Powers to Amend Trust Deed

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When a trust is created, the terms stipulated within the deed are binding on the subsequent actions of the trustees in relation to the trust property. Such terms remain set in stone, unless there is a provision that allows for alterations.

This article will detail common matters to consider when undertaking an amendment to a trust deed and any issues associated with amending a trust deed that practitioners should be mindful of. In addition, we will discuss the recent cases of Dion Investments and its effect on the court’s ability to grant relief to substantially restricted trustees.

The previous decisions regarding the extent to which Trustees may:

1. seek the Court’s assistance to vary terms of trusts where the trust deed does not contain a power to amend the trust’s terms: Re Dion Investments Pty Ltd [2014] NSWCA 67 (Dion Investments); and
2. rely upon the general amendment power is a discretionary trust deeds to replace the appointor by varying the schedule within the trust deed: Mercanti v Mercanti [2015] WASC 297 (Mercanti).

Variation of trusts generally

Discretionary trusts should provide flexibility to vary the deed to deal with changes in the circumstances or in the legislation affecting the trust. Most modern deeds give the trustee wide powers of variation, unless there is a specific reason to limit the scope of the variation power. It is important to check the wording of the deed to ensure the trustee’s power has not been limited or fettered.

When amending a trust deed, it is imperative to ensure that:

1. the powers within the trust deed are sufficiently broad enough to enable the change;
2. any power of variation are exercised properly; and
3. the procedures within the trust deed are followed.
Before undertaking a variation of trust terms, it is necessary to ascertain:

1. whether the power of variation allows amendments of all provisions in the deed (including schedules) or are there limitations;
2. who has the power to make the change (e.g. the trustee or appointor);
3. the procedures for variation (e.g. by deed, minute or notice in writing);
4. whether it is necessary to obtain the consent of any party such as the appointor; and
5. whether there are any specific restrictions on the power of variation (e.g. prohibiting amendment of certain clauses).

A failure to comply with procedural requirements may result in the variation being ineffective or void. Consequently, any action taken by the trustee may be void.

There are further general law restrictions on the scope of even apparently unrestrained power to vary. These include:

1. the exercise of a power to vary cannot itself be amended, removed or annulled by means of an exercise of the power;
2. the exercise of a power to vary cannot affect any vesting that has already taken place; and
3. a power to vary a trust deed may not be used to manifestly alter or defeat the main purpose(s) of the trust.

In addition to the requirements outlined above, the power to amend the terms of a trust deed must be exercised in good faith and for the benefit of the beneficiaries as a whole. To avoid complications with both interpretation and limitation issues, it is essential that the amendment clause be sufficiently broad to allow for the variation of the whole of the deed, including any schedules.

Seeking assistance from the Courts

Dion Investments

In Dion Investments, the Court of Appeal of the New South Wales Supreme Court clarified the rights of trustees to seek additional powers from the courts.

The Court considered whether the power to vary a trust deed is a ‘transaction’ for the purposes section 81 of the Trustee Act 1925 (NSW), which allows the court to make orders
giving effect to certain ‘advantageous transactions’ involving a trust. We note that a similar power exists within the section 94 of the Trusts Act 1973 (Qld).

The Court denied the application, confirming the position that where a trust deed’s terms omit a power to amend the deed itself, that omission is permanent.

It was held that section 81(1) permits the Court to authorise transactions that in the management or administration of trust property are ‘expedient’ to be undertaken, even where to do so supplements or overrides the terms of the trustee, but it does not permit alterations of the terms of the trust instrument.

The Court made it clear that its position does not affect the operation of a provision of the trust instrument permitting variation of the terms of the trust, nor does it affect the power of beneficiaries who are all absolutely entitled and all sui juris, unanimously, to put an end to the trust or to vary its provisions.

**Mercanti**

In Mercanti, the validity of amendments to two discretionary trust deeds was called into question. The amendments in each trust purported to delete the existing definition of ‘appointor’ who was defined to be Michael Mercanti and replace it with his son, Tyrone. After Tyrone purported to exercise his powers as appointor to change the trustee, Michael argued that each deed’s variation was invalid as they were not in accordance with the variation power.

The Court decided that the change of appointor was valid in one deed but not valid in the other based on the wording of the variation clause. It found that:

1. one deed had the ability to “vary all or any of the trusts, terms and conditions” in the amendment power and this was sufficiently broad to allow the change of appointor; but
2. the other deed’s power did not extend to varying the appointor as the deed only gave the power to “vary all or any of the trusts”. Unlike the first deed, there was no express provision to vary the terms and conditions of the deed.

**Lessons**

1. always read the trust deed and check whether the amendment clause authorises
or covers the amendment which you are proposing;
2. remember that not all amendments can be made by relying on the various state
   Trusts Acts where the power to amend is not within the terms of the Trust Deed;
3. there is an ability to apply to the court to amend a trust deed where the Court is
   satisfied that an alteration is expedient, to authorise the trustees to do or abstain
   from doing any act or thing which if done or omitted by them without the
   authorisation of the Court or the consent of the beneficiaries would be a breach of
   trust.

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