



Unit Trusts and Land Tax Threshold Exemptions

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Land tax threshold exemptions available for unit trusts

In NSW, a fixed trust is eligible for land tax threshold exemptions if it satisfies the definition of "fixed trust" under the *Land Tax Management Act 1956 (Act)*, so that the beneficiaries of the trust are considered to be the owners of the land at the taxing date of midnight on 31 December prior to the tax year.

Revenue NSW provides guidance regarding the requirements for a trust to qualify as a fixed trust. In summary, the trust deed must satisfy the following:

- the unit holders must be presently entitled to all the income and capital of the trust (that is, the unit holders must have a right to demand payment of income and capital from the trustee and the trustee must have the obligation to attend to such request);
- the unit holders must be able to require the trustee to wind up the trust and distribute the trust property or the net proceeds of the trust;
- the unit holders' entitlements can't be removed, restricted or otherwise affected by the exercise of any discretion conferred on the trustee by the trust deed;
- only one class of units can be issued, and the proportion of trust capital a unit holder is entitled to on winding up or surrender of units must be fixed, and must be the same as the proportion of income of the trust to which the unit holder is entitled.

A unit trust that does not qualify as a fixed trust is deemed to be a "special trust" under the Act and is not entitled to the benefit of the land tax threshold exemptions available in NSW.

The decision in *Marius Street Developments* and the importance of getting the trust deed provisions right

In *Marius Street Developments P/L ATF The Gerryjohn Unit Trust v CCSR [2020] NSWCATAD 291*, the Tribunal decided whether a unit trust deed satisfied the definition of "fixed trust".

The trust deed in question contained provisions confirming the trustee's discretion in relation to the income and capital of the trust in addition to the trustee's ability to issue units at premium and admit new unit holders. The trust deed also contained a "saving clause" stating the following:

"Notwithstanding any other provisions of this Deed, the unit holders are presently entitled to all of the income from any land owned by the Trust after the payment of the expenses properly incurred by the trustee in the authorised administration of the trust. Further the unit holders may require the trustee to wind up the trust and distribute either the land or the net proceeds of the sale of the land"

The Tribunal found the words "notwithstanding any other provisions of this deed" could not be construed to override the other clauses in the trust deed. As a result, the unit holders were found to not have a present right of beneficial enjoyment of the land and no right existed for them to have the trust wound up and the land (or the proceeds of its sale) distributed.

The case highlights the importance of carefully considering the provisions which are required to be drafted or amended in a trust deed to ensure they comply with fixed trust requirements. In particular, the inclusion of saving clauses when varying a trust deed may not be appropriate if they contradict the existing and unvaried clauses of the trust deed.

Tailoring or varying trust deeds to satisfy the definition of "Fixed Trusts"

Unit trusts may be tailored or varied to fix the beneficiaries' entitlements. However, given the limitations of fixed trusts, the pros and cons of such amendments must be carefully considered against the objectives of each trust.

If you would like to discuss whether the set up or amendment of your trust to comply with "fixed trust" requirements is available and suitable to your objectives, please contact [John Gray](#) on 02 8235 1205.

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