

## RESETTLEMENTS REVISITED

On 2 September 2011 the High Court refused the Commissions application for special leave to appeal from the Full Federal Court's decision in *FCT v Clark* [2011] FCAFC 5.

The High Court, effectively, agreed with the Full Federal Court that despite changes to the trustee, unit holders and trust property as well as the recapitalization of the trust, the trust estate of the Unit Trust continued for tax purposes.

Before the special leave application was assessed the ATO had already added the following note to its publication *Creation of a new trust - Statement of Principles August 2001*:

"Some of the issues raised in this statement were mentioned by the full Federal Court in its decision in the *Federal Commissioner of Taxation v. Clark and Anor* [2011] FCAFC 5.

In the course of deciding that a net capital gain arising from the disposal of a property by a trust could be reduced by carry forward net capital losses, the majority of the full Federal Court (Edmonds and Gordon JJ) rejected the Commissioner's argument that the trust estate that made the losses was not the same trust estate as made the gain because of extensive changes to the trust arrangements in the interim.

The Commissioner is seeking special leave to appeal to the High Court. This statement will be reviewed on resolution of the special leave application or, if granted, the appeal."

It is now a case of "watch this space" in relation to trust resettlements until the ATO delivers its response.

However, we fear the ATO will, just as it did after the Commercial Nominees case in 2001 which related to a super fund, only amend its views in the Statement of Principles as they relate to changes to unit trust.