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In the Supreme Court of Queensland an application has been granted to extend the vesting date of two family discretionary trusts thereby averting the impending imposition of Capital Gains Tax (CGT) and Stamp duty.

[Re Arthur Brady Family Trust; Re Trekmore Trading Trust \(2014\) QSC 244](#) makes some interesting observations.

Each of the two family discretionary trusts had a vesting date of (no later) 16 February 2017. Each of the respective trustees sought, pursuant to section 94 of the *Trusts Act 1973 (Qld)* to amend the vesting date to 16 February 2057. All of the persons or companies to which the income of the trust fund could now be paid, or who could share in the capital upon the vesting date, supported the trustees' applications.

Each trust deed contained powers to amend the deed but expressly prohibited amendment to certain provisions including an amendment to the vesting date. Accordingly, with no power to amend the vesting date, the trustees felt compelled to seek the approval of the Court.

It appears that the sole reason for the applications to amend the vesting date was to avert CGT and stamp duty liability.

The family discretionary trusts held substantial real estate assets. If the vesting date remained as 16 February 2017 there was a combined estimated \$1.1 million in Capital Gains Tax liability and an estimated \$770,000 in stamp duty liability on distribution of the real estate assets.

The Court considered that amending the vesting date constituted a "transaction" and "was in the best interests" of beneficiaries and therefore satisfied the requirements of section 94 of the *Trusts Act 1973 (Qld)*.

The court saw no bar to its position that the trustees were seeking "to minimise taxation liability of or in relation to trust property".

The court specifically noted:-

"The financial burdens which would result from the vesting of the property of these trusts are understandably sought to be avoided by the trustees and by each and every person or entity in whose favour either of the trustees would pay any of the

income or capital of the trust fund. Plainly, the proposed amendment of each trust deed could not be effected because of the absence of a power within the trust deed to effect such an amendment. There is an absence of a power in this sense where the trust deed contains an express prohibition against the exercise of a power.”

Each state jurisdiction has similar provisions to section 94 of the Queensland legislation. The court in this case carefully considered with approval the similar circumstances of a New South Wales case [Stein v Sybmore Holdings \[2006\] NSWSC 1004](#).

Although not cited in this case a similar conclusion on similar circumstances was reached in the Victorian decision [Re Plator Nominees \[2012\] VSC 284](#). The Victorian Supreme Court ordered an amendment to the vesting date of a family discretionary trust deed pursuant to section 63A of the *Trustee Act 1958 (Vic)*.

Lessons for Trustees:

1. Initially, a careful understanding of the terms of the trust deed, particularly the trustee's powers to amend, is required.
2. Even if there is an express prohibition on amending the vesting date, an application to the courts may still be available.
3. Be mindful of the State statutory and common law rules against perpetuities, that is the maximum life of a trust.
4. Some comfort can be taken that in many circumstances an amendment to the vesting date will not trigger a resettlement for income tax purposes (see [Commissioner of Taxation V Clarke \[2011\] FCAFC 5 21 January 2011](#))
5. Consider an application to the Australian Taxation Office (ATO) for a private binding ruling on your particular circumstances before acting.

N.B

However, the NSW Court of Appeal in [Re Dion Investments Pty Ltd \[2014\] NSWCA 367](#) determined that in NSW (at least) where a trust deed's terms omit a power to amend the trust deed that omission is permanent and a trustee cannot obtain that power from a court. The Court considered whether the power to vary a trust deed is a “transaction” for the purposes of section 81(l) which allows a court to make orders giving effect to certain “advantageous transactions” involving a trust.

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Victor Hamit
Wentworth Lawyers Pty Ltd
Level 40
140 William Street
MELBOURNE VIC 3000

Tel: (03) 9607 8380
Mobile: 0408 590 706

Email: vhamit@wentworthlawyers.com.au
Website: www.wentworthlawyers.com.au

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