

Update: 23 September 2009 Diamonds may be, but... Trusts are not forever



Fleming Muntz
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Summary

We have recently been involved in several matters where clients or their advisors have assumed that a family trust operates forever.

What are the limits?

In general, only charitable trusts are perpetual. Other trusts, and certainly common discretionary and unit trusts, can only exist for 80 years under section 16 of the *Perpetuities Act 1984* (NSW) or, in Victoria, section 5 of the *Perpetuities and Accumulations Act 1968* (Vic).

Of the common small-medium business entities, only a trading company has an unlimited lifespan or 'perpetual succession'.

Why does it matter now?

Given that family trusts only became popular in the late 1960's, it is true that this is unlikely to be a common problem for another 30 years or so.

However some trust deeds specifically set a shorter lifespan. We saw one trust deed recently that had been operating merrily for several years after its stated 25 year lifespan, simply because advisors had not checked the deed and, instead, assumed it was indefinite.

Alternatively, even if a trust has some remaining life, the acquisition of a very long-term or family investment might occasionally be better done through a new trust to get the benefit of a full 80 years.

What are the consequences?

In any case where a trust reaches the end of its 80 year life, there are likely to be stamp duty and CGT costs. Where the trust has inadvertently operated beyond its 'use by date', the taxation consequences are even more complex.

What are the solutions?

When the 80 year limit comes around, the best that can be achieved is a carefully planned winding up and distribution of capital.

However, if a trust deed sets a shorter lifespan, there is case law showing that an extension – up to the 80 year maximum – may be available if it is "expedient" for administering the trust.

How can Fleming Muntz help?

Fleming Muntz has experienced trust lawyers who have dealt with many flawed and unusual trust deeds. They can provide rigorous, practical advice on what options are available.

Important fine print

This update is for general information only. It is not a complete guide to the area of law. Competent advice should be obtained before taking any action.

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