IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
PROBATE LIST

Not Restricted

S CI 2015 02020

W E PICKERING NOMINEES PTY LTD (ACN 007 817 825) AS TRUSTEE OF THE W E PICKERING FAMILY TRUST & ORS — Plaintiffs

v

JACQUELINE ROBYN PICKERING & ORS — Defendants

JUDGE:	McMillan J
WHERE HELD:	Melbourne
DATES OF HEARING:	16 July, 4 December 2015
DATE OF JUDGMENT:	4 March 2016
CASE MAY BE CITED AS:	W E Pickering Nominees Pty Ltd & ors v Pickering & ors
MEDIUM NEUTRAL CITATION:	[2016] VSC 71

TRUSTS — Power of the Court to vary trust — Where plaintiffs seek variations to trust deed — Where defendants consent to proposed variations — Where interests of potential unborn beneficiaries affected by proposed variations to trust deed — *Trustee Act 1958*, s 63A — *George v Kollias and Ors* [2007] VSC 46 — *Thomas Hare Investments v Hare* (2012) 34 VR 656 — *Alan Synman Family Trust* [2013] VSC 364 — *Trustee Act 1958*, s 63 — *Riddle v Riddle* (1952) 85 CLR 202 — *Royal Melbourne Hospital v Equity Trustees Limited* (2007) 18 VR 469 — *Re Barns* [2011] VSC 314 — *Re Dion Investments Pty Ltd* (2014) 87 NSWLR 753.

PRECEDENT — *stare decisis* — Where decision of a single judge of same superior court — Supreme Court of Victoria — *Colonial Foundation Ltd v Attorney-General* [2007] VSC 344 — *Re Barns* [2011] VSC 314.

PRECEDENT — Principle of comity — Where decision of intermediate appellate court in Supreme Court of New South Wales — Interpretation of statutory provision — Where equivalent statutory provision but not uniform national legislation — *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 — *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 — *Re Dion Investments Pty Ltd* (2014) 87 NSWLR 753.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	R Gordon, solicitor advocate	Partners Legal
For the Defendants		Clancy & Triado

HER HONOUR:

Introduction

1 The first plaintiff is the trustee of the W.E. Pickering Family Trust ('the trust'). The trust was constituted by deed dated 1 February 1977 ('the deed') between George Stewart Pickering as settlor and the trustee.[1] The second, third and fourth plaintiffs are the directors of the first plaintiff.

2 Clause 2 of the deed defines a closed class of beneficiaries, consisting of William Edward Pickering and Jacqueline Robyn Pickering, their six children, and the grandchildren of William Edward Pickering and Jacqueline Robyn Pickering.

3 The sixteen defendants are all of the living adult beneficiaries of the trust.[2] There are two minor beneficiaries of the trust, who are the children of the fifth defendant. When the proceeding was issued, they were not named as defendants to the proceeding. Subsequently, the two minor beneficiaries were joined as defendants to the proceeding, represented by their mother, the fifth defendant, as their litigation guardian.

4 The trust is part of a larger corporate structure that operates a national transportation business. The trustee does not own any shareholdings in any of the entities within that transportation business. The trust owns 542,575 units out of 1,560,020 in the Pickering Properties Unit Trust and has other substantial assets, including commercial properties in Victoria. As at 30 June 2013, the trust had non-current trust assets with an historical cost of approximately $1,589,000.[3] The trustee has its registered office and principal place of business in Victoria. As such, this Court has jurisdiction to deal with the application.[4]

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1 Affidavit of Rick Pickering, 30 January 2015, [7], exhibit RP-1.
2 Affidavit of Rick Pickering, 30 January 2015, [7], exhibit RP-1: trust deed, cl 2.
3 Affidavit of Rick Pickering, 30 January 2015, [22], [24].
4 *Re Dion Investments Pty Ltd* [2013] NSWSC 1941, [32]–[34] (Young AJ). On appeal, the finding of the trial judge on jurisdiction was not commented upon and should, therefore, be accepted.

Plaintiffs' application

5 By originating motion filed 28 April 2015, the plaintiffs seek orders, pursuant to ss 63, alternatively 63A, of the *Trustee Act 1958* ('the Act'), that the deed be varied and amended in the following manner:

(a) to expand the class of beneficiaries of the trust to include siblings, spouses, children and other relatives of existing beneficiaries and certain related companies and trusts;

(b) to provide for the second, third and fourth plaintiffs to be the appointors of the trust; and

(c) to provide the trustee with a general power of amendment of the trust.

6 Specifically, the plaintiffs seek to include the following clauses in the deed:

1. The W.E. Pickering Family Trust (the 'trust') be varied by inserting the following before 'any further child or children' in clause 2:

in relation to any person described in sub paragraph (a) – (h):

(i) his or her spouse, former spouse, widow or widower;
(ii) his or her children and remoter issue;
(iii) his or her parents, grandparents, brothers, sisters, aunts, uncles or cousins; and
(iv) any person relying on him or her for maintenance, education or support;
(v) any company in which that person has a beneficial interest or in which that person is a director;
(vi) any trust (other than a trust where a distribution to it would breach the rule of law or equity known as the 'rule against perpetuities', as modified by any relevant legislation) under which that person is capable of receiving any benefit, whether or not any other person is capable of receiving a benefit under that trust;
(vii) any corporation, association or body whether incorporated or unincorporated which may legally be the subject of a charitable trust under the proper law of this deed, which the trustee from time to time nominate.

2. The trust be varied after clause 15(c), by inserting the following clauses 15(d), 15(e), 15(f), 15(g), 15(h), 15(i), 15(j), 15(k), 15(l), 15(m):

(d) The persons specified as Roger Stewart Pickering, Daryl John Pickering and James Stewart Pickering are to hold office as joint appointors.
(e) If the appointor ceases to be an appointor and a successor has not been appointed in accordance with clauses 15(f) or 15(i), the trustee may appoint a new appointor.

(f) Any person for the time being holding office as an appointor may by instrument in writing appoint some other person or persons to be appointor in succession.

(g) An appointor may resign his office by giving not less than 30 days' notice in writing to the trustee.

(h) If an appointor resigns from office and there is at any time after such resignation no appointor in office, he may (notwithstanding his resignation) by instrument in writing appoint himself or some other person to be the appointor.

(i) The appointor has power to remove a trustee and to appoint any new trustee by notice in writing. The appointor has the power to make a determination in the event of a disagreement between the trustees.

(j) If at any time there is more than one person holding office as appointor, then any powers or discretions capable of being exercised by the appointor pursuant to this deed require the unanimous consent of all such persons holding office as appointor.

(k) A person ceases to be appointor if he is found to be a lunatic or of unsound mind or if he dies whilst in office. If at the date of his death no other person holds office as appointor, the executor or administrator of the estate of that person or, if more than one, the executors or administrators acting jointly are to hold office as appointor.

(l) If no appointor is in office, the trustee or trustees has power by instrument in writing at any time and from time to time in its absolute discretion to appoint any new or additional trustees on such terms and subject to such conditions as it thinks fit.

(m) An appointor who commits an act of bankruptcy or has an action brought against him under the Corporations Act shall be disqualified from the position of appointor.

3. The trust be varied after clause 16, by inserting the following amendment clause as 16(a);

(a) The trustee may by deed, or written instrument (whether executed or unexecuted), add to, vary, delete or revoke any of the provisions of the trust deed, including provisions which confer powers, authorities and discretions on the trustee, except that any such addition, variation, deletion or revocation must not affect any vested interest in the income or extend the vesting date.

Background

7 William Edward Pickering died in 2012 ('the deceased'). By his will dated 19 September 2011, the deceased:

(a) purported to appoint the second, third and fourth plaintiffs as joint appointors of the trust: clause 5;

(b) bequeathed the deceased's shares in the trustee to the second, third and fourth plaintiffs: clause 6;

(c) expressed a wish that the trustee of the trust resolves to make a capital distribution of certain specified assets into the names of the second plaintiff and Jill Elizabeth Pickering as trustees of the R&J Pickering Family Trust; the third plaintiff and Pauline Michelle Pickering as trustees of the D&P Pickering Family Trust and the fourth plaintiff and Dellana Kaye Pickering as trustees of the J&D Pickering Family Trust as tenants in common in equal shares and proportions: clause 11; and

(d) expressed a wish that the trustee resolves to make a capital distribution of all other assets of the trust to his three daughters, being the second, third and fifth defendants equally: clause 12. [5]

8 The plaintiffs have received legal advice to the effect that the trust can only be varied without capital gains tax implications if the proposed variations to the deed are made with the approval of the Court.[6] The plaintiffs submit that, in any case, in light of the absence of a provision for amendment in the deed, such a variation could only take place with this Court's approval.

9 All of the adult beneficiaries of the trust, the two minor beneficiaries and the trustee consent to the deed being amended so as to allow for greater flexibility in the management of the trust's activities, including how the income and capital of the trust is distributed; for tax, asset management and succession planning relating to the trust; and for the management of the trust in a manner consistent with the wishes expressed in the deceased's will.

10 The adult beneficiaries and the two minor beneficiaries appreciate the effect that the proposed orders may have on their distributions from the trust and understand that one or more of them may end up not taking any distributions from the trust.[7]

11 In affidavits filed 1 December 2015, the second, third and fourth plaintiffs, who are the directors of the trustee, referred to the deceased's wishes as expressed in

5 Affidavit of Rick Pickering sworn 30 January 2015, [11], exhibit RP-3.
6 Affidavit of Rick Pickering sworn 30 January 2015,[25]-[27], exhibit RP-9.
7 Affidavit of Rick Pickering, 30 January 2015, [29].

clauses 5 and 11 of his will and depose of their belief that the orders sought in this proceeding are consistent with those wishes. They also depose as follows:

(a) the intention of the trustee is to continue to use the trust assets in the operation of the business and it does not intend to distribute any trust assets while the business continues to operate;

(b) knowing that the trustee is not bound by the deceased's wishes, the trustee intends to distribute the trust assets in accordance with his expressed wishes at the time when any of the assets are distributed and, to the extent possible, at the relevant time;

(c) to the extent that the beneficiaries in the deceased's will are not alive at the relevant time, the directors of the trustee intend to distribute to the lineal descendants of the deceased's beneficiaries;

(d) the trustee intends to distribute income from the trust from time to time to the expanded class of beneficiaries as set out in the originating motion;

(e) the directors of the trustee do not have any current intention to terminate the trust or its operations and intend to keep the trust on foot indefinitely or until, at the latest, the trustee is required to vest the trust; and

(f) the directors are not aware of any circumstances that may compel them to terminate the operation of the business, distribute the trust assets or vest the trust.

Procedural history

12 In support of their application, the plaintiffs relied on four affidavits: an affidavit of the second plaintiff sworn 30 January 2015, an affidavit of the third plaintiff sworn 29 January 2015, an affidavit of the fourth plaintiff sworn 30 January 2015 and an affidavit of the accountant for the first plaintiff, Rick Pickering, sworn 30 January 2015.[8] These affidavits were filed on 30 April 2015.

13 By summons filed 18 May 2015 by the plaintiffs, the proceeding was listed in the Probate List on 12 June 2015. In the week prior to 12 June 2015, the plaintiffs

[8] The accountant for the first plaintiff is not related to the Pickering plaintiffs or defendants.

forwarded minutes of consent orders signed by the plaintiffs and the then defendants containing substantially the same orders as sought in the summons. At that stage, no notice of appearance was filed on behalf of the defendants. The proceeding was adjourned on the papers for plaintiffs to provide written submissions in support of their application and for the defendants to file an appearance.

14 The plaintiffs forwarded their written submissions on 17 June 2015 addressing the power of the Court to make the orders sought by the plaintiffs pursuant to ss 63 and 63A of the Act. The Court was not satisfied that the submissions addressed all issues and listed the proceeding for further directions on 16 July 2015.

15 At that hearing, Mr R Gordon, solicitor-advocate for the plaintiffs, informed the Court that the plaintiffs sought orders pursuant to s 63A of the Act and the plaintiffs 'did not press s 63' of the Act. He also informed the Court that there were two minor beneficiaries of the trust. The Court informed Mr Gordon that the minor beneficiaries needed to be represented in the proceeding and that the defendants had not yet filed an appearance in the proceeding. The further hearing of the proceeding was adjourned pending further communications from the plaintiffs.

16 Between 18 August and 23 November 2015, the Court made numerous enquiries of the plaintiffs as to the progress of the proceeding. On 14 October 2015, the Court was informed that the defendants had obtained legal representation and that the fifth defendant consented to act as litigation guardian on behalf of the two minor beneficiaries of the trust.

17 On 28 October 2015, the plaintiffs informed the Court that the minor beneficiaries would be joined to the proceeding. No further documents were filed in respect of an application to appoint a litigation guardian for the minors. The defendants had not filed a notice of appearance.

18 On 23 November 2015, pursuant to r 1.14(2) of the *Supreme Court (General Civil Procedure) Rules 2015*, the Court informed the solicitors for the plaintiffs and the

defendants that the proceeding was listed for directions on 4 December 2015 as there had been no progress in the proceeding.

19 On 30 November 2015, the solicitors for the defendants filed a notice of appearance on behalf of the defendants. On the same date, they also filed a summons seeking to join the minor beneficiaries to the proceeding. Mr Paul Staindl, solicitor, filed two affidavits, both sworn 20 November 2015, deposing that he acts for the minor beneficiaries and the fifth defendant, who is their mother, and that she agrees to act as their litigation guardian. Mr Staindl deposed that the fifth defendant would have no interest adverse to the minor beneficiaries in the proceeding and was therefore an appropriate litigation guardian. Mr Staindl also acts on behalf of the remaining defendants.

20 On 1 December 2015, the plaintiffs filed the three supplementary affidavits referred to at [11]: an affidavit of the second plaintiff sworn 17 September 2015, an affidavit of the third plaintiff sworn 2 September 2015 and an affidavit of the fourth plaintiff sworn 30 September 2015.

21 On 4 December 2015, Mr Gordon provided supplementary submissions dealing with the appointment of a litigation guardian for the minor beneficiaries and made short further submissions concerning the substantive applications pursuant to ss 63 and 63A of the Act. Mr Gordon informed the Court that the solicitor for the defendants was unable to remain in court and had asked him to mention the application for the joinder of the minor beneficiaries to the proceeding on his behalf. The Court appointed the fifth defendant as the litigation guardian for the minor beneficiaries and joined them as defendants to the proceeding.

22 Mr Gordon then submitted that, as the defendants were being separately represented and the two minor beneficiaries were also represented, he relied on his written submissions dated 17 June 2015 and 3 December 2015 and that it was appropriate to deal with the proceeding on the papers. The defendants had been provided with these submissions and they consented to the plaintiffs' application, as

did the litigation guardian for the minor beneficiaries. Mr Gordon submitted that as all of the defendants consented to the proposed orders, it was a question of whether the Court was minded to give legal force to the agreement reached by them.

Consideration

23 In seeking the orders to amend the deed, the plaintiffs rely primarily on s 63A of the Act, alternatively, s 63 of the Act. They submit that s 63A is the path of least resistance for their application but do not resile from or abandon their submissions as to s 63, although they concede the recent decision of *Re Dion Investments Pty Ltd*[9] in the Court of Appeal in New South Wales works against the success of their application under s 63.

24 Whilst Mr Gordon submitted that the application was a question of whether the Court would approve the agreement of the parties, the question to be answered is whether the Court may approve the arrangement as between the trustee and the beneficiaries under either s 63A, alternatively s 63, of the Act.

25 Before considering the issues arising under ss 63A, alternatively s 63 of the Act, there are certain issues that affect the plaintiffs' application that are now set out.

26 The plaintiffs concede there is no power in the deed to expand the class of beneficiaries, to amend the deed for the appointment of an appointor to the trust or to amend the deed generally. They also concede that the deceased's wishes as expressed in his will are his wishes only and cannot bind the trustee of the trust.

Orders seeking a power to expand the class of beneficiaries

27 The plaintiffs submit the orders sought to expand the class of beneficiaries of the trust are consistent with the deceased's wishes as set out in clause 11 of his will.

28 Clause 11 expresses the wish that the trustee resolve to distribute certain specified assets of the trusts to the family trusts of, in effect, the second, third and fourth plaintiff.

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9 (2014) 87 NSWLR 753 ('*Re Dion*').

29 The defined class of beneficiaries of the trust in clause 2 of the deed does not include family trusts or the partners of the defined beneficiaries. It is also noted that the deceased's will describes the fourth plaintiff as his step-nephew.[10] If that is correct, he is not included in the defined class of beneficiaries of the trust.

30 Although not addressed by the plaintiffs, it is apparent that there is also a class of potential unborn beneficiaries of the trust not represented in the proceeding. This class of beneficiaries arises as a result of the distribution date as defined in the deed and the provisions for the distribution of the trust assets at the distribution date. The distribution date is defined:

> …[u]ntil the twenty first anniversary of the death of the last survivor of the presently living descendants of Queen Elizabeth the Second or until the twenty first anniversary of the death of the last to die of the beneficiaries as hereinafter defined living at the date of this deed whichever shall last occur…[11]

31 The deed provides powers to the trustee as to the distribution of the income and corpus of the assets of the trust as it shall in its absolute discretion determine and if there is a failure of the trusts then the trust assets are to be held on trust for:

> such persons being alive at the distribution date as would be entitled to succeed to the estate of the deceased as upon his intestacy and upon the basis that the settlor of the trust predeceased him and that his death occurred on the distribution date.[12]

32 The plaintiffs' proposed variation to expand the class of beneficiaries of the trust would mean that clause 2 of the deed would read as follows:[13]

> … for the benefit of such one or more of a class consisting of –
> (a) William Edward Pickering
> (b) Jacqueline Robyn Pickering
> (c) Roger Stuart Pickering
> (d) Dawn Margaret Pickering
> (e) Robyn ElizabethPickering
> (f) Peter Edward Pickering
> (g) Darryl John Pickering
> (h) Cindy Lynne Pickering

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10 Affidavit of Rick Pickering, 30 January 2015, [11], exhibit RP-3, clauses 5 and 6.
11 Affidavit of Rick Pickering, 30 January 2015, [7], exhibit RP-1: trust deed, cl 2.
12 Affidavit of Rick Pickering, 30 January 2015, [7], exhibit RP-1: trust deed, cl 4.
13 Plaintiff's proposed variation in italics.

and any further child or children *in relation to any person described in sub paragraph (a) – (h):*

(i) *his or her spouse, former spouse, widow or widower;*
(ii) *his or her children and remoter issue;*
(iii) *his or her parents, grandparents, brothers, sisters, aunts, uncles or cousins; and*
(iv) *any person relying on him or her for maintenance, education or support;*
(v) *any company in which that person has a beneficial interest or in which that person is a director;*
(vi) *any trust (other than a trust where a distribution to it would breach the rule of law or equity known as the 'rule against perpetuities', as modified by any relevant legislation) under which that person is capable of receiving any benefit, whether or not any other person is capable of receiving a benefit under that trust;*
(vii) *any corporation, association or body whether incorporated or unincorporated which may legally be the subject of a charitable trust under the proper law of this deed, which the trustee from time to time nominate.*

hereafter born of the said William Edward Pickering and Jacqueline Robyn Pickering and for any of the grandchildren of the said William Edward Pickering and Jacqueline Robyn Pickering being the issue of any of the children of the said William Edward Pickering and Jacqueline Robyn Pickering (all of whom are hereinafter called 'the beneficiaries')…

33 Whilst it is difficult to construe the proposed variation as incorporated within the deed in a meaningful manner, it is not difficult to conclude that it goes far beyond the deceased's wishes as set out in clause 11 of his will. His wishes are specifically directed to the trustee resolving to make certain capital distributions to the trustees of the three named family trusts. They do not purport to contemplate any benefits of the trust passing to the much wider class of beneficiaries now sought by the plaintiffs.

34 As well as substantially diluting the beneficial interests of the current beneficiaries of the trust, the proposed variation to expand the pool of beneficiaries of the trust would also substantially dilute the beneficial interests of the potential unborn beneficiaries. This, in turn, would have a substantial financial impact on both categories of beneficiaries of the trust.

Orders seeking to add appointors to the trust

35 The plaintiffs submit that there is no appointor or any similar office with the power to appoint or remove trustees in the deed and that the proposed variation for

orders providing for appointors of the trust are consistent with the deceased's wishes set out in clause 5 of his will.

36 The plaintiffs' proposed variation is to add the relevant clauses after clause 15(c) of the deed. Clause 15 refers to powers of the trustee of the trust. If the deed were to be amended as proposed, the amendment should be a stand–alone clause of the deed rather than simply added on to an existing clause that deals with the trustee's powers under the trust.

37 The plaintiffs refer to clause 16 of the deed that provides that the trustee is entitled to exercise all the powers, authorities and discretions conferred on it by Parts I, II and III of *Trustee Act 1936* (SA) ('SA Act') and all statutory amendments, modifications and re-enactments thereof. They then refer to s 14 of the SA Act which provides that, in the absence of a person nominated by the relevant deed for the purpose of appointing new trustees, that power shall rest with the 'surviving or continuing trustees or the trustee for the time being'.

38 Although not referred to by the plaintiffs, the SA Act contains further provisions concerning the power to appoint new trustees and remove existing trustees. Section 36 of the SA Act provides that the court may appoint, remove or replace a trustee if it is desirable either in the interests of the persons who are to benefit from the trust or to advance the purposes of the trust. There is no need for the court to find any fault or inadequacy on the part of the existing trustee before making such an order. The Attorney General, a trustee, a beneficiary or any other person who satisfies the court that he or she has a proper interest in the trust may apply for an order.

39 Considering the breadth of the powers contained in s 36 of the SA Act to appoint and remove trustees, the plaintiffs' submissions must rest primarily on their submission that the proposed variation for the appointment of an appointor to the trust is consistent with the deceased's wishes set out in clause 5 of his will, wishes that they concede are not binding on the trustee.

Orders seeking a general power to amend the deed

40 The deed contains no express provision for amendment of the deed. The plaintiffs refer to clause 10 of the deed that provides that the settlor and/or the trustee may revoke the existing trusts and settle the trust fund on new trusts and say this clause does not appear to allow the trustee to amend the deed, including any amendment to either expand the class of beneficiaries or to incorporate a power of appointment. Accordingly, they submit the deed can only be amended pursuant to a court order.

41 The reason given by the plaintiffs for the proposed variation is to provide the trustee with a general power of amendment of the deed so the trustee does not have to return to Court if it wishes to amend the deed in the future.

Section 63A of the Trustee Act 1958

42 In seeking the proposed variations to the deed, the plaintiffs rely upon the powers granted to this Court by s 63A of the Act, which provides as follows:

> 63A Power of Court to vary trusts
>
> (1) Where property, whether real or personal, is held on trusts arising, whether before or after the commencement of this Act, under any will settlement or other disposition, 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 minority 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 person unborn; 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—

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 or 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 unless the carrying out thereof would be for the benefit of that person.

(2) In the foregoing subsection 'protective trusts' means trusts specified in paragraphs (a) and (b) of subsection (1) of section thirty-nine of this Act or any like trusts, the principal beneficiary has the same meaning as in the said subsection (1) and 'discretionary interest' means an interest arising under the trust specified in paragraph (b) of the said subsection (1) or any like trust.

(3) Notice of an application to the Court for an order pursuant to subsection (1) of this section shall be given to such persons as the Court may direct.

(4) Nothing in the foregoing provisions of this section shall apply to trusts affecting property settled by Act of Parliament.

(5) Nothing in this section shall limit the powers conferred by section sixty-three of this Act section sixty-four of the *Settled Land Act 1958* or section one hundred and seventy-one of the *Property Law Act 1958*.

43 Section 63A was inserted into the *Trustee Act* by the *Trustee (Variation of Trust) Act 1962.* In the Second Reading Speech for that Act, the Hon R J Hamer made the following remarks:[14]

> The reasons behind the Bill are these: It often happens that when property is subject to a trust, it is desirable to vary the provisions of the trust in the interests of the people who benefit from it – the persons who are beneficiaries under the terms of the trust. If those beneficiaries are all in existence, and if they are not under any legal disability, such as infancy, or unsoundness of mind, they can, by their own agreement, vary the terms of the trust and, by mutual agreement, make any arrangement they like. If any of the beneficiaries is under some legal disability – one of them could be an infant or a lunatic – or is not yet ascertained, or is unborn, there is no way of varying the trust except under very special circumstances.
>
> Before 1954, the court in Victoria exercised jurisdiction to make orders in cases where it considered that a variation of the trust was for the benefit of a person under disability. In other words, the court took to itself certain jurisdiction to enable it to act in the interests of the beneficiaries. However, in 1954, a decision of the House of Lords in the case of *Chapman v Chapman* revealed that the court had no inherent jurisdiction of that kind, and that its power to make those orders related only to a rather limited class of case. One

[14] Victoria, *Parliamentary Debates,* Legislative Council, 23 October 1962, 943-5 (The Hon R J Hamer).

type of case in which the court could make an order varying a trust was where there was some dispute as to the rights of the beneficiaries, and the court was able to sanction a compromise on behalf of infants if the compromise was considered to be for the infants' benefit.

In addition, the court had certain statutory powers which may be found in section 63 of the *Trustee Act 1958*, and section 64 of the *Settled Land Act 1958*. With respect to the provisions of the *Trustee Act*, the view taken is that it applies only to matters arising in the management of the trust property and does not authorize the sanctioning of any arrangement which would vary the interests of persons under the trust. In the *Settled Land Act*, the provision gives the court wider powers, but it applies only where the trust property is land. Therefore, it is apparent that the existing power of the court is extremely restricted.

It is clear that the question whether the court has any power in any particular case to sanction an arrangement on behalf of a person under disability might depend on whether there is a dispute between the beneficiaries, or whether the trust property is some interest in land or personal property. In England, the Law Reform Committee also referred to the fact that under the English *Divorce Act 1950*, the divorce court has power to vary a marriage settlement for the benefit of the children of the marriage, and a similar power is conferred on the court in Victoria by section 86 of the Commonwealth *Matrimonial Causes Act 1959*. Therefore, there are scattered throughout our Commonwealth and State legislation certain provisions which allow a court to intervene where it believes the interests of the beneficiaries so dictate, but no general power exists for such action to be taken.

…

I should like to quote two paragraphs from the report of the English Law Reform Committee, which were also quoted by the Chief Justice's Law Reform Committee in Victoria. The first paragraph reads –

> We think it is clear that the present situation is unsatisfactory. It cannot be right that the question whether the court can sanction changes in trusts on behalf of infants or potential beneficiaries should depend on the entirely irrelevant considerations upon which it depends to-day. In our view the only satisfactory solution of the problem is to give the court the unlimited jurisdiction to sanction such changes which were in fact exercised in the years immediately preceding the decision in *Chapman v Chapman.*

In other words, in all the years up to 1954, that is what the court, in fact, did, because it believed it had this inherent jurisdiction to do it. The second paragraph reads –

> Why should an infant whose parents are happily married be in a worse position than a lunatic, or an infant whose parents are divorced? Why should an infant who is interested in land be better off than one who is interested in personalty? Why should it not be possible to arrange the affairs of all infants to their best advantage? Why should anyone be prevented from arranging his affairs to his best advantage by reason of some potential beneficiary who (if he ever acquires an interest) would be equally benefited by the arrangement?

…

> The Bill is designed to remove these defects and anomalies and to give the court the powers which prior to 1954 it was commonly thought to have. The court will be able to give its approval to an arrangement varying a trust on behalf of interested persons who are unable to consent to the variation themselves – that is, persons who are under some legal disability, which prevents them from giving the necessary consent. It gives the court no power to force any arrangement on any beneficiary. The approval given by the court on behalf of beneficiaries who are under disability will enable the arrangement to be carried into effect if the other beneficiaries agree to it.
>
> The Bill does this by providing for the insertion into the *Trustee Act 1958* of a new section 63A. Sub-sections (1) and (2) of the new section reproduce the main provision of the English Act and provide that the court may approve of an arrangement on behalf of a number of different classes of persons: First, persons who are incapable of assenting to the arrangement by reason of infancy or other incapacity; secondly, persons who may become entitled to an interest if they fulfil a specified requirement at a future date – in other words, potential beneficiaries; thirdly, unborn persons, who may also be held to be potential beneficiaries; and, fourthly, persons who have discretionary interest under what are known are protective trusts – that is, trusts where the principal beneficiary is entitled to the property until he charges it or deals with it in such a way as to bring about a forfeiture, in which case the trustees are directed to hold the property on trust for the maintenance of the principal beneficiary and a number of other persons referred to in the trust instrument.
>
> …
>
> The House will agree that in its general approach, the measure effects a desirable reform which will enable a number of suitable arrangements to be made and a number of beneficiaries to receive advantages which, at present, are denied them on a somewhat arbitrary basis.

44 In *George v Kollias and Ors*,[15] Hansen J considered in some detail the authorities relating to s 63A. His Honour noted that, under s 63A, an arrangement cannot be approved unless the carrying out thereof would be for the benefit of those who cannot consent. If the requirement of benefit is satisfied then the Court may, if it thinks fit, approve the arrangement,[16] with Pennycuick J in *In re Remnant's Settlement Trusts* describing the second or latter stage as one in which the Court is 'further satisfied that the arrangement is in its nature a fair and proper one'.[17] In *Re Van Guisen's Will Trusts, Bagger v Dean*,[18] Ungoed-Thomas J expressed it thus:

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15 [2007] VSC 46 (5 March 2007) (Hansen J).
16 Ibid [41].
17 *In re Remnant's Settlement Trusts* [1970] 1 Ch 560, 565.
18 [1964] 1 All ER 843.

> The court is also concerned whether the arrangement as a whole, in all the circumstances, is such that it is proper to approve it. The court's concern involves, *inter alia*, a practical and business-like consideration of the arrangement, including the total amounts of the advantages which the various parties obtain, and their bargaining strength.[19]

45 In *Goulding v James,*[20] Mummery LJ referred to that passage with approval, adding that 'the function of the court is to protect those who cannot protect themselves'.[21] As regards proposed arrangements that involve a potential risk from the point of view of infants and unborn persons, the decision of *In re Cohen's Will Trust*[22] establishes that although such a risk will not necessarily be decisive against approval, the Court must be able to conclude that the risk in question 'is a risk that an adult would be prepared to take', and which the Court is prepared to take on behalf of those persons.

46 After considering the above authorities, Hansen J in *George v Kollias and Ors* refused to grant the variation sought, which was that the discretionary trust established for the benefit of a particular family, and to be distributed among members of that family on a needs basis, be split into fifteen separate funds to be assigned to each branch of that family. The variation was sought on the basis that, among other things, it would avoid family disunity. His Honour noted that although such a consideration was relevant, the proposed arrangement carried no guarantee that such disunity would not nevertheless result – '[i]t would be to deny the frailties of human nature, and the experience of life and the variety of personal circumstances within families, to suggest otherwise'.[23] Further, his Honour had regard to the fact that the proposed alteration to the terms of the trust would represent a significant alteration to the intended position of the testatrix– a consideration which, though not determinative, is relevant. The consideration upon which his Honour placed the most weight, however – and which was strongly pressed by the trustees and one of the defendants in opposition to the application –

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19 Ibid 844.
20 [1997] 2 All ER 239.
21 Ibid 249, citing *Re Weston's Settlements* [1968] 3 All ER 338, 342 (Lord Denning).
22 [1959] 1 WLR 865, 868 (Danckwerts J).
23 Ibid [52].

was that the splitting of the fund into smaller parts would reduce the trust's ability to provide a substantial sum to any one beneficiary who might suffer significant financial distress.[24] His Honour said:

> It is not an irrelevant consideration that the present single fund exists because that is what the testatrix determined upon as being appropriate in the circumstances which included the reasonable foresight of a large number of beneficiaries. A division of the fund into 15 parts with the consequent diminished ability to make payments of income and capital would constitute a significant change in her intended position. This is a relevant though not determinative consideration.[25] The question remains one of benefit for the represented beneficiaries and whether it is fit and proper to approve the arrangement. Nevertheless the departure from that intended [sic] is substantial…
>
> [W]ith good fortune the risk of beneficiaries suffering … a misfortune might not become a reality, although the occurrence of relationship breakdown and employment and business failure is common. Hence, conversely, beneficiaries might suffer misfortune and it is to cater for such possibilities that the discretionary trust is ideal, and the larger the fund the better for reasons of the type discussed.
>
> I am of the view that to approve the variation would involve the beneficiaries accepting a risk that that an adult acting sensibly in his or her own interest would not take when regard is had to the relatively minimal benefits to be gained.[26]

47 In their original written submissions, the only case relied upon by the plaintiffs was *Thomas Hare Investments v Hare*.[27] In that case, an application was made by the trustee of a family trust seeking, inter alia, orders varying the terms of the deed of settlement. The applicant sought an order extending the vesting date of the trust, and an order that would expand the class of beneficiaries such that it would no longer exclude companies of which the sons and daughters of the appointor were beneficial shareholders, and which were a trustee of a trust estate of which the son or daughter had received income in the relevant year.[28] Both orders were sought in reliance upon s 63A of the *Trustee Act*. The applicant also sought that the orders in question be made *nunc pro tunc*, as the trustee had already made distributions to

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24 Ibid [66].

25 Ibid [68]. See also *Goulding v James* [1997] 2 All ER 239, in which the English Court of Appeal held that the wishes of the settlor were not relevant in determining whether a trust ought to be varied.

26 Ibid [68]-[70].

27 (2012) 34 VR 656 ('*Hare*').

28 Ibid 661 [14].

several beneficiaries in accordance with an amendment, the validity of which had subsequently been called into question. In contrast to the situation in the matter under consideration, the class of beneficiaries in *Hare* was an open one; the trustee had the power to appoint any person as a beneficiary as long as they were a relative by blood, marriage or adoption of one or more of the beneficiaries for the time being.

48 Habersberger J granted the order extending the vesting date, noting that the extension would be of benefit to the unascertained class of potential beneficiaries because it would be extending the period of time within which it was possible for them to become beneficiaries at all.[29] His Honour cited the remarks of Lavan J in *Faye v Faye*[30] regarding the application of the Western Australian equivalent to s 63A, to the following effect:

> A function of the Court on an application of this nature is to act as a substitute for the persons who are incapable either because they lack capacity or because they are not born to signify their consent. Its jurisdiction is limited to authorizing an arrangement which such beneficiaries themselves could have authorized if they had all been ascertained and sui juris.[31]

49 Habersberger J also granted the order expanding the class of beneficiaries, as it would achieve greater flexibility in distributing the benefit, and tax burden, of the trust (given that the beneficiaries were at that stage receiving the income from the trust in their personal capacity). His Honour said:

> I am therefore satisfied that the proposed order does not cause detriment to the unascertained class of potential beneficiaries and that, had they been ascertained and sui juris, they would have consented to the limitation of the classes of persons who are to be excluded from being a beneficiary in the manner that has been proposed.[32]

50 His Honour declined to make the orders in question *nunc pro tunc*, however,[33] stating that they did not answer the description of being to 'overcome procedural difficulties' in the sense discussed by Ormiston JA in *Hartley Poynton Ltd v Ali*,[34] as

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29 Ibid 666 [39].
30 [1973] WAR 66.
31 Ibid 71-2.
32 *Hare* (2012) 34 VR 656, 667 [42].
33 Although his Honour did absolve the plaintiff from liability for potential breach of trust by exercising his power under s 67 of the *Trustee Act*.
34 (2005) 11 VR 568 (Buchanan and Eames JJA agreeing).

the postponing of when beneficiaries would become absolutely entitled to the trust assets, the deferral of potential tax liability (via the extension of the vesting date), along with the bringing of a previously disqualified person into the class of beneficiaries, were clearly matters that were substantive in nature.

51 The plaintiffs' supplementary submissions considered a few other cases decided in this jurisdiction, including *Re Estate of Barns*,[35] *George v Kollias*,[36] and *Alan Synman Family Trust*,[37] as well as some English cases that considered the discretionary nature of the power of the Court to vary a trust.

52 In *Perpetual Trustees Victoria Limited v Barns & Anor*,[38] the Court of Appeal allowed an appeal against the decision of the trial judge to reject an application brought under s 63A to vary the terms of a trust. The trustee had made an application to be granted the power to advance capital from the trust fund on behalf of the settlor's disabled daughter, who was the surviving life tenant of the settlor's residuary estate. The daughter lacked the capacity to consent to the arrangement, and the costs associated with her living expenses had begun to exceed the income she derived from the trust. The Attorney-General, representing any charity which would potentially benefit from the residue of the trust fund, neither opposed nor consented to the application.

53 Williams AJA (Buchanan and Bongiorno JJA agreeing) overturned the decision of the trial judge, noting that he had erred in law in concluding that he lacked the power to make the order sought in the absence of consent from the Attorney-General.[39] Further, the Court of Appeal came to the conclusion that the proposed arrangement ought to be approved:

(a) first, because the testator had evidently intended that his daughter receive the benefit of the trust in preference to any charities;

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35 [2011] VSC 314 (5 July 2011) (Robson J). Note this judgment was appealed in *Perpetual Trustees Victoria Limited v Barns & Anor* [2012] VSCA 77 as outlined below.

36 [2007] VSC 46 (5 March 2007) (Hansen J).

37 [2013] VSC 364 (19 July 2013) (Ginnane J).

38 [2012] VSCA 77 (2 May 2012) (Buchanan and Bongiorno JJA and Williams AJA).

39 Ibid [34].

(b) secondly, because he did not appear to have anticipated the possibility of his daughter needing additional funds for her living expenses, believing rather that she would be provided with a surplus by the income from the trust; and

(c) thirdly, because the attitude of the Attorney-General in neither opposing nor consenting to the application was the practice in non-contentious and administrative proceedings, where only the court can make final orders and the Attorney-General does not intend to be bound by them.[40]

As such, the arrangement proposed was found to be fair and proper.

54 In *Re McDonald Trust No 1*,[41] an order was made pursuant to s 63A to amend a typographical error in the trust deed regarding the vesting date. Other cases in which an order was made extending a trust's vesting date pursuant to s 63A include *Re Plator Nominees Pty Ltd*,[42] in which Davies J granted such an order on the grounds that doing so would advance the purpose of setting up the trust; that it was the wish of all the sui juris beneficiaries; that there appeared to be no specific reason for the existing vesting date in the deed; and that the trust had significant investments in property which would render it liable to a large capital gains tax liability if the vesting date were not extended as per the application. In *Patros v Patros*,[43] Cavanough J relied upon the Court's inherent jurisdiction, s 63, or at the very least the combined operation of ss 63 and 63A, in granting an application to allow the sale of a trust property to the trustee.[44]

55 Queensland, Tasmanian and Western Australian legislation contains provisions which follow a similar scheme to the Victorian s 63A.[45] In *Re Humphreys*,[46] Ambrose J approved an application to vary a trust under, inter alia, s 95 of the *Trusts Act 1973*

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40 Ibid [43].
41 [2010] VSC 324 (28 July 2010) (Judd J).
42 [2012] VSC 284 (27 June 2012) (Davies J).
43 [2007] VSC 83 (26 March 2007) (Cavanough J).
44 See also *Re Arthur Brady Family Trust* [2014] QSC 244 (30 September 2014) (McMurdo J) – another alteration of vesting date case, in which the application to amend the deed was approved in order to avoid substantial tax liabilities to which the trust fund would otherwise have become subject.
45 *Trusts Act 1973* (Qld) s 95; *Variation of Trusts Act 1994* (Tas) ss 13, 14; *Trustees Act 1962* (WA) s 90.
46 [2002] QSC 90 (10 April 2002) (Ambrose J).

(Qld) (the equivalent section to s 63A), on the basis that the proposed amendment would benefit all beneficiaries and all potential beneficiaries. The amendment in question involved selling the trust property and creating a life interest for the respondent trustee/beneficiary, in place of the personal license to occupy the property for life conferred by the will. In *Re Hoang Minh Le*,[47] the court granted an application to permit the substantial majority of trust monies to be transferred to a superannuation fund in a policy in favour of the sole beneficiary.

56 There are several cases where applications to vary a trust deed under the equivalent to s 63A have been refused, including *In Re Ritchie's Will Trusts*[48] in which Helman J considered an application to vary a trust established under a will by varying the term of the trust from 20 years from the date of death of the deceased to a period of 30 days from the date of his death. Under the terms of the trust the class of beneficiaries would not close until 2022. The effect of the variation would have been to crystallise the potential beneficiaries under the will at a much earlier time. The children of the testator had all asserted that they would not have more children. Helman J found that the order sought would clearly not be for the benefit of any as yet unborn child of the children of the testator, because the effect of the order would be to deprive that child of any relevant benefit under the will. In *Re Bradbury*,[49] Wilson J refused an application by the settlor's children to distribute the trust property, which was held on trust for them or their children, should they predecease, contrary to the terms of the deed. Though all the adult beneficiaries agreed to the variation, it was refused on the basis that such variation was not for the benefit of infant grandchildren/unborn grandchildren. In *Re Christmas' Settlement Trusts*,[50] McPherson J refused an application to vary a trust such that it eliminated unborn grandchildren as potential beneficiaries, despite the fact that the variation was a condition of a sale of trust property which would bring a substantial amount

47 [2012] WASC 31 (2 February 2012) (Beech J).
48 [2005] QSC 81 (14 April 2005) (Helman J).
49 (Unreported, Supreme Court of Queensland, Wilson J, 2 July 1999).
50 [1986] 1 Qd R 372.

of money, because the variation was not for the benefit of unborn persons who could potentially become beneficiaries.

57 The emphasis throughout the case law examined, as well as in the extraneous materials and in the wording of s 63A itself, is upon the interests of beneficiaries, or potential beneficiaries, who are incapable of providing their own consent to variations that could affect them. In this instance, there remain potential unborn beneficiaries who are not capable of consenting to the proposed variations to the deed, in particular, the proposed variation to expand the class of beneficiaries of the trust. The plaintiffs did not address the question of whether this proposed variation would adversely affect the interests of any potential unborn beneficiaries in the trust. Although the litigation guardian of the two minor defendants has stated that she would not act contra to their interests, this does not account for any potential unborn beneficiaries.

58 Given that the substance of the proposed variations is, inter alia, to expand the pool of beneficiaries substantially, which would dilute the proportion of the assets of the trust to be distributed to each beneficiary and any potential unborn beneficiary, there is a prima facie reason to presume that the interests of any potential unborn beneficiaries could be adversely affected.

59 In *George v Kollias and Ors*,[51] Hansen J saw a diminution of potentially available funds as a compelling reason to refuse to allow a variation under s 63A. In the circumstances, this Court should not make the order approving the proposed variation to expand the class of beneficiaries of the trust on behalf of any potential unborn beneficiaries.

60 I am similarly unconvinced that the other orders sought, namely the power to amend and the power to appoint an appointor ought be approved under s 63A. There is no authority for the proposition that s 63A confers on the Court the ability to grant a general power of to amend or to a power to appoint an appointor.

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51 [2007] VSC 46 (5 March 2007) (Hansen J).

61 In regard to the power to amend, I am fortified by, and adopt, the remarks made by Ginnane J in *Re the Alan Synman Family Trust*.[52] His Honour refused to grant the requested power of variation to the trust deed pursuant to s 63A, stating that:

> In this, and in most applications under s 63A, the appropriate path is for a trustee to seek the court's approval of an arrangement to vary specific provisions of the Trust Deed, rather than seeking approval of an arrangement giving the trustee a general power of variation. By the former path, the Court can, in most circumstances, best assess whether the carrying out of the arrangement would be for the benefit of persons who have an interest under the trust and who are incapable of giving their assent. It is far more difficult to reach that conclusion when the Court does not have the detail of all the variations that the trustee will make, once given the general power of variation.[53]

62 In regard to the power to appoint an appointor, the provisions of the SA Act have sufficient breadth to address any issues that might arise concerning the appointment and removal of the trustee to the trust.

63 For the reasons set out, the Court will not approve the proposed variations and amendments to the trust deed sought by the plaintiffs pursuant to s 63A of the Act.

Section 63 of the Trustee Act 1958

64 Section 63(1) provides:

> Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument (if any) or by law, the Court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose on such terms and subject to such provisions and conditions (if any) as the Court thinks fit and may direct in what manner any money authorized to be expended, and the costs of any transaction are to be paid or borne as between capital and income.

65 The court's discretion to confer power on a trustee under s 63 arises where the expenditure or transaction is (a) in the management or administration of property vested in trustees; (b) expedient; and (c) not otherwise able to be affected because of

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52 [2013] VSC 364 (19 July 2013) (Ginnane J).
53 Ibid [26].

an absence of power.[54] The High Court has construed the central criterion of this provision and its equivalents: 'expedient' as meaning 'advantageous', desirable', 'suitable to the circumstances of the case'.[55] The question of expediency must be determined by reference to the interests of the beneficiaries and the benefit of the trust property as a whole.[56]

66 The plaintiffs relied on the decision in the trial division of this Court, namely, *Colonial Foundation Ltd v Attorney-General (Vic)*[57] that gives s 63 an operation favourable to their application. That case considered s 63 in the context of an application to vary a trust deed to give powers, inter alia, for the trustees to vary the terms of the trust as and when necessary.

67 The Court of Appeal decision in the *Royal Melbourne Hospital v Equity Trustees Ltd*,[58] delivered shortly before *Colonial Foundation*, considered s 63 in the context of an appeal from a trial judge's decision to only grant the trustees a power limited in scope and time to affect a partial sale of the remaining trust property. The power was limited by the trial judge so as to enable the trustees to effect sufficient sales to meet liabilities expected within the following 18 months. The Court did allow a power of managed sale of the trust property but would not adopt a course that interfered with the beneficial interests under the trust. Bell AJA gave the leading judgment in relation to s 63. His Honour commenced by analysing s 63[59] and then analysed the same provision of the Act under the heading 'Rewriting a trust or altering or interfering with the beneficial interests'.[60] His Honour considered the English Court of Appeal decision in *In re Downshire Settled Estates*[61] and the legislative history of s 63. Bell AJA concluded by stating that '… the power in s 63(1)

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54 *Riddle v Riddle* (1952) 85 CLR 202, 214 (Dixon J). The Court considered s 81 of the *Trustee Act 1925* (NSW), which is the equivalent of s 63 of the Act.
55 Ibid 221-222 (Williams J); Ibid 227 (Fullagar J).
56 Ibid 214, 220, 222.
57 [2007] VSC 344 (18 September 2007) ('*Colonial Foundation*') (Smith J).
58 (2007) 18 VR 469 ('*Royal Melbourne*').
59 Ibid [148]–[167].
60 Ibid [168]–[185].
61 [1953] Ch 218 ('*Downshire*').

is for the expedient management of trust property, not the alteration of the beneficial interests it creates'.[62]

68 A later decision of Robson J in *Re Barns*[63] of this Court also came to the opposite conclusion to that in *Colonial Foundation*. Although *Re Barns* was overturned by the Court of Appeal, the successful applicants relied on s 63A, not s 63 of the Act. In addition, the recent decision of the New South Wales Court of Appeal in *Re Dion Investments Pty Ltd*[64] which has interpreted the equivalent provision in that State, being s 81 of the *Trustee Act 1925* (NSW) ('the NSW Act'), came to the same conclusion as *Re Barns* and the opposite conclusion in *Colonial Foundation*.

69 Whilst it is the duty of a trial judge to determine the case before him or her, a trial judge is bound to follow precedent. Where that case involves a question of statutory construction, the 'fundamental responsibility of a court... is to give effect to the legislative intention as it is expressed in the statute'.[65]

70 The plaintiffs urged the Court to follow *Colonial Foundation* and the earlier New South Wales Supreme Court decision in *Stein v Sybmore Holdings Pty Ltd*[66] in preference to *Re Dion* on the basis that this Court is not bound by *Re Dion*. They did not refer to *Royal Melbourne*. They also relied on the following passage of the High Court decision in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* in submitting that *Re Dion* should not be followed:

> The caution required in construing modern Australian legislation by reference to 'principles' derived in this way is indicated by McHugh J in *Marshall v Director-General, Department of Transport*. That case concerned the expression "injuriously affecting" as it appeared in s 20 of the Acquisition of Land Act 1967 (Qld); ss 49 and 63 of the 1845 Act had used the same phrase as had the subsequent legislation in various jurisdictions. Differing interpretations had

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62 *Royal Melbourne* (2007) 18 VR 442 [304]. Ashley and Redlich JJ agreed with his Honour that s 63 conferred on the Court a discretion to grant trustees powers for the expedient management of administration of trust property in a manner least likely to disturb beneficial interests under the trust: *Royal Melbourne* (2007) 18 VR 442 [9], [12]. It should be noted, however, that the joint judgment focused on the relationship between the Act and the *Settled Land Act 1958*.

63 [2011] VSC 314 (5 July 2011) (Robson J).

64 (2014) 87 NSWLR 753 ('*Re Dion*').

65 *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 [13] (Mason J).

66 [2006] NSWSC 1004 (27 September 2006) ('*Stein*') (Campbell J) and referred to with approval in *Colonial Foundation*.

been given to the expression in question. McHugh J noted the similarity in the terms of the legislation and went on:

> [62] But that does not mean that the courts of Queensland, when construing the legislation of that state, should slavishly follow judicial decisions of the courts of another jurisdiction in respect of similar or even identical legislation. *The duty of courts, when construing legislation, is to give effect to the purpose of the legislation. The primary guide to understanding that purpose is the natural and ordinary meaning of the words of the legislation. Judicial decisions on similar or identical legislation in other jurisdictions are guides to, but cannot control, the meaning of legislation in the court's jurisdiction.* Judicial decisions are not substitutes for the text of legislation although, by reason of the doctrine of precedent and the hierarchical nature of our court system, particular courts may be bound to apply the decision of a particular court as to the meaning of legislation.[67]

71 In *Re Dion*, the trustee sought orders under s 81 the NSW Act conferring on it power to amend the trust deed, including by adding a clause allowing the trustee unilaterally to alter the terms of the trust. Section 81(1) provided:

> (1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust, or by law, the Court:
>
> (a) may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, including adjustment of the respective rights of the beneficiaries, as the Court may think fit, and
>
> (b) may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

72 The Court of Appeal upheld the trial judge's decision to decline to confer on the trustee the power to vary the trust. When deciding whether s 81 empowered the court to confer that power on the trustee, the Court of Appeal considered a line of authority stating that s 81 and its equivalents in Victoria, New Zealand and Queensland did so empower the court.[68] The Court of Appeal referred to three

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67 (2008) 233 CLR 259, [31] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). (Emphasis added and citations omitted.)

68 (2014) 87 NSWLR 753, [49]-[86].

Victorian cases where the court conferred power on the trustee under s 63 of the *Trustee Act* to vary the trust deed: *Colonial Foundation*; *Hutchinson v Attorney-General for the State of Victoria*;[69] and *Ballard v Attorney-General*.[70]

73 The Court of Appeal accepted that 'transaction' is a word of wide import, but said it is clear that s 81 does not authorise the court to confer every conceivable power on a trustee.[71] The section empowers the court to confer on a trustee the necessary power to engage in two classes of dealing:

> …each of which is introduced by the word "any". The first class consists of "any sale, lease, mortgage, surrender, release, or disposition". Each of these words describes a dispositive act of an owner of property by which the property or some interest in it passes or accrues to another person. Dealings within the first class are thus, of their nature, dealings of a kind engaged in by an owner of property or, as the section recognises, trustees in whom property is vested.
>
> The second class of dealings is defined or delineated by the words "any purchase, investment, acquisition, expenditure, or transaction". Ignoring, for the moment, "transaction", these words concentrate principally on ways of deploying money. That is certainly the case in relation to "purchase", "investment" and "expenditure" and will very often be the case in relation to "acquisition" (for example, subscription for shares or other securities).
>
> "Transaction", of itself, does not imply an outlay of money. Nor should any such limitation be taken to be indicated by the fact that the reference to "transaction" comes immediately after references to "purchase", "investment", "acquisition" and "expenditure". A "transaction" that in fact involves an outlay of money is certainly in contemplation. But so too, in my view, is one that does not…
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> Although "transaction" is a very wide expression, power for a trustee to effect a particular "transaction" may be supplied by the court only if, in the management or administration of any property vested in the trustee, the "transaction" is, in the court's opinion, "expedient" — that is, according to Dixon J in *Riddle v Riddle* (at 214), expedient "in the interests of the beneficiaries" or, according to Williams J (at 222), "advantageous", "desirable" or "suitable to the circumstances of the case" but, in every case, with expediency tied to management or administration of trust property.[72]

74 As to trust variations, the Court said that varying the terms of a trust is not something that it is expedient for a trustee to do, nor is it something done in the

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69 [2009] VSC 551 (19 November 2009) (Habersberger J).
70 (2010) 30 VR 413.
71 (2014) 87 NSWLR 753, [87].
72 Ibid [89]-[92].

management or administration of trust property.[73] Instead of using s 81 of the NSW Act to confer on trustees power to vary the trust, courts should use s 81 to confer on trustees the substantive new powers needed to effect dealings contemplated by s 81. Barrett JA, with whom Beazley P and Gleeson JJA agreed, said:

> Conferral of specific new powers pursuant to s 81(1) should not be by way of purported grant of authority to amend the trust instrument so that it provides for the new powers. Rather, the court's order should directly confer (and be the sole and direct source of) the powers which then supplement and, as necessary, override the content of the trust instrument. And, of course, the only specific powers that can be conferred in that direct way are those that fall within the s 81(1) description concerned with management and administration of trust property.[74]

75 His Honour continued:

> If the power to be given to the trustee is not a specific power with respect to a particular dealing (or dealings of a particular kind) but, rather, a wide discretionary power to alter the terms of the trust as the trustee thinks fit, the case is not within s 81(1)…
>
> If, under the guise of giving the trustee a power to undertake a "transaction" of amending the trust deed by adding a comprehensive and virtually unrestrained amendment provision, an order is made that purports to put the trustee into a position from which it can make all and any alterations to the terms of the trust it thinks desirable, the court takes the impermissible course of both appropriating to itself and giving to the trustee a "general power to depart from the precise directions … that a settlor thought proper to declare" (*In re Downshire Settled Estates* at 247). Because there is no "proposed transaction … which is specifically related to the management or administration by trustees of trust property, quoad property" (at 252), the matter is not within the scope of the section.[75]

76 Barrett JA said that the post-1997 decisions that have treated variation of trust terms as a 'transaction' within the meaning of s 81 rest on an unsound foundation.[76] The correct position is that the court is not empowered by s 81 to grant power to a trustee to amend the trust instrument or the terms of the trust. Under s 81, the court:

> …may only grant specific powers related to the management and administration of the trust property, being powers that coexist with (and, to the extent of

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73 Ibid [94].
74 Ibid [97].
75 Ibid [98]-[99].
76 Ibid [100].

any inconsistency, override) those conferred by the trust instrument or by law.[77]

77 It is clear that the Court of Appeal held that conferring on the trustee power to vary the terms of the trust is neither expedient nor in the management or administration of trust property. It is less clear whether the Court held that varying the terms of the trust can be a 'transaction' within the meaning of s 81. It is sufficient to note that *Re Dion* is authority for the principle that varying the terms of the trust does not fall within the composite phrase 'transaction expedient in the management or administration of trust property'.

78 *Re Dion* was applied in *Hancock v Rinehart*, where Brereton J held that s 89 of the *Trustees Act 1962* (WA) (the equivalent of s 81 of the NSW Act and s 63 of the Act) did not empower the court to make an order conferring on the trustee power to amend the trust deed.[78]

79 The plaintiffs relied on *Re Arthur Brady Family Trust*,[79] where the Supreme Court of Queensland did not follow the first instance decision in *Re Dion*. In *Re Arthur Brady Family Trust* P McMurdo J noted that the Queensland equivalent of s 81 the NSW Act is not limited to orders that are expedient in the management or administration of trust property, as are s 81 and s 63 of the *Trustee Act 1958*. Under s 94 of the *Trusts Act 1973* (Qld) the court may confer power on trustees where a '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, or the majority of the persons, beneficially interested under the trust*'.[80] The court granted the orders sought, namely, orders empowering the trustee to amend the vesting date in the trust deed, on the basis that amending the terms of the trust was a transaction that was in the best interests of all the potential beneficiaries.[81] The order was not made on the basis that the transaction was expedient in the management or administration of trust property. Following *Stein*, P McMurdo J held that amending the trust deeds by

77 Ibid.
78 [2015] NSWSC 646 (28 May 2015) (Brereton J), [191]-[192].
79 (2015) 2 Qd R 172.
80 (Emphasis added.)
81 [2015] 2 Qd R 172, [42].

varying the vesting date constituted a transaction within the meaning of s 94,[82] but he did not say that he agreed with the decision in *Stein* that the transaction was expedient in the management or administration of trust property.

80 The Victorian decision of Robson J in *Re Estate of Barns*[83] is consistent with the decision in *Re Dion*. In *Re Estate of Barns,* Robson J considered the scope of s 63 and whether it allowed the court to confer on a trustee power to alter the distribution of trust property among beneficiaries. His Honour gave detailed consideration[84] to the English Court of Appeal decision *Downshire* and the legislative history of s 63. He held that s 63:

(a) covers administrative or management transactions, not transactions altering the beneficiaries or altering the objects of the trust;[85]

(b) cannot be used for the purpose of varying the terms of the trust, however an order under s 63 may have the incidental effect of altering a beneficiary's beneficial interest so long as the power is to be exercised for the benefit of the trust estate as a whole;[86] and

(c) does not deal with giving trustees power to alter the distribution of trust property among beneficiaries. It deals with the management or administration of the trust property in the hands of the trustee.

81 Robson J held that neither s 63 nor s 63A empowered the court to grant the orders sought by the trustee. The trustee appealed the decision on s 63A, but not the decision on s 63. The Court of Appeal allowed the appeal, only considering his Honour's decision on s 63A.[87]

82 In *Colonial Foundation,* Smith J granted orders under s 63 conferring power on the trustee to vary the trust deed, which is not in line with the decisions of this Court in

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82 Ibid [41].
83 [2011] VSC 314 (5 July 2011) ('*Barns*') (Robson J).
84 Ibid [13]-[22].
85 [2011] VSC 314 (5 July 2011) [46].
86 Ibid [47].
87 *Perpetual Trustees Victoria Ltd v Barns* (2012) 34 VR 387.

Royal Melbourne or *Barns*. His Honour was satisfied that the proposed amendments, including removing all limits on the trustee's power to amend the trust, would constitute transactions for the purposes of s 63 and that they were expedient in the management and administration of the property vested in the trustees.[88] Smith J cited *Stein* and two other decisions of the New South Wales Supreme Court in support of the proposition that the proposed amendments were 'transactions' under s 63, but did not discuss any of those cases. Nor did his Honour appear to consider *Downshire* and the legislative history of s 63. I note that in *Barns*, Robson J did not appear to consider *Colonial Foundation* or *Stein*.

83 In *Stein*, Campbell J conferred power on the trustee to vary the vesting date in the trust deed. Campbell J held that 'transaction' in s 81 extends to amendment of the trust deed, and his Honour relied on three decisions in reaching that conclusion.[89] His Honour did not discuss those cases, nor did he refer to *Downshire*. When finding that it was 'expedient' to confer the power sought, his Honour did not cite any authorities to the effect that it may be expedient for a trustee to vary the terms of a trust.[90] Further, when finding that varying the terms of the trust was 'in the management or administration of' trust property, Campbell J did not cite any authorities to the effect that varying the trust may be something done in the management or administration of trust property.[91]

84 Since *Re Dion*, *Stein* is no longer authority in New South Wales for the proposition that varying the trust deed can be a transaction that is expedient in the management or administration of trust property. All three cases relied on by Campbell J in *Stein* were carefully considered in *Re Dion* and overturned.

85 Thus, the three decisions relied upon by Smith J in *Colonial Foundation* are no longer authority in New South Wales for the proposition on which Smith J relied.

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88 *Colonial Foundation* [2007] VSC 344 (18 September 2007), [6], [10] (Smith J).
89 *Stein* [2006] NSWSC 1004 (27 September 2006), [45] (Campbell J).
90 Ibid [47]-[57].
91 Ibid [58]-[62].

As *Colonial Foundation* relies on overruled New South Wales authorities, its persuasiveness diminishes.

86 It is significant that none of the cases on s 81 of the NSW Act or s 63 of the Act that reached the opposite conclusion to *Re Dion* or *Royal Melbourne* has considered *Downshire*. In *Downshire* the Court of Appeal considered the scope of s 57 of the *Trustee Act 1925* (UK) ('the UK Act'), which was the foundation for s 63 of the *Trustee Act*. It was argued that:

> …whatever may have been the position before the passing of the Trustee Act, 1925, the court now has jurisdiction, by virtue of s 57, to sanction the alteration or re-arrangement of the dispositions declared by a trust instrument, if it is satisfied that it is to the substantial advantage of infants and unborn issue who are beneficially interested thereunder so to do. If this proposition be well founded, it is at least clear that a jurisdiction has been created of a quality which has never been assumed or recognised by our courts before, viz, a jurisdiction to eliminate, vary or re-mould dispositions and trusts which the settlor himself has thought proper to establish, provided only that the beneficiaries who are sui juris desire it and the court is satisfied that the order which it is being asked to make is materially advantageous to the infants and unborn issue concerned.[92]

87 Based on the words 'management or administration' in s 57 of the UK Act, Evershed MR and Romer LJ rejected that argument and said that the subject-matter of 'management' and of 'administration' is the trust property vested in trustees, not the equitable interests which a settlor has created in that property.[93] They also said that:

> …neither trustees nor the court itself at any time, prior to 1925, had any general power to depart from the precise directions (provided that they were within the law) that a settlor thought proper to declare. *If Parliament, in enacting s 57, had intended to confer this power on the court it is, in our view, inconceivable that it would not have done so in express terms…*
>
> In our judgment, the object of s 57 was to secure that trust property should be managed as advantageously as possible in the interests of the beneficiaries, and, with that object in view, to authorise specific dealings with the property which the court might have felt itself unable to sanction under the inherent jurisdiction, either because no actual "emergency" had arisen or because of inability to show that the position which called for intervention was one which the creator of the trust could not reasonably have foreseen, *but it was no part of the legislative aim to disturb the rule that the court will not re-write a trust* or

92 [1953] Ch 218, 244.
93 Ibid 247.

> to add to such exceptions to that rule as had already found their way into the inherent jurisdiction.[94]

88 The plaintiffs' submitted that the Court is faced with conflicting decisions of trial judges concerning substantially identical legislation with none of those decisions being binding. They further submitted that the Court should not follow the New South Wales Court of Appeal's decision in *Re Dion*. These submissions were premised on the fact that there was no binding authority in Victoria.

89 This is not the case. In my view, I am bound by the Court of Appeal's decision in *Royal Melbourne*, which decision is reflected in the reasoning of both Robson J's decision in *Barns* and the New South Wales Court of Appeal decision in *Re Dion*, which is that s 63 of the Act grants power to the Court to confer on trustees certain powers for the expedient management of trust property, but not powers to alter beneficial interests under a trust instrument.

90 Even if this were not so, the principle of comity provides that I should follow decisions of intermediate appellate courts in this and other jurisdictions, unless convinced that they are plainly wrong.[95] This principle applies to decisions of intermediate appellate courts on the interpretation of Commonwealth legislation and uniform national legislation and also in relation to non-statutory law.[96] There is debate and unease about the meaning of 'plainly wrong' and the appropriateness of the expression.[97]

91 As to decisions of single judges of this Court, the very same principle of comity applies. Single judges should follow decisions of other single judges unless convinced that they are plainly or clearly wrong. This has been said by single judges

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94 Ibid 247-248. (Emphasis added.)

95 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 (*Farah*), [135].

96 Ibid; and *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).

97 See *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609, [92]-[102] (Leeming JA, with whom Gleeson JA agreed), particularly [94] and the cases there cited; *Khoo v R* [2013] NSWCCA 323 (20 December 2013) [4] (Leeming JA, with whom Bellew J agreed); *R v XY* (2013) 84 NSWLR 363, [34] (Basten JA); *Director of Public Prosecutions v Patrick Stevedores Holdings Pty Ltd* (2012) 41 VR 81, [111]-[117]; and *RJE v Secretary to the Department of Justice* (2008) 21 VR 526, [104] (Nettle JA).

of this Court on several occasions,[98] and I agree with those statements of principle. Strictly speaking, however, single judges of this Court cannot themselves establish a binding rule of comity concerning how later judges of this Court should treat earlier decisions of this Court. Fortunately, there is a higher source for the principle. This Court is bound by *Farah* to defer to decisions of interstate intermediate appellate courts on non-statutory law, unless convinced they are plainly wrong.

92 For the following reasons, I find the conclusion and reasoning in *Re Dion* and *Barns* more persuasive, and, in any case, they are in line with the binding authority in *Royal Melbourne*.

93 First, this Court has previously noted that decisions of the Supreme Court of New South Wales in relation to the equivalent provision are useful in understanding the operation of s 63 of the *Trustee Act 1958* and has cited them with approval.[99]

94 Secondly, the second reading speech recited in [43] above, explicitly states that s 63 of the Act applies only to matters arising in the management of the trust property and does not authorise the sanctioning of any arrangement which would vary the interests of beneficiaries under the trust. This interpretation of the provision and its equivalent is reflected in *Re Dion,* as well as Robson J's decision in *Barns* and Bell AJA's decision in *Royal Melbourne*.

95 In *Re Dion,* the Court of Appeal gave careful consideration to *Stein*, various other New South Wales authorities consistent with *Stein*, and the Victorian authorities consistent with *Stein*, before reaching a contrary conclusion. The Court also considered *Downshire*. In *Royal Melbourne* and *Barns,* both decisions considered *Downshire* and the legislative history of s 63. As stated, the cases conflicting with *Re*

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98 See *Holloway v Department of Human Services* [2015] VSC 184 (14 May 2015) (McDonald J); *DPP (Cth) v Magistrates' Court of Victoria and Barbaro* (2010) 28 VR 56, [8]; *ABC Developmental Learning Centres Pty Ltd v BM Children's Services Pty Ltd* [2010] VSC 262 (16 June 2010), [5] (Pagone J); *Euroasia (Pacific) Pty Ltd v Michael* [2008] VSC 524 (1 December 2008), [85] (Hollingworth J); *Tomasevic v Travaglini* (2007) 17 VR 100, [21]-[24]; *Booth v Ward* (2007) 17 VR 195, [48]; *Equuscorp Pty Ltd v Olsen* [2004] VSC 454 (10 November 2004), [22] (Balmford J); *Anteden Pty Ltd v Glen Eira City Council* [2000] VSC 366 (14 September 2000), [25] (Balmford J); and *Re Brashs Pty Ltd* (1994) 15 ACSR 477, 483.

99 See, eg, *Royal Melbourne Hospital v Equity Trustees Limited* (2007) 18 VR 469 [181] (Bell AJA); *Hornsby v Playoust* (2005) 11 VR 522, 536–527 (Mandie J).

Dion did not consider *Downshire* or the legislative history of s 81 and s 63. In *Colonial Foundation*, the Court did not discuss the principles underlying s 63; it simply relied on three decisions of the New South Wales Supreme Court that no longer state the law in that jurisdiction. The persuasiveness of *Colonial Foundation* is significantly undermined after *Re Dion*, notwithstanding the binding decision in *Royal Melbourne*.

96 As the Court of Appeal said in *Downshire*, the focus of s 57 of the UK Act and s 63 of the Act is on the 'management or administration' of trust property. The purpose of the provisions is to empower the court to confer on a trustee the specific additional power required in order for the trustee to carry out a particular proposed dealing. If varying the terms of a trust to enable a trustee to amend the trust deed at his/her/its discretion were to be considered a transaction expedient in the management or administration of trust property, and orders were granted under s 63 accordingly, it would only be necessary for the trustee to approach the court for orders under s 63 once. This is because on all future occasions where the trustee considers it necessary to have additional powers before engaging in a dealing, the trustee could simply amend the trust deed to confer upon itself that power.

97 In my view, s 63 contemplates the trustee returning to the court for orders each time the trustee desires specific additional powers to engage in dealings in the management or administration of trust property. Each time the trustee approaches the court under s 63, the court will consider whether the proposed dealing is expedient in the management or administration of trust property. Section 63 does not contemplate a single application of the 'expedient in the management or administration of trust property' test, after which the trustee can simply confer on itself any necessary powers.

98 Further, interpreting s 63 in a way that it cannot be used for the purpose of varying the terms of the trust, or to vary the interests of beneficiaries inter se is consistent with the enactment of s 63A. As P McMurdo J noted in *Re Arthur Brady Family Trust*[100] the limitations on s 57 of the UK Act discussed in *Downshire* resulted

100 [2015] 2 Qd R 172 [38].

in the enactment of the provision equivalent to s 63A of the Act. If s 57 of the UK Act did not suffer from the limitations discussed in *Downshire*, the additional provision in s 63A may not have been necessary. Following the decisions of *Re Dion*, *Royal Melbourne* and *Barns* gives proper recognition to the existence of two separate provisions that have their own spheres of operation.

99 Consistently with the reasoning and conclusions in *Re Dion, Royal Melbourne* and *Barns*, this Court will not exercise its discretion under s 63 to grant the orders sought to confer the power to make any of the proposed amendments to the deed. All of the proposed amendments involve varying the terms of the trust, in particular, the proposed amendment to expand the class of beneficiaries of the trust, and takes the application beyond the ambit of s 63.

Orders

100 Accordingly, the plaintiffs' application for orders to vary the deed is refused.

SCHEDULE OF PARTIES

W E PICKERING NOMINEES PTY LTD (ACN 007 817 825)	First plaintiff
ROGER STEWART PICKERING	Second plaintiff
DARYL JOHN PICKERING	Third plaintiff
JACQUELINE ROBYN PICKERING	First defendant
DAWN MARGARET PICKERING	Second defendant
ROBYN ELIZABETH HOSKING	Third defendant
PETER EDWARD PICKERING	Fourth defendant
CINDY LYNNE PICKERING	Fifth defendant
NATASHA WHITE	Sixth defendant
JUSTIN PICKERING	Seventh defendant
REBECCA PICKERING	Eighth defendant
EMMA PICKERING	Ninth defendant
LACHLAN PICKERING	Tenth defendant
LANA HOSKING	Eleventh defendant
CHRISTOPHER HOSKING	Twelfth defendant
TEGHAN PEARSE	Thirteenth defendant
MYKAELA PICKERING	Fourteenth defendant
BENJAMIN PICKERING	Fifteenth defendant

MATTHEW PICKERING	Sixteenth defendant
NICHOLAS JAMES CROSS BY THEIR LITIGATION GUARDIAN, CINDY LYNNE CROSS (NEE PICKERING)	Seventeenth defendant
MITCHELL JORDAN CROSS BY THEIR LITIGATION GUARDIAN, CINDY LYNNE CROSS (NEE PICKERING)	Eighteenth defendant