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Welcome to the eighth edition of the quarterly STEP Australia Newsletter.

I firstly wish to say thank you for the honour of being the Chair of STEP Australia. Like you, I have found STEP to be informative (especially on international matters) and collegiate. We now just need to get the STEP message to our many professional colleagues.

Our role at STEP Australia is to underpin and support the Australia-wide STEP branches who, with dedicated teams of volunteers, work hard to make STEP relevant for you. Our vision is to be the pre-eminent worldwide professional association for those advising families across generations. You can be a part of this vision by promoting the benefits of your branch to your colleagues.

I encourage you to invite your legal, financial and accounting colleagues to a STEP event and let them experience first-hand the quality of your branch’s education opportunities. I know of no other professional association in Australia that can boast of the quality of judges, professors and senior government officials who regularly support STEP.

Take the opportunity, as I have done, to send colleagues a link on how Australian practitioners can join STEP (www.stepaustralia.com/join-us/how-to-join-step). I know that it may look a little complex at the moment, but we are simplifying the message: it really is easy to join STEP.

Are you looking to get involved?

There are various ways you can get involved and contribute. Get in touch with your branch committee or a STEP Australia Board Member if you would like to further your involvement with STEP.

We are keen to develop a greater involvement in policy matters; join us and help make the STEP voice one to be listened to.

If mentorship is more your style, we are currently developing a mentor programme. Another way to contribute is to become active on the STEP Australia LinkedIn page at www.linkedin.com/company/step-australia

The STEP Australia Newsletter Sub-Committee, chaired by Andrea Olsson, welcomes expressions of interest from members. Please email any feedback or expressions of interest to Dior Locke at dior.locke@step.org

With best wishes for a great 2020, Peter Bobbin TEP, STEP Australia Chair

Announcements

Congratulations to BNR Partners on receiving the 2019 STEP Private Client Award for Accountancy Team of the Year (Midsize Firm).
The Australian Financial Complaints Authority: The new Superannuation Complaints Tribunal

Fiona Fagan TEP, Senior Associate, Tindall Gask Bentley

The Australian Financial Complaints Authority (AFCA) was introduced as an external dispute-resolution scheme set to replace the Financial Ombudsman Service, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal (SCT). The idea for creating the AFCA was to provide a 'one-stop shop' for consumers and small businesses with financial services and product complaints.

The AFCA was originated following the independent review of external-dispute-resolution schemes as initiated by the Australian government and completed by a panel led by Professor Ian Ramsay. A key recommendation of the review was to create a single external-dispute-resolution scheme. Following the introduction of the AFCA, complaints could be received from 1 November 2018.

KEY FACTS
- The AFCA received more than 30,000 complaints in its first five months of operation.
- The AFCA is a free-of-charge service for complainants.
- A main aim of the AFCA is to ensure that complaints are resolved in the most effective, fair and efficient way possible.

WHO CAN LODGE A COMPLAINT?
To lodge a complaint with the AFCA, the complainant must be an eligible person. The AFCA Rules note that a complaint must be about a financial firm that is an AFCA member at the time the complaint is submitted to the AFCA.

Additionally, the complaint must encompass a number of prerequisites:
- the complaint must arise from a customer relationship or other circumstance that brings the complaint within the AFCA's jurisdiction;
- there must be a sufficient connection with Australia;
- time limits apply within which the complaint must be submitted to the AFCA; and
- when involving traditional trustee company services, all other affected persons must provide their consent to the complaint being made.

A key feature of the AFCA is the timely manner in which complaints are resolved. The AFCA has jurisdiction to consider a broad range of financial problems issued by complainants, including:
- banking transactions and credit-listing errors;
- insurance claim denials (including home and contents, car, pets, travel, trauma and income protection);
- inappropriate investment advice;
- a complainant's difficulties in repaying loans, credit cards and short-term finance; and
- a trustee's decisions about the distribution of a superannuation benefit.

The AFCA may be able to assist complaints if a financial firm has acted unfairly by breaking the law, breaching a relevant code of practice or not meeting relevant industry-sector standards.

COMPLAINTS THE AFCA CONSIDERS
The AFCA cannot deal with:
- complaints with a business that is not a member of the AFCA at the time the complaint is lodged;
- complaints already dealt with by a court, tribunal or a predecessor scheme;
- certain complaints subject to legal proceedings;
- specific insurance products, such as compulsory third-party insurance, private health insurance and certain commercial general insurance products; and
- a financial firm's assessment of the credit risk posed by a borrower.

AFCA DETERMINATIONS
A key feature of the AFCA is the timely manner in which complaints are resolved, with the least amount of formality and technicality involved, while ensuring transparency is of paramount importance. The general aim of the AFCA is to resolve complaints by using informal methods, such as negotiation or conciliation, to achieve an early settlement.
Should the need arise for more formal methods to resolve complaints, a formal determination is to be made by the relevant AFCA decision-maker.

The AFCA decides how each complaint is determined by considering a range of factors, including the amount of the loss, the complexity and significance of the complaint and any expertise required. Determinations made by the AFCA are made in writing and are then published on its website on a de-identified basis. Financial firms are generally required to implement the determination within 30 days if it is accepted by the complainant.

### VARYING DECISION-MAKERS

Different decision-makers at the AFCA are utilised to suit each individual complainant. The decision-makers are as follows:

- **AFCA Adjudicator** – who deals with one to two small issues of low value and settles complaints in the fast-track stream;
- **AFCA Ombudsman** – an expert in superannuation law and industry practice, who deals with multiple parties and settles complaints in standard and complex streams; and
- **AFCA Panel** – a group consisting of a chair (generally an ombudsman), an industry representative and a consumer representative formed to make a determination for complex matters or complaints involving significant monetary value.

### REMEDIES AVAILABLE

There is no monetary limit on the amount that may be awarded to the complainant in a superannuation complaint; however, for most other complaints, a limit per claim does apply.

Upon the determination of a complaint, the AFCA may require a financial firm to undertake a course of action to resolve the complaint, including:

- paying a sum of money;
- forgiving or varying a debt;
- releasing security over a debt;
- repaying, waiving or varying a fee or other amount paid (or owing) to the financial firm (or its representative or agent);
- reinstating, rectifying or properly performing a contract;
- varying the terms of a credit contract in cases of financial hardship; and
- meeting a claim under an insurance policy.

### THE AFCA’S APPROACH TO SUPERANNUATION DEATH BENEFIT COMPLAINTS

The AFCA can deal with a superannuation complaint relating to the distribution of a superannuation death benefit if it is made within the time limits prescribed under the AFCA Rules, which are consistent with s.1056 of the Corporations Act 2001. The time limits require:

- an objection made to the payment of the death benefit proposed by the financial firm within 28 days of being given notice of the proposed decision; and
- a complaint submitted to the AFCA within 28 days of being given notice from the financial firm of its decision in relation to the payment of the death benefit.

Note, however, that if notice of the trustee’s decision has not been given, the time limits will not apply. The above process is utilised to ensure that trustees are able to pay out death benefits in a timely manner if no objections have been received from potential beneficiaries.

The decision-making process of determining a superannuation death benefit complaint is emphasised to provide for those dependants who would have continued to rely on the member for financial support, but for the member’s death. Non-binding nominations will, at most, be used as a guide only and, in the absence of a binding nomination or trust deed, the AFCA would likely determine a payment to an estate only if there are no dependants. While the AFCA may still test the validity of a binding and non-lapsing nomination, it will ultimately remain bound by the trust deed of the fund.

The introduction of the AFCA delivers an external-dispute-resolution mechanism that enables the timely and fair determination of a complaint. The ‘one-stop shop’ for consumers and small businesses with financial services and product complaints should be utilised to enable complainants to have an impartial and independent decision-maker decide an appropriate outcome for each individual case. It is also hoped that the process through the AFCA will provide complainants with a more timely determination.

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Clarification at last, and a quirky outcome

Grahame Young TEP, Barrister, Francis Burt Chambers, Perth WA

The decision of the High Court of Australia (the High Court) in *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth* resolved a long-standing controversy concerning entitlement to distributions from realisation of assets of insolvent corporate trustees of trading trusts.

On the one hand were two decisions of the Victorian Court of Appeal, *Re Enhill Pty Ltd* and *Re Amerind Pty Ltd (In Liq)*, and on the other a decision of the Full Court of the Supreme Court of South Australia, *In re Suco Gold Pty Ltd (In Liq)*, and a decision of the Full Court of the Federal Court of Australia, *Jones v Matrix Partners Pty Ltd*.

It seems remarkable that after the two contrary decisions in 1983, the questions were not raised again in cases before courts until 2018, 35 years later; and that the Victorian and Federal Courts continued to reach contrary conclusions. The delay may be explained by the fact that corporate trustees do not usually carry on business or hold assets in their own right, although some may do, nor is it usual for a corporate trustee to act as trustee for more than one trust where there is a risk of insolvency.

It is not the purpose of this note to consider the Corporations Act 2001 insolvency aspects of the decision in detail. The decision of the High Court to dismiss the appeal and to uphold the decision, but not the reasoning, of the Victorian Court of Appeal was unanimous, but there were three separate judgments delivered: a joint judgment of Kiefel CJ, Keane and Edelman JJ; a joint judgment of Bell, Gageler and Nettle JJ; and a separate judgment of Gordon J.

All judgments emphasised that the answers to the questions posed by the appeal were to be determined by the application of fundamental principles of trust law. Given the centrality of those fundamental principles in resolving the decades-old controversy that continued to divide the intermediate courts of appeal, it is worth repeating them.

**FUNDAMENTAL PRINCIPLES**

- A trust is not a separate entity.
- A trustee is the (legal) owner of the trust assets; the rights of beneficiaries are impressed on, not carved out of, those assets.
- A trustee is personally liable for debts incurred as trustee.

From these it follows that a trust does not have a separate insolvency status from the trustee, and that an ‘insolvent trust’, ‘trust assets’ and ‘trust creditors’ are all shorthand respectively for:

- an insolvent trustee (whether that insolvency results from liabilities incurred when acting in its own right or in its capacity as trustee or both);
- the rights in assets held on trust by the trustee; and
- those creditors of the trustee whose debts were properly incurred with authority in the course of trust business.

And I might add that a non-trust creditor is one for whom the trustee is not entitled to an indemnity from trust assets. The correlative of the personal liability of the trustee are the rights of indemnity out of the trust fund. If the trustee has discharged the liability out of its own personal property it is entitled to reimbursement or recoupment. If the liabilities have not been discharged it is entitled to apply trust property in discharging the liability; that is, the trustee is entitled to exoneration.

The rights of indemnity are a proprietary interest in the trust assets taking priority over the rights of beneficiaries. It was with the right, or power, of exoneration that the High Court was concerned in *Carter Holt Harvey*.

**APPLICATION OF THE PRINCIPLES**

In brief, the High Court held that:

- trust assets held by an insolvent trustee company in its capacity as trustee are property of the company, but only to the extent the company is entitled to exercise its rights of indemnity to satisfy the claims of trust creditors;
- the employees of a trading trust have the same priority over other creditors of the trust as is provided under the Corporations Act 2001; and
- the proceeds of the trustee’s right of exoneration from trust assets are only available to satisfy trust creditors and not creditors generally.

It was this last aspect that had divided the Victorian and South Australian Courts initially. The High Court relied on the reasoning in *Re Suco Gold* and *Jones*: ‘If he [that is, the trustee] takes trust property into his possession to satisfy his right to be indemnified in respect of unpaid trust liabilities ... that property retains its character as trust property and may be used only for the purpose of discharging liabilities incurred in performance of the trust.’

‘It was with the right, or power, of exoneration that the High Court was concerned’
In a sense, the Court was saying the river can rise no higher than its source: the source of the interest the trustee has in the trust assets is the performance of the trust in the interests of the beneficiaries; the trustee has no right to use trust assets for its personal benefit by satisfying liabilities incurred by it when not entitled to indemnity from trust funds.

THE DIFFERENCE BETWEEN RIGHTS OF EXONERATION AND REIMBURSEMENT

As set out above, a trustee’s right of exoneration is a right to apply trust assets to satisfy an unpaid liability to trust creditors. The right of reimbursement permits a trustee who has paid the trust creditors to apply trust assets to recoup or reimburse itself for the payment made.

The High Court in Carter Holt Harvey made it clear they were only dealing with the right of exoneration.

It may be thought that because exoneration and reimbursement are both rights of indemnity, flowing from the principle that a trustee incurs personal liability for trust creditors as well as non-trust creditors, then the same outcomes should apply whichever right the trustee is exercising.

Gordon J in her judgment, and Alsop CJ in his judgment in Jones, made it explicit that although the proceeds of the trustee’s right of exoneration from trust assets are only available to satisfy trust creditors and not creditors generally, the same result does not happen in regard to the proceeds from the right of reimbursement. Those proceeds are available for distribution rateably between all of the creditors of the trustee, including trust creditors.

As the late Professor Julius Sumner Miller famously asked: ‘Why is it so?’

Once again, the answer lies in those fundamental principles. If a trustee has paid a trust creditor from its own resources, then it has used its own funds and, on them being reimbursed, is entitled to the funds as its own, and not trust, property.

In using its own funds it has depleted the assets available for its non-trust creditors. But does that mean that the proceeds of the right of reimbursement are only available to the non-trust creditors and not the trust creditors?

This question was not explicitly considered by Gordon J, but the answer must be that they are not.

The fundamental principle is that a trustee is personally liable for all debts incurred as trustee, so the creditors entitled to a distribution from the proceeds will be all creditors to whom the trustee is liable and will not be restricted to those creditors who are not trust creditors.

If there are rights of both exoneration and reimbursement, then that will result in trust creditors receiving a higher rate of return than the non-trust creditors, perhaps a surprising, but certainly a principled, result.

6 This was the name of a popular television programme first broadcast in the US from 1962 to 1964 and subsequently in Australia from 1965 to 1986 presenting educational and entertaining experiments in physics.

PARTNERING TO DELIVER QUALITY SERVICE

Whenever a trustee establishes or reviews an investment portfolio, they are legally required to consider a multitude of factors.

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This service is one of the complementary services we provide to our partners in the legal and estate-planning professions. Our model is simple – when our partners in the profession refer a valued client to us for our trustee or executor services, we respect that relationship and we refer the legal work associated with that estate back to you or your firm.

We take our higher duty of care outlined under the trustee legislation seriously. But as a professional trustee company, we know a client’s best interests are served when they have a trusted advisor they are confident with – and that they consult over important decisions. Equity Trustees can assist to protect a client’s wealth and assets through complementary, competitively priced, tailored services – partnering with you to deliver a more secure future for your clients.

Find out more about how Equity Trustees works with our partners at www.eqt.com.au/business-partners

[Image of Equity Trustees logo]

STEP AUSTRALIA NEWSLETTER ISSUE 8, DECEMBER 2019

INSOLVENT TRUSTEES GRAHAME YOUNG TEP

WWW.STEPAUSTRALIA.COM
Introducing... Daniel Kelliher TEP
Specialist wills and estates lawyer, Eastern Bridge Lawyers

WHEN DID YOU BECOME A MEMBER OF STEP?
I joined STEP in 2002, but I had first become aware of STEP when it was launching its Victoria Branch in 1999.

WHAT BENEFIT DOES STEP BRING?
It has broadened my professional engagement with trust and estate practitioners, including non-lawyers, and also gives me involvement in a worldwide organisation.

WHAT IS YOUR MOST-USED STEP RESOURCE?
Foremost, the local and national meetings. I also read the STEP Journal and visit the STEP website often.

CAN YOU GIVE US SOME INSIGHT INTO YOUR EXPERTISE?
My practice is in estate planning and trusts advice; probate and estate administration; and estate, trusts and superannuation litigation. I was accredited as a Wills and Estates Specialist by the Law Institute of Victoria in 1996 and graduated in 2005 from Macquarie University with a Master of Laws in Financial Services, for which I wrote a thesis on family trust succession.

TELL US WHAT MOTIVATED AND INSPIRED YOU TO GAIN THE EXPERTISE YOU HAVE TODAY?
I grew up on a family farm managed under a life interest will by the Union Fidelity Trustee Company. Later, I completed my articles of clerkship training and practised in northern Victoria for nine years, which introduced me to issues of succession affecting the farming and business communities there.

WHAT ISSUES CAN YOU SEE STEP ADDRESSING IN THE FUTURE?
The use of trusts for negative purposes. Identifying and distributing good economic theory and studies relating to trusts, whether public or private. Increased engagement between practitioners and the academic and judicial communities.

WHAT IS THE BEST ADVICE OR GUIDANCE YOU HAVE EVER BEEN GIVEN?
Be yourself and follow your own passions – a legal career needs motivation from within!

WHAT IS YOUR MOST MEMORABLE STEP EVENT?
A catered reception beneath the dome in the Supreme Court Library.

WHAT ‘MUST READ’ BOOK WOULD YOU RECOMMEND?
Thomas on Powers by Professor Geraint Thomas.

OUTSIDE OF THE OFFICE, WHAT DO YOU LOOK FORWARD TO?
Spending time through family meals, outings and holidays with my wife Anita and our three teenage daughters; otherwise, gardening and wide reading. I also enjoy watching films and television sometimes.

Policy update:
PCG 2018/4

On 22 August 2018, the Australian Taxation Office (ATO) issued practical compliance guideline PCG 2018/4 about income tax – the liability of a legal personal representative (LPR).

The ATO agreed to review the operation of the PCG so it could consider extending the protection it offers LPRs. At present, the PCG deals with the simplest estates with simple compliance profiles. One feature is that the total market value of estate assets on death must be less than AUD5 million, but there are other restrictions.

STEP Australia wants to have your frank feedback about how this PCG has been working in practice. That way, we can feed useful material back to the ATO, both positive and negative, for a realistic and worthwhile review.

Please respond by 1 February 2020 to dior.locke@step.org

DAVID W MARKS QC TEP, CHAIR, POLICY COMMITTEE
The STEP branches provide forums in which professionals from different areas can collaborate and share knowledge and experience. We welcome all professional advisors, educators and students with a trusts and estates focus in their practice, whether for private or corporate clients. We are committed to building strong links between our local, national and international STEP colleagues.

STEP SOUTH AUSTRALIA 2020
ANNUAL TRUSTS SYMPOSIUM

- **DATE:** Friday 6 March 2020
- **VENUE:** Adelaide Oval
- **REGISTER:** www.trybooking.com/BGNIL

**SPEAKERS:**
- The Honourable Robert French AC, Retired Chief Justice of the High Court of Australia
- The Honourable Tom Gray QC, Retired Justice of the Supreme Court of South Australia
- The Honourable Dyson Heydon AC QC, Retired Justice of the High Court of Australia
- The Honourable Justice Kate McMillan, Supreme Court of Victoria
- The Honourable Justice Julie Ward, Chief Justice in Equity, Supreme Court of New South Wales
- Professor Charles Rickett, Dean of Law, Auckland University of Technology
- David W Marks QC, Inns of Court, Brisbane
- Arlene Macdonald, STEP South Australia’s founding member

Please email kylie@stepsa.com.au for further details.

New Web Events available:
- Professor Prue Vines and Barrister Mr Simon Chapple on ‘Testamentary Freedom and Aboriginal Estates’
- Jane Needham SC on ‘Enduring Problems: The interrelationship of elder law and succession law’
- Sean Cortis, CEO and Principal of Chapman Eastway, on ‘Blue Print for Success: Effectively plan for succession’
- David Raphael, Barrister-at-Law, on ‘The Institutional Constructive Trust – A modern look at a remedy or a trust?’
- Steve Lancken, Acc Spec Mediation and Commercial Litigation, on ‘Key Aspects of Estate Mediation’

Plus more seminars from STEP branches around Australia. Visit webevents.stepaustralia.com to view them now.

STEP NSW Branch seminars 2020
- **DATE:** 19 February 2020
- **SPEAKER:** Justice Hallen
- **TOPIC:** ‘Testamentary Capacity’
- **DATE:** 18 March 2020
- **SPEAKER:** Andrew Mills (ATO), Second Commissioner, Law Design & Practice
- **TOPIC:** ‘Are Your Trustee Clients Ready for the End of the Financial Year?’
- **DATE:** 15 April 2020
- **SPEAKER:** John Armfield
- **TOPIC:** ‘Which Probate Application is Most Appropriate?’

STEP QLD Branch – save the date
- **Tuesday 25 February 2020:** Lunchtime seminar
- **Thursday 26 March 2020:** Roundtable
- **Tuesday 28 April 2020:** Lunchtime seminar

We welcome all STEP members to attend events hosted by other STEP branches. For more information on the STEP Australia events calendar, contact Dior Locke at dior.locke@step.org

See more on events and keep up to date
Keep informed on upcoming STEP events via the following links:
- **STEP worldwide events:** www.step.org/events
- **STEP worldwide website:** www.step.org
- **STEP Australia website:** www.stepaustralia.com
- **STEP Australia events programme:** www.stepaustralia.com/events

Branch events programme available on the STEP Australia website:
- **STEP NSW Branch:** www.stepaustralia.com/events/?bid=53
- **STEP SA Branch:** www.stepaustralia.com/events/?bid=56
- **STEP VIC Branch:** www.stepaustralia.com/events/?bid=58
- **STEP QLD Branch:** www.stepaustralia.com/events/?bid=55
- **STEP WA Branch:** www.stepaustralia.com/events/?bid=59