

## Understanding unincorporated associations

The various advantages and disadvantages of these various analyses could be understood by reference to the following diagram. In essence this table records each of the five key analyses which have been described in this discussion and asks (a) whether or not each will be valid and (b) whether or not each provides the donor with sufficient control over the use of the property once it has been transferred to its intended recipient. In essence, if a transferor transfers property to a person then she will want to know that that property will be used for the purpose for which she transferred it originally, whereas it is possible of course that when the officers of the unincorporated association receive the property then they may decide they want to use it for purposes of which the transferor would not approve. Therefore, the fiduciary offices (like trustee and agent) offer protection for the transferor in that the fiduciary is bound by her fiduciary duties to use the property appropriately, whereas if the property is the subject of a gift then the recipient acquires "complete control" over the property and so is free to do with the property whatever she wishes. Here is the table then.

<i>Various analyses of transfer to unincorporated association</i>	<b>Abstract purpose trust</b>	<b>"People trust"</b>	<b>Gift passing "complete control"</b>	<b>An accretion to funds</b>	<b>Taking property as agent subject to mandate</b>
<i>Leading case exhibiting this analysis</i>	<i>Leahy v Att-Gen NSW</i>	<i>Re Denley</i>	<i>Re Lipinski</i>	<i>Re Recher</i>	<i>Conservative Association v Burrell</i>
<i>Valid or Void?</i>	Void	Valid	Valid	Valid	Valid
<i>Does the transfer retain control of money after transfer?</i>	Yes, but void	Yes, because governed by trustee's fiduciary duties	No, because all title passes	No, because governed only by terms of association's constitution	Yes, because governed by agent's fiduciary duties
<i>Is it clear who owns the property?</i>	Yes, but void	Yes, held on trust	Yes	No	No

On each set of facts, having analysed (as discussed already in this section) which analysis best fits the facts of the situation, it is then important to advise a transferor as to which of the various possible structures offers the transferor the best combination of valid transfer and suitable control over the property. For example, if the transferor is also one of the officers of the association who will receive the property on behalf of that association, then having little control over the property once received would not bother her particularly; whereas if she had no control over that body then she may require there to be some control over the recipient once the property is transferred to the unincorporated association. A lawyer's role is to advise her client on the best structure for her goals. However, it is important to note that it is not a lawyer's (nor a student's) role simply to assume that the analysis which suits the client best is the one which necessarily applies: instead one must look at the circumstances and recognise which analysis honestly fits the circumstances best, and if one has the luxury of being able to structure the circumstances for the transferor before property is transferred then one must ensure that the structure actually embodies the desired result. For example, if one wishes to seem most like *Re Denley* then one should use the precise formulation used in that case by Goff J.