

ON APPEAL FROM THE COURT OF APPEAL  
OF SUPREME COURT OF WESTERN AUSTRALIA

10 BETWEEN:



**MONTEVENTO HOLDINGS PTY LTD**  
First Appellant

**EUGENIO SCAFFIDI**  
Second Appellant

and

20

**GUISEPPE DIEGO SCAFFIDI**  
First Respondent

**MARIA SCAFFIDI BY GUARDIAN AD LITEM THE PUBLIC TRUSTEE**  
Second Respondent

30

**FIRST RESPONDENT'S SUBMISSIONS**

**Part I:**

1.1 The first respondent certifies that these submissions are in a form suitable for publication on the Internet.

**Part II:**

40 2.1 The issue that the appeal presents is whether, on a proper construction of the Trust Deed, in particular, clause 11.03, the First Appellant (**Montevento**) is eligible to be appointed as trustee of the Scaffidi Family Trust (**Trust**) in circumstances where the Second Appellant (**Eugenio**) is the appointor under the Trust and Montevento is a company of which Eugenio is the sole controller and the directing mind and will.

**Part III:**

3.1 The first respondent certifies that he has considered whether any notice should be given in compliance with section 78B of the Judiciary Act 1903 (Cth).

**Part IV:**

- 4.1 The first respondent accepts the material facts outlined at paragraphs 5.1, 5.2, 5.6, 5.8- 5.11, 5.15 and 5.16 of the appellants' submissions.
- 10 4.2 As to paragraph 5.7, the first respondent accepts the material facts and refers to CA [44]-[45] and CA [48] –[49].
- 4.3 As to paragraphs 5.12 and 5.13, the first respondent accepts that the Trust Deed contains the provisions as set out in those paragraphs. The Trust Deed also contains other provisions relevant to the appeal that the first respondent will refer to in his statement of argument.
- 4.4 As to paragraph 5.14, the first respondent accepts the material facts and says further that Giuseppe (the first respondent) sought in the alternative that Montevento be removed under section 77 of the *Trustees Act 1962 (WA)*; CA [15], CA [105].
- 20 4.5 As to paragraphs 5.3-5.6 and 5.11, the first respondent accepts the material facts save for the following matters;
- (a) as to paragraph 5.3, the first respondent says that Salvatore Scaffidi, and not Antonio, was the Settlor of the Trust Deed: CA [11];
  - (b) as to paragraph 5.4, the first respondent says that Antonio and Maria were appointed as directors of Scaffidi Nominees Pty Ltd on 3 May 1977: CA [7];
  - (c) as to paragraph 5.5, the first respondent says that it was on 16 August 1995, not 1 July 1995, that Scaffidi Holdings Pty Ltd replaced Scaffidi Nominees Pty Ltd as the sole trustee of the Trust: CA [12].
- 4.6 The following facts are also relevant.
- 30 4.7 Scaffidi Nominees Pty Ltd was incorporated on 27 April 1977. Giuseppe and Eugenio were the original directors: CA [7].
- 4.8 Scaffidi Holdings Pty Ltd was incorporated on 29 June 1995: CA [8].
- 4.9 On 30 June 2006, Maria as guardian of the Trust executed a document declaring that the powers referred to in cl15.01 of the Trust Deed could be exercised without reference to the Guardian: CA [138].
- 4.10 On 7 November 2008, the State Administrative Tribunal declared Maria to be a person in need of representation under the provisions of the guardianship laws and appointed the Public Trustee as her plenary administrator: CA [6], CA [140].

4.11 Heenan J at first instance found that Eugenio was the sole director and shareholder of Montevento, hence the sole controller and directing mind and will of Montevento. Further, that Montevento had no apparent commercial purpose or history other than acting in the role of trustee: CA [56] and [107].

**Part V:**

5.1 The first respondent accepts the appellants' statement of applicable statutory provisions, except for ss. 100 and 102 of the *Stamp Duties Act 1920* (NSW).

10 5.2 Ss. 100 and 102 of the *Stamp Duties Act 1920* (NSW) as set out in Annexure A to the appellants' submissions were not applicable at the date of the Trust Deed formation in 1977. Those provisions should be amended as follows:

- (a) the words "*but exclusive of any power exercisable in a fiduciary capacity*" should be omitted from s.100 and the words "*or otherwise but does not include any power exercisable by any person in a fiduciary capacity for the benefit of others only arising..*" should be inserted in their place;
- (b) in s. 102(1)(a) the words "*in addition where the deceased was domiciled in New South Wales all personal property of the deceased situate outside New South Wales at his death; and*" should be inserted after the words "New South Wales at his death; and";
- (c) the words "*the next succeeding section*" should be omitted from in s.102(1)(b) and the words "section 103 of this Act" should be inserted in their place;
- (d) the words "*or special*" should be omitted from s. 102(2)(a).

20

5.3 A copy of ss. 100 and 102 of the *Stamp Duties Act 1920* (NSW) applicable in 1977 is annexed to these submissions.

5.4 At paragraph 6.17 of the appellants' submissions reference is made to s. 102 of the *Income Tax Assessment Act 1936* (Cth). The first respondent annexes a copy of that section to these submissions.

30 5.5 In developing the argument below, the first respondent refers to ss. 114, 198E, 201A, 248B and 249B of the *Corporations Act 2001* (Cth). A copy of these provisions is annexed to these submissions.

Part VI:

Summary

- 6.1 The decision of the majority in the court below as to the proper construction of clause 11.03 was correct. The clause precludes the appointment of Montevento as Trustee, given that Eugenio is the sole director and shareholder of that company.
- 6.2 The ordinary meaning of the phrase "*that individual shall not be eligible to be appointed as a Trustee*" is wide enough to include an appointment by which the powers and functions of a Trustee are to be exercised by that "*individual*".
- 10 6.3 The ordinary meaning of the above phrase is reinforced when one has regard to, amongst other things, the Trust Deed as a whole which discloses that the evident purpose of clause 11.03 is to keep the exercise of the Trustee's powers independent of the Appointor when the Appointor is also a beneficiary.

Principles of Construction

- 6.4 The task of construing either a contract or trust document requires intention to be ascertained by determining what, objectively, is the meaning of the language used. The task is not to ascertain what the parties to the document meant to say: ***Toll (FCGT) Pty Ltd v Alphapharm Pty Ltd*** (2004) 219 CLR 165 at [40]; [2004] HCA 52; ***Byrnes v Kendle*** (2011) 243 CLR 253 at [53] per Gummow and Hayne JJ; [2011] HCA 26.
- 20 6.5 Accordingly, the meaning of a document is determined by what a reasonable person would have understood it to mean having regard to, not only the text, but also the surrounding circumstances known to the parties, the purpose and the object of the transaction: ***Toll (FCGT) Pty Ltd v Alphapharm Pty Ltd*** at [40].
- 6.6 The ordinary meaning of the words or language used by the parties to the document is to be ascertained having regard to the instrument as a whole, because the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious with one another: ***Australian Broadcasting Commission v Australasian Performing Rights Association Ltd*** (1973) 129 CLR 99 at 109 per  
30 Gibb J; [1973] HCA 36.
- 6.7 Further, ascertaining the natural or ordinary meaning of the words or language used requires consideration of the syntactical and grammatical construction of the sentence in which the words appear. The unit of communication by means of

language is the sentence and not the parts of which it is composed. The significance of individual words is affected by other words and the syntax of the whole. It is a fallacy to "treat the words of an English sentence as building blocks whose meaning cannot be affected by the rest of the sentence": **Collector of Customs v AGFA - Gevaert Ltd** (1996) 186 CLR 389 at 397; (1996) 71 ALJR 123; [1996] HCA 36; **R v Brown** [1996] 1 AC 543 at 561 per Lord Hoffman; 2 WLR 203 at 213.

- 6.8 The proper grammatical and syntactical structure of a disputed phrase can itself be disputed and it is part of the process of construction to resolve that: **Byrne v Macquarie Group Services Pty Ltd** [2011] NSWCA 68 at [2]-[11] per Campbell JA.
- 6.9 In considering the text, therefore, the focus is not upon ascribing a literal meaning to individual words in isolation. Rather, the ordinary meaning of the words, language or text, read naturally, must be ascertained from the syntactical and grammatical context in which they appear, and having regard to the instrument as a whole.
- 6.10 Context (that is, purpose and object and, to the extent permissible, surrounding circumstances) is important as well "for the symbols of language convey meaning according to the circumstances in which they are used": **Codelfa Construction Pty Ltd v State Rail Authority (NSW)** (1982) 149 CLR 337 at 401 per Brennan J; [1982] HCA 24; **Royal Botanic Gardens and Domain Trust v South Sydney City Council** (2002) 240 CLR 45 at [10] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; [2002] HCA 5; **McLaughlin v Dungowan Manly Pty Ltd** (2011) 82 ACSR 582 at [22]; [2011] NSWSC 215.
- 6.11 One example is the context of a commercial contract. If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business common sense: **Maggbury Pty Ltd v Hafele Australia Pty Ltd** (2001) 210 CLR 181 at [43] per Gleeson CJ, Gummow and Hayne JJ; [2001] HCA 70; citing **Antaios Compania Naviera SA v Salen Rederierna AB** [1985] AC 191 at 201 per Lord Diplock.

## The Context of the Trust Deed

### General powers of appointment

- 6.12 The appellants contend, in substance, that the statutory regime regarding the imposition of tax and death duties that prevailed at the time the Trust Deed was made provides the only context relevant to the construction of clause 11.03, insofar as that regime prompted a need to ensure that the trustee's power of appointment over the trust property could not be characterised as a general power of appointment.
- 6.13 That contention is questionable for the following reasons.
- 10 6.14 The overarching purpose and object of the trust is to regulate the acquisition, management and disposal of assets of the Scaffidi family through a flexible structure capable of adapting to changing circumstances: CA [14]. Hence the discretionary nature of the trust and the very broad powers conferred upon the trustee.
- 6.15 It is reasonable to assume that as an aspect of this overarching purpose, the trust was intended to facilitate the minimisation of the payment of duties and taxes in respect of trust assets and income. But that is unlikely to have been its exclusive purpose. Estate planning and asset protection are other benefits usually associated with the establishment of a typical discretionary family trust:
- 20 Hardingham and Baxt, *Discretionary Trusts*, 1984, Chapter 1; Kessler and Flynn, *Drafting Trusts & Will Trusts in Australia*, 2008, page 203-204.
- 6.16 A beneficiary has something approaching a general power of appointment over, and therefore ownership of, trust property if that beneficiary effectively controls the trustee's power of appointment. Effective control of the trustee's power of appointment can arise where the beneficiary is also the trustee (or one of them), or is also the appointor under the trust i.e. has the power to appoint a new trustee: ***Australian Securities and Investments Commission v Carey*** (No 6) (2006) 153 FCR 509 at [37]; [2006] FCA 814.
- 6.17 That was also the effective position under s.100 of the *Stamp Duties Act 1920*
- 30 (NSW) at the time the Trust Deed was made, as referred to by Buss JA below; CA [71], [79]-[81], and [96].
- 6.18 If it were the intention to avoid this consequence, one would expect the Trust Deed to have precluded any beneficiary from holding the position of Appointor or Trustee. Clause 11.03 does not achieve that. The clause only precludes the Appointor from acting as a Trustee where the Appointor is also a beneficiary. The

Trust Deed does not prevent any other beneficiary acting as a trustee, nor does it prevent any beneficiary acting as an Appointor.

**Limitations on the power of an appointor to appoint themselves as trustee**

- 6.19 A more compelling context for the construction of clause 11.03 lies in a consideration of the whole of the Trust Deed, and the purpose and objects evidenced within it, against the background of accepted and long-standing principles relating to the concept of a trust and the powers of the appointor.
- 6.20 As noted above, the purpose of the trust is to provide a flexible structure for dealing with the assets of the Scaffidi family. It should be assumed that this is not only for tax or duties minimisation purposes, but also for the purposes of estate planning and asset protection.
- 10 6.21 It is an essential element of a trust that the trustee is under a personal obligation to deal with the trust property for the benefit of the beneficiaries and that they are owed an irreducible core of obligations by the trustees which is fundamental to the concept of a trust: Heydon JK and Leeming LJ, *Jacobs' Law of Trusts in Australia* (7th ed, 2006) [110], [1620]; CA [149].
- 6.22 The power of appointment of the trustee must be viewed in that context.
- 6.23 A trust deed may confer a power upon an appointor to appoint himself or herself as a trustee: *Montefiore v Guedalla* (1903) 2 Ch 723, 725-6; CA [145].
- 20 6.24 Nevertheless, that power should only be exercised to that end in exceptional or special circumstances. This is regarded as a "salutary" rule: *Montefiore v Guedalla* 725, 726; CA [146].
- 6.25 Eugenio and Guiseppe are the Specified Members of the Class of Beneficiary: clause 1.04 of the Trust Deed and Schedule, Item 5; CA [52]. As such, they have certain rights to income of the Trust that has not been otherwise dealt with by the Trustee and, similarly, to the Trust Fund at the termination date: clauses 5.03 and 8.0 1.02 of the Trust Deed.
- 6.26 The Trust Deed confers broad powers upon the Trustee, and a broad discretion as to their exercise.
- 30 6.27 Those are, however, subject to oversight by the Appointor through the power (which is subject to clause 11.03) to remove and appoint trustees: clause 11.02.
- 6.28 There can be more than one Appointor: clause 1.09.
- 6.29 The Guardian also has an important role to play overseeing the exercise of the Trustee's powers. Many of those powers, including important powers to appoint or accumulate income and to appoint capital before the termination date, cannot be

exercised without the Guardian's express written consent: e.g. clauses 5.2, 9 and 15.01.

6.30 In circumstances where there is no Guardian the Trustee is not permitted to exercise those sorts of powers in a manner that will "*diminish or impair the vested contingent or expectant share*" of the Specified Members: clause 15.02.

6.31 It is reasonable therefore to impute an intention to limit the Appointor's power of appointment of the Trustee in respect of trust property to ensure that the residuary trust income and assets are appropriately preserved for the benefit of the Specified Members.

10 6.32 Against this background, a limitation on the ability of the Appointor to appoint themselves as Trustee when they are also a beneficiary, is readily understandable. In other words, the object and purpose of the Trust Deed, read as a whole, reflects the "salutary rule". The evident intention of clause 11.03 is to keep the exercise of the Trustee's powers independent of the Appointor when the Appointor is also a beneficiary.

#### **Objects and purposes are not mutually exclusive**

20 6.33 The first respondent's contention is that the purpose of limiting the Appointor's power to keep them independent of the Trustee is a more likely and relevant purpose or object of clause 11.03 than ensuring that the trustee's power of appointment is not characterised as a general power. Nevertheless, these purposes are not inconsistent with each other or mutually exclusive. There is no reason why the clause could not have been intended to achieve both purposes. That was the approach the majority took in the court below: CA [158].

#### **Single person companies**

6.34 Since 1995, a proprietary company has been permitted to have only one shareholder and one director: *Corporations Act 2001* (Cth), ss. 114 and 201A(1); CA [10].

6.35 The sole director and sole shareholder of a company may be the same person.

30 6.36 A director who is the sole director and shareholder of a company must manage or direct the management of the business of the company: *Corporations Act*, s. 198E(1).

6.37 To that end, such director may exercise all of the powers of the company except any powers that the *Corporations Act* or the company's constitution (if any)

requires the company to exercise in general meeting: *Corporations Act*, s. 198E(1).

6.38 A sole director can pass resolutions and make declarations: *Corporations Act*, s. 248B.

6.39 A sole shareholder can pass a resolution: *Corporations Act*, s. 249B.

6.40 The effect of these provisions is that, although a proprietary company is an entity legally separate from the person who is its sole director and shareholder, the management of the company and its corporate powers are vested exclusively in that person.

10 6.41 Single person companies are unlikely to have been in the contemplation of the parties to the Trust Deed at the time of its formation. However, it is relevant that the Settlor and original Trustee did contemplate the trust continuing for up to 80 years: clause 1.07.01. It can be assumed that the parties intended the Trust Deed to be able to operate in such a way that so as to accommodate and adapt to changes in the law in a way that would give effect to the purposes and objects of the trust.

#### **Clause 12.11 of the Trust Deed**

20 6.42 Clause 12.11 of the Trust Deed assumes particular significance against the background of the introduction of single person proprietary companies. That clause provides, in substance, that the powers of a corporate Trustee may be exercised by a resolution of the company or its directors, or by its appointed natural person representative. The parties to the Trust Deed must be taken to have contemplated or intended that the functions of a corporate Trustee could and would be exercised by a natural person or persons. In the case of a corporate Trustee that is a single person company, those powers will be exercised by or at the direction of the sole director and shareholder.

#### **The Language of the Trust Deed**

30 6.43 The word "*individual*" in clause 11.03 cannot be read in isolation from the sentence or phrase in which it appears. The sentence provides that the individual shall not be eligible to be appointed "as a" Trustee. That wording can be contrasted with the sentence in clause 11.05 that permits a Trustee to appoint "*any person to be an alternate Trustee*" (emphasis added).

- 6.44 The preposition "as" in clause 11.03 signifies "in the role, function, status or manner" of a trustee: Macquarie Dictionary definition; CA [162]. Having regard to that definition, the ordinary meaning of the phrase "*to be appointed as a Trustee*" comfortably accommodates an appointment by which the powers and functions of a Trustee (ie a trustee under the Trust Deed) are to be exercised by a person in the manner of a Trustee.
- 6.45 The Trust Deed has not, in any event, been "couched so deliberately", nor has it been drafted with such precision or consistency of language, that warrants the strict or literal approach to the construction of the word "*individual*" in clause 11.03 contended for by the appellants.
- 10 6.46 One example of the linguistic imprecision of the Trust Deed is in clause 11.05 that deals with the appointment of an alternate Trustee. The clause speaks variously of a "*person*", an "*individual*" and a "*natural individual*". Another example is the reference to both a "*Sole Trustee which is a corporation or company*" in clause 12.12 and a "*single corporate Trustee*" in clause 12.09.02 (and to which clause 12.12 directly relates).
- 6.47 An example of more general imprecision in the drafting of the deed as a whole is apparent when contrasting clauses 11.01, 13.01 and 14.01. The Trust Deed provides expressly that the Trustee and the Guardian may be a corporation. There is no express provision to that effect in relation to the Appointor, although that is implicit in clause 13.05.
- 20

### **Conclusion – The Proper Construction of Clause 11.03**

- 6.48 The word "*individual*" must be read in the context of the phrase of which it is part to ascertain its ordinary meaning. The ordinary meaning of the phrase "*to be appointed as a Trustee*" is wide enough to include an appointment by which the powers and functions of a Trustee are to be exercised by a person or "*individual*", even if that person does not or is not intended to have or hold the specific title of "Trustee".
- 6.49 The ordinary meaning of the above phrase is reinforced when one has regard to:
- 30 (a) clause 12.11 of the Trust Deed which contemplates explicitly the exercise of a corporate Trustee's powers and functions through a resolution of its shareholders or directors or by its appointed natural person representative;
- (b) the Trust Deed as a whole which discloses that the evident purpose of clause 11.03 is to keep the exercise of the Trustee's powers independent of the Appointor when the Appointor is also a beneficiary; and

(c) against the background of that evident purpose, the apparent imprecision in the language and drafting of the Trust Deed.

6.50 The majority in the Court of Appeal did not, as the appellants contend, ignore the natural and ordinary meaning of the clause. The majority approached the issue of construction correctly by arriving at a conclusion as to the meaning of the words of clause 11.03 "in their ordinary usage": CA [163].

6.51 In addition, the majority did not "ignore the surrounding circumstances", namely the revenue legislation framework that existed at the time the Trust Deed was formed. This was the first of three purposes the majority considered that clause 11.03 was intended to serve: CA [158].

6.52 The proper construction of clause 11.03 for which the first respondent contends does not depend upon a conclusion that the clause is ambiguous. Ambiguity is not to be equated with difficulty of construction, even difficulty to a point where judicial opinion as to meaning has differed: ***FL Schuler AG v Wickman Machine Tool Sales Ltd*** [1974] AC 235 at 261, per Lord Wilberforce.

6.53 Further the decision of the majority below did not involve "lifting the corporate veil". That issue would only have arisen had the majority reached a view as to the proper construction of clause 11.03 that permitted Eugenio to appoint Montevento as the Trustee.

6.54 The proper construction of clause 11.03 does not permit the appointment of Montevento as Trustee, given that Eugenio is the sole director and shareholder of that company. The provisions of the Corporations Act referred to above make plain that the powers and functions of Montevento as Trustee could only have been exercised by or at the direction of Eugenio. Given that Eugenio was also a Specified Member (beneficiary) of the Trust, it is also plain that the objective intention of clause 11.03 was to preclude that situation.

6.55 The decision of the majority in the court below as to the proper construction of clause 11.03 was accordingly correct.

30

**Part VII:**

7.1 The first respondent does not advance a notice of contention or cross appeal.

**Part VIII:**

8.1 The first respondent estimates that not more than 1 hour will be required for the presentation of his oral argument.

Dated 3 SEPTEMBER 2012 .

*Patricia Cahill*  
.....  
*Catherine Garde*  
.....

10

Patricia Cahill and Catherine Garde

Telephone: (08) 9220 0444  
Facsimile: (08) 9325 9111  
Email: [pcahill@francisburt.com.au](mailto:pcahill@francisburt.com.au)  
[cgarde@francisburt.com.au](mailto:cgarde@francisburt.com.au)

## Annexure A (PT V)

### Corporations Act 2001 (Cth)

#### **114 Minimum of 1 member**

A company needs to have at least 1 member.

#### **198E Single director/shareholder proprietary companies**

##### *Powers of director*

- (1) The director of a proprietary company who is its only director and only shareholder may exercise all the powers of the company except any powers that this Act or the company's constitution (if any) requires the company to exercise in general meeting. The business of the company is to be managed by or under the direction of the director.

Note: For example, the director may issue shares, borrow money and issue debentures.

##### *Negotiable instruments*

- (2) The director of a proprietary company who is its only director and only shareholder may sign, draw, accept, endorse or otherwise execute a negotiable instrument. The director may determine that a negotiable instrument may be signed, drawn, accepted, endorsed or otherwise executed in a different way.

#### **201A Minimum number of directors**

##### *Proprietary companies*

- (1) A proprietary company must have at least 1 director. That director must ordinarily reside in Australia.

##### *Public companies*

- (2) A public company must have at least 3 directors (not counting alternate directors). At least 2 directors must ordinarily reside in Australia.

#### **248B Resolutions and declarations of 1 director proprietary companies**

##### *Resolutions*

- (1) The director of a proprietary company that has only 1 director may pass a resolution by recording it and signing the record.

##### *Declarations*

- (2) The director of a proprietary company that has only 1 director may make a declaration by recording it and signing the record. Recording and signing the declaration satisfies any requirement in this Act that the declaration be made at a directors' meeting.

Note 1: For directors' declarations, see sections 295 and 494.

Note 2: Passage of a resolution or the making of a declaration under this section must be recorded in the company's minute books (see section 251A).

## 249B Resolutions of 1 member companies

- (1) A company that has only 1 member may pass a resolution by the member recording it and signing the record.
- (2) If this Act requires information or a document relating to the resolution to be lodged with ASIC, that requirement is satisfied by lodging the information or document with the resolution that is passed.

Note 1: A body corporate representative may sign such a resolution (see section 250D).

Note 2: Passage of a resolution under this section must be recorded in the company's minute books (see section 251A).

### Stamp Duties Act 1920 (NSW) – applicable in 1977

100. In this Part and Part V and the Third Schedule hereto, unless the context or subject-matter otherwise indicates or requires,—

“General power of appointment” includes any power or authority which enables the donee or other holder thereof, or would enable him if he were of full capacity, to appoint or dispose of any property, or to charge any sum of money upon any property, as he thinks fit for his own benefit, whether exercisable by instrument inter vivos or by will or otherwise but does not include any power exercisable by any person in a fiduciary capacity for the benefit of others only arising under a disposition not made by himself, or exercisable as tenant for life under Part IV of the Conveyancing and Law of Property Act, 1898, or as mortgagee.

102. For the purposes of the assessment and payment of death duty but subject as hereinafter provided, the estate of a deceased person shall be deemed to include and consist of the following classes of property:—

- (1)(a) All property of the deceased which is situate in New South Wales at his death.

And in addition where the deceased was domiciled in New South Wales all personal property of the deceased situate outside New South Wales at his death; and

- (b) all property of the deceased mentioned in section 103 of this Act

to which any person becomes entitled under the will or upon the intestacy of the deceased, except property held by the deceased as trustee for another person under a disposition not made by the deceased.

- (2) (a) All property which the deceased has disposed of, whether before or after the passing of this Act, by will or by a settlement containing any trust in respect of that property to take effect after his death, including a will or settlement made in the exercise of any general power of appointment, whether exercisable by the deceased alone or jointly with another person:

Provided that the property deemed to be included in the estate of the deceased shall be the property which at the time of his death is subject to such trust.

- (b) Any property comprised in any gift made by the deceased within three years before his death, and whether made before or after the passing of this Act, including any money paid or other property conveyed or transferred by the deceased within such

period in pursuance of a covenant or agreement made at any time by him without full consideration in money or money's worth.....

- (j) Any property over or in respect of which the deceased had at the time of his death a general power of appointment.

**Income Tax Assessment Act 1936 (Cth) – applicable in 1977**

102. (1) Where a person has created a trust in respect of any income or property (including money) and-

- (a) he has power, whenever exercisable, to revoke or alter the trusts so as to acquire a beneficial interest in the income derived by the trustee during the year of income, or the property producing that income, or any part of that income or property; or
- (b) income is, under that trust, in the year of income, payable to or accumulated for, or applicable for the benefit of a child or children of that person who is or are under the age of twenty-one years and unmarried, the Commissioner may assess the trustee to pay income tax, under this section, and the trustee shall be liable to pay the tax so assessed.

(2) The amount of the tax payable in pursuance of this section shall be the amount by which the tax actually payable on his own taxable income by the person who created the trust is less than the tax which would have been payable by him if he had received, in addition to any other income derived by him, so much of the net income of the trust estate as-

- (a) is attributable to the property in which he has power to acquire the beneficial interest;
- (b) represents the income, or the part of the income, in which he has power to acquire the beneficial interest; or
- (c) is payable to or accumulated for, or applicable for the benefit of, a child or children of that person who is or are under the age of twenty-one years and unmarried.

(2A) Where any property the subject of a trust has been converted into other property, this section shall apply in the same way as if the trust had originally been created in respect of that other property.

(3) Where this section is applied to the assessment of the income of a trust estate or part thereof derived in the year of income, no beneficiary shall be assessed in his individual capacity in respect of his individual interest in the income or part to which this section has been so applied, and the trustee shall not be assessed in respect of that income or part otherwise than under this section.