2.13 Clear and well understood communication between adviser and client is essential for the adviser to discharge their duty to their client whether that duty is created by:

- the law of equity, including fiduciary obligations;
- the law of torts;
- the law of contract;
- legislation including:
  - Corporations Act; and
  - Australian Consumer Law.[5]

This responsibility to communicate rests equally on both client and practitioner. Feedback is essential as communication proceeds. Any lack of understanding must be clearly communicated between client and practitioner and then resolved to their mutual satisfaction. Clients who fail to adhere to this communication responsibility represent a threat to the practitioner's ability to discharge their duty of care to the client.

2.14 Since the decisions of *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 and *Garcia v National Australia Bank Ltd* [1998] HCA 48 (*Garcia*), we have authority for the proposition that where one party in a relationship has a special disadvantage then the other party has a heightened duty of care to them. It is necessary for advisers to consider how a special disadvantage might be created.

In *Garcia's* case (at [102]), the court cited the following passages from *Blomley v Ryan*[6] with approval:

> The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage vis-à-vis the other.
>
> This is a well-known head of equity. It applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.

While the Australia of 1954 (the time of the *Blomley v Ryan* decision) was in some respects a simpler time and culture, reflecting on these comments from

5 For example, <www.accc.gov.au/consumers/consumer-rights-guarantees> and <www.austlii.edu.au/au/legis/cth/consol_act/caca2010265/sch2.html>.

6 [1954] HCA 79; (1956) 99 CLR 362 at 405 and 415. As cited in *Garcia*.

our current perspective reminds us that the cases of diminished capacity and disadvantage in clients remain remarkably constant over time.

The majority judgment in the *Garcia* case held (at [83]):

> The result to which I have come flows not from the fact that Mrs Garcia was a married woman in need of special protection, as such, from the law of equity. It flows from a broader doctrine by which equity protects the vulnerable parties in a relationship and ensures that in proper cases they have full information and, where necessary, independent advice before they volunteer to put at risk the major asset of their relationship for the primary advantage of those to whose pressure they may be specially vulnerable.

2.15 It is therefore necessary when engaging with clients that advisers determine whether there is any vulnerability or disadvantage held by the client that should alter the way in which they approach the management of their duty of care. Factors to consider include, in addition to those cited:

- the ability of the client to communicate;
- the educational level required in order to understand the solutions recommended by an adviser;
- the cultural or social background of the client which may limit their ability to understand the options they have under Australian law or commerce, for example, a person from a civil law jurisdiction does not have the background to understand the concept of a trust; and
- the legal or testamentary capacity of the client.

In response to these factors advisers may find themselves acting as follows:

- not proceeding with a particular recommendation;
- procuring independent advisers for one or more parties;
- educating clients about the reasons why certain options exist and evaluating the results of that education before placing any recommendations before them for decision; and
- requiring evidence of capacity or legal personal representation before proceeding with an engagement.

Advisers need to remember that communication is about what the client understands, not what the adviser intends. If the adviser intends to change the client's understanding about their affairs in a way that will endure over time, then the adviser needs to determine how those educational values will be delivered, and assessed as being delivered, if client satisfaction in the engagement is to be maximised and professional duty discharged.

If the adviser is unable to communicate with their client in a way that the client can understand and then evaluate and respond, it may be necessary for the adviser to deal only with the legal personal representatives of that client. The appointment of those persons may be required before the substantive assignment can proceed.

CLIENT RESPONSIBILITY — AN ABILITY TO DECIDE

2.16 Even with a commitment and ability to communicate and no special vulnerability or disadvantage, a client nonetheless may become overwhelmed by the consequences of a decision and therefore be unable to proceed further. This may delay the completion of an engagement for some time. To cater for this risk, the contractual terms between adviser and client need to clearly make the following points:

- It is the role of the adviser to present options for evaluation and decision.
- The client remains the primary decision-maker in the engagement unless they introduce a properly appointed legal personal representative to make a decision on their behalf.
- It is **not** the role of an adviser to make decisions on behalf of a client.
- The client must disclose to the adviser any legal jurisdiction other than Australia to which they or the management of their affairs is connected and any limit that may place on their ability to make decisions about their affairs in Australia.
- The adviser may terminate the retainer where a client cannot make decisions vital to its progression within a reasonable period.
- The adviser is entitled to be paid as work is completed and billed, preferably monthly or at termination of the matter by either party.
- Where the adviser is dealing with the collective interest of more than one person, the impact of governance and the decision-making risk of the group interest needs to be expressly dealt with as a condition of the engagement.
- Where a client is engaged to a group interest or alternate decision-maker such as an attorney, the client's understanding of how financial abuse risk is to be managed in their affairs needs to be understood by all advisers and people otherwise engaged to the management of those affairs. Key choices about managing financial abuse risk include:
  - doing nothing and relying on the right thinking and conduct of the group or alternate decision-maker;
  - conditioning the appointment to reduce the perceived financial abuse risk; and
  - providing formal mechanisms for the oversight or termination of the decision-making function of concern.

Where, for example, a discretionary testamentary trust is to be recommended, it is necessary for the client to consider whether succeeding controllers of the trustee decision-making power will exercise their powers as the client expects or requires. If this does not occur, then the financial benefit the client is contemplating may not in fact be delivered to their successors. For an example of this, see *Katz v Grossman* [2005] NSWSC 934.

2.17 Where estrangement is already present in family decision-making, then the impact of that on the representation, estate management and succession strategies must be considered. This will require the adviser to consider the extent to which, in the engagement, any of the following characteristics are being shown by clients or interested parties in any critical issue of concern:[7]

- hardening of position;
- debates and polemics;
- focus on actions not words;
- concern about images and coalitions;
- concern about loss of face;
- presenting strategies of threats;
- receiving limited destructive blows;
- focus on fragmentation of the enemy; and
- commitment to proceed together into the abyss.

2.18 It is necessary for advisers to realistically assess the ability of their clients and their alternate decision-makers and successors to operate any strategy or solution they present for the planning period concerned. With the increasing longevity of clients and their families, it is vital that client and adviser agree the prospective time span over which an estate planning strategy needs to operate and how any consequential impact on continuity of decision-making and management is to be handled in the estate administration plan of the client. The functional ability of the client and their alternate decision-makers will create a normative limit on the longevity of any strategy or solution produced by an estate planner. Identifying those limits as early as practical in an engagement is part of the fundamental professional responsibility of an estates practitioner.

Escalating differences that are proving not amenable to the normal operations of the enterprise and the need to provide mechanisms to assess the most appropriate path to deal with the difference before it hardens into a matter that is only amenable to adviser or curial led dispute resolution processes is a necessary part of the estate planning process.

A necessary part of both estate planning and estate administration is recognising the extent of the embedded level of conflict in a family or decision-maker's situation and deciding what technique, resolution process or combination of both is most suitable for the situation at hand. If a client is not responsive to the significance of these issues in their situation, limitation of the estate administration strategy or solution approach advocated by the estates adviser may be needed.

In extreme cases, the presence of irreconcilable conflicts within the family may bring the estate planning engagement to an end.

7 Based on the work of Friedrich Glasl. For a commentary on this work, see the article at <www.mediate.com/articles/jordan.cfm>.

PRACTITIONER RESPONSIBILITY AT INITIAL ENGAGEMENT

2.19 In response to these client duties and responsibilities, at the start of an engagement it is necessary for the practitioner, to the extent allowed by their professional or occupational competence:

- to act in accordance with their general legal, legislated and professional duties and responsibilities;
- to listen to the client and discern their needs, objectives, concerns and questions;
- to determine a focus for initial action and response to the client that proposes to deliver to the client the advantage the client seeks from their adviser;
- to establish any limitations on the engagement whether determined by the client or any feature of their situation; and finally
- to determine whether to proceed with the engagement in accordance with the constraints contained in the first point above.

STATEMENTS REASONABLY RELIED ON — GENERAL DUTY OF CARE

2.20 Resolving the above duties and responsibilities of the client in an engagement will normally also produce the situation of reliance from which the adviser's duty of care to the client flows.

In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1964) AC 465, the parameters of tortious (legal wrong) responsibility for statements reasonably relied on were developed. The principles of that case have been described as follows:[8]

> Where a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, and a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.

In the context of estate planning, this rule needs to be considered in the light of s 961E of the Corporations Act 2001 (Cth)[9] that states:

> It would reasonably be regarded as in the best interests of the client to take a step, if a person with a reasonable level of expertise in the subject matter of the advice that has been sought by the client, exercising care and objectively assessing the client's relevant circumstances, would regard it as in the best interests of the client, given the client's relevant circumstances, to take that step.

8 As cited at <http://en.wikipedia.org/wiki/Professional_negligence_in_English_Law>.
9 See <www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s961e.html>.

Irrespective of whether fiduciary duty applies to the client/adviser relationship, all professional advisers have a tortious duty of care to their clients (liability for which may be found at least in the law of negligence) that arises out of the reasonable reliance a client can have on the statements of their advisers. In discharging this duty of care, it is vital therefore that advisers establish both the advantage and (if relevant) the threat their advice represents to their client. It is for the client to decide whether any threats or disadvantage posed by a recommendation from an adviser outweigh the advantage to be gained by the client from following the tendered advice.

2.21 A key purpose of engagement management in professional service firms is to provide a procedural framework for the undertaking of professional work through which the duty of care established by the engagement is discharged.

Professional bodies within the trust and estates field provide various codes of conduct that articulate each body's approach to this issue.[10] For example, the Financial Planning Association of Australia Ltd (FPA) sets out the following expectations of its members in its code of ethics:[11]

- place the client's interest first;
- provide professional services with integrity;
- provide professional services objectively;
- be fair and reasonable in all professional relationships;
- act in a manner that demonstrates exemplary professional conduct;
- maintain the abilities, skills and knowledge necessary to provide professional services competently;
- protect the confidentiality of all client information; and
- provide professional services diligently.

In comparison, the Tax Practitioners Board recognises the following core principles of operation in its practitioner code of conduct:[12]

- honesty and integrity;
- independence;
- confidentiality;
- competence;
- other responsibilities.

> You must not knowingly obstruct the proper administration of the taxation laws.
>
> You must advise your client of the client's rights and obligations under the taxation laws that are materially related to the tax agent services you provide.

10 A range of examples are provided in **Appendix A** to this chapter.
11 For full text, see the information at <http://fpa.com.au/about-fpa/code-of-ethics-code-of-professional-practice>.
12 See Tax Practitioner Board Explanatory Paper TPB 01/2010 at p 7, and the further information at <www.tpb.gov.au>.

> You must maintain the professional indemnity insurance that the Board requires you to maintain. You must respond to requests and directions from the Board in a timely, responsible and reasonable manner.

These principles reflect what is expected of the tax practitioner's conduct. While fidelity to the client is a large and significant duty, it is clear that duties to the law, professional bodies and regulators have a substantial impact on the scope of responsibility of a professional adviser and how they operate. The practice systems of the firm in which the estates adviser operates must codify and conveniently make available the terms on which the firm operates so that the client can assess the suitability of that firm for their purposes. The terms of engagement of the firm need thus to also reflect the way in which the firm holds itself accountable to:

- the law;
- legislated requirements; and
- professional bodies with oversight of its operations directly or through employment by that firm of members of the professional body.

2.22 The manner of the adviser's professional operation is further expanded by the applicable code of conduct of the professional body with oversight of the adviser and their firm. For example, the Financial Planning Association of Australia (FPA) Code of Conduct requires the following procedural elements be adhered to by advisers when performing their work:

- establish engagement;
- collect client information;
- analyse and assess client situation;
- develop suitable strategies and recommendations;
- implement recommendations as decided by client; and
- review and re-evaluate estate administration plan.

These six steps are not unique to the FPA, but rather reflect the FPA's adoption of broader professional practice standards.

While these approaches are useful, in order to determine whether a duty of care is sufficiently discharged by an engagement the adviser must first define the duty assumed in the engagement (the purpose of the engagement) and then evidence why and how his or her actions discharge that duty.

It is a fundamental responsibility of professional advisers to operate their practice in a way that inherently responds to and resolves the duty of care raised and discharged in the course of normal client engagements.

2.23 Once advisers are clear about how they discharge this common law duty to their clients, attention can then be given to the rigour of legislative and professional body compliance requirements. To whom an adviser owes a duty of care may sometimes be difficult to determine. The case of *Hill v Van Erp* [1997] HCA 9 at 3 discusses this point as follows:

> ... the undertaking of a specialist task pursuant to a contract between A and B may be the occasion that gives rise to a duty of care owed to C who may be damaged if the task is carelessly performed.[13]

Where a client wishes to create a benefit for a third party and engages a professional adviser to assist in that work, the adviser is liable to not just the original client but also to that third party for the delivery of the intended benefit. Managing this liability means there must be great clarity between the adviser and the primary client about the intended scope of the adviser's role in the overall engagement. Advisers need to continually challenge themselves to be able to resolve whether, for any given engagement, they have an objective measure of when the engagement is complete and the expectations of the client satisfied.

2.24 The case of *Howe v Fischer* [2014] NSWCA 286 (26 August 2014) is a timely reminder of the normative effect the initial scope of engagement has on the extent of a practitioner's professional liability. The following extract from the judgment (at [73]–[77]) is of particular note:

> Breach
>
> The primary judge concluded that there was a breach of the retainer as she had formulated it (that is, a retainer to give legal effect to Mrs Fischer's testamentary intentions and not merely to prepare a formal will and arrange for its later execution) because the appellant did not 'procure' the execution by Mrs Fischer of an informal will. On that view of matters, the retainer required that the solicitor prepare on the spot (or immediately afterwards) a handwritten document setting out Mrs Fischer's wishes as communicated (presumably with no nomination of an executor but an implicit expectation that a grant of administration would be sought by a person with a clear interest) and then 'procure' the signing of that document by Mrs Fischer.
>
> Even if the judge's formulation of the retainer is accepted (which, as I have said, it should not be), the most that could have been required of the appellant was the exercise of reasonable care in advising Mrs Fischer that it was possible for her to sign virtually immediately a statement of testamentary intentions in the expectation that, if she died or lost capacity in the relevant period of about two weeks, the Supreme Court might be expected to make a positive decision in relation to it under s 8(2)(a) of the Succession Act, thereby causing the document to be treated as her will. There could not have been any duty to 'procure' that Mrs Fischer do anything in response to that advice.
>
> On the formulation of the retainer that I consider to be required by the evidence, however, any duty to call attention to the possibility of making an informal will would have arisen only if the appellant was aware that some factor was at work that, as a matter of reasonable foresight, might cause to be frustrated Mrs Fischer's objective of making effective testamentary dispositions by means of a formal will in about two weeks time. The only such factor that could have been relevant was awareness, entertained as a matter of reasonable foresight,

13 See *Phillips v Britannia Hygienic Laundry Co* [1923] 1 KB 539; *Stennett v Hancock* [1939] 2 All ER 578; *Malfroot v Noxal Ltd* (1935) 51 TLR 551 as cited in *Hill v Van Erp* [1997] HCA 9 at 3 and the discussion at this page of the judgment.

Intangibles and the estates practitioner

5.33 The development of the information, communication and technology (ICT) industries is largely based on the commercialisation of intangible assets. The first wave of the internet attempted simply to sell access to 'for free' intangible assets and services that were otherwise easily available. With further development, there is now sufficient network and program control over many forms of intangible assets such as MP3 files that it is possible to make many forms of intangible assets directly tradable. Whether this will develop into a recognised form of legal possession of intangibles is yet to be seen. The development of the information economy erodes the traditional distinction between, for example, a printed book and copyright and requires standards and systems to exist that package and control both the asset being vended as well as the expression and application of rights of use over the asset.

It is necessary for the estates practitioner to be able to analyse a client's estate and identify the existence of intangible assets of economic value. It is then necessary as part of the client's estate management plan to establish an appropriate system of asset recognition and control.

Chattels real

5.34 This is the classification of personal property rights that is normally referred to as leasehold. While the impact of legislation in recent years has been to elevate leasehold to the de facto position of a legal estate in land, conceptually, leasehold remains a settled bundle of possessory rights that landholders can transfer to occupiers of part or all of their property. As it has only been the force of legislation that has elevated the endurance and transferability of leasehold rights, the common law conceptual classification of leaseholds remains in force. Any lease can only be understood on its terms either as a lease in writing or an implied tenancy at will. The estates practitioner needs to understand leases by reference to their documented terms. If tenancies at will are in force in an estate, their terms need to be appropriately evidenced in order that they can be managed. Certain leaseholds are also regulated by legislation and to the extent necessary all leases need to be understood by reference to their governing legislation and not just the common law. Practitioners should take particular note of the operation in New South Wales of:

- Agricultural Tenancies Act 1990 (NSW);
- Retail Leases Act 1994 (NSW);
- Residential Tenancies Act 2010 (NSW);
- Retirement Villages Act 1999 (NSW); and
- Retail Trading Act 2008.

The classification of leaseholds as personalty remains an historical artefact that in our view will continue indefinitely. This field of property law needs to be understood state by state.

Native title

5.35 A detailed exposition of the law of native title is beyond the scope of this book. It is nonetheless essential to recognise native title as a source of law in Australia that is founded on the religion, history and culture of indigenous Australians. The boundaries of this law are still being defined but arguably extend to indigenous and cultural property the subject of customary law. It is clear that native title, irrespective of its extent, is now recognised by Commonwealth law as an allodial form of property ownership, founded in concepts of tribal custodianship and regulated by the customary laws of indigenous tribes. While there is a passing resemblance at this level of analysis to the feudal hierarchy of tenures, native title is distinct because it does not rely on concepts of ownership and seisin to provide boundaries to the extent of the thing owned. It is against the evolution of the themes of custodianship, possession, personal right and continuity of tribal ownership and authority after death, that the full detail of native title is expected to emerge.

In the meantime, for the estates practitioner, it is vital that the cultural heritage of a client be understood as part of the estate planning process. To the extent that a person is a member of an indigenous tribe, then the extent to which that person is accountable to the customary law of the tribe needs to be defined and responded to on a case-by-case basis.

EQUITY

Sources of this law

5.36 Meagher, Gummow and Lehane in their seminal equity text describe the law of equity as follows:[6]

> Equity can be described but not defined. It is the body of law developed by the Court of Chancery in England before 1873. Its justification was that it corrected, supplemented and amended the common law. It softened and modified many of the injustices in common law and provided remedies where at law they were either inadequate or non-existent.

This body of law was imported into Australia with the establishment of English colonial rule of this country. Since 1972 in New South Wales, there has been a fusion of the administration of common law and equity by the Supreme Court that is now empowered to '... have all jurisdiction which may be necessary for the administration of justice in New South Wales'. Limited equitable jurisdiction is also exercisable in inferior courts such as the District Court of New South Wales by virtue of s 6 of the Law Reform (Law and Equity) Act 1972 (NSW) (Law and Equity Act) which states, 'Every inferior court shall in every proceeding before it give such and the like effect to every ground of

6 Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed, LexisNexis Butterworths, Sydney, 1992, p 3.

defence, equitable or legal, in as full and ample a manner as might and ought to be done in the like case by the Supreme Court under the Supreme Court Act 1970'.

Section 5 of the Law and Equity Act established the current relationship between the common law and equitable jurisdictions by providing, 'In all matters in which there was immediately before the commencement of this Act or is any conflict or variance between the rules of equity and the rules of common law relating to the same matter, the rules of equity shall prevail'. It is in this provision that we see the modern application of the observation that equity provides a moral conscience to the administration of common law rights.

Focus of this law

5.37 The operation of the law of equity can be approached through an appreciation of the traditional maxims of equity. These maxims are conceptual themes rather than settled rules and principles that illustrate the application and operation of the law of equity. The maxims consist of the following:

- equity will not suffer a wrong to be done without a remedy;
- equity follows the law;
- where the equities are equal, the law prevails;
- he or she who seeks equity must do equity;
- he or she who comes into equity must come with clean hands;
- equity is equality;
- equity assists the diligent, not the tardy;
- equity looks to the intent rather than the form;
- equity looks on that as done which ought to be done;
- equity imputes an intention to fulfil an obligation; and
- equity acts in personam.

These maxims reflect that equitable rights arise in the infinitely various circumstances in which a person can suffer a wrong. The law of equity must be viewed therefore as a framework through which equitable rights are administered. The extent of the equitable jurisdiction continues to evolve as the activities of people and society change and develop over time.

For the estates practitioner, it is the law of equity, in addition to the law of contract, that provides a legal foundation for the administration of second and third party (including beneficiary) rights in a person's estate.

Operation of this law

5.38 While the boundaries and composition of the law of equity may be fluid, its administration has become focused around the core operational areas of:

- equitable proprietary interests;
- equitable assurances and assignments;

- unconscionable transactions;
- equitable remedies;
- equitable defences;
- fiduciary relationships;
- deceased estates; and
- emerging or incidental doctrines including:
  - confidential information;
  - passing off;
  - restrictive covenants; and
  - merger, election and conversion.

Each of these areas provides a means for the administration of the conscience of the equity jurisdiction in relation to a person's conduct.

For the estates practitioner, it is the areas of equitable proprietary interests, fiduciary relationships and deceased estates that provide the core day-to-day application of the law of equity to the normal affairs of clients. We will focus our discussion now on these areas.

Equitable proprietary interests

5.39 We have already seen in relation to the law of property, that property is not only the consequence of the possession of a thing but the rights that flow from possession of a thing. The law of equitable proprietary interests focuses on the administration of rights that attach to property and control of interference with such rights. An injunction may be granted to restrain a person from interfering with a particular thing. The boundary line between property in the thing possessed and property in the thing that grounds the right to have an injunction can be exceedingly fine.

The interaction of the law of equity and property and native title was explored by the High Court in *Yanner v Eaton* (1999) 201 CLR 351 at [17]–[20],[7] where the court said in relation to property and equity:

> The word 'property' is often used to refer to something that belongs to another. But in the Fauna Act, as elsewhere in the law, 'property' does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of 'property' may be elusive. Usually it is treated as a 'bundle of rights'. But even this may have its limits as an analytical tool or accurate description, and it may be, as Professor Gray has said, that 'the ultimate fact about property is that it does not really exist: it is mere illusion'. Considering whether, or to what extent, there can be property in knowledge or information or property in human tissue may illustrate some of the difficulties in deciding what is meant by 'property' in a subject matter. So too, identifying the apparent circularity of reasoning from the availability of specific performance in protection of property rights in a chattel to the conclusion that the rights protected are proprietary

7 See the full text at <https://jade.barnet.com.au/Jade.html#!article=68155>.

> may illustrate some of the limits to the use of 'property' as an analytical tool. No doubt the examples could be multiplied.
>
> Nevertheless, as Professor Gray also says, 'An extensive frame of reference is created by the notion that "property" consists primarily in control over access. Much of our false thinking about property stems from the residual perception that "property" is itself a thing or resource rather than a legally endorsed concentration of power over things and resources.'
>
> 'Property' is a term that can be, and is, applied to many different kinds of relationship with a subject matter. It is not 'a monolithic notion of standard content and invariable intensity'. That is why, in the context of a testator's will, 'property' has been said to be 'the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have'.
>
> Because 'property' is a comprehensive term it can be used to describe all or any of very many different kinds of relationship between a person and a subject matter. To say that person A has property in item B invites the question what is the interest that A has in B? The statement that A has property in B will usually provoke further questions of classification. Is the interest real or personal? Is the item tangible or intangible? Is the interest legal or equitable? ...

5.40 The law of equity recognises that the possessor of a thing may not be able to control more than the mere current possession of a thing. For example, take a bare trustee of an item of property. While the trustee has possession of the trust property, it is the beneficiary that has the absolute right to call for the transfer of the property to him or her. A resulting trust may be established in favour of the beneficiary if the beneficiary is the source of all of the purchase price for the property so that the trustee is only acting as the apparent purchaser of the property. If the trustee transfers the trust property other than in accordance with the terms of the trust to a person who is not a bona fide purchaser for value without notice of the trust, then the beneficiary of the trust will be able to use the law of equity to trace the property into the hands of the recipient and enforce his or her rights against the recipient of the property. The beneficiary may also transfer and transmit his or her interest under the trust to third parties as long as the transfer is otherwise carried out in accordance with the law of conveyancing insofar as it applies to the relevant type of property in the transaction.

In New South Wales, the Conveyancing Act 1919 explicitly preserves the operation of the law of equity in relation to the conveyance of property in s 23 which provides:

> 1. Subject to the provisions of this Act with respect to the creation of interests in land by parol:
>   a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by the person's agent thereunto lawfully authorised in writing, or by will, or by operation of law,
>   b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by the person's will,

> c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same or by the person's will, or by the person's agent thereunto lawfully authorised in writing.
>
> 2. This section does not affect the creation or operation of resulting, implied, or constructive trusts.

5.41 The law of equitable proprietary interests is the framework that administers the interface between legal possession of property and the rights that may interfere with or dispossess a person of that property. Intangible property is fully subject to the law of equity and it is in this domain that the nexus between rights, remedies and equities can be easily illustrated. The operation of these interests was illustrated starkly in New South Wales in the case of *Delaforce Simpson v Cooke* [2010] NSWCA 84. In this case, notations to Family Court property settlement orders were given the effect of equitable property interests and operated in advance of the family provision rights under the Succession Act. The court's decision was summarised in the headnote of the case as:[8]

> (1) The wife had relied on the promise and her reliance was reasonable;
>
> (2) She had changed her position by giving up the chance of having the Family Court incorporate the husband's promise in its enforceable orders;
>
> (3) Prima facie equity would enforce the wife's expectation based on an unambiguous promise;
>
> (4) There was no reason for the Court to do otherwise than enforce the wife's reasonable expectation.

Put simply, promises can count as property in the administration of a client's estate. Discovery of the fact of those promises can only occur through an appropriate investigation of the property (in a legal sense) which comprises a person's estate.

In relation to copyright, the Copyright Act 1968 (Cth) creates a code for the transfer and creation of interests in copyright assets in s 196, which provides:

> 1. Copyright is personal property and, subject to this section, is transmissible by assignment, by will and by devolution by operation of law.
>
> 2. An assignment of copyright may be limited in any way, including any one or more of the following ways:
>   a) so as to apply to one or more of the classes of acts that, by virtue of this Act, the owner of the copyright has the exclusive right to do (including a class of acts that is not separately specified in this Act as being comprised in the copyright but falls within a class of acts that is so specified);
>   b) so as to apply to a place in or part of Australia;
>   c) so as to apply to part of the period for which the copyright is to subsist.
>
> 3. An assignment of copyright (whether total or partial) does not have effect unless it is in writing signed by or on behalf of the assignor.

8 See <www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCA/2010/84.html?stem=0&synonyms=0&query=title(%222010%20NSWCA%2084%22>.

4. A licence granted in respect of a copyright by the owner of the copyright binds every successor in title to the interest in the copyright of the grantor of the licence to the same extent as the licence was binding on the grantor.

5.42 **Copyright Act** It is for the estates practitioner to be able to discern and extract evidence of the arrangements that apply to the use of the relevant property. Those uses include in relation to original copyright works as set out in s 31 of the Copyright Act 1968 (Cth):

> ... the exclusive right:
>
> a) in the case of a literary, dramatic or musical work, to do all or any of the following acts:
> (i) to reproduce the work in a material form;
> (ii) to publish the work;
> (iii) to perform the work in public;
> (iv) to communicate the work to the public;
> (vi) to make an adaptation of the work;
> (vii) to do, in relation to a work that is an adaptation of the first-mentioned work, any of the acts specified in relation to the first-mentioned work in subparagraphs (i) to (iv), inclusive; and
>
> b) in the case of an artistic work, to do all or any of the following acts:
> (i) to reproduce the work in a material form;
> (ii) to publish the work;
> (iii) to communicate the work to the public; and
>
> c) in the case of a literary work (other than a computer program) or a musical or dramatic work, to enter into a commercial rental arrangement in respect of the work reproduced in a sound recording; and
>
> d) in the case of a computer program, to enter into a commercial rental arrangement in respect of the program.

Rights and remedies flow in accordance with the arrangements made with respect to these activities and compliance with authorised activities by licensed users. The above legislative outline illustrates the complex tapestry of conduct and interactions that can give rise to equitable rights that need to be recognised and managed in an estate.

Commissioner of Stamp Duties (Qld) v Livingstone
[1965] AC 694

In this case the court recognised that in a deceased estate, while the legal ownership of the estate property vests in the legal personal representative of the estate, it is the beneficiary that normally has the right to receipt of the estate property, subject only to due administration of the estate. That right of due administration of the estate and the right to receive that portion of the estate property directed by the will, are equitable rights of the beneficiary in the estate. Equity will aid the beneficiary to require a correct administration of the estate in his or her

favour. Absent action from the estate's legal personal representative to recover property due to the estate from third parties, a beneficiary will have sufficient interest to pursue recovery of the property. In so doing, the beneficiary is concurrently exercising his or her remedy for the due administration of the estate and the property right of the estate legal personal representative. The law requires that both legal and equitable interests be recognised concurrently as a consequence of the ownership or possession of property.

Fiduciary relationships

5.43 While equitable proprietary interests flow out of the existence and possession of property, equitable fiduciary interests flow out of the particular characteristics that the law prescribes to certain kinds of relationships between persons.

Mason J summarised the current law in relation to fiduciary relationships in the case of *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 (*Hospital Products* case), where he observed (at [67]–[69]):

> Because distributor-manufacturer is not an established fiduciary relationship it is important in the first instance to ascertain the characteristics which, according to tradition, identify a fiduciary relationship. As the courts have declined to define the concept, preferring instead to develop the law in a case by case approach, we have to distill the essence or the characteristics of the relationship from the illustrations which the judicial decisions provide. In so doing we must recognize that the categories of fiduciary relationships are not closed (*Tufton v Sperni* (1952) 2 TLR 516, at p 522; *English v Dedham Vale Properties Ltd* [1978] 1 WLR 93, at p 110).
>
> The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations (cf *Phipps v Boardman* [1967] 2 AC 46, at p 127), viz, trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions 'for', 'on behalf of' and 'in the interests of' signify that the fiduciary acts in a 'representative' character in the exercise of his responsibility, to adopt an expression used by the Court of Appeal.
>
> It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed. See generally: Weinrib, 'The Fiduciary Obligation' (1975) 25 *University of Toronto Law Journal* 1, at pp 4–8. Thus a mere sub-contractor is not a fiduciary. Although his work may be described loosely as work which is to be carried

adviser engagement'. The knowledge financial planners have acquired regarding producing statements of advice is useful for completing this work. Of note, however, is the fact that estate planning deals with more than just the financial dimension of the client; therefore, the practices of estate professionals need also to be influenced as appropriate by the disciplines of other estates practice fields such as:

- accounting;
- tax;
- law;
- family business consulting;
- psychology;
- management;
- organisational development and change; and
- family dynamics, operations and dispute resolution.

As the multi-disciplinary focused occupations of estates practitioner and wealth adviser become more established, we can expect increasingly more settled practices to emerge. In view of the process orientation that is required to streamline and manage estate services, we expect that audio-visual communication methods including diagrams, sound recordings and animations may emerge as common tools in the estate planning process.

You have agreed with the client the advantage to be produced from your engagement.

10.9 If the outcomes of estate planning are to be reflective of the client's interests and objectives, the practitioner must, when writing up the initial terms of engagement with the client, be able to describe the advantage to be delivered to the client as a result of the engagement. When circumstances emerge through the situation review that alter the originally stated outcomes for the engagement, then the impact of those circumstances on the terms of engagement needs to be considered and any engagement variations negotiated and approved by the client.

10.10 In taking this approach, the practitioner and client need to be able to agree what outcomes the practitioner will produce that will result in the client agreeing the engagement is completed, at least satisfactorily. If that cannot be done, then there are problems in the assignment that need rectification. In any estate planning assignment, the baseline goal of the engagement must always be the creation of a satisfied client.

You understand how the client connects to the economy and society

What defines the business, investment or working life of the client?

10.11 The estates practitioner, in dealing comprehensively with the interests of their client, is charged in an estate strategy review with understanding the nature and process of how a client is active in both society and the economy.

Estate planning is a process through which a client can enforce the social accountability of the assets in their estate. Undertaking estate planning requires the estates practitioner to consider how a client is engaged with regard to:

- active business interests;
- management of investment capital through structures such as trusts, companies and other arrangements;
- the direct ownership of property; and
- the control or management of capital held for social, community or charitable purposes.

The social and community accountability of clients can be expressed through personal activities including donations to charitable causes, social, charitable, philanthropic and community and family support activities as well as the formation and operation of philanthropic capital management vehicles such as private ancillary funds (PAFs) and accounts with philanthropic intermediaries such as community foundations.[4] It is through the expression of the social accountability of a client that the values of the client enliven and drive the management and operation of their estate. Social contribution activities of clients can be generally described as:

1. casual philanthropy — give when asked;
2. passive philanthropy — establish a process to give regularly to some agency who will deliver the desired social impact;
3. active philanthropy — be engaged with both the donation and the delivery of the social impact desired.

Social impact can be defined as action that 'contributes to creating a positive, meaningful and sustainable change for the benefit of society and particularly those at disadvantage as a result of systemic, long-term problems'.[5] A client's perception of their role and function in society will shape any objectives they have for social impact. The practitioner cannot mandate a client to have values, but they need to respond to whatever values of the client drive their objectives for the administration of their estate.

10.12 In contrast, the market economy-based activities of clients are based on the manner of their work including investment in the economy that can include involvement with any of these sectors, which are recognised by the Australian Bureau of Statistics:[6]

- Div A — Agriculture, forestry, fishing and hunting;
- Div B — Mining;
- Div C — Manufacturing;

4 For more information, see <http://communityfoundations.philanthropy.org.au/community-foundations-in-australia/>.

5 Following the commentary at <http://csi.edu.au/about-social/what-is-social-impact/>.

6 This classification is taken from the Australian Bureau of Statistics 1292.0 — Australian and New Zealand Standard Industrial Classification (ANZSIC), 1993.

- Div D — Electricity, gas and water supply;
- Div E — Construction;
- Div F — Wholesale trade;
- Div G — Retail trade;
- Div H — Accommodation, cafés and restaurants;
- Div I — Transport and storage;
- Div J — Communication services;
- Div K — Finance and insurance;
- Div L — Property and business services;
- Div M — Government administration and defence;
- Div N — Education;
- Div O — Health and community services;
- Div P — Cultural and recreational services; and
- Div Q — Personal and other services.

The professions are not only participants in the economy but also provide services to all the sectors set out above. No professional can be an expert in all areas of human occupation and endeavour. It is for this reason estate services engagements, in anything other than the simplest of cases, progress as a collaboration between industry experts, relevant professionals and the client in order that complete solutions and schemes of management for a client's estate and interests are established. Establishing the normative limits of your responsibility in an engagement is an essential risk management objective for any practitioner in any estate planning engagement.

You understand the significant threats and risks affecting the client

Is the client focused on all issues of concern?

10.13 Any analysis of a client's needs must include a consideration of the particular risks to which a client may be subject. Clients will invariably have their own assessment of these risks but it is the role of the adviser to test the accuracy and validity of the client's perception of risks to which they may be subject. These risks normally include:

- Life risks:
  - health;
  - longevity;
  - domestic relationship continuity; and
  - family or estate beneficiary vulnerability;
- Economic risks:
  - taxation;
  - fiscal liabilities;

  - rates of financial return;
  - economic environment decline;
  - shortening economic life of investment assets;
  - financial distress in estate beneficiaries; and
  - solvency of client, family or successors;
- Legal risks:
  - legal compliance risk;
  - governance risk in estate structures and legal personal representation;
  - forced heirship from non-Australian jurisdictions;
  - inheritance tax from non-Australian jurisdictions; and
  - enforceability of offshore arrangements on Australian located assets.

Estates advisers from all disciplines may have a role in assisting a client to deal with these risks. Any justification of a client's situation as being a simple case needs to be made in the light of an objective consideration of their actual circumstances and a reasoned conclusion that factors adding complexity do not apply in their situation.

Client concerns set a primary context for advice

10.14 Advice is never delivered in a vacuum. Estate planning has developed as the strategic advisory discipline that assists both estates practitioners and their clients to efficiently construct plans for the management, operation and succession of a client's estate. Using a standardised methodology for this service is vital to meet professional service quality requirements. It is the features of the estate advisory service that provide the context for the client's implementation of the advice.

Estates practitioners need to challenge themselves continually and test the usability of their advice. Clearly separating the delivery of strategic, operational and transactional fulfilment services in the scope of an estate engagement is a prerequisite to managing these phases of an estate services engagement efficiently and facilitating the usability of the advice.

10.15 Estate advice is grounded in estate strategy and the immediate concerns of our client. This simply is the method by which a client achieves their objectives and is generally motivated by issues such as:

- security;
- wellbeing;
- a legacy to:
  - family;
  - community; and
  - others; and
- a life simplified or empowered.

In moving from agreeing estate strategy to establishing and implementing the estate plan, the first hurdle is for the adviser to establish the outcomes that the client is seeking to be satisfied by the strategy. Some examples of these include the following.

10.16 Financial objectives These objectives relate to financial stability for the client, their family and successors as appropriate by:

- protecting assets from third party claims;
- managing the interests of vulnerable beneficiaries;
- assuring support to surviving spouse and family; and
- assuring the continuation or orderly sale of the family business.

10.17 Family objectives Family objectives may include:

- educating the grandchildren;
- protecting the kids' inheritances;
- spending the kids' inheritances;
- managing family longevity;
- managing family incapacity; and
- establishing the means for a family to manage its collective capital available for investment for the benefit of itself and succeeding generations.

10.18 Other objectives Other objectives may include:

- establishing the means for enduring social and community contribution as appropriate by your client, their business interests and their successors;
- responding to foreign, tribal and customary law; or
- implementing or responding to agreements and choices made before death or disability.

Once the client's objectives are understood, then agreeing on the method by which they will be achieved can then be undertaken.

You adopt as necessary a two-axis model for estate advice

10.19 In **Chapter 9**, we introduced this model of advice delivery proposed by James Grubman and Keith Whitaker.[7]

The core issue for the estate planner is to make sure they choose an appropriate method of engaging with their client. There are a range of candidate engagement modes in which family, personal and financial risk are counterbalanced in a variety of ways. Estate planners must embrace all presented dimensions of the client's situation and deal with those dimensions in a way that also responds to the client's objectives for the engagement.

7 J Grubman and K Whitaker, 'A Two-Axis Model of Financial Advising', *FFI Practitioner*, Nov 2008; <www.jamesgrubman.com/TwoAxisModelofFinancialAdvising_2009.pdf>.

Start to plan — characterising client needs

10.20 As we craft our advice to our clients, we need to reflect about how the use of our advice will satisfy their needs. In our advice, we normally lead our clients through strategic choices between various estate operational choices, such as:

- asset protection versus small business tax concession qualification;
- family or personal representatives versus public or corporate representatives;
- managed funds versus direct asset ownership and direct asset manager management mandates;
- providing long-term income streams for the family versus short-term capital break-up on death of an asset owner; and
- the need for long-term capital growth to maintain the real value of their estate over time.

In the final analysis, we have to identify the choices a client can make that will result in their objectives or requirements being met. These choices tend to revolve around:

- appointing legal personal representatives during life and to function after death;
- establishing management succession rules for businesses, companies, trusts and similar entities;
- establishing administration and succession rules for superannuation and any associated self-managed superannuation funds;
- establishing investment administration and beneficiary accountability rules for long-term family capital management;
- establishing testamentary trusts in the wills of parents in order to provide protected income streams to the parents and their successors, not just their children;
- establishing testamentary trusts in order to address concerns about re-partnering risk on the death of the first spouse; and
- establishing testamentary trusts in order to keep the legal ownership of trust property within Australia and manage the multi-jurisdiction risk in the operation of a client's affairs.

10.21 As we review our advice to clients we need to ask ourselves, how does this solution meet the needs of my client? Have we adequately explained what is in it for them when they adopt my solution? Advisers should adopt a client-centred explanation of their solutions that relates to the following client objectives:

- affairs management;
- wealth preservation;
- wealth transfer;
- family continuity;
- legacy within society, community and family;

- financial security and compliance; and
- business ownership, control and transfer.

Reflecting about estate administration strategy

10.22 If our advice always connects the proposed solution with the declared needs of our client, its effectiveness and clarity should not be called into question. Whether clients will follow our advice is, however, another matter and beyond our formal responsibility. The method of undertaking those activities that result in the client's estate administration objectives being met is the estate administration strategy of the client. This client-led approach to estate planning is fundamental to optimising the business in which the estate planning is practised for the attraction and retention of clients.

Starting the planning conversation

10.23 **Table 10.1** (see **10.30**) sets out some initial questions that focus on framing the most common concerns of private, not-for-profit and commercial clients.

These questions are not mutually exclusive and are offered simply as entry points for estate planning discussions.

Is my case simple?

10.24 Simple estates will generally be focused on personal ownership of estate property and be of a scale that will (absent tax, beneficiary vulnerability and asset protection concerns) generally make direct ownership and transfer of estate assets the most appropriate estate asset ownership model.

Clients will often have an erroneous view about the level of complexity of their affairs. Advisers need to build a consensus about this issue as quickly as possible with their client. In this section of the chapter, we set out a number of approaches for discussing issues with the client. It is the adviser's role to use their knowledge of the client's circumstances to filter these issues and help the client come to grips with the essence of the matters before them.

As the indirect capital ownership of clients increases with their accumulation of interests in superannuation, businesses and other enterprises, so too does the complexity of their estate planning. It is the adviser's role to identify those factors which create complexity in the estate and to advise how the client should respond to their influence.

Simple cases are normally characterised by binary (clear and evaluable A/B) choices being available to the client.

When can I justify estate structures?

10.25 It is becoming a currently accepted norm in the financial services sector that absent any other justification such as imminent bankruptcy, approximately $200,000–$500,000 of subscribed capital, or the ability to grow

the fund to this size in the short term, for example, 6–36 months, is required in order that a private passive investment focused capital management structure such as a self-managed superannuation fund (SMSF), family trust, testamentary trust or prescribed private fund can become self-sustaining while also providing market competitive investment returns. While it may be appropriate to consider these structures for clients with particular risk profiles or wealth management objectives while having lower capital levels, it is beyond this threshold that we find these structures become a normal feature of a client's estate.

What triggers the need for estate structures?

10.26 As the population continues to age and government responsibility for social services becomes increasingly constrained, it is necessary that clients be challenged to consider the extent to which they need to ensure their families are self-sustaining economic entities through the lives of at least three generations of family members (as this will generally be the span of generation that the trust perpetuity period of 80 years will capture).

Attaining this objective requires that families harness not only the savings from workers within families but also the investment power of savings, windfalls and inheritances. The superannuation environment provides a starting point for families to implement structures and processes to achieve these objectives.

Depending on the scale of wealth to be managed, clients may also have to consider, as appropriate to their circumstances:

- how a person's business interests and cultural or creative output can serve the needs of subsequent generations;
- how inheritances can be managed separately from business, superannuation and other investment interests;
- how the longevity of family members can challenge the role of superannuation in long-term family capital management if superannuation strategies remain focused on allocated pension and market-linked pension income streams;
- how trusts can provide a longer term capital management framework for families than superannuation;
- how the superannuation tax concessions are relevant to the circumstances of each worker;
- to what extent a person's estate is to be managed for social and community accountability;
- to what extent third party risk can limit a person's ability to respond to the full range of their personal, family, social and community accountabilities; and
- the structures and processes to limit the impact of third party risk on the management of a person's estate.

There are no stock answers to these questions. The circumstances, objectives and intentions of each client must be examined as needed to formulate answers to strategic questions such as these. In this chapter, we will be exploring in more detail how estates practitioners can best approach the strategic advice requirements of their clients.

10.27 While government policy may be focused on retirement incomes for the current working generations, many workers have an interest in ensuring that their successors are able to profit from the capital accumulations they have made.

10.28 It is clear that the economic bull markets of the decades between 1987–2005 have already transferred substantial wealth into the currently working or retired generations. As these people die, their successors are challenged by the choice of either taking the money into their personal estate and exposing it to all third party risk in their estate, or (providing that appropriate estate structures exist), maintaining the integrity of the investment pool in the estate and working to operate and enlarge that pool in order that it can provide an effective common capital base for subsequent generations.

10.29 As clients age, they also need to consider the extent to which they are prepared to assist their local communities to accumulate social capital to maintain community services with a focus that cannot otherwise be provided through federal, state and local government programs. The social and community accountabilities of clients generally reflect the extent to which the business interests and personal values of the client are served by the community connection of the client. This is a personal matter for each client that must be addressed on a case-by-case basis.

Moving from issues to action

10.30 It is the role of the estates practitioner to draw out and present a range of estate management options that are appropriate to the circumstances of the client. Once the strategic focus of the estate plan is decided, then the establishment of suitable estate management and operation processes can occur.

TABLE 10.1: FRAMING THE ISSUES

	ESTATE STRUCTURES	ESTATE MANAGEMENT AND OPERATIONS	ESTATE REPRESENTATION AND SUCCESSION
Private client	What are the appropriate forms of ownership of my estate?	Do I manage my estate myself, employ others to manage my estate or have a mix of both?	How do I pass ownership and management of my estate to others? Should ownership, management and enjoyment of my estate be separated?

	ESTATE STRUCTURES	ESTATE MANAGEMENT AND OPERATIONS	ESTATE REPRESENTATION AND SUCCESSION
Commercial/ corporate client	Through what form of structure or vehicle do I operate my business?	What governance and accountability do I need to enforce in the management of my business? How do I balance the interests of shareholders and third parties in the operation of my business?	For what shareholder outcomes are my commercial or corporate interests being managed? Is the life of the business to extend beyond participation of its founders? How is the incapacity of key people in the business to be managed?
Not-for-profit (NFP) client	How best do I organise myself to deliver the desired social or community outcomes for which I am chartered?	What governance audit and accountability should operate in relation to the social and community objectives of the NFP client?	By what process does the NFP organisation sustain itself beyond the participation of its founder?

Moving on — engaging with client decisions — getting to a judgment call

A client's process of judgment[8]

10.31 In making decisions, clients are making judgments about advice and information they receive. Estates practitioners need to consider how their advice serves as an effective aid to the client making a judgment about their objectives or requirements. The client/practitioner relationship can be usefully characterised as a judge/adviser system.[9] Operating in this relationship entails the client doing the following:

Preparation phase:

- describe their concerns about the future;
- engage with the essence of issues;
- set clear parameters for advisers to assist the client;
- provide a shared language and context through which advisers engage with the client;

8 Following 'Making Judgment Calls', *Harvard Business Review*, October 2007, p 97.

9 See also <http://en.wikipedia.org/wiki/Judge%E2%80%93advisor_system>.