

Topical Trust Issues

INTRODUCTION	1
CHAPTER 1 - TRADING TRUST	2
What is a trading trust?	2
Why consider a trading trust?	2
Trustee liability issues	3
Trustee's right of indemnity out of trust assets	3
<i>Can the right of indemnity be excluded by contract?</i>	4
Style/content of trading trust deeds	5
Who should own the shares in the corporate trustee, and who should be the directors?	6
What can be done to dilute this control issue?	6
Use of a trading trust in tandem with a conventional discretionary trust	7
Who should be beneficiaries of the trading trust?	8
What are the tax advantages of a trading trust?	8
CHAPTER 2 - TAX CONSEQUENCES OF RESETTLEMENTS	10
CHAPTER 3 - TRUST ADMINISTRATION AND GOVERNANCE – DOING IT RIGHT	12
Introduction	12
Trustees' duties	12
The <i>Rahman</i> case	14
CHAPTER 4 - ASSOCIATED PERSONS - THE NEW MINEFIELD	17
Section CD1 - "associated person" as defined in s OD8(4)	17
<i>Structure 1</i>	18
<i>Structure 2</i>	19
<i>Structure 3</i>	20
<i>3 Structures - risks</i>	21
<i>Section CD1 associated person test - determined at time of acquisition or time of disposal?</i>	21
Approved issuer levy - impact of the associated person test	22
Anti-avoidance and penalty risk in relation to "associated person" planning	23
CHAPTER 5 - TRUST INVESTMENT - A PROBLEM OF PRUDENCE	25
Law prior to Trustee Amendment Act 1982	25
Recommendation of working party	25
Introduction of the prudent person test	26
General investment power	26
The two prudent person tests	26
Relevant investment considerations	27
New Zealand, English and US formulations	27
Three recent cases	29
Expressing a contrary intention	31

Deciding on an investment strategy	32
Modern portfolio theory - does it qualify?	32
Some relief in cases of breach of trust	33
Delegation of investment decisions	34
CHAPTER 6 - PROS AND CONS OF LICENCES TO OCCUPY/LEASES FOR LIFE	36
How a licence to occupy works	36
Problem if property sold	36
Gift duty risks	36
Possible estate duty risks	37
Some tests to determine whether to use the technique	37
CHAPTER 7 - OFFSHORE TRUST AND OTHER VEHICLES - NON-TAX ADVANTAGES	52
Creditor protection	53
<i>Foreign judgments</i>	53
<i>Limitation periods</i>	53
<i>Bankruptcy</i>	53
<i>Fraudulent conveyances</i>	53
<i>Statutory certainty that a settlor can be a beneficiary</i>	54
<i>Statutory certainty that a settlor can retain some degree of control</i>	54
<i>Trust validity - even if disposition is voidable</i>	54
Confidentiality	55
Forced heirship	55
Matrimonial and de facto property issues	55
Practicalities	56
CHAPTER 8 - TAX PLANNING FOR MIGRANTS AND RETURNING EXPATRIATES USING FOREIGN TRUSTS	57
CHAPTER 9 - LIABILITY ISSUES FOR TRUSTEES UNDER MORTGAGES	59
The trustee is personally liable <u>unless</u>	59
Limiting the trustee's liability	59
Typical limitation of liability clauses	60
<i>Trustee's clauses</i>	60
Some bank clauses	61
Limitation of trustee liability by trust deed	66
CHAPTER 10 - GIFTING TO TRUSTS	68
Problem with some discretionary beneficiaries	70
Error in Commissioner's approach	70
New legislation?	71
What should be done now?	71
IRD attitude disappointing	72
CHAPTER 11 - VARIATIONS OF TRUSTS - THE TECHNICAL BITS	79
Court sanctioned variations	79
Power within trust deed	80

<i>Kearns v Hill</i>	81
Common variation clauses	82
<i>Tax aspects</i>	83
CHAPTER 12 - CRYSTAL BALL GAZING	85
Parallel trusts	85
<i>The problem before death duty abolished</i>	85
<i>Use of mirror trusts</i>	85
Next the joint trust	85
<i>Some problems with the joint trust</i>	85
The case for parallel trusts	86
Protectors	87
<i>"What is a protector"? - "What is an appointor"?</i>	87
<i>Some use of protectors beginning to emerge</i>	89
<i>Judicial control of protectors</i>	90
<i>Does the protector concept go too far?</i>	91
<i>Does a trust need a protector?</i>	91
Other issues	92
<i>Possible future Capital Gains Tax or Inheritance Tax</i>	92
<i>Blind trusts</i>	92
<i>Asset protection</i>	93
<i>Powers to vary deeds or add/remove beneficiaries</i>	93
Conclusion	93