

Article Information

Authors: Donna Benge, Jennifer Turner

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Distribution deliberations: How trustees of discretionary family trusts can protect themselves

As the end of the financial year approaches, trustees of discretionary trusts will no doubt be turning their minds to preparing trustee resolutions recording the distribution of income and possibly, capital for the current financial year. In doing so, the decision in the case of *Owies v JJE Nominees Pty Ltd* [\[1\]](#) which we discussed in a previous [Insight](#) should be front of mind for all trustees.

In the *Owies* case, the court found that when making annual income distributions from a discretionary trust, the trustee had not given real and genuine consideration in the exercise of its discretion which were determined by the court to be voidable.

There are several considerations for trustees when determining the distribution of income and capital each financial year. Often, tax is at the forefront of trustees' minds and distributions are calculated to achieve certain outcomes however, following the *Owies* case, it is prudent for trustees to:

- review the trust deed to ensure they understand the purpose of the trust and the key beneficiaries from whom the trust was established to benefit. In considering the purpose of the trust, it is:
 1. helpful to review the default position in the trust deed for the distribution of accumulated income (and capital on vesting) which is commonly shared equally between key beneficiaries; and
 2. important to bear in mind that even if relationships within the family are strained, the purpose of the trust to provide for family members within a class of beneficiaries of the trust, does not change;
- actively inform themselves of the differing circumstances, needs and desires of each key beneficiary and commence the information gathering process well in advance of the end of the financial year;
- ensure that they give real and genuine consideration to the needs and claims of each key beneficiary; and
- hold a meeting in accordance with the terms of the trust deed and ensure decisions are recorded in proper meeting minutes.

There is no requirement for trustees to give reasons for their decisions for distributions in the meeting minutes. Whilst including reasons may provide evidence that the trustees were informed and gave real and genuine consideration to the needs of key beneficiaries, including reasons may subject trustees to scrutiny and criticism of their decisions by disgruntled beneficiaries. The preferred approach is for trustees to inform themselves and if required, be prepared to provide evidence to support their decisions if later challenged.

Ultimately, whilst it is prudent for all trustees to remind themselves of their duties before making any distributions of income or capital of trust assets, the considerations in the *Owies* case are of particular importance for family trusts where there are strained relationships or where the trustee is considering making a distribution to only a select number of key beneficiaries. In these circumstances, where the possibility of a challenge is greater, it may be prudent for trustees to seek professional advice to avoid disgruntled beneficiaries seeking recourse against the trustee after the distributions have been made.

[\[1\]](#) [2022] VSCA 142