



# TOMB RAIDER: COURT EXTRACTS LIFE POLICY FROM DEREGISTERED TRUSTEE OF LOST SUPER FUND

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**NSW Supreme Court grants \$28.5K rollover from undocumented super trust without reviving deregistered trustee**

## THE FACTS

In 1987 Robert Rafidi took out life insurance in a super fund trust that had his company as trustee. Before the maturing of the policy in 2015, however, Mr Rafidi's company was

deregistered in 1996 and the trust deed lost.

As a consequence, in 2015 Mr Rafidi's insurance payout was made to the Commonwealth rather than to his defunct company. ASIC advised Mr Rafidi that it would not transfer the money to the trustee of Mr Rafidi's new super fund (as he had requested ASIC do) unless and until the Court attributed the insurance payout money to that trustee.

Mr Rafidi accordingly sought the Court's approval.

## **LEGISLATIVE FRAMEWORK – DEREGISTERED TRUSTEES & THEIR ASSETS**

The deregistration of a company is essentially its 'death'. Under the Corporations Act 2001, a deregistered company cannot trade, act, or own anything.

Upon deregistration, any property or asset (including money) in a trust held by that company as trustee becomes 'vested' in the Commonwealth. ASIC is then empowered (on behalf of the Commonwealth) to act in the shoes of the deregistered company as if ASIC was itself the trustee.

This occurs for any company deregistered since 14 July 1989 and continues indefinitely until a court does one of three things:

1. re-registers the old trustee company;
2. appoints a different company as trustee (which we shall call Company B); or
3. transfers ("rolls over") the asset from the Commonwealth to a different trust held by Company B.

If option #1 is taken, the re-registered company resumes its trustee position in the original trust (which we shall call Trust A) and reclaims any vested property/assets from the Commonwealth.

If option #2 is taken and Company B is already trustee of another trust, the two trusts do not combine. Company B must still hold its newly-acquired assets in accordance with the Trust A deed, entirely separately from any other pre-existing trust.

If option #3 is taken, the transferred property is combined (unless the court says otherwise), meaning Company B holds the newly-acquired property in accordance with its pre-existing trustee arrangement. “Rolling over” must however first be permitted under the Trust A deed.

## MR RAFIDI’S BEST OPTION – #3

At first, Mr Rafidi tried to take option #1. After re-registration, his plan was to transfer the money from the old company (which would be the company’s only asset) to himself and then put the company back into deregistration.

The Court refused to do this however because it was Mr Rafidi’s 1987 super fund trust that was entitled to the money (not Mr Rafidi himself). For Mr Rafidi to take the money in this way would be a violation of the old company’s 1987 trust arrangement.

Mr Rafidi, therefore, asked the Court to approve either option #2 or #3.

The Court decided that option #3 (“rolling over”) was the most appropriate because the money would be going into a pre-existing trust that hadn’t lost its deed.

Interestingly, despite it technically being necessary for the (lost) 1987 trust deed to permit this “rolling over”, the Court thought it reasonable to assume the deed did permit it (as most deeds do), given that the “roll over” would not negatively impact anyone else and there was relatively little money at stake.

## LESSONS

This case has several lessons for controlling directors who have defunct companies holding their personal life insurance policies in a trust.

First and foremost, directors should avoid getting such companies deregistered. Failure to do so runs the risk of (at least temporarily) forfeiting insurance payouts.

If however deregistration has already occurred, controlling directors should know their three options (above) in reclaiming forfeited assets and whether their trust allows for each. As a general rule:

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if the director does not have another trust, he/she should re-register the trustee company;

- If the director does have another trust, he/she should “roll over” the forfeited assets to that trustee.

And finally: a lost trust deed does not mean a lost trust asset.

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If your company trustee is facing deregistration or you have any questions about any of the content covered in this article please contact Principal, [Shelley Mulherin](#) or Lawyer, [Joshua Wood](#) of McInnes Wilson Lawyers Canberra for a free quote.

## Contact the article author for more info



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