

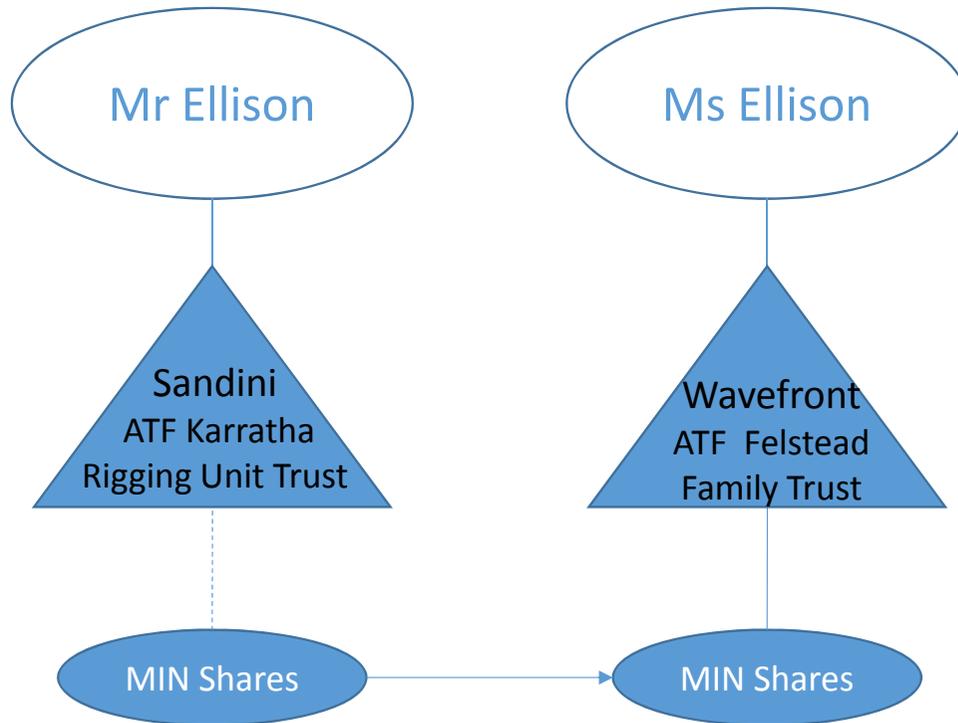
# The Magic of Sandini: Obtaining Tax Certainty Via Declaratory Relief

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# Background Facts



Mr and Ms Ellison divorced. As part of the financial arrangements, a Family Court order was made under the *Family Law Act 1975* (Cth) that:

*“Sandini Pty Ltd, as trustee for the Ellison Family Trust be joined to these proceedings...[and]...within 7 days of orders being made Sandini do all acts and things and sign all documents necessary to transfer to [Ms Ellison] 2,115,000 [MIN Shares]”*

Ms Ellison subsequently directed that the MIN shares be transferred to Wavefront Pty Ltd as trustee of the Felstead Family Trust. The shares were transferred.

Sandini claimed the benefit of a Subdivision 126-A rollover. Ms Ellison contended the rollover was ineffective (i.e. gain to Sandini, market value cost base for Wavefront).

The Commissioner issued a position paper stating no rollover was available but had not issued an amended assessment.

# Issues

- Was declaratory relief available?
- Was the Family Court Order effective to transfer a beneficial interest in the MIN shares to Ms Ellison?
- If the Family Court Order caused the beneficial interest in the shares to be transferred to Ms Ellison and was this sufficient to cause CGT Event A1 on making of the order?
- If CGT Event A1 only happened on transfer of the shares to Wavefront at direction of Ms Ellison, was the rollover available?

# Positions on declaratory relief

Sandini applied for declaratory relief that it was entitled to the benefit of the rollover.

Ms Ellison argued that declaratory relief was not available as there was no “matter” with the meaning of the *Judiciary Act 1903* or the *Federal Court Act 1975* and further, even if it was, that the rollover did not apply.

The Commissioner accepted declaratory relief would be available but that issuing alternative assessments (i.e. leading to Part IVC proceedings) was preferable and that the rollover did not apply. On appeal, the Commissioner orally conceded that declaratory relief was appropriate if the taxpayer was correct on the law and Ms Ellison conceded the Court had jurisdiction.

# Was declaratory relief available?

- A “matter” is a controversy for determination by the Court (*Re McBain* (2002) 209 CLR 372). A matter must involve a justiciable controversy (*Scott v Bowden* [2002] HCA 60).
- A declaration involves a conclusive decision based on a concrete and established situation to quiet a controversy (*Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334).
- Tax law is not excluded from these ordinary rules and even if there is no prospect of an imminent amended assessment, declaratory relief is still available (*Oil Basins Ltd v Commonwealth* (1993) 178 CLR 643).
- There was nothing “hypothetical” about the facts of the case nor was it a mere “advisory opinion”. The necessary facts to determine the issue were in the past. Declaratory relief was available.

If Sandini succeeded the correct form of the order would be:

*“In calculating the net income of the trust estate of The Karratha Rigging Unit Trust for the income year 30 June 2010, the first applicant is entitled to the roll-over consequences in s 126-5 of the 1997 Act due to the operation of s 126-15(1) (a) of [the 1997 Act] in relation to its disposal of the 2,115,000, shares in Mineral Resources Limited as processed in 4 October 2010.”*

# Statutory Provisions

Provision	Text (emphasis added)
Section 126-5 of the ITAA 1997	There is a roll-over if a *CGT event...happens <b>involving an individual...and his or her *spouse (<i>the transferee</i>)</b> ...because of...a court order under the <i>Family Law Act 1975</i> ...
Section 126-15 of the ITAA 1997	There are the roll-over consequences in section 126-5 if the trigger event <b>involves...a trustee...and a *spouse (<i>the transferee</i>)</b> ...because of...a court order under the <i>Family Law Act 1975</i>
Section 104-10 of the ITAA 1997 (CGT Event A1)	You dispose of a *CGT asset if a <b>change of ownership occurs</b> from you to another entity, whether because of some act or event or by operation of law. However, <b>a change of ownership does not occur if you stop being the legal owner of the asset but continue to be its beneficial owner.</b>

# Was the Family Court Consent Order effective to transfer a beneficial interest to Ms Ellison?

- The court order misidentified Sandini's trustee capacity by stating it was trustee of the "Ellison Family Trust" and not the Karratha Rigging Unit Trust. The actual transfer of the shares took place after the seven day period in the orders. Ms Ellison also said the specific 2,115,000 shares had not been identified.
- These were insufficient to make the orders ineffective or unenforceable.
- The wording required the "doing of all things" to cause the transfer was sufficient to transfer a beneficial interest in the MIN shares.

# Did CGT Event A1 happen on making of the order?

- While no CGT Event A1 happens when legal title changes but beneficial interest does not (e.g. substitution of a trustee) the converse is not true.
- The fact that the provision did not specify that a change of beneficial ownership without a change in legal ownership would not trigger CGT event A1, taken in context, is consistent with the notion that CGT event A1 would be triggered where there was a change of beneficial ownership.

If CGT Event A1 only happened on transfer of the shares to Wavefront at direction of Ms Ellison, was the rollover available?

- Section 126-15 provides a rollover for a trustee or company where a transfer happens under a *Family Law Act 1975* court order that “*involves...a spouse or former spouse*”.
- While not necessary given earlier findings, McKerracher J found that Ms Ellison was sufficiently involved in the transfer to cause the rollover to be available under this provision at this time if required.

# Further Applications of Declaratory Relief

- Where a transaction or facts are settled, taxpayers do not only have to wait for an amended assessment to be issued to obtain certainty.
- Even where evidence is required to determine what the facts are, declaratory relief may still be available.
- Tax disputes with multiple stakeholders outside of the Commissioner and the taxpayer may particularly benefit from the clarity of declaratory relief.
- Possible examples could include rollovers, withholding tax obligations and liabilities, debt-equity characterisation, whether an amount is a “frankable distribution” or a commercial dispute over an M&A warranty.

# Recent History

- Not a new topic: *Oil Basins Ltd v Commonwealth* (1993) 178 CLR 643; various GST cases.
- *TAB Ltd v Commissioner of Taxation* (2005) ATC 4512. Unusual in that determined by NSWSC not FCA.
- State Sup Courts have jurisdiction: through 39B(1A)(c) *Judiciary Act 1903*; and s 4 *Jurisdiction of Courts (Cross Vesting) Act 1987*.
- BUT CAUTION REQUIRED: “special federal matters” ordinarily transferred, these include matters within original jurisdiction of FCA under s 39B.

# CONTROVERSY ARISES 2007-2008

- *Commissioner of Taxation v Indooroopilly Children Services (Qld) Pty Ltd* (2007) 158 FCR 325  
“[I]t was incumbent on the Commissioner ... either to follow ... or to seek a declaration...”
- Hon Daryl Davies QC, writing in *Taxation in Australia*  
“[I]t would have been entirely inappropriate for the Commissioner at any stage to seek a declaration...”

# 2014 and subsequent developments

- Allsop CJ address to University of Melbourne (2014)
- Commissioner's address to Tax Bar Association (2014)  
*"We acknowledge that there are benefits in using declaratory proceedings to try and resolve ambiguous points of law, without the need to go through an expensive litigation process"*
- New Tax-1 Practice Note (October 2016)  
*"Declaratory relief ... may be appropriate, but is not limited to, circumstances where the facts are agreed or are not in dispute"*

# Principles and pitfalls

- Jurisdiction: s 39B *Judiciary Act 1903*, s 21 *Federal Court Act 1975*
- Proceedings by way of originating application accompanied by affidavit (Rule 8.05 and Tax-1 Practice Note para 4.3)
- The requirement for a “matter” does not necessarily preclude declaratory relief where the relevant conduct has not yet taken place (*Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 356)

# Possible applications?

- Taxpayers in losses
- Withholding obligations
- Debt/equity characterisation issues
- Part IVA
- Conduct by ATO
- Valuation disputes and identification of “conditions” under s 815-125 ITAA 1997