The Tax Institute

NSW Tax Forum

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Sofitel Sydney Wentworth

Trust Vesting

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Agenda

In the context of discretionary trusts:

- What is ‘vesting of a trust’
- What are the implications of a trust vesting?
- Extending the vesting date
- What if the trust has vested?

What is ‘vesting of a trust’

The point in time where the beneficiaries’ interests in a trust become fixed.

What is ‘vesting of a trust’

Generally, trusts can vest:

1. On the set date in the trust terms for the trust to vest occurs (referred to as the ‘vesting date’ or ‘termination date’); or
2. Upon the trustee exercising a power to vest the trust prior to the vesting day.

What is ‘vesting of a trust’

The Common Law Rule Against Perpetuities

The modern ‘rule against perpetuities’ can be traced back to the 1682 decision of Lord Nottingham in the Duke of Norfolk’s Case.

Public policy to facilitate land being entered into commerce.

Need to understand the Common Law rule against perpetuities to properly consider the vesting date for the trust.

What is ‘vesting of a trust’

The Common Law Rule Against Perpetuities

In its classical form, the rule can be stated in the following two propositions:

1. Any future interest in any property, real or personal, is void from the outset if it may possibly vest after the perpetuity period has expired (known as ‘the **initial certainty rule**’);
2. The perpetuity period consists of any life or lives in being together with a further period of twenty-one years (known as ‘the **perpetuity period**’).

What is ‘vesting of a trust’

Statutory Rule Against Perpetuities

Each of the Australian jurisdictions have modified or abolished the common law against perpetuities.

WA was the first Australian jurisdiction in 1962 and NT was the last in 1994.

The changes made are not uniform.

Care should be taken to ensure the correct perpetuities laws are applied to the trust.

What is ‘vesting of a trust’

Statutory Rule Against Perpetuities

Jurisdiction	Legislation	Summary
ACT	*Perpetuities and Accumulations Act 1985 (ACT)*	Modified perpetuity period – 80 year perpetuity period ‘Wait and see rule’ replaced the ‘initial certainty rule’
NT	*Part II of the Law of Property Act 2000 (NT)*	Modified perpetuity period – enables trust terms to adopt either common law perpetuity period or 80 years and if not stated then 80 year perpetuity period applies Wait and see rule’ replaced the ‘initial certainty rule’
NSW	*Perpetuities Act 1984 (NSW)*	Modified perpetuity period – 80 year perpetuity period ‘Wait and see rule’ replaced the ‘initial certainty rule’

What is ‘vesting of a trust’

Statutory Rule Against Perpetuities

Jurisdiction	Legislation	Summary
QLD	*Property Law Act 1974 (Qld)* although effective from 1 August 2025, this Act will be replaced by the *Property Law Act 2023 (Qld))*	Current Law – permits trust terms to specify perpetuity period, provided it does not exceed 80 years. ‘Wait and see rule’ replaced the ‘initial certainty rule’ New Law – Common Law rule against perpetuities abolished, 125 perpetuity period applies.
SA	Section 61 of the *Law of Property Act 1936 (SA)*	Common Law rule against perpetuities abolished

What is ‘vesting of a trust’

Statutory Rule Against Perpetuities

Jurisdiction	Legislation	Summary
TAS	*Perpetuities & Accumulations Act 1992 (Tas)*	Modified perpetuity period - permits trust terms to specify perpetuity period, provided it does not exceed 80 years. Wait and see rule’ replaced the ‘initial certainty rule’
VIC	*Perpetuities & Accumulations Act 1968 (Vic)*	Modified perpetuity period - permits trust terms to specify perpetuity period, provided it does not exceed 80 years. Wait and see rule’ replaced the ‘initial certainty rule’

What is ‘vesting of a trust’

Statutory Rule Against Perpetuities

Jurisdiction	Legislation	Summary
WA	*Property Law Act 1969 (WA)*	Modified perpetuity period - permits trust terms to specify perpetuity period, provided it does not exceed 80 years. If nothing is stated, default is common law perpetuity period. Wait and see rule’ replaced the ‘initial certainty rule’

What is ‘vesting of a trust’

Statutory Rule Against Perpetuities

‘Wait and see rule’ v ‘the initial certainty rule’

In the context of discretionary trusts – relevant for ‘trust-to-trust’ distributions

Be careful in applying statute to older trusts – the common law rule against perpetuities may still apply!

What is ‘vesting of a trust’

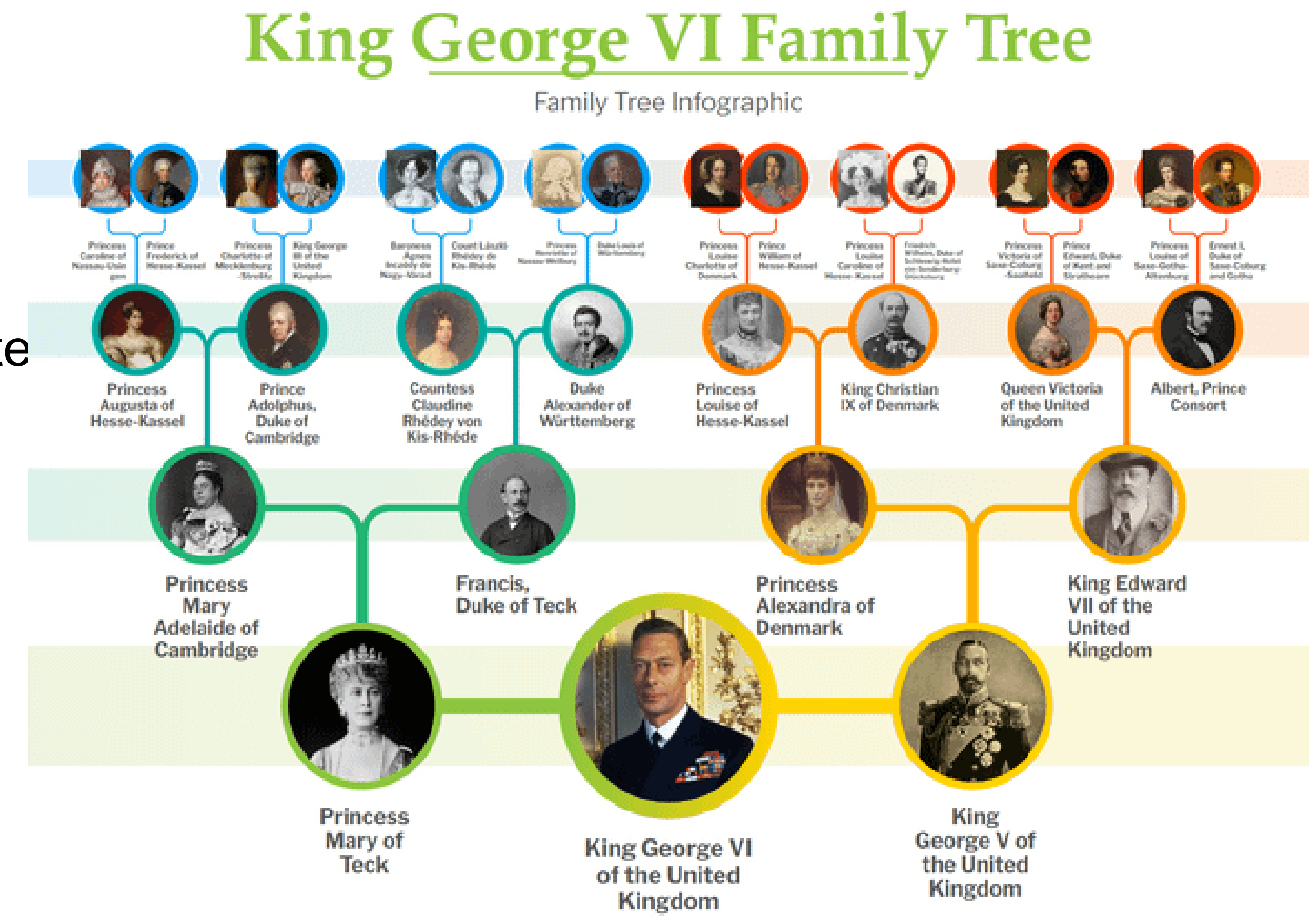
Types of Vesting Dates

The ‘vesting date’ is different to the ‘perpetuity period’

Use of cascading clauses to define vesting date

The Royal Lives clause in older deeds

Restrictions on vesting



What are the implications of a trust vesting?

Trust Law

The trust terms set out how the trust fund is to be dealt with on the vesting date

Could include a power for trustee to elect beneficiaries prior to vesting date

Could include a cascading clause of default beneficiaries

Could be broad and flexible or very prescriptive

Importantly, on the vesting date, the interest in the trust become fixed – trustee no longer has discretion

Usually doesn’t cause a new trust to be established

What are the implications of a trust vesting?

Trust Law

Prior to the vesting date, planning is key - you should:

- Identify the vesting date – change or extend it if necessary (subject to the trust terms)
- Identify who the appropriate beneficiaries are to receive the trust fund (consider tax implications and personal circumstances of the beneficiaries)
- Put in place any nominations prior to the vesting date (if applicable) to ensure the appropriate beneficiaries receive the trust fund on vesting
- If required, amend the capital on vesting clause to ensure the appropriate beneficiaries receive the trust fund on vesting
- Alternatively, if the trust terms are not appropriate, consider distributing the capital and income to chosen beneficiaries prior to the vesting date

What are the implications of a trust vesting?

Income Tax

CGT implications on the vesting of a trust are complex and should be carefully considered.

Whilst the vesting of the trust in and of itself may not trigger a CGT event, the actions taken by the trustee following the vesting day may trigger a CGT event.

Start by looking at the trust assets – is CGT relevant?

If the trust only holds cash, then CGT is not relevant.

If the trust only holds pre-CGT assets, then a capital gain is disregarded.

ATO view – TR 2018/6

What are the implications of a trust vesting?

Income Tax

CGT Event	Description	Application
A1	Disposal of CGT asset	Will be triggered if assets disposed of prior to vesting date Not necessarily triggered merely upon the vesting date May be triggered where trust terms require sale
E1	Creation of a new trust	Subject to the trust terms, the vesting date usually does not cause the existing trust to come to an end and a new trust to be established. Parties could potentially trigger this if seek to affirm the new trust arrangement

What are the implications of a trust vesting?

Income Tax

CGT Event	Description	Application
E5	Beneficiary becoming 'absolutely entitled'	Determining 'absolute entitlement' is complex and uncertain ATO views in TR 2004/D25 – in draft for over 20 years now Better view, beneficiary is absolutely entitled to CGT asset where: • The beneficiary has a vested and indefeasible interest in the entire asset, which is not shares with another beneficiary; and • The beneficiary has a right to call for the transfer of the asset and therefore a right to terminate the trust. If the CGT assets are fungible, then multiple beneficiaries can be absolutely entitled. PBR 1052105674721 (2023)

What are the implications of a trust vesting?

Income Tax

CGT Event	Description	Application
E7	Disposal to beneficiary to end capital interest	Unlikely to occur on vesting of a discretionary trust. Requires the beneficiary to have a pre-existing right in all or part of the capital before the disposal takes place. Generally, a mere object of a discretionary trust does not have an interest in all or part of the trust fund, as their interest is merely a right to due administration of the trust. May occur upon in a post-vesting setting in respect of the fixed trust, however only to the extent that the beneficiaries are not already absolutely entitled.

What are the implications of a trust vesting?

Duty

Unless a concession applies, ad valorem duty will generally be charged on any transfers of dutiable property to beneficiaries in connection with trust vesting.

NSW – concession under s57 of the Duties 2007 (NSW) will generally not apply, as the property had to be the subject of the declaration of trust, upon which ad valorem duty was paid.

Commonly, inter vivos discretionary trusts are established with a nominal sum with any assets being acquired at a later date. For this reason, upon establishment, the trust deed is stamped for concessional duty under Section 58 of the Duties 2008 (NSW) Act.

Other jurisdictions however contain more generous concessions which could apply.

Can the vesting date be extended?

There are three potential ways to extend the vesting date:

- Exercising a power provided under the trust terms;
- Obtaining the consent of all beneficiaries;
- Obtaining an order of the court.

Prior to undertaking any extensions, carefully consider the relevant rule against perpetuities that applies to the respective trust to ensure that any extensions will not breach such rule.

Can the vesting date be extended?

Exercising a power provided under the trust terms

The trust terms may provide a specific power to extend the vesting date, or a broad amendment power.

The scope of the power must be wide enough to validly facilitate extension of the vesting day.

Some amendment powers, of trust terms more generally, can contain restrictions on extending the vesting date – it is important to consider the amendment power in the context of the whole trust terms.

Consider the substratum of the trust – the nature and purpose of the trust intended by the settlor/testator.

Where the vesting date is key to the substratum of the trust, then extending the vesting date may be problematic.

Can the vesting date be extended?

Extension with consent of beneficiaries

The rule in Saunders v Vautier (1841) 41 ER 842.

Can apply where:

- All beneficiaries of the trust can be ascertained;
- The beneficiaries are of the trust are of age and have legal capacity;
- All consent to the proposed extension.

This option is really only available to those discretionary trusts with a closed class of beneficiaries that can be ascertained.

Problematic where there is a broad class of beneficiaries including minors and unborn persons.

Can the vesting date be extended?

Extension by Court order

In each Australian jurisdiction the Court is authorised by statute to vary trust instruments where this is expedient (or in NT where the Court thinks fit)(WA and Qld, Courts can also approve a transaction in the best interest of beneficiaries as an alternative to ‘expediency’).

Slight differences between jurisdictions.

Context of the trust terms can bear weight in overcoming restriction of extending vesting date – Stein v Symbore Holdings Pty Ltd [2006] NSWSC 1004.

In NSW, significant tax consequences may not be enough to allow the Court to vary the trust – Paloto v Herro [2915] NSWSC 445.

Can the vesting date be extended?

Trust resettlement risk and taxation issues with extending the vesting date?

CGT events E1 and E2 relevant.

TD 2012/21.

Commission of Taxation v Clark [2011] FCAFC5.

Generally, if exercised pursuant to a valid power or by exercise of the Court, extending the vesting date should not trigger a trust resettlement or trigger CGT events E1 or E2.

PBR 1051583205177.

Chief Commissioner of Stamp Duties v Buckle (1995) 38 NSWLR 574.

Can the vesting date be extended?

If it is problematic, look at it from a commercial perspective.

Would it be better to trigger vesting and incur the tax to gain certainty?

What if the trust has already vested?

Once the trust vesting date occurs, you can no longer seek to extend such date.

Tax office view – TR 2018/6 - the vesting of a trust is irrevocable when the vesting date has passed even where the trustee is ignorant of the fact that the vesting date has passed.

The key is to be proactive to ensure you plan and take action before the vesting date.

However, where the vesting date has been missed, then consider:

- What are the fixed interests your left with?
- Has a CGT event occurred? – depending on the trust terms – perhaps not
- The beneficiaries on vesting will be presently entitled to the income of the trust for tax purposes, regardless of the distributions made
- Consider potential issues for trustee acting in breach of trust

Case Study - 1

NSW discretionary trust – established on 1 April 1980 (**First Trust**). Older style deed, very restrictive.

First Trust wishes to distribute to a new NSW discretionary trust established in 2025 (**Second Trust**).

Clients receive advice that they should change the vesting date of the Second Trust so this it vests before the First Trust to ensure the distribution will not breach the rule against perpetuities.

The Second Trust vesting date is subsequently amended to 31 March 2060 (being 1 day before 80 years from the date the First Trust was established). And distribution subsequently made.

The error – the 80-year perpetuity period does not apply to the First Trust (s4 of the Perpetuities Act 1984 (NSW)). The First Trust still comes under the common law rule against perpetuities with the life in being plus 21 years perpetuity period.

As it cannot be certain that the First Trust will vest after the Second Trust (based on the new vesting date) – the distribution would be void at the outset.

Based on *Domazet v Jure Investments Pty Limited [2016] ACTSC 33.*

Rectification orders were sought.

Case Study - 2

NSW discretionary trust – established by paternal grandparents for son and his 2 daughters.

In reality, it was the son's trust, he contributed to the trust for the trust to acquire property.

Short 19-year vesting period. 2 daughters were the takers in default.

Father has terminal illness, as part of estate planning, discovered the trust vested 30 years ago without the parties knowing.

Clients were concerned there was tax exposure and there would be issues for the father's estate plan.

After careful consideration, turns out no CGT events triggered and duty not triggered.

As all parties get along, no reason to take steps to windup in the interim.

May have to amend tax returns of 2 daughters to include income (as it has been distributed to the father), however only minimal amounts.

Overall not disastrous.

However, could have been much worse if parties did not get along or significant income and capital had been distributed post vesting.

Thank you

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