



# WEEKLY TAX BULLETIN

[www.thomsonreuters.com.au/tax](http://www.thomsonreuters.com.au/tax)



## Restrictions on decision making for discretionary trust trustees

*by Matthew Burgess, Director, View Legal*

In holistic estate planning, the greatest strength of a discretionary trust (being the near absolute flexibility for the trustee to determine how income and capital are allocated), can be seen to also be the greatest weakness.

The protection at law of the integrity of the flexibility granted to the trustee of a discretionary trust is arguably best encapsulated by the prohibition on trustees of discretionary trusts on 'fettering' their decision making.

### *The prohibition on fettering*

As explored in this Bulletin previously (see 2017 WTB 44 [1508]), the principle in relation to the prohibition on a trustee fettering its discretion is succinctly captured in the decision of *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liquidation)* [2001] FCA 1628.

In this case, the key concepts concerning fettering were summarised as follows:

"... a trustee is not entitled to fetter the exercise of a discretionary power (for example a power to sale) in advance: *Thacker v Key* (1869) LR 8 Eq 408; *In re Vestey's Settlement* [1951] Ch D 209.

If the trustee makes a resolution to that effect, it will be unenforceable, and if the trustee enters into an agreement to that effect, the agreement will not be enforced (*Moore v Clench* (1875) 1 Ch D 447), though the trustee may be liable in damages for breach of contract ...".

A more modern explanation is provided by J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (8th ed, 2016, LexisNexis), which explains the principle as follows:

"Trustees must exercise powers according to circumstances as they exist at the time. They must not abandon or fetter their exercise of a power by anticipating the arrival of the proper period in purporting to release the power or by undertaking beforehand as to the mode in which the power will be exercised in futuro."

The high profile trust case of *Owies v JJE Nominees Pty Ltd (in its capacity atf Owies Family Trust)* [2022] VSCA 14 provides further context about the rules in this area as follows:

"... where there is a discretionary power, the trustee must turn its mind to whether to exercise the power and, in each case, the discretion must be exercised as and when it arises. A trustee may not divest itself of the continuing responsibility of consideration by adopting a universal rule or by acting under the dictates of another."



# WEEKLY TAX BULLETIN

[www.thomsonreuters.com.au/tax](http://www.thomsonreuters.com.au/tax)



## ***Recent decision***

More recently again, *Irwin v Pamplin & Ors (No 4)* [2024] NSWSC 73, was a case that involved a relatively complex factual matrix, which in part considers the rule against trustee fettering. Broadly the background centred around brothers who were members of a Nomads Motorcycle Club and were found to have transferred all assets to various structures controlled by their mother following illicit drug trafficking convictions. The 'warehousing' of the assets was driven by asset protection concerns due to the possible application of proceeds of crime legislation and were also couched with reference to holistic estate planning objectives.

A key part of the case was an estoppel claim, to effectively force the trustee of a discretionary trust to acknowledge the terms of an oral agreement about how the assets of the trust would be administered. The court had to consider whether allowing the estoppel application to succeed would be a breach of the rule against trustee fettering and have the effect of prejudicing other discretionary objects of the trust (who were not joined to the proceedings).

In concluding that in granting the estoppel there was no breach of the rule against trustee fettering, the court confirmed:

1. There is a general principle that the fundamental nature of a trustee's duty is to act in accordance with a trust deed and that an agreement to fetter the exercise of a discretionary power is likely to be unenforceable.
2. The general rule however does not prevent equity, by way of an estoppel, to operate as a practical fetter or limit on a trustee, although such occurrences will be rare - particularly given the difficulties where, for example, the membership or group of beneficiaries who may be impacted by the estoppel is very large and the position of the discretionary objects needs to be considered (see *Public Trustee v Smith* [2008] NSWSC 397 and *English & Ors v Keats & Ors* [2018] EWHC 673 (Ch)).
3. In this case, a key factor was that the parties to the arrangement held a common assumption prior to the creation of the trust - that is, the trustee actually knew of, and was therefore bound by, the terms of the understanding or common assumption that the estoppel claim would enforce.
4. Granting the estoppel to prevent the trustee from dealing with the income and capital of the trust other than in a manner than was consistent with the terms of the arrangement was permissible, even if this would impact on some non-specified beneficiaries.
5. Further, the estoppel did not amount to the court imposing a universal rule on the trustee; rather it was a moulding of relief to suit the issue in the case and an application of the "cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and the particular facts" (see *Warman International Ltd v Dwyer* [1995] HCA 18).
6. Ultimately, the effect of granting the estoppel was not held to be to compel the trustee to exercise its power in a particular way in the future, but rather to disable it from doing so in respect of a certain percentage of the assets of the trust.
7. That is, as confirmed on appeal in *Pamplin v Irwin* [2024] NSWCA 213, the requirement the court imposed was only that no less than 50% of the income or capital of the trust be distributed in a certain



# WEEKLY TAX BULLETIN

[www.thomsonreuters.com.au/tax](http://www.thomsonreuters.com.au/tax)



manner. This requirement did not preclude the trustee from considering any or all of the discretionary objects. Further it was open to the beneficiary who was to receive the 50% to consent to a distribution of capital or income which would result in some other outcome. In substance therefore, the order gave an entitlement to the relevant beneficiary to insist that they would need to approve any distribution of income or capital which would result in them not receiving at least 50% of the distribution. While this did constrain the powers of the trustee, the limitation was held to be considerably removed from the restrictions protected by the doctrine of fettering.

