

Update: 26 May 2014 Should I move my trust to South Australia?



Fleming Muntz
Solicitors



Summary

In most states and territories, the life of a discretionary trust is limited to 80 years – the 'perpetuity period'. In South Australia, however, a trust can carry on indefinitely, just like a company.

A question regularly discussed among trust lawyers is whether we should move our trusts to South Australia.

What's the issue?

When a trust reaches the end of its life, there is almost always a significant CGT liability, possibly with stamp duty as well. The longer the trust exists, the longer the liability is deferred. A trust governed by South Australian law promises to defer that liability indefinitely.

Should I make my trust South Australian?

Few discretionary trusts were established in Australia before the 60's, and most in the 70's or later. If these trusts have a normal 80 year lifespan, the problem will not arise until the 2040's – too far away to plan for intelligently.

However, we have been involved with trust deeds that, for whatever reason, had a lifespan of less than 80 years and faced an imminent CGT liability. This is not a problem if the deed contains a sufficient power of variation to extend its life out to 80 years. Even without that power, a court may make an order extending the lifespan if it is 'expedient' for the trust's administration.

These existing options mean that rarely would it be necessary to consider making an existing trust subject to South Australian law to extend its life and defer CGT.

Is it a good idea anyway?

In any event, we are not convinced that a perpetual discretionary trust is a good thing. A share in a company gives the holder a clear entitlement to income and participation, and can be sold or passed on by will. The interest of a discretionary beneficiary is not property and cannot be passed on as the beneficiary wants. We see abundant scope for argument as the trust moves across generations.

How can Fleming Muntz help?

Fleming Muntz has particular experience in trust transactions and restructuring. We are pleased to accept referrals from accountants and other lawyers in this field.

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.

Like you, we prefer to avoid unwanted emails. If you would rather not receive any further updates, please telephone us on (02) 6021 2222 or email to enquiries@flemingmuntz.com.au.

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