

## **THE BAMFORD DECISION – LATEST DEVELOPMENTS**

Following the High Court's decision in the Bamford case, the ATO issued its Decision Impact Statement and Practice Statement (PS LA 2010/1) on 2 June 2010. Importantly:

1. The Decision Impact Statement and PS LA 2010/1 deal with the ATO's interpretation of the decision and how the ATO will apply the decision. The statements released by the ATO were open for consultation until 28 July 2010. Practitioners should carefully consider each of these statements and how they will impact on trust deeds.
2. There are a number of issues that the High Court did not address and which are still unresolved.

The ATO has indicated that the Bamford decision means that certain rulings and practice statements are withdrawn from 1 July 2010. These are:

- Taxation Ruling TR 95/29: Income tax: Division 16 - Applicability of averaging provisions to beneficiaries of trust estates carrying on a business of primary production.
- Taxation Ruling No. IT 331: Adjustments to estate income as returned to arrive at net income of estate for the purposes of section 95.
- Law Administration Practice Statement (General Administration) PS LA 2005/1 (GA): Taxation of capital gains of a trust.
- Taxation Ruling TR 92/13 (trust dividends and franking). It appears that the Commissioner's view is that Subdivision 207-B of the Income Tax Assessment Act 1997 appears to adequately deal with the distribution of franking credits attaching to dividends so that they are passed through to beneficiaries. The Commissioner intends to consult on a new interpretative product that will consider the operation of Subdivision 207-B.

The ATO has also detailed issues which remain uncertain including:

- what constitutes a receipt or an outgoing of a trust for the purposes of ascertaining the trust's distributable income of a period;
- whether a trustee can identify and measure the trust's distributable income using an accounting methodology that differs from the accounting methodology the trustee uses to account to beneficiaries as to the condition of the trust estate from period to period;
- the effect for trust law purposes of provisions which purport to equate the trust's distributable income with its taxable income where the taxable income includes notional amounts (e.g. franking credits or deemed capital gains);
- how a trust's distributable income is to be determined where the trust instrument employs different notions of income for different purposes; and
- how the statutory flow-through provisions such as Subdivision 115-C of the ITAA 1997 (capital gains) and Subdivision 207-B of the ITAA 1997 (franking credits) interact with Division 6 given that a beneficiary's liability to be assessed on the taxable income of the trust under Division 6 may not correspond with the beneficiary's actual entitlement.

There also remains a particular issue as to the effect for taxation purposes of a re-characterisation clause that requires or permits the trustee to treat as capital what is otherwise received as income. The ATO appears to be of the view that what appears to be a wide discretion to determine whether receipts are capital or income is in fact no more than an administrative power to honestly classify receipts according to law.

**What to do?**

There is still some uncertainty as to how the ATO will resolve these issues and we expect that they will release further statements in due course. However, trustees of discretionary trusts should still review their trust deeds to determine if:

- the trust deed contains an adequate definition of income and if the trustee can determine at any time what definition the trustee will apply;
- the trust deed contains a discretion for the trustee to determine the nature of receipts and expenses and whether they are applied to the income account or to capital account; and
- the trust deed contains a power for the trustee to distribute specific categories of income to particular beneficiaries.

Trustees and their financial advisers must also review the activities of their trusts and determine if the income definition is effective for those activities.

Where the trustee determines that changes to the trust deed are necessary or desirable, ACIS can provide a deed of amendment to incorporate our post-Bamford changes.

**Special offer for ACIS clients**

Our prices for the “Bamford” amendment deed are as follows (all prices include GST):

	<b>ACIS trust deed</b>	<b>Other trust deed</b>
<b>Standard price</b>	<b>\$385</b>	<b>\$495</b>
<b>Existing ACIS client (less than 10 trusts)</b>	<b>\$275</b>	<b>\$330</b>
<b>Existing ACIS client (more than 10 trusts)</b>	<b>On quotation</b>	<b>On quotation</b>

**Important Note**

Great care needs to be taken when amending trust deeds to incorporate these changes, as the trustee must exercise caution to ensure that the trust is not resettled. Resettlement may result in capital gains tax or stamp duty liabilities.

While we do not provide an opinion on possible resettlement issues, if such an issue is identified, we will refer it to you for instructions.

If you have any queries or require trust deed amendments, please call toll-free on 1800-773-477.