



LAW·COMMISSION  
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# PERPETUITIES AND THE REVOCATION AND VARIATION OF TRUSTS

REVIEW OF THE LAW OF TRUSTS  
THIRD ISSUES PAPER



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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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## FOREWORD

This is the third Issues Paper in the Law Commission's review of trusts. It follows *Review of Trust Law in New Zealand: Introductory Issues Paper* and *Some Issues with the Use of Trusts in New Zealand*, which were both papers that looked at fundamental and general issues relating to trusts. This Issues Paper is the first of our papers to focus in on some of the more technical trust issues that may be in need of reform.

The first part of this paper examines the rules that limit the duration of a trust: the common law rule against perpetuities and the Perpetuities Act 1964. Perpetuities law is some of the most complex and confusing law we have. Far from clarifying and simplifying matters, the 1964 Act is difficult to understand and apply. This is an area of law that could benefit considerably from modernisation and clear drafting. However, this is also an area of law where there are several important questions for law reform. The time may have come for there to be a new approach to perpetuities law in New Zealand. We canvass different options, including retaining the statutory perpetuity rule and abolishing the rule, while exploring the background and underlying rationale for the rule. We want to raise the issue of whether the rule continues to meet a relevant policy need or whether either the mechanism for achieving this policy or the policy basis itself should change.

The second part of this paper looks at the rules that allow trusts to be altered. Trusts may be revoked and varied through various common law, judicial and statutory mechanisms. These rules need to be examined to ensure that they are clear and workable. We are interested in views about whether this area of trust law is in need of reform.

This paper will be followed by an Issues Paper focusing on trustees' duties and powers and trust administration.



*Justice Grant Hammond*  
President of the Law Commission

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Members of the reference group are:

- Kerry Ayers, Helmore Ayers
- Andrew Butler, Russell McVeagh
- Chris Kelly, The New Zealand Guardian Trust Company
- Greg Kelly, Greg Kelly Law
- Jessica Palmer, Senior Lecturer, University of Otago
- Bill Patterson, Patterson Hopkins
- Professor Nicola Peart, University of Otago

The commissioner responsible for this reference is George Tanner, QC.

The researchers and writers of this Issues Paper were Janet November, Senior Legal and Policy Adviser, Susan Hall, Senior Legal and Policy Adviser, and Marion Clifford, Legal and Policy Adviser.



# Call for submissions

Submissions or comments (formal or informal) on this Issues Paper should be sent to Marion Clifford, Legal and Policy Adviser, by **24 June 2011**.

**Law Commission,  
PO Box 2590,  
Wellington 6011, DX SP 23534,  
or by email to [trusts@lawcom.govt.nz](mailto:trusts@lawcom.govt.nz)**

The Law Commission asks for any submissions or comments on this third Issues Paper on the review of the Law of Trusts. The submission can be set out in any format but it is helpful to specify the number of the question you are discussing.

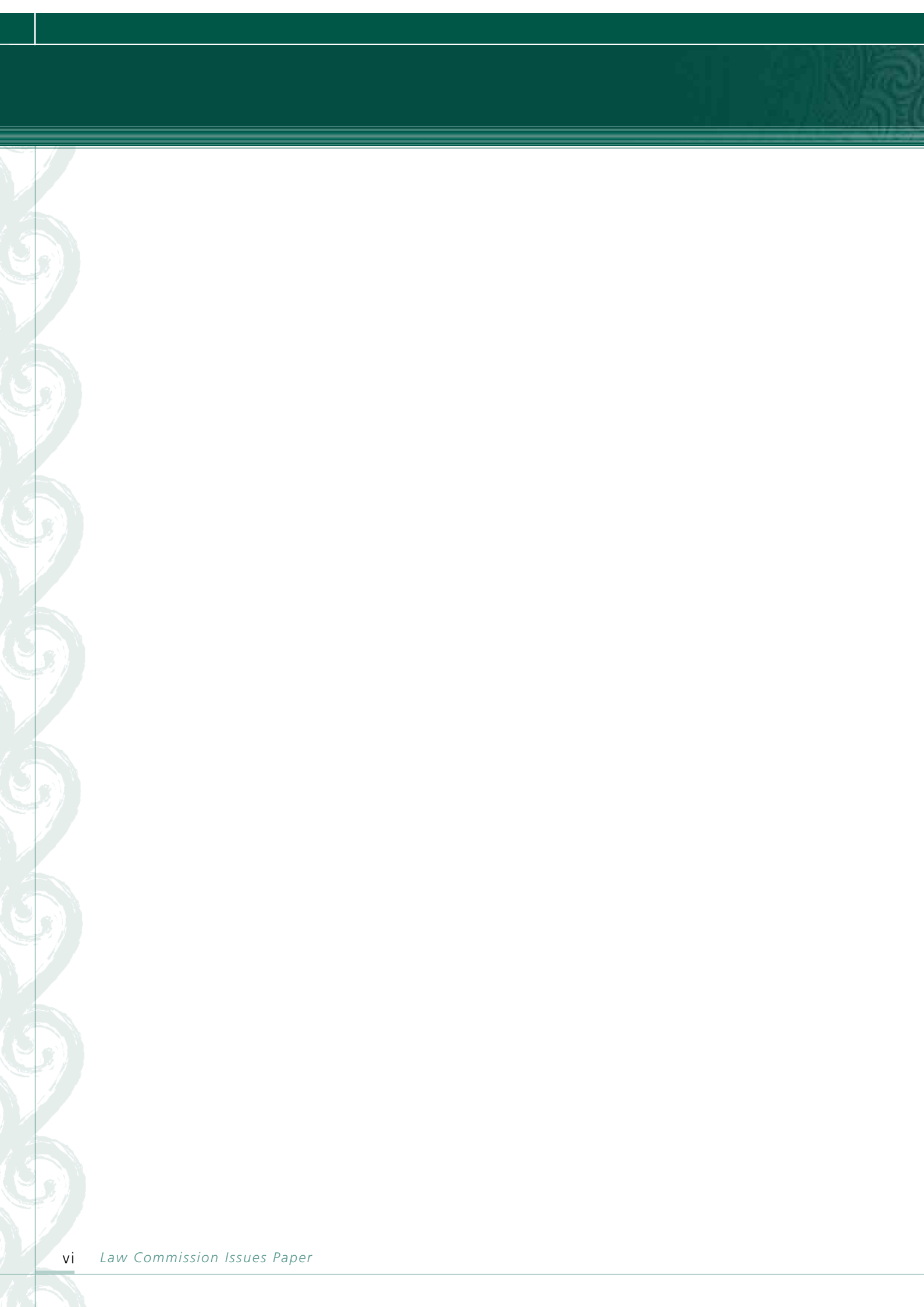
There are some questions at the end of chapters 3 and 5 of the paper that pinpoint the queries on which comments would be most valued. Submitters are invited to focus on any of these questions, particularly in areas that especially concern them, or about which they have particular views. It is certainly not expected that each submitter will answer every question.

Alternatively, submitters may like to make a comment about the trusts review that is not in response to a question in the paper and this is also welcomed.

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## **Official Information Act 1982**

The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus copies of submissions made to the Law Commission will normally be made available on request, and the Commission may refer to submissions in its reports. Any requests for withholding of information on grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act 1982.





# Perpetuities and the Revocation and Variation of Trusts

## Review of the law of trusts Third Issues Paper

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# Introduction

The Law Commission's third Issues Paper on the review of the law of trusts addresses two subjects vital to the mechanics of trust deeds and trust administration: how long trusts can last before they must vest and how trusts can be revoked or varied. These are areas of the law that require consideration to see whether possible minor or more fundamental reforms are desirable. This paper seeks comment from those with experience or knowledge of these aspects of trusts, whether in a professional or personal capacity. The Commission would be greatly assisted by such comments in formulating any recommendations for reform in the areas of perpetuities, and revocations and variations.

This paper is the third in a series of Issues Papers being released as a part of the Law Commission's review of the Trustee Act 1956 and the law of trusts. The Issues Papers in this review are:

- the history and nature of trusts, recent developments in the structure of trusts, and the scope and framework of a revised Trustee Act (released November 2010);
- problems with the use of trusts, including issues relating to relationship property, creditor protection, and sham trusts (released December 2010);
- the Perpetuities Act 1964 and the revocation and variation of trusts (this paper);
- trustees' duties and liabilities, including indemnity provisions and exemption clauses, and the office of trustee and trust administration, including the capital and income distinction, court supervision of trusts, and trustees' powers (such as delegation, investment and insurance) (second quarter of 2011);
- any remaining issues, including trading trusts, dispute resolution for trusts and registration of trusts (third quarter of 2011).

Part one of this Issues Paper examines the rule against perpetuities and the Perpetuities Act 1964. Chapter one is a discussion of the history and reasons for the rule against perpetuities, problems with the rule and the reforms introduced by the Perpetuities Act 1964. Chapter two examines the reasons for having the rule, problems created by the rule and whether it is necessary or desirable to retain the rule in its current form. Chapter three raises options for reform by discussing the approaches taken in other jurisdictions and asks for comment on a series of questions.

The second part of this paper addresses issues relating to the revocation and variation of trusts. Chapter four discusses non-statutory methods of varying and revoking trusts. Chapter five focuses on statutory provisions for varying and revoking trusts and raises options for reform before presenting questions for comment on this subject.

# Part 1

## THE PERPETUITIES ACT 1964



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# Chapter 1

## Background to the rule against perpetuities and the Perpetuities Act 1964

**INTRODUCTION** 1.1 The rule against perpetuities (the rule) effectively sets a limit for the duration of trusts. John Chipman Gray's famous and succinct statement of the rule against perpetuities is as follows:<sup>1</sup>

No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.

- 1.2 The rule was first established by the courts at common law. It has since been incorporated into statute. In New Zealand the Perpetuities Act 1964 provides the statutory rule applicable to trusts and to other interests with delayed vesting.
- 1.3 The rule is regarded by many as the most complex of all areas of law. The rule is complicated; nevertheless the policy considerations are significant and fascinating. The rule reflects a tension between the freedom of a property owner to dictate how his or her property will be used in the future on one hand, and the ability of those who receive it to use it in the most effective and efficient way. The questions at the core of the review of the rule are: should there be a limitation on when a trust may vest, and if so, what should the limit be and which types of trust should this apply to?
- 1.4 This chapter looks at the common law rule, including its history and policy basis, and problems with the rule, and then summarises the reforms that resulted from the Perpetuities Act 1964.

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1 JC Gray *The Rule against Perpetuities* (4th ed, Little Brown & Co, Boston, 1942) at [201].

## THE COMMON LAW RULE AGAINST PERPETUITIES

- 1.5 The rule is a rule against the remoteness of vesting of interests. By “vesting” is meant the giving of an immediate, fixed right of present or future enjoyment of property. The rule applies to the remoteness of vesting of interests in trust property under a trust deed – it prevents interests from vesting too far in the future. It does not determine how long the property interest or trust can last. The rule applies not only to dispositions in trusts but to legal and equitable interests in both real and personal property.
- 1.6 The common law rule is that in order to be validly created, an interest in property must either:
  - be vested when it is created; or
  - vest no later than 21 years after the death of a person (or persons) who was alive (or *in utero*) at the time that the interest was created.
- 1.7 Every interest that would not or may not vest within that period is invalid from the start. Any subsequent or dependent provisions are also void, meaning that one must be certain from the start that an interest will vest within the time allowed.<sup>2</sup>
- 1.8 The person or persons who are alive at the time an interest was created are referred to as “a life or lives in being”. This person or persons named in the trust instrument need not be a beneficiary or in any way connected with the trust. There is no restriction on the number of people that can be the lives-in-being, as long as the number is not so large as to make it impossible or practically impossible to ascertain when the last survivor died.<sup>3</sup>

### A brief history

- 1.9 Since about the 13th century, it seems that the common law had a bias towards alienability of land (the ability for land to be sold or transferred).<sup>4</sup> There was a conflict between the landed gentry’s desire to settle their estates for generations to come with ties and restraints on what could be done with the property and the policy of freedom of alienation of land. This led to various rules to prevent

<sup>2</sup> N Kelly, C Kelly and G Kelly *Garrow and Kelly Law of Trusts and Trustees* (6th ed, LexisNexis, Wellington, 2005) at 137.

<sup>3</sup> N Kelly *Garrow and Kelly’s Law of Trusts and Trustees* (5th ed, Butterworths, Wellington, 1982) at 74, citing *Cadell v Palmer* (1833) 1 Cl & F 372, 6 ER 956. In *Re Moore* [1901] 1 Ch 936; [1900-3] All ER Rep 140 vesting was postponed “until the period of 21 years from the death of the survivor of all persons who shall be living at my death” and this was held to be void for uncertainty. In *Re Villar* [1929] 1 Ch 243 (CA) vesting after 20 years from the death of the last survivor of all of the linear descendants of Queen Victoria was held to be valid. Royal lives clauses, such as this one, have been fairly common.

<sup>4</sup> See Gray, *The Rule against Perpetuities*, above n 1, at ch 1 and particularly at [140]–[146]. The Statute of Quia Emptores 18 Edw 1, c 1 (1289) enabled tenants in fee simple to alienate their land and provisions in conveyances restraining alienation were invalid. F Pollock and FW Maitland *The History of United Kingdom Law* (2nd ed, Cambridge University Press, London, 1968) vol 2, at 18–19.



the tying up of land through “entailed estates”, which involved successive life estates and future interests dependent on contingencies (such as marriage). The rule against perpetuities was the 17th century way of solving this conflict.<sup>5</sup>

- 1.10 The judges and lawyers who worked out the rules were settlors and landowners themselves so it is not surprising that they sought a balance between ensuring an active land market and allowing for family settlements (entailed estates) to last at least until the grandson of the testator was in possession. The common law rules allowed the entail to be broken by the life tenant in possession, preventing a string of perpetual life estates passing from father to son, and voided contingent future interests.<sup>6</sup>
- 1.11 However, equity, the body of law developed by the English Courts of Chancery to ameliorate the effect of strict rules of the common law courts, was always more permissive in allowing landowners to settle their estates in ways that tied them up for long periods.<sup>7</sup> This was the case with trusts, which with their “shifting and springing” future interests in particular,<sup>8</sup> meant the transfer of ownership of land could be prevented for years. Estates could be tied up in families in perpetuity. Consequently, by the end of the 17th century it was clear that a new rule was needed to control perpetual trusts: the rule against perpetuities.<sup>9</sup>
- 1.12 The rule first appeared in 1681 in *Howard v Norfolk (The Duke of Norfolk’s case)*.<sup>10</sup> Lord Nottingham LC decreed that whether or not a future interest is valid depends on the time when it will vest. In particular, he held that a future interest was incapable of vesting later than the expiration of a “life-in-being” at the time the interest was created (that is, it must vest within the lifespan of a person alive at the time the trust was created). In a series of later decisions, culminating in *Cadell v Palmer*,<sup>11</sup> it was held that the rule required that an interest should vest within lives-in-being at the creation of the interest, plus 21 years from the death of the survivor (including a period of gestation if necessary).

5 See AWB Simpson *A History of Land Law* (2nd ed, Clarendon Press, Oxford, 1986) at ch IX.

6 See Simpson, above n 5, for details.

7 GS Alexander “The Dead Hand and the Law of Trusts in the Nineteenth Century” (1985) 37 *Stan L Rev* 1189 at 1197.

8 See Law Commission *Review of Trust Law in New Zealand: Introductory Issues Paper* (NZLC IP 19, 2010) at ch 2.

9 Simpson, above n 5, at 222–223; R Megarry and HWR Wade *The Law of Real Property* (4th ed, Stevens & Sons, London, 1975) at 207. Note however, that there is a view that the rule actually increased the ability of landowners to tie up their property for the future. See GL Haskins “Extending the grasp of the Dead hand: Reflections on the origins of the Rule against Perpetuities” (1977) 126 *U of Pa LR* 19 at 37.

10 *Howard v Norfolk* 3 Ch Ca 1; 2 Ch Rep 229; 22 ER 930 (*The Duke of Norfolk’s case*), affirmed by the HL (1685) 3 Ch Cas 54; 22 ER 963.

11 *Cadell v Palmer* (1833) 1 Cl & F 372; 6 ER 956. See Gray *The Rule against Perpetuities*, above n 1, at [169]–[170] for the *Duke of Norfolk’s case* and ch 1 for a detailed history of the cases establishing the rule.

## Policy reasons for the rule and the inherent tensions

1.13 The purposes for the rules promoting alienability of land and the rule against perpetuities were:<sup>12</sup>

- to promote the freedom of living people to transfer property and the enjoyment of property by the living;
- to prevent the continuous entailment of estates (that is, the tying up estates through successive life interests to the male heir) perpetuating control by a will maker (known as the “dead hand”); and
- to reduce uncertainty of title for long periods of time.

1.14 In the words of John Chipman Gray in the 1880s, the modern, liberal system was one in which:<sup>13</sup>

... everyone was free to make such agreements as he thought fit with his fellow creatures, no one could oblige any man to make any agreement that he did not wish... a system in which there was no place for privileges... for rank, wealth, or moral weakness.

1.15 This support for the autonomy of the individual was apparent in a dislike of limits on a landowner’s freedom to dispose of his<sup>14</sup> property as he pleased. However, this rhetoric ignored the inherent tensions and ambiguity in the individualistic proposition that people should be free to dispose of their property as they wish. If the landowner is free to dispose, does this mean the landowner has the freedom to impose limits and ties for the future? Whose freedom is the law trying to protect: the freedom of the landowner to dispose of property as he or she wishes or the freedom of the persons to whom it is disposed to use it as they wish? There is a conflict between this individualistic philosophy and the paternalistic idea that property settled in trust can have conditions, limits and restraints that can be perpetuated. These conflicts and tensions persist today in discussion about the rule.

1.16 In addition, freedom of alienation can refer to the public interest in keeping assets in the stream of commerce in the public interest, or the ideology of individual autonomy. Blackstone perceived a progression from feudalism to commercialism with its freedom of transfer and circulation of assets.<sup>15</sup> In the mid-19th century, the American jurist, Kent, saw this progression also:<sup>16</sup>

Perpetuities, as applied to real estates, were conducive to the power and grandeur of ancient families, and gratifying the pride of the aristocracy, but they were extremely disrelished by the nation at large, as being inconsistent with the free and unfettered enjoyment of property.

12 See Megarry and Wade, above n 9; HA Ford and WA Lee *Principles of the Law of Trusts* (Law Book Co Ltd, North Ryde, NSW, 1983) at [724].

13 JC Gray *The Rule against Perpetuities* (1996) cited in GS Alexander “The Dead Hand and the Law of Trusts in the Nineteenth Century” (1985) 37 *Stan L Rev* 1189 at 1206–1207, expressing his strong objections to spendthrift trusts.

14 In those days landowners were almost all male.

15 W Blackstone *Commentaries* at 420, cited in Alexander, above n 7.

16 J Kent *Commentaries on American Law* (14th ed, Boston, 1896) at 264.

- 1.17 For Gray, in the late nineteenth century, alienability of property was a matter of public policy, and the morality of repaying one's debts:<sup>17</sup>

The true ground [for why equitable estates cannot be made inalienable] is that on which the whole law of property, legal and equitable, is based – that inalienable rights of property are opposed to fundamental principles of the common law; that it is against public policy that a man 'should have an estate to live on, but not an estate to pay his debts with', ... and should have the benefits of wealth without the responsibilities.

- 1.18 For these reasons he opposed the American "spendthrift trusts"<sup>18</sup> as undemocratic and creating a privileged class, enabling "grown men" to become parasites and be "kept all their lives in pupillage" and "live in luxury on inherited wealth".<sup>19</sup> This era also saw the philosophy of redistribution of wealth gaining momentum. In the New Zealand parliamentary debates on the Death Duties Act 1909, the theme of taxing the wealthy in order to more fairly distribute wealth was consistently mentioned by the Attorney-General and the Prime Minister, as well as by members of Parliament on both sides of the House.<sup>20</sup> In addition, there was reference to the "creation of sybarites" (persons devoted to luxury and sensuality) similar to Gray's concern for the creation of parasites. The debates quoted Bentham, JS Mill, Andrew Carnegie and others on the dangers of accumulation of property in the hands of a few. The following extracts indicate the rhetoric expressed:<sup>21</sup>

Now this bill proposes to get at the wealthy classes. On whom does it impose a burden? Practically on no-one at all. It is not so much an increase in taxation as a perfectly fair and legitimate attempt to aim at a more equitable distribution of wealth.

Surely there may be a good deal to be said for the view expressed by John Stuart Mill that it is unwise in most cases that any one man should be endowed with wealth to such an amount as to place him entirely beyond the need of earning a living ... More young men have been made shipwreck by having too much wealth left to them than from any other cause.

- 1.19 Such liberal views on inherited wealth would have supported the rule as at least some attempt to confine the duration of trusts and favour alienation of property, even if not the clearest and most successful way to do so.

17 JC Gray *Restraints on the Alienation of Property* (2nd ed, Boston Book Co, Boston, 1895) at Preface and 246, cited in Alexander, above n 7, at 1236.

18 See Law Commission, above n 8, at [2.75]. Spendthrift trusts are protective trusts that give beneficiaries an interest for life, or a lesser period, which would not be lost in the event of bankruptcy.

19 Gray *Restraints on the Alienation of Property*, above n 17, at 246–247.

20 See (1909) 148 NZPD 908 442. Prime Minister Joseph Ward observed that a progressively imposed estate duty was "the fairest and most equitable of all taxes under a rational law." These and other quotations from the speeches are also cited in L McKay "Historical Aspects of the Estate Tax" (1978) 8 NZULR 1 at 6.

21 NZPD, above n 20, at 908 449 per Mr G Laurenson and at 908 907 per Attorney-General.

## Examples of the common law rule

1.20 The following are some examples of the common law rule in practice:

- A gift to X for life, with the remainder of the gift to his sons in succession, is valid even if X is childless, as X is a life-in-being and each son must be born within his life and will have a vested interest at birth. The trust is valid.
- If T holds a property in trust for X for life, then for Y, X's interest is vested in possession while he is alive (he is enjoying the property) but Y's interest is still a vested interest, though enjoyment is postponed. The trust is valid.
- If T by will gives property on trust to X (a bachelor) for life, then for such children of X as may marry, the children's interest is contingent on their marrying. Each child's interest will not vest in interest unless and until the child marries (a condition precedent). This could be more than 21 years after the death of X, so is too remote. The trust is not valid.

## Some problems with the common law rule

1.21 There were a number of problems with the common law rule, only some of which were resolved by the Perpetuities Act 1964. The common law rule is complicated to apply. It had a tendency to defeat some future interests that would almost certainly vest within the perpetuity period, but for which there is no way of knowing at the commencement of the period. There was no possibility of waiting to see what happens at common law.

### *Vesting*

1.22 The rule concerns vesting and not simply duration of future interests. A future interest is vested if:

- the identity of the person is ascertained; and
- the future interest can take effect as soon as the preceding one is terminated. This means that there is no contingency, related to the future interest, to its becoming vested (for example, "if X marries").

If the interest is a gift to a class of beneficiaries, the exact quantum that each member is to receive must be ascertained.

### *Conditions precedent, conditions subsequent and determinable interests*

1.23 One area that was problematic and confusing concerned gifts that are subject to conditions and how these interacted with the rule. The rule applied in different ways to different types of conditions.

1.24 A condition precedent is one which must be fulfilled before the beneficiary is entitled to a vested interest. For instance, a gift to X when she marries will only take place if X satisfies the condition. Under the common law rule, if there was a chance that the condition might not be fulfilled within the perpetuity period, the whole gift was invalid at the outset. A condition subsequent is one that authorises the person who made the gift to subsequently terminate the recipient's

interest: for instance, a gift of land to Y if he does not sell it out of the family. Under the rule, if there was a condition of this type that may have occurred outside of the perpetuity period, the condition was invalid.<sup>22</sup>

- 1.25 The distinction between a condition subsequent and a determinable interest is essentially semantic. A determinable interest is an interest that may end by the occurrence of some specified but unpredictable event.<sup>23</sup> A gift to X “until he marries” is a determinable interest. If X marries, the interest will determine and revert to the person who granted the gift (the grantor). It is difficult to give a clear test for distinguishing between a determinable interest and a condition subsequent. The wording “a gift to X on condition that he does not marry” creates a condition subsequent, while the wording “a gift to X until he marries” is likely to be a determinable interest. As Kevin Gray has said “[t]he distinction is elusive in the extreme and it is ultimately a matter of construction of the words used in the grant.”<sup>24</sup> At common law, despite the fine semantic distinction between a condition subsequent and a determinable interest, the consequences to the validity of a gift were different. A condition subsequent was void if it may be fulfilled outside of the perpetuity period, and if the condition was void, the gift became free of the condition and was made absolute to the person who received the conditional gift.<sup>25</sup> If the “condition” in a determinable interest failed to eventuate, the gift automatically reverted to the grantor.

### *Lives-in-being*

- 1.26 A life-in-being for the purpose of the rule must be any persons alive at T’s death or at the date of the instrument, who are expressly specified in the instrument, or who have a connection with the contingency that governs the vesting.<sup>26</sup> But the lives need not be connected to the intended beneficiaries and there is no limit to the number of qualifying lives so long as they are ascertainable.<sup>27</sup> This has meant that “royal lives clauses” have been relatively widespread. For example, a perpetuity period may be defined as “the period ending at the expiry of 21 years from the death of the last survivor of all the lineal descendants of her late Majesty Queen Victoria who shall be living at the date when the gift comes into effect”.<sup>28</sup> Using such a royal lives clause might have prolonged the length of time within which an interest could vest. However, there may be difficulties in accurately determining the number and identity of royal descendants and

22 Kelly, Kelly and Kelly, above n 2, at 143; *Re Hollis Hospital* (1899) 2 Ch 54; *Re Da Costa* [1912] 1 Ch 337.

23 K Gray *Elements of Land Law* (2nd ed, Butterworths, London, 1993) at 85 cited in Law Commission (UK) *The Rules against Perpetuities and Excessive Accumulations* (Law Com No 251, 1998) at [3.8].

24 Ibid, at 87–88.

25 *Re Da Costa* [1912] 1 Ch 337 and see Law Commission (UK), above n 23.

26 There are two views as to the relevant lives where none are specified expressly – either that they are people causally connected with the gift or those which validate the gift. See DE Allen “Perpetuities: Who are the Lives in Being” (1965) 81 LQR 106.

27 JHC Morris and W Barton Leach *The Rule Against Perpetuities* (Stevens & Sons, London, 1962) at 60. And see *Thelluson v Woodford* (1799) 4 Ves 227.

28 *Re Villar* [1929] 1 Ch 243 (CA); Morris and Leach, above n 27, at 61; Megarry and Wade, above n 9, at 221.



whether they continue to be alive at any point in time.<sup>29</sup> Royal lives clauses are now quite rare in New Zealand and generally are only found in trusts created prior to the Perpetuities Act 1964, although they are more common in offshore jurisdictions.

- 1.27 The facts of life were not relevant at common law (for example, the age of child bearing). So even though a woman was below or well past the age of child bearing, it was assumed for purposes of the rule that she could have a child, and the interest of that child would vest outside the perpetuity period.<sup>30</sup> Nor did the common law rule contemplate the possibilities resulting from modern reproductive technologies.

### *Class gifts*

- 1.28 At common law, if a single member of the class would take outside the perpetuity period the whole gift fails. So a gift to A for life and then equally among children who attain the age of 25 would be void even if some children were alive at the time of the gift. There were, however, some “class closing rules”.<sup>31</sup>

### *Powers of appointment*

- 1.29 Powers of appointment are divided into general powers (exercisable in favour of anyone including the donee of the power) and special powers (exercisable in favour of a specific group of people or anyone apart from the donee). The donee must acquire the power within the perpetuity period (measured from the time when the instrument creating the power takes effect) for it to be valid. The donee of a general power is treated as an absolute owner so the power can be exercised at any time. But the donee of a special power must exercise it within the perpetuity period.

29 In *Re Villar* [1929] 1 Ch 243, the courts accepted the validity of a royal lives clause based on Queen Victoria’s lineal descendants despite there being approximately 120 remaining throughout Europe at that time. However, later it appeared that the courts would no longer accept a royal lives clause based on Queen Victoria “in the case of a testator who dies in the year 1943 or any later date” (*Re Leverhulme (No 2)* [1943] 2 All ER 274). Because the lineal descendants of Queen Victoria are now too numerous to constitute a practicable group of lives-in-being, the descendants of George V or George VI are now more commonly used.

30 Megarry and Wade, above n 9, at 212. See W Barton Leach “Perpetuities: Staying the Slaughter of the Innocents” (1952) 68 LQR 35 at 44–47 for discussion of the cases of the “fertile octogenarian” and the “precocious toddler”. For instance, as an example of the ludicrous extent of the rule’s assumptions, suppose that a will gives land “to A for her life, and then to the first of A’s children to reach 25 years of age.” A is at that time an 85-year-old woman. In theory A could have a child in her 86th year and then in her 87th year all of A’s other children could die, then in her 88th year A herself could die. Because the interest will not vest until her new child reaches 25 years of age, which cannot happen until more than 21 years after A and her other children (who are the “lives in being”) have all died, the rule against perpetuities makes the entire gift void.

31 See Morris and Leach, above n 27, at ch 4 and *Andrews v Partington* (1791) 3 Bro CC 401. A class can close at any time when still capable of increase if any member of the class is entitled to call for a distribution of his or her share.

## THE PERPETUITIES ACT 1964

1.30 The Perpetuities Act 1964 (NZ) introduced some changes to the common law rule described above. The New Zealand Act is based on the Perpetuities and Accumulations Act 1964 (UK) and is also very similar to the Western Australian Trustees Act 1962. The main changes introduced by the Perpetuities Act 1964 were that:

- it became possible to “wait and see” whether interests will vest within the perpetuity period even if the disposition would be void at common law;
- the perpetuity period within which an interest must vest can now be specified as up to 80 years;
- statutory lives-in-being were introduced that are different from common law lives-in-being;
- presumptions of parenthood were enacted; and
- the classes in class gifts were able to be closed.

### The “wait and see” rule

1.31 If a disposition would be void at common law, the wait and see rule applies under section 8 of the Perpetuities Act 1964. The disposition must be treated as if it were not invalid until such time as it becomes certain that the vesting must occur after the end of the perpetuity period. For instance, a gift by will to A’s first son to marry (where A is childless at the settlor’s death) would be void at common law as A’s first son to marry may do so more than 21 years after A dies. But under the Act, it is possible to wait and see if A’s son marries during A’s lifetime or within 21 years of A’s death before the trust is declared invalid. If A dies and no sons of his have married 21 years later, then it is established that the gift is incapable of vesting.<sup>32</sup> The wait and see rule applies to a general power of appointment and to a power, option or other right only if the right is not fully exercised within the period.<sup>33</sup> In cases where there are no lives-in-being and the power to specify a perpetuity period of up to 80 years in section 6 has not been utilised, the period is simply 21 years.

### The 80 year period and special powers of appointment

1.32 The perpetuity period must be specified in the instrument. For powers of appointment, the specification may be either in the instrument creating the power or the instrument made in exercise of the power.<sup>34</sup> In the case of a special power of appointment the period specified runs from the date of the creation of the power. In all other cases the period runs from the time the instrument comes into operation.<sup>35</sup> Section 5 clarifies the nature of a general power. It must be exercisable by one person only and be capable of being exercised immediately (unless exercisable by will).

<sup>32</sup> Megarry and Wade, above n 9, at 215.

<sup>33</sup> Perpetuities Act 1964, s 8(2)–(3).

<sup>34</sup> Perpetuities Act 1964, s 6(2).

<sup>35</sup> Perpetuities Act 1964, s 6(3).



## Lives-in-being are different under the 1964 Act

- 1.33 Under the 1964 Act, statutory categories are sometimes wider and sometimes narrower than at common law.<sup>36</sup> While any number of categories may be chosen at common law, statutory categories include the donor, a donee, the donee's parent or grandparent and the owner of a prior interest. They do not include royal lives clauses. The statutory categories only become relevant if the wait and see principle is activated.

## Presumptions of capacity to have a child

- 1.34 Section 7 of the Perpetuities Act 1964 provides that a woman over 55 years and a male or female under 12 years are incapable of having a child. These are rebuttable presumptions.

## Class gifts

- 1.35 After the introduction of the Property Law Act 1952, class gifts no longer necessarily failed if a member of the class would take outside the period. Section 25 of that Act provided that where a person was required to attain a certain age exceeding 21 years in order to receive a disposition, the disposition would be treated as if the required age was 21 years. Section 9 of the Perpetuities Act 1964 replaced this section and went further, by allowing the age required by a deed to be reduced to the age nearest to that specified that does not breach the rule against perpetuities. It also allowed the exclusion of potential class members whose inclusion would cause the disposition to breach the rule.

## Reformation

- 1.36 Section 10 allows further *cy-pres* modifications (that is, changes that allow the purpose of a disposition to be implemented despite the gift being invalid under the common law rule) to an instrument if it becomes apparent that it infringes the rule. However, this is available only when the general intentions governing the disposition are ascertainable "to give effect, if possible, and as far as possible, to those general intentions". In some cases modification can take place even if invalidity is not certain. The use of *cy-pres* modifications could be an alternative method of varying a trust deed to the variation provisions of the Trustee Act 1964, but only if invalidity is due to a breach of the rule against perpetuities.

<sup>36</sup> Perpetuities Act 1964, s 8.

### Administrative powers of appointment

- 1.37 The 1964 Act makes it clear that the rule does not apply (and shall be deemed never to have operated) to invalidate a trustee's administrative powers.<sup>37</sup>

### Options to acquire an interest

- 1.38 Section 17 sets a more restrictive perpetuity period for certain dispositions. It provides that the rule shall not apply to a disposition conferring an option to acquire for value a reversionary interest on the term of a lease, if the option is exercisable only by the lessee or successor in title, and ceases to be exercisable at or before a year has expired after the revocation of the lease. The purpose was to encourage the development and maintenance of leasehold land. The rule does not apply to dispositions conferring options to acquire property for value if the option is exercised within 21 years after the date on which the instrument conferring the option is conferred.

### Conditions subsequent and determinable interests

- 1.39 Conditions subsequent and determinable interests are assimilated under the Act. Where a gift is dependent on either a condition subsequent or a determinable interest and that condition takes effect outside of the perpetuity period, the gift becomes absolute and the trust is invalid. Section 18 provides that the rule shall apply to a possibility of reverter or resulting trusts (to a grantor) after any determinable interest in property, in which case if the interest does not determine within the period, the interest continues as a fee simple absolute.

### Alternative perpetuity period and the application of the Act

- 1.40 The alternative perpetuity period (up to 80 years) must be specified in the instrument.<sup>38</sup> In *New Zealand Dairy Board v The New Zealand Co-operative Dairy Co Ltd* gifts to corporations for the benefit of future as well as present members were void under the common law rule. Gallen J found that a corporation could not be regarded as a life-in-being and as there were no individuals involved in the trusts who could be lives-in-being, the trusts were void as having breached the rule. However, although no perpetuity period was stated, Gallen J assumed the 1964 Act would apply. He found that sections 8 and 9 meant that the class of beneficiaries could be ascertainable and closed 21 years from the date of the deed. In the end this case was decided upon the finding that the trust deeds were void for uncertainty.<sup>39</sup>

37 Perpetuities Act 1964, s 16.

38 Perpetuities Act 1964, s 6(1).

39 *New Zealand Dairy Board v New Zealand Co-operative Dairy Co Ltd* [1999] 2 NZLR 355 (HC) at 378–9. See *Re Westphal (decd)* [1972] NZLR 792 (SC).

## Accumulations

- 1.41 Another aspect of the law restricting the excessive tying up of assets is the rule against accumulations. For more than 200 years the law has placed restrictions on the accumulation of profits and income under trusts and dispositions.<sup>40</sup> The UK statute restricting accumulations was abolished in New Zealand by the Property Law Act 1952.<sup>41</sup> After several statutory variations, section 21 of the Perpetuities Act 1964 repealed and replaced all other accumulation provisions. This provision means that where a disposition accumulates income it will be valid if and for as long as the perpetuity period of the disposition is valid.
- 1.42 The position in New Zealand was clearly established in *Trustees Executors v Bush*, where it was held that a trust requiring accumulation of one tenth of the income as capital each year indefinitely was void.<sup>42</sup> In this case it was held that the rule against perpetuities does not prevent the creation of a charitable trust in perpetuity, but where there is a trust for charitable purposes and a direction to accumulate some of the income indefinitely, or for a period exceeding that allowed by the rule against perpetuities, the direction is not a trust in favour of the charity. Rather it is a fetter on the charitable trust and prevents the use of the property for charitable purposes during the period for which the accumulation is directed. The trust for accumulation was therefore void for breaching the rule against perpetuities.<sup>43</sup>
- 1.43 Generally, the rule against perpetuities does not apply to charitable trusts so charitable trusts can be perpetual.<sup>44</sup> However, the exceptions are that if a gift to charity is to take effect at a future time, the gift will be void unless it vests within the time allowed by the rule, or unless it is a gift over to one charity following a gift to a prior charity.<sup>45</sup> In these cases the rule against perpetuities applies and the restriction under section 21 that accumulations of income can only last as long as the perpetuity period. Where directions for accumulation are for a period exceeding that allowed by the rule against perpetuities, the directions are void.<sup>46</sup>

40 *Thellusson v Woodford* (1805) 11 Ves 112; 32 ER 1030; [1803-13] All ER Rep 30.

41 Property Law Act 1952, s 155(1) and 6th sch.

42 *Trustee Executors and Agency Company Ltd v Bush* (1908) 28 NZLR 117 (SC).

43 *Ibid*, at 119–120.

44 *Re Chambers (deceased)* [1971] NZLR 703; *Perpetual Trust v Roman Catholic Bishop of Christchurch* [2006] 1 NZLR 282.

45 Kelly, Kelly and Kelly, above n 2, at 159.

46 *Ibid*, at 317.

# Chapter 2

## Arguments for and against the rule

**INTRODUCTION** 2.1 The chapter presents the arguments in favour of having the rule against perpetuities and those against it. On one side are policy rationales that have been used to justify the rule, and on the other are difficulties and problems that the rule causes that militate against its usefulness. The traditional reasoning behind the rule is that it limits the control of the dead testator and has beneficial economic impacts by ensuring the alienability of property. The validity of these policies and the rule's effectiveness in achieving them must be balanced against the rule's complexity, uncertainty, obsolescence, harshness and arbitrariness.

### ARGUMENTS IN FAVOUR OF THE RULE

#### "Dead hand" control and balance between generations

2.2 One of the central bases for the rule is that it limits the "dead hand" control of a deceased testator or settlor over his or her descendants. Simes discussed the need to stay:<sup>47</sup>

... the hand of the man who is continuing to control the devolution of his property after he is dead either by the terms of his will or by some other instrument which effectuates the same purpose.

2.3 Earlier, Kohler stated that "[t]he far-reaching hand of a testator who would enforce his will in distant future generations destroys the liberty of other individuals and presumes to make rules for distant times."<sup>48</sup>

2.4 It is argued that it is not desirable for the control of property to be dictated by someone who is long dead. A will maker cannot predict the changes in family circumstances, taxation laws or social and economic conditions generally in the future and cannot react to such changes posthumously.<sup>49</sup> Consequently, the decisions that he or she makes regarding the future of his or her property cannot be fully informed. The overall policy consideration is that there should be some means of restricting how long the will maker or settlor should be able to influence

47 Lewis Simes *Public Policy and the Dead Hand* (University of Michigan Law School, Ann Arbor, 1955) at 58–63.

48 A Kohler *Kohler's Philosophy of Law* (1914) 12 *Modern Philosophy* 205.

49 Irish Law Reform Commission *The Rule Against Perpetuities and Cognate Rules* (LRC 62, 2000) at 53.

decisions about how property is used. The rule limits this ongoing dead hand control by requiring that interests must vest before the elapse of too great a period of time. Shively describes further potential problems of dead hand control.<sup>50</sup>

A trust can be structured to allow for payments to beneficiaries based on the attainment of certain goals or the occurrence of certain contingencies, either by the beneficiary or others, set out by the transferor at the time the gift is made into trust. The possible income from the trust will create a huge incentive for beneficiaries to achieve these goals or make the contingencies occur. This incentive is not problematic, so long as the duration of the trust is limited. However, with a trust that is unlimited in duration, one can envision a situation arising in which the trust would encourage its beneficiaries to achieve goals that were set many, perhaps hundreds, of years prior and that are no longer desirable for the beneficiary or in the best interests of society.

- 2.5 Without the rule, indefinite dead hand control could lead to large numbers of beneficiaries. Bloom estimates that a trust lasting 500 years, with each generation producing the average number of children, would have approximately 3.4 million beneficiaries.<sup>51</sup> With perpetual trusts, there is the potential for administrative difficulties and expense in dealing with overly fractionalised interests in trust property, as the group of descendent beneficiaries grows exponentially.<sup>52</sup>
- 2.6 Related to the dead hand justification for the rule being about the need to free property from the control of long dead testators and settlors, it is argued that there needs to be a balance between current and future generations. From this perspective the rule is said to “strike a balance between the wishes of the dead and the desires of the living with respect to the use of wealth”.<sup>53</sup> In the words of Simes:<sup>54</sup>

... The Rule Against Perpetuities strikes a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property which they enjoy. ... In a sense this is a policy of alienability, but it is not alienability for productivity. It is alienability to enable people to do what they please at death with the property which they enjoy in life.

50 John Shively “The Death of a Life in Being – the Required Federal Response to State Abolition of the Rule Against Perpetuities” (2000) 78 Wash ULQ 371 at 392.

51 IM Bloom “The GST Tax Tail is Killing the Rule Against Perpetuities” (2000) 87 Tax Notes 569 at 574.

52 G Moritz “Dynasty Trusts and the Rule Against Perpetuities” (2003) 116 Harv L Rev 2588 at 2599.

53 Robert J Lynn *The Modern Rule Against Perpetuities* 10 (1966) cited in S Harding “Perpetual Property” (2009) 61 Fla L Rev 285 at 297.

54 Simes, above n 47, at 58.



- 2.7 Simes goes on to describe the social desirability of the wealth of the world being controlled by the living and not the dead. He refers to a quotation attributed to Thomas Jefferson: “The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please during their usufruct [that is, while they have the right to possess and enjoy it].”<sup>55</sup>
- 2.8 The dead hand justification for the rule has had widespread acceptance for many years. This rationale was key to the recommendations of the Alberta Institute of Law Research and Reform in 1971, the United Kingdom Law Commission in 1998 and the Victorian Scrutiny of Acts and Regulations Committee in 2003 to retain the rule in their respective jurisdictions.
- 2.9 Yet, the need for the rule to achieve a balance between generations has been questioned. The Manitoba Law Reform Commission did not see that the rule was needed to achieve a balance of interests when the courts are given the power to consent to the variation or revocation of trusts on behalf of the incapacitated, the unascertained and the unborn.<sup>56</sup>
- 2.10 The Manitoba Law Reform Commission recommended abolition of the rule and a court power to vary trusts as the solution to addressing the dead hand control problem. If beneficiaries can request the court to vary the trusts (and the court has power to consent on behalf of the unborn, incapacitated and unascertained), this should restore the balance in favour of the current generation.<sup>57</sup> However, this is not an ideal solution as variation must be for the benefit of all the beneficiaries concerned and some may refuse to consent. The Manitoba Commission recommended guidelines for the courts’ variation powers be drawn up from the cases<sup>58</sup> as to the meaning of benefit and the importance of considering the settlor or testator’s intention<sup>59</sup>
- 2.11 In the United States, most perpetual trusts are drafted so that each generation is given a power to appoint the remainder to the next generation outright or in further trust, meaning the power of the dead hand is well and truly diminished without the need for the rule.<sup>60</sup>
- 2.12 More recently, the rule’s effectiveness in achieving what purports to be its basis under the dead hand argument and the relevance of this argument’s assumptions have been questioned. The Irish Law Reform Commission argued that the rule is of very limited use in restricting the influence of a deceased settlor or testator. The rule’s only function is to preclude extremely remote contingent interests. It does not affect interests that have vested in interest but not yet in possession,<sup>61</sup> and may not vest in possession for many years. Furthermore, the Irish

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55 Ibid, at 58–59.

56 Manitoba Law Reform Commission *Report on Rules against Accumulations and Perpetuities* (No 49, Winnipeg 1982) at 52–53.

57 Ibid.

58 See, for example, *Re Steed’s Will Trusts* [1960] Ch 407; 1 All ER 487.

59 Manitoba Law Reform Commission, above n 56, at 56–57.

60 RH Sitkoff and MM Schanzenbach “Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes” (2005) 115 Yale LJ 356 at 413.

61 Irish Law Reform Commission, above n 49, at 53.

Commission argued, the rule does not act in response to changes in times and circumstances to see whether the trust remains suitable, but only concerns remoteness of vesting.<sup>62</sup>

- 2.13 In taking issue with the use of Thomas Jefferson's dictum in support of the rule, Moritz argues "the rule does not exactly wrest the earth from the grip of the dead – after all, it basically accepts that the earth can belong to the recently dead".<sup>63</sup> It is, therefore, somewhat false to speak of the rule as preventing dead hand control altogether. The rule is at best a compromise, a balance of interests. It allows freedom of disposition to settlors and will makers, but not freedom to dictate the future of their property tying down generations beyond a certain period of time.

- 2.14 Maintaining a balance between freedom of disposition by present and future generations was the main reason why the United Kingdom Law Commission did not recommend the abolition of the rule in 1998. Likewise, the American Restatement on this area of law sets out a rationale against dead hand control with specific reference to the rule:<sup>64</sup>

[T]he rules against perpetuities provides an adjustment or balance between the desire of the current owner of property to prolong indefinitely into the future his control over the devolution and use thereof and the desire of the person who will in the future become the owner of the affected land or other thing to be free from the dead hand. Thus viewed, the regulation of the interference with the alienation of property is socially desirable because it embodies one of the compromises prerequisite to the maintenance of a going society controlled primarily by its living members.

- 2.15 Gallanis has raised the concern that intergenerational justice arguments, such as those relied on by the United Kingdom Law Commission as justifying the rule, may be based on incorrect assumptions. It is not necessarily true that the satisfaction of all property owners will be highest if owners' directions regarding the use of property can continue in force after death for the time allowed by the rule. In Gallanis' view, both the situation where there is no rule and some property owners can control their property forever, and the situation where property dispositions can have no effect after the death of the settlor, are likely to produce as much, if not more, satisfaction.<sup>65</sup> Furthermore, Gallanis points out that there is no reason why a utilitarian justification based on the satisfaction of property owners should override other important considerations, such as justice, equality and property rights.<sup>66</sup>

- 2.16 However, it has to be remembered that the rule exists in a social environment where inherited wealth is permitted; the arguments about justice and equality are therefore not particularly relevant. The optimal satisfaction of property owners that is being considered under a utilitarian justification for the rule is

62 Ibid.

63 Moritz, above n 52, at 2600.

64 The American Law Institute *Restatement of Property Donative Transfers* (Second) (1983) at 3. The Restatement is an authoritative summary of American trust law put together by leading academics and trust practitioners.

65 TP Gallanis "The Rule Against Perpetuities and the Law Commission's Flawed Philosophy" (2000) 59 CLJ 284 at 287.

66 Ibid, at 290.



really only that of the relatively wealthy. As noted above, the rule is a compromise between present and future property owners (whereby the role of the dead hand is limited), and is not essentially concerned with the utilitarian value of the greatest good for the greatest number.

### Prevention of accumulation of wealth in the hands of a few

- 2.17 The assumed rationales for the aim of preventing accumulation of property in a few hands are social justice and economic efficiency (for both of which a case would need to be made out). However, even if either can be shown to be a valid rationale, as Morris and Leach have said, the rule is not the best way to achieve it. The rule only marginally restricts the duration of trusts and is mainly concerned with delayed vesting of future interests.<sup>67</sup> In theory, taxation (particularly wealth transfer taxes) is a more efficient way to prevent vast accumulations of fortunes and to redistribute wealth. However, trusts have themselves often been a response to high taxation and estate duties so that from a social justice perspective, if this were to be considered, some disincentive for the wealthy to shelter their assets in trusts would be necessary. There is also the possibility that perpetual trusts may well increase the number of beneficiaries over the generations so that property may not be accumulated in the hands of a few.

### Alienability of property and economic justification

- 2.18 Another common argument for the rule is that it has an important role in ensuring the alienability of property and preventing the dynastic tying up of estates in perpetuity or for overly long periods. This was one of the chief justifications for the rule after it was established in the 17th century. The rule was an important protection against the withdrawal of property from commerce in a society where the only major industry was agriculture and the main form of property was land.<sup>68</sup>
- 2.19 The concerns regarding land have lost some relevance in today's less agrarian era and in countries where there is no landed gentry wanting to hand down the same land perpetually. Additionally, the trust mechanism is now sufficiently flexible that there is usually a power to sell particular property and transfer future interests to property purchased through the proceeds of the sale.<sup>69</sup> The argument is that as long as a trustee has the power to sell the land or other property that is held in trust, the concerns about alienability disappear.<sup>70</sup>
- 2.20 Yet this justification has not completely lost its relevance. A "reformulated and updated version" of this argument, as described by the Irish Law Reform Commission, is the concern to prevent large concentrations of wealth, whether land or other property, from being used in ways that are of less benefit to the community and economy than they otherwise would be.<sup>71</sup> If there were no restriction on the length of time a trust may hold property, the management of

67 JHC Morris and W Barton Leach *The Rule Against Perpetuities* (Stevens & Sons, London, 1962).

68 Irish Law Reform Commission, above n 49, at 50.

69 Ibid, at 51.

70 Lewis Simes, above n 47, at 40–42.

71 Irish Law Reform Commission, above n 49, at 51.

property could be perpetually tied up and the property not be put to its highest and best use.<sup>72</sup> Perpetual trusts are said to concentrate wealth to the detriment of society.<sup>73</sup>

- 2.21 Even if trusts no longer remove property from the stream of commerce any longer because of the flexibility available to most trustees in how trust property may be used, there may still be detrimental economic implications. Haskell notes that “trust assets are generally channelled into conservative investments, reducing the availability of risk capital.”<sup>74</sup> Professor Simes has noted that trustees generally do not have the freedom to invest property as freely as a person who owns it outright, and that if too much capital is tied up in private trusts, none will be available for financing new economic enterprises.<sup>75</sup> Risk investments and the purchase of consumer goods, which are not as likely with trust property, can have value to the economy. Trustees now have wide powers of investment but may still tend to be conservative, especially since the 2009 economic crisis.
- 2.22 The extent to which this concern is valid is not known. Gallanis considers that the economic basis is the only possible justification for the continued existence of the rule, but that it is very difficult to evaluate the economic impact of the rule or its abolition. He advocates monitoring those jurisdictions that have abolished the rule to see whether there are detrimental economic impacts that would justify the rule’s retention.<sup>76</sup> The unknown nature of the potential economic consequences could be a reason to retain the rule.

### Summary of arguments in favour

- 2.23 The two main arguments in favour of the rule are the inter-generational balance argument and the economic argument. Neither has clear evidence in support but neither has been absolutely refuted as a rationale for preventing perpetual trusts. Nor has it been shown that perpetual trusts are economically inefficient or detrimental. However, even assuming that perpetual trusts are not in the best interests of society, either socially or economically, the rule is not necessarily an appropriate means of preventing them. A rule limiting the duration of a trust or a rule restricting numbers of future interests might be more appropriate and direct.

<sup>72</sup> See RA Posner *Economic Analysis of Law* (2nd ed, Little Brown & Co, Boston, 1977) at 30–31 cited in AI Ogus “The trust as Governance Structure” (1986) 36 UTLJ 186 at 216.

<sup>73</sup> J Dobris “The Death of the Rule Against Perpetuities” (2000) 35 Real Property, Probate and Trust Journal 601 at 614.

<sup>74</sup> PG Haskell “A Proposal for a Simple and Socially Effective Rule Against Perpetuities” (1988) 66 N C L Rev 545 at 558–559.

<sup>75</sup> Simes, above n 47, cited in Moritz, above n 52, at 2599. See Morris and Leach, above n 67, at 16.

<sup>76</sup> Gallanis, above n 65, at 292.

## ARGUMENTS AGAINST THE RULE

- 2.24 In considering arguments against the rule in New Zealand, the reform of the common law rule in the Perpetuities Act 1964 needs to be borne in mind. The following discussion endeavours to separate the arguments that apply only to the common law rule from those that are also applicable to the rule as modified by the statute.
- 2.25 The United Kingdom Law Reform Committee in 1956 thought the necessity for placing some time limit on the vesting of future interests was “beyond argument”.<sup>77</sup> The United Kingdom Law Commission was less convinced of this necessity in 1993 and discussed seven main criticisms of their Perpetuities and Accumulations Act 1964, which is similar to New Zealand’s statute.<sup>78</sup> New Zealand practitioners have also criticised the New Zealand statute, particularly for its continuing complexity.

### Complexity

- 2.26 One of the central arguments for the abolition of the rule is its complexity. The rule at common law is particularly complex and overly subtle, particularly in relation to working out the lives-in-being,<sup>79</sup> and working out the difference between conditions precedent and subsequent, and between conditions subsequent (that may occur outside a perpetuity period) and determinable interests (not subject to the rule).
- 2.27 Leach described the common law rule as:<sup>80</sup>
- ... so abstruse that it is misunderstood by a substantial percentage of those who advise the public ... [and] so capricious that it strikes down in the name of public order gifts which offer no offence except that they are couched in the wrong terms.
- 2.28 The Irish Law Commission quoted the judgment in *Re Hay* which stated that the decisions depend in so many cases upon the particular phraseology employed by the testator.<sup>81</sup>
- 2.29 A number of rules of construction have been devised to ameliorate the harshness of the rule’s application, such as a presumption in favour of vesting and “closing” a gift to a class of beneficiaries, so that vesting can be within the period even though there might have been further members not yet born. Morris and Leach note that, on a careful examination of an instrument, it may be shown that an apparent contingent interest is one that is vested, but liable to be divested on failure of a condition subsequent.<sup>82</sup>

77 Law Reform Committee Fourth Report (1956) Cmnd 18 at [4], cited in Law Commission (UK) *The Law of Trusts: The Rules against Perpetuities and Excessive Accumulations* Consultation paper 133 (HMSO, London, 1993) at 3.

78 Law Commission (UK) *The Law of Trusts Consultation Paper*, above n 77, at 50–56. The criticisms were complexity, uncertainty, inconsistency, interference with commercial transactions, harshness, lack of adaptability and expense.

79 Irish Law Reform Commission, above n 49, at 56.

80 WB Leach “Perpetuities in Perspective: Ending the Rule’s Reign of Terror” (1952) 65 Harv L Rev 721 at 722.

81 *Re Hay* [1932] NI 215; Irish Law Reform Commission, above n 49, at 23.

82 Morris and Leach, above n 67, at 39. See *Re Baillie* (1907) SRNSW 265 per Simpson CJ at 213–218.

2.30 Complexity is possibly a stronger argument for the reform of the rule rather than its repeal as it says little about its necessity or social value.<sup>83</sup> Legislative alterations of the rule, such as New Zealand's Perpetuities Act 1964, have "worn down its sharp edges", for instance, by changing the way the rule turns on remote contingencies through the wait and see approach and introducing a fixed perpetuity period. However, legislation has not solved all the complexity problems, and may have introduced others.

2.31 Submissions to the Select Committee on the Trustee Amendment Bill 2007 noted that many lawyers advising on trusts have not understood the rule sufficiently, even after the 1964 reform, and trust instruments still fail because of the rule. Noel, Chris and Greg Kelly noted that:<sup>84</sup>

In our experience it is one of the least understood and most technically complex areas of law likely to be encountered by lawyers and trustees. In 1964 an attempt was made to reform the law by the Perpetuities Act 1964. At the time that Bill was introduced it was estimated that a substantial number of trusts throughout New Zealand were technically invalid because of failure to understand the rule against perpetuities. In our experience the same problem continues to this day.

2.32 Bill Patterson has commented that the growth of trusts in the last 50 years or so in New Zealand has meant that there are a number of trust deeds drafted so as to breach the rule.<sup>85</sup> As a subcommittee of the Law Revision Committee noted in a report on various problems that needed attention, there was:<sup>86</sup>

... a special problem in New Zealand which stems from the tremendous growth in the formation of trusts and settlements since the last war, and the fact that a number of them have been drafted by some practitioners on the basis of certain precedents prepared many years ago, and these precedents have until recently been accepted without question. However, in recent years some doubts have been raised as to whether these precedents do in fact infringe the rule against perpetuities; although the matter has not been litigated before the Courts it is generally considered today that they would be held void.

2.33 Because the Act is not retrospective,<sup>87</sup> different legal rules apply to a trust made before 1964 to one made after 1964. Thus, there are two possible regimes running in parallel which add to the complexity, although there are fewer and fewer trusts still in existence that were made prior to 1964. In addition, the common law rule must be applied first. It is only if the common law rule would lead to a void result that the wait and see rule can be applied. For example, in *Re Frost*,<sup>88</sup> a father purported to give property by will to his unmarried daughter for life, with the remainder to any husband she might marry, for life, and then to all the daughter's children alive at the death of the survivor of the daughter

<sup>83</sup> Moritz, above n 52, at 2596.

<sup>84</sup> NC Kelly, CJ Kelly and GF Kelly "Submission To the Justice and Electoral Select Committee" at [13.1].

<sup>85</sup> WM Patterson "When is a Trust a Trust?" (paper presented at the Legal Research Foundation Seminar "A Modern Law of Trusts", Auckland, 28 August 2009) at 1.

<sup>86</sup> Law Revision Committee *Rules Against Perpetuities and Accumulations* [1964] NZLJ 520 cited in Patterson, above n 85, at 1.

<sup>87</sup> The exception is s 16 which says that the rule shall not operate and shall be deemed never to have operated to invalidate administrative powers of trustees.

<sup>88</sup> *Re Frost* (1889) 43 Ch 246.

and her husband. At common law, at the date of the father's death, the daughter could have married someone not yet born. This would mean the daughter was the only relevant life-in-being. The husband could have survived the daughter by at least 21 years, in which case the gift to the children would not vest until more than 21 years after the daughter's death, and so it was void for perpetuity. If the will maker had died after 1964, the validity of the gift in favour of the children could be decided when the daughter or her husband died.

- 2.34 This means that a practitioner needs to know both the common law rule and the changes made to it by the 1964 Act. The 1964 Act is not simple to understand; there are some lengthy and quite complicated provisions, for example sections 9 and 10 on *cy-pres* modifications. But it should be noted that the United Kingdom Law Commission reported in 1998 that there had been only two reported cases on the Perpetuities Act 1964 (UK), which they assumed meant that it had been successful in curing many of the problems.<sup>89</sup> There seem to be very few cases in New Zealand also. While this could mean that the Perpetuities Act 1964 (NZ) is working well, it is likely that the lack of cases reflects the fact that perpetuities law is so difficult to understand.

### Uncertainty

- 2.35 Linked to the complexity problem is the issue of uncertainty, particularly around the lives-in-being, both at common law and under the legislation. As the United Kingdom Law Commission put it,<sup>90</sup> “[o]ne gift can contain different types of dispositions. The gift has to be split into separate dispositions so that the appropriate lives-in-being for each one can be determined.” Nor is it clear whether the donee of a power is a life-in-being for the purposes of determining the validity of the exercise of a power under section 8(5) of the Perpetuities Act 1964.<sup>91</sup> The main change in the Act, and in similar legislation in other jurisdictions, is to introduce the concept of waiting to see whether or not the interest at issue will vest within the perpetuity period. There is an argument that this creates uncertainty and also tends to prolong the period allowed for vesting. Uncertainty can lead to expense as it may be necessary to apply to the court to decide whether a disposition is in breach of the rule or to vary or resettlement a trust.<sup>92</sup> The wait and see approach does not resolve uncertainty, as whether or not the rule applies is not known at the outset as it is at common law. If it is not clear whether a gift will vest, a court decision as to its validity may well be delayed until near to the end of the period.<sup>93</sup>

89 Law Commission (UK) *The Rule Against Perpetuities and Excessive Accumulations* (Law Com No 251, 1998) at [4.2].

90 Ibid, at [4.9].

91 Ibid.

92 Ibid at [4.18]–[4.19].

93 P Sparkes “How to Simplify Perpetuities” [1995] Conv 212 at 219 gives the example of *Re Green's Will's Trusts* [1985] 3 All ER 455, where Mrs Green's son was lost in action in World War II and presumed dead. Mrs Green believed him to be alive and left £700,000 to him if he reappeared before 1 January 2020. The Court managed to avoid the result by administrative directions.



- 2.36 If the dead hand rationale is accepted, the 1964 Act (and, some would say, the rule itself)<sup>94</sup> favours the dead hand rather more than the living, although abolition of the rule would give will makers and settlors an even stronger hand with which to control the future. Jurisdictions that have abolished the rule and that had not previously opted for statutory reform decided against following the statutory reform route because of the concern about complexity and the uncertainty of when an interest vests.

## Obsolescence

- 2.37 This argument claims:<sup>95</sup>

... the Rule is obsolete, a relic of a feudal, land-based society that is quite out of place in our modern, capitalist age, in which wealth is more often counted in shares of stock than in parcels of land.

- 2.38 The Manitoba Law Reform Commission found that, while the rule may have been relevant to 17th century England, the conditions in Manitoba never constituted the circumstances that call for the rule.<sup>96</sup> The Commission considered that the number of people who would wish to create dynastic trusts was likely to be small and it was very unlikely the dynastic trust would ever become a social or economic problem in Manitoba. The argument is that the social reasons for the rule no longer exist. This might particularly be the case in New Zealand, a jurisdiction without estate duty, so that there is little incentive to create life interests with future interests and delayed vesting of such interests.
- 2.39 On this basis, it is argued that there is very little appetite and motivation for perpetual trusts that tie up property for generations.<sup>97</sup> The evidence from Scotland, which has never had the rule, is that very few trusts there last longer than 100 years. However, this is certainly a jurisdiction-specific argument, as perpetual trusts are common in some jurisdictions.<sup>98</sup> There has been a vast increase in the number of perpetual trusts established in the United States, although it is likely that the impetus for this has been the Generation Skipping Transfer Tax exemption.<sup>99</sup>
- 2.40 The introduction of mechanisms, such as the trust for sale (where trustees are directed to sell the trust property and hold the sale proceeds in trust for the beneficiaries) and trustees' power of sale, that allow trust property to be transferred and land to be kept alienable has made the rule redundant in some senses. Yet, as discussed below, the economic rationale for restricting duration of trusts and tying up property still appears to have some force.

94 George L Haskins "Extending the grasp of the Dead Hand: Reflections on the Origins of the Rule against Perpetuities" (1977) 126 U Pa L Rev 19.

95 Moritz, above n 52, at 2596–2597.

96 Manitoba Law Reform Commission, above n 56, at 51.

97 Moritz, above n 52, at 2597.

98 Kellee Clark "The Rule Against Perpetuities" (2007) 11 Otago LR 495 at 504.

99 This is discussed in ch 3.

- 2.41 However, it is argued that the rule is an ineffective mechanism for achieving the policies at which it is aimed – combating dead hand control and encouraging alienability.<sup>100</sup> There are other, more direct ways of achieving these goals, such as having a separate law suspending the power of alienation beyond the perpetuities period, as has been enacted in Alaska.<sup>101</sup>
- 2.42 Furthermore, the rule has been criticised for being unable to adapt to societal changes. The 80 year period included in many perpetuity statutes was originally intended to approximate a life-in-being plus 21 years but is now arguably too short to reflect current life spans.<sup>102</sup> The New Zealand Law Society, in its submission to the Select Committee on the Trustee Amendment Bill in 2007, proposed a 125 or 150 year period because of the increase in life expectancy. The United Kingdom Law Commission recommended a 125 year period, which was accepted and enacted in the Perpetuities and Accumulations Act 2009 (UK). Also, advances in reproductive technology have created the potential for uncertainty about whether a cryopreserved embryo can be considered a life-in-being or beneficiary. The law is not clear as to whether a cryopreserved embryo can be considered a child “in gestation” for the purposes of being a life-in-being and beneficiary.<sup>103</sup>

### Harshness and arbitrariness

- 2.43 Much of the dissatisfaction with the rule arose because it is “rigid and mathematical”.<sup>104</sup> Leach argues that the types of cases that have arisen in the courts in both England and the United States involve ill-advised donors who violate the letter of the law rather than the spirit. These wills and trusts could have been drafted in ways that did not violate the rule, but fail because of a lawyer’s ignorance or oversight of the rule’s complexities. Leach goes on to say:<sup>105</sup>

This means that our courts in applying the Rule are not protecting the public welfare against the predatory rich but are imposing forfeitures upon some beneficiaries and awarding windfalls to others because some member of the legal profession has been inept.

- 2.44 For example, it is common for will makers to want to divide their estate between their children provided they reach the age of 25, and if any of the children do not survive, the child’s share is to be divided equally among the child’s children who survive the will maker and reach 25. Technically this would breach the common law rule, as the will maker may die leaving one son who dies before reaching 25 but leaves a pregnant partner. The son is the life-in-being, but his child would not take a vested interest until age 25, which is outside of the life-in-being plus 21 year limit. The Perpetuities Act 1964 does provide ways of solving this so that the trust is not void, such as the wait and see rule and allowing the trustee to reduce the 25 year age threshold to whatever age will fit

100 Law Reform Commission of Saskatchewan “Proposals Relating to the Rules Against Perpetuities and Accumulations” (Publication 66, June 1987) at 23.

101 Moritz, above n 52, at 2598; Alaska Statutes 34.27.100. Suspension of the Power of Alienation.

102 Clark, above n 98, at 504.

103 Law Commission (UK), above n 89, at 108.

104 Shively, above n 50, at 380.

105 W Barton Leach “Perpetuities: Staying the Slaughter of the Innocents” (1952) 68 LQR 35 at 36.



within the perpetuity period. However, the fact that the law would restrict such a reasonable and harmless disposition at all, and that statutory measures are needed to interfere with the disposition to make it compliant with perpetuities law make the rule seem unnecessary and unreasonable.

- 2.45 When a trust interest fails because of a breach of the rule, the interest may devolve upon persons whom the testator or settlor did not want to benefit. In such a case, the testator's intentions are thwarted.<sup>106</sup>
- 2.46 This rationale was influential in the Manitoba Law Reform Commission's decision to abolish the rule, as they considered that the chances were too high of unsuspectingly creating an invalid limitation because of the way the trust is drafted. These errors can take much time and expense to remedy,<sup>107</sup> and legislative reform has not necessarily remedied the problem. It was because of concerns about cases in the 1980s in England, where carefully thought out dispositions of property ran the risk of being declared wholly or partially invalid, that the United Kingdom Law Commission proposed to examine the rule and the 1964 statute.<sup>108</sup>
- 2.47 Another illustration of the harshness of the rule is that there may be reasonable uses of trusts that are not possible because of the rule. For instance, a settlor may want to protect a family business from dissipation and asset-stripping by children and grandchildren in order to benefit future generations. The rule obstructs this purpose.
- 2.48 It should be noted that there are a limited of class of purpose trusts (that is, trusts that do not have beneficiaries and are not for a charitable purpose) that are valid.<sup>109</sup> The rule against perpetuities applies to these. If the rule is abolished, these trusts will also be able to last indefinitely.

### *Application in commercial contexts*

- 2.49 While the justifications for the law mostly relate to a family law context, the rule applies equally to commercial trusts and property interests. The application to commercial trusts and property interests, such as options, creates several problems. There is often no life-in-being in relation to these interests, as was the case in *New Zealand Dairy Board v New Zealand Co-operative Dairy Co Ltd*,<sup>110</sup> so that the perpetuity period is only 21 years.
- 2.50 The rule may be seen as an unwarranted interference in the ability of parties to contract, particularly as parties are often likely to have equal bargaining power. The restriction appears to serve little purpose in the commercial context.<sup>111</sup>

<sup>106</sup> Law Commission (UK), above n 77, at 55.

<sup>107</sup> Manitoba Law Reform Commission, above n 56, at 49.

<sup>108</sup> Law Commission (UK), above n 89, at [2.16], citing *Re Drummond* [1988] 1 WLR 234 and *Re Green's Will Trusts* [1985] 3 All ER 455.

<sup>109</sup> These include trusts for the erection or maintenance or monuments of graves; trusts for the saying of masses in jurisdictions where such trusts are not regarded as charitable; trusts for the maintenance of particular animals; and trusts for the benefit of an unincorporated association (N Kelly, C Kelly and G Kelly *Garrow and Kelly Law of Trusts and Trustees* (6th ed, LexisNexis, Wellington, 2005) at 337).

<sup>110</sup> *New Zealand Dairy Board v New Zealand Co-operative Dairy Co Ltd* [1999] 2 NZLR 355 (HC).

<sup>111</sup> Law Commission (UK), above n 77, at 55.

For example, developers may wish to create easements to take effect more than 21 years into the future. Similarly, gifts over to charities in private trusts may be void because they are contingent on an event that might occur at too remote a time, although the rule is not applicable to charitable trusts.

- 2.51 The perpetuities rule poses considerable problems for energy trusts in New Zealand. The Commission is advised that the deed establishing an energy trust requires distribution to the capital beneficiaries on the vesting date. The capital beneficiaries are certain local authorities, who have never contributed any assets to the trust. If there had been no requirement for a perpetuity period, the trust would not have included capital beneficiaries. It appears to be unfair that these local authorities should benefit from a community asset merely because of the requirements of the rule.<sup>112</sup>
- 2.52 Application to commercial interests is not consistent. The rule applies to easements and to options to purchase but not to options to renew leases or rights of pre-emption, as these do not confer proprietary interests.<sup>113</sup> Unit trusts are also subject to the rule. However, the rule does not apply to superannuation trusts or trusts of a share purchase scheme.<sup>114</sup>
- 2.53 The United Kingdom Law Commission decided not to recommend specific exceptions to the rule for listed “commercial dispositions”. The reason for this was that, although it considered that commercial transactions should not be subject to the rule because they are outside of the mischief the rule seeks to contain, it was too difficult to define or list the transactions that should be excluded. Instead, under its proposal, the statute would state the only circumstances in which the rule would apply and that these would be limited to future estates and interests.<sup>115</sup> The United Kingdom Law Commission in 1993 considered that there was an argument that if there were to be numerous exceptions to the rule, this could diminish justification for retaining it.<sup>116</sup>

<sup>112</sup> Meeting of the Law Commission with David Bigio and Ian Ward, Auckland Energy Trust Board (May 2010).

<sup>113</sup> *Laws of New Zealand* “Perpetuities and Accumulations” (online looseleaf ed, LexisNexis) at [3.34]–[3.35].

<sup>114</sup> Perpetuities Act 1964, s 19.

<sup>115</sup> Law Commission (UK), above n 89, at [4.2].

<sup>116</sup> Law Commission (UK), above n 77, at [5.21].

# Chapter 3

## Options for reform

### REFORM VERSUS ABOLITION

- 3.1 If it is decided that reform of the rule against perpetuities is needed, the main options are :
  - further statutory reform of the rule;
  - abolition of the rule (and repeal of the 1964 Statute); or
  - replacement of the rule with a different statutory rule in support of its policy.
- 3.2 A number of the states in the United States and some Canadian provinces have abolished the rule or all but abolished it. Ireland has also opted for abolition, as have a number of offshore jurisdictions. New Zealand previously chose reform rather than abolition when it passed the Perpetuities Act 1964, following the introduction of the Perpetuities and Accumulations Act 1964 in England.
- 3.3 The main question is whether the policies and purposes that justify the rule are valid in New Zealand today, and if so, whether the rule is the appropriate response.

### Reforming the 1964 Statute

- 3.4 Statutory reforms can alleviate the rule's harshness and complexity. The Perpetuities Act 1964 appears to have done this to some extent. The question remains whether there continues to be dissatisfaction with the rule's operation in New Zealand and whether further statutory reform is necessary. This might involve making the legislation simpler, clearer and more modern, or a comprehensive revision that makes some substantive changes to the Act.

### *Modernisation and simplification of the 1964 Act*

- 3.5 The Victorian Scrutiny of Acts and Regulations Committee (the Committee) reviewed the Perpetuities and Accumulations Act 1968 in 2003. The review's purpose was to consider the content and relevance of the Act, and to determine whether any of its provisions, including those regarding the rule, were unclear, redundant, ambiguous and in need of repeal, amendment or revision.<sup>117</sup> The Committee considered that the policy behind the rule of restricting the capacity of the current generation to control the devolution of their property by future generations continued to be relevant and valid in Victoria.<sup>118</sup> Consequently,

<sup>117</sup> Victorian Scrutiny of Acts and Regulations Committee "Perpetuities and Accumulations Act 1968" (2003).

<sup>118</sup> Ibid. This was because living persons should not have their freedom to deal with their own property unduly constrained by the wishes of persons long dead.

the Committee recommended that the rule be retained, their Act be redrafted to make it more understandable and that a law reform body consider whether modifications should be made to the supplementary rules of the Act.

- 3.6 This could be an option for New Zealand as parts of the Act are quite wordy and technical. However, there seem to be more substantive problems with the law.

### *Substantive changes to the Perpetuities Act*

- 3.7 The United Kingdom's new Perpetuities and Accumulations Act 2009 came into force in April 2010. This legislation was based on an United Kingdom Law Commission's report of 1998. The Law Commission concluded that the rule continued to fulfil an important function and had sound policy grounds.<sup>119</sup>
- 3.8 The Perpetuities and Accumulations Act 2009 retained the rule but substantially modified it. For trusts and wills created on or after 6 April 2010, the perpetuity period is increased from 80 years to 125 years. Application of the rule is limited to interests that arise under private trusts. It does not apply to easements, options, or rights of pre-emption or commercial arrangements.<sup>120</sup> The new Act also includes a clear exemption from the rule for all pension schemes administered through a trust. These schemes are already exempt in New Zealand.<sup>121</sup>
- 3.9 The Perpetuities and Accumulations Act 2009 is generally prospective. It does not affect existing trusts which continue to be governed by the 1964 Act, under which settlors could select a perpetuity period not exceeding 80 years.<sup>122</sup> However, where an existing trust is governed by the common law period of a life or lives-in-being, the new Act gives trustees a power to adopt a perpetuity period of 100 years, but only when it is "difficult or not reasonably practicable" to ascertain whether the lives have ended.<sup>123</sup>
- 3.10 The new Act has been considered a "welcome simplification" to the rule. The 125 year period is preferable to the common law rule, as it will be less difficult and expensive to determine when the period has ended.<sup>124</sup> The lengthening of the period from 80 years to 125 years means that the standard perpetuity period is now approximately as long as the longest period available under the common law rule.
- 3.11 One area of some concern to practitioners is the length of the maximum perpetuity period set out in the New Zealand statute. Eighty years is probably out of step with standard life expectancies and may mean that an unduly short perpetuity period is required under New Zealand law. The reforms in England effectively give every trust the opportunity of the maximum length of perpetuity period allowable under the common law rule. The Isle of Man introduced legislation in 2001 that extended the perpetuity period for new trusts from 80

119 Law Commission (UK) *The Rule Against Perpetuities and Excessive Accumulations* (Law Com No 251, 1998) at [2.28].

120 Ruth Hughes "The Perpetuities and Accumulations Act 2009" (2010) Step Journal < [www.stepjournal.org](http://www.stepjournal.org) > .

121 See Perpetuities Act 1964, s 19

122 Marilyn McKeever "Perpetuating the trust" (2010) Step Journal < [www.stepjournal.org](http://www.stepjournal.org) > .

123 Hughes, above n 120.

124 Ibid.

years to 150 years from 1 January 2007.<sup>125</sup> Increasing the statutory period in New Zealand's Perpetuity Act could alleviate many of the current concerns with the rule.

- 3.12 The other main reform in England, the non-application of the rule to easements, options, rights of pre-emption and commercial arrangements, may be a welcome change in New Zealand. At the same time, the Act could be revised in plain English and could clarify matters such as the impact of assisted reproductive technology.
- 3.13 An objection to further substantive reform of the 1964 Act is that it could lead to further complexity, particularly if it is not retrospective. If a new Act is not retrospective, there could be three parallel but different regimes in operation: the common law, the 1964 statutory regime and the reformed statute. Retrospectivity is discussed below.

### Abolition of the rule and repeal of the 1964 Statute

- 3.14 In England, the Law Commission decided against abolition as, in its view, the rule was still necessary to control the dead hand.<sup>126</sup> The majority of submitters to the United Kingdom Law Commission's Consultation Paper did not favour abolition. However, the criticisms of the present law made in the Consultation Paper were endorsed by most consultees who commented on them and there was overwhelming support for the rule not to apply to commercial interests.<sup>127</sup> It has been suggested that the real problem is encumbrances affecting land, such as easements and options.<sup>128</sup> The Commission had examined the possibility of commissioning a full study of the economic implications of abolishing the rule because of the potential for overly and ongoing conservative investment of trust assets. But having discussed the economic implications with Professor John Vickers, Drummond Professor of Political Economy at Oxford University, the Commission decided not to proceed because it proved impossible to obtain sufficient data for the consultant to complete such a task other than through guesswork.<sup>129</sup> The Commission also investigated the position in Scotland where there has never been a rule against perpetuities, but there are rules against "liferent interests" (similar to life estates) other than to a living person, and against perpetual accumulations, that check the control of the dead hand.<sup>130</sup>
- 3.15 The United Kingdom Law Commission had previously noted that other rules might ensure alienability of property and curtail dead hand control. Trustees' powers of sale seem to solve the alienability problem and tax legislation (such as estate duty, gift duty and taxes on discretionary trusts) can restrict dead hand

<sup>125</sup> Trustee Act 2001 (Isle of Man), s 38.

<sup>126</sup> Law Commission (UK), above n 119, at [2.28] and [2.35].

<sup>127</sup> Law Commission (UK) *The Law of Trusts: The Rules against Perpetuities and Excessive Accumulations – Consultation paper* 133 (HMSO, London, 1993) at [2.24]–[2.25].

<sup>128</sup> P Sparkes "How to Simplify Perpetuities" [1995] Conv 212 at 216–217.

<sup>129</sup> Law Commission (UK), above n 119, at [2.30]–[2.32].

<sup>130</sup> Ibid, at [2.34]–[2.37]. It is possible to create perpetual trusts in Scotland but very few are created privately. The maximum duration of private trusts seems to be about 100 years in Scotland and most are much shorter, due partly to tax reasons, the fragmentation of beneficial interests and the risk of the disposition failing for uncertainty. See Scottish Law Commission *Discussion Paper on Accumulation of Income and Lifetime of Private Trusts* (Discussion Paper Number 142, 2010).



control by discouraging lengthy trusts.<sup>131</sup> However, in New Zealand, wealth transfer taxes have been abolished (in the case of estate duty) or are about to be (in the case of gift duty).<sup>132</sup> Taxation policies are, in any event, subject to change and cannot be relied upon to control trusts. Variation powers both in trust deeds and available to the courts also limit dead hand control,<sup>133</sup> and the jurisdictions that have abolished the rule have mostly relied on these powers of variation to limit settlor or will maker control in favour of beneficiaries.

### *Jurisdictions where the rule has been abolished*

- 3.16 The recommendation for abolition of the rule has largely been made only in jurisdictions where there has been no prior statutory reform, such as the introduction of a Perpetuities Act. The main exceptions to this are in the United States.

#### Canada

- 3.17 In 1982, the Manitoba Law Reform Commission found that most practitioners did not consider the rule was of any practical significance in Manitoba at the end of the 20th century. Most settlors would not be interested in trusts lasting beyond their grandchildren's lives and in modern Canadian society farmers or businessmen settling property were motivated by tax considerations, not by the rule.<sup>134</sup> The Commission thought that dynastic trusts were a bygone feature of the 17th to 19th century English landed gentry.<sup>135</sup> The Commission proposed abolition, together with amending the courts' powers to vary trusts, as a solution to the dead hand problem for the benefit of living beneficiaries.<sup>136</sup>
- 3.18 The rule was abolished in Manitoba in 1983.<sup>137</sup> There is no empirical data as to the effect of abolition in Manitoba, but anecdotal evidence in 2007 indicated that some perpetual trusts were being established, largely for family security reasons.<sup>138</sup> However, at that stage there seemed to be a lack of awareness that the rule had been abolished or that perpetual trusts could be set up. It was also considered that taxes in Manitoba would be a disincentive to establishing them. Commentators have indicated that there have not yet been any apparent

131 Ibid, at [5.24]–[5.26].

132 The Taxation (Tax Administration and Remedial Matters) Bill 2010 (257-1), currently being considered by the Finance and Expenditure Select Committee, would repeal gift duty from 1 October 2011.

133 Ibid, at [5.27]–[5.29].

134 Manitoba Law Reform Commission *Report on Rules against Accumulations and Perpetuities* (No 49, Winnipeg 1982) at 35–39. The Law Commission (UK) had a similar view in 1993: see Law Commission (UK), above n 127, at [5.18]–[5.21].

135 However the experience in the United States indicates that in certain circumstances dynastic trust can again become popular (discussed below).

136 Manitoba Law Reform Commission, above n 134, at 52–53.

137 See Perpetuities and Accumulations Act 1983 (Manitoba).

138 Letter from STEP to the Manitoba Law Reform Commission regarding the abolition of the Rule against Perpetuities in Manitoba (3 October 2007), provided to the New Zealand Law Commission in November 2010, with the permission of the Chair of STEP, Winnipeg.

“grievous” consequences of the abolition of the rule.<sup>139</sup> Since the rule was abolished there has not been a perceptible increase in the use of trusts as a commercial tool.<sup>140</sup>

- 3.19 In Saskatchewan, the Law Reform Commission in 1987, recommended abolition for similar reasons as in Manitoba, considering that the policy underlying the rule (that long successions of interests can be inconvenient) could be adequately achieved by application of the Variation of Trusts Act with modifications.<sup>141</sup> In the Commission’s view the social conditions which gave rise to the rule no longer exist,<sup>142</sup> and because the rule depends on the difficult notion of remoteness of vesting, abolition would be preferable to reform. The Commission saw reform using a wait and see principle as unsatisfactory because it “suspends the final determination of the validity of interests indefinitely” which could mean delaying administration of an estate for years.<sup>143</sup>
- 3.20 The Uniform Law Conference of Canada, which is working on drafting a uniform trusts statute for Canadian provinces, has recently decided that the rule against perpetuities should be abolished in the forthcoming Uniform Trustee Act.<sup>144</sup>

### South Australia

- 3.21 The South Australian Law Reform Committee recommended abolition in 1984.<sup>145</sup> The Committee said that the rule was a response to the creation of successive interests that kept land within families for many years in England, which would be an impossibility in South Australia due to tax laws.<sup>146</sup> The Committee thought that using wait and see provisions created uncertainty and possibly tax problems for South Australian trusts. They preferred the *cy-pres* method of reform, as in section 10 of the Perpetuities Act 1964 (NZ), except that this depends on the problem of discerning the settlor or testator’s intention.<sup>147</sup> The rule was abolished in 1996 subject to a court power to order vesting of property within 80 years in certain circumstances.<sup>148</sup>

139 Mark Gillen and Faye Woodman (eds) *The Law of Trusts: A Contextual Approach*, (2nd ed, Emond Montgomery, Toronto, 2008) at 183.

140 Scottish Law Commission, above n 130, at 71.

141 Law Reform Commission of Saskatchewan “Proposals Relating to the Rules Against Perpetuities and Accumulations” (Publication 66, June 1987) at 7, and 23–24. Saskatchewan recently passed the Trustee Act SS 2009 c T-23.01, which, among other things, abolishes the rule against perpetuities.

142 Ibid, at 3.

143 Ibid, at 11.

144 Russell J Getz “Uniform Trustee Act: Progress Report” (paper presented at Uniform Law Conference of Canada, Civil Law Section, Halifax, August 2010) at 3.

145 Law Reform Committee of South Australia *Report Relating to the Reform of the Law of Perpetuities* (Report 73, 1984).

146 Ibid, at 11.

147 Ibid, at 7–11.

148 Law of Property Act 1936 (SA) as amended by the Law of Property (Perpetuities and Accumulations) Act 1996 (SA).

## Ireland

- 3.22 The Republic of Ireland's Law Reform Commission recommended abolition in 2000. From 1 December 2009, the Land and Conveyancing Law Reform Act 2009 allows all present and future trusts to continue forever. The new legislation also allows the variation of existing trusts.<sup>149</sup> The Irish Law Reform Commission considered that the rule tended to disrupt innocent gifts, was difficult to operate in practice and that abolition was unlikely to lead to many perpetual trusts.<sup>150</sup>

## The United States

- 3.23 All American states, except Louisiana, received the common law rule from England. In order to combat some of the harsh results of the rule, some states introduced statutory amendments such as the wait and see rule. In 1986 the National Conference of Commissioners on Uniform State Laws developed the Uniform Statutory Rule Against Perpetuities (USRAP). This model legislation included a wait and see rule and a set perpetuity period of 90 years. A number of states adopted the USRAP. Approximately one third of states continue to have legislation based on the USRAP in force.
- 3.24 Over the last 25 years a growing number of states have abolished the rule. While three states, Idaho, South Dakota and Wisconsin, abolished the rule prior to the mid-1980s,<sup>151</sup> it was not until 1986 that the movement towards abolition truly began.
- 3.25 The year 1986 saw the introduction of the generation-skipping transfer tax (GSTT) by the US Congress. This tax sought to close up a previous loophole that meant that estate tax could be avoided by using successive life interests. The GSTT meant that any transfer to a grandchild, great-grandchild or other person who is two or more generations below the settlor would be taxed. The GSTT rate is equivalent to the highest rate of the estate tax.<sup>152</sup> However, the tax legislation provides every person with a lifetime exemption of a specific amount from the estate tax and GSTT.<sup>153</sup> Consequently, a settlor can transfer the amount of the exemption to a trust without the GSTT applying. This

149 Mathieson Ormsby Prentice "Significant developments in Irish trust law" (2010) Lexology < [www.lexology.com](http://www.lexology.com) > .

150 Irish Law Reform Commission *The Rule Against Perpetuities and Cognate Rules* (LRC 62, 2000).

151 Idaho in 1957, Wisconsin in 1969 and South Dakota in 1983 (RH Sitkoff and MM Schanzenbach "Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust" 27 Cardozo L Rev 2465 at 2473 ["Perpetuities or Taxes?"]).

152 RH Sitkoff and MM Schanzenbach "Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes" (2005) 115 Yale L J 356 at 370 – 1 ["Jurisdictional Competition for Trust Funds"]. The GSTT is 35 % in 2011. The GSTT provisions are in ch 13 of the Internal Revenue Code IRC §§ 2601-2663 (2000).

153 The amount of the exemption when first introduced was US\$1 million. This grew incrementally to US\$3.5 million in 2009 and to US\$5 million in 2011 (although the rate of GSTT was 0 % for 2010 meaning the tax effectively did not apply to transfers made in 2010) 26 U.S.C.S §§ 2641, 2001 (c)(2) (B); Sitkoff and Schanzenbach "Jurisdictional Competition for Trust Funds", above n 152, at 371.

property will continue to be free of tax for as long as state perpetuities laws permit.<sup>154</sup> As a result of the introduction of GSTT, state perpetuities laws became “a highly salient factor in estate planning”.<sup>155</sup>

- 3.26 Since 1986, 17 states and the District of Columbia have abolished the rule and seven others have vastly extended their perpetuity periods for trusts. The latest state to join this movement was Kentucky, which brought new legislation into force in 2010. This brings the total number of states in which the rule effectively no longer applies to 27.<sup>156</sup>

- 3.27 The different states have used several methods of repealing or altering the rule. Moritz details the six methods used as follows:<sup>157</sup>

The first method seeks to permit dynasty trusts of unlimited duration where the trustee retains power to alienate the trust corpus, while allaying the traditional perpetuities concern with removing property from the stream of commerce. A second method is to abolish the Rule as applied to trusts, but retain it in other cases. Method three is to extend the length of the perpetuities period. A fourth method, always combined with method one, makes the Rule a default, but allows drafters to opt out in the trust instrument. A fifth method is to apply the traditional Rule to real property, but to except personal property altogether. Only one state – Rhode Island – seems to have been zealous enough to completely abolish its rule without any alienation-preserving gap filler.

- 3.28 The GSTT factor has meant that the abolition of the rule by states in the United States has had an economic element that has not been present in other jurisdictions. Some commentators have tried to argue that the abolition of the rule stems from a desire among settlors for perpetual trusts in order to have greater control of their estates. However, after having undertaken empirical analysis, researchers have concluded that it is the GSTT that has prompted the abolition of the rule and the rise of perpetual trusts in the United States.<sup>158</sup> The three states that had abolished the rule prior to 1986 experienced little to no advantage in the jurisdictional competition for trust funds.<sup>159</sup> Only once the tax advantage was available, and only in the states where the maximum tax advantage could be obtained, did the number of perpetual trusts increase. The official synopsis of Delaware’s Bill to abolish the rule makes it clear that the purpose of the reform was to restore Delaware’s ability to compete as a trust-friendly jurisdiction with those states that did not have a rule against perpetuities. The synopsis states that the repeal of the rule “will demonstrate Delaware’s continued vigilance in maintaining its role as a leading jurisdiction for the

154 Sitkoff and Schazzenbach “Jurisdictional Competition for Trust Funds”, above n 152, at 371.

155 Ibid, at 372.

156 John V Orth “Allowing Perpetuities in North Carolina” (2009) 31 Campbell L Rev 299, at 300. The states with statutes permitting perpetual trusts are Alaska, Arizona, Delaware, Idaho, Illinois, Kentucky, Maine, Maryland, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, South Dakota, Virginia, and Wisconsin, as well as the District of Columbia. The states that permit very long trusts are Colorado (1000 years), Florida (360 years), Nevada (365 years), Tennessee (360 years), Utah (1000 years), Washington (150 years), and Wyoming (1000 years).

157 G Moritz “Dynasty Trusts and the Rule Against Perpetuities” (2003) 116 Harv L Rev 2588 at 2591.

158 Sitkoff and Schazzenbach “Perpetuities or Taxes?”, above n 151, at 2465.

159 Sitkoff and Schazzenbach “Jurisdictional Competition for Trust Funds”, above n 152, at 373.

formation of capital and the conduct of trust business.”<sup>160</sup> There has been little or no debate on the merits of the rule in the states such as Delaware that have abolished it. Dukeminier and Krier have stated that the:<sup>161</sup>

... absence of interest in perpetual trusts prior to the [GSTT] gives rise to the troubling likelihood that the Rule Against Perpetuities is being abolished with little if any reflection upon the merits of the Rule *on its own*, without regard to tax considerations.

- 3.29 The reforms of the rule against perpetuities have had evident financial impacts in the United States. Sitkoff and Schazzenbach’s empirical research based on 2003 statistics concluded that, on average, a state’s abolition of the rule increased its reported trust assets by US\$6 billion and its average trust account size by approximately US\$200,000. They found that in 2003 approximately US\$100 billion in trust assets moved to states that had abolished the rule.<sup>162</sup> In particular, it was states that also did not levy income taxes on trusts funds that attracted trust funds from other states and showed an increase in trust business. This shows that out-of-state settlors are sensitive to the difference in tax laws between states and will send their trust assets to the states that provide the most benefit.<sup>163</sup>
- 3.30 The increased trust business that has occurred in states that have abolished the rule has little direct benefit for the Government of the state itself. It is a state’s trust lawyers, bankers and administrators that stand to benefit the most from increased business in perpetual trusts, and it was these professions that formed the basis of local lobby groups that pressured for the reforms in a number of states.<sup>164</sup> Jesse Dukeminier has commented that reforms of the rule are “pushed along by lawyers for the rich seeking tax advantages and trust companies seeking fees for managing perpetual trusts”.<sup>165</sup>
- 3.31 The trend of abolishing the rule among states of the United States has persisted with the continuation of federal tax laws that give an advantage to those with perpetual trusts.<sup>166</sup> While tax law has almost certainly led to the abolition of the rule in many states, it is thought to be unlikely that there would be much impetus for the rule to be reinstated in the event that tax laws were changed to remove the tax advantages of perpetual trusts.<sup>167</sup>
- 3.32 As a rather different taxation environment, in particular one where there is no estate duty, New Zealand is in a different position from the United States. However, it may be that if abolition of the rule spreads it will be seen to be more and more obsolete. The one rationale that convinced the United Kingdom not to repeal the rule, the need to reduce or avoid dead hand control, was also persuasive in Canada and Ireland. However, the solution advocated in those

160 H R 245, 138th General Assembly (Delaware, 1995) (Bill synopsis).

161 J Kukeminier and JE Krier “The Rise of the Perpetual Trust” (2003) 50 UCLA L Rev 1303 at 1317.

162 Sitkoff and Schazzenbach “Jurisdictional Competition for Trust Funds”, above n 152, at 359.

163 Ibid, at 362.

164 Ibid, at 363.

165 J Dukeminier and J E Krier *Property* (4th ed, Aspen, New York, 1998) 316 quoted in J Dobris “The Death of the Rule Against Perpetuities” (2000) 35 Real Property, Probate and Trust Journal 601 at 613.

166 Somewhat anomalously, under the Economic Growth and Tax Relief Reconciliation Act 2001 no estate tax or GSTT applies for those who died in 2010. However, both have been reinstated for 2011 (Sitkoff and Schazzenbach “Jurisdictional Competition for Trust Funds”, above n 152, at 373).

167 Ibid, at 414.



jurisdictions has been to introduce clearer powers to vary trusts. It is therefore necessary to consider clearer variation powers as a solution in the event that abolition of the rule were to be the preferred option in New Zealand.

### *Other jurisdictions*

- 3.33 Bermuda has recently enacted legislation to abolish the rule. The Perpetuities and Accumulations Act 2009, which applies to trusts created from 1 August 2009, removes the 100 year time limit for the duration of trusts in Bermuda, except to the extent that the instrument or power of appointment relates to land in Bermuda.<sup>168</sup> Existing trusts can apply to the court for an extension of the trust period.<sup>169</sup>
- 3.34 Bermuda's Finance Minister has indicated that the purpose of this amendment is to make Bermuda a more attractive trust jurisdiction for wealthy families wanting to set up a family trust.<sup>170</sup> Trust advisors have already found that there has been a high level of interest expressed in forming perpetual or dynastic trusts in Bermuda.<sup>171</sup>
- 3.35 Both Jersey and Guernsey have made changes to their trusts legislation to remove restrictions on the duration of a trust.<sup>172</sup>

### *Scotland*

- 3.36 The rule against perpetuities has never applied in Scotland. A former Lord President of the Court of the Session, the head of the judiciary in Scotland, commented that Scottish law did not view perpetuities "with the abhorrence in which they are held both in the language of United Kingdom authorities and in the decisions of the Courts of that country".<sup>173</sup> Scotland does have legislation that limits the ability of settlors to pass on a liferent interest<sup>174</sup> other than to those who are alive or *in utero* at the execution of the deed, with an absolute interest being conferred instead.<sup>175</sup>
- 3.37 Because the rule does not apply there, Scotland has been used as a case study of what may happen if a jurisdiction does not have the rule. The United Kingdom Law Commission surveyed the views of a number of Scottish conveyancing lawyers. They found that some perpetual trusts are created, but that these are rare and generally confined to trusts for public purposes, including charitable and non-charitable purpose trusts. They were advised that "in practice, the maximum duration of trusts in Scotland was ... about 100 years" with most

168 Randall Krebs "Bermuda abolishes the rules against perpetuities and accumulations" (2009) 15 *Trusts and Trustees* at 722.

169 Perpetuities and Accumulations Act 2009 (Bermuda), s 4.

170 "Now Bermuda trusts need never die" (2009) *Step Journal* < [www.stepjournal.org](http://www.stepjournal.org) > .

171 Krebs, above n 168, at 724.

172 *Trusts (Jersey) Law 1984*; *Trust (Guernsey) Law 2007*.

173 *Suttie v Suttie's Trustees* (1846) 18 SC Jur 442 at 445.

174 "Liferent is the right to use and enjoy a subject during life, without destroying or wasting its substance": J Rankine *The Law of Land-Ownership in Scotland* (4th ed, W Green, Edinburgh, 1909) at 720, cited in Law Commission (UK), above n 119, at 21.

175 Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s 18.

lasting much less time than this.<sup>176</sup> As a consequence, the United Kingdom Law Commission drew the conclusion that the mere fact that the law allows perpetual trusts does not mean that settlors will create them. Other factors, such as taxation or the risk that a disposition may eventually fail for uncertainty, tend to have a limiting role on the duration of trusts in Scotland.<sup>177</sup>

- 3.38 The Scottish Law Commission has recently published a discussion paper on the accumulation of income and the lifetime of private trusts.<sup>178</sup> It recommends that Scotland should abolish its existing rules against excessive accumulations and successive liferents. One reason given is that Scottish law retains rules that are perceived by many to be outdated, and there is a danger that trust business will move to a more accommodating jurisdiction nearby, such as Jersey, Guernsey, the Isle of Man, England or Wales.<sup>179</sup>

### *Application to New Zealand*

- 3.39 The effect of any possible abolition of the rule in New Zealand should be considered in the context of trust use in New Zealand. In *Some Issues with the Use of Trusts in New Zealand* the Commission discussed features of the trusts landscape in New Zealand.<sup>180</sup> Trusts are used frequently in New Zealand and there are a high number of trusts per head of population. Many trusts in New Zealand are family trusts where settlors transfer a family home to a trust. The reasons New Zealanders use trusts include structuring businesses, protecting vulnerable people, protecting assets from creditors or from a relationship property claim, minimising tax obligations and qualifying for government assistance. Given these factors, it is unlikely that New Zealand settlors will want to tie up their property in trusts that last much past their death. Moreover, there is no estate duty in New Zealand. This means that some of the concerns about transferring property to others, and resulting motivations for perpetual trusts that exist in other jurisdictions, are not present here. Tying up property in families for several generations does not appear to be a reason that many New Zealanders use trusts. However, the Commission is interested in whether there are uses of trusts for which the ability to make a trust perpetual would be advantageous and whether it is likely that many perpetual trusts would be created if the rule was abolished.

176 Law Commission (UK), above n 119, at 22.

177 Ibid, at 22.

178 Scottish Law Commission, above n 130.

179 Ibid, at 81.

180 Law Commission *Some Issues with the Use of Trusts in New Zealand: Review of the law of trusts – Second issues paper* (NZLC IP20, 2010) at ch 2.

## Variation of trusts and the rule

- 3.40 The solution to dead hand control advocated by the Manitoba, Saskatchewan and Irish Law Reform Commissions, and the Law Reform Committee of South Australia, has been clearer powers of variation by the courts. This might restore the balance for the beneficiaries, but at the cost of increased litigation.
- 3.41 This power in New Zealand is found in sections 64 and 64A of the Trustee Act 1956 and is discussed in part two of this Issues Paper. Modern trust deeds also have wide powers of variation.<sup>181</sup>
- 3.42 The South Australian legislation gives the courts power to vary a trust deed after 80 years or more from the date of the disposition of property on the application of the parties. Parties may apply to the court if it is clear that interests under a trust deed cannot vest or are unlikely to vest within 80 years.<sup>182</sup> The court's power is likely to be exercised in the cases where the settlor's intention is to provide for the financial welfare of beneficiaries but he or she failed to foresee and provide for circumstances which would cause the postponement of vesting to act against this intention.<sup>183</sup>
- 3.43 The Irish Law Reform Commission is of the same view: the main objection is that it may contradict wishes of the settlor.<sup>184</sup> But there is a distinction between *inter vivos* trusts, where beneficiaries may well include the settlor, and the dead hand argument does not really apply, and trusts where the balance between the living and the dead testator's wishes is relevant. It is unlikely that an *inter vivos* trust is an attempt to tie up property for future generations; it is more likely to be principally for purposes of tax reduction.<sup>185</sup>

## Replace with a new rule

- 3.44 Peter Sparkes suggested replacing a rule that revolves around "vesting" of interests by a rule requiring an interest to take place in possession within a certain period as much easier to apply and to explain to non-lawyers.<sup>186</sup> In his view the rule should be directed to the overall duration of the trust and require property to revert to an absolute owner within the perpetuity period, and should not be based on "the mysterious and outdated concept of vesting". He suggests it would take the form of the following wording:<sup>187</sup>

The trust property must pass to one or more absolute owners by the end of the perpetuity period.

181 Bill Patterson "Trusts the second time round – a survey from a practical perspective" (paper presented at NZLS Trusts Conference, 2005) at 80.

182 Law of Property Act 1936 (SA), s 62.

183 HAJ Ford and WA Lee *Principles of the Law of Trusts* (loose-leaf ed, Thomson Reuters) at [7560].

184 Irish Law Reform Commission *Report on the Variation of Trusts* (LRC 63, 2000) at 10.

185 Manitoba Law Reform Commission, above n 134, at 35.

186 P Sparkes "How to Simplify Perpetuities" [1995] Conv 212.

187 *Ibid*, at 215.

- 3.45 Ruth Deech, discussing the Manitoba Law Reform Commission's recommendation for abolition in 1982 and the dissenters' views, noted that a rule against perpetual trusts could serve a useful purpose in the event that dynastic trusts became a problem in the future.<sup>188</sup> She also considered that, while the lengthy trust may be undesirable for a number of reasons,<sup>189</sup> there was no good reason for the rule's concern with vesting rather than duration of interests. In her view there was universal agreement that the rule should never have been extended to commercial interests, contracts, options and easements.

SHOULD ANY  
SUBSTANTIVE  
REFORM BE  
RETROSPECTIVE?

- 3.46 An important question is whether any reform to the Perpetuities Act 1964 or any repeal or reform of the rule should apply retrospectively to trusts already in existence, or whether they should only apply to trusts created after the legislative change. Applying the reforms retrospectively to all trusts would simplify the law by making the former law obsolete. If the reforms do not apply retrospectively, three different laws of perpetuities will be in existence:
- the common law rule for trusts made prior to the 1964 Act;
  - the common law as modified by the 1964 Act for trusts made after the enactment of that statute but before the introduction of new legislation; and
  - the new law for trusts made after the enactment of new legislation.
- 3.47 While non-retrospective application of any changes would undoubtedly lead to complexity, applying the new legislation retrospectively also raises some concerns. As the United Kingdom Law Commission noted in its Consultation Paper, retrospectively changing the law of perpetuities affects property rights. Retrospective reforms could result in property ending up in the hands of a different person than it would have under the former law, as dispositions that are void for perpetuity under current law may be retrospectively validated.<sup>190</sup> Applying a lengthened maximum perpetuity period retrospectively could end up disadvantaging those whose existing trust deeds specify a valid 80 year perpetuity period, and advantaging those whose trust deed incorrectly provide for a longer period, which becomes valid after the law change. Applying an abolition of the rule retrospectively would raise the issue of what happens to existing trusts where the settlor has specified a perpetuity period but likely only did so because of the rule. Should the stated perpetuity period apply?
- 3.48 The United Kingdom Law Commission recommended that the new legislation not apply retrospectively. It proposed excluding some types of rights and interests, such as commercial arrangements, from the scope of the rule, it considered that applying the new legislation retrospectively would validate dispositions that would have been void for perpetuity or treated differently if the rule had not applied from the beginning. Its view was that this would interfere with commercial bargains that had been concluded on the basis of the

188 R Deech "The Rule against Perpetuities Abolished" (1984) 4 OJLS 454 at 457

189 Ibid. A trustee cannot invest as freely as a beneficial owner, a trust fund can only be used for investment not purchase and pressure may be exerted on beneficiaries where conditions are attached to the enjoyment of income.

190 Law Commission (UK), above n 127, at 63.

extant law. It considered that there was no satisfactory approach that met the goals of simplifying the law and removing the need to know the former law, while preserving the effect of concluded or void transactions.<sup>191</sup>

- 3.49 The New Zealand Law Commission will need to consider the issue of retrospectivity in deciding the form that any reform proposals should take and is interested in views about whether applying new law retrospectively to existing trusts would have undesirable consequences.

**ACCUMULATIONS** 3.50 Section 21 of the Perpetuities Act 1964, which allows the accumulation of income as capital for the length of the valid perpetuity period of a trust, can cause problems in relation to some charitable trusts. As discussed in chapter 1, the rule against perpetuities generally does not apply to charitable trusts, but in the cases where it does (where a gift to charity is to take effect at a future time) section 21 can cause problems.<sup>192</sup> Because under section 21 accumulations are only valid for the perpetuity period, where there is no life in being, accumulation is only allowed for 21 years.<sup>193</sup> Where directions for accumulation are for a period exceeding that allowed by the rule against perpetuities, the directions are void.

- 3.51 The meaning of section 21 has been described as obscure<sup>194</sup> and difficult to understand. The Commission understands that the requirements of section 21 are sometimes overlooked in the drafting of charitable trust deeds and that, consequently, many may contain unlawful accumulation provisions. This was the case in *Perpetual Trust v Roman Catholic Bishop of Christchurch*, where a will provided for the ongoing accumulation of one-fifth of the income from the testator's estate as capital, while the remaining four-fifths was to be paid to the Roman Catholic Bishop on trust to be used for his work among the aged in Canterbury.<sup>195</sup> Provisions such as this one were based on the misconception that this was the only way to safeguard the value of the capital of a trust fund during periods of high inflation. The correct answer to this problem is to invest in accordance with the "prudent person" rules in part two of the Trustee Act 1956.<sup>196</sup>

- 3.52 Further complication arises in this area with the poorly understood distinction between accumulation (adding income to capital) and saving (putting aside some income but retaining it as income available for payment should the trustees think there is reason to do so).<sup>197</sup> The English courts have considered that although accumulations are unlawful, savings are allowed.<sup>198</sup> This distinction has caused considerable confusion as to the law on accumulations.

- 3.53 It has been suggested to the Law Commission that section 21 of the Perpetuities Act 1964 should be replaced with a provision for charitable trusts which:

- Allows trustees to capitalise if they think fit;

191 Law Commission (UK), above n 119, at 96.

192 See [1.41]–[1.43].

193 N Kelly, C Kelly and G Kelly *Garrow and Kelly Law of Trusts and Trustees* (6th ed, LexisNexis, Wellington, 2005) at 161.

194 *Perpetual Trust Ltd v Roman Catholic Bishop of Christchurch* [2006] 1 NZLR 282 (HC) at [12], per Chisholm J.

195 *Ibid.*

196 Letter from Chris Kelly, General Counsel, Guardian Trust to Marion Clifford, Law Commission regarding accumulations (22 February 2011).

197 *Ibid.*

198 *Re Lindsay's Trustees* [1911] SC 584 at 588; *Re Berkley* [1968] Ch 745; [1968] 3 All ER 364.



- Declares invalid any trust provision which requires mandatory capitalisation of income;
- Requires trustees (where income is being paid but not capital) to keep a fair balance between having sufficient income to meet the needs of current charitable purposes, and ensuring the capital retains its value; and
- Remind trustees of the duty to invest so as to maintain the real value of capital in cases where there is no power to pay out capital or the trustees have decided not to.

The Commission is interested in views on whether there are problems with section 21 of the Act and how any such problems should be resolved.

## QUESTIONS

3.54 The Law Commission would appreciate feedback on the following questions.

Q1 Do you think that the need to restrict dead hand control and to encourage the alienability of property continue to be valid policies that need to be upheld?

Q2 Do you think that the reasons given for the rule justify its existence in its current form?

Q3 Are there any other problems with the rule?

Q4 Are there other reasons why the rule should be retained?

Q5 Do you favour any of the following reform options:

- further statutory reform of the rule, such as extending the perpetuity period (for instance, to 125 or 150 years) or limiting the types of dispositions to which the rule applies (for instance, exempting commercial transactions from the rule);
- abolition of the rule;
- replacement of the rule with a new rule in support of the same policy, such as one that limits the duration of a trust rather than being concerned with vesting.

Q6 Do you think that any changes should apply retrospectively to existing trusts?

Q7 Are you aware of any problems with section 21 of the Perpetuities Act 1964 and how do you think these could be resolved?

# Part 2

## THE REVOCATION AND VARIATION OF TRUSTS



LAW • COMMISSION  
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# Chapter 4

## Non-statutory revocation and variation of trusts

**INTRODUCTION** 4.1 One the trustee's core duties – his or her “very plainest duty” – is to adhere to the terms of the trust.<sup>199</sup> However, abiding by this duty is not always easy<sup>200</sup> and to do so can in fact be undesirable. Changes in law, taxation rules and family circumstances can mean that trust instruments need to be modified to enable the trust property to be dealt with or the trust administered in a way that was not provided for at the outset. The law has therefore long recognised that there are circumstances where a trust should be able to be varied, brought to an end or “resettled” onto new trusts.

4.2 Trusts may be modified or revoked by the following means:

- with the consent of all the beneficiaries provided they are all adult and of full legal competence (generally referred to as the rule in *Saunders v Vautier*);<sup>201</sup>
- under a power contained in the trust instrument;
- in limited circumstances, by the High Court either:
  - under its inherent jurisdiction; or
  - pursuant to an application under section 64A of the Trustee Act 1956, which allows the court to approve the variation or revocation of a trust on behalf of certain beneficiaries; or

199 Quoted in N Kelly, C Kelly and G Kelly Garrow *and Kelly Law of Trusts and Trustees* (6th ed, LexisNexis, Wellington, 2005) at [20.3.1] and attributed to Augustine Birrell *The Duties and Liabilities of Trustees* (1896) at 22.

200 A Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at 125; N Richardson Nevill's *Law of Trusts, Wills and Administration in New Zealand* (9th ed, LexisNexis, Wellington, 2004) at 184.

201 The “rule in *Saunders v Vautier*” is that where all beneficiaries of a trust are of full age and capacity who together are entitled to the full beneficial interest of the trust, the beneficiaries can call upon the trustees to convey the trust property to them and bring the trust to an end (Butler, above n 200, at 147–148).

- pursuant to an application under section 64 of the Trustee Act 1956, which allows the court to extend trustees' powers to deal with trust property where the deed is deficient (modification only).
- 4.3 These are each discussed below. A number of other provisions in the 1956 Act allow trustees to deal with trust property in a way not provided for in the trust deed. Section 15(1)(j) and (k) of the Act give the trustees power to appropriate trust property, and sections 40 to 41A authorise trustees to pay trust money for maintenance, education or benefit, notwithstanding the absence of such a power in the trust document. The Commission will consider those provisions in a later Issues Paper.
- 4.4 The law discussed in this paper relates to the variation and resettlement of private, express trusts. Additional rules apply to the amendment of charitable and superannuation trusts. Part 3 of the Charitable Trusts Act 1957 provides mechanisms for the modification and variation of the mode of administration and purposes of charitable trusts. Superannuation trusts registered under the Superannuation Schemes Act 1989 are the subject of certain restrictions applying to amendments. The variation of superannuation trusts has given rise to a number of cases both in New Zealand and abroad.
- 4.5 It is clear that there is a need for legislative provision for variation, even though it seems that the jurisdiction is not used with great frequency. The limited use of judicial variation of trusts is likely due to the high cost of pursuing an action in the High Court and the greater frequency with which trust instruments are including their own variation and revocation provisions. In this paper, the questions focus on whether:
- (a) any modifications to the existing statutory provisions are required; and
  - (b) any benefit is to be gained from clarifying and setting out the common law rules in legislation.
- 4.6 In the first of the Law Commission's Issues Papers on the review of trusts, *Review of Trust Law in New Zealand: Introductory Issues Paper*, the Commission raised questions about whether there should be clarification or modification of some of the fundamental areas of trust law, such as the definition of a trust and the parties involved in a trust, and the role of trust legislation.<sup>202</sup> It should be noted that if there are changes that result from this consideration, it could well affect matters such as the revocation and variation of trusts. Many areas of trust law are interlinked.
- 4.7 Reform of the rule against perpetuities, as discussed in part one of this paper, could also impact upon the need for changes to the law on variation of trusts. If the rule against perpetuities is abolished or the maximum perpetuity period is substantially increased, trusts that endure for many generations will be possible. This would potentially give the dead hand of the settlor a long-lasting influence.

<sup>202</sup> Law Commission *Review of Trust Law in New Zealand: Introductory Issues Paper* (NZLC IP19).



As was noted in chapter 2, changing social, economic or personal circumstances over time can mean that what was an appropriate and desirable settlement at the time the trust was settled ends up far from being in the beneficiaries' best interests. One way in which this concern can be alleviated without needing to rely upon the rule against perpetuities is through the power to vary a trust. It is possible that abolishing the rule against perpetuities could create a need for broadened variation powers.

POLICY  
BASIS FOR  
REVOCATION  
AND THE  
RELEVANCE OF  
THE SETTLOR'S  
INTENTIONS

- 4.8 Before addressing each of the means by which a trust can be varied, it is worth revisiting the policy underlying the existing law on variation. The starting point is that trusts, once established, cannot be varied. If there is no relevant power under the trust deed, and the rule in *Saunders v Vautier* does not apply, and if the legal hurdles to judicial variation cannot be surmounted, all the parties are bound by the deed as it was drafted. While this can be extremely inconvenient, the rationale is that it gives effect to the settlor's intentions. Certainly, this is how the courts have historically seen the limits of their jurisdiction.<sup>203</sup>

The general rule ... is that the court will give effect, as it requires the trustees themselves to do, to the intentions of a settlor as expressed in the trust instrument ...

- 4.9 However, in New Zealand, as in the United Kingdom, where a *Saunders v Vautier* variation is possible, the settlor's intention becomes less relevant. The common law proceeds on the basis that if all the beneficiaries consent to the variation or revocation of the trusts, the settlor's views are immaterial. This may be surprising to many people settling trusts. It means that essentially, where all the beneficiaries who are of full age and legally competent agree, they are able to defeat the settlor's intentions at any time after the establishment of the trust, including immediately. The rationale for this rule is that the beneficiaries together are the beneficial owners of the property and no one else has an interest in the property.

- 4.10 The New Zealand position is stated in *Re Byrne*.<sup>204</sup>

... the Court may approve an arrangement that is contrary to an express prohibition in the will or trust deed. The Court will not contradict the testator's or settlor's wishes lightly, but the Court does not stand in for the testator or settlor. It approaches the matter from the perspective of those on whose behalf it is asked to approve the arrangement ... it should be influenced by the testator's intentions only to the extent that such considerations might reasonably have influenced those persons if of full age and capacity.

- 4.11 This was also the approach adopted by Tipping J in *Re Greenwood*,<sup>205</sup> where he concluded that the settlor's intentions are irrelevant to the question of jurisdiction under section 64A. He too, however, suggested that the intentions of the settlor "may well go to the merits of approval" by the Court on behalf of beneficiaries.<sup>206</sup> It may be, then, that New Zealand courts are willing to give slightly greater weight to the settlor's intentions than is the case in the United

203 *Re Chapman's Settlement Trusts* [1953] Ch 218 at 233 (CA), quoted with approval by the House of Lords in *Chapman v Chapman* [1954] AC 429 at 451.

204 *Re Byrne* HC Wellington CIV-2003-46-167, 25 May 2004 at [26]–[27].

205 *Re Greenwood* [1988] 1 NZLR 197 (HC).

206 *Ibid*, at 211.



Kingdom. In *Goulding v James*,<sup>207</sup> Mummery LJ in the English Court of Appeal stated clearly that the court does not attach “any overbearing or special significance to the wishes of a settlor”.

- 4.12 Under New Zealand’s procedural rules, a settlor has no right to appear before the court in a variation application under section 64A of the Trustee Act 1956, which is silent on the settlor’s interests and intentions. Interestingly, however, English court rules require that if the settlor is living, he or she must be made a party to proceedings under the Variation of Trusts Act 1958.<sup>208</sup> However, the English courts have also rejected suggestions that the existence of this rule supports a view that the intention of the benefactor is relevant to the court’s assessment of the arrangement.<sup>209</sup>
- 4.13 The United States takes a starkly different approach to the settlor’s intentions. There, the “material purpose” doctrine applies. The doctrine is based on the following statement of the Supreme Judicial Court of Massachusetts in *Claflin v Claflin*:<sup>210</sup>
- ... A testator has the right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and ... his intentions ought to be carried out, unless they contravene some positive rule of law or are against public policy ...
- 4.14 The effect of the rule is that a trust cannot be terminated early, even though all the beneficiaries consent, if revocation would be contrary to a “material purpose” of the settlor.
- 4.15 To place greater emphasis on the settlor’s intentions than at present in New Zealand would amount to a significant change in the law, and would challenge the fundamental basis on which variations of trusts have proceeded since at least 1841. Furthermore, there are means available to a settlor to restrict attempts to vary or resettle his or her trust, such as making himself or herself a beneficiary, in which case the settlor’s consent would be required. And by including unborn, minor or unknown beneficiaries, the settlor would place the hurdle of a court application in the way of a desired variation. Nevertheless, both the common law rule and court-approved variations subordinate the settlor’s intentions in such a way that may be undesirable to many of those establishing trusts.
- 4.16 The Irish Law Reform Commission has surveyed the arguments in favour of disregarding the settlor’s intentions.<sup>211</sup> In particular, it suggested that it will often be the case that the need for the proposed variation may never have been contemplated by the settlor. It might be wrong to make assumptions about his or her views on the proposed modification in these circumstances. Perhaps the most persuasive argument in favour of the status quo, however, is that once the settlor has established the trust, he or she no longer has any legal interest in

207 See *Goulding v James* [1997] 2 All ER 239 at 250–251, clarifying the dicta of Lord Evershed MR in *Re Steed’s Will Trusts* [1960] Ch 407 at 421.

208 Civil Procedure Rules (UK), r 64.4(2).

209 *Goulding v James* [1997] 2 All ER 239 at 251.

210 *Claflin v Claflin* 20 NE 454 (Mass 1889).

211 Irish Law Reform Commission *The Variation of Trusts* (Report 63, Dublin, 2000) at 10–11.

the trust property (unless, as a trustee): that, after all, is the very basis of a trust. If all of those people who *do* have a beneficial interest agree, it is arguable that they should be able to arrange their affairs in any manner they see fit.

- 4.17 Before addressing the means by which revocations and variations can be undertaken, it is worth asking the question whether the fundamental premise of the *Saunders v Vautier* rule remains valid. To what extent, if any, is the settlor's intention relevant?

#### REVOCATION AND VARIATION BY BENEFICIARIES

- 4.18 The courts have long accepted that where all the beneficiaries to a trust are legally capable and in agreement, they can act together to require the trustees to terminate the trust and transfer the trust property to the beneficiaries for them to distribute as they see fit. This is the rule in *Saunders v Vautier*.<sup>212</sup> The rule recognises that while the title and management of the trust property resides with the trustees, the right to beneficial ownership lies with the beneficiaries. In the final analysis, it is for them to decide how they will enjoy the property.<sup>213</sup>

- 4.19 In its classic formulation, *Saunders v Vautier* relates to the revocation of a trust. The testator, Mr Wright, left £2000 of East India stock in trust for his grand-nephew Daniel Vautier which Daniel would receive along with accumulated interest and dividends when he attained the age of 25. When Daniel turned 21 he petitioned the court for the transfer of the stock to him. The Lord Chancellor agreed to this and the case establishes the principle that where all of the beneficiaries in the trust are of adult age and under no disability and together are absolutely entitled, the beneficiaries may require the trustee to transfer the legal estate to them and thereby revoke the trust.

- 4.20 The scope of the rule has become wider than merely allowing a trust to be revoked. The New Zealand High Court has allowed beneficiaries to use the rule to vary trusts by conferring new powers upon trustees or allowing them to deviate from, or vary, the terms of the trust where trustees are in agreement. In *Re Philips New Zealand Ltd*, Justice Baragwanath said:<sup>214</sup>

The rule in *Saunders v Vautier* ... points the way: while all beneficiaries *sui juris* cannot direct trustees who bona fide oppose a particular course of action — *Re Brockbank* [1948] 1 Ch 206 — their power to put an end to the trust is the ultimate exercise of unanimous consent. Since they can together use their possession of the total bundle of proprietary rights to terminate the trust it is difficult to see why they cannot use the same rights to permit the trustees to modify it.

- 4.21 This is also the position in the United Kingdom.<sup>215</sup> The Commission considers that this extension follows the policy behind the rule in *Saunders v Vautier*. Where those with the right of enjoyment of property are in agreement and do not suffer from any disability, they should be able to dictate the manner of its enjoyment.

212 *Saunders v Vautier* (1841) Cr & Ph 240; 41 ER 482.

213 DWM Waters, MR Gillen and LD Smith *Waters' Law of Trusts in Canada* (3rd ed, Thomson Carswell, Toronto, 2005) at 1175.

214 *Re Philips New Zealand Ltd* [1997] 1 NZLR 93 at 101. See also *Neville v Wilson* [1996] 3 All ER 171.

215 *IRC v Holmden* [1968] AC 685 at 713; *Goulden v James* [1997] 2 All ER 239 at 247; and *Wyndham v Egremont* [2009] EWHC 2076.

- 4.22 However, this extension of the *Saunders v Vautier* rule to include variation as well as revocation of a trust is not accepted in some jurisdictions. In a 2003 consultation paper, the British Columbia Law Institute treated the rule as limited to the revocation of trusts.<sup>216</sup> Yet in its report on the subject,<sup>217</sup> the Institute proposed that legislation should in essence codify the rule in *Saunders v Vautier*, and make it clear that consenting, legally capable beneficiaries can vary, revoke and resettlement a trust without the oversight of the court. This was also the approach of the Scottish Law Commission.<sup>218</sup>
- 4.23 The Commission suggests that the adoption in New Zealand of a similar provision – that is, codification of the extended *Saunders v Vautier* rule – would make the law clearer and more accessible. The other jurisdictions referred to have proposed including the rule in a revised version of section 64A of the Trustee Act 1956. Thus, the provision would cater for court-approved variations, revocations and resettlements (see chapter 5) of trusts and would enshrine in legislation the principle that adult, capable beneficiaries acting together can also effect each of these actions, without court oversight. The form such a revised variation provision might take is considered below.
- 4.24 The case of *Saunders v Vautier* involved a single beneficiary with a vested interest in the relevant trust property. The *Saunders v Vautier* rule clearly applies to beneficiaries with vested interests who together are absolutely entitled to the property. However, it is not so straightforward when determining how the rule in *Saunders v Vautier* applies to contingent and discretionary beneficiaries. It appears that the rule does not apply if a beneficiary's interest is not indefeasible and absolute. A beneficiary cannot request the revocation of a trust where their interest is contingent, as was the case in *Burns v Steel*, where the High Court found that Ms Burns' interest in company shares was contingent upon a pre-emption process in the company's constitution and, as a result, *Saunders v Vautier* could not apply.<sup>219</sup>
- 4.25 The rule in *Saunders v Vautier* also does not apply in certain types of discretionary trusts. Where trustees have a discretion to apply the whole or part of the trust fund to a beneficiary, the beneficiary cannot revoke the trust under the rule as he or she does not have a vested interest in the whole of the trust fund. However, where the trustees do not have a discretion as to the amount of the trust fund to be given to the beneficiary, but only as to the method in which the fund shall be applied for the beneficiary, the beneficiary may revoke the trust. In the case of a fixed discretionary trust with several beneficiaries, where the trustees have a discretion regarding how much (if anything) each beneficiary receives, but the whole of the trust fund must be divided somehow for those beneficiaries, the *Saunders v Vautier* rule can apply.<sup>220</sup>

216 British Columbia Law Institute *Consultation Paper on the Variation and Termination of Trusts* (2003) at 2. See also Manitoba Law Reform Commission *Report on the Rule in Saunders v Vautier* (Report 18, 1975) at 11 and Scottish Law Commission *Discussion Paper on Variation and Termination of Trusts* (DP 129, 2005) at [2.8].

217 British Columbia Law Institute *Report on the Variation and Termination of Trusts* (Report 25, 2003) at 4 and British Columbia Law Institute *A Modern Trustee Act for British Columbia* (Report 33, 2004) at 76.

218 Scottish Law Commission *Report on Variation and Termination of Trusts* (Report 206, 2007) at [4.4].

219 *Burns v Steel* [2006] 1 NZLR 565 at [36].

220 *Re Smith: Public Trustee v Aspinall* (1928) Ch 915 at 918.

- 4.26 The rule in *Saunders v Vautier* can also be used to transfer to an adult, legally capable beneficiary of a fixed share of the trust property his or her share.<sup>221</sup> The limitation on this is that the trust property must be of a form that allows the beneficiary's share to be transferred to him or her. It is more difficult where the property includes land or shares in a private company. The beneficiary may have to wait until property can be sold so that it can be divided.<sup>222</sup>
- 4.27 Given the complexity of the law in this area, it may be helpful if the legal position was clarified in legislation.

#### VARIATION UNDER A POWER IN THE TRUST INSTRUMENT

- 4.28 Experience of tax and other law changes over the years means that solicitors now commonly include variation and resettlement powers in trust instruments. Including a variation clause in a trust deed means, among other things, that expensive court action can be avoided. Variation powers usually lie with the trustees, but may be reserved to the settlor or some other person. It is also possible to include a revocation power in a trust deed, although the editors of *Garrow and Kelly* note that revocation provisions are uncommon these days.<sup>223</sup>
- 4.29 The extent of any such power will depend on the interpretation of the clause and deed itself. Because of this, it is difficult to identify definitive rules from the case law that guide the use of such clauses; cases need to be construed in the context of the type of trust involved and the particular wording employed.
- 4.30 What is clear, however, is that the principles of interpretation adopted in *Boat Park Ltd v Hutchinson*<sup>224</sup> apply to the trust deed.<sup>225</sup> In the context of the interpretation of a contract, these principles have been summarised as follows:<sup>226</sup>
- The best start to understanding a document is to read the words used, and to ascertain their natural and ordinary meaning in the context of the document as a whole. One then looks to the background to “surrounding circumstances” to cross-check whether some other or modified meaning was intended.
- 4.31 As the editors of *Garrow and Kelly* illustrate, the nature of a trust – for example, whether it is a family trust, superannuation trust, debenture trust, or energy trust – also influences how its provisions are interpreted.<sup>227</sup> Generally speaking, it seems accepted that “clear words” giving a power of variation are required<sup>228</sup> and the court is to “construe each provision according to its natural meaning,

221 Butler, above n 200, at 147; *Quinton v Proctor* [1998] 4 VR 469.

222 *Stephenson v Barclays Bank Co Ltd* [1975] 1 All ER 625 at 637.

223 They also note that there are good reasons to omit them: again, previously taxation laws made it undesirable for a settlor to be able to exert such control over his or her trust; and were the settlor to become insolvent the power to revoke may pass to the official assignee who could revoke the trust, making the trust assets available to meet the settlor's debts. Kelly, Kelly and Kelly, above n 199, at 763–764.

224 *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA), adopting the principles set out by the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98.

225 *Manukau City Council v Lawson* [2001] 1 NZLR 599 (HC); *Winter v Attorney-General* HC AK M333-IM01, 21 December 2001; *Re Andrews* HC CH M5/02, 21 June 2002.

226 *Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd* [2001] NZAR 789 (CA) at [29].

227 See Kelly, Kelly and Kelly, above n 199, at ch 11 and 764–765 and *Re Andrews* HC M5/02, 21 June 2002. See also *Re Courage Group's Pension Schemes* [1987] 1 All ER 528; *Re UEB Pension Plan* [1992] 1 NZLR 294; and *Re Philips NZ Ltd* [1997] 1 NZLR 93.

228 *Hemming v Chambers* HC Auckland CP351-SD97, 7 December 2000.



and in such a way to give it its most ample operation”.<sup>229</sup> *Underhill and Hayton Law of Trusts and Trustees* states that there seems to be a rebuttable presumption that a variation power cannot be used to extend its own scope or amend its own terms.<sup>230</sup> Similarly, the New Zealand Court of Appeal has held that trustees cannot use a variation power to remove a specific restriction to which they were subject from the very foundation of the trust.<sup>231</sup>

- 4.32 In the context of commercial trusts (specifically in the case of a premium trust deed which Lloyd’s underwriters were required to enter into), a variation power “cannot be exercised beyond the reasonable contemplation of the parties”.<sup>232</sup>

- 4.33 Should there be limits on how far a trust deed can allow its own variation? Some modern deeds contain extremely wide variation powers. An example is:

#### Variation of the trust deed

The Trustees may at any time by deed vary the provisions of this deed (including the deletion of this power of variation but excluding clause 13), provided that no variation shall be made which appoints as one of the class of Discretionary Beneficiaries and/or of the class of Final Beneficiaries any person if such person has been excluded permanently from such class or classes by prior exercise of the Trustees’ discretion or otherwise by this deed.

- 4.34 Given the need for a contextual approach to the interpretation of such powers, it does not appear to the Commission that much is to be gained from enshrining any guidance in legislation. The Commission’s impression is that variation clauses should continue to be construed on a case by case basis according to the existing principles of interpretation.

#### VARIATION UNDER THE HIGH COURT’S INHERENT JURISDICTION

- 4.35 Where a *Saunders v Vautier*-type variation cannot be made (because, for example, not all the beneficiaries are of age), the court can rely on its inherent jurisdiction to permit certain variations of trusts. The starting point is that “as a rule, the court has no jurisdiction to give and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not, on the face of the instrument creating the trust, authorised by its terms”.<sup>233</sup> However, in *Chapman v Chapman*,<sup>234</sup> the House of Lords ruled that there were four limited circumstances where the courts could give consent to variations on behalf of incapable beneficiaries, summarised by the New Zealand High Court as follows:<sup>235</sup>
- (a) changing the nature of an infant’s property;

229 *Kearns v Hill* (1990) 21 NSWLR 107. See also *Re Andrews* HC Christchurch M5/02, 21 June 2002 at [58].

230 D Hayton, P Matthews and C Mitchell *Underhill and Hayton Law of Trusts and Trustees* (17th ed, Butterworths, London 2007) at [47.19], citing *Aitken v Christy Hunt plc* [1991] PLR 1; and *British Coal Corp v British Coal Staff Superannuation Scheme Trustees Ltd* [1995] 1 All ER 912. However, Hayton states: “it seems a power to alter any provision or to amend any provision will permit the addition of new beneficiaries: *Kearns v Hill* (1990) 21 NSWLR 107 (CA) cited with apparent approval in *Napier and Ettrick v R F Kershaw Ltd* (No 2) [1999] 1 WLR 756, HL.”

231 *Re UEB Industries Ltd Pension Plan* [1992] 1 NZLR 294 (CA) at 301.

232 *Lord Napier & Ettrick v R F Kershaw Ltd* [1999] 1 WLR 756 at 766.

233 *Re New* [1901] 2 Ch 534 at 544.

234 *Chapman v Chapman* [1954] AC 429. See also *Re Gray (deceased)* [1956] NZLR 764 and *Re Ebbett (deceased)* [1974] 1 NZLR 392.

235 *Re Ebbett* [1974] 1 NZLR 392 at 396.



- (b) providing maintenance for an infant and, rarely, for an adult beneficiary;<sup>236</sup>
  - (c) sanctioning unauthorised transactions for the purpose of salvage of the estate; and
  - (d) sanctioning a compromise on behalf of an infant.
- 4.36 In *Chapman*, their Lordships ruled that the fourth category did not extend to cases where there was no dispute in need of compromise, but where the adult beneficiaries were really seeking court approval to bind any infant or unborn beneficiaries to a rearrangement of the beneficial interests under the trust instrument.<sup>237</sup>
- 4.37 Despite these apparent limitations, *Garrow and Kelly*<sup>238</sup> notes that the New Zealand High Court has been willing to use its inherent jurisdiction to effect other changes to a trust where the modification has been of an administrative nature, rather than a change to the beneficial interests. So, in *Re CP Clifton Children's Trust*,<sup>239</sup> Paterson J authorised a change to the person named as having the power to remove and appoint trustees. In *Kain v Hutton*,<sup>240</sup> Panckhurst J indicated that the jurisdiction could be used to remove and appoint trustees even where a power of appointment had been given to someone under the trust instrument, and to restrain the proposed actions of an appointor.
- 4.38 The Commission does not consider that these apparent expansions of the court's inherent jurisdiction raise concerns, although it notes that in neither of the cases mentioned above did the court directly discuss the breadth of its jurisdiction. The result is that the scope of the court's inherent jurisdiction in New Zealand is not entirely clear. In the next chapter the appropriate scope of the court's power to approve variations under the Trustee Act 1956 is discussed. Broadening the scope of the legislative power could largely remove the need for the court to resort to its inherent jurisdiction. Doing so would have the coincidental effect of removing any potential confusion over the scope of the inherent jurisdiction.

236 See *Re McGruer: Armour and MacDonald v NZ Guardian Trust Co Ltd* HC CH M 158/93, 21 October 1994 per Tipping J for New Zealand position: Kelly says this exception allows the Court to approve a variation of trust to enable maintenance to be paid out of income directed to be accumulated. The rationale is that the accumulation will be of no use if the beneficiary starves to death in the meantime. In his view, apart from this, there is no general inherent power to allow maintenance out of trust property. If not covered by section 40 of the Trustee Act 1956, the court's only inherent power is to allow maintenance out of income directed to be accumulated. In that case, although an increase in the annuities of the plaintiffs was a step justifiable for their maintenance, there was no question of accumulation and therefore the Court did not have inherent jurisdiction. Kelly, Kelly and Kelly, above n 199, at [26.20.7].

237 *Chapman v Chapman* [1954] AC 429.

238 Kelly, Kelly and Kelly, above n 199, at [26.20.4]–[26.20.6].

239 *Re CP Clifton Children's Trust* HC Auckland CIV 2004-404-4185, 5 November 2004.

240 *Kain v Hutton* HC Christchurch M198/00, 3 December 2004.

# Chapter 5

## Statutory revocation, variation and resettlement provisions

### VARIATION UNDER SECTION 64A OF THE TRUSTEE ACT 1956

5.1 The United Kingdom Parliament responded to the limitations identified in *Chapman v Chapman* by introducing the Variation of Trusts Act 1958. The New Zealand Parliament followed suit and section 64A was added to the Trustee Act 1956 in 1960.<sup>241</sup> It is in similar terms to section 1 of the UK Act and provides:

- (1) Without limiting any other powers of the Court, it is hereby declared that where any property is held on trusts arising under any will, settlement, or other disposition, or on the intestacy or partial intestacy of any person, or under any order of the Court, the Court may if it thinks fit by order approve on behalf of—
  - (a) Any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting; or
  - (b) Any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the Court; or
  - (c) Any unborn or unknown person; or
  - (d) Any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined—

<sup>241</sup> The 1956 Act did, however, already contain a limited variation power in s 64(2). That subsection was repealed when section 64A was added (see the discussion about s 64, below).

any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts:

Provided that, except by virtue of paragraph (d) of this subsection, the Court shall not approve an arrangement on behalf of any person if the arrangement is to his detriment; and in determining whether any such arrangement is to the detriment of any person the Court may have regard to all benefits which may accrue to him directly or indirectly in consequence of the arrangement, including the welfare and honour of the family to which he belongs:

Provided also that this subsection shall not apply to any trust affecting property settled by any Act other than the Administration Act 1969.

(2) Any rearrangement approved by the Court under subsection (1) of this section shall be binding on all persons on whose behalf it is so approved, and thereafter the trusts as so rearranged shall take effect accordingly...

- 5.2 The power under section 64A is discretionary and is limited to approving, on behalf of those who are legally incapable of giving their consent and certain others, any “arrangement” varying or revoking the relevant trusts or enlarging the powers of the trustee in respect of the property subject to those trusts.<sup>242</sup> The court is unable, for example, to override a refusal of consent by someone who is of full age and capacity. The only express guidance given to the court is that the arrangement must not be to the “detriment” of those on behalf of whom it provides consent (except under section 64A(1)(d)). In *Re Greenwood*,<sup>243</sup> Justice Tipping considered that:

... the proper course, is for those parties who are capable of consenting to execute an appropriate deed, which should recite the fact that the Court has approved on behalf of the relevant persons the arrangement effected by the deed. It would no doubt be desirable for the recital to refer to a sealed copy of the order of the Court annexed to the deed.

- 5.3 In the previous chapter it was suggested that the rule in *Saunders v Vautier* and the extension of this rule to cover variations could be codified in a revised variation provision to replace section 64A. Here, the various requirements under section 64A are examined along with whether any amendments are required, either to adequately capture the common law rules, or for the purpose of clarifying or modernising the existing provision.

### What “arrangements” should be allowed?

- 5.4 At present, two types of arrangement may be approved under section 64A: (a) those that vary or revoke all or any of the trusts; and (b) those that enlarge the powers of the trustees of managing or administering the trust property. The former enables changes to the beneficial interests under the trusts to be made. However, the phrase omits reference to “resettlements” of the trust property. On the face of the provision, the second type of variation, ((b), above) also has its limitations which are discussed below.

<sup>242</sup> *Re Clifford (deceased)* HC Christchurch A 30/82, 22 July 1993 at 11.

<sup>243</sup> *Re Greenwood* [1988] 1 NZLR 197 (HC) at 206.

## Resettlement

- 5.5 Simply stated, a resettlement takes place where a trust's assets are removed from that trust and settled onto a new trust. Trust property can be resettled onto one or more new trusts under appropriate powers in the trust instrument. Thus, they can be effected by reliance on powers enabling:
- appropriation (under section 15(1)(i));
  - advancement (either an express power in the trust document, or by reliance on section 41 of the Trustee Act 1956);
  - the removal and addition of beneficiaries;
  - maintenance; and
  - variation.
- 5.6 The corollary of this is that exercise of any of these powers could be considered to amount to a resettlement of trust property. This is important because a number of consequences can flow from a resettlement. Consideration must be given to whether the resettlement would offend against the rule against perpetuities. Tax liability can also arise because of depreciation recovered, because the resettlement triggers a taxable accrual gain or for GST purposes.<sup>244</sup> In addition, in some circumstances Inland Revenue treats a resettlement as a separate disposition, so gift duty can arise.<sup>245</sup> Trustees may also remain liable for any debts or other liabilities relating to the old trust.
- 5.7 Although the term is not mentioned in the provision, courts have increasingly appeared willing to interpret section 64A as allowing resettlements. In *Clucas v Trustees of T E Clucas Family Trust*,<sup>246</sup> Chisholm J relied on the following dicta of Tipping J in *Re Greenwood*<sup>247</sup> in approving, in principle, an arrangement whereby the trust property would be resettled on five new trusts: "revocation can encompass both the termination of the existing trusts and the revocation of the existing trusts and their substitution by new trusts." In *Rutherford v Stalker*,<sup>248</sup> the same Judge overcame any potential limitation in the provision by allowing a variation that added a resettlement power to a trust deed.
- 5.8 The English approach has been more restrictive. *Re Ball's Settlement Trusts*<sup>249</sup> involved an arrangement to resettle the trust fund onto new trusts. Megarry J took a literal approach to the wording of the legislation, holding that "there is

244 See generally, J Young "Trust resettlements – How to and what to look out for" (paper presented at 2nd Annual Trusts, Assets & Estates Planning Legal Update, Wellington, 11 November 2009).

245 Inland Revenue has not identified any set rules on when this occurs – it considers each case on its merits. The difficulties that arise from an uncertain approach to trust rearrangements that amount to resettlements was considered by Darrell Barnett in "Resettlement: Finding the new charter of rights" (2006) 80 ALJ 254. The Taxation (Tax Administration and Remedial Matters) Bill 2010 (257-1), currently being considered by the Finance and Expenditure Select Committee, would repeal gift duty from 1 October 2011.

246 *Clucas v Trustees of T E Clucas Family Trust* HC Christchurch M1/95, 5 May 1998.

247 *Re Greenwood* [1988] 1 NZLR 197 (HC) at 211.

248 *Rutherford v Stalker* HC Dunedin CP25/99, 18 November 1999.

249 *Re Ball's Settlement Trusts* [1968] 1 WLR 899.

plainly no jurisdiction to approve the arrangement as regards ‘resettling’ the property”.<sup>250</sup> Nevertheless, he found himself able to approve the particular arrangement at issue on the basis that:<sup>251</sup>

... if an arrangement changes the whole substratum of the trust, then it may well be that it cannot be regarded merely as varying that trust. But if an arrangement, while leaving the substratum, effectuates the purpose of the original trust by other means, it may still be possible to regard that arrangement as merely varying the original trusts, even though the means employed are wholly different and even though the form is completely changed ...

- 5.9 Megarry J went on to observe that the “jurisdiction of the 1958 Act is beneficial and ... the court should construe it widely and not be astute to confine its beneficent operation.”<sup>252</sup> In doubting the validity of the distinction drawn in *Ball’s* case, the Irish Law Reform Commission submitted that:<sup>253</sup>

... the decisive factor in deciding whether or not to exercise the court’s discretion ought not to be whether or not a given arrangement falls on one side of the hazy line between variations and resettlements. Even the slightest variation could, in practical terms, have far-reaching consequences. By the same token, a resettlement might, in reality, effect only minor changes. To rest everything on this variation/resettlement divide, will inevitably throw up unjustified anomalies ...

- 5.10 Two issues arise. The first is whether a new variation provision should provide for resettlements of trust property, whether by consenting beneficiaries under a *Saunders*-type rule, or by court approval.
- 5.11 As stated above, the general principle is said to be that where those with the present right of enjoyment of property are in agreement and do not suffer from any legal disability, they should be able to dictate the manner of its enjoyment. If that principle is well-founded, it is difficult to justify treating resettlements any differently from variations and revocations. The approach of the Irish Commission’s proposals was that the court would retain oversight of resettlements: that Commission chose not to recommend the codification of the *Saunders* rule, thus the Irish statute does not confirm that beneficiaries alone can resettle a trust.
- 5.12 However, the Law Commission cannot see any reason why a new section 64A should not expressly allow beneficiaries to effect, and courts to approve, arrangements that “vary, revoke and resettle” trusts. This has also been the approach recommended by some other law reform commissions.<sup>254</sup> The Commission is interested in feedback on whether there is anything that

250 Ibid, at 903.

251 Ibid, at 905.

252 Ibid.

253 Irish Law Reform Commission *The Variation of Trusts* (Report 63, Dublin, 2000) at [3.15].

254 British Columbia Law Institute *A Modern Trustee Act for British Columbia: A Report prepared for the British Columbia Law Institute by its Committee on the Modernization of the Trustee Act* (BCLI Report No. 33, 2004) at 76; Manitoba Law Reform Commission *Report on the Rule in Saunders v Vautier* (Report 18, 1975) at 28–29; and Scottish Law Commission *Report on Variation and Termination of Trusts* (Report 206, 2007) at 55.



differentiates resettlements from variations to the extent that the ability to resettle should not be expressly extended to consenting beneficiaries, and such that resettlements should not be included in a new section 64A.

- 5.13 The second issue is whether there should be any restriction on variations or resettlements of trusts which fail to leave the “substratum” of the trust intact. This goes, in part, to the relevance attached to the settlor’s intentions.

#### The substratum and relevance of the settlor’s and trustees’ views

- 5.14 Using the elusive concept of the “substratum” of a trust to distinguish between resettlements and variations, as Megarry J did in *Re Ball*,<sup>255</sup> is problematic.<sup>256</sup> The concept has also been referred to by courts when determining whether or not to approve a variation of a trust. As the Commission views it, the only justification for attributing weight to such a concept would be to ensure that there remained some adherence to the settlor’s original purpose in determining the terms of the trust.

#### “Enlarging the powers of the trustees of managing or administering” the trust property

- 5.15 On a strict reading of the phrase “enlarging the powers of the trustees of managing or administering” in section 64A(1), the power is quite restrictive. Arguably, it allows only for broadening the trustee’s existing powers and not for adding new or removing existing powers. It does not, on its face, provide for general amendments to the administrative provisions of a trust.
- 5.16 In *Re CP Clifton Children’s Trust*,<sup>257</sup> Paterson J acknowledged that the word “arrangement” is used in its “widest possible sense” to cover any proposal which any person may put forward for varying or revoking the trusts.<sup>258</sup> However, His Honour concluded that the provision could not be used to substitute the person with the power to appoint and remove trustees under the trust, since such an arrangement did not affect the trusts on which the property was held. Section 64A did not, he considered, enable the court to modify the administrative provisions controlling the trusts in that manner.
- 5.17 Nevertheless, the High Court had, previously, in *Re Basil Parks Deed of Trust*,<sup>259</sup> assented to a number of administrative amendments to a trust, including one almost identical to that proposed in *Clifton*. In *Basil Parks*, Justice Ellis approved an expansion of the list of beneficiaries, and amendments relating to the number of trustees, preventing the settlor or appointer from acting as trustees and appointing a new appointer. Section 64A was also relied upon to amend a trust

255 *Re Ball’s Settlement Trusts* HC Dunedin CP25/99, 18 November 1999.

256 See, for example, Darrell Barnett, above n 246, who critiques the use of the concept for identifying “resettlements” for tax purposes.

257 *Re CP Clifton Children’s Trust* HC Auckland CIV-2004-404-4185, 5 November 2004 at [40]–[43].

258 *Re Steeds Will Trusts* [1960] Ch 407.

259 *Re Basil Parks Deed of Trust* HC Blenheim M55/97, 11 February 1997.

so that the law governing it would be changed from New Zealand to Australian law.<sup>260</sup> Section 64A has also been used to amend an error in an original draft of a trust deed by way of rectification.<sup>261</sup>

- 5.18 Other law reform bodies have considered the types of trust deed amendment that should be permissible under trusts statutes. The Scottish Law Commission proposed that an arrangement should be able to vary (meaning enlarge or restrict) any or all of the powers of the trustees to manage or administer a trust estate.<sup>262</sup> The British Columbia Law Institute proposed a definition of “arrangement” which included: “varying, deleting, adding to or terminating the powers of a trustee in relation to the management or administration of the property subject to the trust.”<sup>263</sup> The Irish Law Reform Commission proposals extend the definition to “enlarging, adding to or restricting the powers of the trustees to manage or administer any of the property subject to the trusts”.<sup>264</sup>
- 5.19 Should there be limits on the power to approve variations? For example, should it enable the court or beneficiaries to effect the removal of a person’s power of appointment? Or should it be possible to adopt such a route to dismiss trustees? Should the section state explicitly the matters that cannot be approved? In the United Kingdom, adult, capable beneficiaries can act together to force a trustee to resign in certain circumstances.<sup>265</sup>

### Detriment

- 5.20 The first proviso to section 64A(1) states that:

Provided that, except by virtue of paragraph (d) of this subsection, the Court shall not approve an arrangement on behalf of any person if the arrangement is *to his detriment*; and in determining whether any such arrangement is to the detriment of any person the Court may have regard to all benefits which may accrue to him directly or indirectly in consequence of the arrangement, including the welfare and honour of the family to which he belongs ...

- 5.21 Here, section 64A differs from section 1 of the Variation of Trusts Act 1958 (UK) which provides instead that the court cannot approve an arrangement “on behalf of any person unless the carrying out thereof would be for the benefit of that person”. In *Re Smith*, Cooke J said:<sup>266</sup>

It seems to me that the New Zealand Court has more than a “fractionally wider” discretion and that the New Zealand legislature has deliberately given the Court a freer hand – though of course not an unfettered discretion, as the condition must still be satisfied.

260 *Re Henry Trust* HK Christchurch CIV-2003-409-520, 22 August 2003.

261 *Re Stokes Family No 2 Trust* HC Hamilton M288/94, 30 September 1994.

262 Scottish Law Commission, above n 254, at [4.3].

263 British Columbia Law Institute, above n 254, at 76.

264 Irish Law Reform Commission, above n 253, at 24.

265 This is so in the case of trusts of land and provided that there is no person nominated for the purpose of appointing new trustees by the trust instrument: see *Trusts of Land and Appointment of Trustees Act 1996*, section 19.

266 *Re Smith* [1975] 1 NZLR 495 (SC) at 498, doubting the observation of Gresson J in *Re Bryant* [1964] NZLR 846 (SC) at 848.

- 5.22 The “fractionally wider” discretion arises because the court does not need to find a positive benefit to the beneficiary in question; it is sufficient that the arrangement does not leave them worse off. In assessing whether any detriment would result, the court must weigh any competing benefits and detriments and is entitled to look at the whole proposal.<sup>267</sup> It may take account of indirect as well as direct benefits: the direct economic impact of the variation is not the sole factor to take into account. One of the indirect benefits is the effect that the variation will have on the welfare and honour of the family, and it is said that that concept must be viewed broadly.<sup>268</sup> Where there is a real possibility of detriment to a person, the position may be met by the giving of covenants to make good any loss which may occur.<sup>269</sup> That a variation results in a reduction of a trust’s tax liability is not a reason to decline approval.<sup>270</sup>
- 5.23 Again, the Commission has no information before it to suggest that there are any problems with the application of this requirement. The provision needs to include some form of guidance about the protection to be afforded to the interests of a beneficiary on behalf of whom it is approving the variation, and it is suggested that the existing formulation provides for this adequately.

### Persons on behalf of whom the court can consent

- 5.24 Paragraphs (a) to (d) of section 64A(1) describe the persons on behalf of whom the court can give consent. This provision applies only to persons who cannot consent for themselves. The consent of other beneficiaries will have to be obtained. Although there is some doubt about their breadth, paragraphs (a), (c) and (d) are far clearer in application than paragraph (b). These paragraphs are dealt with first. The Commission considers whether there should be clarification or reform to any of these categories. The Commission is interested in views on whose consent should be required, on whose behalf the court should be able to consent, and whose consent should be able to be dispensed with if an attempt is to be made to clarify and possibly reform the law on the consent needed to effect a revocation, variation or resettlement.

#### *Paragraphs (a) and (c): minors, incapable, unborn and unknown persons*

- 5.25 Paragraph (a) refers to:

Any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting.

It seems clear that paragraph (a) does not capture minors or the incapacitated, who are discretionary beneficiaries, as they would not have either a vested or contingent interest.

267 See *Clucas v Trustees of T E Clucas Family Trust* HC Christchurch M1/95, 5 May 1998; *Armour v The New Zealand Guardian Trust Co Ltd* HC Christchurch M158/93, 21 October 1994; *Re ABS & GLS Black Settlement Trust* HC Christchurch M55/94, 25 May 1994 and *Re Bryant* [1964] NZLR 846.

268 See *Re Clifford (deceased)* HC Christchurch A 30/82, 22 July 1993 at 11. See also *Van Gruisen’s Will Trusts*, *Bagger v Dean* [1964] All ER 843 and *Re Bryant* [1964] NZLR 846.

269 See *Re Aitken’s Trusts* [1964] NZLR 838 (SC) and *Re Smith* [1975] 1 NZLR 495.

270 *Re Whittome’s Trust* [1962] NZLR 773 (SC).

- 5.26 The Age of Majority Act 1970 states that a person reaches full age on attaining the age of 20 years.<sup>271</sup> Thus, a court must give its consent on behalf of beneficiaries under that age with a vested or contingent interest. It can be assumed however, that it would take account of the views of older minor beneficiaries, depending on its assessment of their understanding of the issue at hand.
- 5.27 Incapacity is used in its legal sense of want of legal ability to act, the most common example being committal under mental health legislation. It does not extend to untraceable beneficiaries.<sup>272</sup>
- 5.28 Unborn or unknown beneficiaries are captured by paragraph (c). There is High Court dicta suggesting that a company, as yet unformed, could be included in the term.<sup>273</sup> Presumably, this would extend also to unformed charities and other bodies.
- 5.29 Section 64A(1)(c) differs from variation provisions in most other jurisdictions (including in the UK Act) in that it makes reference to “unknown” persons.<sup>274</sup> The meaning of “unknown person” was considered in *Re Campbell (deceased)*.<sup>275</sup> There, a beneficiary in the trust had not been heard from in a number of years and could not be located to give consent to a proposed variation. Chief Justice Eichelbaum considered whether the court could provide its consent on behalf of the absent beneficiary. The Chief Justice considered it was tempting to give the provision a liberal interpretation. However, he did not believe, considering the context (“unborn and unknown persons”), that he could safely take the legislative intent any further than contemplating enlargement of the expression “unborn persons” to the extent of encompassing persons who if born would have an entitlement, where it was not known whether any such persons had been born or not:

... otherwise every person whose whereabouts were unascertainable, and about whom nothing had been heard for a sufficiently long period, or regarding whom there were other circumstances sufficient to raise a doubt as to whether they were still alive, would have to be regarded as an unknown person. There would be no particular need for legislation to cover that situation. The person’s identity being known, he or she could be made a party or otherwise identified for purposes of proceedings, and procedural rules are available to cater for substituted service, or for dispensing with service. Had it been intended to encompass such persons more appropriate statutory language would readily have been available.

271 Age of Majority Act 1970, s 4.

272 *Re Campbell (deceased)* [1991] 3 NZLR 363 (HC) at 366.

273 *New Zealand Dairy Board v New Zealand Co-operative Dairy Co Ltd* [1999] 2 NZLR 355 (HC) at 383.

274 See also Trustees Act 1962 (WA), s 90.

275 *Re Campbell (deceased)* [1991] 3 NZLR 363.

- 5.30 The Chief Justice also held that the beneficiary in question could not be considered to fall within paragraph (a), as a person who by reason of “other incapacity” was “incapable of assenting”. The *Campbell* case involved an intestacy and a Law Reform (Testamentary Promises) Act 1949 claim against the deceased’s estate. The Chief Justice was able to call into aid section 3(6) of that Act to exonerate the estate from the incidence of an award under the Act and to prioritise between beneficial interests, thus protecting the estate from a future claim by the absent relative.
- 5.31 The Scottish Law Commission has recently recommended, however, that an amendment be made to its trusts legislation to deal specifically with the difficulty of an untraceable beneficiary whose identity is ascertainable and who is of full age, meaning that that the court has no power to approve the arrangement on his or her behalf.<sup>276</sup> The Commission noted that a Scottish court had previously dispensed with the need to obtain the consent of an untraceable beneficiary with a remote interest.<sup>277</sup> However, it considered that this was unsatisfactory from the standpoint of the trustees as they were left unprotected should that beneficiary later emerge to make a claim. In cases where a New Zealand court could not rely on section 3(6) of the Law Reform (Testamentary Promises) Act 1949, as it did in *Campbell*, the same position would arise in New Zealand.
- 5.32 The Scottish proposal is that the court should have power to approve an arrangement on behalf of a person who has not been traced, provided that the court is satisfied that:<sup>278</sup>
- (a) reasonable steps have been taken to trace the person; and
  - (b) the proposed arrangement would not be prejudicial to that person’s interests.
- 5.33 The effect of such approval would be to remove the possibility of future challenge if the beneficiary re-appeared and claimed to have been prejudiced by the arrangement because of, for example, the emergence of an unlikely contingency.<sup>279</sup> The Commission has no information on whether this problem arises with any frequency in New Zealand. However, in reviewing the legislation the Commission is keen to ensure that a revised provision caters adequately for events that could thwart a desirable variation. The Commission is interested in whether there is a need to provide for untraceable beneficiaries in New Zealand, but suggests that any such provision should similarly be limited to ensuring that reasonable steps are taken to contact absent beneficiaries, and that any proposed arrangement does not operate to the detriment of such a person. The Commission welcomes views on this issue.

276 Scottish Law Commission, above n 255, at [5.33]. See also the Irish Law Reform Commission, above n 254, at 33–34, which has proposed that the category of persons on whose behalf the courts may consent includes “any person whose identity, existence or whereabouts cannot be established by taking reasonable measures”.

277 *Morris, Petitioner* 1985 SLT 252.

278 Scottish Law Commission, above n 254, at [5.33], referring to s 1(b) of the Variation of Trusts Act 1958 (UK).

279 See similar recommendations in Ireland (Irish Law Reform Commission, above n 254) and British Columbia (British Columbia Law Institute, above n 255).



*Paragraph (d): discretionary beneficiaries under protective trusts*

- 5.34 Paragraph (d) relates specifically to discretionary beneficiaries under protective trusts, as defined in section 42 of the Trustee Act 1956. Protective trusts are a type of discretionary trust that are used to protect beneficiaries' interests for life, or a lesser period, so as to prevent squandering of property or insolvency by an extravagant or spendthrift beneficiary.<sup>280</sup> The Commission understands that there are some protective trusts in existence in New Zealand, but that they are now seldom used. In light of this, it may not be necessary to distinguish beneficiaries under protective trusts from discretionary beneficiaries for the purposes of a provision outlining on whose behalf the courts can consent.

*Paragraph (b): those who "may become entitled to an interest"*

- 5.35 Paragraph (b) states:

Any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the Court;

This paragraph addresses beneficiaries with a more remote interest than those with vested interests, but it can be difficult to determine exactly what types of beneficiaries fit within this category. In considering the English equivalent of this paragraph, the Irish Law Commission stated "... law should not be unduly complicated and uncertain of application. It is suggested that paragraph (b) fails on each score".<sup>281</sup>

- 5.36 The interpretation of paragraph (b) has caused considerable difficulty for courts and commentators. The paragraph needs to be read in two parts. The first half refers to any person who "*may become entitled to*" an interest in the trust property. The position adopted by Warner J in the English case of *Knocker v Youle*<sup>282</sup> was that this does not include persons with an existing vested or contingent interest in the trust property. The reason given was that those persons are already entitled to an interest and (except if they fall under paragraph (a)) need to decide for themselves whether they will give consent to a proposed agreement. Warner J considered that a court cannot approve an arrangement on behalf of a person who already has an interest in the property, even if that interest can be defeated (by the exercise of a power of appointment). On this basis, paragraph (b) applies only to those who may have a hope or expectation of benefitting from the trust.<sup>283</sup> He concluded that a person with a contingent interest (even a doubly contingent interest), even where that interest is defeasible on the exercise of general testamentary powers, had what is properly described

280 A Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at 62.

281 Irish Law Reform Commission, above n 253, at [5.13].

282 *Knocker v Youle* [1986] 2 All ER 914. See N Kelly, C Kelly and G Kelly *Garrow and Kelly Law of Trusts and Trustees* (6th ed, LexisNexis, Wellington, 2005) at [26.8.9].

283 *Knocker v Youle* [1986] 2 All ER 914 at 917.

in legal language as “an interest” and would not be covered by this paragraph. He considered that it was plain that the word “interest” in the provision is used in its technical, legal sense.<sup>284</sup>

- 5.37 This view may be reinforced by the proviso in the second half of paragraph (b), the effect of which is that the paragraph does not apply to those whose “interest” has already come about. Thus, if an event has occurred that makes a person of the relevant “description” or a member of the relevant class, he or she has already become entitled to an interest (whether vested or contingent and even though that interest may be defeated by the exercise of a power of appointment).<sup>285</sup>
- 5.38 However, *Knocker* does not appear to have been the subject of further detailed judicial consideration in the English courts. What New Zealand references there are to paragraph (b) reveal some confusion about its application, or perhaps a divergence of views with the English case about whether the court can consent on behalf of beneficiaries with a contingent interest. For instance, in *Capral Fiduciary Ltd v Ladd*,<sup>286</sup> unascertained future spouses were dealt with under paragraph (b), but with the apparent justification that they were “beneficiaries with contingent interests”. In *Ewington v Schultz*, the Judge said that “[s]ection 64A Trustee Act 1956 confers on the court the power to approve a variation on behalf of persons not legally able to do so for themselves (s 64A(1)(a)) or who have a contingent interest (s 64A(1)(b)) and any unborn person (s 64A(1)(c)).”<sup>287</sup>
- 5.39 Because of the differing approaches, it is not clear who falls within the ambit of paragraph (b). The commonly used example is of a trust that provides for a future spouse of the settlor or a beneficiary. Where the future spouse cannot yet be identified, the court may give its consent to a variation on behalf of such an unascertained person. In *Knocker*, Warner J also expressed the view that paragraph (b) clearly applies to a person with a spes successionis, that is a presumptive or prospective next of kin.<sup>288</sup> The Irish Law Commission criticised the decision in *Knocker* on the grounds that it leaves “precious little of substance to paragraph (b)” because of the finding that a person who has an actual interest directly conferred upon him or her by trust, albeit a remote, contingent interest, cannot properly be described as one who “may become” entitled to an interest, and hence falls outside the scope of paragraph (b).<sup>289</sup> Others have been more supportive of the approach taken in the case.<sup>290</sup>
- 5.40 The clarity of section 64A(1) can be improved considerably. The task is to establish (a) whose consent should be required before a variation can be undertaken; (b) in what circumstances should the court be able to provide its consent; and (c) whether it would be right to dispense with anyone’s consent altogether. This is best achieved by returning to the original policy behind the provision. The

284 *Knocker v Youle* [1986] 2 All ER 914 at 916.

285 See *McGruer (deceased)* HC Christchurch M158/93, 21 October 1994.

286 *Capral Fiduciary Ltd v Ladd* HC Auckland M397/99, 12 July 1999.

287 *Ewington v Schultz*, HC Auckland CIV-2008-404-006596, 5 May 2009, Winkelmann J at [21]. Kerry Ayers has also stated the view that s 64A(1)(b) includes “those with a contingent interest” (KR Ayers *Variations of Trusts* (Brookers, Wellington, 2000) at 110).

288 *Knocker v Youle* [1986] 2 All ER 914.

289 Irish Law Reform Commission, above n 253, at [5.10]–[5.11]. See also JG Riddall [1987] Conv 144.

290 See for example Scottish Law Commission, above n 254, at [5.6]; P Luxton 136 NLJ 1057 at 1057–1059.

rationale for section 64A is the same as the justification for the rule in *Saunders v Vautier*: those who together are entitled to the entire beneficial interest in the trust property are able, if they are all capable and acting consensually, to revoke or (more recently) vary the trust. The aim of section 64A is to fill the gap where some of those beneficiaries are incapable or not yet ascertained for some reason or who are not yet entitled (such as a discretionary beneficiary). It is not to allow the court to override the consent of capable beneficiaries.

- 5.41 The Irish Law Reform Commission suggested that the aim of section 1(b) of the Variation of Trusts Act 1958 (UK) (equivalent to section 64A(1)(b) of New Zealand's Trustee Act 1956) was also to deal with people whose "interests are so conditional that it is not worth the time and trouble of securing their consent and secondly, and possibly more important, because it was probably thought wrong to allow them a power of veto".<sup>291</sup> That Commission concluded that the court should be able to provide its consent on behalf of all those with a contingent interest in the trust property.
- 5.42 The Scottish Law Commission recently dealt with the matter in a different way. It focussed its attention on (a) beneficiaries with an interest of negligible value; and (b) unborn or unascertained persons who would have a hope or expectation of acquiring an interest but where this was so remote that there was no reasonable likelihood that it would ever come into existence.<sup>292</sup> It proposed that, where the court was satisfied that either of these situations existed, it could provide its consent on behalf of those persons in certain circumstances. In the former case, the trustees would be relieved of any liability for loss to such a beneficiary, and in the latter case the court could approve a variation "notwithstanding the possibility of prejudice" to the person. The first category clearly raises the question of at which level the value of an interest becomes sufficiently small to be described as "negligible". The Scottish Law Commission expressed the view that it should not be rigidly defined and should be left to the courts to decide in the circumstances of a particular case.<sup>293</sup> This approach has the advantage of flexibility but could cause a lack of certainty.
- 5.43 The position regarding an object of a special power of appointment also requires consideration.<sup>294</sup> *Underhill and Hayton* suggests that neither paragraph (a) or (b) applies and that the court cannot consent on their behalf.<sup>295</sup>

291 Irish Law Reform Commission, above n 253, at 33.

292 See Scottish Law Commission, above n 254, at 32–33, recommendations 7 and 8.

293 Ibid, at 32.

294 A power of appointment gives the donee of the power a discretion (sometimes circumscribed) to distribute property for the benefit of others.

295 D Hayton, P Matthews and C Mitchell *Underhill and Hayton Law of Trusts and Trustees* (17th ed, Butterworths, London 2007) at [47.39].

## Non-consenting beneficiaries

- 5.44 Both the Irish and Scottish Commissions dealt expressly with the problem of a capable adult beneficiary who declined to consent to a proposed variation, despite the fact that he or she would suffer no detriment as a result of the variation. The United States Uniform Code allows the court to give its consent on behalf of such persons in these circumstances.<sup>296</sup> Allowing the court to override the consent of a beneficiary with a vested interest goes against the principle of consensus. However, it may be unfair to consenting beneficiaries that the arrangement can be vetoed by persons who are no worse off as a consequence of it.<sup>297</sup> After consulting on the option of giving the court a power to consent on behalf of these beneficiaries, the Scottish Law Commission decided against recommending reform in this area because of concern that it could be regarded as expropriation of the non-consenting beneficiaries' property and because it was not found to be a common problem in Scotland.<sup>298</sup> For similar reasons, the Irish Law Reform Commission recommended that the court's power to consent on behalf of a recalcitrant adult should be strictly limited to those cases where the adult's interest is merely contingent.<sup>299</sup>
- 5.45 There may be circumstances where the beneficiaries are numerous and where it may be undesirable for one person's views to frustrate the intentions of the majority, if that person would suffer no detriment. For example, *Farmers Trading Company Ltd v Persons directed to be served*<sup>300</sup> involved a trust, the beneficiaries of which were all the employees of the company and numbered around 3,500. The court found that section 64A requires that consent had to be obtained from all capable beneficiaries. Such a case may be justification for the court being able to consent on behalf of both a non-consenting adult beneficiary and classes of beneficiaries too numerous to contact.

### SECTION 64: POWER OF THE COURT TO AUTHORISE DEALINGS WITH TRUST PROPERTY AND VARIATIONS OF TRUST

- 5.46 The origin of section 64 of the Trustee Act 1956 is section 57 of the Trustee Act 1925 (UK). The provision was introduced in New Zealand in 1936, in the same terms as its United Kingdom counterpart, and allows the court to approve dealings with the trust property in circumstances where the trustees lack the power to do so under the trust instrument. At present, it provides:
- (1) Subject to any contrary intention expressed in the instrument (if any) creating the trust, where in the opinion of the Court any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, retention, expenditure, or other transaction is expedient in the management or administration of any property vested in a trustee, or would be in the best interests of the persons beneficially interested under the trust, but it is inexpedient or difficult or impracticable to effect the same without the assistance of the Court, or the same cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the trust instrument (if any) or by law, the Court may by order confer upon the trustee, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and

296 National Conference of Commissioners on Uniform State Laws "Uniform Trust Code" (2000), section 411(e).

297 Scottish Law Commission, above n 254, at 37.

298 Ibid, at 38.

299 Irish Law Reform Commission, above n 253, at 35.

300 *Farmers Trading Company Ltd v Persons directed to be served* HC Auckland M1533/93, 9 February 1995.



conditions (if any) as the Court may think fit, and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne, and as to the incidence thereof between capital and income:

Provided that, notwithstanding anything to the contrary in the instrument (if any) creating the trust, the Court, in proceedings in which all trustees and persons who are or may be interested are parties or are represented or consent to the order, may make such an order and may give such directions as it thinks fit to the trustee in respect of the exercise of any power conferred by the order.

- (2) Repealed.
- (3) The Court may from time to time rescind or vary any order made under this section, or may make any new or further order:
- (4) Provided that no such rescission or variation of any order shall affect any act or thing done in reliance on the order before the person doing the act or thing became aware of the application to the Court to rescind or vary the order.
- (5) An application to the Court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

### Relationship between sections 64 and 64A

- 5.47 The respective foundations of sections 64 and 64A are quite different. Section 64A allows variations to a trust instrument or revocation of a trust with the protection of the consent of the adult, capable beneficiaries and with the approval of the court. Because the consent of all the beneficiaries is either expressly obtained, or given by the court, the provision allows for variations that may be contrary to the settlor's intentions.
- 5.48 Section 64, in contrast, allows for transactions to be carried out that are not provided for in the trust instrument. It allows such transactions to take place without the protection of the beneficiaries' actual or implied consent. Instead, the provision states that the transaction can only be approved "subject to any contrary intention expressed" in the trust instrument – that is, subject to the intention of the settlor. As set out below, the proviso to subsection (1) was added later to diminish the extent of this restriction. These differences, as well as the express terms of the provisions themselves, seem to have implications for the breadth of section 64, as it is currently drafted.
- 5.49 Despite these differences, the courts have, on occasion, taken a flexible approach to the overlap between the two provisions. For example, in *Re Agar*,<sup>301</sup> after considering the range of potential beneficiaries on behalf of whom consent may need to be given by the court, and the potential detriment to those beneficiaries (such as, elements required for a variation under section 64A), Casey J held that the trustee had the power to purchase a property under section 64.
- 5.50 One matter for consideration is what the ongoing relationship between the two provisions should be, and whether indeed there is a need for both.

301 *Re Agar* [1981] 2 NZLR 684 (HC) at 689.



## Current elements of section 64

5.51 Since its introduction in 1936, some notable alterations have been made to the provision, so it now has its own unique flavour when compared with equivalents in other jurisdictions. It provides, in some ways, a narrower power and, in some ways, a wider one than its United Kingdom equivalent. The court's power to approve dealings under the section is more limited because it is expressed to be "subject to any contrary intention expressed in the instrument ... creating the trust".<sup>302</sup> The inclusion of this restriction makes the court's power considerably narrower than it had been before the 1956 Act, and was the subject of direct criticism in *Re Allison*.<sup>303</sup> Justice Adams could see no reason for limiting the court's jurisdiction in this way and thought that there would be general agreement that the opening words of section 64(1) should be deleted. The impact of the restriction was subsequently ameliorated by an amendment in 1960, when the proviso to section 64(1) was added.<sup>304</sup> The policy adopted was that the intent of the settlor could only be overruled with either the consent of all the trustees and those beneficially interested in the trust property, or if those people were represented at the hearing. To an extent then, section 64 reflects section 64A, however there is no express scope for the court to give consent on behalf of incapable beneficiaries. But, it may be implied that the court can supplant its consent for a non-consenting beneficiary or trustee who is represented at the hearing.

5.52 In *Winter v Attorney-General*,<sup>305</sup> Justice Fisher said:

Section 64 of the Trustee Act is essentially administrative in nature, empowering the Court to sanction specific transactions where they would be in the best interests of beneficiaries and there would otherwise be difficulties in effecting those transactions. The transactions in question are concerned with the non-distributive administration of the trust property. The provision does not permit the Court to interfere with the incidence of the beneficial interests under the trust.

5.53 The power under section 64 is wider than its English ancestor because the court can approve dealings that are not only "expedient" in the management or administration of the trust property but also those that would be "inexpedient or difficult or impracticable to effect" without the assistance of the court. Since 1960, the section may also be used to approve dealings that "would be in the best interests of the persons beneficially interested under the trust". Unlike in England, then, the court can approve transactions even where the trustees have the power to carry them out, but it would be "inexpedient or difficult or impracticable" to do so without the court's assistance.

302 This express restriction was included (in different terms) in the 1956 Act, as it was introduced. The modern wording was adopted in 1960 (see below).

303 *Re Allison (deceased)* [1958] NZLR 678 (SC).

304 In the 5th edition of *Garrow and Kelly's Law of Trusts*, the editors commented that this amendment was made in response to Adams J's comments in *Re Allison*. See NC Kelly *Garrow and Kelly's Law of Trusts and Trustees* (5th ed, 1982) at 249; see also *Re Greenwood* [1988] 1 NZLR 197 (HC) at 207.

305 *Winter v Attorney-General* HC Auckland, M333-IM 01, 21 December 2001 at [26].

- 5.54 Where it is only wider administrative powers (rather than alteration of beneficial interests) that are sought, section 64 offers a more convenient route than section 64A. This is because since it is not necessary to obtain the consent of every beneficiary of full age and capacity, and rather than considering the potential detriment to incapable beneficiaries, the court considers the beneficiaries' interests collectively.

### Alteration of beneficial interests not permitted

- 5.55 The courts have consistently held that section 64 does not allow for changes to the beneficial interests under the trust to be made.<sup>306</sup> Where changes to beneficial interests are sought this can be achieved with the consent of all adult beneficiaries, or an application must be made under section 64A.

### Variation of trust instrument permitted?

- 5.56 Section 64 allows the court to give trustees the power to effect a "sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, retention, expenditure, or other transaction". What is to be approved under section 64 is the proposed transaction itself, and the power conferred by the court is treated as if it were an overriding power contained in the original trust instrument.<sup>307</sup> Transactions considered by the courts have included investments that were not (before 1988)<sup>308</sup> possible under the Trustee Act 1956 and subdivisions of property. As under section 64A, the fact that a transaction facilitated under section 64 will lead to a lower tax liability is no a reason to withhold the court's approval.<sup>309</sup>
- 5.57 On a strict reading, section 64 does not appear to allow an actual variation to the document: the power to undertake the "transaction" is to be conferred by the court "by order". Nevertheless, New Zealand courts have used the provision to approve actual changes to trust instruments. The judgment in *Re Philips* refers to the application as one seeking orders "under section 64(1) ... conferring on [the trustees] power to amend a trust deed" and treats the proposed "amendment" as the relevant "transaction" to be approved under the provision.<sup>310</sup> There is a question as to whether this is an appropriate application of the provision. To allow amendments to a trust document under section 64, even if they are of an administrative nature, does not align with the policy underlying *Saunders v Vautier* or section 64A, unless all the beneficiaries are indeed legally capable and concur. It may be that in each instance where New Zealand courts have ordered the amendment of a trust instrument under section 64, the agreement of the beneficiaries was indeed acquired, but this is not clear from some of the judgments. In the alternative, it may be that the use of the phrase "the Court may by order confer upon the trustee, either *generally* or in any particular instance, the necessary power for the purpose" implies a power to amend the trust instrument, but this is not entirely clear either.

306 See *Re Smith (deceased)* [1975] 1 NZLR 495 (SC) at 497, *Re Lyell (deceased)* [1977] 1 NZLR 713 (SC) and *Banicevich v Gunson* [2006] 2 NZLR 11 (CA) at [46].

307 Butler, above n 281, at 238 citing *Re Mair* [1935] Ch 562.

308 Changes were made to the investment provisions under the 1956 Act by the Trustee Amendment Act 1988.

309 See *Re Whittome's Trust* [1962] NZLR 773 (SC); *Re Beetham's Trust* [1964] NZLR 576 (SC).

310 *Re Philips New Zealand Ltd* [1997] 1 NZLR 93 (HC) at 94 and 101.

- 5.58 The third possibility is that the history of the provision has led to it being applied in this manner. Prior to the introduction of section 64A, section 64(2) provided for the variation of trusts in some circumstances.<sup>311</sup> It can be presumed that this explains why the heading of section 64 (“Power of Court to authorise dealings with trust property *and variations of trust*”) differs from its United Kingdom and New Zealand predecessors.<sup>312</sup> Despite the replacement of section 64(2) with the more comprehensive section 64A in 1960, the last four words in the heading were retained. The Commission can only speculate as to whether the failure to remove the words was intentional or an oversight. Under the Interpretation Act 1999, headings can be used to help ascertain the meaning of a statute.<sup>313</sup> The retention of the words may, therefore, have encouraged the use of section 64 as a variation provision.
- 5.59 One way of looking at the difference between section 64 and section 64A is to contrast the rationales on which they appear to be based. Section 64A, as an extension of the *Saunders v Vautier* rule, is concerned with beneficiaries’ proprietary rights as opposed to the settlor’s intention. In contrast, section 64 appears to be used to give effect to the settlor’s intentions, in line with the obligational view of trusts.
- 5.60 The issue for consideration, as the Commission sees it, is whether section 64 should be expressly restricted to the approval of certain transactions, and it made clear that any more fundamental amendment to trustees powers or any other terms of the trust should only be permissible under section 64A, or whether section 64 should explicitly allow the variation of trusts. This would make it clear that any variation of a trust can only be made with the consent of the beneficiaries, and that while the court can provide consent on behalf of incapable beneficiaries, it cannot supplant its approval for the views of those that withhold consent. It was asked, above, whether section 64A should be extended so that a variation of any nature can be made under the provision. On one view this would diminish the need for section 64. However, there is also an argument that the fact that beneficiary consent is not required under section 64 means it offers a simpler alternative than section 64A and thus warrants retention. This would essentially confirm *Winter*. Indeed, its convenience may warrant its extension so that it can be used for a broad range of administrative variations, as the New Zealand courts have done on occasion, without the need for beneficiary consent. One possibility would be to restrict section 64 to dealings with trust assets. It may be helpful to consider the principles behind section 64 and 64A. Should the law emphasise beneficiaries’ proprietary rights in trusts by broadening the types of variation that can be approved under section 64A? To what extent should trustees be able to give effect to settlors’ intentions by varying administrative provisions of trusts?

311 Until 1960, section 64(2) provided that where a “rearrangement” of the trusts could not be effected because one or more of the beneficiaries under the trust were unborn, unascertained, unknown or under a disability, the court could approve the rearrangement on their behalf provided that the rearrangement was not to the detriment of any of those beneficiaries.

312 The provision in the 1936 Statutes Amendment Act and Trustee Act 1925 (UK) both refer only to the “Power of the court to authorise dealings with trust property”.

313 Interpretation Act 1999, s 5.

### Meaning of “contrary intention”

5.61 The opening words of section 64(1) mirror the language in section 2(4) and (5) of the Act. As noted above, the proviso to section 64(1) was added after criticism that the words placed too great a constraint on the court’s jurisdiction. Before 1956, the courts were not restricted by any contrary intention expressed in the trust instrument when considering whether to approve dealings.

5.62 “Contrary intention” does not mean “unless expressly forbidden”. Rather the trust instrument as a whole should be considered. The course to be followed is to:<sup>314</sup>

place the statutory subsection alongside the provision of the instrument and then determine whether the provisions in the trust deed express a contrary intention, or to adopt the language of one of the cases discussed in *Re Havill*, whether on a fair reading of the trust deed, one can say a power of sale ... would be inconsistent with the purport of the trust deed.

5.63 In *Banicevich v Gunson*,<sup>315</sup> the Court of Appeal issued the following reminder:

It is also clear that the proviso to section 64(1), while it permits in certain circumstances an order overriding a contrary intention expressed “in the instrument (if any) creating the trust”, is still constrained by the other requirements of the main part of subs (1). That is to say, an order can be made under the proviso only if it is shown to be expedient in the management or administration of trust property or if it is shown that it would be in the best interests of everyone beneficially interested under the trust.

### Meaning of “expedient”

5.64 A transaction approved under section 64 must be expedient “for the trust as a whole”, rather than for one or more beneficiaries: “the court should not sanction the transaction, however expedient it may be for one beneficiary, if it is inexpedient from the point of view of the others.”<sup>316</sup>

5.65 Again, the Commission is not aware of any particular difficulties caused by these elements of the provision. It would be grateful for any feedback about any problems caused by the provision or improvements that could be made.

314 *Re Nichols* HC Dunedin M104/96, 18 March 1999, referring to *Re Havill (deceased)* [1968] NZLR 1116 (SC) at 1126.

315 *Banicevich v Gunson* [2006] 2 NZLR 11 (CA) at [43].

316 See *Re Craven’s Estate* [1937] Ch 431 at 436 and *Banicevich v Gunson* [2006] 2 NZLR 11 (CA) at [42].

- 5.66 This paper has raised several options for reform as regards revocation, variation and resettlement of trusts. The Commission's provisional view is that the basic *Saunders v Vautier* position should be retained: the consent of all adult and capable persons with a beneficial interest in the trust fund should be required. This principle is well established and sensibly founded on the notion that those with the beneficial interest in property should have the power to decide what happens to that property.
- 5.67 The legislation currently does not explicitly state that the consent of the beneficiaries is required for a trust to be revoked or varied. It could be made clearer by setting out the *Saunders v Vautier* rule and the common law extensions to it. The Commission proposes that the legislation allow beneficiaries to consent to a resettlement of the trust, as well as a revocation and variation. The legislation could also recognise (or clarify) cases where a court could give approval in place of certain types of beneficiaries.
- 5.68 The Commission proposes the legislative enactment of the principles that:
- (a) adult beneficiaries who are legally competent and together absolutely entitled to the entire trust property are together entitled to revoke, vary or resettle the trust;
  - (b) an adult beneficiary who is legally competent and entitled to a fixed share of trust property is entitled to have the trust property (so far as is practicable) transferred to him or her;
  - (c) where trustees under a fixed discretionary trust have a discretion as to the proportion of the trust property to give to each beneficiary but must give the whole of the trust property to some or all of the beneficiaries, adult beneficiaries who are legally competent, are together entitled to revoke, vary or resettle the trust.
- 5.69 The Commission would be interested to receive views on whether the legislation should authorise the court to consent to a revocation, variation or resettlement of a trust on behalf of the following:
- minors (currently section 64A(1)(a));
  - incapacitated persons (currently section 64A(1)(a));
  - persons who may become entitled at a future date or on the happening of a future event or once they become a member of a certain class (currently section 64A(1)(b));
  - unborn persons (currently section 64A(1)(c));
  - persons who have an interest, but who it is impracticable to contact;
  - persons who have an interest but cannot be traced despite reasonable efforts to do so;
  - beneficiaries under protective trusts (currently section 64A(1)(d));
  - persons with an interest in the trust property that is too remote or too conditional;
  - persons with an interest in the trust property that is of negligible value;
  - any beneficiary who would benefit from the revocation, variation or resettlement, but who has refused to consent to it.



- 5.70 The Commission considers that it may be helpful for the legislation also to provide the court with power to direct trustees that they must seek the consent of any person who would otherwise fall within any of these categories. The Commission seeks views on each of these possible categories. How far should a provision allowing the court's approval to a variation or revocation on behalf of beneficiaries go?
- 5.71 The Commission is of the view that the scope of the court's power under section 64 should be clarified, and seeks views about whether certain types of variations should be allowed under section 64 and whether the consent of beneficiaries is required.

## QUESTIONS

- 5.72 The Commission would appreciate responses to the questions set out below.

Q8 If all the beneficiaries agree to a variation or the court has approved a variation, should the settlor's intention be relevant to whether a variation takes place?

Q9 Should the extended rule in *Saunders v Vautier* (that is, allowing the revocation and variation of a trust based on the consent of the beneficiaries) be set out in legislation?

Q10 Should there be limits on the extent to which a trust can be varied? Do you consider that the concept of leaving the substratum of the trust intact should be a restriction on variation or resettlement?

Q11 How far should it be possible to enlarge the powers of the trustee under the legislation from those set out in the deed?

Q12 Should section 64A be rewritten to explicitly allow the court to approve resettlements in addition to variations and revocations?

Q13 Are there any problems with the requirement that the court must not approve an arrangement on behalf of any person that is "to his detriment"?

Q14 On whose behalf should the court be empowered to provide consent for a revocation or variation of a trust? Do you see any problems with allowing the court to consent on behalf of any of the categories of persons listed in paragraph 5.69?

Q15 Should the court have the discretion to direct trustees to seek the consent of any person for whom court approval would be possible?

Q16 What should be the relationship between section 64 and section 64A? Should new legislation clarify that variations to a trust instrument should only be made with the agreement of the beneficiaries, or only under section 64A, or are there some merely administrative amendments that should be able to be made more simply under section 64?



# Appendices



# Appendix A

## Questions


### PART ONE – THE PERPETUITIES ACT 1964

- Q1 Do you think that the need to restrict dead hand control and to encourage the alienability of property continue to be valid policies that need to be upheld?
- Q2 Do you think that the reasons given for the rule justify its existence in its current form?
- Q3 Are there any other problems with the rule?
- Q4 Are there other reasons why the rule should be retained?
- Q5 Do you favour any of the following reform options:
- further statutory reform of the rule, such as extending the perpetuity period (for instance, to 125 or 150 years) or limiting the types of dispositions to which the rule applies (for instance, exempting commercial transactions from the rule);
  - abolition of the rule;
  - replacement of the rule with a new rule in support of the same policy, such as one that limits the duration of a trust rather than being concerned with vesting.
- Q6 Do you think that any changes should apply retrospectively to existing trusts?
- Q7 Are you aware of any problems with section 21 of the Perpetuities Act 1964 and how do you think these could be resolved?

### PART TWO – THE REVOCATION AND VARIATION OF TRUSTS

- Q8 If all the beneficiaries agree to a variation or the court has approved a variation, should the settlor's intention be relevant to whether a variation takes place?
- Q9 Should the extended rule in *Saunders v Vautier* (that is, allowing the revocation and variation of a trust based on the consent of the beneficiaries) be set out in legislation?
- Q10 Should there be limits on the extent to which a trust can be varied? Do you consider that the concept of leaving the substratum of the trust intact should be a restriction on variation or resettlement?



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- Q11 How far should it be possible to enlarge the powers of the trustee under the legislation from those set out in the deed?
- Q12 Should section 64A be rewritten to explicitly allow the court to approve resettlements in addition to variations and revocations?
- Q13 Are there any problems with the requirement that the court must not approve an arrangement on behalf of any person that is “to his detriment”?
- Q14 On whose behalf should the court be empowered to provide consent for a revocation or variation of a trust? Do you see any problems with allowing the court to consent on behalf of any of the categories of persons listed in paragraph 5.69?
- Q15 Should the court have the discretion to direct trustees to seek the consent of any person for whom court approval would be possible?
- Q16 What should be the relationship between section 64 and section 64A? Should new legislation clarify that variations to a trust instrument should only be made with the agreement of the beneficiaries, or only under section 64A, or are there some merely administrative amendments that should be able to be made more simply under section 64?

# Appendix B

## Consultation List

The Law Commission has consulted with the following during the review of the law of trusts:

- Auckland Energy Trust Board
- Ayres Legal
- David Bigio
- John Brown
- Chapman Tripp
- United Kingdom Law Commission
- Glaistor Ennor Solicitors
- Anthony Grant and Richard Green
- Inland Revenue
- KPMG
- Legal Services Agency
- Ministry of Economic Development
- Ministry of Justice
- Ministry of Social Development
- Anthony Molloy QC
- New Zealand Law Society
- New Zealand Trustee Services
- Office of the Official Assignee
- Professor John Prebble
- Price Waterhouse Coopers
- Reserve Bank of New Zealand
- Scottish Law Commission
- Taylor Grant Tesiram
- The Treasury

We are grateful for their contribution.



