The Tax Institute

The Yarra Valley Tax Retreat

Session 1: A Pandora's box of trust issues

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1. Introduction[1]

According to Greek mythology, in the beginning the earth was free from misery; the land covered with flowers, and rivers flowed with milk and honey. Earth was inhabited only by men. After being angered by Prometheus, Zeus sought revenge by ordering the creation of the first woman – Pandora. She was moulded to look like Aphrodite and received the gifts of wisdom, beauty, kindness, peace, generosity and health from the gods.

As a wedding gift, Zeus gave Pandora a box and told her not to open it. You see, the box contained all the evils – greed, envy, hatred, pain, disease, poverty, war and death.

When curiosity got the better of her, life's evils and miseries were released, ending the earthly paradise. However, what Zeus did not know is that hope had been secretly added to the box. And so, humans have been able to hold onto this hope to survive the wickedness that Pandora had released.

In the 70s and 80s, discretionary trusts were praised for their flexibility, asset protection benefits, business efficacy and ability to facilitate succession planning and provide for multiple generations. They were also seen as the exemplar of tax minimisation. As has been stated:[2]

> In the 1970s discretionary family trusts flourished in Australia. They were a taxation avoidance or minimisation device. In addition to reducing the amount or incidence of income tax, and gift, estate and death duties, discretionary family trusts offered flexibility and procedural simplicity. They facilitated succession planning.

More recently, esteemed tax practitioners have questioned their modern utility. That primarily is in light of a few decades of challenging court decisions, in particular in relation to trust administration,[3] and, perhaps more importantly, what seems like a one-eyed attack on any tax benefit that arises because of the nature of trusts.[4] Some of that encroachment has also arisen as a result of the blatant, artificial and contrived misuse of trusts, particularly in the late 70s and early 80s, and the legislative

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[1] As the saying goes, many hands make light work. I express my thanks and appreciation to the team at Sladen Legal, and, in particular Kseniia Gasiuk, Will Monotti and Daniel Smedley, for their assistance and helpful suggestions in drafting this paper. The views expressed, and any errors, are those of the author alone.
I also express my thanks and appreciation to my husband, who endures many days (and nights and weekends) parenting alone while I write papers about tax.

[2] *Mercanti v Mercanti* (2016) 340 ALR 290, [26] referring to See Hardingham and Baxt, Discretionary Trusts, 1975, chapters 7, 8 and 9; Grbich, Munn and Reicher (eds), Modern Trusts and Taxation, 1978, 1–2; GL Davies, 'Some Problems with Discretionary Trusts', (1974–75) 9 Taxation in Australia 415; DH Bloom, 'The Discretionary Trust — Some Practical Implications', (1974–75) 9 Taxation In Australia 586; DKL Raphael 'Problems in Discretionary Trusts — What? Why? and How?', (1975–76) 10 Taxation in Australia 662; DG Hill, 'Comments on "Problems in Discretionary Trusts"', (1975–76) 10 Taxation in Australia 674; TW Magney, 'A Comparative Analysis of Estate Planning Vehicles', (1977–78) 12 Taxation in Australia 22; See also, Scaffidi v Montevento Holdings Pty Ltd [2011] WASCA 146, [69].

[3] *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142; *FCT v Carter* [2022] HCA 10.

[4] For example, the Commissioner's evolving view in relation to present entitlements of corporate beneficiaries that are not immediately paid and sub trusts in TR 2010/W3, PSLA 2010/W4, PCG 2017/W13 and TD 2022/11; the ATO's guidance on s 100A in TR 2022/4 and PS LA 2022/2; the ATO's view in relation to the derivation of non-TAP gains on and the application and interaction of Division 855 of the ITAA 1997, with s 95 and s 99B of the 1936 Act in *Taxation Ruling* TR 2018/23 and *Taxation Ruling* TR 2018/24; TR 2012/D1 which is still in draft 12 years later, and largely viewed by practitioners as an attempt to reinterpret *Bamford*.

response.[5] Unfortunately, the drafting of that legislative response leaves many in a state of uncertainty.

I do not, entirely, disagree with that view. But I also do not entirely agree – there remains a place for trusts. However, a practitioner must understand that the box of troubles has certainly been opened, and caution must be exercised.

However, there remains – as it did for Pandora – hope for the humble trust.

This paper explores some trust issues that have emerged or reemerged in recent years with respect to discretionary trusts.[6]

References to:

a. ITAA 1936 is to the *Income Tax Assessment Act* 1936; and

b. ITAA 1997 is to the *Income Tax Assessment Act* 1997.

[5] In particular, the introduction of s 100A and s 99B of the ITAA 1936.

[6] Only some. There are many more, including issues relating to vesting, sub-trusts and more.

2. A trust, the trust instrument and terms and conditions

The High Court has described the trust as a "…*creature of equity*…" subject to the jurisdiction of a court of equity.[7] As was stated by Steward J in Aussiegolfa Pty Ltd,[8]

> The term 'trust' refers to the legal relationship created – inter vivos or on death – by a person, the settlor, when assets have been placed under the control of the trustee for the benefit of a beneficiary or for a specified purpose.

Elsewhere he said, "*a trust is not an entity… it is a relationship governing the basis upon which property is held.*"[9] Another way of putting it, is as follows:[10]

> A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called trust property), for the benefit of persons (who are called the beneficiaries or cestuis que trust) of whom he may himself be one, and any of whom may enforce the obligation.

Accordingly, there are four essential elements of a trust relationship:[11]

a. a trustee must hold a legal or equitable interest in the trust property;

b. the trust property must be property capable of being held on trust;

c. there must be one or more beneficiaries other than the trustee;

d. the trustee has a personal obligation to deal with the trust property for the benefit of the beneficiaries, and that obligation is also annexed to the property.

The relationship between a trustee and beneficiaries is based in equity, as modified by statute, but (assuming there is one) is guided by the terms agreed in a trust deed.

2.1 Equitable principles governing the trustee beneficiary relationship

The obligations of a trustee are based in equity, being a personal obligation annexed to the trust property. A fiduciary relationship exists between the trustee and the beneficiary.

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[7] *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145, 175 (Mason CJ, Dawson Toohey, Gaudron JJ).
[8] [2018] FCAFC 122, [189].
[9] [2018] FCAFC 122, [188].
[10] *Law of Trusts and Trustees*, 12th ed, p 3, which was cited with approval by Cohen J in *Re Marshall's Will Trusts* (1945) Ch 217, at p 219, and by Romer LJ in *Green v Russell* (1959) 2 QB 226, at p 241. For some judicial attempts at definition, see *Wilson v Lord Bury* (1880) 5 QBD 518, per Brett LJ at pp 630 — 631; *Sturt v Mellish* (1743) 2 ER 765 per Lord Hardwicke; and *Re Scott* (1948) SASR 193, per Mayo J at p 196.
[11] *Harmer v FCT* 89 ATC 5180.

On assuming a trustee relationship, some of a trustee's duties include:

a. to ascertain and uphold the terms of the trust;

b. comply with the trust deed terms; and

c. to avoid conflict between the trustee's duty to the trust and personal interest;

d. to act in good faith, to be properly informed and give real and genuine consideration when exercising a discretion;

e. to act fairly between the beneficiaries entitled to income and those entitled to capital;

f. to act personally and not delegate;

g. exercising care, skill, and diligence in the best interests of the beneficiaries; and

h. not to fetter its discretion.

A trustee who breaches these duties may be held liable for any resulting losses.

However, not all equitable duties of trustees will necessarily result in a trustee being in breach of its duties. For example, the decision of *Dagenmont Pty Ltd v Lagton*[12] considered the prohibition of fettering a discretion. That case involved a discretionary trust, which operated a business supplying books to libraries. The primary beneficiaries were Mr Pal, his wife, Mr Lagton, and his wife. Almost 20 years after the trust was established and after a breakdown in the relationship between Mr Pal and Mr Lagton, the trustee entered into a deed (**2000 deed**) pursuant to which Mr Lugton resigned from his office as director of the trustee and transferred his shares in the trustee company to Mr Pal and his siblings. The 2000 deed also purported to provide Mr Lagton with an amount of $150,000 per year increased by CPI.

Some 7 years after entering into the 2000 deed, the proceeding was brought. Mr Pal, who apparently no longer wanted the trust to make the payments, sought a declaration that the deed was ineffective. The basis of the application was, as the Court quoted from *Law of Trusts*, "*trustees cannot fetter the future exercise of powers vested in trustees…any fetter is of no effect. Trustees need to be properly informed of all matters at the time they come to exercise their relevant power."*[13]

The Court held that the 2000 deed did amount to a fettering of the trustee's discretion and, "*[i]f matters rested there*", would have provided for the declarations sought. However, the Court went on to hold that the fettering of discretion could be ignored because the 2000 deed was a permitted variation of the trust deed, even though the 2000 deed did not purport to be founded in that power.[14]

[12] [2007] QSC 272.
[13] *Dagenmont Pty Ltd v Lagton* [2007] QSC 272, [14], quoting Underhill and Hayton, *Law of Trusts*, 16th edition, 690.
[14] *Dagenmont Pty Ltd v Lagton* [2007] QSC 272, [21] and [34].

2.2 Statutory frameworks that affect trusts

In addition to the trust instrument and the principles in equity, each Australian State and Territory has adopted some form of legislation which affect Trusts.

While this paper will focus on Victoria, the main statutory sources that impact on the law of trusts include:

New South Wales	*Trustee Act* 1925 (NSW)	*Perpetuities Act* 1984 (NSW)
Victoria	*Trustee Act* 1958 (VIC)	*Perpetuities and Accumulations Act* 1968 (Vic)
Queensland	*Trusts Act* 1973 (QLD)	*Perpetuities and Accumulations Act* 1972 (QLD)
Western Australia	*Trustee Act* 1962 (WA)	*Property Law Act* 1969 (WA) - Part XIII deals with Perpetuities and Accumulation
South Australia	*Trustee Act* 1936 (SA)	*Law of Property Act* 1936 (SA)
Tasmania	*Trustee Act* 1898 (TAS)	*Perpetuities and Accumulations Act* 1968 (TAS)
ACT	*Trustee Act* 1925 (ACT)	*Law Reform (Miscellaneous Provisions) Ordinance 1955* (ACT) - Part X deals with Perpetuities and Accumulations
NT	*Trustee Act* 1893 (NT)	*Law of Property Act* 2000 (NT) - Part 12 deals with Perpetuities and Accumulations

The Trustee Act in each jurisdiction differs in each State and territory but include the minimum obligations placed on trustees, as well as limited powers.

In Victoria, this includes the power:

a. to sell by auction;[15]

b. give receipts; [16]

c. to compound liabilities;[17] and

d. delegate trusts during absence abroad.[18]

The Trustee Act in each jurisdiction also provides the Court various powers, including the power to:

a. appoint and discharge trustees;[19]

[15] *Trustee Act* 1958 (VIC), s 13.
[16] *Trustee Act* 1958 (VIC), s 18.
[17] *Trustee Act* 1958 (VIC), s 19.
[18] *Trustee Act* 1958 (VIC), s 30
[19] *Trustee Act* 1958 (VIC), Pt III and Pt VI.

b. authorise dealings with trust property;[20]

c. vary trusts;[21] and

d. relive trustee from personal liability.[22]

However, there are other statutory sources that impact on the regulation and administration of trusts. In respect of discretionary trusts, the application of the *Family Law Act 1975* (Cth) enables the Court to make orders affecting the administration of, and alter the beneficial interests in, a discretionary trust.[23]

2.3 The trust instrument

While it will not always be the case,[24] the trust relationship is primarily governed by the trust instrument. Trust deeds are often used to ensure that:[25]

> Trustees are furnished with the most ample powers of management and disposition of the settled fund coupled with maximum flexibility in the use of those powers, so as to accommodate the settled fund to emerging and ever-changing economic and revenue considerations.

A trust deed is a critical document that delineates the terms and conditions governing the operation of a trust. It outlines the roles and responsibilities of the trustees, the entitlements of the beneficiaries, and the overall framework and purpose of the trust.

Notwithstanding that the origins and nature of contract and trusts are quite different, the same principles that apply to construction and interpretation of contacts applies when interrupting the trust instrument.[26] The trust instrument should be interpreted according to its "*natural and ordinary meaning, and is not in a narrow or unreal way*",[27] unless the words have "*a special or technical meaning*."[28]

Further:[29]

> The terms of an instrument must be construed in the context of the entire document and in such a way that renders them 'all harmonious one with another.'

The challenge is that trust deeds are "*conspicuously, but not atypically, ill-drafted*."[30]

[20] *Trustee Act* 1958 (VIC), s 63.
[21] *Trustee Act* 1958 (VIC), s63A.
[22] *Trustee Act* 1958 (VIC), s67.
[23] See, for example, *Ellison v Sandini* [2018] FCAFC 44 and *Duff v Duff* (1997) 90-257.
[24] See, for example, *Kennon v Spry* (2008) 238 CLR 366.
[25] *Kearns v Hill* (1990) 21 NSWLR 107, 109.
[26] *Byrnes v Kendle* (2011) 243 CLR 253, [59] and [102].
[27] *Mercanti v Mercanti* [2016] WASCA 206, [80], [353].
[28] *Schreuders v Grandiflora Nominees Pty Ltd* [2016] VSCA 93, [21] (Kyrou, Ferguson & McLeish JJA).
[29] *Schreuders v Grandiflora Nominees Pty Ltd* [2016] VSCA 93, [21]. See also *Hill (Viscount) v Hill* (*Dowager Viscountess)* [1897] 1 QB 483 at 486 Lord Esher MR.
[30] *Kearns v Hill* (1990) 21 NSWLR 107, 109.

There is but one Golden Rule: read the deed. It cannot be stated enough. If you do not comprehend it after you have read it, read it again. If you still do not understand it, get advice.

2.4 Who has jurisdiction over the trust?

The initial reference point for any jurisdictional questions relating to trusts is the *Trusts (Hague Convention) Act 1991*, Federal legislation which imports the wording of the Hague's 1985 Convention on the law of trusts into Australian law.

Chapter II of the Convention, contained in a schedule to the *Trusts (Hague Convention) Act 1991*, deals with the "Applicable Law" of the trust. It provides that the applicable law is "the law chosen by the settlor".[31] Where the settlor has not verifiably made a choice as to the applicable law, then the trust "shall be governed by the law with which it is most closely connected".[32] To determine this, reference is to be made to the place of the trust's administration, the location or *situs* of the trust's assets, the place of residence or business of the trustee, and the places in which the objects are to be fulfilled.[33] The laws across Australian jurisdictions in relation to the rights and duties of trustees and beneficiaries are, broadly, very similar. But there are some differences. However, the jurisdiction of a trust within Australia will nonetheless have relevance, on several fronts. For example, the amount of duty payable upon stamping of a trust deed at its establishment varies across Australian jurisdictions. Further, and more significantly, the laws relating to perpetuity periods differ across the jurisdictions. In its original form, the rule required a trust to vest within a period 21 years after the death of a person who was alive at the time of commencement of the trust. However, with the exception of South Australia where the rule has been abolished (or at least, the effect of the legislation is that a disposition is not invalid because of the remoteness of vesting),[34] each Australia jurisdiction has legislation specifying the perpetuities period.[35] In Victoria, if the statutory period is adopted, a trust's maximum perpetuity period is 80 years from its establishment;[36] and in Queensland, the maximum period is 125 years.[37] Further, in Victoria, the *Perpetuities and Accumulations Act 1968 (Vic)*, s 5 and s 6 provide that there is the power to specify a perpetuity period in the deed, and introduces a wait and see rule.

The persons involved in the establishment of a trust may be attracted to adopting South Australian law as the applicable law to the trust, given that the trust could exist there in perpetuity (subject any Court order to vest within 80 years or immediately if it has existed for 80 years or more),[38] availing many generations of beneficiaries of the asset protection benefits of trusts, as well as averting the tax and duty implications that are associated with a trust vesting.

If the settlor decides that the trust is to be a South Australian trust, then a Court is only ever likely to decline to accept South Australia as the applicable jurisdiction if there is "*no or an insufficient*

[31] *Trusts (Hague Convention) Act 1991* (Cth), Art. 6 of the Schedule.
[32] *Trusts (Hague Convention) Act 1991* (Cth),Art. 7.
[33] *Trusts (Hague Convention) Act 1991* (Cth),Art. 7.
[34] *Law of Property Act 1936* (SA), s 61.
[35] Perpetuities and Accumulations Act 1985 (ACT), ss 8 and 9; Perpetuities Act 1984 (NSW), ss 7 and 8; Law of Property Act 2000 (NT), ss 187 and 190; Property Law Act 1974 (Qld), ss 209 and 210; Perpetuities and Accumulations Act 1992 (Tas), ss 6 and 9; Perpetuities and Accumulations Act 1968 (Vic), ss 5 and 6; Property Law Act 1969 (WA), ss 101 and 103.
[36] *Perpetuities and Accumulations Act 1968* (Vic), s 5.
[37] *Property Law Act 2023* (Qld), s 201.
[38] *Law of Property Act 1936* (SA), s 62.

connection between a trust and South Australia."[39] If the trust's property comprises real estate not located in South Australia and no other assets, then that connection may be difficult to establish. However, case law suggests that a trust could nominate its jurisdiction as South Australia notwithstanding it might hold assets in other jurisdictions (in particular, where the trusts' assets are moveable), and/or have a trustee or beneficiaries located in other Australian jurisdictions.[40]

[39] See, for example, *Host-Plus Pty Ltd v Blackwell* [2022] SASC 59, [85], and the cases cited by Blue J in that paragraph.
[40] See, for example, *Host-Plus Pty Ltd v Blackwell* [2022] SASC 59, [86].

3. The beneficiaries

Perhaps the most critical job of a tax lawyer (at least one dealing with trusts) is to determine who can benefit from the trust. In other words, can the intended beneficiary qualify as a beneficiary, and, if they can, what rights they have. Income beneficiaries, capital beneficiaries, beneficiaries on vesting and contingent beneficiaries may all vary.

That determination dictates who can be presently entitled to income and taxed pursuant to s 97 of the ITAA 1936; and, if an entity is made presently entitled, not only will any subsequent distribution be invalid, but it may lead, depending on the terms of the trust, to the trustee being taxed. It is also relevant to determining who might be entitled to the assets of the trust on vesting.

The concept of a beneficiary is also an essential element for numerous other provisions. This includes s 100A (which cannot apply unless "*a beneficiary of a trust estate who is not under any legal disability*") and s 99B of the ITAA 1936 (which cannot apply unless an amount being property of the trust estate is paid to or applied for the benefit of "*a beneficiary of the trust estate who was a resident at any time during the income year*". However, even a reference to those two provisions ought to make it clear that the not all beneficiaries will be caught by those provisions.

To determine the beneficiaries of a trust properly and definitively, it is necessary to establish:

a. who may benefit from the trust;

b. to what extent a particular individual or entity can benefit from the trust; and

c. how a particular benefit may be provided.

To do so, you must carefully review all clauses that operate to define the class of beneficiaries of the trust, including clauses which limit the range of individuals and entities who may be included in a particular class of beneficiaries based on those individuals or entities falling within specific groups such as excluded persons. This requires careful review of the whole deed as often excluded persons clauses can appear many pages passed the definition of a beneficiary.

In reviewing who can benefit from a trust some specific questions to ask are:

a. Who are the named beneficiaries?

b. Who is in the class of general beneficiaries?

c. Does the class of general beneficiaries include any ineligible beneficiaries?

d. Does the deed exclude any particular persons or entities as an ineligible beneficiary?

e. Are there any saving provisions?

f. Have there been any variations to the trust deed that impact on the class of eligible beneficiary?

The variations are endless, but there are some particular individuals or entities that one should be aware of:

a. While many trust deeds will include in the class of general beneficiaries the spouse of the named beneficiary, and the spouse of individuals who fall in the class of the general beneficiaries, in some cases a decision is made when establishing the trust to exclude spouses.

b. Former spouses may not be included.

c. The way descendants of either the named beneficiary, or of individuals who fall within the class of beneficiaries are included vary considerably between trusts. In some instances, it may only include blood relatives, in other instances it may include step or adopted children.

d. The settlor is generally an excluded beneficiary, and the guardian or appointor is sometimes an excluded beneficiary.

e. Sometimes also the notional settlor, is excluded. The notional settlor is often described as "*as someone who has made any disposition of property in favour of the trustee other than for full consideration in money or moneys' worth.*" As key family members often transfer assets to the trust as gifts, or at less than market value consideration, this could inadvertently result in a principal benefactor of the trust being excluded as a potential beneficiary of the trust. The exclusion of the notional settlor usually only applies where that person is not named as a primary beneficiary. Accordingly, in these circumstances, where a beneficiary of the trust (other than a primary beneficiary) gifts their present entitlement to the trust for asset protection reasons, that person would cease to be a beneficiary. The operation of notional settlor provisions may result in persons who had been receiving distributions of income and capital from a trust not actually being included within the class of beneficiaries of the trust.

f. In some circumstances, entities in which specific persons (ie the settlor or the guardian) have any interest may be excluded.

g. In many circumstances, the trustee may be excluded. If there is corporate trustee, and that company acts in different capacities (perhaps as trustee of multiple trusts or in its own right) careful attention should be paid to whether any clause excluding the trustee from the class of beneficiaries applies in respect of it acting in all capacities, or only in its capacity as trustee.

h. In recent years, many trusts have been amended to address the state taxation and FIRB concerns regarding being considered a foreign trust.

i. In some circumstances, if a family trust election has been made, there may be a restriction the class of beneficiaries (including named beneficiaries) to only include individuals or entities which will not result in family trust distribution tax being payable under the ITAAs.

j. Capital, income, vesting and contingent beneficiaries might not be the same.

But that is not all.

With many family groups holding assets through several separate trusts, the ability to appoint income or capital between those trusts need to be careful considered. Simply having the same primary beneficiaries named in the schedules to both trust deeds does not mean that the trustees of both trusts may make distributions between the two trusts. Further, the fact that two trusts have made a

family trust election with the same test individual or an interposed entity election, that is only effective for tax purposes: the ability to distribute between the two trusts is still only governed by the trust deed. It is important to pay attention to the operation of any exclusions that apply to provisions of the trust deed that identify the class of beneficiaries.

Some common examples include:

a. In relation to amendments to address state taxation and FIRB concerns, it is not uncommon to see an exclusion along the lines of:

> any person, entity or trustee (in that trustee's capacity as such trustee) that is a "foreign person" or a "foreign trust" as those terms are defined in (the relevant legislation)"

In that situation, depending on the nature of the definitions in the relevant jurisdiction the recipient trust may be defined as a "foreign trust" if it continues to allow the trustee to distribute to a wide class of beneficiaries which may include foreign persons. As such, the recipient trust is excluded from the class of beneficiaries of the distributing trust and the distribution is invalid.

b. To address the "wait and see" rule, it is not uncommon for the class of eligible trusts to only include trusts that have a vesting date that is no later than the perpetuity period of the distributing trust.

Read the deed, then read it again. And if the trustee is distributing to another trust, read that deed too.

4. Trust Amendments

There are numerous reasons why you might need to amend the terms of the trust deed. Significant life events often necessitate variations, but other circumstances can also prompt an amendment including:

1. correcting errors or ambiguous terms in the trust document;
2. reflecting changes in tax laws or estate planning strategies;
3. accommodating new financial or personal circumstances, such as significant changes in assets or income;
4. addressing the needs of a beneficiary with special needs or to create a special needs trust;
5. changing the distribution plan due to shifts in family dynamics, or relationships, including marriage, divorce, death, or births;
6. removing outdated or unnecessary provisions;
7. changing the class of eligible beneficiaries;
8. changing the powers of the trustee.

4.1 Power to amend

Most, but not all, trust deeds include a clause granting the trustee the power to amend the deed. However, the scope of that power of amendment often differs, and regard must be had to the scope. There is a significant difference in the scope of a power of amendment with only minimal changes to wording.

Consider the following amendment clauses (drafted for illustrative purposes only):

> The Trustees for the time being may at any time and from time to time by deed of appointment or other deed revoke add to or vary all or any of the ***trusts*** hereinbefore but shall not be in favour of or for the benefit of the Settlor or result in any benefit to the Settlor.

Compare that with:

> The Trustees for the time being may at any time by Deed and with the consent of all beneficiaries living and of full age and capacity at the time this power is exercised, otherwise without such consent, ***revoke, add to or vary all or any of the terms and conditions*** of the Trust and ***may also by Deed declare new or other trusts or powers*** concerning the Trust Fund or any part thereof but so that the law against perpetuities is not thereby infringed.

And compare again with:

> The trustee may in writing, at any time and from time to time before the vesting date, with the prior consent of the guardian, revocably or irrevocably or prospectively or retrospectively, revoke,

> **add to or vary any powers, trusts or provisions of this deed (including this clause and the Schedule)**, whether in this deed or as revoked, added to or varied under this clause at any time and from time to time.

The variations to each of those clauses should highlight how careful one must be when reading the deed.

Not only does it highlight that powers may require the consent of a different class of person or entity, where the power of amendment does not refer to each of "powers", "trusts", "terms", and "conditions" difficult questions can arise as to whether particular amendments are authorised.[41]

Those three examples should also demonstrate that trust instruments commonly contain restraints. In particular, it is common for amendment powers to restrict amendments that breach the perpetuity periods, and that vary the rights to a settlor, or related entities of the settlor.

In respect to restrictions preventing an infringement against the rule against perpetuities, regard will need to be had to the jurisdiction of the trust.

However, even if the amendment clause does not restrict an amendment that breaches the perpetuity period, any amended vesting date must not offend the rule against perpetuities of the relevant jurisdiction of the trust. In *Re Plator Nominees*, where an extension was obtained under section 63A of the *Trustee Act 1958* (Vic), it was decided that the revised vesting date was to be determined according to a royal life clause. In the Court's reasons, it was observed that this approach was adopted out of an abundance of caution.[42]

In respect of restricting amendments that may benefit the settlor, that drafting is to prevent the possible application of s 102 of the ITAA 1936.[43] Section 102 provides the Commissioner with power to tax a trustee:

> [w]here a person has created a trust in respect of any income or property (including money) and:
>
> (a) the person has power, whenever exercisable, to revoke or alter the trusts so as to acquire a beneficial interest in the income derived by the trustee during the year of income, or the property producing that income, or any part of that income or property; or
>
> (b) income is, under that trust, in the year of income, payable to or accumulated for, or applicable for the benefit of a child or children of that person who is or are under the age of 18 years…

If s 102 applies, the trustee is taxed on an amount equal to the difference between the tax actually payable by the settlor and the tax the settlor would have paid but for the trust.[44]

[41] See, for example, *Jenkins v* Ellett [2007] QSC 154 and *Mercanti v* Mercanti [2016] WASCA 206.
[42] [2012] VSC 284, [8]. This approach was taken to guard against the possibility, however remote, that an instrument for the purposes of subsection 5(1) of the Perpetuities and Accumulations Act 1968 (Vic) did not include a court order made pursuant to section 63A of the Trustee Act 1958 (Vic).
[43] See also *Hobbs v FCT* [1957] HCA 58 and *Truesdale v FCT* [1970] HCA 27.
[44] ITAA 1936, s 102(2).

Whenever contemplating an amendment to a trust deed it is first necessary to:

1. identify the relevant amendment clause and understand its scope (and limitations within that clause, along with any form or notice requirements);
2. identify any restrictions placed on that amendment clause more broadly by the trust instrument; and
3. ensure any proposed amendment aligns with the trust's objectives and beneficiaries' interests.

This power must be exercised within the limits specified in the trust deed and relevant legislation. An amendment is only valid if it is within the scope of the amendment power granted.[45] If an amendment exceeds the scope, a trustee acting in accordance with the purported amendment may breach trust or inadvertently imply the use of another power.

4.2 Resettlement, *Commercial Nominees* and *Clark*

A resettlement under general law happens when property governed by one trust is transferred to a different trust, creating a new framework of future rights and obligations for that property.[46] However, the concept of a trust resettlement must not be confused with the various tests which may be relevant to determining whether a capital gains tax event has happened, such as CGT event E1 and E2 (see section 4.4), or duty consequences (which differ both in test and in rate) which may arise.

Over the years, many cases have considered whether there has been a resettlement for general law purposes.

In *FCT v Commercial Nominees*,[47] the High Court considered whether there was a resettlement (or a "*continuity*"[48]) of a complying superannuation fund for the purposes of maintaining the necessary continuity to claim deductions for carry forward tax losses. The High Court stated:

> Whatever may be the position in relation to the continuity of trusts generally, in applying Pt IX of the [1936 Act], the legal and commercial incidents of superannuation funds, and the interrelationship between the [1936 Act] and the [Superannuation Industry (Supervision) Act], must be taken into account.

The High Court held that provided there was continuity of the trust, the superannuation fund could utilise the carry forward tax losses. The High Court stated (emphasis added):[49]

> …**the question is one of continuity**, to be considered in the context of a superannuation fund which, of its nature, may be expected to undergo change. The question is whether the eligible entity which derived the taxable income in the year ended 30 June 1995 is a different entity from the eligible entity that incurred losses in the earlier years. If, as the appellant contends, it is a different entity, there is a question as to what happened to the original entity. **The three main indicia of continuity for the purposes of Pt IX are the constitution of the trusts under**

[45] *Pitt v Holt; Futter v Futter* [2012] Ch 132,[96].
[46] *Davidson (Collector of Imposts) v Chermside* (1908) 7 CLR 324 at 340-341.
[47] *FCT v Commercial Nominees of Australia* [2001] HCA 33.
[48] *FCT v Commercial Nominees of Australia* [2001] HCA 33, [30].
[49] *FCT v Commercial Nominees of Australia* [2001] HCA 33, [36]

> **which the fund (if a trust fund) operated, the trust property, and membership. Changes in one or more of those matters must be such as to terminate the existence of the eligible entity, or to produce the result that it does not derive the income in question, to destroy the necessary continuity.** The trusts under which the fund operated in 1994–95 were constituted by the original trust deed in 1988 as varied by the exercise, in 1993, of a power of amendment. The property the subject of the trusts did not alter at the time the amendments took effect. Persons who were members of the fund before the amendments remained members of the fund after the amendments. The fund, both before and after the amendments, was administered as a single fund, and treated in that way by the regulatory authority.

In *COT v Clark* (**Clark**)[50] the Court considered whether the trust estate (a unit trust) maintained continuity. The Full Federal referred to the decision of *Commercial Nominees* and said:

> When the High Court in Commercial Nominees spoke of trust property and membership as providing two of the indicia for the continued existence of the eligible entity or trust estate, the Court was not suggesting that there had to be a strict or even partial identity of property for the first and objects for the second. It was speaking more generally: that there had to be a continuum of property and membership, which could be identified at any time, even if different from time to time; and without severance of one or both leading to the termination of the trust in question. In the present case, the Commissioner never contended, nor on the evidence could he, that there was a severance in the continuum of trust property and objects of the CU Trust. Their identity changed from time to time, but not their continuum.

4.3 Substratum of the trust

Neither *Commercial Nominees* nor *Clark* referred to the concept of whether the substratum of the trust has been altered. However, there seems to be some authorities which suggest that the power to vary a deed may be held not to extend to a variation which would alter the substratum of a trust.[51]

The concept of the substratum of the trust, which developed in the UK, is usefully explained in *Re Balls Settlement Trusts* where it was said that:[52]

> If an arrangement changes the whole substratum of the trust, then it may well be that it cannot be regarded merely as varying that trust. But if an arrangement while leaving the substratum, effectuates the purpose of the original trust by other means, it may still be possible to regard that arrangement as merely varying the original trusts, even though the means employed are wholly different and even though the form is completely unchanged.

In *Re Dyer*[53] it was held that the power of amendment in a particular trust deed did not extend to the variation of a trust deed to the extent it would destroy the substratum. The circumstances of *Re Dyer* involved the establishment of a charitable trust which was for the purpose of establishing and maintaining a metropolitan permanent orchestra in Victoria. The establishment of such an orchestra had provide difficult, such that no orchestra had been able to be established. The trustee applied to

[50] [2011] FCAFC 5
[51] *Jenkins v Ellett* [2007] QSC 154, [19]; *Kock v Westpac Banking Corporation* (1991) 25 NSWLR 593.
[52] *Re Ball's Settlement Trusts* [1968] 1 WLR 899, 905.
[53] [1935] VLR 273

the Court to vary the trust deed in accordance with a broad power of amendment (which enabled the trustee to vary all or any part of the trusts or powers and to alter and vary the provisions and terms). There were two proposed variations. First, one which enabled past accumulations and future income to be distributed to musical objects other than the orchestra. Second, one that enabled past accumulations to be distributed to other musical objects other than the orchestra and future income distributions to the British Music Society of Victoria, unless the orchestra could be established. At first instance, Macfarlane J held both proposed amendments were not a valid exercise of the power of amendment stating:[54]

> …it is impossible to use the moneys in such a way as will depart from the original purpose of the gift.

The question of whether the power of variation could be validly exercised was the only question before Macfarlane. On appeal, however, submissions were made as to the validity of the trust itself. It was held that the trust infringed the rule against perpetuities or failed for uncertainty and there was, therefore, a resulting trust in favour of the settlor. However, in obiter, the Court stated that they tended to agree with the views of Macfarlane J. In particular, by way of separate judgment from the majority, Martin J stated:[55]

> It would be strange if the donor who desired to help in founding a fund for a particular purpose, and who expected others to contribute to the fund, attempted to reserve to himself a power to change the whole substratum of the gift, not only as regards his own donation, but also the donations of others who subscribed money for the particular purpose. A power to revoke is common in deeds of this nature, and I cannot believe that the draftsman would not have included such a power had it been intended that the donor was to be entitled to benefit an object other than the one nominated in the deed. What are the limits of the power to vary is a very difficult question, which does not call for determination here, but I consider none of the draft deeds submitted falls within those limits…

However, in *Kearns v Hill*, some reservations were expressed in respect of whether a variation power would be construed to not allow variations which destroyed the substratum. *Kearns v Hill* considered the follow variation power:

> (a) The trustee may be deed release or revoke any power or powers conferred on the trustee under this Deed and may vary or amend any of the provisions contained in this Deed other than clause 2 or the vesting date PROVIDED HOWEVER that no such release revocation variation or amendment shall be valid if such release revocation variation or amendment would have the effect of infringing any rule against perpetuities or directing or requiring any excessive accumulation of income or would entitle the settlor or the trustee or any person who has been a trustee of the settled fund to receive any of the income or corpus of the settled fund.
>
> (b) On the execution of any deed pursuant to paragraph (a) of this clause:—
>
> (i) the power (if any) purported to be released or revoked pursuant to such Deed shall be absolutely and irrevocably released or revoked.

[54] In re Dyer (1935) 41 Argus LR 384, 386.
[55] *Re Dyer* [1935] VLR 273, 291.

> (ii) the amendments to or variations of the provisions of this Deed purported to be effected thereby (if any) shall (subject as aforesaid) be deemed to be effective forthwith.
>
> PROVIDED FURTHER that upon the death of the appointor the trustee shall have all the powers of the appointor under this clause.

The Court held that the amendment to the deed, which added a new class of beneficiaries called discretionary beneficiary, being the children of the primary beneficiaries, was a valid exercise of the power of amendment. In considering the concept of substratum, Meagher JA queried whether the propositions in *Re Dyer* were relevant:[56]

> where either it is impossible to locate any substratum at all, or alternatively, the relevant substratum is the benefit of the descendants of a named person, and the interests of that class are being actively promoted rather than diminished by the [relevant amendment to the class of beneficiaries].

He also firmly queried whether the concept of substratum of the trust was relevant in the Australian context stating:[57]

> I also put to one side the equally obvious consideration that the conditions which existed in England in 1850 are not necessarily the same as those which existed in New South Wales in 1970.

It remains to be seen how, if at all, the jurisprudence in relation to the substratum of the trust will development in Australia.

Further, in more recent times, some reservation has been expressed, and a question has been raised as to whether the exercise of a power that changes the whole substratum of trust is no more than the application of the equitable doctrine of fraud on the power.[58]

In *Mercanti v Mercanti*, Buss P stated:[59]

> Hely J said that the authorities which suggest that a power to vary a trust deed may be held not to extend to a variation which would 'alter the substratum of the trust' may be 'no more than an application of the equitable doctrine of fraud on the power'. His Honour's view is, in my respectful opinion, correct, having regard to the decisions of the High Court in Byrnes and Montevento, which have held that the rules applicable to the construction of contracts apply also to trusts, and to the decision of the High Court in Bargwanna. In other words, the notion of an alteration to the substratum of the trust is not an aspect of the rules applicable to the construction of a trust deed but is, rather, an application of the equitable doctrine of fraud on a power.

[56] *Kearns v Hill* (1990) 21 NSWLF 107, 111.
[57] *Kearns v Hill* (1990) 21 NSWLF 107, 111.
[58] *Cachia v Westpac Financial Services Ltd* (2000) 170 ALR 65, [68].
[59] (2016) 340 ALR 290, [101].

However, the plurality in Mercanti, Newnes JA and Murphy JA, found it unnecessary to decide stating:[60]

> It is unnecessary to examine the question of whether authorities to the effect that a power to vary a trust deed does not include a power which could alter the substratum of the trust, are no more than illustrations of the application of the equitable rule of fraud on the power.

4.4 Capital gains tax considerations for amendments

CGT considerations are only relevant to an amendment to a trust deed if the amendment results in a CGT event happening. Perhaps the two most commonly cited CGT events in respect of trust amendments are:

> 104-55(1) CGT event E1 happens if you create a trust over a *CGT asset by declaration or settlement.
>
> 104-60(1) CGT event E2 happens if you transfer a *CGT asset to an existing trust.

4.4.1 Statement of principles

Following the decision of *Commercial Nominees*, the Commissioner released the document, published on the ATO website titled "Creation of a new trust - Statement of Principles August 2001" (**Statement of Principles**), which was an updated version of the document published on 9 June 1999.

In the Statement of Principles, the Commissioner sought to clarify when changes to a trust were such that for income tax purposes one trust comes to an end as was replaced by another. For convenience, this has sometimes been referred to as a "resettlement". The 2001 Statement of Principles stated:

> In the ATO's view both the stamp duty and estate duty cases indicate that a new trust arises when there is a fundamental change to the trust relationship. It is a change in the essential nature and character of the original trust relationship which creates a new trust. This may mean that the original trust ceases to exist, and a new trust arises. Alternatively, a new trust may arise which exists independently of the original trust.
>
> Changes potentially leading to a new trust can arise by several means, including variations under a power in the deed and a variation by agreement among the beneficiaries. Listed below are some of the changes which raise the question of whether a new trust has been created.
>
> - any change in beneficial interests in trust property;
> - a new class of beneficial interest (whether introduced or altered);
> - a possible redefinition of the beneficiary class;
> - changes in the terms of the trust or the rights or obligations of the trustee;

[60] (2016) 340 ALR 290, [306].

- changes in the nature or features of trust property;
- additions of property which could amount to a new and separate settlement;
- depletion of the trust property;
- a change in the termination date of the trust;
- a change to the trust that is not contemplated by the terms of the original trust;
- a change in the essential nature and purpose of the trust; and/or
- a merger of two or more trusts or a splitting of a trust into two or more trusts.

Depending on their nature and extent, and their combination with other indicia, these changes may amount to a mere variation of a continuing trust, or alternatively to a fundamental change in the essential nature and character of the trust relationship. In this second case, the original trust is brought to an end and/or a new trust created.

Whether a new trust is created will depend, among other things, on the terms of the original trust, and on the powers of the trustee. The original intentions of the settlor must be considered in determining whether a new trust has been created. There may be different trigger points/tests for different types of trusts.

The answer to whether alterations to trusts, taken together, result in terminations and creations of trust estates will generally flow from establishing whether the essential nature and character of the original trust relationship has fundamentally changed. Nothing that the High Court said in the Commercial Nominees of Australia Limited case is contrary to the principles stated here in relation to trusts generally.

Following the *Clark* decision, the Commissioner withdrew the Statement of Principles from the website. In its place, he issued *Taxation Determination* TD 2012/21.

4.4.2 Relevant ATO guidance

The Commissioner states in TD 2012/21:

24. Even though Clark and Commercial Nominees were decided in the context of whether changes in a continuing trust were sufficient to treat that trust as a different taxpayer for the purpose of applying relevant losses, the ATO accepts the principles set out in these cases have broader application. Relevantly, the principles established by those cases are also relevant to the question of the circumstances in which CGT event E1 or E2 may happen as a result of changes being made to the terms of an existing trust pursuant to a valid exercise of a power in the deed (including a power to amend). In light of those principles, the ATO accepts that a change in the terms of the trust pursuant to exercise of an existing power (including an amendment to the deed of a trust), or court approved variation, will not result in a termination of the trust and, therefore, subject to the observation in paragraph 27 below, will not result in CGT event E1 happening.

….

27. Even in instances where a pre-existing trust does not terminate, it may be the case that assets held originally as part of the trust property commence to be held under a separate charter of obligations as a result of a change to the terms of the trust - whether by exercise of a power under the deed (including a power to amend) or court approved variation - such as to lead to the conclusion that those assets are now held on terms of a distinct (that is, different) trust.

The question in TD 2012/21 is:

does CGT event E1 or E2 in sections 104-55 or 104-60 of the Income Tax Assessment Act 1997 happen if the terms of a trust are changed pursuant to a valid exercise of a power contained within the trust's constituent document, or varied with the approval of a relevant court?

The answer:

No. In these circumstances neither CGT event E1 nor CGT event E2 in sections 104-55 or 104-60 of the Income Tax Assessment Act 1997 (ITAA 1997) happens unless:

• the change causes the existing trust to terminate and a new trust to arise for trust law purposes, or

• the effect of the change or court approved variation is such as to lead to a particular asset being subject to a separate charter of rights and obligations such as to give rise to the conclusion that that asset has been settled on terms of a different trust.

The Commissioner provides the following to be examples where making the resolution to amend, which were all made pursuant to a valid power of amendment, would not give result in a CGT event happening:

1. Example 1: addition to new entities to, and exclusion of existing entities from, the class of objects
2. Example 2: expansion of power to invest;
3. Example 3: addition of definition of income, power to stream, and extension of vesting date;
4. Example 3A: extension to vesting date (and goes on to state "*[t]he result would be the same if the vesting date was extended with the approval of a relevant court rather than under the trust deed*" – see also section 4.5).[61]

The Commissioner then provides for an example which would give rise to a CGT event happening if there is the settling of a trust asset on a new trust.

The examples in TD 2012/21 are fairly simple, particularly in relation to Example 1.

While it has not been dealt with in this paper, advisors should also consider any stamp duty and other State tax consequences when exercising a power to vary to ensure there are no adverse consequences that flow from the amendment.

[61] See also TR 2018/6.

4.5 Where there is no, or an insufficient, power of amendment

If the trust instrument does not contain a power of amendment, or the scope of the power of amendment is insufficiently drafted to enable the proposed amendment, then regard may be able to be had to:

1. amending by application of the rule in *Saunders v Vautier*; and
2. approval of amendments by the Court.

4.5.1 The rule in Saunders v Vautier

The rule in *Saunders v Vautier* allows a beneficiary (or a number beneficiaries acting together) of full capacity with an absolute, vested and indefeasible interest in both the income and capital of the trust to, at any time, require that the property be transferred to him or her (or them) and to terminate any trust. As was stated in *CPT Custodian v Commissioner of State Revenue* (footnotes omitted):[62]

> In Anglo-Australian law the rule has been seen to embody a "consent principle" recently identified by Mummery LJ in *Goulding v James* as follows:
>
> > "The principle recognises the rights of beneficiaries, who are sui juris and together absolutely entitled to the trust property, to exercise their proprietary rights to overbear and defeat the intention of a testator or settlor to subject property to the continuing trusts, powers and limitations of a will or trust instrument."

The rule in *Saunders v Vautier* has been extended to enable beneficiaries of full capacity who have an indefeasible interest in the trust, to consent to amendments of the trust.[63] However, applying the rule in *Saunders and Vautier* is often of limited utility. First, in the case of a typical discretionary trust, there will ordinarily be minor beneficiaries or potential future beneficiaries, which prevents the rule from operating. Second, as was stated by Barrett JA (Beazley P and Gleeson JJA agreeing) in *Re Dion Investments Pty Ltd*, although the principles of equity may enable the rule in *Saunders v Vautier* to be extended to the variation of a trust deed by adult beneficiaries of full capacity:[64]

> Their capacity to produce that result also enables them to require, as an alternative, that the property be held by the trustee upon varied trusts; but, if they do so require, the situation may in truth be one of resettlement upon new trusts rather than variation of the pre-existing trusts (and the trustee may not be compellable to accept and perform those new trusts …)

[62] (2005) 224 CLR 98, [43].
[63] *Re McGowan & Valentini Trusts* [2021] VSC 154.
[64] (2014) 87 NSWLR 753, [46].

4.5.2 Approval of amendments by the Court

If the amendment power is unclear or absent, trustees may seek court approval.[65] The rules provided under the statute of each Australian state or territory vary significantly, both in relation to what is required, but also in relation to the powers of the Court.

In Victoria, the Court may approve an amendment on behalf of persons (including minority beneficiaries, beneficiaries' incapable of consenting, persons who are unborn) if carrying out the arrangement would be for the "*benefit*" of persons whom it is being approved for.[66] The position in Victoria is similar to that of Queensland and New South Wales.[67] However, it can be contrasted with the position in South Australia, where not only can the Court vary the trust (as opposed to providing consent for the variation), the Court must also be satisfied that the variation:[68]

1. the application is not substantially motivated by a desire to avoid or reduce the incidence of tax;
2. that the proposed exercise of powers would be in the interest of the beneficiaries and not unfairly advantage of one class of beneficiaries to the prejudice of some other class;
3. that the proposed exercise of powers would not disturb the trusts beyond what is necessary to give effect to the reasons justifying the exercise of the powers; and
4. that the proposed exercise of powers accords as far as reasonably practicable with the spirit of the trusts.

The Gengoult-Smith case – Court approved extension to vesting date

The decision of *Re Gengoult-Smith Family Trust* [69] involved an application to the Court to amend the terms of a family discretionary trust, the Gengoult-Smith Family Trust, pursuant to s 63A of the *Trustee Act* 1958 (Vic).

Clause 3 of the trust deed provided that the trust would vest 50 years after establishment, which was due to occur on of 29 April 2024. It further provided that on vesting, the Gengoult-Smith Family Trust was to be held for the benefit of the children of Norman and Jillian Gengoult-Smith who were alive, in equal shares, with a gift over to any children of any child who predeceases the vesting date. If the trust had vested on 29 April 2024, in all likelihood it would have vested in Hugh, Alexandra and Edward in equal shares, being the only children of Norman and Jillian (and given the time of the hearing, were also likely to be still alive on that date).

The power to amend the terms of the Gengoult-Smith Family Trust was narrow, drafted as follows:

> [The Trustee] may at any time and from time to time by Deed vary any of the provisions contained in clauses 5 to 10 hereof, provided that no such variation shall increase the rate of

[65] *Trustee Act 1958 (Vic)*, s 63A; *Trustee Act 1962 (WA) s 90; Variation of Trusts Act 1944 (Tas)*, Part 3; *Trustee Act 1925 (NSW), s 86A, 86B, 86C; Trust Act 1973 (QLD), s 95; Trustee Act 1936 (SA), s 59C; Trustee Act 1893 (NT)*, s 50A; *Trustee Act* 1925 (ACT), s 81.
[66] *Trustee Act* 1958 (Vic) s 63A.
[67] *Trustee Act 1925 (NSW), s 86A, 86B, 86C; Trust Act 1973 (QLD), s 95.*
[68] *Trustee Act* 1936 (SA), s 59C(3).
[69] [2024] VSC 189.

> commission prescribed by clause 7 hereof or diminish the liability of the Trustee prescribed by clause 10 hereof or otherwise operate to the personal advantage of the Trustee.

Accordingly, that power did not allow any amendment of clause 3.

The Gengoult-Smith Family Trust had significant investments, primarily in real estate, worth approximately $80 million. The judgment states that "*Hugh and Edward have… been advised that, if the Trust vests on 29 April 2024, the Trust will incur a capital gains tax liability of up to $10 million*."[70]

Hugh and Edward Gengoult-Smith sought the Court's approval to vary the vesting date to 29 April 2054. In other words, they sought the Court's approval for an extension of the vesting date by a further 30 years.

The Court, relying on decision of Lyons JA in *Re Pickering Family Trusts,*[71] adopted a two-stage approach to determining the application under s 63A. The first stage was to consider whether the arrangement "*would be for the benefit of*" the relevant person, and, once the first stage had been satisfied, the Court may approve the arrangement if, in its nature, it is a proper and fair one.

In respect of the first stage, the Court stated (references omitted):[72]

> (a) First, the Court is required to consider 'how the arrangement or proposal will or will likely be carried out or to operate in fact'.
>
> (b) Secondly, a benefit must be established. The 'benefit' is not limited to a financial benefit, but may include a benefit of any other kind including 'social, familial, moral or educational benefits'17 and must be considered:
>
> > … in the context of the particular trust to which the proposed arrangement relates. Thus, in the context of an object of a discretionary trust, any 'benefit' said to arise from the proposed arrangement must be considered in light of the present rights of such an object.
>
> However, 'if the arrangement or the carrying into effect of the arrangement involves such risk that any purported benefit is theoretical or illusory, it is not a 'benefit' for the purpose of the proviso'.
>
> (c) In relation to arrangements which may involve a risk from the point of view of infants or unborn children, for the purpose of satisfying the proviso and the requirement of a 'benefit', Lyons JA expressed reservations about the appropriateness of asking whether 'the risk [is] one that an adult would be prepared to take?', as posed by Hansen J in George v Kollias.
>
> (d) Thirdly, in relation to non-financial benefits, Lyons JA referred to limitations in the reliance able to be placed on familial benefits connected with the promotion of family harmony and the avoidance of jealousies and conflict.

[70] *Re Gengoult-Smith Family Trust* [2024] VSC 189, [2].
[71] [2024] VSC 5.
[72] *Re Gengoult-Smith Family Trust* [2024] VSC 189, [25].

In respect of the second stage, the Court quoted from the decision in *Re Pickering Family Trusts* (references omitted), stating that in considering the arrangement as a whole:[73]

> [c]ourts should engage in a 'businesslike consideration of the arrangement, including the total amounts of the advantages which the various parties obtain, and their bargaining strength'. Courts may take into account the purpose of the trust and the intention of the settlor, and the attitude of other beneficiaries or interested persons.

The Court held that the proposed extension to the vesting date would only benefit minor and potential unborn beneficiaries because it would continue their rights and expectations beyond 29 April 2024, and provide an opportunity for more beneficiaries to be born who could qualify as beneficiaries. Accordingly, the proposed variation could only benefit the class of beneficiaries and potential beneficiaries for a longer period.[74] The Court also held that the prospect of utilising the Gengoult-Smith Family Trust "*for the benefit of the next generation is conductive of familial benefits which are consonant with the purposes of the Trust.*"[75]

The Court also held that the possibility that minor or unborn beneficiaries might suffer detriment from the making of the proposed variation was extremely remote. For example, given the timing of the application *vis a vis* the original vesting date, there was the remotest of possibilities that either of Alexandra or Hugh (being the only children who themselves had children) would die, leaving their share to their children on the vesting date. That remote possibility was insufficient to outweigh the tangible and clear benefit.

The Court also held that the proposed arrangement was proper and fair, not only because the all legally capable beneficiaries had consented to it, but also because Alexandra, Hugh and Edward, whose interests were to be adversely affected by the proposed amendment, had consented to it.[76] The Court was also satisfied that the proposed extension to the vesting date aligned with the settlor's intentions.

Finally, relying on the decision of *Perenna Nominees Pty Ltd*,[77] the Court stated:[78]

> It has been repeatedly affirmed that a court should not hesitate to approve an arrangement for the extension of a trust's vesting date merely because one of the purposes of the arrangement is to avoid, reduce or defer taxation consequences.

In those circumstances, the Court approved the arrangement proposed to extend the vesting date.

[73] [2024] VSC 5, [25].
[74] *Re Gengoult-Smith Family Trust* [2024] VSC 189, [36]-[37].
[75] *Re Gengoult-Smith Family Trust* [2024] VSC 189, [37].
[76] *Re Gengoult-Smith Family Trust* [2024] VSC 189, [45].
[77] [2022] VSC 193, [101].
[78] *Re Gengoult-Smith Family Trust* [2024] VSC 189, [45].

5. Lost trust deeds

Despite execution of multiple original trust deeds upon the establishment of the trust, it is not uncommon for all original trust deeds and copies to be lost. While accounting and legal firms' document management systems aspire to minimise this risk, trust deeds are often lost or inadvertently destroyed by clients, in transit between the client and their advisers, between advisers (including between current advisors, and between current and successor advisors) and between advisors and/or clients and financial institutions during transactions.

A lost trust deed can be extremely problematic. While the trust relationship will continue, administering the trust will be difficult and uncertain for several reasons.

First, without a trust deed, it may be challenging to prove the trust's existence in the first place. Second, it will be difficult for the trustee to discharge the trustee's obligations to administer the trust in accordance the deed. Where a trust deed is lost, there can be no certainty that any purported exercise of power by a trustee is valid and, as a result, any exercise of power by a trustee will expose that trustee to potential liability for acting in breach of trust. Third, a lost trust deed can create a real risk of claims being made by beneficiaries for breaches in trust. Fourth, it also leaves the trustee in the unenviable position of dealing with the ATO with a total inability to establish the terms of the trust that may be relevant in any dispute with the ATO.

However, all hope should not be lost, and steps can be taken to mitigate risk. The trustee can seek advice and directions from the Court. This can include for declarations that trust to continue in a proper fashion or be wound up, for orders regarding the validity of terms of the trust, or for orders confirming the validity of actions by the trustee. However, seeking advice and directions from a Court can be an expensive process.

But a word of warning. If an original trust deed is lost, do not execute a new trust deed. Nothing good will come of it, least not the tax and duty consequences that will arise.

5.1 Minimum residuary powers and obligations

Where a trust deed has been lost, the *Trustee Act* 1958 (Vic) (and equivalent in each jurisdiction) and trust law will provide minimum obligations on, and limited powers to, a trustee as an effective default position (see also sections 2.1 and 2.2 above).

In the absence of trust deed, a trustee's duties based in equity will continue, and a trustee's powers will effectively be limited to those provided in the relevant statute. However, the challenge is that modern trust deeds often modify or abrogate equitable duties. In the absence of a trust deed, usual intra-family dealings may be restricted or unauthorised.

Where a particular dealing may constitute a beach of these duties, the beneficiaries may be able to consent to the breach, and permit the trustee to depart from the terms of the trust. However, it can be high-risk strategy as an errant beneficiary may frustrate the necessary consents. Further, without a trust deed it will be impossible to identify all the beneficiaries that must provide their consent. The court can excuse a breach where the trustee has acted honestly and reasonably and ought fairly be excused for the breach.

5.2 Where to look for the trust deed

The trustee should undertake extensive investigations to locate an executed and stamped original, or a copy of the executed and stamped original trust deed. Usually, the expected enquiries would include contacting:

1. all current and former trustees and directors of corporate trustees;
2. the settlor and any appointors and guardians;
3. the trust deed provider;
4. all adult relatives of the client;
5. all adult primary and default beneficiaries;
6. any legal personal representatives of the above;
7. all current and former accountants and lawyers of the trust and adult beneficiaries;
8. all current and former financiers and brokers who may have obtained a copy of the deed as part of any finance applications.

Documenting all enquiries and responses is essential to establish a proper audit trail.

In the event that the extensive investigations do not locate an original trust deed, how to manage the next steps will depend on what information is collected, and will also depend on what jurisdiction you are based in.

5.3 Reinstating the trust deed by court orders

Where a trust deed has been lost, the court can confirm the appropriateness of continuing trust management on the basis of the particular document. If a court makes such orders or directions, the trustee is protected from liability for subsequent trust administration in accordance with the Court's guidance.

The orders a court can make will vary and depend on what evidence of the original deed is available, but can include an order that:

1. an order varying the terms in accordance with the terms set out in secondary evidence;[79]
2. an order in the form of judicial advice that the trustee is justified in managing and administering a trust in accordance with the terms set out in secondary evidence;[80]

[79] For example, *Jowill Nominees Pty Ltd v Cooper* [2021] SASC 76.
[80] For example, *Application of NBT Pty Ltd* [2023] NSWSC 919; *Sutton v NRS (J) Pty Ltd* [2020] NSWSC 862; *Re Porlock Pty Ltd* [2015] NSWSC 1243.

3. a declaration that the terms of the trust are in accordance with any terms set out in secondary evidence;[81]

4. an order that the trust does not fail for uncertainty and remains valid;[82] or

5. an order than the trust vest and be wound up.[83]

In Victoria, an application is made pursuant to s 63 of the *Trustee Act 1958* (Vic), which allows a trustee to seek the court's opinion, advice, or directions on any question respecting the management or administration of trust property.[84]

Across Australian jurisdictions, a line of authority has developed whereby secondary evidence must provide "*clear and convincing proof*" of both the deed's existence and its contents if the original copy of the deed is lost or unavailable.[85]

At least in Victoria, it may be that the clear and convincing proof test imposes too high a burden for what is actually required.[86] In Victoria, it seems that where a trust deed is lost, it will be necessary to determine whether the loss of the trust deed results in the trust failing for uncertainty.[87] In order for the trust to be valid, the evidence, based on the balance of probabilities, must be able to demonstrate the following three certainties:

1. certainty of intention;

2. certainty of subject matter; and

3. certainty of objects.

In doing so, there is a difference between evidence from testimony of those who claim to have seen a lost deed and to remember its terms, and a case where the terms themselves exist in writing where it can be proved that the terms so produced are a copy of the terms originally executed.[88] With regard to the latter, that might come in the form of either an executed or unexecuted copy of the deed.

An executed and stamped copy of a trust deed will constitute strong evidence of the original trust deed.[89] In some instances, where only part of the trust deed can be located, such as a schedule, that may be sufficient to prove the existence of the trust.[90]

Unsigned copies of the trust deed, or even a copy of the trust deed precedent that was current at the date of the establishing the trust, may be sufficient evidence of the original trust deed.[91] Whether

[81] For example, *DR McKendry Nominees Pty Ltd* [2015] VSC 560.
[82] For example, *Mantovani v Vanta Pty Ltd* [2023] VSCA 53.
[83] For example, *Re Thomson* [2015] VSC 370.
[84] See also the *Administration and Probate Act 1958* (Vic), section 49, which allows for similar applications in the context of the administration of estates.
[85] *Maks v Maks* (1986) 6 NSWLR 34, 36; *Re Cleeve Group Pty Ltd* [2022] VSC 342, [62]-[71]; *Barry McMahon Nominees* [2021] VSC 35, [12].
[86] *Vanta Pty Ltd v Mantovani* [2023] VSCA 53, [84]-[87]..
[87] *Vanta Pty Ltd v Mantovani* [2023] VSCA 53, [93].
[88] *Application of NBT Pty Ltd* [2023] NSWSC 919, [26] referring to *Re Cleeve Group Pty Ltd* [2022] VSC 342, [34].
[89] See, for example, *Application of NBT Pty Ltd* [2023] NSWSC 919; *Sutton v NRS(J) Pty Ltd* [202] NSWSC 826, [16]-[18]. *Re Cleeve Group Pty Ltd* [2022] VSC 342, [34]
[90] *Vanta Pty Ltd v Mantovani* [2023] VSCA 53, [103]
[91] *D.R. McKendry Nominees Pty Ltd* [2015] VSC 560

unsigned copies or precedents are sufficient evidence may depend on other evidence available which may include file notes, invoices for preparation of the deed, and other contemporaneous documents, as well as the recollection of relevant persons.

For discretionary trusts, the past pattern of distributions disclosed in minutes and tax returns may be sufficient to identify some of the beneficiaries in a class of beneficiaries, particularly if it can be proved that the distribution was valid. Whether or not that will be the case will depend on the circumstances of the case.

However, where there is insufficient evidence capable of proving the contents of the lost trust deed, the trust may fail for uncertainty.[92]

5.4 Reconstituting the trust deed without court orders and the risks that arise

Informal restatement of the trust deed by executing a non-binding memorandum of terms, or a legally binding restatement recording or identifying the terms of the lost trust deed are likely to be ineffective, have adverse taxation consequences or, at best, be insufficient evidence to prove any adverse tax consequences.

In particular, where the terms of the relevant trust have been restated, the ATO can argue that there is no evidence that the terms of the restatement are the same terms as in the original trust deed. Accordingly, it may be very difficult to prove that the restatement does not amount to the creation of a new trust (CGT event E2). The burden of proof will rest with the taxpayer.

5.4.1 Non-binding memorandum of terms

Where investigations have found reliable evidence of the terms of the lost trust deed, it may be appropriate to consolidate those terms and any explanation in a non-binding memorandum for ease of reference. Those terms can include the trust law principles and statutory powers under the relevant Trustee Act creating a virtual trust instrument. The trustee and the trustee's advisers will then have a clear document stating the powers of the trustee in administering the estate.

There is no implied or inherent trust law or statutory power vested in the trustee to amend the trust deed in the absence of an express power in the trust deed. An invalid amendment, appointment of a trustee or distribution to a beneficiary is void ab initio. Without a copy of the trust deed or a deed of amendment that recites the exact wording of the amendment power, any attempt at reconstructing the trust deed that legally binds the trustee and the beneficiaries is likely to be ineffective.

Further, some third parties, such as banks, the ATO or the SRO, may not accept a non-binding memorandum of terms (or, indeed, any deed of ratification) as a replacement for the lost original, and could be subject to challenge from one or more of the beneficiaries. Further, if this approach is to be taken, significant care must be taken to ensure sufficient evidence is available to demonstrate that there has not been the creation of a new trust.

[92] *Yap v Lee* [2019] VSC 743.

5.4.2 Restatement deeds

To avoid court costs of reinstating the trust deed by court order, some commentators and advisors have suggested that a combination of the settlor, the trustee and beneficiaries should execute a legally binding restatement deed recording the identified or assumed terms of the lost trust deed as a substitute for the lost trust deed. This is likely to be ineffective or may have adverse taxation consequences.

In the absence of a signed and stamped copy trust deed, the trustee should not attempt to create a replacement trust deed as this may constitute the creation of a new trust or resettlement of the trust. Even where an unsigned executed copy or precedent copy of the trust deed is obtained from the trust provider, execution or adoption of that trust deed by the trustee could constitute a new declaration of trust, and in such circumstances it would certainly be preferable for the trustee to seek direction from a Court that the trust be administered in accordance with the terms of the unexecuted deed.

5.5 A final word on lost trust deeds

While collecting the evidence needed to establish the trust's terms may be time-consuming and the court process expensive, trustees should consider this approach for certainty of administration of the trust and to avoid personal liability. Further, as has been said, "*a trustee who proceeds without appropriate guidance from the Court can be at 'serious risk'."*[93]

Even where there is sufficient evidence to prove the existence of the trust, a failure by the trustee to seek judicial approval may result in the trustee breaching its powers and obligations, and being open to attack from the beneficiaries.[94] In particular, a beneficiary can, at any time, see certain records of the trust on making a request to the trustee. The trustee should always be ready to answer such a request. Where a trust deed has been lost, the trustee should not wait for such a request before taking action.

[93] *Re Ellasil Pty Ltd atf Daycom Communications Pty Ltd Superannuation Fund* [2023] VSC 69, [64], quoting *Wooster v Morris* [2013] VSC 594.
[94] *Vanta Pty Ltd v Mantovani* [2023] VSCA 53, [155].

6. The impact of the 'Owies' decision – how that might impact trustee decisions.

The Victorian Supreme Court of Appeal's decision in *Owies v JJE Nominees Pty Ltd*[95] has reinforced the general duty on trustees to be "*properly informed*" as part of their duty to give "*real and genuine consideration*" when exercising a discretionary power.

As a minimum, when exercising a discretionary power, the trustee must:

1. assess the range of objects that may benefit from the exercise of its discretion; and
2. make a determination about whether or not to exercise its discretion.

However, *Owies* provides some guiding principles as to what may be necessary to discharge its duty to give real and genuine consideration and has implications for trustees, especially in family trust scenarios where relationships may be… challenging.

6.1 Guiding principles

In the seminal case of *Karger v Paul,*[96] McGarvie J established the foundational principles governing the obligations of trustees in the exercise of their discretionary powers.

The central issue was whether the trustee's decision could be challenged based on the alleged failure to give proper consideration to relevant factors or due to bad faith. McGarvie J stated:[97]

> In my opinion the effect of the authorities is that, with one exception, the exercise of a discretion in these terms will not be examined or reviewed by the courts so long as the essential component parts of the exercise of the particular discretion are present. Those essential component parts are present if the discretion is exercised by the trustees in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred. The exception is that the validity of the trustees' reasons will be examined and reviewed if the trustees choose to state their reasons for their exercise of discretion.

Karger v Paul amplified the deference courts typically give to trustees, reaffirming that judicial intervention is limited to instances where there is a clear breach of trust, bad faith, or consideration of irrelevant factors, unless the trustee gives reasons.

6.2 Owies - factual background

John and Eva Owies had three children: Michael, Deborah, and Paul. John and Eva were estranged from two of their children – Deborah and Paul – during the years in question. Michael had a favourable relationship with his parents but also had a fractured relationship with his siblings.

[95] [2022] VSCA 142.
[96] *Karger v Paul* [1984] VR 161.
[97] *Karger v Paul* [1984] VR 161, 163–164.

In 1970, John and Eva established a family trust (the Owies Family Trust), which they, as directors of the trustee, controlled during their lifetime. The trust held assets worth approximately $23 million and generated substantial income annually.

The Owies Family Trust was a fairly typical discretionary trust, containing a broad discretionary power to distribute the net income of the trust in each accounting period. Notably, however, it did have a narrow class of beneficiaries. The primary beneficiaries were Michael, Deborah and Paul, while the general class of beneficiaries were certain relatives of the primary beneficiaries. As a result, in the years in question there were less than 10 people in the class of beneficiaries.

From 2011 to 2018, the trustee distributed the net income in a consistent pattern: 40% to John, 40% to Michael, and 20% to Eva, with Paul and Deborah receiving nothing. In 2019, the entire income was distributed to John, despite his advanced age and minimal needs. Additionally, in April 2019, a capital distribution in the form of a residential unit (the South Yarra apartment) was made to Deborah, who had lived there since 1984.

Deborah and Paul commenced proceedings seeking to:

1. challenge purported variations of the trust deed in relation to the identity of the guardian and the appointor;
2. declare that no income distributions were made under the trust deed or, in the alternative, that the trustee failed to give real and genuine consideration to the objects of the trust; and
3. remove the trustee based on the breaches.

6.2.1 The decision at first instance

At first instance, it was held:[98]

1. a limitation defence made by the trustees applied which confined the dispute to the 2015 to 2019 income years;
2. the purported variations to the guardian and appointor were invalid;
3. the trustee had failed to give proper consideration to Deborah and Paul in the 2015 and 2016 income years, and to Deborah in the 2018 years; and
4. declined to remove the trustee.

Deborah and Paul, the two estranged children, sought to have the distributions set aside and claimed compensation on the basis that they ought to have been entitled to the income as default beneficiaries. The trial judge rejected the entitlement to compensation on the basis that it had not been plead and leave was not granted to amend the pleadings.

[98] *Re Owies Family Trust* [2020] VSC 716, [199]-[202].

Accordingly, the trial judge only made declarations that the trustee had breached its obligations in the relevant income years but did not set aside the distributions.

6.3 Owies - Court of Appeal

On appeal, Deborah and Paul argued the trial judge had erred in:

1. finding that the trustee did not breach its duties in 2017 and 2019 by failing to give real and genuine consideration to them;
2. concluding that the appropriate relief was declaratory, rather than setting aside the distributions; and
3. not removing the trustee.

Kyrou, Niall and Walker JJA held:

1. the trustee breached its duty to give real and genuine consideration when exercising the income distribution power in the 2017 to 2019 income years;[99]
2. that the consequence of that breach was that the distributions were voidable, but not void;[100]
3. the trustee had not given reasons for its decision and the trial judge did not err in concluding that the trustee was required to consider the wishes of the guardian;[101] and
4. the trustee ought to be removed.

6.3.1 Real and genuine consideration

The purpose and terms of the trust were given regard by the Court of Appeal. In particular, the Court considered:

1. The nature and purpose of the trust

The Court had regard to the fact that "*[t]he trust deed is by settlement, and as the preamble records, the settlor settled the sum 'being desirous of making provision for the Primary Beneficiaries and the General Beneficiaries'."*[102]

2. Small class of beneficiaries

The Court held that given the stated purpose, it would be expected that the class of general beneficiaries would not be particularly large, and "*would continue to revolve around the three Owies children."*[103] The Court held that the "*obvious, but unstated, premise*" would be that the trustee would continue to be informed by the differing circumstances, needs and desires of each

[99] *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [167].
[100] *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [143].
[101] *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [132].
[102] *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [110].
[103] *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [111]

of the beneficiaries.[104] Further, the Court stated "[i]*t is not to be supposed that, when those familial bonds become strained or broken, the purpose of the trust to provide for the family as a whole would change or that the trustee would be relieved of the obligation to properly inform itself."*[105]

3. Default of appointment of income

While the trustee had a broad discretion to distribute income, in default of such an appointment, the trust deed provided that the income would be held for the three children pursuant to an express trust in equal shares. The Court held that the default appointment clause reinforced the trust as being for the benefit of the three children in equal shares, albeit one that allowed for the possibility of unequal distributions.[106]

In determining that the trustee had not given real and genuine consideration, the Court highlighted the following:

1. The trustee made no enquiries of Paul and Deborah.[107]

2. The income was substantial, but the payout ratio was "*strikingly uniform*".[108] This was particularly so where the distributions could not be explained by need because as a matter of course John and Eva loaned the amount of their entitlement back to the trust and had substantial loan accounts, notwithstanding that the trust was not short of assets or income. That position could be contrasted with that of Deborah (and, to a lesser extent, Paul) who had a "*demonstratable need for income*" and who's "*health and financial situation were parlous*".[109] Further, when that pattern was altered, it did so in a way that did not point to any real and genuine consideration to Paul and Deborah.[110] In particular, the Court stated that to appoint 100% of the income to John after Eva's death was "*remarkable*", particularly given he was 96, was in residential care and had no need for income. [111] That distribution was "*so extreme and without any evident justification that it provides an additional factor that demonstrates that the trustee exercised its discretion under cl 3 without real and genuine consideration of the position of Paul and Deborah*."[112]

3. The evidence indicated that there was "*an elision between the interests of John and Eva and the best interests of the beneficiaries under the trust*."[113] While the Court held that John (and, on his death) Eva had an important role in the administration of the trust, the trustee was required to exercise an independent mind.

4. There was "*a history of antipathy between Eva and Paul, and Eva and Deborah*".[114]

[104] *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [111]
[105] *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [111].
[106] *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [112].
[107] *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [115].
[108] *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [120].
[109] *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [120]-[121].
[110] *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [126].
[111] *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [127].
[112] *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [127].
[113] *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [122].
[114] *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [124].

6.3.2 Consequences of the breach of duty

The Court held that the failure to give real and genuine consideration to the exercise of the power to appoint income did not render the distributions void, but they were voidable.[115]

In finding that the distributions were voidable, the Court placed significant weight on the UK decision of *Pitt*. In Pitt: [116]

> the Court distinguished between those cases where the disposition is plainly beyond power and those dispositions that are within power, but in respect of which there has been some breach of duty. An example of the first category is a purported distribution to an entity that is not a beneficiary under the trust. An example of the second category is a distribution that is made to a beneficiary within the terms of the trust, but where there has been a failure by the trustee of its duty to give proper consideration to relevant matters or its duty to give real and genuine consideration to the power.

The Court concluded that with cases involving some breach of duty, it is necessary for a plaintiff to establish that the decision should be set aside.

The "*insurmountable problem*" in the circumstances of *Owies* was that no order was sought to set the decisions (and leave was refused to amend the application to seek that relief). Accordingly, although the Court held that the trustee had failed to give due and proper consideration of Deborah and Paul, that failure in the pleadings left the Court unable to set aside the decisions and make an order for compensation to Deborah and Paul.

The Court did, however, order removal of the trustee on the basis that the "*continuation of the trustee or any trustee in which Michael has a controlling hand is untenable*."[117]

6.4 Practical implications for Trustees

The decision in *Owies* serves as a practical reminder that trustees must give real and genuine consideration when exercising discretion. However, the decision must be applied with due regard to the very specific factual matrix of the decision.

As the court in *Owies* stressed:[118]

> An obvious, but unstated, premise on which the trustee would be expected to discharge its duties is that it would generally be informed about the differing circumstances, needs and desires of each beneficiary as an incident of the familial bonds that underpin the trust and explain its purpose.

How a trustee goes about that will depend on the circumstances of the case. Generally, in happy families, this issue may not arise – a failure to give real and genuine consideration is merely voidable,

[115] *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [140].
[116] *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [141].
[117] *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [164].
[118] *Owies v JJE Nominees Pty Ltd* [2022] VSCA 142, [111].

and there may be no challenge to the exercise of a trustee's decision. However, "*each unhappy family is unhappy in its own way*"[119], and can pose a problem and care must be taken.

[119] L Tolstoy, *Anna Karenina*.

7. Conclusion

> Having opened Pandora's box, and aware of the horror that might ensue, [Leo] Szilard could not help himself. He delved ever deeper inside, pursuing the mystery of the atom while never quite admitting to himself or to others what his research meant and where, inexorably, it was leading.[120]

Initially, after conceiving of the idea of the nuclear chain reaction, Szilard patented the idea before assigning it to the British Admiralty to ensure the idea stayed secret and hidden.

The trust issues raised in this paper (a mere peak into the many trust issues in Pandora's box), may make some stick their head in the sand (perhaps hoping the troubles that may ensue stay hidden for eternity).

Others cannot help themselves. The challenges and complexities of trust law, and its interaction with the tax laws, entices one to open the box a little more, sometimes releasing horrors, but always looking for hope.

[120] R Flanagan, *Question 7,* (2023) Penguin Random House Australia, 127.