

Should a trust deed have a power to vary its provisions?

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It is common to find that, over time, the terms of a Trust may need to be updated or revised, usually because of changes to the law, including tax and duty laws. Not having a power to vary the terms of a Trust can have significant issues and create unnecessary financial impositions.

The first step if you're considering options to vary the provisions of a trust deed is to understand what power, if any, exists to be able to add, remove or amend any terms of the Trust.

The importance of having a comprehensive power of variation in a trust deed

A comprehensive power of variation is one of the most important aspects of any trust deed, as a power which is too narrow or too wide or a power which does not exist at all can have critical consequences. The key to a power of variation is to ensure that the variation power allows you to vary the trust deed as intended, therefore limiting any potential issues when the variation is exercised.

A trust deed outlines the rules of the Trust, including how a Trust may be varied. A Deed of Variation is the legal document that can then be used to vary the terms of the Trust. The terms of the trust deed, and in particular, the specific wording of the variation power used in the trust deed, sets out the extent of the variation permitted.

If a valid variation clause exists in the trust deed, then the wording needs to be considered to understand what it does and does not permit, together with the processes required for the variation. The variation should be fairly straightforward, provided that the terms of the variation and the processes for the variation are followed accurately. However, clauses providing for the variation to Trusts are not always simple and straightforward.

What happens if the variation power is too narrow?

In situations where the variation power of the trust deed is too narrow, it may be that the Court will be required to intervene.

Case example – limit power to vary the terms

An example of a case in which a limited power to vary was granted under the Trust instrument is the case of *Budumu Pty Ltd* [2021] NSWSC 522.

In this case, the power to vary was granted under the Trust instrument to two primary beneficiaries only during the lifetime of the beneficiaries, however both had died at the time the variation was required.

As a result, the Court had to intervene and approve the variation being made by the successor trustees. If the Court had not allowed the variation, the Trust would have been charged the land tax surcharge concerning foreign beneficiaries, which would have resulted in significant tax implications for the trust.

What if there is no variation power in a trust deed?

If there is no variation clause, the *Trustee Act 1925 (NSW)* empowers the Court to make a variation in certain circumstances.

Case example – no variation power in the trust deed

In the decision of *Casibond Pty Ltd: In the matter of George Tsivis Family Trust* [2021] NSWSC 320, despite the trust deed having no formal power of variation, the Court intervened and approved steps allowing the desired outcome.

In this case, the trust deed did have the following provision:

"*(The Trustee may) generally, determine all matters as to which any doubt, difficulty or question arises in relation to the Trust Fund and every such determination shall bind all parties interested in the Trust, but nothing in this sub-clause shall prevent the Trustee or any person interested in the Trust Fund from applying to the Court."*

The Court determined that this provision was insufficient to allow the trustee to vary the trust deed in order to avoid the application of the foreign beneficiary surcharge duty. The Court did, however, intervene to enable the trust deed to be varied to deal with the surcharge duty issue.

Tax implications for resettlement of a Trust

When considering whether to vary the terms of a Trust, it is also important to think about the consequences of the proposed variation and whether this may lead to a capital gains tax event.

Generally, if the variation or amendment is made through a valid exercise of power, then there will be no capital gains tax consequences. However, if the proposed variation terminates the Trust or alters the rights and obligations within the Trust, then there may be capital gains tax consequences.

This issue is often considered not only by lawyers but also in consultation with an appropriate tax adviser.

Get help from a lawyer experienced in Trusts

If you're considering updating or revising your Trust and you have queries about the variation powers in your trust deed (or there are no powers), you should seek advice from a lawyer experienced in Trust law. One of our experienced lawyers would be more than happy to assist.

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

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