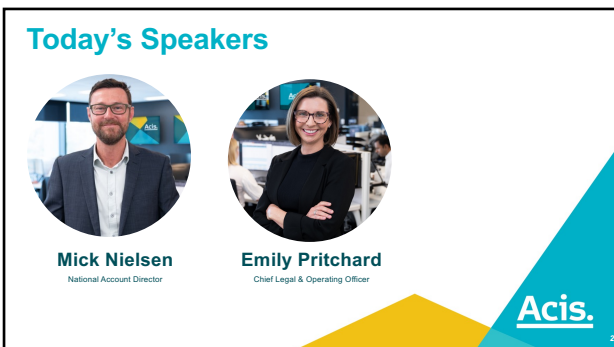




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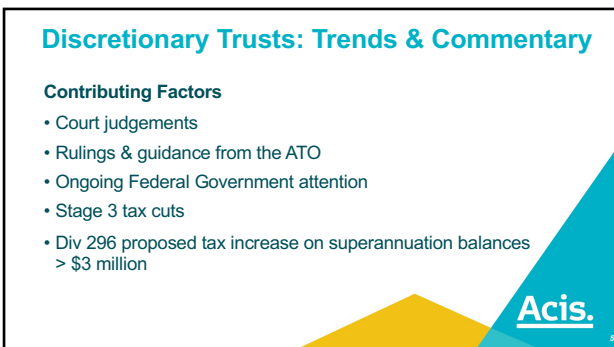
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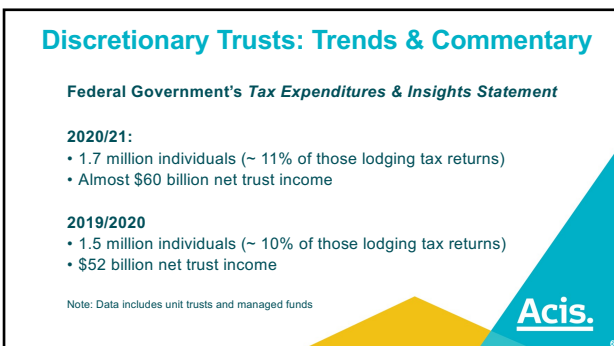
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7

Owies #1
Re Owies Family Trust [2020] VSC 716

- Purported change to Guardian and Appointor using amendment power:
"revoke add to or vary all or any of the trusts hereinbefore limited... and... declare any new or other trusts or powers concerning the Trust Fund..."
- Court held **trusts** referred to the **primary trust constituted** by the trust deed which was distinct from any other **powers and provisions** and so the power to vary the **trusts** did not extend to changing the Appointor and Guardian and the purported amendment was invalid.
- Powers relied upon in a trust deed need to be sufficiently broad for the purpose that they are used.

Acis. 8

8

Mercanti
Mercanti v Mercanti [2016] WASCA 206

- Purported amendment of 2 discretionary trust deeds to replace an existing Appointor/Guardian.
 - Deed #1: *"vary all or any of the trusts, terms and conditions"*
Court held that this extended to amending the name of the Appointor/Guardian in the Schedule and so the amendment was valid.
 - Deed #2: *"vary all or any of the trusts"*
Court held this did not extend to amending the name of the Appointor/Guardian in the Schedule and so the amendment was invalid.
- An application for special leave to appeal to the High Court was dismissed.
- Powers relied upon in a trust deed need to be sufficiently broad for the purpose that they are used.

Acis. 9

9

Demian

Advanced Holdings Pty Limited as Trustee for The Demian Trust v FCT [2021] FCAFC 135

- Purported change of trustee.
"The Principal may at any time by notice in writing to the Trustee remove from office any or all of the Trustees or Trustee for the time being of this Deed and may by Deed appoint a new Trustee in its or their place to be the Trustee hereof..."
- Issue: whether the power to appoint a new trustee under that clause could be exercised without a prior removal of a trustee.
- The Court held that the Principal's power to appoint a new trustee under the trust deed could not be exercised without first removing the existing trustee.
- Court construed the clause relied upon literally and held that it was insufficient for the purpose and that the trustee had not been validly appointed.
- Powers relied upon in a trust deed need to be sufficiently broad for the purpose that they are used, and deeds should be reviewed to ensure they contain sufficient mechanisms for change.

Acis. 10

10

Owies #2

Owies v JJE Nominees Pty Ltd [2022] VSCA 142

- Trustee's "**absolute and uncontrolled**" discretion to distribute income challenged.
- Court found distributions voidable on the basis that the trustee had not given "**real and genuine consideration**" to the circumstances and needs of each beneficiary.
- Trustee needs to give real and genuine consideration to the personal circumstances of potential beneficiaries.

Acis. 11

11

Minerva

Minerva Financial Group Pty Ltd v Commissioner of Taxation [2022] FCA 1092

- After a complex restructure, the trustee distributed only nominal income amounts to a corporate silo and the majority of income to a trust silo, which resulted in less tax being paid compared to the tax that could have been paid under the Commissioner's view of what would have happened if the "scheme" had not been entered into.
- A scheme for the sole or dominant purpose of obtaining a tax benefit.
- An unnecessarily complex restructure, with the sole purpose of reducing tax, can be caught by Part IVA (general anti-avoidance rule).

Acis. 12

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Guardian

Guardian AIT - Commissioner of Taxation v Guardian AIT Pty Ltd ATF Australian Investment Trust [2023] FCAFC 3

- Agreement involving the incorporation of a company, the nomination of that company as an eligible beneficiary of a trust that conducted investment activities and the subsequent distribution of income from those investment activities to the company.
- The Full Federal Court concluded that section 100A requires that a reimbursement agreement exist at or prior to the time by which a beneficiary was made presently entitled to net income of the trust and that for section 100A to apply, there must be an agreement in place which requires consensus and adoption between at least two parties. Because this couldn't be established, the Court held that s. 100A did not apply.
- Inconsistency with TR 2022/4: "an exact understanding of the parties of the nature and extent of the agreement and benefits to be provided is not required". TR 2022/4 subsequently amended.
- The Full Federal Court held that Part IVA (general anti avoidance provisions) applied.



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Bendel

Bendel and FCT [2023] AATA 3074

- Company became entitled to a share in trust income with most distributions remaining unpaid.
- Administrative Appeals Tribunal held that an unpaid present entitlement (UPE) between a corporate beneficiary and trust did not constitute a 'loan' under Division 7A ITAA 1936.
- The Commissioner has appealed the decision to the Federal Court and released an Interim Decision Impact Statement: "until the appeal process is finalised, the Commissioner does not intend to revise the current ATO views relating to private company entitlements to trust income as set out in TD 2022/11".



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BBlood


B&F Investments Pty Ltd as trustee for the Illuka Park Trust v Commissioner of Taxation [2023] FCAFC 89

- Taxpayer's appeal of decision in *BBlood Enterprises Pty Ltd v FCT* [2022] FCA 1112 where it was held that s. 100A applied.
- Full Federal Court held on appeal that s.100A applied.
- Section 100A:
 - a beneficiary is made presently entitled to trust income – not in dispute
 - there was an agreement that another person (usually another beneficiary or the trustee) gets a benefit attributable to that trust income – not in dispute
 - a purpose of the agreement was someone paying less (or no) tax (subsection 100A(8)) - issue
 - the agreement was not "entered into in the course of ordinary family or commercial dealing" – not in dispute
- TR 2022/4 subsequently amended.



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TR 2022/4 & PCG 2022/2




- Three requirements:
 - Connection requirement
 - Benefit to another requirement
 - Tax reduction purpose requirement
- Exception
 - Ordinary dealing exception
- Contemporaneous record keeping

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TR 2022/4 & PCG 2022/2



- TR 2022/4 & PCG 2022/2
 - Draft - 23 February 2022
 - Finalised - 8 December 2022
 - Updated post 2023 *Guardian* and *BBlood* decisions - 27 September 2023

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**Finding the Balance:
Technical &
Practical Strategies**



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Technical & Practical Strategies

What we know we want to do....

- Continue using trusts for:
 - Succession planning
 - Asset protection
 - Tax planning
 - Ongoing flexibility
- Mitigate risks for trustees and advisors
- Evolve with the changing trust landscape
- Implement practical strategies
- Confidently advise trust clients



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Trust Evolve™



- Expert Review
- Report
- Amendment
- Distribution Guide (including risk assessment & distribution templates)

"An innovative and valuable tool to assist advisers"
Brian Richards
CTA, Richards Advisory




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Trust Evolve™ Process & Pricing

- More Trust Evolve™ information, including letter to help with client communications and related commentary, can be found on our website: [Trust Evolve – Acis](#)
- Order on the Acis platform
- Trust Evolve™ Advisor pricing: \$1,320 (inc. GST)
- Special Offer for those attending this webinar



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- Bendel appeal
- Amendments to ATO Guidance
- Ongoing Federal Government attention
- Federal Budget – 14 May 2024
- Stage 3 tax cut changes – effective 1 July 2024
- Div 296 proposed tax increase on superannuation balances > \$3 million. Bill before Federal parliament. Effective 1 July 2025.

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