The Tax Institute

VIC Tax Forum

Taxation of trusts – Common issues in preparing trust deeds and how to deal with them

Presented at the Grand Hyatt Melbourne on 20-21 March 2025

Dr Philip Bender, ATI
Victorian Bar

Contents

1. Overview

This paper is aimed at examining some issues in drafting trust deeds and problems that can arise therein. The objective of the paper is not to comprehensively outline all possible issues, but to give some examples and then to outline potential methods of dealing with drafting problems that rise. The focus of the paper is on discretionary trust issues, although there are some other examples also covered.

One of the most common problems that I see in practice is clients being given stock standard trust deeds that are not tailored to meet their particular circumstances and objectives. They may contain clauses that are not appropriate for a particular client or their situation. Unfortunately, that seems to be a difficult problem to deal with due to the rise of companies that specialise in selling cookie cut trust deeds for rock bottom prices, with little ability to custom alter the deed for a client's own situation. Often discretionary trusts are established with, or become enriched with, significant assets, so placing faith in a cheap, cookie cutter deed is not advisable given the potential consequences of poor drafting.

The biggest problems that I see come up with trust deeds are ambiguous drafting or poorly worded clauses (eg undefined terms that are ambiguous); a lack of foresight about circumstances that might arise in the future; and a lack of power to do something.

Older trust deeds will often use a drafting style that makes them difficult to understand and interpret including:

- Archaic language;
- The never-ending sentence;
- Very little structure and minimal use of clause numbering;
- Poor use of definitions.

A good modern trust deed might, in contrast, have:

- A table of contents of clauses;
- Numbering of paragraphs and sub-paragraphs;
- Good use of definitions;
- Clauses organised by topic area;
- Short, easy to understand sentences and plain language.

Other problems I have seen on occasion are:

- A law firm without a good precedent trust deed might obtain an ancient or poorly drafted deed from a colleague and then tinker with that around the edges to use for a one-off client;
- "Adding to the beast" – having a precedent trust deed that has been added to with new clauses year upon year without thinking about whether the deed as a whole works and the clauses interact appropriately.

2. Appointor and Guardian related issues

2.1 Choice of Appointors and Guardians

Appointors and Guardians are officerholders or donees of powers under trust who can play an important role in safeguarding the trust. They can provide a check on the power of a trustee. The Appointor would usually be given the power to remove and appoint trustees, so they play a critical role in controlling a trust.

A Guardian is often given an additional protective role in respect of a trust by, for example, requiring their consent before particular acts or exercises of power can be carried out. Sometimes the roles of Appointor and Guardian are combined.

The critical role of these officeholders makes it vital to choose an appropriate person to hold the role. Usually, that will not be problem during the life of the patriarch or matriarch of the family who caused the trust to be settled – generally, those persons will want to hold the controlling role. That may not always be the case, though, as there may be asset protection reasons why a person does not want to hold the Appointor/Guardian role.

2.2 Fiduciary powers?

One issue which can arise with Appointor and Guardian powers is whether the powers are fiduciary in nature. Why does that matter? It matters because if they are not fiduciary in nature then the donee of the power can exercise the powers in their own personal interests. If the powers are fiduciary then the donee must exercise them for the benefit of the trust/beneficiaries as a whole, not in their personal interest, and they have a duty of undivided loyalty to the beneficiaries. That does not mean that a donee who is not a fiduciary is absolved of all restrictions – they must still exercise the power in good faith and not for an improper person. However, the level of protection for beneficiaries is much less if an Appointor or Guardian is not a fiduciary.

There is no single answer to this question. In *Blenkinsop v Herbert* [2017] WASCA 87, the Western Australian Court of Appeal considered whether a Guardian's power to consent to the appointment of income and capital and the advancement of capital to beneficiaries was a fiduciary power.

The Court held that simply being a Guardian under a trust deed does not automatically mean that the guardian is a fiduciary. Determining whether they are a fiduciary depends upon a construction of the trust deed and whether the particular power(s) are fiduciary in nature. In that particular case, the Guardian did not occupy a fiduciary position as, amongst other things, they were entitled to act in their own interests in deciding whether to consent. They did not have any obligation to the other objects of the trust when considering whether to grant consent.

One way of dealing with this issue may be to include a specific provision in the deed to make it clear that a Guardian is intended to occupy a fiduciary role and/or act in the best interests of the beneficiaries as a whole rather than solely in their own interests. As the Court of Appeal found the matter to be one of construction that would arguably deal with the issue because it would explicitly set out the settlor's intent in the deed.

Example: Thaddeus P Thylacine is the primary beneficiary of a family trust, the Tas Tigers Trust, that he has caused to be settled by his accountant. His instructions to the lawyer that drafts the trust deed are that his wife, Thelma Thylacine, and his son, Terry Tiger, should be joint Appointors of the Trust. The lawyer uses a precedent deed which names Terry Tiger and Thelma as joint Appointors, but there is no express clause in the trust deed which makes it clear if the office of Appointor is a fiduciary one.

Thaddeus acts as the initial trustee of the trust. He also has a daughter, Patricia Possum, from a previous relationship. The class of beneficiaries includes, amongst others, Thaddeus, his spouse and his lineal descendants.

Thelma dies leaving Terry Tiger as the sole Appointor of the Trust. Terry Tiger does not care about his father or his sister. He thinks it would be in his own best interests to appoint his friend, Bobo the Bandicoot as trustee of the Trust. He exercises his power as Appointor to remove Thaddeus as trustee and to replace him with Bobo. Whether this is an appropriate exercise of power will depend, in part, as to whether the office/powers of Appointor should be properly construed as fiduciary in nature.

2.3 Joint appointors or guardians

Sometimes two or more individuals are named in a trust deed as Appointors or Guardians. It is preferable to make it clear when drafting a deed as to what happens when one of those persons dies. That is, it should be made clear whether the surviving person can exercise the powers alone, or whether the intent is that the powers can only be exercised by both persons acting together (or by, for example, a legal personal representative of the deceased person together with the surviving Appointor/Gurdian).

Ambiguous drafting in this regard can lead to possible problems.

This issue has recently been explored in *Mak v Juventus Pty Ltd* [2024] WASC 409. An Appointor usually fulfils a key role in the control of a trust by having the power to appoint or remove trustees. An Appointor can also be given a role in respect of reserved powers, such as the Trustee needing their approval in order to exercise named powers, like powers of appointment. Sometimes a Guardian is also named and may take on this protective role. This means that the roles are crucial to control over a trust.

If there is a bare power that has been given to two or more people jointly in their own right as individuals then the survivor will not be able to exercise the power alone. When a power is annexed to a particular office (eg the office of Guardian), then it may be exercisable by the survivor of the persons holding that office. That will not always be the case, though, if the power was really given only to the persons officially named. In other words, if the donor of the power intended that it be donated to those persons together (despite being annexed to a particular office), and exercised by those persons only in their joint capacity, then a survivor will not be able to exercise the power. In that scenario, one would need to look to the trust deed to determine who, if anyone, has the right to exercise the powers as Appointor or Guardian on death of one of the joint persons. Sometimes, for example, a trust deed will permit the Trustee to exercise the power if there is no occupant of the office of Appointor or Guardian.

Mak's case illustrates these principles. The Court went through a process of construing the trust deed

and concluded in that particular case that the objective intention was that the survivor of joint appointees was to continue with the powers of the office of Guardian.

Example: Thaddeus P Thylacine and his wife, Thelma Thylacine, are originally named as joint appointors of the Tas Tiger Trust. There is no office of Guardian under the deed. Thaddeus and Thelma later get divorced, but the trust deed is not updated so Thelma remains named as one of the joint appointors. The class of beneficiaries is wide enough to include any lineal descendants of Thaddeus, as well as those of Thelma. After the divorce, Thaddeus has 2 children with a new spouse and runs a successful business through the trust for decades. Thelma also has 2 children with a new spouse.

Decades after the divorce, Thaddeus dies. His new spouse takes over control of the corporate trustee of the Tas Tiger Trust. Thelma's lawyers discover that she is still named as an Appointor in the trust deed. It is unclear under the trust whether a surviving Appointor can exercise the powers alone. Thelma assumes that she can exercise the powers and appoints her best friend as substitute trustee for the corporate trustee. She then influences her friend to exercise their discretion to distribute income and capital to Thelma's children with hew new spouse, to the exclusion of Thaddeus' widow and her children.

2.4 Limited succession

One problem I have seen on a number of occasions are dead end succession clauses for Guardians and Appointors that can leave the trust without an officeholder. What do I mean by that? Suppose a trust deed has an Appointor/Guardian clause which:

(1) Names a specific Guardian/Appointor;
(2) Names a specific successor Guardian/Appointor, but no successor after that person;
(3) Gives a power to a current Guardian/Appointor to name a successor while alive by deed, or in their will;
(4) Does not otherwise contain provisions to deal with succession to the Guardian/Appointor offices, and does not otherwise contain a power to change the identity of the Guardian/Appointor or to appoint a new one.

If the current Guardian/Appointor and the successor both die without naming their own successors, then there will be no Guardian/Appointor and no mechanism to appoint a new one.

If such a scenario arises, then unless there is a power of amendment in the deed which allows a new Guardian or Appointor to be named, the trustee may need to make an application to the Court to seek to fill the offices.

The above scenario can be remedied by including failsafe clauses in the deed, such as a clause allowing the legal personal representative of the last surviving Appointor or Guardian to assume the office or appoint a new officeholder (or even, as a last resort, allowing the trustee to exercise such a power).

Example: Thaddeus is the named Appointor/Guardian of the Tas Tiger Trust. The Schedule to the trust deed also names Thelma has his successor Appointor/Guardian. No other successor is named in the Schedule. The current Appointor/Guardian has a power to appoint a new Appointor/Guardian while they live, or name one in their will on their death, but the trust deed does not contain any other provisions to name successor Appointors/Guardians or to appoint a new one if the offices are vacant. Thelma dies before Thaddeus without naming a successor to her office. Thaddeus then dies. He also fails to name a successor. The trust is left with no Appointor/Guardian and, as the trust has no

power of amendment, there is no mechanism in the trust deed by which a new Appointor/Guardian can be named. A court application is the only option.

2.5 Reserved/restricted powers – succession issues

Where a Guardian is included in a deed, it is common to require their consent to exercise key powers under the deed, such as a power of appointment. Sometimes this mechanism is drafted simply by including a clause in the relevant power. Other times, the drafter will use a concept of a reserved or restricted power that may require Guardian consent, or for the Guardian to be informed in writing before it is exercised (which allows them an opportunity to consider the proposal and to raise any complaints with the trustee beforehand, or, in the case of an Appointor, to potentially remove the trustee if there is a major concern). That typically involves the trust deed including a list of reserved/restricted powers. These could be very narrower in scope, such as being limited to the power of amendment and the discretion as to which beneficiaries receive trust capital on vesting of the trust. The list could also be very wide and include, for example, all powers to distribute capital. I have seen some trust deeds in which this has even been extended to a power to distribute income.

Dead end succession of Guardians can create some real difficulties if these sorts of clauses are used. That can be heightened when even more controls are placed on the exercise of reserved/restricted powers by trustees. Some trust deeds include specific provisions which prevent the trustee from exercising reserved/restricted powers when the office of Guardian is vacant. That can create enormous practical difficulties for a trustee if there is no mechanism that can be used to appoint a new Guardian, for example, if powers to distribute income and capital are reserved powers.

Example: Assume the facts in the previous example, except that the trust deed does contain a power of amendment. The power of amendment is a broad one that, on the face of it, could be used to change the identity of the Guardian/Appointor. The power of amendment is, however, listed as a reserved power in the trust deed that cannot be exercised without Guardian consent. The power to distribute income and the power to distribute capital are also reserved powers. The trust deed also contains a clause stating that the trustee cannot exercise reserved powers while the office of Guardian is vacant. Due to the dead end succession described in the previous example, there is currently no Guardian. However, the trustee is unable to use the power of amendment to appoint a new Guardian because of the restriction in the deed that prevents reserved powers from being exercised when the office of Guardian is vacant. The trustee is left with a huge practical problem because the powers to distribute income and capital are also reserved powers which cannot be exercised without Guardian consent and while there is no Guardian in office.

2.6 The non-existent clause or wrong clause reference

One common drafting error I have seen is where the drafter has made changes to a cookie cutter deed and has not updated and checked the clause cross references. That can have serious consequences for the proper operation of a deed and can cause all sorts of interpretational issues.

Example: The Tas Tiger Trust deed names a Guardian without whose consent reserved powers cannot be exercised by the trustee. The deed includes a list of reserved powers by reference to clause numbers. The reserved powers include clauses 20, 25, and 30. There is, however, no clause 30 of the trust deed. The trust deed ends at clause 29. Clause 29 is the power of amendment. Clause 29 is not included in the list of reserved powers. This was due to a drafting error – the previous trust deed precedent used by the firm included the power of amendment with a clause

number of 30, but the power became included in clause 29 after another clause was deleted from the deed. Prima facie, without some kind of constructional gymnastics, this error means that the trustee could exercise the power of amendment without Guardian consent.

2.7 Do I need to consider mental incapacity?

It may also be prudent for a drafter to consider what happens to the Appointor or Guardian role in the event that the person currently fulfilling that role is permanently or temporarily incapacitated. Without an effective mechanism, that situation could leave a trust dangerously exposed to risk.

The recent Western Australian case of *Dryandra Investments Pty Ltd v Hardie by her guardian Ian Yorrington* [2024] WASC 248 illustrates the problems that can arise in this type of scenario. Isobel Hardie was the named Appointor and Guardian of a trust, but had dementia so she was incapable of fulfilling her duties in those roles. The trust deed required Guardian consent before reserved or restricted powers could be exercised by the trustee, so the trustee was constrained due to Isobel's incapacity. There was a serious problem because one of the reserved/restricted powers was the power to distribute income, so without Guardian consent the trustee could not distribute and was left with a tax problem.

The trustee made a court application under s 90 of the *Trustee Act 1962* (WA) seeking approval of variations of the trust deed as follows:

(a) The definition of 'Guardian' in the Schedule to the Trust Deed be varied by adding the following words:

and in the default of appointment, the second named person's legal personal representative.

(b) That the following clause be inserted after clause 14.1 of the Trust Deed:

14.1A In the event that either the Appointor or Guardian by reason of mental disability, however occasioned, is declared by the Supreme Court of Western Australia or the State Administrative Tribunal of Western Australia to no longer have capacity to manage his or her own affairs, then any attorney of the Appointor or Guardian under a subsisting and valid enduring power of attorney may exercise the powers of Appointor and Guardian under this Deed in the place of the Appointor and Guardian for such period as the loss of capacity subsists.

The first variation was sought to ensure there was a Guardian after Isobel's death, and the second amendment was sought to deal with her mental incapacity.

The Court accepted that, despite the incapacity, Isobel was still validly appointed as Guardian and Appointor. However, her incapacity meant that she could not exercise her powers.

The Court refused to make the variations on the basis that, to invoke the jurisdiction under s 90, the court had to be satisfied that the person seeking the variation had an interest in the trust. Isobel was a beneficiary, but the variation was sought in her capacity as Guardian.

The Court did, however, find that it had inherent jurisdiction to change the Guardian and Appointor and it changed them to Isobel's legal personal representative.

The case highlights, though, why it would be prudent to have a clause dealing with the incapacity of an Appointor and Guardian – it can potentially lead to real problems in practice if there is no such clause.

In Victoria, in the absence of a specific clause, the situation could become more complicated if there is an administrator appointed for a person by VCAT, or there is a power of attorney in place. Practitioners would need to consider s 50 of the *Guardianship and Administration Act 2019* (Vic) and the *Power of Attorney Act 2014* (Vic). A consideration of situations of that nature is beyond the scope of this paper.

3. Beneficiary and trustee issues

3.1 Too narrow a class of beneficiaries

Practitioners need to be careful with old trust deeds to ensure that they do not make assumptions when organising year end distributions. Not all deeds are drafted to allow distributions to companies and trusts. Many old trust deeds restrict the classes of beneficiaries to individuals only from a particular family. I have seen a number of situations in which practitioners have picked up a trust client with an old deed and have prepared distribution resolutions distributing funds to companies or trusts without reading the deed and where the trust deed only had individual beneficiaries.

That can cause all sorts of problems including:

(1) Potential breach of trust by the trustee which might result in personal liability.
(2) A question of whether there is an obligation on the trustee to seek the return of the trust funds improperly distributed (eg by relying on a cause of action based on money had and received) and whether there are defences to such a claim (eg lache or reliance by the beneficiary).
(3) An issue as to whether the beneficiary's income tax returns need to be amended as they had no present entitlement to the income.
(4) An issue as to whether the trustee will be assessed on any income if there was no default distribution clause in the trust deed, or whether the trust resolution was drafted such that some other beneficiary is entitled to the income and should have been taxed on it.

There are obviously good tax reasons for wanting to be able to distribute to corporate and trust beneficiaries. If a deed is restricted to individuals, then the methods in section 9 of this paper to amend the deed to expand the class of beneficiaries need to be considered.

3.2 Breadth of the class of beneficiaries

3.2.1 Challenges to discretion

Too broad a class of beneficiaries can be just as dangerous as too narrow a class. One often sees cookie cutter deeds being used which define the class of beneficiaries to include every possible relative of the primary beneficiaries under the sun including cousins (not restricted to first cousins), aunts, uncles, nieces, nephews, siblings, and all their spouses as well, and sometimes even all their lineal descendants.

Whilst flexibility to distribute is good, too wide a class of beneficiaries can also lead to potential disputes or risks for the primary family for whom the discretionary trust was set up. That is particularly the case in light of *Owies v JJE Nominees Pty Ltd* [2022] VSCA 2022.

A trustee of a discretionary family trust generally has a wide and unfettered discretion as to which beneficiaries they distribute income and capital to. In most cases, depending on the trust deed, they would not even be required to give reasons for their decisions. That does not mean there are no limits on the discretion. Further, if a trustee does not keep records as to why they exercised the discretion in a particular manner, then, if the decision is subsequently challenged, it may be more difficult to justify the decision.

As has been made clear in *Karger v Paul* [1984] VR 161 at 164, such a power can be impugned by a Court on the following grounds:[1]

1. A failure to exercise the discretion in good faith.
2. A failure to give real and genuine consideration to the exercise of the discretion. One aspect of the duty to give real and genuine consideration is that there must be an exercise of an "active discretion". That is, the person must apply their own mind to the exercise of the discretion.[2] They cannot simply do nothing or act under the instructions of another. Further, a breach of this duty can occur where a person did not really apply their mind to the exercise of the discretion or they shut their eyes to the facts.[3]
3. A failure to exercise the discretion for the purposes for which it was conferred.
4. If the trustee does give reasons, then the Court is able to review them.

There are some overlapping duties which will not be discussed in this paper.

In the *Owies* case, a challenge to the exercise of a trustee's discretion was upheld on the basis that the trustee had not given real and genuine consideration to the exercise of the discretion. That was because they had failed to make inquiries about the relevant beneficiary's circumstances, including their financial position.

Although a trustee may not necessarily need to inquire about *every* possible beneficiary's situation *every* year before exercising a discretion to distribute, the wider the class of beneficiaries the greater the risk there is and the greater the possibility that a family member outside the core immediate family may attempt to challenge the trustee's actions. That makes an extremely wide class of beneficiaries something that is not always going to be desirable.

Example: Mr Thylacine is the primary beneficiary of the Tas Tiger Trust. He has two little tiger cubs and a spouse, Thelma Thylacine. His discretionary family trust, the Tas Tiger Trust, has a corporate trustee in which Mr Thylacine holds all the shares. The class of beneficiaries is wide and includes all kinds of relatives of Mr Thylacine including his siblings and cousins and nephews and nieces and their spouses. He names his brother, Thucydide Thylacine, as his sole executor in his will. Mr Thylacine then dies. As executor, Thucydide, takes over control of the corporate trustee and becomes its sole director. He decides to distribute large amounts of income to Thelma and Mr Thylacine's tiger cubs. He also, however, distributes a large amount of income to himself and his own children.

Thelma challenges the exercise of the discretion. In addition, a destitute cousin, Timmy, also challenges the exercise of discretion on the basis that no inquiries were made of him about his financial situation and so there was no genuine consideration in exercising the discretion.

3.2.2 Foreign beneficiaries

Another danger of having a wide class of beneficiaries is that one might unintentionally sweep up some foreign resident beneficiaries in that class. That can cause problems because it can potentially

---

1 *Beck v Colonial Staff Super Pty Ltd* [2015] NSWSC 723 at [241].

2 *Partridge v The Equity Trustees Executors and Agency Co Ltd* (1947) 75 CLR 149 at 164; *Turner v Turner* [1984] Ch 100; *Klug v Klug* [1918] 2 Ch 67.

3 *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896 at 905 cited in *Sinclair v Moss* [2006] VSC 130 at [17].

lead to foreign purchaser duty surcharge, or foreign person land tax surcharge being imposed. Older deeds might need to be amended to avoid this problem by excluding persons that fall within the definition of foreign persons in the various State duties/land tax legislation. One needs to be careful in drafting such an exclusion because the definitions of foreign persons/purchasers are not all the same across jurisdictions.

3.3 Step-children, adopted children, and widows/widowers

One common issue that can arise with beneficiaries is a lack of clarity on when children and spouses are meant to be beneficiaries. That can often occur when those concepts are either not defined, or defined ambiguously. Advisers need to also consider very carefully with their clients whether their clients actually **want** those persons to be beneficiaries in all circumstances. That can be one of the dangers of a stock trust deed without modification.

Take "children" to start with. If the term is not defined, then it leaves a potential construction issue as to whether step-children and adopted children are supposed to be included within the term. Defining the term makes it clear what the intention is. References to step-children can also create problems if it is not clear whether those persons are to remain beneficiaries if the parents divorce, or if one parent dies but they are still married as at death. It is far better to make it clear in the deed the circumstances in which step-children should remain beneficiaries. That is something that should also be discussed with the client – some people, due to their close relationship with the step-child, may want them to remain beneficiaries regardless of any divorce or death of the spouse, others may not.

A similar situation arises with spouses. One problem that can arise is where spouses are specifically named as beneficiaries in a trust deed. That makes it much more difficult to sever the relationship with the trust after divorce. It is far better to include a general reference to "spouses", rather than specifically naming a person (and to include a definition of what a spouse is). If the person ceases to be a spouse due to divorce then they will no longer be a beneficiary. One other ambiguity that can arise when there is merely a reference to a "spouse" is whether that person remains a beneficiary after the death of the primary beneficiary. For example, the class of beneficiaries might include a primary beneficiary and their spouse and certain relatives and their spouses. It is better to make the deed clear and to specifically reference widows/widowers if the intention is for such persons to remain beneficiaries after the death of their partner.

3.4 Unadministered estates as beneficiaries

I am occasionally informed by practitioners about some practitioners assuming that a discretionary trust can make distributions to a deceased estate merely because the trust deed includes other trusts in which at least one beneficiary has an interest or potential or contingent interest in. Such an assumption misapprehends the nature of an unadministered deceased estate. Until the administration is complete, the estate is *not* a trust and the executor is *not* a trustee. No beneficiary of the estate has any interest in the underlying assets of the estate while the estate remains unadministered.[4] That means that one cannot simply treat an unadministered estate as just another trust and distribute to it under a class of eligible trusts in the trust deed. It has recently been confirmed in *Re Estate of Stagliano* [2025] VSC 39 that is not the correct approach and an

[4] *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694.

unadministered estate would not fall within the usual type of “eligible trusts” beneficiary class that one sees in discretionary trust deeds.

3.5 No power to exclude beneficiaries, or to change beneficiaries

It is common for trust deeds to give a trustee the power to exclude beneficiaries. Sometimes that requires the beneficiary’s consent. It is a useful power to have to deal with a troublesome beneficiary or to deal with a settlement of a family dispute, but subject still to potential challenges based on bad faith or fraud on a power by a trustee. It is rare to see in a trust deed a specific power allowing wholesale changes to the beneficiary class. Broad powers of amendment can usually allow the beneficiary class to be changed[5]

[5] Eg *Kearns v Hill* (1990) 21 NSWLR 107.

4. Streaming, income and related matters

4.1 Income definitions

The High Court's decision in *Commissioner of Taxation v Bamford* (2010) 240 CLR 481 confirmed the proportionate approach to the taxation of trust income. That means that a presently entitled beneficiary is required to include in their assessable income under s 97(1) of the *Income Tax Assessment Act 1936* (Cth), a share of the net income (the taxable income) of the trust. That share is determined by ascertaining the beneficiary's percentage share of *trust* income (i.e. income as determined under the trust deed) and applying that percentage share to the net income (taxable income) of the trust.

Whilst *Bamford* is now quite some time ago, amendments to old trust deeds to accommodate *Bamford* is still something that advisers need to be mindful of.

The most common problem with old trust deeds is that they may not contain a definition of income or net income. In that situation, the term refers to income according to ordinary concepts and accounting principles.[6] That excludes capital gains. That can result in beneficiaries who do not receive capital gains being taxed on them, or the trustee sometimes being taxed on them.

Example: Tas Tiger Trust makes $30,000 of losses as its ordinary income is less than its expenses. It made a resolution to distribute all of its income to Mr Thylacine during the 30 June 2024 income year under the income distribution clause in the trust deed. There is no definition of "income" in the trust deed. It has a capital gain of $60,000 which, if it had been included in distributable income, would have been distributed to Mr Thylacine and he could have been taxed on it. The capital gain is not ordinary income and so is not distributed effectively by the distribution resolution. The trustee is taxed on the capital gain.

Common methods of dealing with these types of issues in old deeds include:

(1) Keeping income undefined but specifically including capital gains as income.

(2) Making net income equivalent to taxable income under s 95 of the *Income Tax Assessment Act 1936* (Cth), or a similar definition. Sometimes adjustments may be necessary in this regard to, for example, strip out notional assessable amounts which cannot be physically distributed. This sort of clause will not allow the non-assessable capital gains discount portion of a capital gain to be distributed under the income distribution clause (although, if the distribution resolution is drafted appropriately, it might still be possible to distribute that capital under another power in a trust deed allowing distribution of trust capital). That might create a problem for streaming of capital gains as, for streaming purposes, a beneficiary needs to receive the financial benefit referable to the capital gain in order to be specifically entitled to it.

(3) Giving the trustee the discretion to determine what is included in net income; and/or

(4) Having a default mechanism as to what constitutes income if the trustee does not exercise such a discretion.

[6] *Re Ryan v Commissioner of Taxation* (2008) 72 ATR 498.

If there is an old deed, then it may be necessary to consider updating the income definition using one of the methods set out in section 9 of this paper.

4.2 Default income or capital beneficiary clauses

Often trust deeds will contain a default distribution clause to deal with income where the trustee does not exercise its discretion as to how income is distributed. This is important because if no beneficiary is presently entitled to the trust income then the trustee will be taxed at the penal tax rate. Usually trust deeds will also give the trustee a discretion as to how capital is distributed on vesting of a trust. A default clause that operates on vesting is also advisable so that capital is effectively dealt with in the event that the trustee does not exercise their discretion prior to vesting.

Such default distribution clauses can be effective if they are drafted appropriately.

In *Commissioner of Taxation v Carter* (2022) 274 CLR 304, the trust deed contained the following default clause on vesting:

"As from the Vesting Day, the Trustee shall hold the Trust Fund:

4.1 in trust for such one or more of the General Beneficiaries for such interests and in such proportions and for one to the exclusion of the others as the Trustee may subject to clause 16 appoint by deed before the Vesting Day and the appointment may be either revocable or irrevocable (but if revocable shall be revocable only until the end of the day preceding the Vesting Day when it shall become irrevocable);

4.2 in default of appointment and subject to any partial appointment under the preceding paragraph, in trust for such of the Primary Beneficiaries as shall be living at the Vesting Day as tenants in common in equal shares BUT if any Primary Beneficiary dies before the Vesting Day leaving issue living at the Vesting Day, that issue shall take as tenants in common in equal shares per stirpes the share which the deceased Primary Beneficiary would have received had he or she survived to the Vesting Day ..."

The trust deed also contained the following effective default clause for income distributions:

"If in relation to any Accounting Period, the Trustee has made no effective determination pursuant to the preceding provisions of this clause in respect to any part of the income of that Accounting Period immediately prior to the end of the last day of that Accounting Period, then the Trustee shall hold that income in trust successively for the persons who are living or existing on the last day of that Accounting Period and who are successively described in clauses 4.1 to 4.5 (inclusive) as though that last day of the relevant Accounting Period were the Vesting Day."

Present entitlement of a beneficiary to income for tax purposes must exist as at the end of the income year.[7] The key to drafting an effective default clause in respect of income distributions is to ensure that the present entitlement arises by the end of the income year and not after.

BRK (Bris) v Federal Commissioner of Taxation [2001] FCA 164 provides an illustration of an ineffective default distribution clause. The clause referred to the trustee, on default of exercising their discretion to distribute income, being required to "divide the Fund equally among the beneficiaries

[7] *Colonial First State Investments Ltd v Commissioner of Taxation* (2011) 192 FCR 298.

named in the Schedule hereto" on a date after the income year had ended. The Court found that there was no present entitlement for tax purposes as at the end of the income year due to the trustee not making the distribution to default beneficiaries until after the income year had ended. The trustee was then taxed on the income. In other words, the default distribution clause was not effective because it did not result in a present entitlement arising for beneficiaries by the end of the income year.

Example: The Tas Tiger Trust has a default income distribution clause in it that provides that, in default of the trustee exercising their discretion to distribute income within a reasonable time after the end of the income year, then the income is set aside for the primary beneficiaries in equal shares. The default clause is ineffective for tax purposes as it does not give the primary beneficiaries a present entitlement to the income by the end of the income year.

4.3 Classification and streaming powers

Historically, the courts applied the conduit theory of trust income as per *Charles v Federal Commissioner of Taxation* (1954) 90 CLR 598. That is, it was considered that the trust acted as a conduit through which different types of income could flow and retain their characteristics in the hands of the beneficiaries. That approach allowed streaming of different types of income and capital for tax purposes, provided that the trust deed had appropriate clauses in it.

The Full Federal Court in *Commissioner of Taxation v Greenhatch* (2012) 203 FCR 134 found that the proportionate method endorsed by ***Bamford's*** case meant that a beneficiary received a proportionate share of trust income that had no single character (i.e. it was an undissected sum). That meant that, when applying the proportionate approach under s 97 of the *Income Tax Assessment Act 1936* (Cth), a beneficiary included in their assessable income a mixed amount of all different types of income and capital gains that had been included in the trust's net taxable income. That meant that streaming was not possible from a tax perspective.

Legislation has now ameliorated that outcome, but only to some extent. It is now possible to stream franked distributions and capital gains in accordance with legislation.[8] For capital gains, a beneficiary needs to be specifically entitled to the capital gain or part of it. That, broadly, involves them receiving, or they can be reasonably expected to receive, an amount equal to a share of the net financial benefit referable to the capital gain.[9] They must have that entitlement in accordance with the terms of the trust.

The legislative provisions for streaming of franked distributions also rely upon the concept of a beneficiary being specifically entitled to the franked distribution.[10] Once again, that concept relies upon the share of the net financial benefit of the beneficiary, being the financial benefit in accordance with the trust that the beneficiary receives or can reasonably be expected to receive that is referable to the franked distribution.[11]

To be able to stream under these statutory provisions, the trustee needs to have an appropriate streaming power under the trust deed. Whilst it may be possible to imply such a power in some

[8] Division 6E, *Income Tax Assessment Act 1936* (Cth) and Subdivision 207-B and Subdivision 115-C, *Income Tax Assessment Act 1997* (Cth).

[9] s 115-228, *Income Tax Assessment Act 1997* (Cth). The amount must also be recorded in its character as referable to the capital gain in the accounts or records of the trust no later than 2 months after the end of the income year.

[10] s 207-58, *Income Tax Assessment Act 1997* (Cth).

[11] It must also be recorded in its character as referable to the franked distribution in the accounts or records of the trust no later than the end of the income year.

circumstances when a trustee has a very broad discretion to distribute and apply income and capital, it is preferable for the trust deed to contain an express streaming power. The most typical form is to have a power that allows the trustee to classify different types of income and capital based on tax and other attributes, and then to allocate those different classes amongst beneficiaries and make them entitled to those separate amounts. Although streaming is only possible for tax purposes for franked distributions and capital gains, it is desirable to have a broader clause that allows broader classification and streaming of other amounts in case there is further legislative change in the future. Older trust deeds may not have such express clauses, which then requires a drafter to look at options for amending the trust deed as per section 9 of this paper.

5. Administrative power issues

Trustees cannot simply assume that they have power to do something under a trust deed. Their ability to do an act is confined by the scope of the powers and discretions granted under the trust deed, as well as any statutory powers which supplement the trust deed (eg there are statutory powers granted to trustees under the *Trustee Act 1958* (Vic)).

Drafters need to be careful to ensure that sufficiently wide powers are given to the trustees under the trust deed so that they can carry out their role effectively. That does not necessarily mean that every single possible thing that a trustee might ever do needs to be named as a power in the trust deed. Sometimes one sees trust deeds which contain an inordinately long and detailed list of powers, where broader powers might accomplish the same end.

One common area where the scope of administrative powers often arises is when a trustee wishes to borrow money from a bank or financier, or wishes to give a guarantee. Before lending funds, a financier will usually conduct a review of the trust deed to ensure that acceptable powers are included in it. Sometimes it will be necessary to amend a trust deed to accommodate a financier's requirements, so it is important to have an appropriate power of amendment to allow that to happen (see section 6 of this paper) otherwise an expensive court application may be necessary (see section 9 of this paper).

6. Powers of amendment

Powers of amendment can provide a useful mechanism to allow a trust deed to be changed in response to changing circumstances or even changes in trust law or tax law. That does not, however, mean that all trust deeds contain a power of amendment, or that they should contain one. Some older trust deeds do not. Generally, it would be preferable to include some form of power of amendment for flexibility. Clients will not always want this though. I have seen examples of clients who want to "rule beyond the grave" and do not wish to give their descendants power to change the deed – they want to protect their intent in the trust terms as much as possible.

6.1 Careful use of language

When drafting powers of amendment it is important to be very precise as to the language that is being used and to understand the effect of particular language. Two examples illustrate this point.

6.1.1 "Hereinbefore"

Often one will see powers of amendment that refer to being able to amend provisions "hereinbefore" contained. The use of that word can have very real effects if a drafter is not careful. For a power of amendment contained at the very end of a trust deed, all other provisions would be contained before it. Sometimes, though, there might be a schedule after the power of amendment, or the power of amendment might have other clauses after it. In such a case, a court would generally give effect to the word "hereinbefore" and effectively place a limitation on the scope of the power of amendment. That could have very real consequences if one needs to, for example, amend a schedule.

Mercanti v Mercanti [2015] WASC 297; (2016) 50 WAR 495; (2017) 340 ALR 225 (***Mercanti's* case**) is an illustration of the problems that such wording can potentially cause. In that case, the power of amendment used the word "hereinbefore". The definitions of Appointor/Guardian were contained in a clause at the start of the trust deed, but the named Appointor/Guardian was set out in the Schedule to the trust deed. The Schedule was after the power of amendment, so there was an issue as to whether the identity of the Appointor/Guardian could be changed using the power of amendment (i.e. because the Schedule was not "hereinbefore" contained). The power of amendment could be used to change the identity of the Appointor/Guardian, but only because the definitions of those offices were "hereinbefore" the power of amendment and those definitions were linked to the Schedule. That may not always be the case and situations might arise when something in the Schedule is independent of a definition in the main trust deed and needs amending. Inclusion of the word "hereinbefore" in a power of amendment could cause problems in that sort of situation.

6.1.2 "Trusts" vs "provisions" or "powers" or "terms and conditions"

Mercanti's case also provides a second illustration of problems that can arise from the use of language in a power of amendment. Some older trust deeds contain powers of amendment that refer to being only able to amend the "trusts" in the deed. One of the trust deeds in *Mercanti's* case had such a provision. The Court essentially adopted a technical meaning of "trusts", such that it did not cover all of the terms of the trust deed, only the core trust provisions such as the actual declaration of trust; the power to deal with profits of the trust; the provision operating on vesting of the trust; and

certain trustee's powers. The power of amendment could not be used to alter the identity of the Appointor/Guardian because it was not part of the "trusts".

Contrast that result with broader wording in a power of amendment such as one that allows alteration of any "provisions and powers" or "terms and conditions", which would ostensibly cover most, if not all, of a trust deed.

Drafters need to be careful of these differences in language in a power of amendment. A broader power, though, will not always be appropriate – there may be situations in which particular clients want a more narrow power of amendment that may not allow, for example, changes to the identity of officeholders other than through the specific provisions of the deed that allow such changes.

6.2 Administrative powers only

Sometimes trust deeds contain restrictions on a power of amendment which only allow them to be used to change administrative powers in the deed. Drafters need to be careful of wording which, for example, refers to only exercising the power in the "administration" of the trust if such a restriction is not intended.

6.3 Restrictions on particular powers vs power of amendment itself

There are other restrictions that are common on a power of amendment, such as not being able to amend to benefit a settlor, or not being able to amend to take away benefits that have already accrued to beneficiaries.

An important consideration for drafters to consider is whether the power of amendment can be used to amend itself. There are cases in which Courts have implied a restriction on a power of amendment, such that it cannot be used to amend itself.[12] That will not always be the case. In *Re McGowan & Valentini Trusts* (2021) 63 VR 449, the Court accepted that a widely drafted power of amendment could be used to amend itself. Accordingly, if a drafter wishes to prevent the power of amendment being used to amend itself, then it is better to include an *express* prohibition in the power. There are reasons why that sort of control is appropriate – without it, the power of amendment could be used to negate other restrictions in the power (subject to any argument that exercising the power in that manner would be a fraud on a power i.e. would be exercising the power for an improper purpose or in bad faith).

Another strategy to restrict the use of a power of amendment is to make it a reserved power that can only be exercised with Appointor or Guardian consent. That strategy is discussed in section 2 of this paper.

Finally, sometimes it may be appropriate to place restrictions in the power of amendment to prevent it from being used to amend specified powers within the deed (eg Guardian powers).

[12] Eg *University of Adelaide v Attorney-General (SA)* [2018] SASC 82 at [17] and *Jenkins v Ellett* [2007] QSC 154 at [15].

7. Self-managed superannuation funds – death benefits

The purpose of this seminar is not to examine drafting problems that can arise with superannuation trust deeds. This section of the paper will only consider one issue with a common dispute that arises with self-managed superannuation funds – the distribution of death benefits. With the rise of self-managed superannuation funds (**SMSFs**) and the gradual inter-generational wealth transfer from baby boomers, this sort of issue is likely to continue to give rise to many disputes in the future.

Usually SMSF trust deeds will give the trustee a discretion to distribute death benefits to dependants of the deceased or to the deceased's estate (in line with regulatory requirements in the superannuation law). Often, there will also be provision for a member of the fund to make a binding death benefit nomination that will bind the trustee as to how they distribute the death benefits.

There are various requirements that must be met to cash funds out of a superannuation fund under the *Superannuation Industry (Supervision) Act 1993* (Cth) and under the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**SIS Regulations**).

Regulation 6.17A of the SIS Regulations, amongst other things, requires a trustee to pay a death benefit in respect of a fund member to a person mentioned in a binding death benefit notice. There are, however, conditions for that rule to apply. Those include:

(1) The person(s) mentioned in the notice have to be the legal personal representative or a dependant of the fund member;

(2) The proportion of the benefit that will be paid to the person(s) has to be certain or readily ascertainable from the notice;

(3) The notice has to be in writing;

(4) The notice has to be signed and dated by the fund member in the presence of 2 witnesses;

(5) The 2 witnesses have to be 18 and not a person mentioned in the notice.

(6) There must be a declaration signed and dated by the witnesses stating that the notice was signed by the fund member in their presence.

The High Court in *Hill v Zuda* (2022) 275 CLR 24 confirmed that members of SMSFs do not, as a general proposition, need to abide by these requirements to have a valid death benefit nomination. That is not to say, however, that members will **never** need to meet these requirements. Although it is not compulsory as a general proposition for members to comply with these requirements, that is still subject to the trust deed. A particular trust deed might still import these requirements for a death benefit nomination to be binding, and, in that event, a member would need to comply. If so, then a member risks the nomination being invalid and being challenged by a potential beneficiary of the trustee's discretion.

That makes it important for the drafting in the trust deed to be clear as to whether these requirements need to be met for a valid binding death benefits nomination. Prior to *Hill v Zuda*, there was some uncertainty for quite some time as to whether these requirements in r 6.17A applied to SMSFs. Some older deeds from that era may contain some ambiguity as to whether the r 6.17A requirements apply

in all circumstances, or only if r 6.17A actually was a mandatory rule that applied to SMSFs. Such ambiguity can create future problems if there are challenges to the validity of binding nominations.

Although the requirements in r 6.17A do not have to be applied, advisers should also be considering with their clients whether it is **desirable** anyway to mandate in the trust deed compliance with any of those requirements for a death benefits nomination to be binding. On the one hand, it can be easy to make mistakes resulting in non-compliance with such technical requirements that can create disputes about validity. The greater danger, though, may be the potential risks that removing such guard rails creates. Often when nominations are made, a fund member may be suffering from cognitive decline or a degenerative disease or be in an end of life situation. That creates risks that an unscrupulous family member may attempt to influence the fund member into making a nomination in their favour.

Whilst it may be possible to challenge a nomination based on undue influence or unconscionability or similar grounds, that is very difficult from an evidentiary perspective. If there are no witnesses to what has occurred, a family member who wished to challenge a nomination might be left with attempting to draw inferences from a course of conduct or surrounding circumstances and medical evidence about the fund member's health at the time of signing the nomination. Even medical evidence is not always easy to obtain if the family member who wishes to challenge the nomination is not the executor of the deceased's will.

The requirements in r 6.17A provide an additional safeguard. If they are mandatory under the trust deed then they must be complied with for the nomination to be valid and binding. The requirement for two witnesses to sign and also to sign a declaration that they have seen the fund member signing can, for example, provide a safeguard against a family member exerting pressure on a fund member to sign a nomination while they are in ill-health.

Example:

Mr Thylacine is on his death bed in Chauncey Vale Caves in rural Tasmania. His tiger stripes have faded grey, his brown fur is mottled and falling out. His end is fast approaching. He is a member of the Tiger SMSF and has $2m in his account. The trust deed of that fund allows binding nominations to be made in respect of death benefits, but it has requirements that must be met for a valid nomination and those requirements mirror r 6.17A. Mr Thylacine's nephew, Terrible Timmy, slips into his cave as Mr Thylacine lies in a foggy stupor. Terrible Timmy has drafted a death benefits nomination which names him as the sole beneficiary of Mr Thylacine's superannuation benefits. He aggressively pressures Mr Thylacine to sign the nomination and Mr Thylacine, in pain and doped up with possum juice, complies. Terrible Timmy has, however, forgotten about the requirement to have 2 witnesses sign and the nomination lacks a witness declaration. The nomination does not comply with the requirements under the trust deed and is invalid.

8. Charitable trusts

A detailed consideration of drafting issues with charitable trusts is beyond the scope of this paper. Charitable gifts/trusts are common in wills. The danger is if those gifts/trusts fail. That can happen immediately when the gift/trust is supposed to take effect on death of the testator, or at some future point in time after the death of the testator and after the gift/trust has taken effect. This part of the paper will briefly considered drafting issues that can result in initial impossibility of a gift.

8.1 Initial impossibility of gifts

The drafting of a will can result in a charitable gift/trust being impossible to implement on the death of the testator. One common scenario where this can happen is if a gift is left to a particular charitable institution but that institution does not exist, or no longer exists, or there is ambiguity as to which institution is being referred to.

Assume Mr Thylacine leaves money to the Aged and Invalid Tasmanian Tiger Fund of Queensland of 55 Striped Tail Road. 50% of the time the Fund helps aged and invalid Tasmanian Tigers all of the time. Consider the following scenarios which may result in a gift that is impossible to fulfil:

- There is no such fund and no fund by that name has ever existed.
- There was previously such a fund at the time the will was drafted but it was wound up prior to Mr Thylacine's death.
- There is only an Aged and Invalid Tasmanian Tiger Fund of Tasmania.
- There is an Aged and Invalid Tasmanian Tiger Fund of Queensland, but it has never had the address of 55 Striped Tail Road. There is also an Aged and Invalid Tasmanian Tiger Fund of Victoria which does have an address of 55 Striped Tail Road.

Another common scenario is where there are conditions placed on a gift, but it may be impossible or impractical to fulfil those conditions.

Example: Mr Thylacine drafts his own will. He leaves a gift of $200,000 to the Tasmanian Devil Facial Tumour Foundation, but only if they also establish a library for books about Tasmanian Tigers and about the Western Tasmanian wilderness. The gift is too small to establish and maintain a library. The condition cannot be met and the gift fails.

Drafters need to keep these sorts of problems in mind, and consider:

- Checking that the correct name of the charitable organisation is used and its address.
- Checking whether the organisation exists and advising clients of the need to update the will in case charities cease or merge.
- Considering the possibility of a partial intestacy if a gift is ineffective (see following sections).
- Considering whether the testator still wants the gift to go to charity if the gift to the particular organisation fails for any reason.
- Consider how practically the charitable gift might work. For example:

- Is the gift large enough to achieve the objective?
- Are there sufficient details to enable the gift to work practically? For example, if a physical place was to be established to carry out a charitable gift then there may need to be details as to how that is to practically operate.
- Are there conditions which it is practically difficult to comply with or impossible to comply with? I have, for example, seen scenarios in which a testator has wanted a family member to work for a charitable done for a period as a condition of a gift, or the gift is cumbersome because it would require the executor to monitor its terms over a long period of time.

8.2 Gift over clauses and successor institutions

It is prudent to consider whether a gift over clause is appropriate in a will to specify an alternative destination for a charitable gift if it fails. That allows the gift to still take effect in an alternative manner, assuming that the gift over clause itself is not impossible to perform.

In some scenarios, a charitable institution may have been named in a will and may no longer exist, but there may be a successor institution. In that scenario, a gift can potentially take effect if the new institution is truly a successor to the old one. A change in legal structure from, for example, an incorporated association to a company limited by guarantee will not necessarily prevent the new organisation from being a successor. An analysis of the similarity of the charitable objects of the organisations; the activities of both; and what happened to the assets/liabilities after the change is necessary. In *Re Estate of Henry Brough Smith* [2020] VSC 378, for example, involved a gift to the Burwood Boys' Home, an organisation which previously existed but no longer existed at the time of the deceased's death. The Court considered whether an incorporated entity, Child & Family Care Inc, was the successor institution to the Burwood Boys' Home. The Court found that there was significant practical identity between their charitable activities and that Child & Family Care Inc was the successor institution.

8.3 Cy pres and general charitable intent

If a charitable gift is initially impossible to perform on death of a testator and there is no gift over clause, then there is a question whether the gift can be applied *cy pres*. *Cy pres* is a doctrine that allows, usually with Court approval,[13] a gift to be applied for purposes as near as possible as the original purposes. Where a gift is impossible to perform from the outset (i.e. on death of the testator), the *cy pres* doctrine can only be relied upon if there is a general charitable intent expressed by the testator in the will. In other words, the issue is whether the testator intended the gift *just* for that specific done organisation for particular purposes, or whether there was a general intent to benefit charity.

Courts will usually be quite ready to find a general charitable intent so that a failed gift can be applied *cy pres*. *Re Coghlan; Merriman v Attorney-General (No 2)* [2020] VSC 668 is one example of this lenient approach to interpretation. In that case there was a gift of one third of the estate's residue to "Diabetes Australia of 26 Arundal Street, Glebe, New South Wales". The problem was that there was a Diabetes Australia, a Diabetes NSW, and a Diabetes Australia – Victoria. The address used in the

[13] There are some limited circumstances in Victoria when the Attorney-General can approve a *cy pres* scheme for small charities with up to $500,000 of assets.

will was not that of Diabetes Australia, it was the address of Diabetes NSW. It was impossible to tell which organisation the gift was intended for.

The will did not refer to any charitable purpose, nor did it refer to there being a "general charitable intent". The Court found that the absence of a reference to any charitable purpose, or the absence of express terms of a general charitable intent, was not necessary in every case and that did not preclude a finding that there was a general charitable intent. The reference to the name of one charitable organisation in the gift clause and the address of a separate charitable organisation as well, suggested that the deceased intended the gift to benefit *an* organisation which supported people with diabetes. There was a general charitable intent.

9. Dealing with drafting issues after the deed is executed

If a trust deed has already been executed and a drafting error or problem has emerged, there are limited mechanisms that can be used to deal with the issue. This section of the paper examines some potential avenues for fixing a problem:

(1) Use of a power of amendment in the trust deed.
(2) Use of the rule in *Saunders v Vautier*.
(3) Rectification of the trust deed.
(4) A court application seeking judicial advice on the correct interpretation of the trust deed, or to seek the court's approval to vary the trust deed.

9.1 Powers of amendment

The simplest way in which to amend a trust is by exercise of a power of amendment in the trust deed. Not all trust deeds contain a power of amendment though. Further, one needs to be careful to *read* any power of amendment carefully to ensure that it is actually broad enough to permit the required drafting change. Some powers of amendment may specifically prohibit certain types of changes to the deed. For example, a deed might prohibit changes to the class of beneficiaries, or to the vesting date, or to other specific clauses of the deed.

Other powers of amendment, whilst not specifically prohibiting alterations to particular clauses, might either limit the types of changes that can be made, or make general limitations on the changes that can be made. For example, some deeds limit the changes that can be made to those in the management or administration of trust property (which would not cover every clause of the deed), and some deeds limit the changes that can be made to the "trusts" in the deed.

9.2 Rule in *Saunders v Vautier*

The rule in *Saunders v Vautier* allows beneficiaries of full capacity with an absolute, vested and indefeasible interest in the trust capital/income to call for that fund.[14] The Court has accepted that the rule in *Saunders v Vautier* can extend to amendments of a trust deed by beneficiaries of full capacity who have an infeasible entitlement to the trust fund: *Re McGowan & Valentini Trusts* [2021] VSC 154. Accordingly, it is highly likely that the rule in *Saunders v Vautier* can be used to extend the vesting date of a trust *if* all beneficiaries are of full capacity. This will not, ordinarily, be of much use with a discretionary trust as there would usually be minor beneficiaries, or potential future beneficiaries (eg unborn descendants), in which case the rule could not operate. One strategy that is sometimes used to prevent beneficiaries utilising the rule in *Saunders v Vautier* is to include a charitable purpose in the

[14] See *CPT Custodian v Commissioner of State Revenue* (2005) 224 CLR 98 at [47]; *Krstic v State Trustees Ltd* [2012] VSC 344 at [13]-[15].

trust deed (eg as a default beneficiary on vesting of the trust, or even as part of the general class of beneficiaries.

9.3 Rectification

Rectification is an equitable remedy available to fix documents if there has been a mistake that has caused the document not to operate as intended by the parties. A trust deed may need to contain particular provisions to comply with the provisions of a duty concession or exemption. There might be situations in which the drafter makes an error in the trust deed such that the requirements of a duty exemption could not be met. Rectification of the trust deed is a possible solution to such a problem. An application could generally be made to a superior court to seek orders for rectification of a trust deed.

Rectification is available to reform documents, but not to reform the bargain or arrangement between the parties.[15] The following principles apply in respect of rectification of trust deeds:[16]

(1) Rectification is available where there is a mistaken expression of the true intention of the maker or makers of a document. In the case of a trust deed the mistake must be on the part of the settlor.

(2) Rectification is generally not available where the mistake is only as to the legal effect of the document. However it is no bar to rectification that the rectification is sought to avoid stamp duty or that a fiscal benefit will result from the order.

(3) It is no bar to an order for rectification that the parties have previously entered into a deed of rectification in an attempt to record the true state of affairs.

(4) It is no bar to rectification that the mistake was due to negligence.

(5) What is required is convincing proof justifying the making of an order permitting the correction of a mistake in the relevant document.

(6) An order for rectification takes effect retrospectively, so that the document is rectified with effect from the date of its making.[17]

In a trust deed rectification case, the relevant subjective intent may not always be that of the settlor. Where the settlor is acting on instructions and has no independent intention in respect of the trust, it may be the intention of the person who provides the instructions to the settlor to set up the trust that may be relevant.[18] A court application for rectification of a trust deed that may have an impact on a tax or duty provision may have a revenue authority joined as an appropriate contradictor,[19] although there may be cases in which that may not be necessary.[20]

---

15 *Holloway v Commissioner of State Revenue* [2024] TASSC 45 at [16].

16 *Holloway v Commissioner of State Revenue* [2024] TASSC 45 at [16]-[17]; *Trustee for the Michael Hayes Family Trust v Commissioner of Taxation* [2019] FCA 426 and *Commissioner of Taxation v The Trustee for the Michael Hayes Family Trust* (2019) 273 FCR 567.

17 *Craddoc Brothers v Hunt* [1923] 2 Ch 136 at 151 and *CherryTree Investments Limited v Landmain Limited* [2013] Ch 305 at 336.

18 *In the matter of the C.E. Brenchley Family Trust* [2019] NSWSC 1602 at [34]. And see *Application of NBT Pty Ltd* [2023] NSWSC 919 and *In the matter of the George Hardi Family Trust* [2021] NSWSC 1584.

19 *Holloway v Commissioner of State Revenue* [2024] TASSC 45 at [11]-[12] and *Commissioner of Taxation v The Trustee for the Michael Hayes Family Trust* (2019) 273 FCR 567 at [53].

20 *Keadly Pty Ltd & ors* [2015] SASC 124.

Holloway v Commissioner of State Revenue [2024] TASSC 45 illustrates how rectification of a trust deed can be a vital tool to ensure that duty or other tax concessions or exemptions can be properly applied. In *Holloway*, a Tasmanian solicitor had been instructed to draft and be the settlor of a family discretionary trust. The purpose of the trust was to purchase farming land from the executor of the estate of a relative to two individuals and, in doing so, to qualify for the family farming duty exemption in s 225 of the *Duties Act 2001* (Tas). That exemption applied, amongst other things, if there was a transfer of property used solely or principally in connection with the business of primary production. Where the transfer was from a natural person to a trustee of a trust, that trust's beneficiaries had to be all individually named and be relatives of the transferor and the trust could not be varied other than by the addition of a relative individually named in any deed of variation.

The solicitor had received instructors that the two individuals intended to rely on the exemption for the purchase of the farming land; that the solicitor was to create a trust that would qualify for the exemption; and that it was their intention that they would be the only beneficiaries of the trust. The solicitor did not update a template discretionary trust deed of her firm to comply with the clients' instructions. After the Commissioner assessed duty on the transfer, a deed of rectification was prepared and executed by the settlor and the clients. The Commissioner took the view that the deed was not binding on him. The deed of rectification was still defective, though, because it did not limit the beneficiaries such as to comply with the exemption.

The individuals brought an application to rectify the trust deed so that it complied with the requirements of the exemption, and also to seek a declaration that the deed of rectification was of no legal effect because it did not record their true intention. The Court granted the application for rectification of the trust deed. The Court was somewhat hesitant to declare the deed of rectification as being of no effect but, nonetheless, did so. The Court also commented that if it were wrong to make such orders then rectification orders could still be made to rectify the trust deed to exclude or reverse the attempt at rectification made by way of the deed of rectification.

9.3.1 Example

Harry Hobart is a bumbling Bicheno barrister. Mr Thylacine approaches him to draft a discretionary trust deed for his family (Mr Thylacine is to be the settlor, but not a beneficiary, of the trust). Mr Thylacine gives him specific, written instructions to name Mr Thylacine's wife, Thelma Thylacine, as the appointor in the trust deed and to include a power for the trustee to amend the trust deed. Harry Hobart names Thelma as appointor and includes the power in his draft trust deed. Being his usual bumbling self, he accidentally deletes those clauses from the final version of the deed without realising his mistake. The trust deed is executed and real property of significant value is settled on the trust. Mr Thylacine is furious when he realises the mistake and is advised to seek rectification of the deed in a court application to reflect his intention as settlor.

9.4 Court applications – judicial advice on deed interpretation

In each Australian jurisdiction, a court can give judicial advice on matters relating to a trust to, amongst others, the trustee. In Victoria, the Supreme Court can give judicial advice pursuant to r 54.02 of the *Supreme Court (General Civil Procedure) Rules 2015*. If there is an error in drafting then an amendment may not always be critical. If the trust deed could be construed in a manner which gets around the drafting issue then that could be sufficient to avoid having to amend the deed. The Court can give judicial advice on such trust deed construction issues. For example, an ambiguous

phrase may have been used in the trust deed and it might be possible to construe that phrase in a favourable way in the context of the whole deed.

9.5 Court applications – approval for trust deed variation

In Victoria, it is possible to have the Court approve a variation to a trust deed under s 63A of the *Trustee Act 1958* (Vic) on behalf of those who cannot approve a variation themselves. It is the agreement between the beneficiaries, combined with the Court's approval, that effects the variation.[21] That is, the Court's order does not, of itself, vary the trust deed. That means the consent of all adult beneficiaries with capacity is required to give effect to the variation.

The power in s 63A cannot be applied if the variation results in a resettlement of the trust. A consideration of trust resettlement is beyond the scope of this paper.

9.5.1 Classes of beneficiaries on whose behalf approval can be sought

In Victoria, s 63A prescribes the following classes of beneficiaries on whose behalf the Court can approve a trust variation:

(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

(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

(c) any person unborn; or

(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.

The Courts have approved many applications involving minor beneficiaries or others without the capacity to consent, and unborn beneficiaries. There has, however, been little judicial consideration

[21] See the discussion in *Re EM McPherson Settlement* [2024] VSC 744.

of the second category of persons on whose behalf the Court can approve an arrangement (category (b) above).

In *In the Application of* ***Nyasa*** *No. 19 Pty Ltd* [2023] NSWSC 578, the Court accepted that a class of discretionary objects of a discretionary trust could come within the NSW equivalent of category (b) above. The case involved a lost trust deed. The original deed, nor a copy of it, could be found. There were deeds of other trusts that were settled at the same time that were available. The Court accepted that it could approve an arrangement that the trust be administered in accordance with the amended terms of a trust deed.

The decision in *Nyasa* could potentially be significant in other cases in which there are wide classes of discretionary objects, and it may be difficult to identify all the beneficiaries such as to obtain their consents. In that scenario, there may be a possible argument that the Court could consent on their behalf, although the bounds of the Court's consent in respect of this category is yet to be fully tested. It may also be the case that there are some possible members of a discretionary class whose interests are so remote as to be negligible such that consent was not required,[22] although that proposition does not appear to have been tested in Australia.

9.5.2 The test to be applied

The statute in each jurisdiction should be considered on its own terms to determine the relevant matters the Court has to consider in approving a variation. In Tasmania, for example, the statute sets out specific matters that must be considered by the Court. In Victoria, there is a two stage test that the Court applies when deciding whether to approve an arrangement:[23]

(1) Whether the arrangement would be for the benefit of the beneficiaries who are unable to consent. This is not restricted to financial benefit and can include other non-financial benefits, such as social, familial, moral or educational benefits.

(2) Whether the arrangement is by its nature a fair and proper one overall, taking into account the particular advantages which the various parties will gain from the arrangement, and their respective bargaining strength. Relevant to this consideration is

[22] Eg *Mubarak v Mubarak* [2008] JCA 196; *Phillips and others, Petitioners* 1964 SC 141; *The Serious Fraud Office & Anor v Litigation Capital Ltd & Ors* [2021] EWHC 1272.

[23] See *Application by Perenna Nominees Pty Ltd* [2022] VSC 193 at [83] and the authorities cited therein.

whether the arrangement is consistent with the purpose of the trust and the intention in establishing it.

There has been a possible additional question raised in *George v Kollias* [2007] VSC 46 at [44] and in *Re: Alan Synman Family Trust* [2013] VSC 364, based on *In re Cohen's Will Trust* [1959] 1 WLR 865 at 868. The question has been said to arise where there is a risk from the arrangement from the point of view of a beneficiary lacking capacity, or an unborn or minor beneficiary. The additional question is whether the proposed arrangement involves a risk that an adult, well-advised, would be prepared to take.

The Court has recently, in *Re The Pickering Family Trusts* [2024] VSC 5 at [17], expressed reservations about the appropriateness of this question regarding whether an adult would be willing to take a particular risk. The Court at [21] criticises the question as being of limited application beyond its particular circumstances, in part, because of the difficulty of identifying with any certainty the relevant circumstances or characteristics of an underage child or an unborn child which would inform an answer to be given to this question on their behalf.

Example 1 – situations Court has allowed – extending vesting dates

In *Re Plator Nominees Pty Ltd* [2012] VSC 284, the trustee of a family trust successfully applied under s 63A of the *Trustee Act 1958* (Vic) to extend the vesting date of the trust to a date not later than twenty one years after the death of the last living relative of a particular family member. The Court approved the extension of the vesting date for the following reasons:

(1) The trust was established as a property investment vehicle for two parents who intended the trust to continue after their deaths for the benefit of their children under their control. The vesting of the trust would not give effect to that intention, but extending the vesting date would.

(2) All the *sui juris* beneficiaries wanted the trust to continue.

(3) There was no specific reason why the original trust deed specified a particular vesting date and why the powers of variation in that deed specifically excluded the ability to vary the trust to extend the vesting date. If there was any specific reason, it had no relevance.

(4) There would be significant capital gains tax liabilities incurred on post-CGT assets of the trust on vesting (by their disposal or *in specie* distribution to beneficiaries). For the assets

of the trust that were pre-CGT assets, the benefit of the pre-CGT status would be lost if the trust vested and they were distributed to beneficiaries.

An extension of the vesting date of a discretionary trust was also approved for similar reasons in *Re: Perenna Nominees Pty Ltd* (2022) 66 VR 246.

Example 2 – situations Court has allowed – expanding classes of beneficiaries

In *Thomas Hare Investments Ltd v Hare* (2014) 34 VR 656 at [40]-[41], an amendment to a trust deed which added trusts to the class of beneficial objects was approved by the Court under s 63A of the Victorian legislation. It was approved on the basis that it would allow greater flexibility in distributing the benefit and tax burden of the trust's income because, before the amendment, the income had to be distributed to the individuals only.

In *Re EM McPherson Settlement* [2024] VSC 744, the Court approved the expansion of a class of beneficiaries from individuals only to also include companies and trusts in which other beneficiaries had an interest (although there were restrictions placed on the companies to limit them to private companies only).

Example 3 – situations Court has allowed – inclusion of a streaming power and income definition

In NSW, the Court in *Re Dion Investments Pty Ltd* (2014) 87 NSWLR 753 approved an amendment to include a streaming clause in a trust deed under its trust legislation.[24]

Similarly, in *Re EM McPherson Settlement* [2024] VSC 744, the Court approved inclusion of both a streaming clause and a new definition of "income" in a trust deed.

9.5.3 Practical aspects of making a court application

This section of the paper will deal with some of the practical matters in making an application to Court for approval of a trust variation. The focus is on Victoria.

Commencing an application

In Victoria, an application is commenced by originating motion which should include a brief summary of the relief sought. This would usually be a brief summary of the changes to the trust deed for which

[24] And see *Cisera v Cisera Holdings Pty Ltd* (2018) 98 NSWLR 747.

approval is sought. The originating motion is accompanied by affidavit evidence which should generally include:

(1) Background of the trust and family and any reasons personal to the family as to why the amendments are sought.
(2) Drafts of the proposed amendments (this could, for example, be in the form of a draft deed of amendment).
(3) Beneficiary consents to the proposed variation (see below).
(4) Trust deed and any variations to the trust, including changes in trustees and appointors.
(5) Financial information regarding the trust.
(6) Any advice received on benefits of the proposed amendments (including tax and other financial benefits), and tax consequences of the amendments.

In some jurisdictions, for example, in NSW and Victoria, notice of an application must be given to any persons as the Court directs.[25]

Ordinarily, the appropriate person to commence this type of application would be the trustee. Typically, though, the potential applicants are not so limited. You should check the legislation in your home jurisdiction. In Victoria, for example, the persons who can put forward an arrangement to the Court are extremely broad: "by whomsoever proposed and whether or not there is any other person beneficially interest who is capable of assenting thereto".[26]

Beneficiary consents and joinder

As explained above, unless the relevant statute provides that the Court by order can actually vary the trust, the Court's order will not effect a variation. It is the Court's order together with the consent of the adult beneficiaries with full capacity that effects the variation.

There is a question as to whether the consent of all beneficiaries is needed prior to commencing an application. Where there is a specific statutory provision requiring consent, that may be the case. In Tasmania, for example, a proposed arrangement cannot be submitted to the Court for approval until

[25] s 86C, *Trustee Act 1925* (NSW) and s 63A, *Trustee Act 1958* (Vic).
[26] And see *Perpetual Trustees Victoria Ltd v Barns* (2012) 34 VR 387.

an applicant has the consent in writing of any person who is beneficially interested under the trusts and who is capable of consenting to the arrangement.[27]

In other jurisdictions, such as Victoria, there is no specific requirement that consent be obtained by *all* adult beneficiaries prior to bringing an application. The Victorian Court of Appeal has indicated that an absence of consent by a particular beneficiary will not be a barrier to the Court giving its approval on behalf of those who cannot consent.[28] The consent would, however, need to be obtained at some stage for the arrangement to be effective. It would be prudent to obtain consent from all adult beneficiaries with capacity prior to commencing an application.

The next question is the appropriate form of that consent. Adult beneficiaries should be given an opportunity to seek legal advice on the proposed amendments. They should be given full information about them including a draft originating motion; a draft of the proposed amendments; a copy of any advice obtained regarding the merits of the amendments; and possibly draft affidavit material as well if that is available.

There is no prescribed form of consent. A formal consent which can be executed by each beneficiary should be drafted and included in the affidavit evidence. That consent should be fairly detailed in terms of describing the amendments; the material that has been made available to the beneficiary; that they have had the opportunity to seek independent legal advice; and making it clear that they consent and do not wish to be joined to the proceeding. Joinder of beneficiaries is not preferable given the additional time and expense that can be added to the proceeding.

Form of relief

The form of relief will depend on your particular statute (i.e. whether a Court order actually varies the trust, or the Court is merely giving approval). In Victoria, the relief should be framed in terms of the Court giving approval for the variation arrangement on behalf of the particular categories of beneficiaries who are unable to consent.

In States like Victoria where the Court's order does not vary the trust, the next issue is then, if the Court gives approval, what further thing needs to be done to give effect to the arrangement.

---

27 s 13(4), *Variation of Trusts Act 1994* (Tas).

28 *Perpetual Trustees Victoria Ltd v Barns* (2012) 34 VR 387 at [33]-[35].

Technically, it is the Court's order together with the consent of the adult beneficiaries that effects the variation. Ordinarily, it would be prudent for a deed of amendment to be executed by the trustee to document the arrangement. The written consents of the beneficiaries and the Court's order should be enough to give effect to the arrangement. Prudent practitioners may also wish to have all the adult beneficiaries with capacity to execute the deed of amendment.

Practitioners should also be mindful of the potential operation of the Australian versions of the State of Frauds in each case. For example, in Victoria, s 53(1)(c) of the *Property Law Act 1958* (Vic) requires a disposition of an equitable interest or trust subsisting at the time of the disposition to be in writing signed by the person disposing of the same, or their agent lawfully authorised in writing or by will. Those requirements may be relevant to the manner in which an arrangement to vary a trust is effected if, for example, the amendment caused the disposition of an equitable interest under the trust. The requirements do not, however, affect the creation or operation of a resulting, implied or constructive trust.

A contradictor

The legislation in some States, such as South Australia and Tasmania, specifically requires the interests of all actual and potential beneficiaries to be represented.[29] In jurisdictions in which there is no specific requirement, as a matter of good practice, an applicant should also seek the appointment of a contradictor to represent those beneficiaries who are unable to consent (it may not *always* be necessary for this to be done – see further discussion below regarding *Cisera v Cisera* [2023] NSWSC 1507). That could be a member of counsel only or, in particularly complex cases, it may require counsel and an instructing solicitor. An applicant can put forward names of potential contradictors to the Court for consideration, but a Court may also appoint its own preferred contradictor and may order that their costs be paid out of the assets of the trust.

Revenue authorities

There is no requirement that the Federal or State Commissioners of Taxation be joined to this sort of proceeding. My experience is that they would, generally, not be interested in joinder because these sorts of matters are private and do not directly involve the application of a revenue statute. It is good

[29] s 13(5), *Variation of Trusts Act 1994* (Tas) and s 59C(2), *Trustee Act 1936* (SA).

practice, however, to notify the revenue authorities of the proceeding and ask them whether they wish to be joined and then to file evidence of the same. This is because there is the *potential* for amendments to a trust deed to have revenue consequences.

In my experience, the revenue authorities are likely to be more interested in an application where an applicant is seeking declarations about particular matters regarding a trust. There is a complex issue as to when revenue authorities are bound by decisions of State Courts regarding trust and other legal matters. A consideration of that issue is beyond the scope of this paper.

There are differing views that have been expressed by the Courts as to the need for revenue authorities to be invited to be joined if they so choose. Compare *Cisera v Cisera* [2023] NSWC 1507 (see below), with the following comments of the Court in *Application of Walker Corporation Pty Ltd* [2022] NSWSC 1609 in the context of an application to rectify a trust deed's vesting clause which would have resulted in an extended vesting date:

> *126. In cases such as the present, the amendments are often sought for taxation purposes. In some of the cases, the taxation authorities have been joined as parties, or at least notified and invited to appear. In Carlenka, the Commissioner for Stamp Duties was joined as a defendant at first instance to resist the claim and then appealed (unsuccessfully) against the rectification order that was made.*
>
> *127. In the present case, no enquiry was made of the taxation authorities to see whether they wished to be heard. Mr Bannan suggested in his written submissions that the hearing should not proceed until this enquiry had at least been made.*
>
> *128. Counsel for the Trustee pointed out that, upon vesting, the Trust will be converted from a discretionary trust to a fixed trust. This will not itself have any capital gains tax consequences. That may be so, but, once the assets are vested in individuals, the likelihood of their sale or transfer will increase. The longer the Trust continues, the longer that vesting will be deferred, and the longer the Trustee may be able to distribute its income among the beneficiaries so as to minimise the tax burden on that income.*
>
> *129. The problem is, however, that the future tax consequences of extending the Trust's vesting date are unknown and unquantifiable. Counsel submitted that the tax authorities' interest in the current issue is so remote and speculative that it would have been pointless to invite them to join the proceedings, and I agreed.*

Costs

Ordinarily, a trustee would have general law and statutory rights of indemnity for their costs of the application out of the trust funds.[30] A prudent trustee might seek a specific indemnification order from the Court.

[30] Eg *Hopkins v Edwards* [2020] VSC 456; s 36(2), *Trustee Act 1958* (Vic); and r 63.26, *Supreme Court (General Civil Procedure) Rules 2015* (Vic).