

T H I R T E E N W E N T W O R T H S E L B O R N E

Taxation and Superannuation For Lawyers

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Holdings of Wealth

- Estate planning – consider:
 - Principal place of residence
 - *Inter vivos* trusts
 - therefore - limited role for testamentary trusts]
 - **BIG** issue – restructure of *inter vivos* trust for estate planning reasons]
 - Pembroke J in *Ireland v Retallack* [2011] NSWSC 846
 - Superannuation funds (SMSF)

Superannuation

- Self managed superannuation fund advantages
 - Tax benefits
 - Control
 - Market volatility
 - Fees
 - Real property
 - Gearing

Superannuation

- Concessional vs. Non-concessional
- Concessional contributions
 - less than 50 = \$30,000
 - greater than 49 = \$35,000

Non-concessional contributions - \$180,000

- Division 293 additional tax

Gearing in Superannuation

- S. 67A Superannuation Industry (Supervision) Act 1993 (Cth)
- No prohibition from borrowing under an arrangement where:
 1. trustee of superannuation fund borrows to acquire underlying asset.
 2. Underlying asset acquired by the borrowed money.
 3. Underlying asset held on trust so that the trustee of the superannuation fund has the 'beneficial interest'.

Gearing in Superannuation

4. Trustee of superannuation fund has a right to acquire legal ownership by making further (instalment) payments.
5. Right of the lender is limited in recourse to the underlying asset (ie. taking possession or disposal).
6. If the trustee of the superannuation fund has other rights (other than possession/disposal) – the rights of the lender are limited to rights in relation to the asset.

The Relationships Required

Trust:

1. Trustee of superannuation fund – ‘beneficial interest’.
2. Bare trust relationship – Security Trustee and Trustee of Superannuation Fund to Underlying Asset.

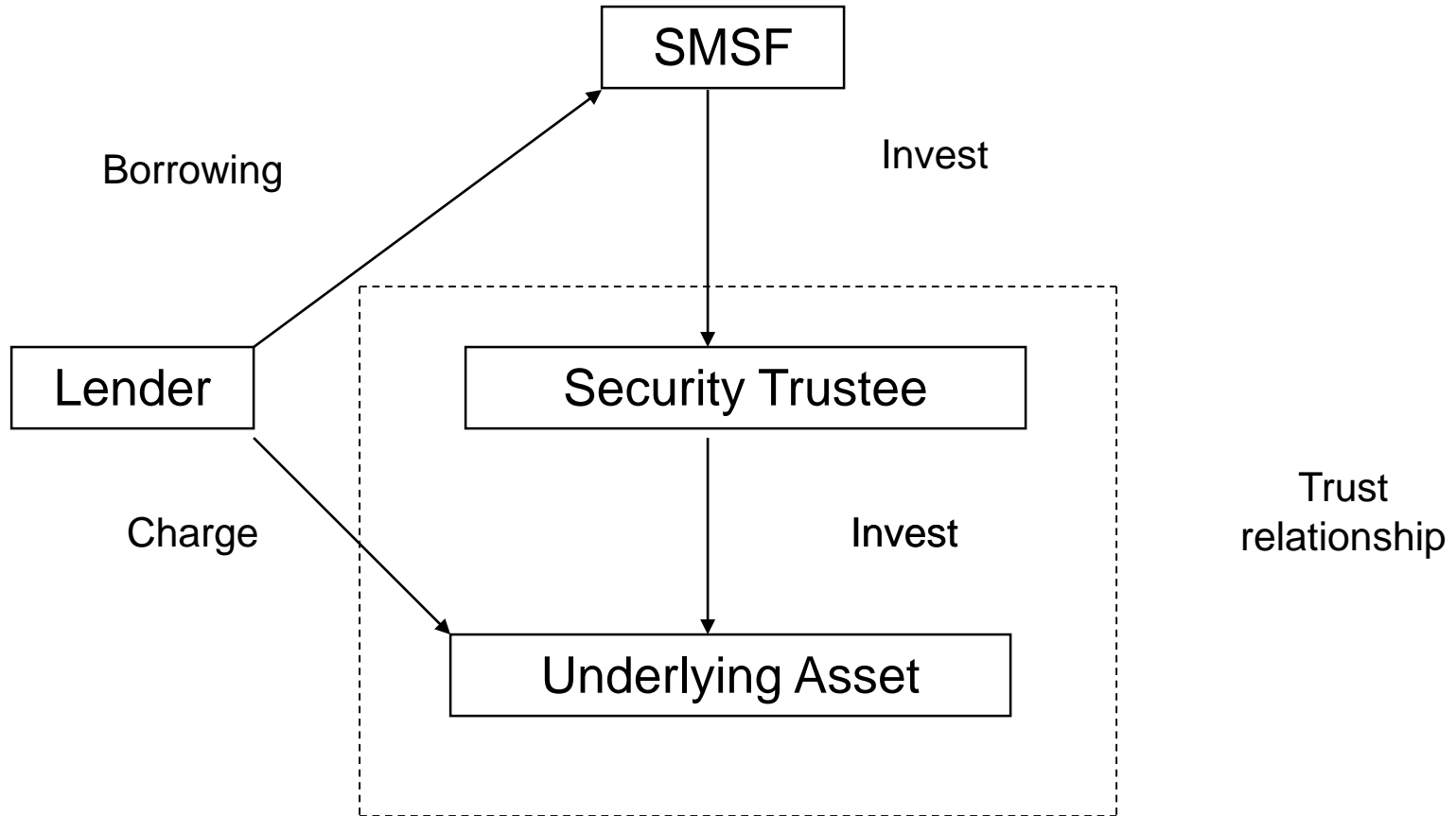
Investor & Asset

1. Trustee of superannuation fund has a right to acquire.

Borrowing

1. Trustee of superannuation fund borrows.
2. Lenders rights limited in recourse to underlying asset.
3. Rights of trustee of superannuation fund subrogated to the lender – but only with respect to the underlying asset.

Relationship



Superannuation death benefits

- Death benefit - not immediately part of estate
- When determining recipient - need to consider:
 - Nominations by member
 - Fund deed
 - Superannuation law
 - Tax law

Superannuation death benefits

Lump Sum Payments

- Reg 6.21 - *SIS Regulations*
 - Death - compulsory cashing event
 - Pay **'as soon as practicable'** after death
- Reg 6.22 – *SIS Regulations*
 - Pay to either / both
 - LPR
 - One or more dependants
- Disputes and death benefits
 - Notional estate – Ch 3 *Succession Act 2006* (NSW)

Superannuation death benefits

Pensions

- Reg 6.21(2) *SIS Regulations*
 1. Lump sum – in respect of each person **only**:
 - (a) a single lump sum; or
 - (b) an interim lump sum and a final lump sum
 2. Pension – 1 or more, but only to:
 - Surviving spouse
 - Children under 18
 - Children under 25, financially dependant at death

Timing Issues

Lump Sum

- Reg 6.21 – cashed as soon as practicable after member dies

Commutation of pensions

- If deceased in pension mode: 3/6 month rule
- Ss. 307-5(3) convert 'superannuation death benefit' into superannuation member benefit
- Alter tax outcome
- Planning for reversionary – commute + roll-over

Income Stream – tax implications

- If income stream payable due to death and beneficiary commutes income stream *within the later* of 6 months from death or 3 months from grant of probate or letters of administration, the commutation is treated as a **superannuation death benefit**.
- If commuted *outside the later of* 6 months from death or 3 months from grant of probate or letters of administration, then treated as a **superannuation member benefit** and taxed as a **superannuation benefit**.

Superannuation death benefits

- Tax outcomes:
 1. Identity of recipient
 2. Component of benefit
 3. Method of payment
 4. If income stream - ages

Death benefits – lump sums

- Tax dependant – tax free (no limit)
 - Irrespective of ages
 - Irrespective of pay directly or estate
 - s. 302-10 ITAA 97 – actual and intended benefit
- Non-tax dependant (eg. adult children) – estate pay
 - 16.5% on taxable component (taxed element)
[i.e. concessional contributions]
 - 31.5% on untaxed element
 - 0% on exempt component
[i.e. non-concessional contributions]

Taxation of superannuation death benefits

Lump sum vs income stream

Lump sum:

- Death benefit dependent - tax free
- Non-death benefit dependant

Component	Tax treatment
Tax-free	Nil
Taxable (taxed)	15% (plus Medicare levy)
Taxable (untaxed)	30% (plus Medicare levy)

[all paid proportionally]

Strategies

1. Re-contribution
 - NCC caps
 - Contribution acceptance (>65)
 - Proportioning rules
2. Tax free withdrawals > 60
3. Minimising untaxed element

Death benefits – pensions

- Pension continued to be paid to ‘death benefit dependant’ taxed – ages of primary and reversionary pensioner
 - If deceased > 60 , pension payments tax free even if reversionary < 60
 - If deceased & beneficiary < 60 – ‘taxable component’ assessable less offset
 - If beneficiary > 60 – non-assessable non-exempt income

Taxation of superannuation death benefits

Income stream

Taxation of pensions from a taxed fund:

Age of original owner at death	Age of beneficiary upon reversion	Taxation (taxed scheme)
Any age	60 or older	Tax-free
60 or older	Under 60	Tax-free
Under 60	Under 60	Tax-free component is tax free and taxable component beneficiary's MTR (with 15% tax offset). Tax-free when beneficiary reaches 60

Death benefits – reversionary

- If no 'death benefit dependant'
- No reversion possible
- Must pay out on death on last surviving spouse

- Tax treatment of non-dependants on death of parent in pension mode depends on proportion of benefits which are exempt at start of pension

Retaining funds in superannuation

- Strategy 1: receive the income as an income stream (either from the accumulation phase or continuation of income stream paid to member). If income not required, the income stream can be commuted later than 6 months from death or 3 months from probate / administration to receive superannuation benefit [not for children under 18 or 18-25]
- Strategy 2: Roll superannuation into a deferred annuity which allows nomination of a reversionary beneficiary. Therefore beneficiary can retain benefit in superannuation until member would have turned 65. A deferred annuity is one which has not yet commenced to be paid – so commutation of income within /outside 3/6 month rule applies.

Issue to consider

- **What takes priority – BDBN or reversionary pension?**
- Reversionary pension in place then BDBN made:
 1. BDBN takes precedence [contract cannot fetter trustees powers];
 2. Reversionary pension, then BDBN when reversionary dies; or
 3. Reversionary pension – all belongs to reversionary and dealt with as reversionary's
- ATO March 2010 Technical minutes – **reversionary pension**

Death Benefit - Important Factors

- Constituent documents
- Superannuation Industry (Supervision) Act
- Income Tax Assessment Acts
- Trustee obligations / powers
[equity / legislation – e.g. Trustee Act]
- Family provision legislation

Death benefit payments

- Payment of death benefits determined by governing rules and not will: *McFadden v Public Trustee for Victoria*
- Prima facie a trustee discretion (subject to trust deed and legislation) [*Katz v Grossman*]
- In SMSF context – deed may allow members to make death benefit nominations.

Death benefit payments

- Limited to 'dependants':
 - Spouse (legal or de facto)
 - Child of the member
 - Person whom member has 'interdependency relationship'
 - Close personal relationship
 - Living together
 - One or both provide financial support
 - One or both provide domestic support and personal care
 - Dependant (common law)
- Estate or LPR (subject to trust deed)

Types of DBN

- (1) Nominated beneficiary
- (2) Binding death benefit nominations
[binding if to dependent]
- (3) Reversionary beneficiary
(income phase only)
[binding if to dependent]
- (4) Beneficiary specified in trust deed

Binding death benefit nominations

SMSF Determination 2008/3:

- Reg 16.7A SIS Regs not apply
- 3 year rule not apply (subject to deed)

Implications for SMSF's:

- Terms of deed essential
- Consider whether Reg 16.7A provided for or implied
- Deed should allow for indefinite BDBN
- BDBN should be drafted with requisite capacity and intention

Treatment of death benefits

- Three step approach:

1. Who is the beneficiary

(death benefit or non-death benefit)

2. Determine method of payment

(income stream or lump sum)

3. Determine tax implications

Superannuation proceeds trusts

- Trust established to only accept superannuation death benefits
- If there is no testamentary trust in a will
- Benefit paid directly from a fund to a trust
- Beneficiaries restricted – spouse and dependent children
- Income – all beneficiaries
- Capital – only dependent children

Wills and payment to the estate

- BDBN - member may nominate a death benefit to be paid to LPR
- No BDBN - trustee may use discretion to pay to deceased estate

IF SO:

will should make provision for such payments

Ioppolo & Anor v Conti & Anor

[2015] WASCA

Issues:

1. Did the executor have to be a trustee (s.17A of the SIS Act)?
2. Did the SMSF trustee act in bad faith?

Section 35 of the Succession Act

- Unintended tax consequence
- If beneficiary does not survive deceased by 30 days, then the beneficiary is deemed to have pre-deceased the deceased
- Subject to contrary intention

Section 35 of the Succession Act

- Example - I die, then my wife dies within 30 days of my death – my wife deemed to have pre-deceased
- Effect – if no other ‘dependants’ – death benefit payments subject to tax
- **Ensure that BDBN and will specifically provides that section 35 does not apply to death benefit payments.**

Binding death benefit nominations

Constituent documents essential

Trust deed to provide:

1. What benefits can be paid?
2. To whom can benefits be paid?
3. The procedure for nominating death benefits?

Complaints procedure?

- Should your deed have a dispute resolution / complains procedure?
- SCT – not applicable to SMSF's
- Create a dispute resolution mechanism. If don't comply – breach?
- If give reasons- reviewable decision for the Courts?

Non-compliance – SMSF context

- Contravention - automatically non-complying
- S. 42A – *Superannuation Industry (Supervision) Act* – Regulator to consider:
 1. Tax implications if non-compliant;
 2. Seriousness of the contravention(s); and
 3. All other relevant circumstances.

Relief

- S. 221 *SIS Act* – relief from liability – contravention of civil penalty provision (s. 193)
 - Acted ‘honestly’ (not reasonably)
 - Ought fairly be excused given circumstances
- S 310 *SIS Act* – relief for ‘official misconduct’
 - Negligence, default, breach of trust or breach of duty
 - Acted ‘honestly’ and ought fairly be excused

Penalties for SIS Act Contraventions

1. *Olsen v Early Sunshine* [2015] FCA 12.
2. *Deputy Federal Commissioner of Tax (Superannuation) v Graham Family Superannuation Pty Ltd* [2014] FCA 1101.

Wood v Inglis [2009] NSWSC 601

- Dr Inglis, wife & children – beneficiaries
- Trust fund invested in shares
- Accounts – movements in net value on income account
- Unrealised gains – income on which beneficiary presently entitled

Wood v Inglis [2009] NSWSC 601

- Dr Inglis left residuary of estate to wife
- Issues:
 1. Whether trustee can treat increase as income?
 2. Whether trustee in fact did treat increase as income?
- If so, then:
 1. Did trustee made the distributions?
 2. Did trustee discharge obligations to pay the distributions?

Wood v Inglis [2009] NSWSC 601

- If movement is income – present entitlement & residuary estate
- If not income – asset of the trust

Wood v Inglis [2009] NSWSC 601

- Trustee could treat movement as income
 - ‘profit’ can be made even if not realised
 - Trust deed confirmed this
- Trustee did in fact resolve to include unrealised gains as income
 - Change of accounting method
 - Inglis – controlling mind of corporate trustee
 - Approved trust accounts by Inglis

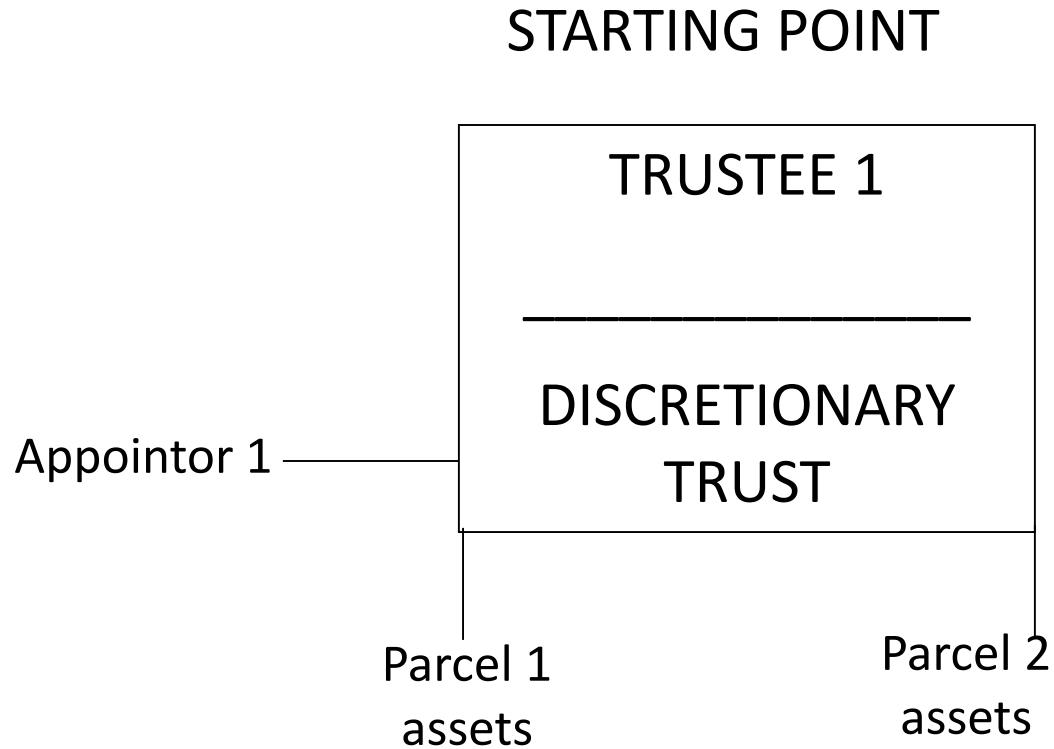
Wood v Inglis [2009] NSWSC 601

- Distributions were validly & effectively made
 - Beneficiary loan account
- Estate did not release trustee from debt

Wood v Inglis [2009] NSWSC 601

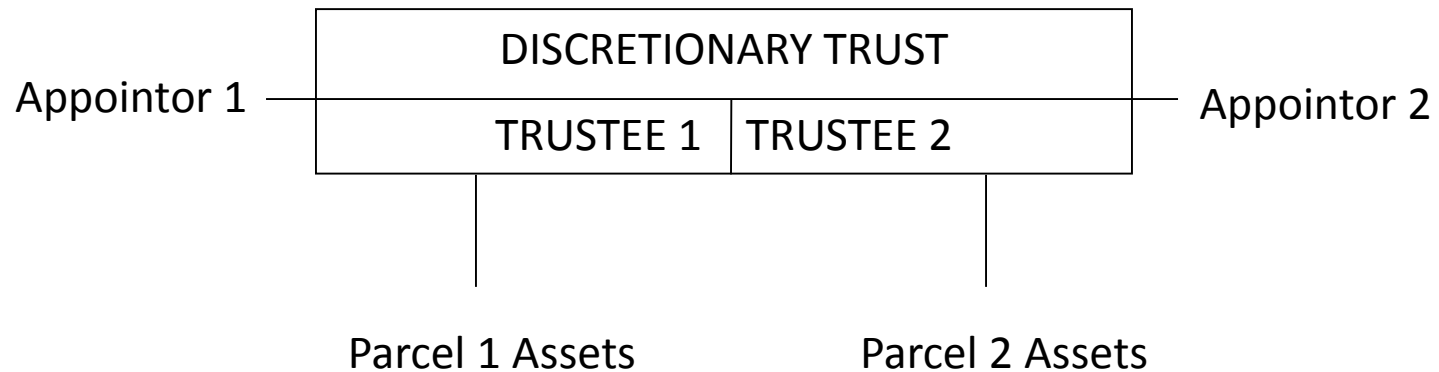
- Unpaid present entitlement important
- Asset of deceased
- Executor may call in

Cloning or Splitting



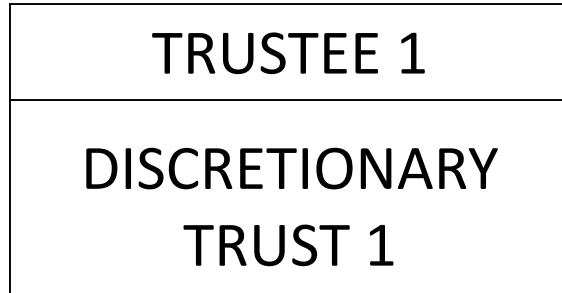
Cloning or Splitting

'Splitting' → One trust relationship but separate trustees

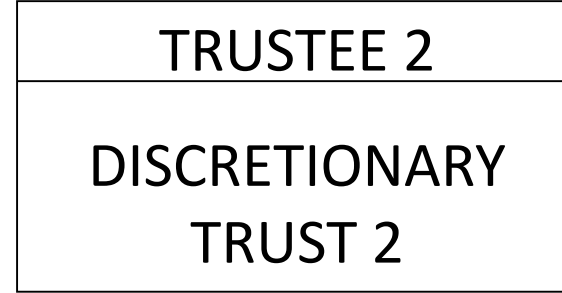


Cloning or Splitting

'Cloning' – Transfer to New Trust



Parcel 1 Assets



Parcel 2 Assets

Splitting – The Drivers

- Nominal or no stamp duty
 - Subsection 54(3) Duties Act 1997 (NSW)
 - land rich duty
 - Victoria DA 030 – ‘commercial objective’

Why Split or Clone

- Incapable of joint decisions
- Ability of family members varies greatly
- Imperfectly blended families
- Different financial needs
- Different financial exposures
- Succession planning

Splitting - Resettlement

- New Trustee → New Trust Relationship (Theory)
- *Re Ball's Settlement*
- Resettlement principles
- Subsection 6(5)(c) *Trustees Act 1925* (NSW)

Varying Deed

- Change substratum?
- Separate appointor
- Family Trust Elections

Splitting – The CGT Events

- Event A1 – *‘merely because of a change of trustee’*
- Events E1 / E 2
- Events E3 / E4 – not relevant
- Event E5 – beneficiary becoming absolutely entitled

Splitting – Tracing Assets

- indemnity from trust assets
- creditors right to be subrogated
- trustee only liable for own acts and liabilities - subsection 59(2) *Trustee Act* 1925 (NSW)
- liability incurred after split

Splitting – ATO ID 2009/86

- appointment of a separate trustee to hold certain trust assets (either the passive or active assets) would be a resettlement
- CGT event E1
- Substantial alteration of the trust relationship to cause resettlement:
 1. Trustee's rights are altered – original trustee has no recourse to assets held by new trustee
 2. Beneficiaries' rights are altered – assets held by new trustee held exclusively for Y family members

Cloning

- CGT event E1 and E2 exemption
- Press Release No. 092
- *Tax Laws Amendment (2009 Measures No. 6) Bill* 2009
 - received royal assent on 24 March 2010
- Roll-over – fixed trusts

Fixed Trust Roll-over

- Assets transferred from 'transferring trust' to 'receiving trust'
- Eligibility:
 1. Both trusts eligible
 2. Same beneficiaries with same interests
 3. No exception applies

Fixed Trust Roll-over

1. Both trusts eligible

- Beneficiaries' interests in each trust must satisfy requirements:
 - (a) interest in or rights to income and/or capital;
 - (b) Nature and extent ascertained in trust instrument
 - (c) No powers to:
 - (i) materially alter interest; or
 - (ii) issue / redeem at > 10% discount
 - (d) CGT event E4 can occur
 - (e) Receiving trust 'clean skin'
 - (f) Both trustees choose to obtain roll-over

Fixed Trust Roll-over

2. Same beneficiaries with same interests

(a) Same beneficiaries;

(b) Receiving trust have same class of membership interest as transferring trust

(c) Market value of interest same

Fixed Trust Roll-over

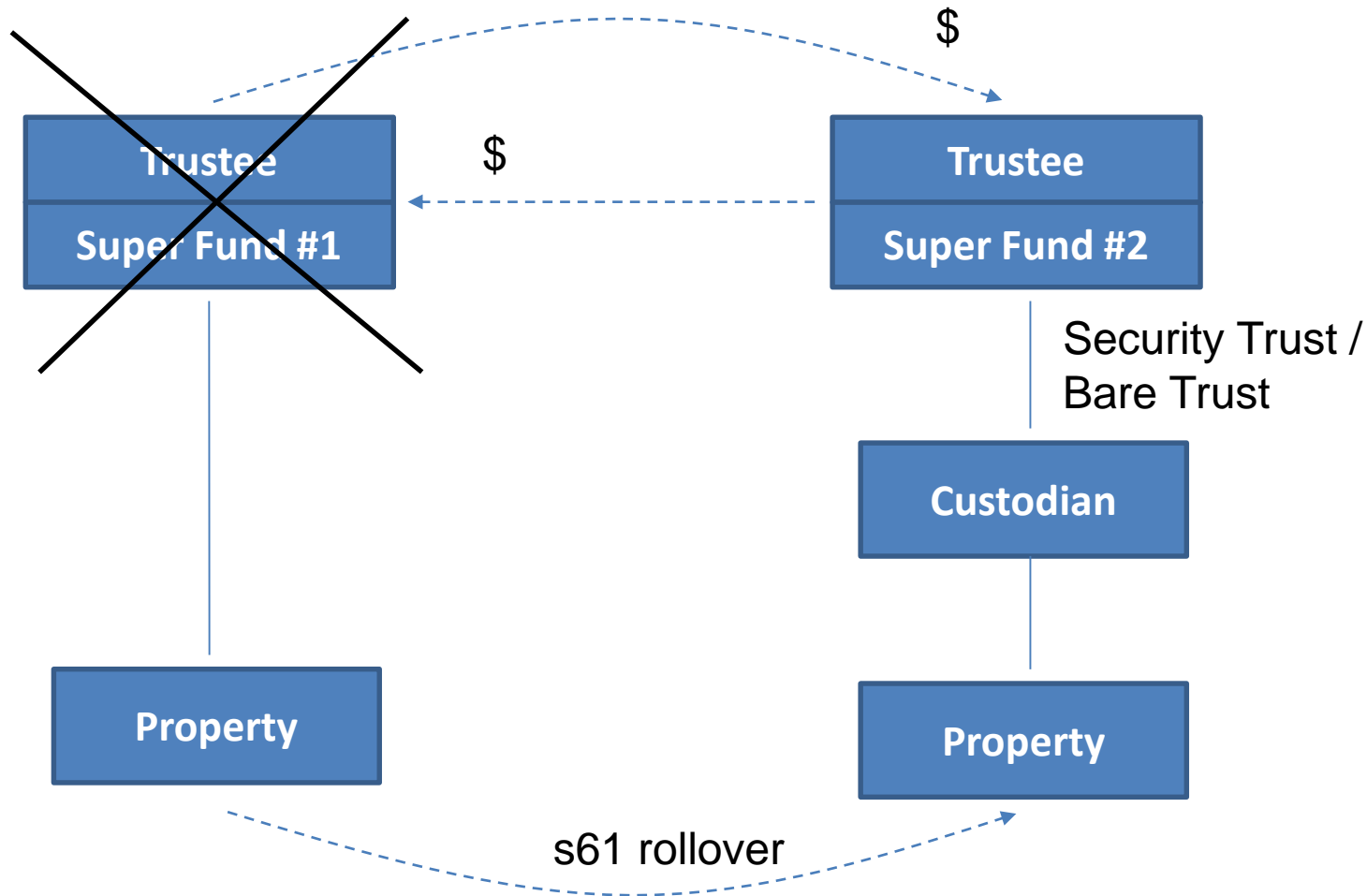
3. Exceptions

- (a) Receiving trust is foreign trust and asset not Australian property;
- (b) Transferring trust or receiving trust is corporate unit trust or public trading trust;
- (c) Transferring trust and receiving trust – same tax choices & elections

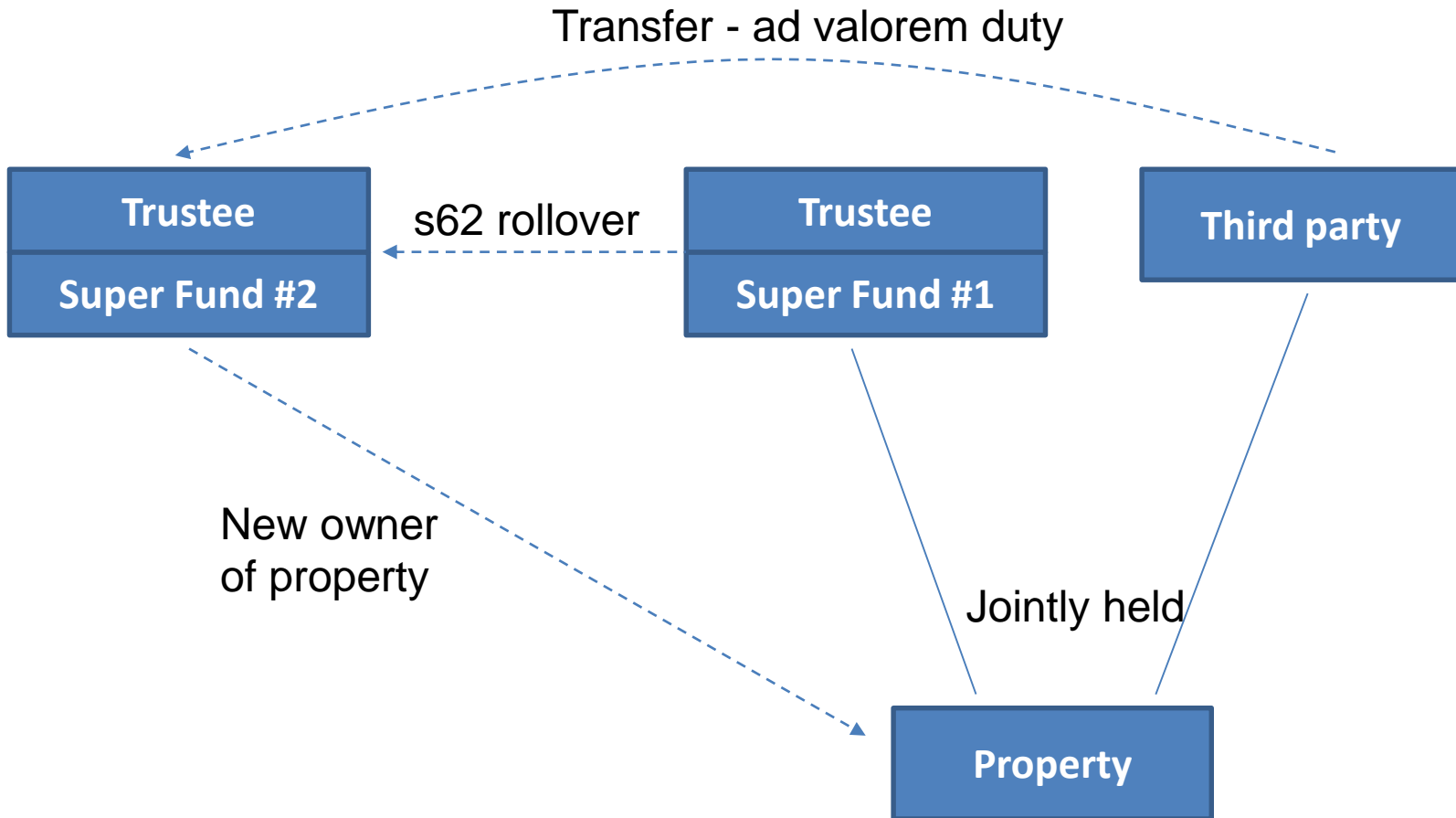
Fixed Trust Roll-over

- Defer capital gain or capital loss
- Cost base of beneficiaries' interest apportioned across interest in transferring trust & receiving trust
- Cost base: $RT = TT$
- Stamp duty still an issue

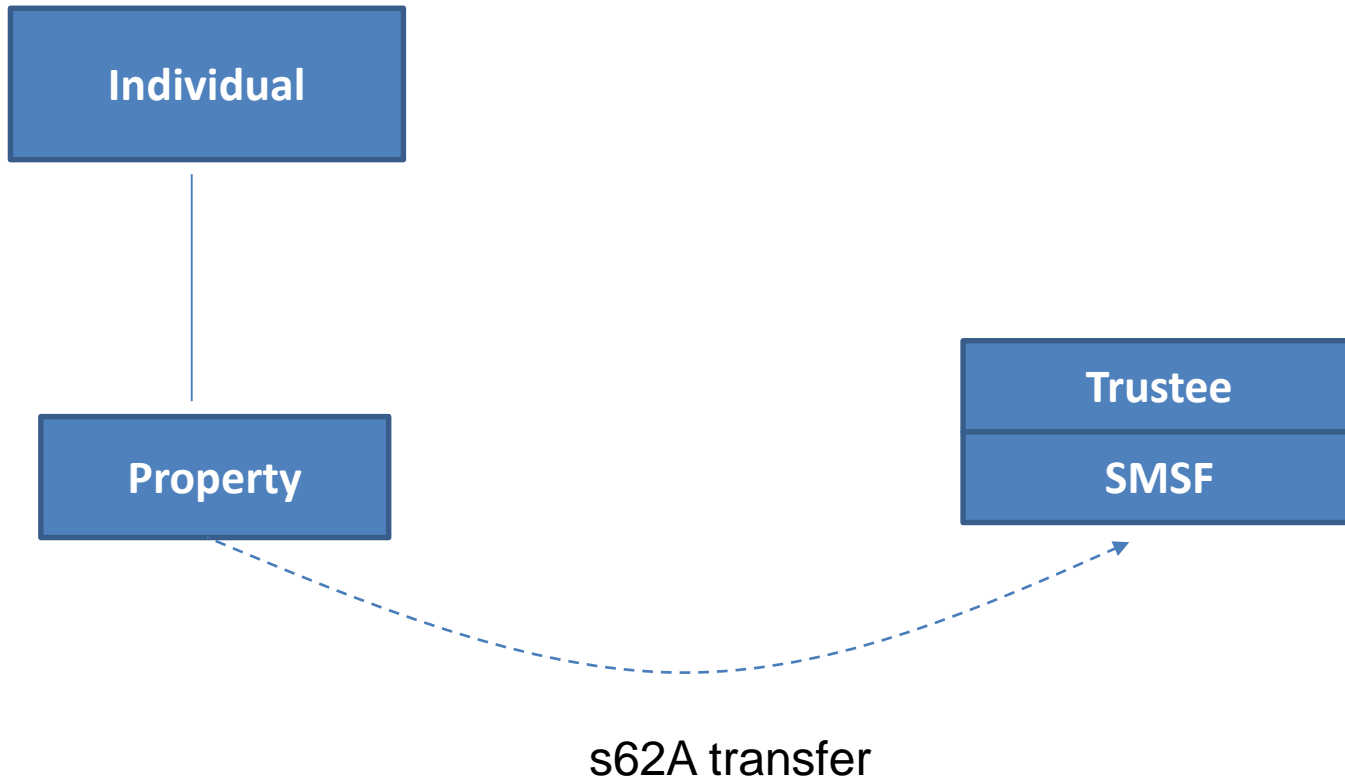
Stamp Duty Exemption - Section 61



Stamp Duty Exemption - Section 62



Stamp Duty Exemption - Section 62A

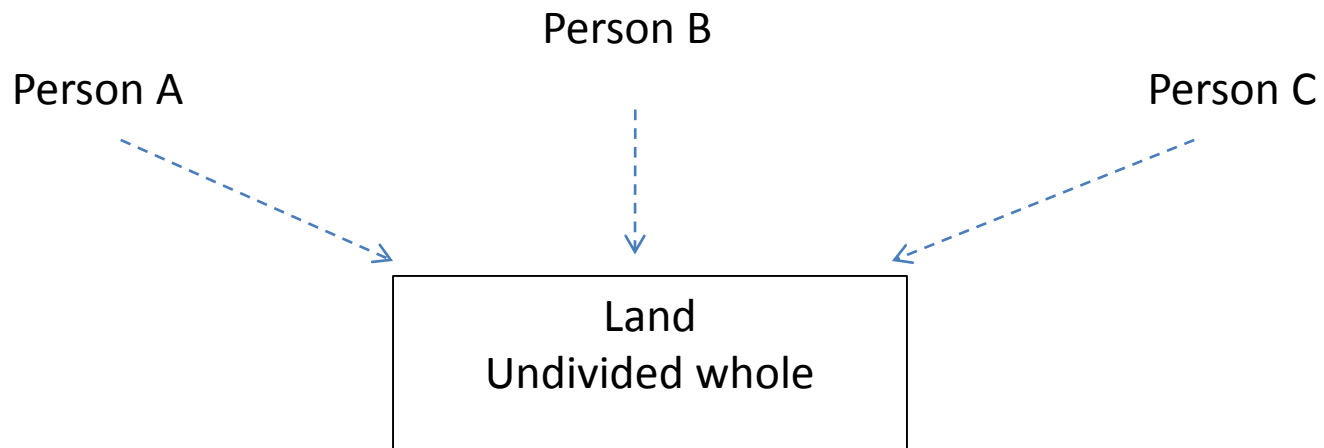


Overview

- 1) Overview of partitioning
- 2) CGT implications
- 3) GST considerations
- 4) Stamp duty
- 5) Transfers from agent / nominees
- 6) Financing risks

What is 'partitioning'?

The starting point



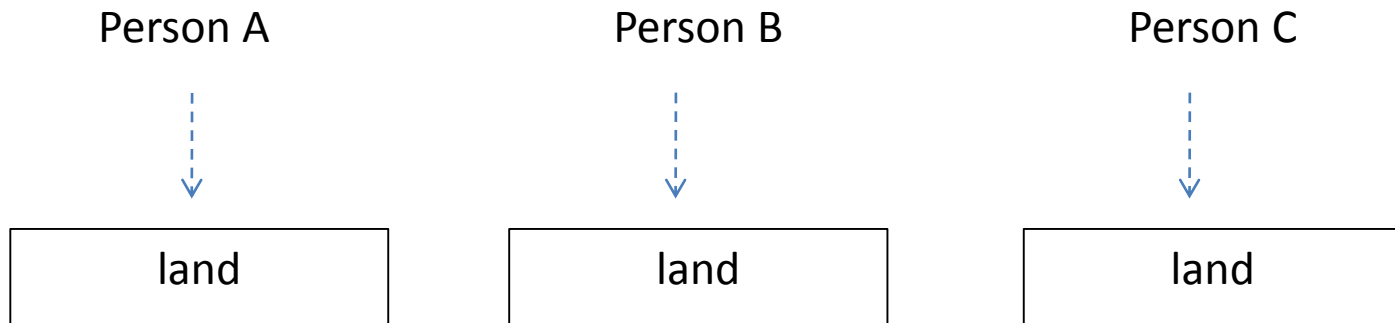
What is 'partitioning'?

Comptroller of Stamps (Vic) v Christian:

- Division of lands, tenements & hereditaments belonging to co-owners.
- Allotment amongst the co-owners of the parts.
- To put an end to community ownership between some or all of them

What is 'partitioning'?

End result



Partitioning vs. Subdivision

- Subdivision – vertical subdivision of land.
- Strata title subdivision – horizontal subdivision
 - strata lots
 - common property.
- Subdivision – transfer of divided parts of land among co-owners.

Steps

1. A & B purchase (co-owners).
2. A & B re-develop.
3. A & B subdivide / strata title.
4. A & B partition.

Documentation

1. Contract for sale of land.
2. Development Agreement.
3. Deed of Partition
 - transfers
 - valuations

Capital Gains Tax

Subdivision of Land

1. Section 118-42 – exempts subdividing an ***existing building*** into stratum units from CGT
2. Section 124-190 – rollover relief where ownership arrangement for a home unit or apartment is converted into strata title ownership

Partitions - Income Tax

- More likely than not to be on capital account
- On revenue if undertaking development business or profit making venture
- Few issues of income account partitioning (maybe trading stock issue)

Partitioning – CGT

- Partitioning has CGT consequences
- *Johnson v FCT* [2007] ATAA 1322 at [15]:

*... Dividing the parcel in two for the purposes of a transfer to each joint owner effectively **requires those owners to relinquish ownership of the CGT assets in the shares in the other parcel in return for clear title to the shares in the parcel they are acquiring.** It is as if the CGT assets contained in each share have to be unpacked and redistributed so that the taxpayer ends up holding half the number of shares in his or her own right – and those shares do not contain any CGT assets belonging to the other (former) joint owner.*

This rearrangement and reallocation of the ownership of CGT assets constitutes a disposition of the CGT asset, and is therefore a CGT event...

Partitioning – CGT

- CGT Events
- There are a number of possibilities:
 - CGT Event D1: if partition agreement creates rights
 - “E” CGT Event: if trust relationship created
 - CGT Event A1: if later disposed by transfer (where no bare trust exists)

Partitioning – CGT

- Each interest cross-transferred by the partition is a separate CGT asset
- This is important for:
 - application of small business concessions
 - timing issues for general discount
 - timing issues for acquisition date (e.g. pre-CGT or post-CGT asset)

Partitioning – CGT: Example

- 10 co-owners as tenants in common or joint tenants
- Subdivision into 10 lots – each co-owner to own one entire lot
- Partition where each co-owner simultaneously transfers their interest in a lot to relevant co-owner and receives the other 9 co-owners' interests in their lot – **10 separate CGT assets**

Partitioning – CGT

- Tax planning opportunity
- Each co-owner holding the other co-owner's interest on bare trust
- No CGT Event on partition because of section 106-50
- May have stamp duty & E1 Event consequence on declaration of trust

GST

Partitioning - GST

- *GSTR 2009/2 Goods and Services Tax: Partitioning of Land*
- Applies to:
 - Joint tenants and tenants in common
 - Partition by agreement and to court ordered partition

Partitioning - GST

- Subdividing does not attract GST – there is no supply
- Partitioning may attract GST (if all requirements met)
- Necessary to consider section 9-5 requirements for ‘taxable supply’

Partitioning - GST

- *Consideration* – the value of the interest(s) coming to the co-owner is consideration for the supply of the interest(s) leaving the co-owner
- *Furtherance of enterprise* – very wide view of ‘furtherance’. Practically, partition by someone carrying on enterprise will always be in furtherance

Partitioning – GST

- Also need to consider:
 - Connected to Australia
 - Registered or required to be registered

Partitioning - GST

- Points to take note of:
 - Applies to Court ordered partitions (e.g. s 66G of *Conveyancing Act*) even though not voluntary
 - No supply of your own interest to yourself
 - One or more, but not all, co-owners being subject to GST does not catch other co-owners
 - Margin Scheme can apply to a partition

Relevant Provisions – Definition of Partition

- *s.30 Duties Act (NSW)*

NSW: For the purposes of this section, a partition occurs when dutiable property comprised of land in New South Wales that is held by persons jointly (as joint tenants or tenants in common) is transferred or agreed to be transferred to one or more of those persons.

- *s.31 Duties Act (Qld)*

QLD: This section applies to dutiable transactions under which dutiable property held by persons, jointly as joint tenants or tenants in common is transferred, or agreed to be transferred, to 1 or more of the persons (*a partition*)

Relevant Provisions

- NSW: *'The dutiable value of a partition is the greater of:*
- (a) the sum of the amounts by which the unencumbered value of the dutiable property transferred, or agreed to be transferred, to a person by the partition exceeds the unencumbered value of the interest held by the person in the dutiable property transferred, or agreed to be transferred, to each person by the partition immediately before the partition, and*
 - (b) the sum of any consideration for the partition paid by any of the parties.'*
- QLD: *'The dutiable value of each dutiable transaction comprising the partition is the greater of the following –*
- (a) the amount by which the unencumbered value of the dutiable property transferred, or agreed to be transferred, is more than the unencumbered value of the interest held by the transferee in the property immediately before the transaction;*
 - (b) The consideration paid by any party to the transaction.'*

Practice

QLD vs NSW

- NSW

- SD payable:

- Unencumbered value of divided part greater than share of undivided whole.

- QLD

- 1) Calculate SD on unencumbered value of dividend part.

- 2) Less: SD on value already held.

Aoun Investments

- Need joint ownership
- “... land ... held by persons jointly ...”.
- “Duel entitlement”.
- Adjoining blocks of land consolidated.
- Practice of Dept. Of Lands:
 - in absence of transfers
 - dual multiple ownership folio upon consolidation
 - Describe interest in consolidated land to interests formally held in cancelled folio

Aoun Investments

- Plaintiffs executed deed of partition.
- Transfers initially stamped nominally.
- Notice of assessment subsequently issued.

Aoun Investments

- “Duel entitlements”

NOT – co-ownership

BUT – ownership in severalty

“In my view, the expression ‘joint proprietors’ ... connotes some form of co-ownership of property and is to be distinguished from the situation in which two or more persons are owners of particular parts of the property, even those parts are included in a single certificate of title. That form of ownership is described as severalty. ... property is said to belong to persons in severalty where the share of each is ascertained (so that he can exclude the others from it as opposed to joint ownership) as opposed to joint ownership, ownership in common, and coparcenary, where the owners hold in individual shares.”

Aoun Investments

- **Held**

“In my view, the plaintiffs hold in severalty in this case. When lot 24 was created, the first plaintiff had title to a particular part of it, namely that part formerly in Lot 27. Likewise, the second plaintiff had title to the other part of Lot 24, namely that formerly in lot 28. There was no entitlement to possession and enjoyment of the whole of the land in either the first plaintiff or the second plaintiff. Their rights were distinct and not rights of co-ownership.”

Aoun Investments

- Held

“To constitute a partition ... [for the purposes of section 30 of the Duties Act] ... the lots the subject of the transfers in question had to be held by the plaintiffs by the plaintiffs as joint tenants or tenants in common. The lots were not so held.”

- Partitioning concession not allowed

Revenue Ruling No. DUT 35

‘Duel Entitlement’ lots – not co-ownership

“Section 30 only applies to land in NSW that is held by persons jointly either as joint tenants or tenants in common. Land that is not held jointly cannot be assessed under Section 30. Land held in the form of a duel entitlement is not held jointly because the ownership is in severalty. [emphasis added].”

NSW – Example One

- NSW land purchased by A & B as equal tenants in common.
- A & B construct two apartments on the land (Lot 1 & Lot 2)
- A & B decide to partition:
 - A to get Lot 1
 - B to get Lot 2
- At partition total value is \$5.9 million:
 - Lot 1 value = \$2.7 million
 - Lot 2 value = \$3.2 million

NSW – Example One

PROPERTY / TRANSFeree	UNENCUMBERED VALUE OF DIVIDED PART TAKEN ('A')	UNENCUMBERED VALUE OF UNDIVIDED SHARE IN WHOLE ('B')	(A-B)	DUTY
Lot 1 – Investor A	\$2.7 m	50% of \$5.9m = \$2.95m	Negative	Nil
Lot 2 – Investor B	\$3.2m	50% of \$5.9m = \$2.95m	\$250,000	\$7,240
TOTAL	\$5.9m	\$5.9m		

NSW – Example Two

- Facts as above – except A & B had interests which equates to their proportionate end values
 - A = 45.76%
 - B = 54.24%

NSW – Example Two

PROPERTY / TRANSFeree	UNENCUMBERED VALUE OF DIVIDED PART TAKEN ('A')	UNENCUMBERED VALUE OF UNDIVIDED SHARE IN WHOLE ('B')	(A-B)	DUTY
Lot 1 – Investor A	\$2.7 m	45.76% of \$5.9m = \$2.7m	Nil	Nil
Lot 2 – Investor B	\$3.2m	54.24% of \$5.9m = \$3.2m	Nil	Nil
TOTAL	\$5.9m	\$5.9m		

QLD - Example

- A & B acquire vacated land as equal tenants in common for \$100,000.
- Stamp duty on acquisition is \$2,350 (i.e. \$1,175 each)
- Two apartments develop – total MV is \$500,000 (i.e. \$250,000 each)
- Decide to partition

QLD Example

QLD stamp duty payable by each:

Unencumbered value

\$250,000.00

Total stamp duty on unencumbered value \$
7,225.00

Less: credit on proportion already owned \$
3,162.50

Investor' liability \$
3 162 50

QLD Example

Total stamp duty payable by each investor:

Proportionate duty paid on acquisition of land	\$ 1,175.00
Duty paid on partition	<u>\$ 3,162.50</u>
Total duty paid	<u>\$ 4,337.50</u>
SD on purchased apartment	\$ 7,225.00
SD actually paid	<u>\$ 4,337.50</u>
Saving	<u>\$ 2,887.50</u>

NSW (QLD facts)

PROPERTY / TRANSFEREE	UNENCUMBERED VALUE OF DIVIDED PART TAKEN ('A')	UNENCUMBERED VALUE OF UNDIVIDED SHARE IN WHOLE ('B')	(A-B)	DUTY
A	\$250,000	50% of \$500,000 = \$250,000	Nil	Nil
B	\$250,000	50% of \$500,000 = \$250,000	Nil	Nil
	\$500,000	\$500,000		

Transfers from nominees after strata titling

- *Growing Wealth Pty Ltd v Comm of Stamp Duties*
- *Sportscorp Australia Pty Ltd v Chief Comm. Of State Revenue*

Growing Wealth

- Three applicants engaged agent to:
 - 1) acquire land
 - 2) subdivide land
 - 3) construct residential units
- Applicants paid all costs
- After strata titling:
 - 1) transferred to applicants (tenants in common)
 - 2) then partitioned

Growing Wealth

Issue –

Whether land acquired, developed, strata titled and then transferred:

- 1) Subject to agent / principal concession
- 2) Subject to partitioning rules

Growing Wealth

Held:

- Land acquired via agent not the same as that which was distributed to applicants
- Strata titling changed character

Sportscorp

- Land acquired by trustee, strata titled and then distributed
- s. 55 – apparent purchaser
- s.57 – property passing to beneficiary
- s.56 – transfer back from nominees

Sportscorp

- Property initially acquired by trustee changed its character
- Creation of common property
 - “ ... the identity between the dutiable property transferred from the apparent purchaser with the dutiable property vested in the apparent purchaser and that identity was lacking ...”

Sportcorp & Growing Wealth

- Timing is critical
- Strata titling changes character (i.e. Common property)
- Critical – transfer to principals / beneficiaries before strata titling

Financing Risks

- Differing forms of funding
- Pre-partitioning – mortgage over whole
- Owners corporation – no mortgage
- Recourse over whole?
- Indemnities?

Stamp Duty Amendments

- Transfers of options to purchase land.
- Put/call options were subject to duty.
- Now call options subject to duty:
 - (i) option holder nominates another purchaser/transferee on or before exercise of option;
 - (ii) option holder nominates another purchaser/transferee on or before exercise of options;
 - (iii) Option holder novates or otherwise relinquishes rights – so another purchases.
- All for valuable consideration.

Stamp Duty Amendments

- Transfers of options to purchase land.
- Duty = greater of:
 1. Consideration of transfer
 2. Unencumbered value of call option.
- SD for transfer is reduced by amount of duty paid on transfer of option.

Stamp Duty on Development Agreements

- *CSR v Lend Lease Developments* [2014] HCA 51

Stamp Duty on conveyances of parts of property

- *Knezevic v CCSR* [2014] NSWCATAD 183.

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