerous structuring options in relation to the ownership of such life insurance policies. This article will consider the issues that arise with the use of a special purpose trust. In particular, it will discuss the trust resettlement issues that may arise with changes in the underlying ownership in the business-owning entity, together with the capital gains tax (CGT) implications of the life insurance policy being held by a trust as opposed to being held directly by the relevant entity or

individual under a self-insurance or cross-insurance structure.

STRUCTURING OPTIONS IN RELATION TO LIFE INSURANCE POLICIES

When drafting a buy-sell agreement which includes provisions regarding the holding of life insurance policies and the application of the proceeds of same, there are a number of structuring options available in relation to the ownership of the life insurance policies. These structuring options¹ include:

- self-ownership (which involves each underlying interest holder taking out a life insurance policy on his/her own life, with the beneficiary of the policy being the insured or the insured's estate);
- cross-ownership (which involves an arrangement where each of the underlying interest holders has an interest in the life insurance policies on the life of the other underlying interest holders);
- trust ownership (which involves a special purpose trust being established to hold the life insurance policies on the lives of the underlying interest holders);
- superannuation fund ownership (which generally is similar to the self-ownership insurance model except that the life insurance policy is held by the underlying interest holder's superannuation fund); or
- company ownership.

Which structuring option is most appropriate for a particular group is a matter for the interest holders to determine, taking into account the benefits

and drawbacks of each structuring option. When considering which structuring option is most suitable, it is essential that the taxation implications of the structure are considered.

One of the taxation issues to be considered is the CGT consequences of the ending of the life insurance policy on the death of the individual, on the basis that a life insurance policy is a CGT asset.² On the death of the relevant individual under a life insurance policy, the ownership of the life insurance policy ends by way of satisfaction of the rights under the policy, being payment of the proceeds. As a result, CGT event C2 is triggered³ for the beneficiary (or the estate of the beneficiary) of the policy. A capital gain will arise for the beneficiary (or the beneficiary's estate) of the policy to the extent that the capital proceeds from the ending of the policy are greater than the cost base of the rights under the policy.⁴ However, s 118-300 ITAA97 provides for any capital gain made on the ending of a life insurance policy to be disregarded where the taxpayer:

- is the original beneficial owner of the policy of insurance on the life of an individual;⁵
- acquired the interest in the policy of insurance on the life of an individual for no consideration;⁶ or
- is the trustee of a complying superannuation entity.⁷

It is therefore essential when determining the structure of ownership of a life insurance policy to consider the conditions upon which the exemption from CGT in s 118-300 is available. This is considered in

further detail below in the context of the use of a special purpose trust.

USE OF A SPECIAL PURPOSE TRUST TO HOLD THE INSURANCE POLICY

There are a number of reasons why the use of a special purpose trust in relation to the ownership of life insurance policies taken out as part of business succession planning is attractive. The benefits of such a structure include:

- central management of the life insurance policies;
- minimising the need for variations to life insurance policies as a result of the exit or entry of an interest holder. That is, while the life of the person insured may change, the legal ownership of the policy remains with the trustee; and
- the trust deed may be able to deal with the terms upon which the proceeds from any insurance policy can be applied.

In addition to considering the CGT implications of this structure and the availability of the exemption in s 118-300, it is also necessary to consider the implications, if any, of changes to the beneficiaries of the special purpose trust arising from a change to the interest holders of the relevant entity. These two key issues are considered in more detail below.

This article will not consider the deductibility of premiums paid in relation to a life insurance policy, and instead assumes that the policy is a capital asset and accordingly no income tax deductions are claimed.

Issue 1: change to beneficiaries

Depending on the type of trust and the terms of the trust deed, the exit or entry of a beneficiary of a special purpose trust may result in the creation of a new trust (also referred to as a resettlement of the trust).

If changes to the beneficiaries of the trust cause a resettlement of the trust, this can result in significant taxation consequences as the assets of the original trust (in this case, the life insurance policies) are taken to have been transferred to the new trust (created as a result of the variation) at market value. These taxation consequences include the triggering

of a CGT liability at trustee level and, depending on the structure of the special purpose trust, at beneficiary level on the basis that the beneficiaries of the special purpose trust may be taken to have disposed of their interests in the original trust and to have acquired interests in the new trust.

Whether a resettlement of trust is triggered on a change to the beneficiaries of a trust is dependent on the terms of the trust deed and will vary from trust to trust. The decision of the High Court in *FC of T v Commercial Nominees of Australia*⁸ considered the issue of resettlement of a trust. In that case, the High Court found that the significant changes made to the trust deed of a superannuation fund did not create a new trust primarily because there was a continuing trust estate (ie the property of the fund).

Following the decision of the High Court in *Commercial Nominees*, the Commissioner released an amended form of the statement of principles⁹ which sets out his opinions as to what constitutes a resettlement of trust. In relation to the issue of additions or removals to the class of beneficiaries, the statement of principles sets out the Commissioner's opinion as follows:

"The identity of those for whose benefit the trust exists is an essential element of the trust obligation and hence the trust relationship. Therefore, changes amounting to a redefinition of the membership class or classes would terminate the original trust. By contrast, changes in the membership of a continuing class are consistent with a continuing trust ..."

It is essential to consider the form of the special purpose trust used for the purpose of holding life insurance policies in light of the possible resettlement issues. This is a fundamental issue as it is more than likely that, during the life of the trust, there will be changes to the underlying owners of the business and therefore the beneficiaries of the special purpose trust. Failure to consider this issue, particularly in light of the Commissioner's position as set out in the statement of principles, may result in future resettlement issues with possible unwanted taxation consequences.

By way of example, if the special purpose trust established was a form of discretionary trust with a relatively restricted defined class of beneficiaries (ie

all of the directors of Business Co Pty Ltd from time to time, with Business Co Pty Ltd being the business-owning entity), such that the new interest holder automatically fell within the definition of beneficiaries without any variation of the trust deed being required, a resettlement of the trust is unlikely to be triggered.¹⁰

While the form of the special purpose trust is important from a trust resettlement perspective, the structure of the trust also needs to be considered when determining whether the exemption from CGT in s 118-300 is available, such that any capital gain made on the ending of a life insurance policy is disregarded. It will not be sufficient to simply establish a discretionary trust in the hope that the exemption in s 118-300 is available.

Issue 2: CGT and the exemption in s 118-300

As outlined above, in order for a capital gain incurred on the ending of a life insurance policy to be disregarded, it is necessary for the taxpayer:

- to be the original beneficial owner of the policy of insurance on the life of an individual;¹¹
- to acquire the interest in the policy of insurance on the life of an individual for no consideration;¹² or
- to be the trustee of a complying superannuation entity.¹³

If the life insurance policy was self-owned, the question of the application of s 118-300 is relatively simple. That is, any capital gain or loss made by the beneficiary of the policy (assuming that the beneficiary is the original beneficial owner of the policy or acquired it for no consideration) at the time of the policy ending would be disregarded¹⁴ on the basis that the beneficiary was the original beneficial owner of the policy or, alternatively, the policy was acquired for no consideration. This is consistent with the approach taken by the Commissioner in the *Discussion paper in relation to buy-sell (business succession) agreements* which was drafted in May 2000 but which remains in draft form.

Unlike the circumstance of a life insurance policy being self-owned, the ownership of a life insurance policy by a special purpose trust means that determining the

availability of the exemption from CGT in s 118-300 is not so clear. In fact, there has been significant uncertainty as to whether the exemption in s 118-300 is available where the policy of life insurance is held by a special purpose trust.

Related to this issue, on 1 September 2010, the Commissioner released PR 2010/18, "Income tax: capital gains tax consequences for a Beneficiary of an Insurance Trust Deed". Although the terms of the product ruling apply only to the defined class of entities as specified in that ruling, it does provide some guidance on the view of the Commissioner in respect to the availability of s 118-300 in the circumstance of a life insurance policy being held by a special purpose trust.

When considering whether the exemption in s 118-300 is available to disregard a capital gain made on the ending of a life insurance policy held by a special purpose trust, the product ruling sets out the following:

- subject to the beneficiary being absolutely entitled as against the trustee to the legally enforceable rights under the life insurance policy, a capital gain will arise under s 104-25 ITAA97 to the beneficiary (and not to the trustee) to the extent that the capital proceeds from the ending of the policy are greater than the cost base of the rights under the policy.¹⁵ This is on the basis that, if a beneficiary is absolutely entitled as against the trustee, s 106-50 ITAA97 applies such that, for CGT purposes, the trust relationship is effectively ignored and the beneficiary is the relevant taxpayer;
- on the basis of the facts of the product ruling, if the beneficiary of the policy is deceased, a capital gain will arise under s 104-25 to the beneficiary's estate.¹⁶ That is, the absolute entitlement of the deceased beneficiary to the life insurance policy will pass to the deceased's estate;¹⁷
- any capital gain or loss made by the beneficiary's estate will be disregarded pursuant to s 118-300;¹⁸ and
- a CGT event will not happen on the transfer of the insurance policy by the trustee to the beneficiary.¹⁹ This is subject to the beneficiary having an

absolute entitlement as against the trustee to the life insurance policy.

A number of the issues highlighted by the Commissioner in the product ruling require further consideration.

"Original beneficial owner" and "absolute entitlement"

Section 118-300 provides that any capital gain made on the ending of a life insurance policy will be disregarded where the taxpayer is the "original beneficial owner" of the policy of insurance on the life of an individual.

For the purposes of determining whether the beneficiary of a special purpose trust is the "original beneficial owner" of the relevant policy, the term "original beneficial owner" is not a defined. The predecessor to s 118-300, s 160ZZI of the *Income Tax Assessment Act 1936* (Cth) (ITAA36), included a similar provision to s 118-300 which made provision for a capital gain to be disregarded where the person holding the CGT asset was the original beneficial owner. The issue of "original beneficial owner" for the purposes of s 160ZZI was considered by the Commissioner in TD 94/31. It was stated that:²⁰

"Although the term "original beneficial owner" is not defined in the [ITAA36], in the context of section 160ZZI, and for the purposes only of that section, an "original beneficial owner" of any of the rights, or any interest in any of the rights, under a policy of life assurance is the first person who:

- (i) at the time the policy is effected, holds such rights, or any interest in such rights, and
- (ii) possesses all the normal incidents of beneficial ownership (for example, is entitled to the benefits of the policy proceeds and has the power of management and control over the policy as well as the power to transfer, grant as security, surrender or otherwise dispose of, the policy)."

In the context of trusts being used in the ownership of life insurance policies, the taxation determination went further to state:²¹

"It is generally accepted in trust law that the trustee of a trust estate is the legal owner, and not the beneficial owner, of rights, or any interest in rights, under a policy of life assurance taken out and held on trust for the beneficiaries of that trust. For the purposes of, and in the context of section 160ZZI, a trustee will be regarded as the "beneficial owner" of such rights or any interest in

the rights of the trustee possesses all the normal incidents of beneficial ownership ...

Note:

- (i) Where a beneficiary of a trust is absolutely entitled as against the trustee to any of the rights, or any interests in any of the rights under the policy, the beneficiary (and not the trustee) will be the relevant taxpayer for CGT purposes in respect of the disposal of such rights, or an interest in any of the rights ..."

No further information is provided in the taxation determination as to what constitutes the "normal incidents of beneficial ownership". Similarly, the product ruling does not consider what is required in order for a beneficiary of a trust to possess all of the "normal incidents of beneficial ownership". Instead, the terms of the product ruling are based on the assumption that the beneficiary(s) of the trust has an "absolute entitlement", consistent with the note in the taxation determination.

When referring to the requirement for the beneficiary to have an "absolute entitlement" to the policy of insurance, the Commissioner in the product ruling confirms the position that, if a beneficiary is absolutely entitled to a CGT asset as against a trustee, the CGT provisions apply to an act done by the trustee in relation to the asset as if the beneficiary had done it (s 106-50 ITAA97).²² That is, the beneficiary is the relevant taxpayer rather than the trustee.

TR 2004/D25

The concept of absolute entitlement is one which is difficult and subject to uncertainty.

On 15 December 2004, the Commissioner released TR 2004/D25 which discusses the concept of absolute entitlement. In relation to the finalisation of this ruling, the ATO, at the National Tax Liaison Group (NTLG) meeting in March 2010, indicated that it did not propose taking steps to finalise this ruling until the government had considered its final response to the Board of Taxation's review of the taxation arrangements applying to managed investment trusts. The status of the draft ruling was further updated at the NTLG meeting of 23 June 2010 at which the ATO advised members that it would give consideration to finalising the draft ruling, given that the Board of Taxation made no recommendations regarding absolute entitlement in its report

on the taxation arrangements applying to managed funds. However, it was also noted by the ATO at this NTLG meeting that the issue is linked to other issues involving bare trusts and that the ATO will be continuing discussions with Treasury about these matters before seeking to finalise the draft ruling. The timing of the finalisation of this ruling therefore remains uncertain.

The draft ruling sets out a number of principles in relation to the concept of absolute entitlement, some of which are considered below:

■ The draft ruling confirms the Commissioner's opinion that the core principle underpinning the concept of "absolute entitlement" is the ability of a beneficiary, who has a vested and indefeasible interest in a trust asset, to call for the asset to be transferred to them or at their direction,²³ it being noted that this principle derives from the rule in *Saunders v Vautier*.²⁴

The rule in *Saunders v Vautier*²⁵ was summarised by the High Court in *CPT Custodian Pty Ltd v Commissioner of State Revenue*²⁶ as follows:

"... an adult beneficiary (or a number of adult beneficiaries acting together) who has (or between them have) an absolute, vested and indefeasible interest in the capital and income of the property may at any time require the transfer of the property to him (or them) and may terminate any accumulation."

■ A beneficiary of a discretionary trust, prior to any exercise of the trustee's discretion in the beneficiary's favour, cannot have an "absolute entitlement".²⁷ The basis for this statement being that a beneficiary of a discretionary trust is a mere object and accordingly does not have any interest in the trust's assets.

■ The following circumstances will not prevent "absolute entitlement":

- a beneficiary acting as trustee for one or more others;²⁸
- a mortgage, encumbrance or other charge of the asset in favour of a third party;²⁹ and
- the beneficiary suffers from a legal disability.³⁰

■ In addition to the above, the draft ruling considers the distinction between one beneficiary having an interest in a

trust asset and the situation of more than one beneficiary with interests in a trust asset. In the circumstance of one beneficiary having an entitlement to an asset as against the trustee (even if the trust has other beneficiaries), to the extent that the beneficiary can terminate the trust in respect of the asset by directing the trustee to transfer the asset to the beneficiary or at its direction, that beneficiary will be absolutely entitled.³¹ This is distinct from the circumstance of multiple beneficiaries having an interest in an asset of the trust, in which case it is the Commissioner's opinion that it is unlikely that absolute entitlement will be able to be established as one beneficiary cannot call for the transfer of the asset to them or at their direction.³²

The justification provided by the Commissioner for the position taken in the draft ruling that, where there are multiple beneficiaries that have an interest in an asset of the trust, they generally will be unable to show absolute entitlement (at least in respect of establishing absolute entitlement for CGT purposes) is based on the fact that it will not be possible for the beneficiary to show that they were entitled to any "particular assets". Instead, the draft ruling contemplates that the interest of the beneficiaries in the case of multiple beneficiaries is simply to have their interest satisfied by a distribution of entire asset(s). The Commissioner takes that view that the beneficiary will be unable to show, prior to the distribution of assets in satisfaction of the beneficiary's interest, that the beneficiary had an interest in a particular asset.³³

Some commentators have queried whether the distinction between one beneficiary or, alternatively, more than one beneficiary having an interest in an asset of the trust is relevant for the purposes of considering the application of s 106-50 ITAA97.³⁴ This is particularly in light of the fact that *Saunders v Vautier* considered that the concept of absolute entitlement involved a class of beneficiaries.

Regardless of the general distinction between the circumstance of one

beneficiary or multiple beneficiaries, the draft ruling does include an acknowledgement that it may be possible for a beneficiary, in the circumstance of there being multiple beneficiaries, to be treated as having an absolute entitlement to an asset of the trust where each of the following are present:

- the assets are fungible. The reference to fungible requires that beneficiaries would be indifferent to the replacement of one asset with another;³⁵
- the beneficiary is entitled, as against the trustee, to have its interest in the assets satisfied by a distribution or allocation of a specific number of the assets in favour of the beneficiary. Ultimately, what this requirement is considering is whether the beneficiary has a vested and indefeasible interest in the trust property,³⁶ but also the nature of the assets in question and in particular whether they are easily divisible as between the beneficiaries;³⁷ and
- there is a very clear understanding between all of the parties involved that the beneficiary is entitled, to the exclusion of all other beneficiaries, to the specific number of assets.³⁸ No further detail is provided in the draft ruling as to what will satisfy the threshold "very clear understanding".

In the case of the asset of the trust being life insurance policies, arguably it is possible for the terms of the trust deed and the structure of the trust to address this issue to ensure that, even if there are multiple beneficiaries, one beneficiary has a particular entitlement to the insurance policy.

As to the terms of PR 2010/18, the arrangement on which the product ruling is based seems to involve each beneficiary entering into an insurance trust deed such that a trust is established for each beneficiary. The effect of this is that a fixed or bare trust is established for each beneficiary and therefore one beneficiary is absolutely entitled to the asset of the trust, that is, the life insurance policy.³⁹ As a consequence of the particular arrangement the subject of this product ruling, consideration was not required to be given to the issue of multiple beneficiaries.

Kafataris

The issue of absolute entitlement was more recently considered in the 2008 case of *Kafataris v DC of T*.⁴⁰ The case considered the concept of absolute entitlement for the purposes of CGT event E1. Although the case concerned the application of CGT event E1, the principles regarding absolute entitlement will also be relevant to s 106-50 ITAA97 and, consequently, the availability of the exemption in s 118-300 ITAA97 on the triggering of CGT event C2 on the ending of a life insurance policy held by a special purpose trust.

The case involved a commercial property in the names of Mr and Mrs Kafataris (acquired in 1987). In 2002, both Mr and Mrs Kafataris declared over the property that their interests in the property were held for separate related superannuation funds, which subsequently sold the property to a third party.

The taxpayers, Mr and Mrs Kafataris, argued that CGT event E1 was not triggered in 2002 in relation to the declarations of trust on the basis that Mr and Mrs Kafataris continued to be sole beneficiaries absolutely entitled to the property as against the trustees of the respective superannuation funds. Somewhat inconsistently with this argument, Mr and Mrs Kafataris also argued that, for the purposes of considering the disposal of the property to the third party, the relevant taxpayer in respect of the capital gain made was the superannuation funds.

Lindgren J held that the relevant event was CGT event E1. When determining that CGT event E1 had been triggered, it was necessary to consider the concept of absolute entitlement. When considering this issue, the following comments were made:⁴¹

“... the expression ‘absolutely entitled to the asset as against the trustee’ in subs (5) of s 104-55 and s 104-60 of the [ITAA97] is intended to describe a situation in which the beneficiary of a trust has a vested, indefeasible and absolute entitlement in trust property and is entitled to require the trustee to deal with the trust property as the beneficiary directs.”

In response to this decision, the Commissioner released a decision impact statement⁴² on 24 December 2008. The decision impact statement sets out the view of the Commissioner that the decision

of Lindgren J confirms the position taken by the Commissioner in respect to the meaning of absolute entitlement in the context of the CGT provisions, including in relation to s 106-50. In this regard, the Commissioner confirmed his view, stating:

“To be absolutely entitled to an asset as against the trustee, the beneficiary must have both a vested and an indefeasible interest in the asset and be able to demand transfer of the asset by the trustee. It does not suffice for the beneficiary merely to have an entitlement under the deed to be paid a benefit. The beneficiary must have an immediate entitlement to demand transfer of the particular asset in circumstances where that entitlement cannot be defeated ...”

Other issues

In addition to a consideration of “beneficially owned” and “absolute entitlement”, it is necessary to be aware of the following provisions:

Meaning of “policy of insurance on the life of an individual”

The reference in s 118-300(1) to a policy of life insurance on the life of an individual is not itself a defined term. However, TD 2007/4 confirms that a policy of insurance on the life of an individual includes:

- but is not limited to, life insurance policies within the common law meaning of the term;⁴³
- other life insurance policies as defined in s 995-1 ITAA(7), but only to the extent that those policies provide for a sum of money to be paid if an event happens that results in the death of an individual;⁴⁴ and
- a life insurance policy to the extent that it provides for the payment of a “terminal illness benefit”.⁴⁵

Transfer for no consideration for the purposes of s 118-300

Assuming that absolute entitlement can be established, if the beneficiary of the life insurance policy is the deceased, the deceased beneficiary’s estate will be taken to have acquired the deceased’s rights under the life insurance policy and accordingly fall within the provisions of s 118-300.⁴⁶

If the life insurance policy is transferred during the life of the beneficiary of the policy, in order for s 118-300 to apply to

the transferee of the policy should CGT event C2 be triggered, it is necessary for the policy to be transferred for no consideration.⁴⁷

In determining what amounts to consideration, the Commissioner in taxation determination TD 94/34 confirmed that the payment of premiums does not constitute consideration⁴⁸.

Competing issues: trust resettlement issues versus availability of s 118-300

The requirement for a beneficiary of a trust to have an absolute entitlement for the purposes of ensuring that the relief provided by s 118-300 is available versus the structure of the trust deed to minimise the triggering of a resettlement of the trust are potentially at odds. That is, absolute entitlement requires the beneficiary to have a vested and indefeasible interest in a trust asset while, conversely, to minimise trust resettlement issues, a discretionary form of trust where beneficiaries have no absolute entitlement is preferable.

The use of a special purpose trust to hold a life insurance policy will require the balance of the two competing issues. The safest course of action may ultimately be to seek a private binding ruling from the ATO in relation to the particular structure.

Self-ownership structure versus special purpose trust structure

Regardless of the release of PR 2010/18, the uncertainty surrounding the requirement for absolute entitlement and the use of one trust with multiple beneficiaries remains. In fact, the product ruling seems to point to the use of multiple trusts. That is, a trust for each beneficiary, such that each trust, which is in effect a fixed or bare trust, has a beneficiary with an absolute entitlement as against the trustee to the life insurance policy.⁴⁹

If a special purpose trust structure is to be used and this requires the use of multiple trusts (being a trust for each beneficiary), the question that arises is, what is the benefit of the trust ownership structure versus the self-ownership structure? It would seem that the self-ownership structure provides the same result as the trust structure, except that the availability of s 118-300 on the ending of the life insurance policy is far more certain.⁵⁰

CONCLUSION

At first glance, PR 2010/18 seems to provide some clarification in relation to the availability of s 118-300 in respect of a capital gain made on the ending of a life insurance policy held by a special purpose trust. However, on a closer inspection of the product ruling, it is clear that the key issue, which continues to be the subject of uncertainty, is the requirement for the beneficiary of a trust to have an absolute entitlement as against the trustee to the life insurance policy. It is hoped that, with the finalisation of TR 2004/D25, further clarification is provided in relation to the meaning of absolute entitlement such that the balancing of the trust resettlement issues and the availability of s 118-300 is able to be addressed.

*Meagan O'Connor ATIA, Special Counsel
Harwood Andrews Lawyers*

References

- 1 For further information on each of the structuring options, see P Hockridge, *Business succession: demystifying buy-sell agreements*, presentation at Taxation Institute of Australia's Succession Planning Masterclass, 18 September 2008.
- 2 S 108-5 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97).

- 3 S 104-25(1) ITAA97.
- 4 S 104-25(3) ITAA97.
- 5 Item 3 of the table in s 118-300(1) ITAA97.
- 6 Item 4 of the table in s 118-300(1) ITAA97.
- 7 Item 5 of the table in s 118-300(1) ITAA97.
- 8 [2001] HCA 33.
- 9 *Creation of a new trust – Statement of Principles August 2001*, Australian Taxation Office, 2001.
- 10 *Creation of a new trust – Statement of Principles August 2001*, Australian Taxation Office, 2001, item 5.1.
- 11 Item 3 of the table in s 118-300(1) ITAA97.
- 12 Item 4 of the table in s 118-300(1) ITAA97.
- 13 Item 5 of the table in s 118-300(1) ITAA97.
- 14 Item 4 of the table in s 118-300(1) ITAA97; PR 2010/18.
- 15 Para 17(c) of PR 2010/18.
- 16 Para 17(f)(i) of PR 2010/18.
- 17 Para 28 of PR 2010/18.
- 18 Item 4 of the table in s 118-300(1) ITAA97.
- 19 Para 17(j) of PR 2010/18.
- 20 Para 2 of TD 94/31.
- 21 Para 4 of TD 94/31.
- 22 Para 23 of PR 2010/18.
- 23 Para 10 of TR 2004/D25.
- 24 (1841) 49 ER 282.
- 25 For further information on the rule in *Saunders v Vautier*, see JD Heydon and MJ Leeming, *Jacobs' law of trusts in Australia*, 7th ed, LexisNexis Butterworths, 2006.
- 26 (2005) 79 ALJR 1724 at [47].
- 27 Para 13 of TR 2004/D25.
- 28 Para 16 of TR 2004/D25.
- 29 Para 17 of TR 2004/D25.
- 30 Para 19 of TR 2004/D25.
- 31 Paras 21 and 22 of TR 2004/D25.
- 32 Para 23 of TR 2004/D25.
- 33 Para 82 of TR 2004/D25.
- 34 R Jorgensen, *Distributing trust assets & capital gains selected issues*, presentation at Taxation Institute of Australia's Noosa National Intensive, 20-22 November 2008.
- 35 Para 85 of TR 2004/D25.
- 36 Para 97 of TR 2004/D25.
- 37 Paras 100 to 107 of TR 2004/D25.
- 38 Para 24 of TR 2004/D25.
- 39 Para 21(b)(i), (j) and (k) of PR 2010/18.
- 40 [2008] FCA 1454.
- 41 [2008] FCA 1454 at [61].
- 42 NSD 2510-9/2007.
- 43 Para 1 of TD 2007/4.
- 44 Para 1 of TD 2007/4.
- 45 Para 2 of TD 2007/4.
- 46 Item 4 of the table in s 118-300(1) ITAA97.
- 47 Item 4 of the table in s 118-300(1) ITAA97.
- 48 Para 1 of TD 94/34.
- 49 The use of a fixed or bare trust raises the issue of CGT event E4 on the appointment and distribution of the capital proceeds (CGT event C2) by the trustee to the beneficiary. However, this issue has not been considered on the basis that s 106-50 ITAA97 is available where the beneficiary has an absolute entitlement such that the beneficiary is the relevant taxpayer for the purposes of CGT event C2.
- 50 *Discussion paper in relation to buy-sell (business succession) agreements* (draft), Australian Taxation Office, May 2000.