



Security Trust Deeds – towards standardisation?

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Panel



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Introduction

Murray Lord

Why and where?

Why use a security trust deed?	Where are they used?
Avoids priority issues between competing securities	Syndicated loans and club loans
Allows financiers to come and go	Single lender, but perhaps later multiple lenders
Stamp duty efficiency	Other structured deals eg securitisation
	Transactions with multiple classes of financiers

Why standardise?

Security trust v other trusts

- Trustee only acts on instructions – virtually no scope to exercise discretion
- Indemnities to trustee:
 - From borrower
 - From beneficiaries
 - Out of trust fund
- Mostly contracts with parties to the security trust deed

Our aims

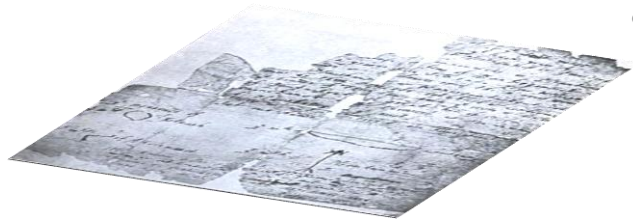
- Start with basic deals – beneficiaries are lenders under SFA, plus hedge counterparties
- Avoid separate trust deed accession process
- Avoid foreign entities having to execute a deed
- Set up a process for change of trustee

A photograph of two gazelles with long, spiraling horns standing in a field of dry, golden-brown grass. The gazelles are facing each other, and the background is a soft-focus field of similar grass. The lighting is warm, suggesting late afternoon or early morning.

Why a deed, parallel debt and limitation of liability to beneficiaries

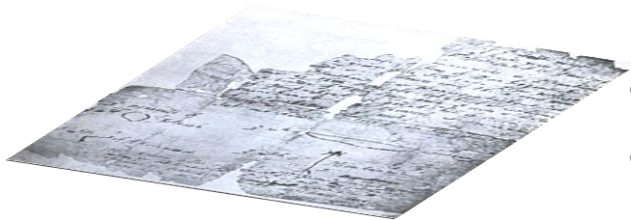
Helena Busljeta

Deeds formalities raise some practical issues



- Remote signings hard to do because deeds must be on paper and difficulties in establishing delivery
- Deeds can't be executed electronically
- Foreign corporations have trouble executing (*but law may be reformed*)
- Difficult for partners and bodies politic to execute
- Attestation can be faulty
- Complicates link between SFA and STD – problematic for agent to sign STD and complicates accession mechanics

But we need a deed to establish the security trust



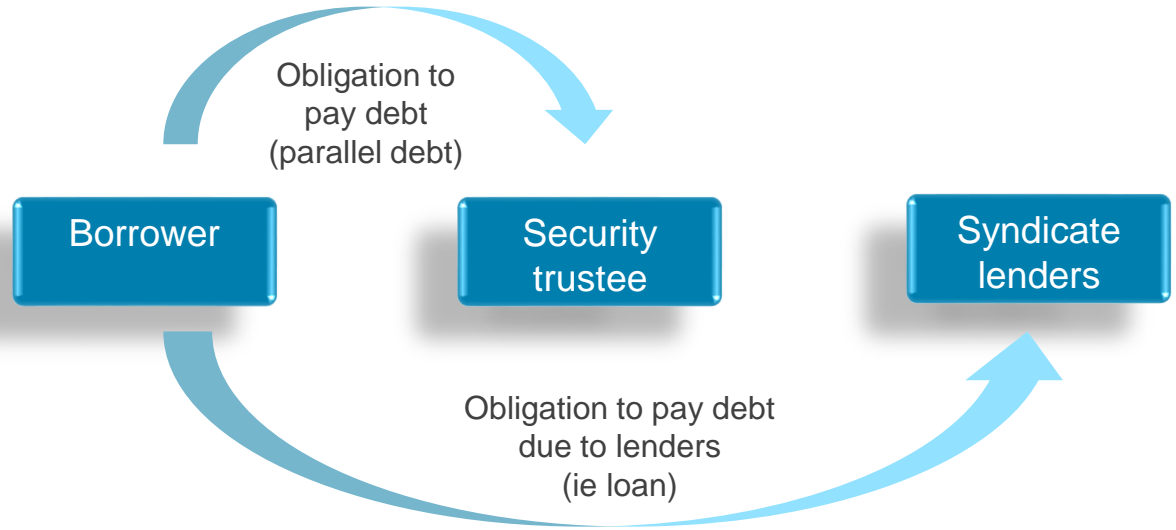
- Required if there is any security over land which is not Torrens system land in NSW
- Every “*assurance*” must be by deed (and an assurance includes a declaration of trust): see s23B *Conveyancing Act 1919* (NSW) and its equivalents in other jurisdictions
- Benefits in using a deed:
 - longer limitation period
 - no consideration required
 - doctrine of election works to bind non-signers
- Other transaction documents will need to be deeds
- Deed may be binding as an agreement or under estoppel

Parallel debt

Borrower owes:

- debt to lenders; and
- separate but equal debt to security trustee

Payment of one debt discharges the other



So why use parallel debt?

Cross border transactions

Where jurisdiction does not:

- recognise concept of trust
- allow security to be granted to A to secure money owed to B

Risk that a jurisdiction will not recognise parallel debt (has been recognised in some eg France and Poland).



Domestic transactions

If you are concerned about statutory notices requirements for power of sale



Statutory conditions to exercise of power of sale

Question	Answer
Which security interests do they apply to?	NSW – security interest in land All other jurisdictions – security interest in land and personal property
Can they be excluded?	Land – no Personal property – only in ACT and Tas (statutory notice can be varied in WA, SA and Vic but unclear whether exclusion is a “variation”)
What do they require?	If default is made in payment of secured money (and in some jurisdictions this default continues for a period of time), notice that complies with the legislation must be served on grantor and require grantor to pay secured money. If default continues for a specified period after service, secured party may exercise power of sale.
What has this got to do with parallel debt?	Is it implicit in the legislation that the amount not paid must be payable, or owing, to the secured party (ie security trustee)?

Statutory references

Land

s57 Real Property Act 1900 (NSW)

s111 Conveyancing Act 1919 (NSW)

s84 Property Law Act 1974 (Qld)

s76 Transfer of Land Act 1958 (Vic)

s106 Transfer of Land Act 1893 (WA)

s132 Real Property Act 1886 (SA)

s77 Land Titles Act 1980 (Tas)

s93 Land Titles Act 1925 (ACT)

s89 Law of Property Act 2000 (NT)

Personal property

s84 Property Law Act 1974 (Qld)

s103 Property Law Act 1958 (Vic)

s59 Property Law Act 1969 (WA)

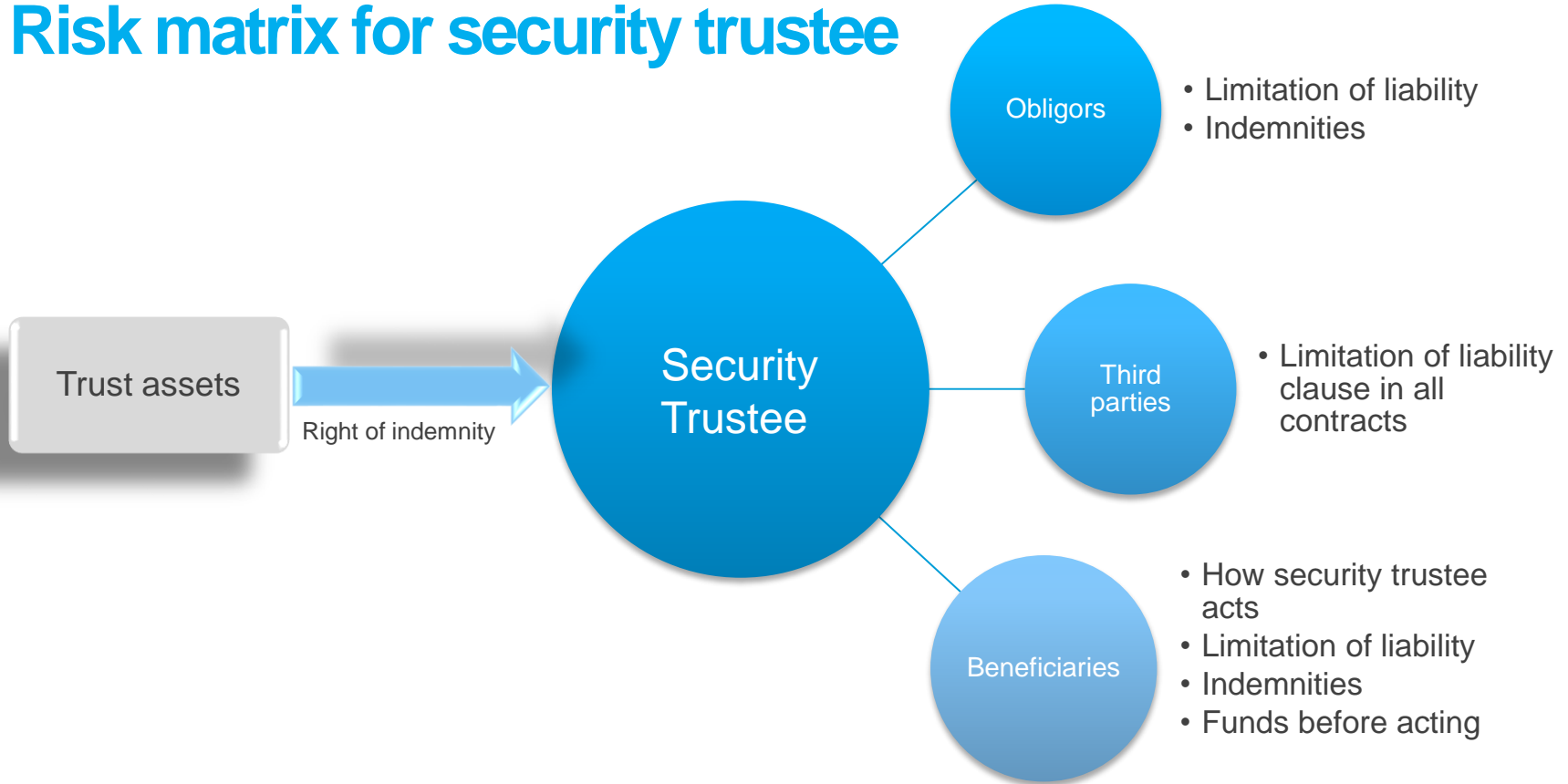
s48 Law of Property Act 1936 (SA)

s22 Conveyancing and Law of Property Act 1884 (Tas)

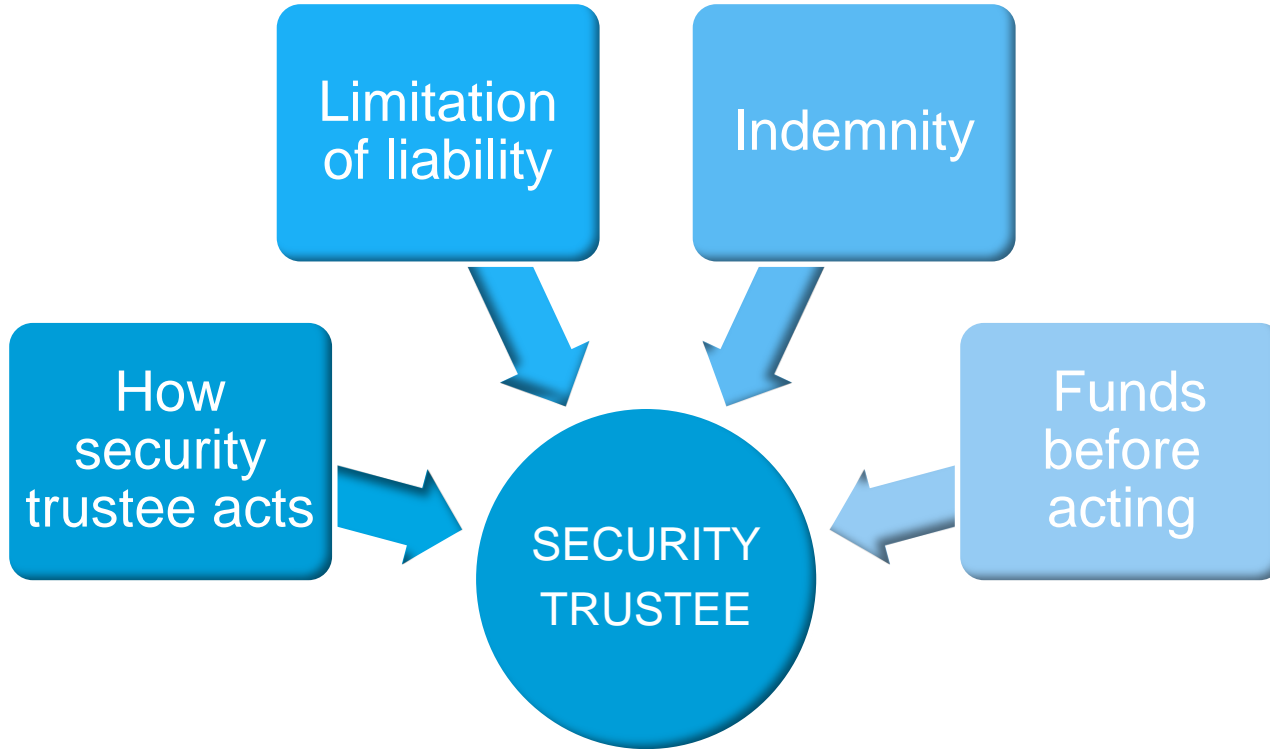
s301 Civil Law (Property Act 2006 (ACT)

s89 Law of Property Act 2000 (NT)

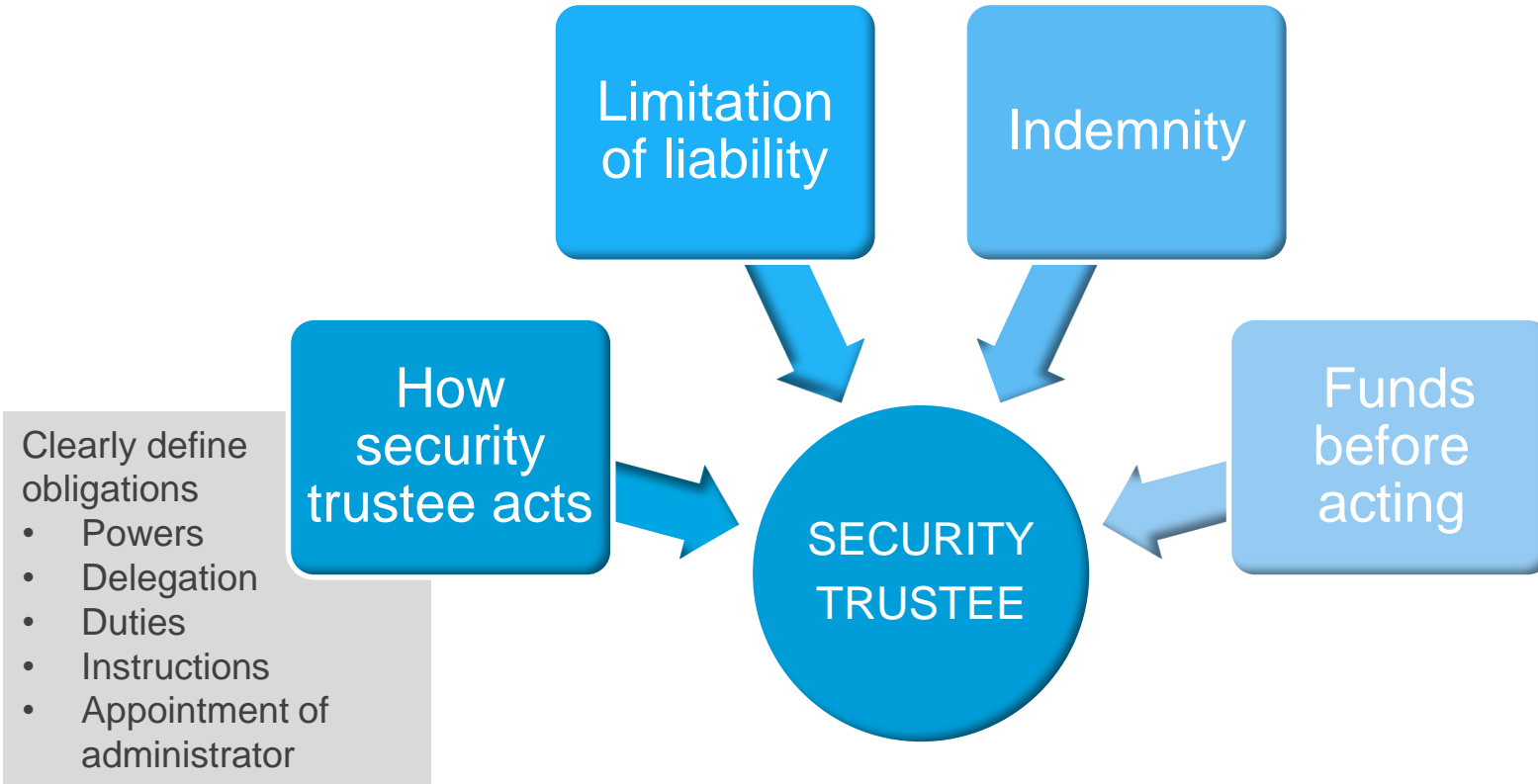
Risk matrix for security trustee



Relationship between security trustee and beneficiaries

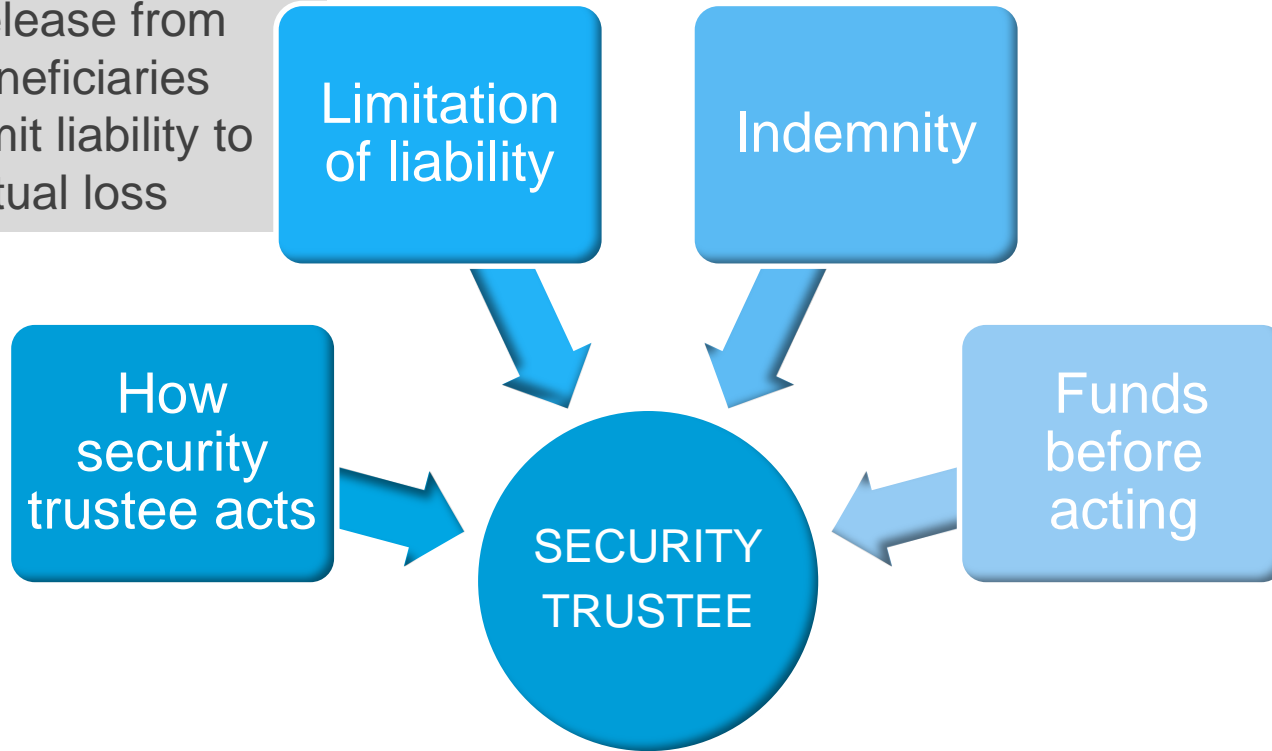


Relationship between security trustee and beneficiaries

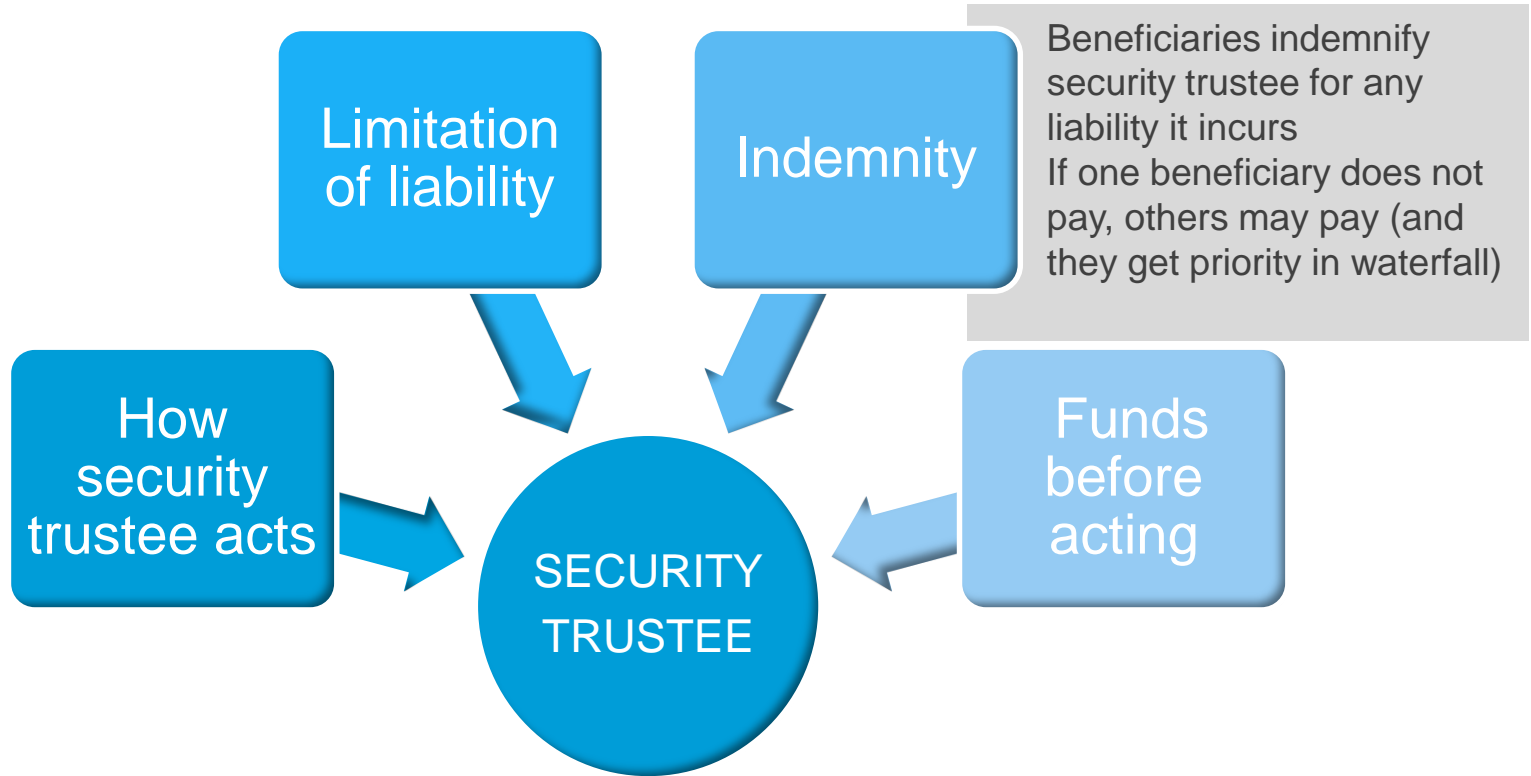


Relationship between security trustee and beneficiaries

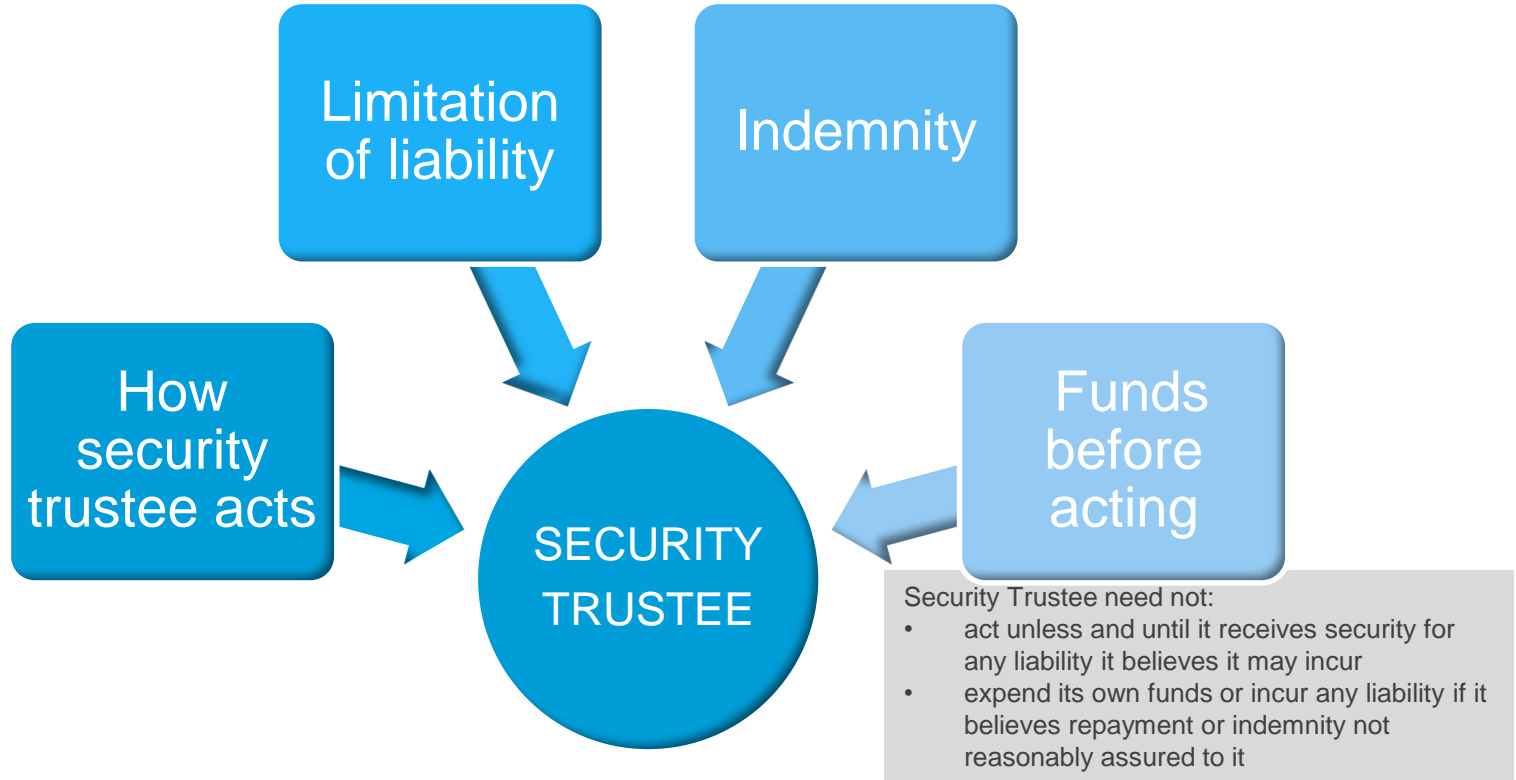
- Release from beneficiaries
- Limit liability to actual loss



Relationship between security trustee and beneficiaries



Relationship between security trustee and beneficiaries



**The Australian Special
Opportunity Fund LP v
Equity Trustees Wealth
Services Ltd**
[2015] NSWCA 225

- Security trustee held security for noteholders under a security trust deed
- Company issuing notes was placed into voluntary administration
- **Issue:** was the security trustee required to enforce security by appointing a controller during decision period or was it only required to do so if the noteholder gave it an indemnity for any liability resulting from the appointment?
- NSW SC (Black J) – yes
- NSW Court of Appeal – yes

Two key clauses

Instructions

Subject to this document, the Security Trustee must, and is only obliged to, act if and only if it receives clear instructions to do so [by the majority noteholders]

6.1 Act on instructions

- (a) **Except as expressly provided in the Security Documents**, the Security Trustee must in relation to any Security Document, act only on, and exercise its Powers in accordance with, the instructions of the Beneficiaries as provided in clause 4.1.
- (b) If an administrator is appointed under Part 5.3A of the Corporations Act (or equivalent in any jurisdiction) to the Company and the Security Trustee has not received instructions under this clause 6.1 in time to enable it to appoint a Controller under the relevant Security Document within the 'decision period' (as defined in the Corporations Act) then **despite any other provision of this document**, the Security Trustee must appoint a Controller within that decision period.

4.11 Security Trustee need not act

- Despite any other provision of this document**, the Security Trustee need not act (whether or not on instructions from one or more of the Beneficiaries)...
- (b) unless its liability is limited in the manner set out in clause 2.
- No Beneficiary may take action or have recourse to the Security Trustee where the Security Trustee does not act on the Beneficiary's instructions as contemplated by this clause 4.11.

Limitation on liability

The Security Trustee is not...liable to any party for... any loss or damage occurring as a result of it exercising, failing to exercise or purporting to exercise any Power under this document or in relation to any Security Document

[This] does not apply to the extent that the Security Trustee...has been guilty of fraud, negligence or breach of trust or wilful act, omission or default

Lessons from this case

..the complexity of the clauses is such that a party exercising reasonable care and acting with professional advice might well have misunderstood them and failed to comply with them

In the Matter of Metal Storm Ltd (Subject to Deed of Company Arrangement) [2014] NSWSC 813
Black J at [157]

An aerial photograph of a lush green valley. The valley floor is covered in vibrant green grass, with a small stream winding through it. The valley is bordered by a dense, dark green forest. In the foreground, a wide, light-colored riverbed with a blueish-green tint is visible, suggesting a glacial or sediment-rich river. The overall scene is a mix of natural beauty and rugged terrain.

Accession and recognition of beneficiaries, bridging the gap

Diccon Loxton

The gap

Security Trust Deed

Security Trustee &
Obligors

Lenders
SFA

New Lenders
Transfer
certificate

Hedge
Counterparty

Others

Bridging the gap

Security Trust Deed

Security Trustee &
Obligors



Lenders
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Others

Structural issues

- Security trust deed must be a deed
- Tie in Beneficiaries BUT if Beneficiary is a party to the Deed as a deed directly or indirectly it must execute a deed — problems and pitfalls
- STD could be both deed and agreement
- Want easy process but if possible
 - not have ST a party to SFA
 - not have Beneficiaries a party to STD as a deed
 - only have one document to affect sell-down, accession



What does the market do?

- No standard approach
- Some have all financiers directly or indirectly parties to STD
 - In some Agent signs on behalf of syndicate — then SFA should be deed
 - Other financiers directly parties — accession deed/recognition document
 - Generally need accession deed on transfer
 - That means 2 bits of paper on transfer — easy to forget
- Some have Security Trustee party to SFA
 - Gives contractual tie-in at least between ST and Lenders
 - And Transfer Certificate can also be accession document
 - But if there are other Beneficiaries, then:
 - They need accession deeds/recognition document
 - Lenders need tie with other Beneficiaries — may need a deed (could be TC)

How do we bridge the gap and link Beneficiaries to STD?

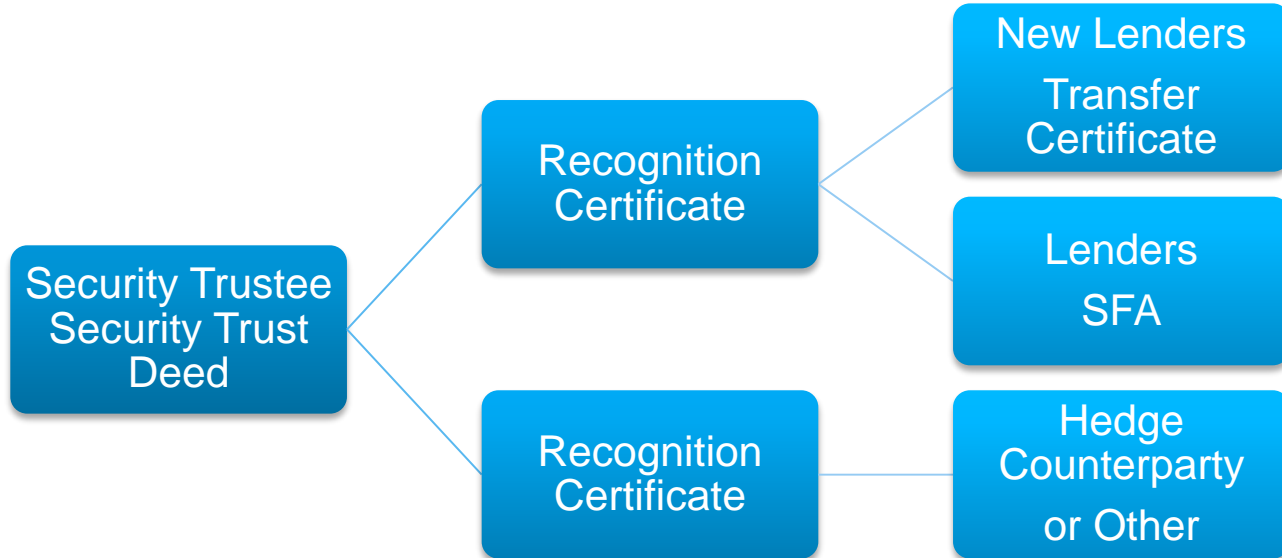
- One good and simple legal answer flows from STD being deed
 - Election — can't take benefit without burden
 - Traditionally used eg with debenture trust deeds, and investment trusts
- BUT
 - How do Beneficiaries know they are anointed?
 - Parties want paper trail, acknowledgement and clarity
 - Parties may want something more than legal doctrine
- SO
 - Have document which has a paper trail acknowledging accession
 - AND binds parties contractually to terms set out in STD

Current draft proposal general approach

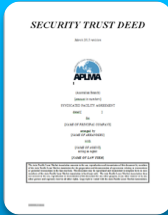
- Day one — One separate accession/recognition document for each financing (ie SFA, master hedge arrangements, USPP etc etc)
 - Recognises beneficiaries
 - Contract by Beneficiaries to comply with terms of STD as a contract
 - Acknowledgment of election
- On transfer — transfer certificates in SFA
 - Transfer and accession mechanism for new Lenders under both SFA and STD
 - One document

Bridging the gap

Current draft proposal



The current draft proposal overall structure



Security Trust Deed

- Only parties are Obligors and ST



Recognition Certificate

- Common in market, but expanded. Binds beneficiaries contractually to comply with STD terms, not deed, AND acknowledge election.
- Separate certificates for HC's and for Agent (for Lenders and Arrangers)



Transfer certificate under SFA

- Slightly amended form
- Novates SFA AND binds new Lender to Recognition Certificate (and STD terms)
- Agent signs for parties to SFA (standard), but also ST(option for ST to sign)

The documents for the syndicate

Day 1

All lenders sign SFA

Security trustee signs STD

Security trustee and agent sign recognition certificate

New lenders

Sign SFA transfer certificate and this binds them to recognition certificate (and thus to comply with STD)

SYNDICATED FACILITY AGREEMENT

March 2017 version



(Amended Book)

[Name of member]

SYNDICATED FACILITY AGREEMENT

Date: []

[NAME OF FINANCIAL COMPANY]

WITNESSED BY [NAME OF AGENT]

WITNESSED BY [NAME OF AGENT]


WITNESSED BY [NAME OF LAW FIRM]

[]

The term 'Facility' in this document refers to the loan, participation and overdraft facilities that are included in the Loan and Finance Documents and the term 'Facilities' includes all such facilities. The term 'Facilities' includes all such facilities as may be determined by the Facility Agreement from time to time. The term 'Facilities' includes all such facilities as may be determined by the Facility Agreement from time to time. The term 'Facilities' includes all such facilities as may be determined by the Facility Agreement from time to time.

SECURITY TRUST DEED

March 2017 version



(Amended Book)

[Name of member]

DEDICATED FACILITY AGREEMENT

Date: []

[NAME OF FINANCIAL COMPANY]

WITNESSED BY [NAME OF AGENT]

WITNESSED BY [NAME OF LAW FIRM]

[]

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RECOGNITION CERTIFICATE

Signed under the Security Trust Deed dated [] between [] (as Borrower and [] (as Security Trustee (and also) the Security Party (and)

This is a Recognition Certificate under Clause 7 of the Security Trust Deed. Terms used in the Security Trust Deed shall have the same meaning as in the Recognition Certificate unless given a different meaning in this Recognition Certificate.

Certification

The Security Trustee certifies as follows:

- Recognition**
[Name of Member] is recognized as a Member (Consignatory and a Beneficiary) of the Dedicated Facility Agreement.
OR
The following are recognized as Beneficiaries:
[Name of Agent], and
Each person and State Lender as defined in the Facility Agreement referred to below which is bound to the Recognition Certificate.
- Finance Documents**
[The following are] the Facility Agreements and Finance Documents as defined in the Security Trust Deed.
OR
[The following are] the Facility Agreements and Finance Documents as defined in the Security Agreement.
OR
[The following are] the Facility Agreements and Finance Documents as defined in the Security Trust Deed. It is a condition of the Finance Documents that they are subject to the Security Trust Deed.

Agreement []

The Security Trustee agrees that it is bound to the Security Trust Deed.

TRANSFER CERTIFICATE

De [] In Agree

From [The Existing Lender] (the 'Existing Lender') and [The New Lender] (the 'New Lender')

Date:

[] (Name of []) (Facility Agreement) (Name of []) (the 'Agreement')

- This is the Agreement. This is a Transfer Certificate. Terms defined in the Agreement have the same meaning in this Transfer Certificate unless given a different meaning in this Transfer Certificate.
- This is the Transfer Certificate (the 'Transfer Certificate').
- The Existing Lender and the New Lender agree to the Existing Lender and the New Lender transferring (to the party) of the Existing Lender's Commitment defined in the Schedule with other terms and conditions of the Transfer Certificate as stipulated with Clause 20 (Procedure for transfer) and corresponding rights and obligations.
- The proposed Transfer Date is []
- To the extent permitted by law, the Existing Lender assigns to the New Lender all rights of action that it may have to enforce the terms of the Commitment and its corresponding rights and obligations and all other permissory under or in connection with the Commitment.
- The Facility Officer will address the notice and electronic notice for notice of the New Lender to the purpose of Clause 20 (Automatic termination) in the Schedule.
- The New Lender agrees to acknowledge the conditions in the Existing Lender's obligation set out in paragraphs (a) and (b) of Clause 20 (Automatic termination) of the Existing Certificate.
- This Transfer Certificate may be executed in any number of counterparts and this has the same effect as if the signature on the counterparts were on a single copy of this Transfer Certificate.

[]

The terms of the recognition certificate

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**RECOGNITION
CERTIFICATE**

Issued under the Security Trust Deed dated [*] between [*] as Borrower and [*] as Security Trustee (and others) (the *Security Trust Deed*).

This is a Recognition Certificate under Clause 5 of the Security Trust Deed. Terms used in the Security Trust Deed shall have the same meaning in this Recognition Certificate unless given a different meaning in this Recognition Certificate.

Certification

The Security Trustee certifies as follows.

1. **Beneficiary**

[Name of Hedge Counterparty] is recognized as a Hedge Counterparty and a Beneficiary if bound by this Recognition Certificate.

OR

The following are recognized as Beneficiaries.

[Name of Agent] as Agent; and

Each present and future Lender as defined in the Facility Agreement referred to below which is bound by this Recognition Certificate.

2. **Finance Documents**

[The following are Hedge Agreements and Finance Documents as defined in the Security Trust Deed:

(a) [describe Master Agreement]; and

(b) any transaction or confirmation under it entered into in accordance with the [Facility Agreement].

OR

The Facility Agreement between the Company, [*] as Agent, the Lenders named in it and others dated [*] is a Facility Agreement as defined in the Security Trust Deed. It and all "Finance Documents" as defined in it are Finance Documents as defined in the Security Trust Deed

Agreement [Insert for syndicated facility]

The Security Trustee agrees that it is bound by the Security Trust Deed.

_____ 24.3.2011 _____

Only signed by security trustee and agent

- Agent signs on behalf of itself, initial lenders and arrangers

Lenders and other beneficiaries

- Acknowledges that lenders etc are beneficiaries,
- Contractually binds them to contract with security trustee (on behalf of itself and all the present and future beneficiaries) to comply with STD
- Also contains acknowledgement by them that they benefit and are bound
- Constitutes Agent as agent of security trustee to sign SFA transfer certificates with new lenders on its behalf binding them to recognition certificate

Obligors

- Day 1 obligors are parties to STD and new obligors become parties by signing STD accession deed
- Also become parties to recognition certificate through agency of security trustee

The terms of the transfer certificate



Specified and required by SFA

Only signed by old and new lenders and Agent (option for ST to sign)

- Agent signs on behalf of other parties to SFA and Security Trustee (unless ST signs itself)
- Novates SFA in usual way
- New Lender agrees it is bound by recognition certificate and therefore terms set out in STD



Issues that arise from trustee entities as lenders

Murray Lord

Trustee entities as lenders

- Limitation of lender's liability
 - If not contemplated on day 1, may not be permitted under SFA
 - Commercial issue for security trustee (and agent) whether to accept
 - Potentially also an issue for borrowers
- Existing APLMA approach to issue

Super funds and their custodians

- APRA requirement that assets be “custodially held”
- What does this mean if the asset is rights as lender under a syndicated loan?
- Who should be the lender of record?
- What involvement should custodian have?

A photograph of two Black-winged Stilts standing on a sandy beach. The birds are white with black wings and long, thin legs. They are positioned in the middle ground, with the ocean in the background. The bird on the right is standing on one leg, while the one on the left is on two.

Replacing the security trustee

Diccon Loxton

The need

Security trustees need to be replaceable

- LMA trend with agents
- Where inter-financier political issues majority may want new ST
- Nature and outlook of financiers can change
- STs may want to resign from sticky situation
- In long term financings , or in refinancings, may need change
- Need competition



The issues

Mechanical

Security trustee needs to be replaced:

- In registered documents
- In holding other assets like bank accounts
- In documents with other parties, eg tripartites, indemnities to receivers
- In documents with obligors and beneficiaries, security trust deed

The issues

Documentary — Security Trustee may continue to be liable, how is it covered?

Old security trustee had:

- Indemnity from obligors
- Benefit of security
- Indemnity from beneficiaries
- Protective clauses
- General law “lien”
- Pole position on proceeds waterfall
- Some say in enforcement . (Possible) right to enforce to recover indemnity amounts or to hang on to security pending payment

Replacement issues

Easy

Do indemnities continue

Benefit of security?

Does benefit of protections continue?

Harder

What happens to “lien”?

What are duties of new ST to old ST?

What rights does old ST have?

Where does old ST sit on waterfall?

General law position — replacement of trustees generally

- Old trustee's "lien" continues, enforceable by court order/ receivership
- Can old trustee hold on to trust assets ? Cases both ways
- If old trustee retains assets, its "lien" then ranks first
- New trustee may owe some duties to the old trustee
- Old trustee could get orders protecting its position re assets with new trustee
- Ranking of old trustee's "lien" against new trustee 's "lien" over assets vested in new trustee?
Indications in case law that old trustee has priority
- Extent of 'lien" over trust assets (entire fund or traced assets?)

The current draft proposal — “hard-wiring”

- Mechanics or replacement expanded
- Form of deed of appointment and replacement attached
- Position of former ST dealt with in STD

The current draft proposal

- Did not go down limited recourse indemnity route
- Indemnities protections preserved
- Old ST is beneficiary, and entitled to security
 - NOTE security documents need to reflect this
- Duties (and limits on them) of new ST to old ST same as other beneficiaries
- But old ST has no vote except where singled out — new ST can (but need not) enforce for large indemnity amounts owed to old ST
- Old ST has equal ranking with new ST on waterfall
- Old ST “lien” continues but only to extent consistent with the above
- If old ST still has assets it follows instructions from new ST (subject to usual carve-outs)

Questions?

