STEP JOURNAL

Technical 26 September 2025 Issue 5, 2025 Matthew Burgess

The 125-year shakeup

Matthew Burgess TEP highlights Queensland's recent extension to the perpetuity period for trusts in Australia

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Every trust established in Australia, with the exception of those in South Australia, has a maximum lifespan known as the vesting period or vesting date.

This maximum lifespan arises from three sources:

- the common-law rule against perpetuities;
- the trusts act in the relevant jurisdiction; and
- the trust instrument.

In general, the vesting date will be the date 80 years from the trust's date of establishment. However, the trust instrument may specify a shorter period.

In each jurisdiction, the legislature has amended the rule against perpetuities. Most jurisdictions have adopted one of two approaches:

- replacing the 'life in being' approach summarised above with a specified vesting period of 80 years – the approach adopted in New South Wales and the Australian Capital Territory (ACT); or
- allowing either the 'life in being' approach or a specified 80-year vesting period – as in Western Australia, Victoria, Northern Territory and Tasmania – or a 125-year vesting period, which from 1 August 2025 is also the approach in Queensland.

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Never-ending trusts

In South Australia, the rule against perpetuities has essentially been abolished, meaning trusts are not required to have a vesting date.

The abolition of the perpetuity period in South Australia is subject to s. 62 of the *Law of Property Act 1936*. This section gives the Supreme Court (the SA Court), if requested, the power to order a trust to vest if, 80 years or more after the disposition, the trust is unvested, taking into account the spirit of the original disposition. In other words, although a trust will not automatically vest in South Australia after 80 years, an interested party may apply to the SA Court to exercise its discretion to wind up the trust after that period.[1]

Despite the legislative pathways for achieving an extension, advisors must carefully consider second-order consequences.

Importantly, superannuation funds, regardless of their jurisdiction, can also last indefinitely.[2] This is provided under s.343 of the *Superannuation (Supervision) Act 1993*, which states, 'The rules of law relating to perpetuities do not apply, and are taken never to have applied, to the trusts of any superannuation entity, whether the entity was established before, or is established after, the commencement of this section'.

Position in Queensland

From 1 August 2025, pursuant to s.201 of Queensland's *Property Law Act 2023* (the Act), the statutory perpetuity period for trusts settled under Queensland law is 125 years, subject to the terms of the trust deed. This 45-year increase from the 80-year limit aligns Queensland with the position in England and Wales, which made an analogous change in 2010.

Existing trusts may also be able to access the 56 per cent increase in potential longevity (via ss.216 and 217 of the Act) without court application if:

- the trust deed includes a variation power broad enough to allow it; or
- all beneficiaries are adults with full legal capacity and agree to the change.

Each of these pathways has nuances that advisors must note. For example, many trust deeds, even those settled recently, have narrow variation powers – and in some instances expressly prohibit changes to the perpetuity period. In addition, potential beneficiaries of discretionary trusts will typically include numerous infants – and even if all beneficiaries are adults, the wide range will make it practically impossible to obtain consent.

Despite the legislative pathways for achieving an extension, advisors must carefully consider second-order consequences. These include trustee duties and revenue consequences, such as capital gains tax (CGT) and stamp duty, to the extent that the relevant trust holds dutiable property.

Court application

As has been the position historically, trustees also have the right to apply to the Queensland Supreme Court (the Court) for approval to extend a vesting date to the maximum period permitted: now 125 years.

Interestingly, the new regime has already featured in a matter before the Court. In *Re: In the Matter of the Evangelista Family Trust*, the deed was established in 1975 and had a 50-year vesting date. Although it granted the trustee an unfettered discretion to vary the trusts, that power was subject to the restriction, 'except to the extent of the vesting date'.[3]

The parties had confirmed that an immediate vesting would trigger very substantial CGT and duty implications. The Court, in granting the extension, confirmed that it was a well-established proposition that an extension may have the potential effect of deferring revenue consequences to a later date. It noted that such a deferral does not deprive proper authorities of revenue; rather, it merely defers the costs to another date, subject to existing laws.[4]

Advisors should view the potential to access a 125-year vesting period as a call to review all existing trust deeds.

Relevantly, the Court acknowledged the (at the time) proposed amendments of the Act. These would not have commenced until after the then-existing vesting date of the trust, but the Court recognised that the amendments would have otherwise extended the maximum perpetuity period of Queensland-regulated trusts to 125 years. This point was considered relevant only because it provided the Court with assurance that there was nothing unusual about granting the perpetuity date of 80 years.

Disadvantages of trust vesting

The significance of the extended vesting period is perhaps best illustrated by considering the issues triggered by a trust ending. The following is not intended to be an exhaustive list, but the ramifications (and in most cases, disadvantages) of a trust vesting can include:

- CGT being payable on the increase in the value of any assets being transferred since the date they were acquired, noting that the Australian Taxation Office has issued a ruling in relation to trust vesting[5]
- Income tax being payable on non-capital assets, such as plant, equipment and trading stock.
- Stamp duty being payable on the transfer of the assets, to the extent that they comprise dutiable property in the relevant jurisdiction.
- Substantial tax, stamp duty and commercial costs being incurred to subsequently transfer the assets out of the name of a beneficiary.[6]
- Asset protection exposure for the beneficiary receiving the assets in the event that they subsequently commit an act of bankruptcy or endure relationship misadventure.
- When an individual receives the assets, needing to update their estate plan to reflect the additional assets owned in their personal name.

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Jurisdiction selection

One key question for advisors from 1 August is whether an existing trust can have its jurisdiction changed from another state to be regulated under the Queensland regime.

The decision in *Clarke* v *Ebdon* provides potentially useful guidance, though it considered a conversion of a trust to South Australian law.[7] In this case, the SA Court was willing to conclude that changing the proper law of the trust to South Australia was permitted under the legislation because the variations met the stated criteria, namely:

- there was good reason to make the variation;
- the change was in the interests of beneficiaries;

- the change would not result in one class of beneficiaries being unfairly advantaged to the prejudice of another class;
- the variation accorded, as far as reasonably practicable, with the spirit of the trust (that the trust last in perpetuity); and
- the variation would not disturb the trust beyond what was necessary to give effect to the reason for the variations.

As a further extension of these concepts, where the settlor of a newly established trust determines that the proper law is to be South Australia, it seems clear that the courts will accept that decision, arguably regardless of the connection with South Australia.[8] Whether the Queensland Court will adopt a similar approach remains to be seen.

Conclusion

Advisors should view the potential to access a 125-year vesting period as a call to review all existing trust deeds, at least to:

- confirm the current vesting date;
- assess whether the deed allows for variation; and
- take the required steps to extend the trust's life to 125 years where appropriate.

These arguably simple steps should ideally be part of a holistic review of a trust deed's key facets and align with the wider estate and succession plan for each key beneficiary.

- [1]There is no perpetuity period for charitable trusts in any Australian jurisdiction.
- [2]Superannuation is regulated under Commonwealth legislation, which applies uniformly across all Australian states and territories.
- [3]*Re: In the Matter of the Evangelista Family Trust* [2025] QSC 83
- [4]*Re Arthur Brady Family Trust* [2015] 2 Qd R 172
- [5]

Taxation Ruling 2018/6

- [6]Australia is a federation comprising six states and two self-governing territories. Trust law is regulated at the state and territory level and may therefore vary depending on the applicable jurisdiction.
- [7][2020] SASC 67
- [8]*Salkeld* v *Salkeld* (no. 2) [2000] SASC 296