COURSE SUMMARY

1. The flexibility of trust law, but also the 'irreducible core'
2. The role of statute
3. The nuances around an 'equitable interest'
4. The importance of context to equitable duties
5. The implications of a corporate trustee
6. The presence of ?
7. Loose ends' in the general law
8. Navigating an inter-legal tapestry
9. Untangling legal issues

Take home exam

- 1 set of facts with associated problem questions + 1 essay
- At least 4 full days of work.
- Available from Moodle at 8 am NEXT Friday (28 October) DUE 4pm **8 November**

Class 1: The Classification of Trusts

WHAT IS A TRUST?

A trust refers to the **duty of aggregate accumulation for obligations that rest upon a person described as trustee.** The responsibilities are in relation to property held by him, or under his control. **That property he will be compelled by a court in its equitable jurisdiction to administer in the manner lawfully prescribed by the trust instrument**, or where there be no specific provision written or oral, or to the extent that such provision is invalid or lacking, in accordance with equitable principles. **As a consequence the administration will be in such a manner that the consequential benefits and advantages accrue, not to the trustee, but to the person called cestuis que trust – beneficiaries**, if there be any; if not for some purpose which the law will recognise and enforce. A trustee may be a beneficiary, in which case advantages will accrue in his favour to the extent of his beneficial interest. (*Re Scott* [1948]).

It is when the owner of a legal or equitable interest in property is bound by an obligation, recognised and enforced in equity to hold that interest for the benefit of others or for some object or purpose permitted by law.

Why is an equitable jurisdiction required for trusts?

Under the *Judicature Act 1870,* as adopted by Australia in 1970, common law and equity courts have the same procedure. We require equity for a trust as it involves relationships which the common law can't see → particularly that of **beneficiary of a trust and the trustee**.

WHY MIGHT YOU SET UP A TRUST?

a) To get the benefit of a trustee's skills and efforts
b) To get protection from creditors taking your assets since you don't own the property (unless you have an identifiable vested interest in that asset)
c) Scaling – pooling money together to get access to opportunities otherwise not available. With more money you might be able to get better investment advice as well
d) Intergenerational transfer on death or on coming of age.
e) Charitable objects
f) For Court oversight – remedies
g) They're flexible and private
h) Nominal ownership of property can be separated from benefit and right of control
i) Benefits can be split (split at once), vest successively (you get your benefit after someone gets theirs) or contingently (once a condition is fulfilled)
j) Allocation of benefit can be put in suspense (until such time that you assign the benefits, none of the beneficiaries have it) – they can tell the trustee to assign, but can't say who to assign it to. The "suspense" is when it is between assignment.
k) Control and management of property can be divorced from the benefit
l) Trust property converted remains subject to the trust. So long as there is not a BFPFV in the chain you have good title.

m) Can accommodate widely dispersed beneficiaries

EXPRESS, RESULTING AND CONSTRUCTIVE TRUSTS

It is possible to classify trusts in the following ways:

(1) From the point of view of intent to create a trust. Trusts are either *(also, see below)*
   a. Express or declared; or
   b. Resulting or implied; or
   c. Constructive

(2) From the point of view of the objects of the trust. Trusts are either
   a. Private (benefitting individuals)
   b. Public or charitable (benefiting community/promoting welfare)

(3) From the point of view of the nature of the duties imposed on the trustee. Trusts are either
   a. Simple (trustee *only* to convey the property, no other duties)
   b. Special (trustee has prescribed duties)

(4) From the point of view of the form of the declaration of the trust. Trusts are either
   a. Executed (trust is perfected)
   b. Executory (settlor expressed a mere outline, something else to be done)

Express trusts: the creator has used language which expresses an intention to create a trust (whether orally or in writing)

- Can be deduced from conduct of parties if there is no uncertainty
- *Quistclose* trust (arising from contract) is an express trust in Australia (*Re Australian Elizabethan Theatre Trust* (1991))
- Examples – family trusts, testamentary trusts, or in eleemosynary (charities, foundations) situations, or in commerce: trade (Romalpa clauses; managed investment shcemes, superannuation).

Resulting trusts: trust property reverts to settlor by reason of an intention presumed by law in the absence of an intention by the settlor.

- Includes 'presumed' and 'automatic' resulting trusts

Constructive trusts: They result from the court 'construing' the circumstances (*see Guimelli v Guimelli*)

- Imposed regardless of actual/presumed intention.
- Some can create proprietary rights, others just impose personal liability to account as trustee

TRUST PROPERTY

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SETTLOR → TRUSTEE → BENEFICIARIES

Notes:

1. **THE TRUST INSTRUMENT IS ALWAYS, ALWAYS PARAMOUNT!**

2. There is no separate legal entity
3. The beneficiaries have no direct interest in individual trust assets but have the right to gain benefit from the trust assets.
4. The trustee may be a beneficiary and need not be a natural person → often it is a company because it means limited liability and if the trust is for a long time it does not get affected by the death of a natural person
5. The terms of the trust may or may not be documented.
6. If you have multiple trustees and want to sell trust property, you need the consent of all of them as they are each legal owners.
7. The settlor may also be a beneficiary → e.g. superannuation
8. The settlor is relevant to determine the content of the trust where it may be ambiguous
9. Anything you can identify a proprietary interest in, you should be able to put in trust.
10. The terms of the trust may come from a trust deed, legislation, or principles

Some Modern Types of Trusts

Every type of trust will have unique and bespoke duties. For example, a duty is the duty to invest, but it doesn't make sense if the trust property is a painting. Another example – the trustee must act gratuitously – what this means is that you can't unfairly benefit from the trust by paying yourself mnoney etc; however if the trust instrument or settling deed of trust outlines that the trustee can get $X per year or whatever for taking care of the trust, then that is perfectly fine.

Discretionary Trusts: A species of **express trusts**, where the entitlement of beneficiaries to income, or to corpus, or both, is not immediately ascertainable; rather the **beneficiaries are selected from a nominated class by the trustee or some other person** and this **power may be exercisable** once or from time to time

- Member of the class of *possible objects* of appointment has **no proprietary interest** in the trust assets
- The members do have standing to *compel the proper administration of the trust*

Bare trusts: the term 'bare trust' is often used to describe a trust in which the **trustee has 'no active' duties to perform**

- Logically, can't have "no" duties: *Corumo Holdings Pty Ltd v Itoh Ltd; Herdegen v FCT*
    - For example – if a house is on trust, and a sinkhole means the house will be destroyed if you don't put in a retaining wall, it is illogical for the trustee to have no duty to put the retaining wall in
- **Instead**, used to describe a situation where the trustee has no interest in the trust assets other than that existing by reason of the office of trustees and the holding of the legal title, and has no active duty *other* than conveying trust property to the beneficiary: *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271 at 281-282
- Under the general law, **there are 2 instances where it is relevant to consider a bare trust**:
    - **A beneficiary is entitled to the possession of the trust assets if the trust be a 'bare trust'**
    - If there involves a sub-trust
- **Practical 'duties' of a bank custodian** → the bank gets told what to do and when to buy and sell investments etc. They don't have their own decision-making process etc. and are a bare trustee.

Unit Trusts: The 'owner' and 'investment manager' functions are carried out **by a 'responsible entity'** which is required to be licensed and which **operates a 'managed investment scheme'.**

- The responsible entity holds scheme property on trust for scheme members: *Corporations Act 2001* (Cth) s601FC(2)
- Scheme property is divided into a large number of units → can be issued, redeemed and traded publicly and privately.
- *Different from shares:* **Unit in the trust deed before us confers a proprietary interest in all the property subject to the trust deed:** *Charles v Federal Commissioner of Taxation* Unit
    - The HC in *Charles v Federal Commissioner of Taxation*: "A unit held under this trust deed is **fundamentally different from a share** in a company. A share confers upon the holder no legal or equitable interest in the assets of the company; it is a separate piece of property …**but a unit in the trust deed before us confers a proprietary interest in all the property** which for the time being is subject to the trusts of the deed"
    - The deeds will contain provisions to the effect that unit holders have only the rights given under the deed → these provisions mean that unit holders do not enjoy beneficial ownership of trust property

Advantages	Disadvantages
1) Gain a tax advantage 2) No legal obstacle to manager of trust repurchasing a unit equal to market value 3) Unit value approximately equal to underlying worth of trust assets	1) The right to redeem can cause havoc if everyone exercises the right simultaneously 2) Possible for unit holder's liability to extend to indemnifying trustees personally 3) Issues where the trust assets include those requiring special consent to acquire the interest

Unlikely to come up:

Trading Trust: Someone wishing to embark on a business enterprise can establish a trust with extensive powers of carrying on a business (this is a trading trust)

Trustee as Monopolist: Where trustees hold shares in companies which controls a HUGE % of an **industry**, and the shares are held on trust for beneficiaries who received 'trust certificates' representing an interest in the corporate aggregation → this is unlawful at general law

Blind Trust, Custodian Trustee, Advisory Trustees → Not applicable in NSW

CREATING A TRUST:

1. INTER VIVOS

There are two ways to create inter vivos trusts:

a. (Self)-Declaration of trust

1. Already hold legal title, so they must intend to impose trustee obligations upon themselves: *Richards v Delbridge*
2. **Formalities**:
   i. For personal property: no formality
   ii. For land: declaration to be manifested and proved by **writing signed** by the person able to declare the trust: Conveyancing Act 1919 (NSW) s 23C(1)(b)

b. By transfer of property to a trustee. There must be:

1. **A declaration of trust**
   i. Must establish that the recipient of the transfer of the property was intended to take the property in capacity of trustee, not beneficially.
      1. Look at the words used by the settlor: *Choithram International SA v Pagarini*

2. **Valid transfer of the intended trust property to the trustee:**
   i. Transfer will be valid in equity if everything the settlor needs to do has been done: *Corin v Patton*
   ii. **Transfer Formalities for land:** Transfer must be **evidenced in writing and signed,** and will otherwise be unenforceable: *Conveyancing Act s 23C(1)(C)*

2. TESTAMENTARY TRUST

These are trusts created by a will and activated upon the death of the settlor. **For a testamentary trust to be created, the testator must:**

1. Have legal capacity to make a will
2. Have unimpaired intention to execute a will (not under undue influence)
3. Comply with the formalities for execution, including: *Succession Act 2006 s 6(1)*
   a. Will in writing
   b. Signature of the will by the testator or their agent
   c. Signature in a special location
   d. Witnesses (two or more) in signing, all at the same time
   e. Signature by the witnesses

   Note: If these aren't complied with, court will still deem the will valid if it is satisfied that the maker the document to constitute a will

Trust Requirements: Certainties

An express trust must be certain in three respects (*Knight v Knight* (1840) 3 Beav 148):

1. **Certainty of intention**
    a. The settlor must have intended to create a trust, **not a gift/lending property**
    b. Doesn't apply to constructive and resulting trusts which are court instruments
2. **Certainty of subject-matter (trust property)**
    a. The subject-matter of the trust must be reasonably certain
3. **Certainty of objects**
    a. The beneficiaries must be sufficiently identifiable

Note**:** Charitable trusts don't have to meet (3) and resulting/constructive trusts only need (2) and (3)

1. Certainty of intention

a) Must prove an intention to impose on the property owner an **obligation to apply the property for the benefit** of identified persons (or charitable purpose)

b) The intention to create a trust is determined **by reference to the settlor's objective intention:** ***Byrnes v Kendle*** → *"Would a reasonable person consider that in the context, the settlor intended to create a trust?"*

Note: Use the subjective intention if it is a sham trust of the trust doesn't represent the parties' actual intentions

2. Certainty of subject-matter

a) The subject-matter of the trust must **constitute legally recognised property**

1. It can be real/tangible such as land, jewellery etc.
2. It can be intangible such as a patent or right to enforce a debt
3. It can be either legal or equitable property
4. *Expectancy =/= property: it is uncertain and cannot be held on trust: Norman v FCT (1963)*

b) The **amount** of property to be held on trust must be **clearly defined**: *Palmer v Simmonds* (1854)

1. Reversionary interest defined as "remainder after…" is ok

3. Certainty of Object

a) **Fixed Trust:** trust instrument specifies how much each beneficiary is to receive. If dividing it between a class of beneficiary, must only valid if all beneficiaries are known

→ **"List certainty":** at the time of distribution the trustees must be able to draw up a list of all the beneficiaries entitled to a share of the trust property

b) **Discretionary Trust (trust power):** valid if the trustees can say with certainty that a given individual is or is not a member of the class → 'Criterion Certainty Test": *McPhail v Doulton*

→ Basically ensures the trustee gives genuine consideration to each beneficiary

TRUST TERMINATION

"*Where all the beneficiaries are of full age and capacity they may terminate the trust by requiring the trustees to transfer the assets to them or at their direction*": *Saunders v Vuatier*

This right overrides any terms contained in the trust, but **only applies where the beneficiaries are entitled to the whole beneficial interest of the trust property** (*CPT Custodian v Commissioner of State Revenue* (2005) 224 CLR 98)

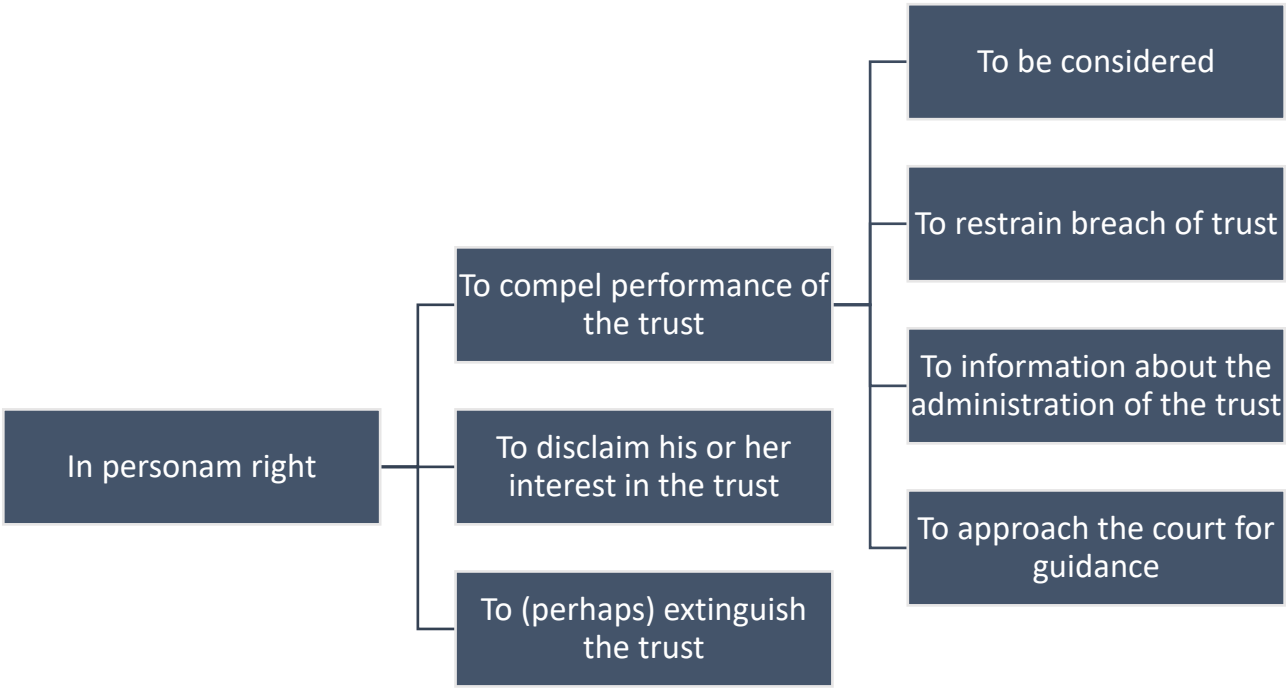
Saunders v Vuatier (1841)	
Facts	**Held**
A single person was the beneficiary of a fixed trust that was fully vested. They had to wait until they were 25 before they could claim the assets of the trust, but they wanted them earlier, so they purported to terminate the trust. The question was **whether a single beneficiary of a fixed trust which is fully vested can end the trust by having the assets transferred to them**.	1. The court held that for *sui juris* beneficiaries, if they have an **absolute/fully vested interest** (i.e. they are the sole beneficiary) then **YES** they can terminate the trust 2. This is a **fundamental** principle of trust law and **the trust instrument cannot override this through any clause** 3. Disagreement between beneficiaries to terminate the trust: a. For example if each has 50% , and the asset is shares, the beneficiary wanting to sell can get their half of the shares transferred to them b. However if it is a single piece of property, you cannot transfer it without disadvantaging the other beneficiary, so it won't be allowed. **Thus this rule applies only to a single *sui juris* beneficiary or multiple ones coming collectively to end the trust.** **What if you don't want to let the beneficiary terminate early?** Here you should create a bare power rather than a fixed trust or trust power. If there is a bare power then the trust is not fully vested and the beneficiary can't rely on this rule

- If there is an **obligation to pay someone (a trust power)**, then the **beneficiaries collectively can bring a trust to an end,** since collectively they own the property and can rely on Saunders: *Gartside v IRC*

- **Does not work in discretionary trusts** (note the last comment in saunders)

THE NATURE OF A BENEFICIARY'S INTEREST

It is an equitable interest – however we need to consider what this means, what the consequences are and whether other rights can co-exist. The ability to take action in equity is not required for the existence of a trust.



'I accept the submission that there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of the trust. If the beneficiaries have no rights against the trustees (*trustee liability to account*) there are no trusts (*Armitage v Nurse*).

Trust is a creature of private law – it is not like Corporations Law which is heavily entrenched in the *Corporations Act*. Thus the law is very wary against impinging in the natural private operation of the trusts and negotiations. The law will only act in the extreme circumstances. However the law is also way against property owners using trusts to evade other obligations (like taxation etc.)

The nature of a beneficiary's interests in different types of trusts

1. **<u>In a fixed trust</u>**

The obligation attaches to the trustees in personam, but is also annexed to the property so that the equitable interest resembles a right *in rem*. It is not sufficient that the trustee should be under a personal obligation to hold the property for another unless it is annexed to the property. The converse is also true. See *DKLR Holding Co (No 2) v Commissioner of Stamp Duties* [1980].

2. **<u>Discretionary trust (where entitlement of beneficiaries is not immediately ascertainable)</u>**