




New Rules for Means Testing Eligibility for Aged Pension

The Federal Government has recently introduced changes to the means tests that determine eligibility for pensions, social security payments and veteran's entitlements.

The legislation deems that certain assets and income of trusts and companies are included within an individual's assessable income that forms the basis of means testing for social security payments. An individual who has an interest in a trust or company who has previously qualified for a social security payment may no longer qualify if the consequences of the legislation are not seriously considered.

Am I affected?

For assets and income of a private trust or private company to be attributed to an individual the trust or company must be:-




-  a designated trust or company; and
-  a controlled trust or company in relation to the individual; and
-  the individual must be an attributable stakeholder of the trust or company.

What is a Designated Trust or Company?

All private trusts, including family trusts, testamentary trusts and those fixed trusts with fewer than 50 members are affected, as well as implied and constructive trusts. A trust may be excluded if the purpose of the trust was not to gain a social security advantage or if it is a complying superannuation fund or excluded trust.

A company is a Designated Private Company if:-



1. the company satisfies two of the following conditions for the financial year immediately prior to assessment:-

-  its consolidated gross operating revenue (including subsidiaries) for the financial year is less than \$10 million;
-  its consolidated gross assets at the end of the financial year is less than \$5 million; or
-  a company which has fewer than 50 employees at the end of the financial year; or

2. the company has come into existence since the end of the last financial year.

Who is considered to control a private company or trust?

There are two tests which determine whether an individual controls a trust or company:-

-  the control test; and
-  the source test.

The Control Test

The test for who controls a private trust or company is broadly defined to include direct or indirect control. An individual may be considered to have indirect control if the control of the trust or company lies with an Associate. An "Associate" is broadly defined to include (but is not limited to):-

- ✓ a relative including a spouse, defacto, grandparent, brother, sister, uncle, aunt, nephew, niece, first cousin, second cousin or lineal descendant and any of their spouses etc;
- ✓ a professional adviser;
- ✓ a trustee of a trust from which the person can benefit either directly or indirectly;
- ✓ a partner of the person or a partnership in which the person is a partner
- ✓ a company where the directors could reasonably be expected to act in accordance with the directions or wishes of the person.

Who is Considered to Control Trusts?

Although day to day management of a trust is often undertaken by a Trustee, effective control of a trust generally rests with a person or persons who can:-

- ✓ dismiss and appoint a trustee;
- ✓ veto a trustee's decision or exercise control over the Trustee in another way or
- ✓ change the trust deed.

This person is commonly known as the Appointor or Principal.

Who is considered to control a Company?

A person with the majority of voting powers or who is considered to be the "governing director" generally controls a company because they have the right to reduce or eliminate profits and pay themselves directors fees or wages. In addition, a person alone or with an Associate who is beneficially entitled to 15% or more of the capital or dividends of the company or a person who is in a position to exercise power over the company are also considered to control the company.

Source Testing

Even though a person may not control a trust or company within the meaning of the Control Test, it is still possible that the assets of the trust or company are relevant to the means test particularly where a person has transferred assets to a trust or company so as to deprive themselves of an asset.

Source testing recognises that people who transfer assets or services to a trust or company generally retain some means of control. The Source Test only applies to assets or services that are gifted to a trust or company after 7.30pm on 9 May 2000 for no consideration or consideration which is less than the amount likely to be paid if the transaction was at arm's length. Under the Source Test, where a person transfers assets to a trust or company in these circumstances the

asset will be considered to be part of the persons assessable income for the purposes of the means test.

This rule, however, is not absolute. It is possible to seek an exemption for the transfer of an asset where it can clearly be shown that a genuine gift has been made, and that there is no ongoing involvement in the company or trust at all.

Attributable Stakeholder

In the circumstances where a person is considered to control a trust or entity, it may be that they are only one of several controlling members. The percentage of a trust or company's assets or income which may be attributed to an individual and considered to be within their assessable income for means testing purposes is proportionate to the number of controlling individuals. This means that if there is one controlling individual 100% of the assets and income of the structure are attributed to the individual. Likewise, if there were 3 controlling individuals then 33.33% of the income and assets would be attributed to each controller.

Your Option to Resign Your Interest

As a consequence of the new legislation, the question arises as to whether it is possible to resign an interest in a trust or company so that it is no longer attributable to an individual so as to affect their ability to collect a social security payment.

Whether or not it is possible to resign or retire an interest in a trust or company without suffering a detrimental impact depends on the nature of the trust or company structure and the individual's circumstances. However, the following general principles can be applied.

Resignations Prior to 1 January 2002 - Discretionary Trusts

Resignation of an interest in a discretionary trust may be effective prior to 1 January 2002 because income from a discretionary trust is not assessable income until it is distributed. However, in certain circumstances such a renunciation is likely to have CGT consequences or may constitute a resettlement of the trust.

Resignations Prior to 1 January 2002 Fixed Trusts and Companies

If a person relinquishes their units or shares prior to implementation for less than the value currently assessed, the deprivation provisions will be applied according to the value currently assigned. This may mean that the value of the asset is included in an individual's assessable income for a period of 5 years. Again, it is also possible that there are CGT or resettlement issues involved with renunciation of an interest in a trust.

Resignations after 1 January 2002

After implementation of the new legislation a person who relinquishes control will have deprived himself or herself of an assessable asset and a five-year deprivation period may apply, during which the asset is deemed to be included in an individual's assessable income.

What should be done now?

Each person likely to be affected by the introduction of this new legislation should consider reorganising their affairs and that might involve amending trust deeds and/or company constitutions so as to maximise their income capacity.

A genuine resignation will be accepted as having occurred where both the controller and their spouse: -

- ✓ relinquish all formal roles and control in respect of the trust or company;
- ✓ relinquish all shares and directorships;
- ✓ relinquish all beneficial interests; and
- ✓ make a written declaration that they will not exert any control over or benefit in any way from the structure.

This may require an individual and their spouse to resign as trustees, and/or principle/appointer of a trust, and where relevant renouncing their entitlement as a beneficiary of a trust. These acts may have stamp duty and taxation implications therefore it is important that professional advice is obtained before any of these things are done.

If we can be of assistance to you in this regard please do not hesitate to contact us.