EXTENDING THE LIFE OF A DISCRETIONARY TRUST

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I INTRODUCTION

Like human beings, discretionary trusts have a limited life span. The termination of a trust relationship may trigger capital gains tax and State duties. For this reason there is often a financial incentive to extend the life of a trust. Whether it is possible to extend the life of a discretionary trust and the circumstances in which that can occur are the subject of this article.

There are three requirements that must be satisfied in order to extend the life of a discretionary trust:

(a) the vesting date must still be in the future;

(b) there must be a mechanism available to amend the trust; and

(c) the extension of time must be within the trust's perpetuity period.

II THE VESTING DATE MUST BE IN THE FUTURE

It may seem odd to include this requirement, but in practice it is surprising how often solicitors or their clients discover too late that a trust has vested. If the trust has vested (or more correctly, interests in the trust property have become vested interests) it is too late to undo the damage. Like physicians, trust lawyers may be able to revive a trust that is close to dying, but a discretionary trust that has vested is beyond recall.[1]

When a trust "vests" the trust relationship does not necessarily cease to exist. An interest is "vested" if –

(1) the identity of the person who is to take is ascertained;

(2) there is no condition precedent to its becoming possessory other than the regular termination of the prior estates, and

(3) where the interest is included in a gift to a class, the exact fraction of interest of each taker is ascertained.[2]

A discretionary trust vests when the trustee ceases to have any discretionary powers to distribute property or otherwise to alter the entitlements of the beneficiaries. But this does not mean that the trustee ceases to hold property on trust. The trustee may continue to hold title to the trust property after the vesting day, absolutely for the named individual or individuals.[3]

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[1] The Commissioner of Taxation has now issued a draft ruling, TR 2017/D10, dealing with the consequences of the vesting of a discretionary trust. In the ruling he correctly rejects an argument that a trust's vesting date may be extended by implication.

[2] The word "vested" carries several meanings – see H Ford, W A Lee, M Bryan, I G Fullerton and J S Glover, *The Law of Trusts* (Thomson Reuters, 4th ed, 2012) [7.10610]-[7.10690]. This is the meaning the word carries when it is used in connection with the rule against perpetuities.

[3] See also TR 2017/D10 at [15].

Upon vesting, one or more of the beneficiaries become absolutely entitled to the assets as against the trustee. If there is one beneficiary who becomes absolutely entitled to an asset, CGT event E5 happens and the trustee becomes liable for CGT on the difference between the market value of the assets and their cost base.[4] The tax liability may ultimately be borne by the beneficiaries if one or more of them is entitled to the trust income,[5] or if the beneficiary who becomes absolutely entitled is also specifically entitled to the capital gain.[6] If two or more beneficiaries become absolutely entitled to a trust asset CGT event E5 may not happen, depending upon the view one takes of "absolute entitlement" and the nature of the trust property.[7]

It is therefore essential before taking any further steps to ensure that the vesting date has not yet arrived.

III THERE MUST BE A MECHANISM FOR VARYING THE VESTING DATE

By a "mechanism" I mean one or more of a power of amendment in the trust instrument; beneficiaries' consent to the variation, or a court order. I deal with each of these in turn.

A *Power of amendment*

It is only possible for the trustee to extend the life of a trust if the trustee has power to vary the terms of the trust. Some trust instruments confer a specific power on the trustee to extend the vesting date. If there is no specific power, most trust deeds confer a general power of variation on the trustee and it has been held in the context of a modern discretionary trust that a variation provision ought to be given its natural meaning and should be interpreted "in such a way as to give it its most ample operation."[8]

Even so, it is essential to read the power of variation carefully and to adhere to any limitations that the power imposes on the trustee. For example, some trust deeds require the trustee to obtain the consent of a Guardian, or Appointor.

If the deed lacks a power of variation there may nevertheless be a power that permits amendments to the trust, for example, a widely drawn power of appointment or power of advancement.

B *The beneficiaries may collectively agree to vary the terms of the trust*

If the trustee lacks a power authorising it to extend the life of the trust an extension may nevertheless be obtained if the beneficiaries collectively agree to vary the terms of the trust. Under the consent principle in *Saunders v Vautier*,[9] if all the beneficiaries of a discretionary trust are sui juris they may instruct the trustee to terminate the trust and transfer the trust property to them.[10] Under this principle, the beneficiaries may also vary the terms of the trust with the trustee's assent, provided they can obtain unanimous agreement on the terms of the variation.[11] This principle

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[4] *Income Tax Assessment Act 1997* (Cth), s 104-75(1), (3).
[5] See *Commissioner of Taxation v Bamford* (2010) 240 CLR 481.
[6] In accordance with *Income Tax Assessment Act* 1997 (Cth), s 115-228.
[7] See Draft Taxation Rulings TR 2004/D25 and TR 2017/D10 at [18]-[19].
[8] *Kearns v Hill* (1990) 21 NSWLR 107, 109 (Meagher JA).
[9] (1841) 4 Beav 155; affirmed in *Saunders v Vautier* (1841) Cr & Ph 240.
[10] *Quinton v Proctor* [1998] 4 VR 469; *Re Smith* [1928] Ch 915.
[11] *Re Dion Investments Pty Ltd* (2014) 87 NSWLR 753, [46] (Barrett JA).

underpins the court's power to make an order varying the terms of a trust, which is outlined under C2 below.

C *Alternatively, the Court may vary the life of the trust*

There are two provisions that potentially give the courts jurisdiction to extend the life of a discretionary trust. The first of these, which allows the court to authorise trustees to engage in certain administrative acts, derives from the *Trustee Act 1925* (UK) s 57. This provision is found in all Australian jurisdictions, in various forms. The second, which derives from the *Variation of Trusts Act 1958* (UK), allows the court to vary the terms of a trust. This provision is found in all Australian jurisdictions except for New South Wales, and the Australian Capital Territory (ACT). I will consider first whether the provisions derived from *Trustee Act 1925* (UK) s 57 permit a court to extend the life of a trust.

1. Court's power to authorise trustees to engage in certain administrative acts

Section 63 of the *Trustee Act 1958* (Vic) is closely modelled on *Trustee Act* 1925 (UK) s 57. It provides that –

> "Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument (if any) or by law, the Court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose on such terms and subject to such provisions and conditions (if any) as the Court thinks fit and may direct in what manner any money authorized to be expended, and the costs of any transaction are to be paid or borne as between capital and income."[12]

There are two variations to this provision that are material to this article. First, in the ACT, New South Wales and South Australian provisions the words "including adjustment of the respective rights of the beneficiaries" replace the words "(if any)" where they appear the second time in s 63(1). Secondly, the Queensland and Western Australian provisions are not confined to a case where the proposed transaction is "expedient in the management or administration of any property vested in the trustee". In those States the court's jurisdiction also exists where a transaction "would be in the best interests of the persons, or the majority of the persons, beneficially interested under the trust …"

It has generally been thought that s 63(1) does not allow a court to extend the duration of a trust, because it is limited to amendments relating to the management and

[12] The equivalent provisions are *Trustee Act 1925* (ACT) s 81(1); *Trustee Act 1925* (NSW) s 81(1); *Trustee Act* (NT) s 50A(1); *Trusts Act 1973* (Qld) s 94; *Trustee Act 1936* (SA) s 59B; *Trustee Act 1898* (Tas) s 47; *Trustee Act 1958* (Vic) s 63A; *Trustees Act 1962* (WA) s 89.

administration of a trust, whereas a change to the duration of a trust would potentially result in a change in the beneficial interests of the beneficiaries.[13]

Nevertheless, in *Stein v Sybmore Holdings Pty Ltd*[14] Campbell J held that *Trustee Act 1925* (NSW) s 81(1) did authorise such an extension. In that case the trustee applied to the New South Wales Supreme Court for an order under s 81 of the *Trustee Act 1925* (NSW) empowering the trustee to defer the vesting day to a date not later than 31 March 2058 (which was said to be the expiry of the perpetuity period). The Court considered that extending the vesting day would change the beneficial interests in the trust fund (at [28]) but held that s 81 of the *Trustee Act 1925* (NSW) authorised the amendment. At [34] Campbell J said that s 81 expressly states that the power it confers extends to "adjustment of the respective rights of the beneficiaries". His Honour pointed out that those words are not found in s 57 of the *Trustee Act 1925* (UK). The decision was followed in *Barry v Borlas Pty Ltd*.[15]

But in *Re Dion Investments Pty Ltd*,[16] the NSW Court of Appeal disapproved of the decision in *Stein v Sybmore*. In *Re Dion Investments Pty Ltd* the trustee applied to the Court for, among other things, an order conferring on it the power to amend the terms of the trust. The trial judge (Young AJ) refused to make the order sought, stating that while he did not wish to criticise the decision in *Stein v Sybmore Holdings Pty Ltd*, he disagreed that "transaction" in s 81(1) extends to amendment of the trust deed.

Barrett JA, with whom Beazley P and Gleeson JA concurred, agreed at [100] with the trial judge that the variation of the terms of a trust is not itself a "transaction" within s 81(1). His Honour concluded that the court may only grant to a trustee specific powers related to the management and administration of the trust property, being powers that co-exist with and, to the extent of any inconsistency, override those conferred by the trust instrument or by law. Conferral of a power to vary the trust would be outside s 81(1).[17]

A different conclusion was reached in *Re Arthur Brady Family Trust,*[18] in which the Queensland Supreme Court made orders under s 94 of the *Trusts Act 1973* (Qld) empowering the trustees of two discretionary trusts to amend each trust deed by changing the vesting date to the date 80 years from the date the first trust was established. The first trust had been established on 16 February 1977 with its vesting date defined as the date 40 years from the execution of the deed or such earlier day as the trustee determines. The second trust was established in 2008 with a vesting date of 16 February 2017 or such earlier date as the trustee determines.

In his judgment, Philip McMurdo J distinguished the first instance decision in *Re Dion Investments*, on the basis that s 94 of the *Trusts Act 1973* (Qld) is wider than s 81(1) of the *Trustee Act 1925* (NSW) because the court has jurisdiction if the transaction would be in the best interests of the persons beneficially interested under the trust. His Honour pointed out (at [25]) that s 94 had been deliberately cast in broader terms than s 81(1), in order to overcome the House of Lords' decision in

[13] At least since the decision in *Chapman v Chapman* [1954] AC 429.
[14] [2006] NSWSC 1004; 2006 ATC 4641.
[15] [2012] NSWSC 831
[16] (2014) 87 NSWLR 753.
[17] Followed by McMillan J in *W E Pickering Nominees Pty Ltd v Pickering* [2016] VSC 71 at [92]-[99]. There was a successful appeal but this aspect of the decision was not challenged. See also *Re Portman Estate* [2015] EWHC 536 (Ch), in which Bliss J declined to confer power on trustees to amend administrative powers in the future.
[18] [2014] QSC 244; [2015] 2 Qd R 172.

Chapman v Chapman.[19] His Honour considered that the amendment of the trust deed to change the vesting date could be fairly characterised as a "transaction", despite the views expressed by Young AJ in *Re Dion Investments*, because "transaction" in s 94 needs to be read in light of the words of the Queensland section, which are not limited to orders that are expedient in the management or administration of trust property. Barrett JA in *Re Dion Investments* referred to the decision in *Re Arthur Brady Family Trust* without disapproval.

Therefore, in summary, it appears that the Queensland and Western Australian versions of s 63(1) of the *Trustee Act 1958* (Vic) do allow the court to give power to a trustee to extend the duration of a trust, while the equivalent sections in other jurisdictions do not.

2. Court's power to vary trusts

The *Variation of Trusts Act 1958* (UK) was enacted in response to the decision in *Chapman v Chapman*,[20] and has been adopted in all Australian jurisdictions except for New South Wales and the Australian Capital Territory.[21] The Victorian provision, s 63A, provides as follows –

> "(1) Where property, whether real or personal, is held on trusts arising, whether before or after the commencement of this Act, under any will settlement or other disposition, the Court may if it thinks fit by order approve on behalf of -
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> (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of minority or other incapacity is incapable of assenting; or
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> (b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class (as the case may be) if the said date had fallen or the said event had happened at the date of the application to the Court; or
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> (c) any person unborn; or
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> (d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined –
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> any arrangement (by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the

[19] [1954] AC 429.
[20] [1954] AC 429.
[21] *Trusts Act 1973* (Qld) s 95; *Trustee Act 1936* (SA) s 59C; *Variation of Trusts Act 1994* (Tas) ss 13-14; *Trustee Act 1958* (Vic) s 63A; *Trustees Act 1962* (WA) s 90. The Northern Territory has adopted an abridged version of this provision in *Trustee Act* (NT) s 50A (2)-(9). This provision is peculiar to the Northern Territory and is not considered any further in this article.

> powers of the trust, or managing or administering any of the property subject to the trusts: Provided that except by virtue of paragraph (d) of this subsection the Court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person."

A material variation from this provision appears in s 59C of the *Trustee Act 1936* (SA). That section confers a power on the court to "vary or revoke" the provisions of a trust. In any proceedings under s 59C, the interests of all actual and potential beneficiaries must be represented, and before the court can exercise its powers it must be satisfied as to a number of matters, including that the application to the court is not substantially motivated by a desire to avoid or reduce the incidence of tax. This last condition is likely to prevent applications under s 59C to extend the duration of a trust in order to avoid triggering capital gains tax and stamp duty liabilities, so I will not say anything further about the South Australian provision.

It is important to note that under s 63A the Court does not vary the provisions of a trust. Rather, s 63A and its equivalents provide a statutory extension to the consent principle established in *Saunders v Vautier*:[22]

> "Under [the Act] the court does not itself amend or vary the trusts of the original settlement. The beneficiaries are not bound by variations because the court has made the variation. Each beneficiary is bound because he has consented to the variation. …So we have an alteration of the settlement which was not made by the settlor or by the court as being empowered to make it, but which was made by the beneficiaries quite independently of the settlor or of any power, express or implied, given or deemed to have been given by him."[23]

The requirements for an application under s 63A are that –

(a) every person whom the arrangement affects must consent to it, or have the court approve it on their behalf;

(b) the arrangement[24] must be for the benefit of the persons on whose behalf the Court approves the arrangement, other than those referred to in paragraph (d). "Benefit" usually means "financial benefit", although it may also be sufficient that the variation provides a moral or social benefit to the relevant beneficiary;[25] and

(c) the Court has an overriding discretion whether to make the orders.

Two successful examples of the use of s 63A to extend the life of a trust are *Coote v Clark & Ors* and *Re Plator Nominees Pty Ltd*.[26]

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[22] (1841) Cr. & Ph 240

[23] *IRC v Holmden* [1968] AC 685, 701 (Lord Reid).

[24] "Arrangement" includes "any proposal which any person may put forward for varying or revoking the trusts": *Re Steed's Will Trusts* [1960] Ch 407, 419 (Lord Evershed).

[25] *Re Holt's Settlement* [1969] 1 Ch. 100; *Re Weston's Settlement Trusts* [1969] 1 Ch 223; *Re Remnant's Settlement Trusts* [1970] Ch 560; *George v Kollias* [2007] VSC 46; *Re Clore's Settlement Trusts* [1966] 1 WLR 955, approved in *FCT v Vegners* 89 ATC 5274, 5278 (Gummow J).

[26] *Coote v Clark & Ors* [2007] WASC 97; *Re Plator Nominees Pty Ltd* [2012] VSC 284. Compare *W E Pickering Nominees Pty Ltd v Pickering* [2016] VSC 71, in which the Court refused to vary the trust as requested. An appeal was allowed on grounds of denial of procedural fairness: [2016] VSCA 273.

3. It is uncertain whether s 63A authorises variations to widely drawn discretionary trusts

If the only beneficiaries who do not consent expressly are minors or individuals who are subject to a legal disability the Court may make orders affecting a discretionary trust. Under s 63A(1)(a) the Court has power to consent on behalf of "*any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of minority or other incapacity is incapable of assenting*". "Interest" in paragraph (a) has been held to cover a person's rights as an object of a discretionary trust: see *Re Clitheroe's Settlement Trusts* and *Re Bristol's Settled Estates*.[27] The Court therefore has power to assent on behalf of beneficiaries under 18 years of age or who otherwise lack legal capacity.

Paragraph (c) of s 63A(1) empowers the Court to consent on behalf of any unborn beneficiaries.

In paragraph (b) of s 63A(1) it has been held that objects of a discretionary power satisfy the opening words, although they are not persons who become entitled by reason of becoming a person of a specified description or a member of a specified class.[28] "Interest" in paragraph (b) therefore has a different meaning to its meaning in paragraph (a).

The more difficult question is the scope of the exclusionary limb in paragraph (b). The exclusionary limb could be read to exclude almost everyone included in the opening words,[29] but it has been held that future spouses of a named beneficiary are not excluded,[30] nor are future members of a sporting club,[31] even though in both cases the beneficiaries appear to be within the literal meaning of the exclusion.

According to W A Lee the expression "any person" where it appears for the second time in paragraph (b) means "any ascertained person",[32] but there is no authority directly supporting this interpretation.[33]

A threshold issue in relation to s 63A is whether it is available for discretionary trusts in which anyone in the world could be added as a beneficiary (either under a specific power or a widely drawn power of variation). If the expression in the proviso to s 63A(1)(b) means "any ascertained person" the court arguably should be able to supply the necessary consents. But is the court's order required? It is submitted that it is not. A person who is not yet an object has no interest in the trust, not even a right to due administration of the trust. The consent of such a person should therefore not be required.[34]

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[27] [1959] 1 WLR 1159; [1965] 1 WLR 469.

[28] *Re Coate's Trusts*, [1959] 1 WLR 375, 378 (Harman J); *Re Clitheroe's Settlement Trusts*, [1959] 1 WLR 1159; *Re Steed's Will Trusts* [1960] Ch 407, 420 (CA).

[29] On a literal interpretation, the only individuals who would not be excluded would be persons who are capable of satisfying a unitary or class distinction upon the happening of more than one contingency – see J W Harris, *Variation of Trusts* (Sweet & Maxwell, 1975) 36-39, citing *Re Suffert's Settlement* [1961] Ch 1 and *In re Moncrieff's Settlement Trusts* [1962] 1 WLR 1344.

[30] *Re Clitheroe's Settlement Trusts* [1959] 1 WLR 1159; *Re Lister's Will Trust* [1962] 1 WLR 1441.

[31] *Re Keysborough Blue Danube Soccer Club* [2003] VSC 119.

[32] H Ford, W A Lee, M Bryan, I G Fullerton and J S Glover, *The Law of Trusts* (Thomson Reuters, 4th ed, 2012) [15.090].

[33] The arguments in favour of this construction are set out comprehensively in J W Harris, *Variation of Trusts* (Sweet & Maxwell, 1975) 36-41.

[34] This issue is discussed, but not determined in *Orb A.R.L. v Ruhan* [2015] EWHC 262 (Comm) [114]-[118] (Cooke J).

If the consent of persons yet to be added as objects is required an alternative to obtaining a court order would be for the trustee to release the power to add such persons as objects.[35]

IV THE EXTENSION OF TIME MUST COMPLY WITH THE TRUST'S PERPETUITY PERIOD

A *What is the perpetuity period?*

The outer limits of a trust's life span are defined by the rule against perpetuities. The rule prescribes a maximum period within which the interest of a beneficiary in trust property is required to vest.

The common law perpetuity rule requires that all interests in trust property must vest within the period of the lifetimes of one or more persons living when the trust is created, plus 21 years. The lifetimes that are relevant for this purpose are those referred to in the trust instrument, either expressly or by implication. Drafters of trust instrument often make use of a "Royal Lives" clause, which is a clause selecting as a vesting date the date of death of the last to die of the lineal descendants of a particular monarch living at the date of creation of the trust. For example:

> "The period ending 21 years after the death of the last survivor of the issue living on the date of this Settlement of his late Majesty King George V."

In order to determine whether a trust satisfies the common law rule it is necessary to establish that there is no possibility, however unlikely, that the trust might breach the perpetuity rule (the "initial certainty rule"). Statutory reforms have relaxed the operation of this rule in all Australian jurisdictions through the introduction of the "wait and see" rule.[36] Under this rule, if interests in property are capable of vesting within the perpetuity period, the court must wait and see if they actually do so. If interests in property do vest within that period, the trust is valid; if they do not, the trust is invalid.

The common law perpetuity period has also been reformed by statute in all Australian jurisdictions. Unfortunately, although those reforms share a common heritage,[37] Australian jurisdictions now adopt a number of different approaches:

(1) In Western Australia, Victoria, Queensland and Tasmania it is now possible to specify a fixed period of up to 80 years to be the perpetuity period.[38] Victoria, Queensland and Tasmania also have a provision, not found elsewhere, that if the trust instrument does not adopt the statutory perpetuity period but does specify "a date certain" as the date when the trust property is to vest, the instrument is deemed to adopt as the

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[35] See for example *Re Christie-Miller's Marriage Settlement* [1961] 1 WLR 462, where the Court's order included a recital that the appointor, by his counsel, had released the power of appointment so far as necessary to make the arrangement binding on any beneficiary who might become interested under any exercise of the power.

[36] *Perpetuities and Accumulations Act 1985* (ACT), s 9; *Perpetuities Act 1984* (NSW), s 8; *Law of Property Act* (NT), s 190; *Property Law Act 1974* (Qld), s 210; *Perpetuities and Accumulations Act 1992* (Tas), s 9; *Perpetuities and Accumulations Act 1968* (Vic), s 6; *Property Law Act 1969* (WA), s 103. South Australia has abolished the perpetuity rule, so needs no "wait and see" rule.

[37] The reforming legislation in all jurisdictions except for South Australia has been heavily influenced by the *Fourth Report of the English Law Reform Committee (The Rule Against Perpetuities)* 1954, including the Western Australian, *Law Reform (Property Perpetuities and Succession) Act 1962*, which was enacted before the *Perpetuities and Accumulations Act 1964* (UK).

[38] See *Property Law Act 1969* (WA) s 101; *Perpetuities and Accumulations Act 1968* (Vic) s 5(1); *Property Law Act 1974* (Qld) s 209; *Perpetuities and Accumulations Act 1992* (Tas) s 6(1). Cf s 1(1) of the *Perpetuities and Accumulations Act 1964* (UK).

perpetuity period a number of years equal to the number of years from the date of the instrument to the specified vesting date.[39]

(2) In New South Wales and the ACT the common law perpetuity period has been abolished and a statutory period of 80 years automatically applies.[40]

(3) In the Northern Territory the perpetuity period is 80 years unless an alternative period of a life in being plus 21 years is specified.[41]

(4) In South Australia the rule has been abolished,[42] subject to a power given to the Supreme Court, on application, to order the vesting of interests that have not vested after 80 years.[43] Such application may be brought by the Attorney-General, a trustee or certain other defined persons who might be expected to be potentially interested in the trust property.

B *Trusts to which the statutory perpetuity period applies*

If a trustee wishes to vary the vesting date of a discretionary trust, it must ensure that the new vesting date falls within the relevant perpetuity period. Different approaches are necessary, depending upon the relevant perpetuity legislation.

In Queensland, Tasmania, Victoria and Western Australia the settlor may adopt any fixed period of years up to 80 as the applicable statutory perpetuity period. The relevant provisions require the settlor to expressly adopt a statutory perpetuity period. By way of example, in a trust with a vesting date defined by reference to a "Trust Period" of 80 years:

> "'The Trust Period' means the period of 80 years beginning with the date of this Settlement. That is the perpetuity period applicable to this Settlement under the rule against perpetuities."

It is implicit in the relevant provisions that, subject to one exception,[44] if a trust is governed by a statutory perpetuity period of fewer than 80 years, this period cannot at any time be extended to take advantage of the full 80-year period referred to in the relevant provision. Nor is it possible to curtail the statutory perpetuity period below the period selected in the trust instrument. This is because the statutes fix a period to be the statutory perpetuity period. That period is not 80 years, it is the period the trustee initially selects. This interpretation is also consistent with the concept of the perpetuity period; that is, it is a period within which the trustee must exercise all the dispositive powers of the trust. If the trustee could exercise a power of variation to extend the perpetuity period it would be exercising dispositive powers (the power of variation) to allow interests to vest outside the perpetuity period.[45]

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[39] *Perpetuities and Accumulations Act 1968* (Vic) s 5(3); *Property Law Act 1974* (Qld) s 209(3); *Perpetuities and Accumulations Act 1992* (Tas) s 6(3). The provision is intended to save trusts that might otherwise breach the rule against perpetuities because the instrument does not formally adopt a fixed period, but its operation is problematic. Is a specified vesting date a date certain if the trustee has power to alter it?

[40] *Perpetuities Act 1984* (NSW) s 7(1); *Perpetuities and Accumulations Act 1985* (ACT) s 8(1).

[41] *Law of Property Act* (NT) s 187

[42] *Law of Property Act 1936* (SA) s 61.

[43] See *Law of Property Act 1936* (SA) s 62.

[44] See IV D below.

[45] See E Campbell, *Changing the Terms of Trusts* (Butterworths Lexis Nexis, 2002) [9.13] in relation to s 1 of the *Perpetuities and Accumulations Act 1964* (UK). Her analysis is also applicable to *Property Law Act 1974* (Qld) s 209(1) and its Australian equivalents.

If the trust instrument adopts a perpetuity period of the full 80 years but the vesting date would otherwise fall short of this period it would be possible to extend the vesting date to take advantage of the full perpetuity period. For example, if a trust instrument adopts a perpetuity period of 80 years but provides for a vesting date 60 years after the creation of the trust, it would be possible to extend the life of the trust to the full 80 years. But this would not be possible if the trust deed originally specified a perpetuity period of 60 years. Further, if an existing trust is governed by the statutory period it cannot be altered so as to introduce the common law period for the purposes of the rule against perpetuities. The legislation allows the settlor to adopt a fixed period of years as the perpetuity period; that choice having been made the common law period does not apply.

The facts in *Re Arthur Brady Family Trust*[46] may be adapted to illustrate the significance of the perpetuity period. Not all the provisions of the relevant deed are set out in the report of the decision, so it is uncertain whether the deed adopted a perpetuity period of 80 years,[47] but let us assume for the purposes of illustration that it did not. Clause 1(d) of the deed provided that the vesting day is 40 years from the execution of the deed or such earlier day as the trustee determines.

Under s 209(3) of the *Property Law Act 1974* (Qld) if the settlor adopts a "date certain" to be the vesting date, the trust instrument is deemed to specify as the perpetuity period a number of years equal to the number of years from the date of the taking effect of the instrument to the specified vesting date. It is doubtful whether cl 1(d) of the deed for the Arthur Brady Family Trust satisfies s 209(3). If it does not, and on the assumption that there was no provision expressly adopting a perpetuity period of a fixed period less than or equal to 80 years, the trust would be governed by the common law period, and would continue until the earlier of the revised vesting date and the end of the common law perpetuity period. If s 209(3) did deem a perpetuity period of 40 years then the trust would expire in January 2017, despite the court's orders (because the amended vesting date would fall outside the perpetuity period).

New South Wales and the ACT differ from Queensland, Tasmania, Victoria and Western Australia, in that for trusts created after the commencement of the relevant perpetuities legislation, an automatic 80 year perpetuity period applies.[48] Further, there is a transitional rule[49] that has the effect that the exercise of a power of appointment by a trustee of a NSW or ACT trust created before the commencement of the relevant perpetuities legislation (which are therefore subject to the common law perpetuity period) may convert it to one coming under the relevant statute, so that an 80 year perpetuity period applies.

South Australia has abolished the perpetuity rule, so there is no perpetuity rule restriction on extending the life of a trust in that State.

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[46] *Re Arthur Brady Family Trust; Re Trekmore Trading Trust* [2014] QSC 244; [2015] 2 Qd R 172.

[47] There is a passing reference at [20] to the applicant's objective being to extend the perpetuity period to 80 years, being the maximum permitted by law, but otherwise there is no consideration of the perpetuity period applicable to the trust.

[48] The position in the Northern Territory is the same, unless the settlor adopted the common law perpetuity period.

[49] *Perpetuities Act* 1984 (NSW), s 4(2); *Perpetuities and Accumulations Act* 1985 (ACT), s 3(2).

C *Trusts whose perpetuity period is a life in being plus 21 years*

It sometimes happens that a trust instrument in Victoria, Queensland, Tasmania or Western Australia does not adopt the statutory perpetuity period and also does not include a Royal Lives clause.[50] Trusts drafted in this manner may have a relatively short life span. If the vesting date has not yet arrived and the trustee has power to vary the provisions of the trust it may be possible to extend the vesting period, provided the variation does not offend the rule against remoteness of vesting. For example, a trust provides that it continues:

> "until the vesting day (which date shall be the date of death of the survivor of the said AB and BB or such earlier date as the Trustee in its absolute discretion may by instrument in writing under its seal so appoint) …"

The relevant perpetuity period of this trust is the death of the survivor of AB and BB plus 21 years. It would therefore be possible to extend the life of the trust within the currently applicable perpetuity period, by 21 years, but is a longer extension possible?

If the trustee has power to amend the deed, it could introduce new relevant lives by which the vesting date of the trust could be determined. Where a trust is governed by the common law period, a question arises whether new relevant lives can be introduced. The better view is that new relevant lives may be introduced, on the basis that under the common law rule the duration of all lives in being at the date of establishing the trust forms part of the common law perpetuity period.[51] What is really in issue is the change of the vesting period, which can plainly be done, provided there is an appropriate power of amendment and provided the new vesting period is within the perpetuity period.

There is therefore no reason from the point of view of the rule against perpetuities why trustees should not extend the duration of a trust governed by the common law period by exercising a variation power to introduce a "Royal Lives" clause.

D *Trusts varied under s 63A of the Trustee Act or by consent of the beneficiaries*

In *Re Holt's Settlement*,[52] Megarry J held that because a variation of trust owed its authority not to the settlement but to the order of the court and the assent of the adult beneficiaries, an arrangement made after the commencement of the *Perpetuities and Accumulations Act 1964* (UK) was an "instrument" within s 15(5) of that Act and it was therefore permissible to insert in the arrangement a provision adopting a fixed number of years under the *Perpetuities and Accumulations Act 1964* (UK). It therefore appears that if a trust is varied by consent of the beneficiaries or by order made under s 63A of the *Trustee Act 1958* (Vic),[53] it may also be given a new perpetuity period, even if the original trust adopted a fixed period of years that expires before the proposed extension to the life of the trust as the perpetuity period.

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[50] Trusts established in New South Wales and the ACT may also be governed by the common law perpetuity period if they were established before the commencement of the reforming legislation, but under the transitional rules referred to in note 47 above the trustee may attract a statutory perpetuity period of 80 years simply by exercising a power of appointment.

[51] See E Campbell, *Changing the Terms of Trusts* (Butterworths Lexis Nexis, 2002) [9.14].

[52] [1967] 1 Ch. 100, 120D–E.

[53] Or the equivalent provisions in *Trusts Act 1973* (Qld) s 95; *Trustee Act 1936* (SA) s 59C; *Variation of Trusts Act 1994* (Tas) ss 13-14; *Trustees Act 1962* (WA) s 90.

V CAPITAL GAINS TAX CONSEQUENCES OF CHANGING THE VESTING DATE

If a variation of trust terminates an existing trust relationship and creates a new trust, capital gains tax may be triggered by reason of any one of CGT events E1, E2 and A1 happening. CGT event E1 happens if you create a trust over an asset by declaration or settlement. CGT event E2 happens if you transfer an asset to an existing trust, while CGT event A1 happens if you dispose of an asset.

In principle one might have thought that a variation of a trust under the consent principle in *Saunders v Vautier* (and under s 63A of the *Trustee Act 1958* (Vic)) would cause the termination of one trust and the creation of a new trust, but this is not, generally speaking, the interpretation the courts have adopted. In *IRC v Holmden*,[54] a majority of the House of Lords held that an arrangement approved under the *Variation of Trusts Act* 1958 (UK) to extend the duration of a trust did not terminate the original trust. According to Lord Morris:

> "The arrangement … did not bring about the ending of the discretionary trust; it brought about its prolongation."[55]

Two more recent decisions to similar effect are *Wyndham v Egremont* and *Wright v Gate*.[56]

A recent exception to this approach may be found in *obiter* remarks of Barrett JA that:

> "the situation may in truth be one of resettlement upon new trusts rather than variation of the pre-existing trusts ..."[57]

Observations by Megarry J in *Re Holt's Settlement* may reconcile these differing views:

> "Here the new trusts are in many respects similar to the old. In my judgement, the old trusts may fairly be said to have been varied by the arrangement whether the variation is effected directly, by leaving some of the old words standing and altering others, or indirectly, by revoking all the old words and then setting up new trusts partly, though not wholly, in the likeness to the old. One must not confuse machinery with substance; and it is the substance that matters. Comparing the position before and after the arrangement takes effect, I am satisfied that the result is a variation of the old trusts, even though effected by the machinery of revocation and resettlement."[58]

Therefore, the courts have generally adopted a pragmatic view – if in substance the trust maintains its identity the courts accept that it has been varied, rather than terminated.[59]

The Commissioner of Taxation has also adopted a pragmatic view. In Taxation Determination TD 2012/21 the Commissioner accepts that CGT events E1 and E2 do

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[54] [1968] AC 685.
[55] At 704B. Lords Hodson and Guest agreed with Lord Morris. Lords Reid and Wilberforce dissented.
[56] *Wyndham v Egremont* [2009] EWHC 2076 (Ch); *Wright v Gate* [2012] 1 WLR 802. There is a full discussion of these authorities in David Marks, 'Changing Perpetuity Periods and Vesting Dates' (2013) 16 *The Tax Specialist* 127, 130–132.
[57] *Re Dion Investments Pty Ltd* (2014) 87 NSWLR 753, [46].
[58] [1969] 1 Ch 100, 177.
[59] Another example of this approach, in the context of a trustee exercising a power of variation, may be found in *FCT v Clark* (2011) 190 FCR 206.

not happen if the terms of a trust are changed under a valid exercise of a power contained within the trust's constituent document or varied with the approval of a court. Example 3 in the Determination is an amendment that includes an extension to the vesting date of the trust. The Commissioner confirms that this does not give rise to any CGT event.

Under the reasoning in the Determination, CGT event A1 also would not happen, because provided there is some continuity of property and membership of the trust, an amendment to the trust that is made in proper exercise of a power of amendment contained under the deed would not have the result of terminating the trust, irrespective of the extent of the amendments so made, so long as the amendments are properly supported by the power.[60]

The Determination does not consider the case of a trust varied by consent of the beneficiaries, but it does indicate that a variation by order of a court would not trigger CGT. Given that variations under s 63A of the *Trustee Act 1958* (Vic) and its equivalents depend on obtaining the express consent of the adult beneficiaries it should follow that no CGT event happens if the life of a trust is extended under the consent principle without the approval of the Court.[61]

VI CONCLUSIONS

When considering whether it is feasible to extend the life of a trust it is necessary to consider first whether the trustee has power to make a suitable amendment. Whether the trustee is authorised to extend the life of the trust will depend upon whether –

- interests in the trust property have already vested;
- the trust instrument confers on the trustee an adequate power of variation or an alternative power that may be exercised to vary the trust; and
- the extension will breach the perpetuity period of the trust.

If the trustee is not authorised to vary the trust it may nevertheless be possible to amend the deed under the "consent" principle, either by obtaining the express consent of all the beneficiaries or by way of an application to the Supreme Court under s 63A of the *Trustee Act 1958* (Vic) and its equivalents. In Queensland and Western Australia it may also be possible to extend the life of a trust under the court's power to authorise trustees to engage in certain administrative acts

An extension to the life of a standard type discretionary trust as a result of either the exercise of a power to vary the trust or a court order should not ordinarily trigger a CGT event.

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[60] Taxation Determination TD 2012/21 [21]-[24].

[61] A private ruling to this effect is private ruling authorisation number 1012928025721, http://law.ato.gov.au/atolaw/browse.htm?category=n.