

# *Certainty of Objects of Trusts and Powers: The Impact of McPhail v Doulton in Australia*

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## **1. Introduction**

The decisions of the House of Lords in *In re Gulbenkian's Settlements*<sup>1</sup> and *McPhail v Doulton*<sup>2</sup> stand as landmarks in the English law on the degree of certainty needed in the definition of the beneficiaries, or objects, of a trust or a power of appointment. In the absence of clear High Court authorities in the area, Australian authors have largely focused on these decisions and those English cases<sup>3</sup> that have sought to interpret and apply them. Consequently, little detailed attention has been given to the gradual emergence of a body of Australian law on the primary rule for certainty of objects and several associated secondary requirements, apart from the extensive literature on the rule against testamentary delegation. It is the purpose of this article to examine critically that body of law, with particular regard to the impact in this country of the changes heralded by *McPhail v Doulton*. The rules will be examined for their impact on three categories of disposition, namely fixed trusts,<sup>4</sup> trust powers<sup>5</sup> and mere powers.<sup>6</sup> In virtually all cases, the issues relating to certainty arise where a trust or power is exercisable in favour of a class of beneficiaries described in generic terms rather than by name.

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1 [1970] AC 508.

2 [1971] AC 424.

3 Principally *In re Baden's Deed Trusts (No 2)* [1973] Ch 9; *Blausten v IRC* [1972] Ch 256; *In re Manisty's Settlement* [1974] Ch 17; *In re Hay's Settlement Trusts* [1982] 1 WLR 202; and *R v District Auditor, ex parte West Yorkshire Metropolitan County Council* [1986] RVR 24.

4 A fixed trust is one where the trust instrument determines the respective entitlement of beneficiaries to the trust property.

5 A trust power is one where the trustee has a duty to distribute the trust property among a class of objects, but has a discretion to decide what share, if any, each member of the class will receive. A trust power is sometimes described as a 'discretionary trust', but the latter is not regarded as a term of art in Australia: *Chief Commissioner of Stamp Duties v Buckle* (1998) 192 CLR 226 at 234; *Federal Commissioner of Taxation v Vegners* (1989) 90 ALR 547 at 551–552 (Gummow J).

6 A mere power is one where the donee of the power has a discretion both as to whether to appoint amongst a class and, if so, how much, if any, of the property to allocate to each of its members. Although it is possible to confer a mere power on a non-trustee, the decided cases more commonly concern mere powers given to trustees.

*In re Gulbenkian's Settlements*<sup>7</sup> and *McPhail v Doulton*<sup>8</sup> established, for a mere power and a trust power respectively, that the power will be valid only 'if it can be said with certainty that any given individual is or is not a member of the class [of objects].'<sup>9</sup> To satisfy this test (the 'McPhail test'), it is insufficient that it could be said of any one person that he or she would be within the class;<sup>10</sup> but it is unnecessary to be able to compile a list of all members of the class.<sup>11</sup> Nor is it necessary to be sure as to the whereabouts or continued existence of members of the class.<sup>12</sup> Beyond that, there is no clear agreement in English law as to how the *McPhail* test is to be applied. *In Re Baden's Deed Trusts (No 2)*,<sup>13</sup> three members of the Court of Appeal adopted different interpretations of the test. Sachs LJ<sup>14</sup> held that the test would be satisfied so long as the concepts used to define the class were sufficiently certain; evidential difficulties in applying the concepts would not be fatal. Megaw LJ<sup>15</sup> required that it be possible to say of a substantial number of objects that they fell within the class. Stamp LJ<sup>16</sup> required that it be possible to say whether any person was or was not a member of the class, although he did not require that a complete list be ascertainable. It appears from this that 'conceptual certainty' or 'criterion certainty' is necessary, so that the concepts defining the objects must be clear.<sup>17</sup> However, 'evidential uncertainty', namely uncertainty as to whether in fact particular persons satisfy the criteria for eligibility as an object, need not cause invalidity.<sup>18</sup>

This primary test of certainty in the definition of objects reflects a concern that all eligible persons are properly considered by the trustees and that only eligible persons obtain a benefit. Other considerations may impose further restrictions on the permissible range of objects. Thus, in the English cases interpreting *McPhail v Doulton*, it has been held that a mere power may also be void for 'capriciousness' where 'the terms of the power negative any sensible intention on the part of the settlor'<sup>19</sup> and so prevent the trustees from exercising sensibly their discretion to

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7 Above n1.

8 Above n2.

9 *Id* at 456 (Lord Wilberforce).

10 *In re Gulbenkian's Settlements*, above n1.

11 *Re Gestetner* [1953] Ch 672; *ibid*; *McPhail v Doulton*, above n2.

12 *McPhail v Doulton*, above n2 at 457 (Lord Wilberforce).

13 Above n3.

14 *Id* at 20.

15 *Id* at 24.

16 *Id* at 27–28.

17 *Id* at 20 (Sachs LJ), 30 (Stamp LJ).

18 It appears that Sachs LJ regarded evidential uncertainty as never fatal; Megaw LJ regarded evidential uncertainty as to a substantial number of persons as acceptable if there was evidential certainty for a substantial number of others; while Stamp LJ regarded evidential uncertainty as always fatal.

19 *In re Manisty's Settlement*, above n3 at 27 (Templeman J).

distribute the property.<sup>20</sup> Further, a trust power, but not a mere power,<sup>21</sup> may also fail for 'administrative unworkability'

where the meaning of the words used is clear but the definition of beneficiaries is so hopelessly wide as not to form 'anything like a class' so that the trust is administratively unworkable or ... one that cannot be executed.<sup>22</sup>

One basis for this objection is that the trust objects are simply too numerous for the trust to be administered properly.<sup>23</sup> A second explanation is that such a trust power would fail because the beneficiaries lack standing to enforce it.<sup>24</sup> The English courts have also considered and rejected the suggestion that the provisions of the *Wills Act 1837* (UK) impose more onerous substantive requirements when trusts and powers are created by will.<sup>25</sup> It remains to be considered how these issues have been dealt with in Australia.

## 2. *The Primary Test in Australia: Defining the Objects with Certainty*

### A. *Fixed trusts*

The traditional view in Australia, as it was in England prior to 1971,<sup>26</sup> was that for any trust to be valid, it must be possible to list all the objects of the trust ('the list certainty test'). This can be seen in decisions on trust powers,<sup>27</sup> and in the decision in *Kinsela v Caldwell*.<sup>28</sup> That case concerned a fixed trust, created in 1964, to distribute the property on 1 January 1984 to

the next-of-kin of the [settlor] in the shares and proportions to which they would be entitled under the laws relating to intestate succession then in force if the [settlor] had died on [1 January 1984].

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20 Ibid; *In re Hay's Settlement Trusts*, above n3 at 212 (Megarry V-C). The courts' reasoning suggest that this objection would be equally applicable to a trust power.

21 *In re Manisty's Settlement*, above n3 at 29 (Templeman J); *In re Hay's Settlement Trusts*, above n3 at 212 (Megarry V-C).

22 *McPhail v Doulton*, above n2 at 457 (Lord Wilberforce).

23 *In R v District Auditor ex parte West Yorkshire Metropolitan County Council*, above n3 at 26, Lloyd LJ held that a trust power for the 2.5 million inhabitants of West Yorkshire was invalid because 'the class is far too large.'

24 *In re Hay's Settlement Trusts*, above n3 at 213–214 (Megarry V-C).

25 *In re Beatty's Will Trusts* [1990] 1 WLR 1503, affirming *In re Park* [1932] 1 Ch 580; *In re Jones* [1945] Ch 105; *In re Abrahams' Will Trusts* [1969] 1 Ch 463.

26 *IRC v Broadway Cottages Trust* [1955] Ch 20; *Re Hain's Settlement* [1961] 1 WLR 440 at 445 (Lord Evershed MR); *In re Gulbenkian's Settlements*, above n1 at 524 (Lord Upjohn).

27 See *Re Gillespie* [1965] VR 402, discussed below at pages 99–100.

28 (1975) 132 CLR 458. Note also *Federal Commissioner of Taxation v Vegners*, above n5 at 551, where Gummow J stated that 'a fixed trust is used to describe a species of express trust where all the beneficiaries are ascertainable and their beneficial interest[s] are fixed, there being no discretion in the trustee or any other person to vary the group of beneficiaries or the quantum of their interests', although it appears that his Honour was referring to the usage of the term, rather than prescribing the test for certainty.

At first instance,<sup>29</sup> Mahoney J ruled that the less onerous tests established in *In re Gulbenkian's Settlements* and *McPhail v Doulton* were not relevant to the question before him, as those cases had dealt with the validity of mere powers and trust powers. The High Court,<sup>30</sup> in endorsing Mahoney J's decision, seems to have accepted that view. Although primarily concerned with the date at which the certainty test must be satisfied, the High Court apparently proceeded on the basis that the relevant test was that of list certainty. The court held that 'it is sufficient that the provisions of the trust ensure that upon [the date of distribution] the beneficiaries can be ascertained with certainty',<sup>31</sup> although it was necessary to assess the ascertainability of the class at the date of distribution from the vantage point of the date the instrument took effect. Thus, the court concluded that the trust in question was valid because 'in 1964 the whole range of objects eligible for selection was made capable of ascertainment at the date of distribution.'<sup>32</sup>

The court made it clear that difficulty in determining whether or not a particular person would be within the description of the class would not defeat the trust. Such evidential uncertainty could be resolved by a court. Further, the requisite certainty was not precluded by the possibility that there would be no member of the class, nor by the artificiality of the class of objects of this trust.<sup>33</sup>

However, the requirement of list certainty was rejected in the decision of the Supreme Court of New South Wales in *West v Weston*.<sup>34</sup> In that case, the testator left his residuary estate upon trust to be divided equally amongst such of the issue of his four grandparents as were living at the testator's death and attained the age of 21 years. There was no conceptual uncertainty: it was accepted that 'issue' meant descendants of all degrees, including both legitimate and ex-nuptial children, but not adopted children.<sup>35</sup> Nor was evidential uncertainty an objection: although there were doubts as to the eligibility of particular persons, the court accepted that questions as to whether X was a child of Y could be resolved by considering the available evidence.<sup>36</sup> The real obstacle to validity lay in tracking down all members of the class: one could never be satisfied, even on the balance of probabilities, that all issue had been identified. Two years of genealogical research had identified 1675 people as entitled to a share under the will, but it was probable that the search had not tracked down all members of the class and that further inquiry might well not discover all of the missing issue.

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29 Supreme Court of NSW, No 1355 of 1972, 28 June 1973, unreported.

30 McTiernan, Stephen and Mason JJ.

31 *Kinsela v Caldwell*, above n28 at 462.

32 *Ibid.* It is a misdescription of the objects to say they were 'eligible for selection.' They were all entitled to shares fixed by the intestacy laws.

33 *Ibid.*

34 (1998) 44 NSWLR 657.

35 Young J supported the inclusion of ex-nuptial children by reference to the *Children (Equality of Status) Act 1976* (NSW), s7(2) (now the *Status of Children Act 1996* (NSW), s6(2)). In excluding adopted children, the court did not address the significance of the *Adoption of Children Act 1965* (NSW), ss35(1), 36(1), nor the more inclusive approach to adopted children taken in *Harris v Ashdown* (1985) 3 NSWLR 193.

36 See also *In re Gulbenkian's Settlements*, above n1 at 524 (Lord Upjohn).

The court accepted that if list certainty were required, the trust would fail. However, Young J did not consider himself bound to apply that test. Asserting that in *Kinsela v Caldwell* 'the High Court did not deal with the present problem',<sup>37</sup> Young J decided not to follow the list certainty test recognised in *IRC v Broadway Cottages Trust*<sup>38</sup> and applied by Mahoney J at first instance in *Kinsela v Caldwell*.<sup>39</sup> Accepting that there was nothing in *McPhail v Doulton* that required a relaxation of the rule for fixed trusts, Young J nevertheless adopted its reforming spirit, in finding that the list test was stricter than was necessary. Accordingly, he propounded a modified rule for certainty, under which the trust would be valid if a substantial majority of the class could be listed:

The rule will be satisfied if, within a reasonable time after the gift comes into effect, the court can be satisfied on the balance of probabilities that the substantial majority of the beneficiaries have been ascertained and that no reasonable inquiries could be made which would improve the situation.<sup>40</sup>

On this test, Young J was prepared to uphold the trust, apparently for the benefit of all issue and not merely for those who had been identified. The trustees would be authorised to distribute the property equally among those who had, after reasonable inquiry, been identified, but without prejudice to the rights of others who had not yet been ascertained. The latter would have no claim against the trustees,<sup>41</sup> but would retain the right to recover their shares from the distributees.<sup>42</sup>

Although the motivation for modifying the rule was understandable,<sup>43</sup> it is submitted that Young J's test should not be accepted. Not only is it in conflict with *Kinsela v Caldwell*, it is unacceptable in principle. First, there is an obvious difficulty in measuring objectively what constitutes a 'substantial majority' of the beneficiaries.<sup>44</sup> It is difficult enough to say what is a substantial majority of a finite number of persons. The problem is even greater when, as here, the total number in the class is not and cannot be known. To institute a test for certainty couched in uncertain terms is not merely ironic; it invites contentious and inconsistent application. Secondly, the test undermines the essential nature of a fixed trust, namely that the trust instrument fixes the quantum of a beneficiary's share. Where equal or proportionate division is required by the terms of the trust among a class

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37 Id at 663.

38 Above n26.

39 Above n29.

40 Above n34 at 664.

41 *Trustee Act 1925* (NSW), s63.

42 *Ministry of Health v Simpson* [1951] AC 251. See also *Trusts Act 1973* (Qld) s109; *Trustees Act 1962* (WA) s65.

43 The testator having died without next of kin, the residue would have passed to the Crown as bona vacantia, if the trust had failed.

44 Similar objections have been raised in relation to what constitutes a 'substantial number' for the purposes of the test adopted by Megaw LJ in *In re Baden's Deed Trusts (No 2)*, above n3. See Underhill & Hayton, *Trusts and Trustees* (15<sup>th</sup> ed, 1995) at 70.

of indeterminate size, the share of each member of the class remains unquantifiable. Thirdly, the trust could only be carried into effect by the court authorising what would otherwise have been a breach of trust. Distribution among those issue who had been identified, where it was probable that they were not the only beneficiaries, would breach the duty to distribute equally among *all* the issue.<sup>45</sup> This may be contrasted with the accepted use of a Benjamin order.<sup>46</sup> Such an order authorises distribution among those who, on the probabilities, are the only beneficiaries, without precluding the possibility that further evidence might reveal the existence of other legitimate claimants.<sup>47</sup> Although the facilitative, pragmatic approach adopted by Young J has its merits, it must also have its limits. It is suggested that to uphold a trust that can only be executed by authorising a departure from its terms is to exceed these limits.

It is submitted that Australian courts should continue to require list certainty for fixed trusts. On this view, a fixed trust will fail if the objects are defined by uncertain concepts, but it should not fail because there are doubts as to whether a particular person meets the criteria.<sup>48</sup> If necessary, a court can resolve such doubts on the available evidence: if there is insufficient evidence that a person is eligible, then, for legal purposes, it is certain that the person is not eligible. Nor should a fixed trust fail because of doubts as to the whereabouts or continued existence of persons known to be eligible, since their share of the fund may be retained by the trustees or paid into court,<sup>49</sup> without affecting the distribution of the rest of the fund to other members of the class. However, more than conceptual certainty is required.<sup>50</sup> It must be possible to know that the list is complete. This raises a problem beyond conceptual and evidential uncertainty. Suppose property is settled on a fixed trust for the past and present employees of a large company, where exhaustive employment records are not available. There would be no conceptual uncertainty<sup>51</sup> and the question of whether a particular person was or had been an employee could be decided by a court on whatever evidence was presented. However, there would remain a further problem in that some person, who could be proved to be eligible, might simply be overlooked. In the absence of a source of comprehensive information, there would be no means of ascertaining everyone who qualified, other than by assessing the eligibility of every living person. Since

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45 Above n1 at 524 (Lord Upjohn).

46 *Re Benjamin* [1902] 1 Ch 723. In that case, property was left on fixed trust for the testator's children. It being probable, though not certain, that one son had predeceased the testator, the court authorised distribution among the remaining children known to have survived their father, without prejudice to the claim of the other son, should he subsequently be shown to have survived his father. For Australian applications, see *Re Hickey* [1925] VLR 270; *Re Dolling* [1956] VLR 535.

47 *Re Green's Will Trusts* [1985] 3 All ER 455 at 462 (Nourse J).

48 *Kinsela v Caldwell*, above n28; see Hanbury, HG & Martin, JE, *Modern Equity* (15<sup>th</sup> ed, 1997) (conceptual and evidential certainty is required.)

49 *Trustee Act* 1925 (NSW) s95; *Trustee Act* 1958 (Vic) s69; *Trustee Act* 1936 (SA) s47; *Trusts Act* 1973 (Qld) s102; *Trustees Act* 1962 (WA) s99; *Trustee Act* 1898 (Tas) s48; *In re Gulbenkian's Settlements*, above n1 at 524 (Lord Upjohn).

50 See Matthews, 'A Heresy and a Half in Certainty of Objects' [1984] *Conv* 22.

51 *In re Baden's Deed Trusts (No 2)*, above n3.

that would be impracticable, an exhaustive list could not be obtained.<sup>52</sup> It is suggested, then, that a fixed trust will also fail if there is no means of ascertaining all the members of the class other than by considering the eligibility of so many people that the task is impracticable.

As is evident from the example given above, validity may depend in part on the state of the available evidence:<sup>53</sup> a fixed trust for the past and present employees of X Ltd might be valid if exhaustive employment records are available or there is someone who would have known and can recall every employee.<sup>54</sup> So, too, with a class defined by family relationships. As there is a logical process to follow in tracking down the members of the class, and records are kept of births, deaths and marriages, it will often be possible to satisfy the requirement of list certainty on the balance of probabilities. However, depending on the range of relations to be included and the circumstances of the particular family, there may come a point when one can no longer be satisfied on balance that all members of the class are known.<sup>55</sup>

### B. Trust Powers

Prior to *McPhail v Doulton*, Australian courts followed the prevailing English view<sup>56</sup> that trust powers required list certainty. This was most explicitly applied in *Re Gillespie*.<sup>57</sup> In that case, the Supreme Court of Victoria refused to uphold as a

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- 52 It may be that this is the difficulty to which Lord Upjohn referred in *In re Gulbenkian's Settlements*, above n1 at 524 when he stated that '[n]ormally the question of certainty will arise because of the ambiguity of the definition of the class by reason of the language employed by the donor, but occasionally owing to some of the curious settlements executed in recent years it may be impossible to construct even with all the available evidence anything like a class capable of definition.' See further at pages 106–110 below.
- 53 The certainty of a particular class is a question of fact, to be decided on the balance of probabilities: *West v Weston*, above n34 at 660–661; *Re Saxone Shoe Co Ltd's Trust Deed* [1962] 1 WLR 943 at 953.
- 54 As in *In re Hain's Settlement*, above n26. See also *In re HJ Ogden* [1933] Ch 678, where the evidence showed that the trustee, Sir Herbert Samuel, could identify all the objects, namely 'political bodies in the United Kingdom having as their objects the promotion of Liberal principles in politics.'
- 55 In *Re Leverhulme, Cooper v Leverhulme (No 2)* [1943] 2 All ER 274 it was recognised that even in the case of the British royal family, a time comes when it is no longer practicable to trace all the issue of a particular deceased monarch.
- 56 *IRC v Broadway Cottages Trust*, above n26; *In re Hain's Settlement*, above n26 at 445 (Lord Evershed MR); *In re Gulbenkian's Settlements*, above n1 at 524 (Lord Upjohn).
- 57 Above n27. The same approach seemed implicit in *Re Griffiths* [1926] VLR 212, where a trust power in favour of any person other than the relatives of the testatrix, or any charitable organisation or institution, would have failed for uncertainty, but for the *Trusts Act* 1915 (Vic) s79, which saved the provision by confining the objects to charitable institutions and organisations. In the same case, a trust power in favour of the relatives of the testatrix (that is, those related by blood) was held to be valid, Mann J apparently assuming that there was no uncertainty in such a provision. The list test also seems to have been assumed in *Tatham v Huxtable* (1950) 81 CLR 639 at 649 (Fullagar J); *A-G (NSW) v Donnelly* (1958) 98 CLR 538 at 578 (Kitto J); and *Lutheran Church of Australia South Australia District Inc v Farmers' Co-Operative Executors and Trustees Ltd* (1970) 121 CLR 628 at 657 (Windeyer J). See also *McCracken v A-G (Vic)* [1995] 1 VR 67 at 70.

trust power a provision in favour of ex-members of the Australian Defence Forces who were Protestant, of British descent and in need of financial assistance. Little J found that the terms were sufficiently certain, but that it was virtually impossible to ascertain all members of the class.<sup>58</sup>

There has as yet been no direct consideration of the *McPhail* test in the High Court, although conflicting signals emerged from the dissenting joint judgment of Brennan, Dawson and McHugh JJ in *Registrar of the Accident Compensation Tribunal v Commissioner of Taxation (Commonwealth)*.<sup>59</sup> The joint judgment sought to demonstrate that the Registrar of the Tribunal did not hold on trust compensation payments made under the *Workers Compensation Act 1958 (Vic)*, by showing that the statutory provisions were incompatible with the usual incidents of a trust. In describing the usual features, Brennan, Dawson and McHugh JJ appeared to accept the traditional view that, in the event of failure by a trustee to execute a trust power, each object would take an equal share.<sup>60</sup> If this were so, the retention of the list certainty test for trust powers would be warranted: a list of objects would be needed to ascertain the share of each one. Yet their Honours also relied on *McPhail v Doulton* in recognising alternative judicial responses to the trustee's failure to distribute, including the appointment of a new trustee and, possibly, the court itself determining the basis of distribution after inquiry.<sup>61</sup> The recognition of these alternative responses, which were critical to the reasoning in *McPhail v Doulton*, may be seen as a step towards the High Court's acceptance of the *McPhail* test.<sup>62</sup> However, it seems not to have been appreciated in the minority judgment that the existence of the alternative responses destroys the basis for assuming that each object has an equal entitlement in default of appointment by the trustee.

There may be cases where a court would order equal division between the objects, in the event of failure by the trustee to distribute, on the basis that that is what the settlor would have intended. In such cases, the implied default provision is in effect a fixed trust, to which the list test should still be applicable. In such cases, each object does have an interest, which is liable to be divested by the trustee making an appointment.<sup>63</sup> But in cases such as *Re Gillespie*,<sup>64</sup> equal division

58 The evidence indicated there were approximately 1.75 million living ex-members of the services in Australia; but no records existed to identify them all, let alone those who would also meet the further requirements for eligibility under the trust. Although invalid as a trust power, the provision was upheld as a charitable trust after excluding the non-charitable objects, pursuant to the *Property Law Act 1958 (Vic)* s131.

59 (1993) 178 CLR 145. The decision of the majority, that the Registrar held the payments on trust, cast no light on the issues discussed here.

60 Id at 183, citing *Queensland Trustees Ltd v Commissioner of Stamp Duties* (1952) 88 CLR 54 at 63.

61 Ibid.

62 Ford & Lee, *Principles of the Law of Trusts* (3<sup>rd</sup> ed, 1996) at [5200].

63 The dicta in *Queensland Trustees Ltd v Commissioner of Stamp Duties*, above n60 at 63 might be explained on the basis that the court assumed that equal division would have been intended in the event of failure by the trustee to distribute. That assumption, however, does not appear warranted on the facts, where the trust power in favour of the settlor's niece, any husband and issue she might have, and her next of kin, appears to have been intended primarily for the benefit of the niece.

64 Above n27.

would not have been intended by the settlor. Rather, equal division, with its consequent need for list certainty, was imposed by the court for want of any other means of enforcing the trust. Once it is accepted that there are alternative ways of enforcing the trust, such as the appointment of a new trustee, the approval of a scheme proposed by the objects, or the court itself determining some other basis for distribution,<sup>65</sup> it is no longer necessary to resort to equal division, except where that would have been intended by the settlor. Since the beneficiaries no longer have a fixed share in default of appointment by the trustees, there is no longer a need for list certainty.

Notwithstanding the lack of clear guidance from the High Court, there is now a body of authority in state courts to suggest the acceptance of the *McPhail* test in Australia. The New South Wales Court of Appeal decision in *Horan v James*<sup>66</sup> shows most clearly that list certainty is no longer required. There the testator created what was construed as a trust power<sup>67</sup> in favour of all the world other than the testator's wife and the trustees. The court unanimously agreed that the trust power was not uncertain,<sup>68</sup> Glass and Mahoney JJA expressly applying the *McPhail* test. It is clear that the list test could not have been satisfied; it is equally clear that the trust would have satisfied the *McPhail* test on even its strictest interpretation. Thus, there was no need to consider the application of the test in any detail.

In *Re Blyth*,<sup>69</sup> the Supreme Court of Queensland applied the *McPhail* test to a trust power in favour of 'such organizations as ... in the Public Trustee's opinion are working for the elimination of war and ... such organizations as in the Public Trustee's opinion are formed for the purpose of raising the standard of life throughout the world.' Thomas J interpreted the *McPhail* test as requiring only conceptual or criterion certainty as opposed to list certainty.<sup>70</sup> On that basis, he found the first sub-class of objects valid, as the criterion was sufficiently certain to say of any organisation whether it was in the class or not, even though he held that a complete list could not have been made of all qualifying organisations. The second sub-class lacked conceptual certainty, and therefore would have failed on either test.

In several other cases, the courts have expressed support for the *McPhail* test, although it has been unnecessary to the decision. In *Gerhardy v South Australian Auxiliary to the British and Foreign Bible Society Inc*,<sup>71</sup> Legoe J applied the reasoning in *In re Gulbenkian's Settlements* and *McPhail v Doulton* in deciding

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65 *McPhail v Doulton*, above n2 at 457 (Lord Wilberforce).

66 [1982] 2 NSWLR 376.

67 Although Hutley JA appeared to be thinking of a mere power when he observed, at 379, that in the event of failure by the trustees, the next of kin would be entitled to call for the estate; his Honour cited the proposition of Lord Upjohn in *In re Gulbenkian's Settlements*, above n1 at 525 that under a mere power, those entitled in default are entitled to restrain misapplications of the fund.

68 The court went on to find that the provision failed for infringing the rule against testamentary delegation, as to which see below at page 107.

69 [1997] 2 Qd R 567.

70 *Id* at 576.

71 (1982) 30 SASR 12.

that a power in favour of 'any other Christian organisation which may need assistance' would be 'of no effect in creating either a mere power or a trust power'.<sup>72</sup> In *McCracken v AG (Vic)*,<sup>73</sup> JD Phillips J found there was no binding decision requiring him to use the *McPhail* test as opposed to the list certainty test; but he was prepared to proceed on the basis that the *McPhail* test applied in Victoria. As in *Gerhardy*, it was strictly unnecessary to decide, as the trust power in favour of 'Christian organisations and societies' would have failed either test, due to the conceptual uncertainty in the adjective 'Christian'.<sup>74</sup> Further, in *Herdegen v FCT*,<sup>75</sup> Gummow J stated, obiter, that the test for certainty of objects for a discretionary trust was that in *McPhail v Doulton*.

### C. Mere Powers

The test for mere powers has received little direct attention in Australia.<sup>76</sup> Even so, it is likely that the *McPhail* test applies. The acceptance of *McPhail v Doulton* in the context of trust powers can be taken as implicit endorsement that the test also applies to mere powers. More directly, in *Gerhardy v South Australian Auxiliary to the British and Foreign Bible Society Inc*,<sup>77</sup> Legoe J specifically applied the test to assess the validity of a mere power. He stated that

a mere power will not be invalid provided the "criterion certainty"... is ascertainable and that the criterion of membership of the range of benefit is sufficiently clear for it to be said of any person or institution that he or it either is or is not within the range of benefit.<sup>78</sup>

### D. Applying the McPhail Test

Although still an open question in the High Court of Australia, there is now considerable support for the *McPhail* test in Australia as applicable to both trust powers and mere powers. Most commentators seem satisfied that the test is appropriate to provide sufficient certainty for both the trustees and the courts to

72 Id at 26. Provisions in favour of other nominated charities were upheld after severing the uncertain class pursuant to *Trustee Act 1936 (SA)* s69a. See *Gerhardy v South Australian Auxiliary to the British and Foreign Bible Society Inc (No 3)* (1986) 44 SASR 195.

73 *McCracken v AG (Vic)*, above n57 at 71.

74 The provision was upheld by construing it as a trust for purposes, some of which were charitable and so could be saved by *Property Law Act 1958 (Vic)* s131.

75 (1988) 84 ALR 271 at 277.

76 In *Re Gillespie*, above n27 at 410–412, the court, relying on *Re Gestetner*, above n11 seemed to accept that a mere power might be valid provided one could say of any given person that he or she was a member of the class. In *re Gulbenkian's Settlements*, above n1 has been referred to with approval, although not in the context of the test for certainty, in: *Lutheran Church of Australia South Australia District Inc v Farmers' Co-Operative Executors and Trustees Ltd*, above n57 at 657 (Windeyer J); *Horan v James*, above n66 at 384 (Mahoney JA); *McCracken v AG (Vic)*, above n57 at 71; and *Re Blyth*, above n69 at 574.

77 Above n71.

78 Id at 23, relying on *Re Gestetner*, above n11 and *In re Gulbenkian's Settlements*, above n1. As indicated above, the provision in favour of 'any other Christian organisation which may need assistance' was held to lack the requisite criterion certainty.

carry out their respective tasks,<sup>79</sup> and there has been no expressed judicial opposition to it. More doubt exists as to what is required to pass that test. There has been no detailed judicial analysis of the *McPhail* test of the kind undertaken in *In re Baden's Deed Trusts (No 2)*.<sup>80</sup> However, the acceptance in *Re Blyth*<sup>81</sup> and *Gerhardy*<sup>82</sup> that conceptual or criterion certainty is the essence of the *McPhail* test accords with the liberal approach of Sachs LJ in *In re Baden's Deed Trusts (No 2)* and suggests that evidential uncertainty is not regarded as a ground of invalidity for either trust or mere powers. Similarly, in *McCracken v AG (Vic)*,<sup>83</sup> JD Phillips J seemed prepared to accept that evidential uncertainty would not invalidate a provision to which the *McPhail* test applied, although he expressed some doubts as to where the boundary between evidential and conceptual or linguistic certainty was to be drawn. In any event, in the light of the High Court's observation in *Kinsela v Caldwell*<sup>84</sup> that evidential difficulties would not defeat a fixed trust, it is most unlikely that a stricter approach would be taken to mere powers and trust powers. One consequence of this interpretation of the test may be to cast a greater burden upon potential beneficiaries to establish their credentials: if those who are not proved to be eligible may be treated as ineligible,<sup>85</sup> trustees might, in cases of doubt, require satisfactory evidence of eligibility to be adduced by anyone wishing to be considered. A further effect may be to increase the number of cases where the courts are required to resolve factual disputes. The benefit to be gained by adopting this interpretation lies in the greater prospect of upholding trust powers and mere powers.

### 3. *Avoiding Uncertainty*

The relaxation of the tests for trust powers and mere powers should reduce the occasions on which such provisions are held invalid, but problems of uncertainty of objects will no doubt continue to arise. In that context, it is pertinent to consider several means by which potential uncertainty might be avoided or uncertain objects salvaged.

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79 See for example Hardingham, IJ & Baxt, R, *Discretionary Trusts* (2<sup>nd</sup> ed, 1994) at 34; Ford & Lee, *Principles of the Law of Trusts*, above n62 at [5200]; Dal Pont & Chalmers, *Equity and Trusts in Australia and New Zealand* (1995) at 371. The editors of Jacobs, *Law of Trusts in Australia* (6<sup>th</sup> ed, 1997) at 45–46 are more equivocal.

80 Above n3.

81 Above n69.

82 Above n72.

83 Above n57 at 73–74.

84 Above n28.

85 *In re Baden's Deed Trusts (No 2)*, above n3 at 20 (Sachs LJ). Some modification of this approach might be required where the class is defined at least in part by exclusion: it would be difficult for anyone to prove eligibility under a trust power for 'employees of X, other than relatives of Y.' Arguably, anyone proved to be an employee of X might be treated as eligible, unless proved to be a relative of Y.

### A. *Defining the Class by Reference to the Opinion of Others*

The drafter of a trust instrument may attempt to avoid problems of uncertainty by defining the objects as those whom the trustee or some third person considers to have met specified, but uncertain, criteria. However, it is doubtful that questions of conceptual uncertainty can be resolved in this way. In essence, the objection is that the 'referee' cannot be expected to answer a question the meaning of which is itself uncertain. This appears to have been the view adopted by Kitto J in *Tatham v Huxtable*, where his Honour held uncertain a power in favour of persons who, in the opinion of the executor, had 'rendered service meriting consideration' by the testator:

What constitutes 'service' within the meaning of the will it is impossible to say; and the standard by which the executor is to decide whether the service rendered by a particular person merits consideration by the testator is none other than the executor's own opinion, for the formation of which no guidance is provided by the will.<sup>86</sup>

Similarly, in *Re Blyth*<sup>87</sup> a trust power in favour of 'such organizations as in the Public Trustee's opinion are formed for the purpose of raising the standard of life throughout the world' was ruled uncertain. Thomas J held the trust invalid because the phrase 'raising the standard of life' was ambiguous. As such, there was no certain criterion for the Public Trustee to apply.

A variant on this strategy is for the settlor to adopt the meaning used by a particular person for an otherwise ambiguous or vague term. For example, in creating a trust power in favour of 'loyal employees', a settlor might indicate that the criteria of loyalty should be those already used by the employer for other purposes such as promotion or granting other benefits. While this seems acceptable in principle as a mode of definition, it may be of limited use: it should be confined to cases where it is clear that the settlor did intend to adopt the third party's definition,<sup>88</sup> and then only where the referee can be shown to have an established, sufficiently clear meaning for the term.<sup>89</sup> Otherwise, the referee would be required to choose between the various available meanings, a task for which no guidance would have been provided.

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86 Above n57 at 653. To similar effect, see *In re Coxen; McCallum v Coxen* [1948] Ch 747; *In re Jones; Midland Bank Executor and Trustee Co Ltd v Jones* [1953] Ch 125 comparing with *Re Leek* [1969] 1 Ch 563 at 579 (Harman LJ); Hanbury & Martin, above n48 at 103.

87 Above n69.

88 In cases such as *Tatham v Huxtable*, above n57 and *Re Blyth*, *ibid*, it can be said that, as a matter of construction, the trustee's opinion was not intended to determine the meaning of the concepts by which the class was defined, but only to decide which persons or organisations met the criteria.

89 In *Re Tuck's Settlement Trusts* [1978] Ch 49 the testator was taken to have adopted for the purposes of a settlement the meaning of 'Jewish faith' as used by the Chief Rabbi of London. It was assumed, rather than proved, that the Chief Rabbi would have a clear definition of the faith so that the concept was rendered certain: see [1978] Ch 49 at 66 (Eveleigh LJ).

### B. Construction

Application of the established principles of construction<sup>90</sup> may on occasion prevent a problem of uncertainty from arising. Conceptual uncertainty may be avoided where the court adopts a particular meaning for a potentially ambiguous term or ignores a vague qualifier. A simple example is provided by *Re Griffiths*,<sup>91</sup> where the court interpreted 'near relatives' as meaning all those related by blood to the testatrix, discarding the alternative meaning of 'relatives' as including those related by marriage and simply ignoring the qualification that the relatives be 'near'. Similarly, potential problems relating to list certainty might dissolve or diminish as a result of a particular construction of the language used. For example, it may be easier to list all of a person's relatives if 'relatives' is construed as the statutory next of kin, rather than all those related by blood. Accordingly, a fixed trust for relatives may be construed as one for the statutory next of kin.<sup>92</sup> While a court may not ignore the clear meaning of the language used by a testator or settlor, it will generally seek to resolve ambiguity so as to avoid invalidity.<sup>93</sup>

### C. Severance

It is inherent in both the list test and the *McPhail* test that where the class of objects consists of a number of sub-classes, the trust will generally fail unless all sub-classes meet the relevant test for certainty.<sup>94</sup> The only exception arises under statutory provisions,<sup>95</sup> which enable a trust for both charitable and non-charitable purposes to be saved by excision of the non-charitable purpose. Beyond that there is no power to sever an offending sub-class. Thus, in *Tatham v Huxtable*,<sup>96</sup> the entire power, in favour of named beneficiaries and other persons who had rendered service meriting the consideration of the testator, failed. It was not possible to save the provision in favour of the named beneficiaries. As Kitto J explained,<sup>97</sup> both sub-classes were expressed to be the objects of a single power, with no restriction on the share that could be distributed to either sub-class.

It is surprising, then, that this basic principle seems not to have been considered in *Re Blyth*.<sup>98</sup> There, Thomas J ordered that:

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90 On the construction of wills, see Hardingham, IJ, Neave, MA & Ford, HA, *Wills and Intestacy in Australia and New Zealand* (2<sup>nd</sup> ed, 1989) at chapter 11.

91 Above n57.

92 *In re Griffiths*; *Griffiths v Griffiths*, id at 217; *Antill-Pockley v Perpetual Trustee Co Ltd* (1974) 132 CLR 140 at 148 (Gibbs J).

93 *Fell v Fell* (1922) 31 CLR 268 at 275 (Isaacs J); *IRC v McMullen* [1981] AC 1 at 11 (Lord Hailsham).

94 Distinguish the situation where the instrument allocates a quantifiable portion of the property to separate classes: a portion given to a certain class may be effective even though the portion for an uncertain class will fail. See, for example, *Re Inman* [1965] VR 238.

95 *Charitable Trusts Act* 1993 (NSW) s23; *Trusts Act* 1973 (Qld) s104; *Trustee Act* 1936 (SA) s69A; *Variation of Trusts Act* 1994 (Tas) ss4(2), (3); *Property Law Act* 1958 (Vic) s131; *Trustees Act* 1962 (WA) s102.

96 Above n57.

97 Id at 652.

98 Above n69.

the gift of residue is a good and valid gift to the extent that it is a gift on trust to be distributed and divided among such organisations as in the Public Trustee's opinion are working for the elimination of war; and that it is invalid insofar as it purports to be a gift on trust to be distributed and divided among such organisations as in the Public Trustee's opinion are formed for the purpose of raising the standard of life throughout the world.<sup>99</sup>

It is clear that this order reflected his Honour's 'primary findings', which were not based upon the statutory severance provisions of *Trusts Act 1973* (Qld) s104. Yet the only power to effect such a severance was to be found in the statute.<sup>100</sup> Indeed, provisions like s104 would have been unnecessary if the courts had an inherent power to save a trust by severing the offending objects. While there is a case for extending a statutory severance power to private trusts,<sup>101</sup> it is too late for the courts to 'discover' an inherent power to reshape a trust or power in such a dramatic fashion.

#### 4. *The Secondary Tests: Administrative Unworkability and Capriciousness*

##### A. *Fixed Trusts*

It appears that fixed trusts are not vulnerable to attack on grounds of capriciousness or administrative unworkability. First, because the trustee of a fixed trust exercises no discretion in the distribution of the property, there is no reason to be concerned with the issue of capriciousness. Secondly, there is no suggestion in the cases that fixed trusts should fail because the objects known to be eligible are 'so hopelessly wide as not to form anything like a class' so as to be administratively unworkable or unenforceable.<sup>102</sup> In *West v Weston*<sup>103</sup> the trustee was prepared to execute, and the court prepared to enforce, a fixed trust in favour of a relatively wide class, namely the 1675 issue who had been identified. In that case, the trust fund was worth about \$500,000. Had it been considerably smaller, it might have been futile to enforce the trust if all or most of the fund would have been expended in tracing the beneficiaries or otherwise executing the trust. However, that problem is not peculiar to trusts for a wide class of objects: it might equally affect a trust of a small sum to be divided between a relatively small class. In any event, it is not clear that a trust will fail on that ground.<sup>104</sup>

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99 Id at 585.

100 The court went on to find that, if necessary, the provision in favour of the first sub-class could have been saved under s104.

101 *Re Leek*, above n86 at 586 (Sachs LJ).

102 This is a separate issue from the problem, discussed above at pages 98–99, which arises where the objects cannot all be known, because it is impracticable to consider the eligibility of a large number of persons.

103 Above n34.

104 In *Re Eden* [1957] 1 WLR 788 at 795, Wynn-Parry J was prepared to countenance the expenditure of the entire trust fund in tracing the beneficiaries.

### B. *Trust Powers*

It is still unclear in Australia whether an objection based on width or the lack of a class of objects applies to trust powers, and if it does, what it entails. In cases prior to *McPhail v Doulton*, trusts for a wide range of objects were likely to fail for infringing the list certainty test. Thus, in *Re Griffiths*,<sup>105</sup> a trust power in favour of anyone other than the relatives of the testatrix (including charitable institutions) was said to be invalid for uncertainty. In language presaging that of Lord Wilberforce in *McPhail v Doulton*, Mann J explained that such a trust was 'incapable of being administered or enforced by the Courts'.<sup>106</sup> However, it is likely that he was referring to the problem that a court would face if required to enforce the trust by equal division. Similarly, in *Re Gillespie*,<sup>107</sup> it was unnecessary to consider the issue of width in relation to a trust power for a potentially large class<sup>108</sup> because the trust was held to fail for want of list certainty.

The cases decided since *McPhail* reveal no clear direction. In *Horan v James*,<sup>109</sup> a hybrid trust power<sup>110</sup> was struck down only on the ground of testamentary delegation. All members of the court cited *McPhail v Doulton* and concluded that the trust did not fail for uncertainty.<sup>111</sup> Mahoney JA, who specifically considered Lord Wilberforce's proviso, interpreted the objection as concerned with the width of the class, yet concluded that a hybrid class was unobjectionable on this ground. If he was correct to find that a power in favour of all the world except a few individuals was not too wide, it is difficult to see how any trust power could fail on this ground. However, it is submitted that the judgment was flawed on this point. It failed to appreciate that the objection may apply differently as between trust powers and mere powers, a point critical to the reasoning in *Re Manisty's Settlement*<sup>112</sup> and *Re Hay's Settlement Trusts*,<sup>113</sup> on which Mahoney JA purported to rely. Both English cases accepted that the requirement of administrative workability applies to trust powers, but not mere powers. Indeed in *Re Hay's Settlement Trusts*, Megarry V-C indicated that a hybrid trust power would fail on this account.<sup>114</sup>

By contrast, in *McCracken v AG (Vic)*,<sup>115</sup> JD Phillips J appeared to regard the objection as applicable in Australia, although he considered its extent to be still uncertain. In that case his Honour suggested without deciding that a trust power in

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105 Above n57. See also *In the Will of Bourk* [1907] VLR 171; *In the Will of Dwyer* [1916] VLR 114; *Re Hollole* [1945] 295.

106 Id at 219.

107 Above n27.

108 Those of the 1.75 million ex-members of the Australian Defence forces who were Protestant, of British descent and in need of financial assistance.

109 Above n66.

110 A trust power or mere power is described as 'hybrid' where the power is exercisable in favour of anyone except specified persons or a specified class.

111 Above n66 at 379–380 (Hutley JA), at 382 (Glass JA), at 383–384 (Mahoney JA).

112 Above n3.

113 Above n3.

114 Id at 213–214.

115 Above n57 at 72.

favour of 'Christian organisations and societies' might be so wide as to be administratively unworkable. Further, in *Re Blyth*<sup>116</sup> Thomas J clearly regarded the requirement as applicable; he thought that the trust power for 'such organizations as in the Public Trustee's opinion are formed for the purpose of raising the standard of life throughout the world' fell foul of the proviso. Here too the reasoning was suspect. Thomas J based his conclusion on the premise that 'raising the standard of life' means different things to different people.<sup>117</sup> That, however, is a problem of conceptual uncertainty rather than administrative unworkability. By contrast, Lord Wilberforce contemplated that administrative unworkability was a distinct issue capable of defeating a trust for conceptually certain objects.

### C. *Mere Powers*

There seems to have been no suggestion in the Australian cases that a mere power will fail simply by reason of the width of the objects, or their failure to constitute a class, although the decisions contain no considered treatment of the issue. In *Tatham v Huxtable*, Fullagar J appeared to accept that a hybrid mere power, if created inter vivos, would be valid:

When it is said in [*Re Park*<sup>118</sup> and in *Re Jones*<sup>119</sup>] that the power given is a valid power as such, *as no doubt it is*, the real question — the question whether there is a testamentary disposition of property — seems to me, with great respect, to be simply avoided.<sup>120</sup>

In *Evans v FCT*,<sup>121</sup> Fisher J cited *Re Manisty's Settlement* and *Re Hay's Settlement Trusts* in declining to invalidate, on grounds of administrative unworkability, a hybrid mere power to add new beneficiaries to the class of objects. In *Gregory v Hudson*,<sup>122</sup> the New South Wales Court of Appeal accepted as valid a similar power, there being no argument to the contrary.<sup>123</sup>

### D. *What Secondary Tests are Needed?*

A closer examination of Lord Wilberforce's statement regarding objects which are 'so hopelessly wide as not to form "anything like a class" so that the trust is administratively unworkable or ...one that cannot be executed' reveals several reasons for the speculation and confusion it has generated. First, the words 'anything like a class' invoked the language used by Lord Upjohn in *In re Gulbenkian's Settlements* to describe objects that could not be completely

116 Above n69 at 577.

117 Ibid.

118 Above n25.

119 Above n25.

120 Above n57 at 649–650 [Emphasis added.]

121 Federal Court, Nos.G2301–2304 of 1987, 21 September 1988, unreported.

122 (1998) 45 NSWLR 300.

123 The Court of Appeal refused to allow the validity of the inter vivos settlement to be questioned on appeal, as it had not been challenged in the court below.

listed.<sup>124</sup> Lord Wilberforce cannot have meant to use the words in that way, as he had already rejected the relevance of list certainty to trust powers. Secondly, the test tends to equate width of the range of objects with the absence of a class. Yet these are distinct issues: a numerically large group, such as ‘women’ or ‘workers of the world’, may properly be described as a class, while a small but disparate collection of named individuals may well not constitute a class. The equation of these concepts only obscures the nature of the problem. It is also unclear whether the notion of ‘administrative unworkability’ and that of unenforceability are being used synonymously, or whether there are two separate problems. Given this uncertainty, it might be more helpful for Australian courts to address the issue of what in principle is required of objects beyond the primary test of certainty, rather than seek to explain Lord Wilberforce’s Delphic dictum.<sup>125</sup>

If one considers the trustees’ needs in executing the trust, the size of the range of objects need not cause insurmountable difficulty. In the case of fixed trusts, if funds are sufficient the property can be distributed to a very large class of identified objects. In the case of trust powers and mere powers, the size of the range of objects need not prevent proper performance of the trustees’ discretions. If the reasoning in *McPhail v Doulton* is accepted, then in neither case are trustees required to consider every possible beneficiary before making a distribution. They can survey the objects ‘by class and category’, in such detail as is appropriate to the size of the fund available.<sup>126</sup>

However, if the trustees are to select relevant categories and determine priorities as between them, it must be possible for them to discern some rational basis for allocating benefits under the power. It is this consideration which has prompted English courts to suggest that a trust power or mere power must not be capricious, and that this concern requires some restriction on the classes of objects for whom a power may be created: the class must not be such as will negative a sensible intention on the part of the settlor.<sup>127</sup> Even so, the suggestion has been made tentatively, and more by way of theoretical argument than in the realistic expectation that it would be applied in practice. Further, the objection is seen to be insubstantial once it is accepted that guidance in the selection of beneficiaries need not be provided by the range of objects, but can be inferred from the purposes for which the power was created, as revealed elsewhere in the instrument or from external circumstances.<sup>128</sup> Even where the class of objects might appear ‘capricious’, it should still be possible to infer the settlor’s intent from other

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124 Above n1 at 524, set out above at footnote 52. Lord Upjohn was referring to trusts of the kind in *Re Sayer* [1957] Ch 423, namely a trust for the employees and ex-employees of a company. This was the very kind of trust in issue in *McPhail v Doulton*, yet there was no indication that it should fail of account of the width of the class. See also *Re Griffiths*, above n57 at 219, where Mann J indicated that a trust would be incapable of being administered or enforced because of its lack of list certainty.

125 It is established in Australia that English authorities generally ‘are useful only to the degree of the persuasiveness of their reasoning’: *Cook v Cook* (1986) 162 CLR 376 at 390 (Mason, Wilson, Deane & Dawson JJ).

126 Above n2 at 449 (Lord Wilberforce).

127 *Re Manisty’s Settlement*, above n3 at 27 (Templeman J).

sources. Hence, it is submitted, there is scant reason for Australian courts, if called upon to consider the issue of capriciousness,<sup>129</sup> to import this objection as a limit on the objects of a trust or power.

### 5. *Restrictions Derived from the Beneficiary Principle*

There is a further consideration, which may warrant a limit on the objects of a trust or power, stemming from the need for beneficiaries with standing to enforce the duties of the trustee. This need, expressed as the beneficiary principle, is usually raised in the context of purpose trusts.<sup>130</sup> However, that principle might equally invalidate trusts for persons where there is no one with the 'immediate and peculiar interest'<sup>131</sup> needed for standing. Such a requirement would not defeat a fixed trust, as each beneficiary's right to receive property would be sufficient to accord standing to all the beneficiaries. By contrast, the interests of the beneficiaries under a broad trust power might be regarded as too remote or insufficiently distinctive. A trust power for all the world, or all the world except for a specified class, would fail on this ground.<sup>132</sup> On the other hand, it seems to have been accepted in *McPhail v Douulton* that the numerous objects of the Baden trust would have had standing to complain in the event of non-performance by the trustees.<sup>133</sup> The question, then, is where the line should be drawn. A solution to this issue might be developed by drawing upon the distinction made between public and private trusts. It is generally accepted that members of the public at large, or of a section of the public, lack standing to enforce a charitable trust, even though they may benefit under the trust. Only the Attorney-General has the requisite standing.<sup>134</sup> It would be open to conclude that, by contrast, members of a private class would have standing. On this view, a trust power would satisfy the beneficiary principle if the objects satisfied the test used to distinguish a private class from a section of the public,<sup>135</sup> namely, whether the objects are defined by reference to a personal nexus

128 It was on this basis that in *Re Hay's Settlement Trust*, above n3 at 212, Megarry V-C exposed the inadequacy of the example of a capricious power offered by Templeman J in *Re Manisty's Settlement*: a power in favour of the residents of Greater London would not be capricious if the settlor had been the Chairman of the Greater London Council.

129 In *Gregory v Hudson* (1997) 41 NSWLR 573 at 580, Young J remarked 'there is nothing to stop a person making the most capricious will' but that comment was not addressed to the issue discussed in *Re Manisty's Settlement* and *Re Hay's Settlement Trusts*.

130 *Morice v Bishop of Durham* (1805) 10 Ves Jun 522; 32 ER 947; *Re Astor* [1952] Ch 342; *Leahy v A-G (NSW)* [1959] AC 457 at 478.

131 *A-G v Brown* (1818) 1 Swan 265 at 290 (Lord Eldon).

132 *Re Hay's Settlement Trusts*, above n3 at 213–214.

133 See above n2 at 452, where Lord Wilberforce specifically considered the application of *Morice v Bishop of Durham*, above n130 to a trust for employees. See also *In re Denley's Trust Deed; Holman and Ors v H. H. Martyn and Co Ltd and Ors* [1969] 1 Ch 373.

134 *Wylde v A-G (NSW)* (1948) 78 CLR 224 at 297 (Dixon J); *Ku-ring-gai Municipal Council v A-G (NSW)* (1955) 55 SR (NSW) 65 at 69–70 (Roper CJ).

135 *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Davies v Perpetual Trustee Co Ltd* [1959] AC 439; *Thompson v FCT* (1959) 102 CLR 315; *In the Will of M. Scales; Permanent Trustee Co of New South Wales Ltd v Freeman and Ors* [1972] 2 NSWLR 108; *Re Evans* [1957] St R Qd 345; compare to *Dingle v Turner* [1972] AC 601.

to one or more propositi, including connecting factors such as familial relationships, club membership, financial dependency or employment, but not residence within a geographical area.<sup>136</sup> Such a test has the advantage that it is already well developed in the law of charities; it would also explain the invalidity of trust powers for 'all the residents of Greater London'<sup>137</sup>, 'the inhabitants of West Yorkshire',<sup>138</sup> 'anyone the trustee thinks fit'<sup>139</sup> or 'anyone in the world save X'<sup>140</sup> and the validity of a trust power for the (numerous) 'present and former employees of Y Ltd, their relatives and dependants'.<sup>141</sup>

The question remains whether a similar restriction should extend to mere powers. In the context of provisions for purposes, the beneficiary principle has been regarded as inapplicable to mere powers, since there is no duty to distribute which might need to be enforced.<sup>142</sup> The issue is whether the duty of trustees to consider properly the exercise of a mere power<sup>143</sup> warrants a different answer in the case of mere powers in favour of persons. It might be thought that there can be no duty to consider unless there are objects of the power with standing to enforce it. Hence, if the duty to consider were regarded as an essential attribute of any mere power given to a trustee, hybrid mere powers would be invalid, despite the line of authority upholding such powers.<sup>144</sup> This conclusion can be avoided, however, by further refinement of the nature of the duty to consider. It is suggested that the trustee of any mere power owes a duty to those entitled in default of appointment not to exercise the power without proper consideration.<sup>145</sup> Clearly, those entitled in default have a sufficient interest to be accorded standing. Further, where the power is exercisable in favour of a discrete class, the members of that class can be regarded as having a sufficiently distinctive prospect of benefiting that they can reasonably expect the trustee to consider whether to make an appointment. To protect that expectation, the trustee can be said to be under a duty to consider

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136 *Hardingham & Baxt*, above n79 at 38–39 suggest a similar but more extensive test, which would include some classes regarded as sections of the public in the law of charities.

137 *McPhail v Doulton*, above n2 at 457 (Lord Wilberforce).

138 *R v District Auditor, ex parte West Yorkshire Metropolitan County Council*, above n3; see also Harpum, 'Administrative Unworkability and Purpose Trusts' [1986] *CLJ* 391 who noted that the decision reinforces the distinction between public and private trusts: public trusts are valid only if charitable.

139 *Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381; *In the Will of Bourk*, above n105; *In the Will of Dwyer*, above n105.

140 *Re Hay's Settlement Trusts*, above n3 at 211.

141 *McPhail v Doulton*, above n2, which is consistent with the conclusion in *Oppenheim v Tobacco Securities Trust Co Ltd*, above n135 that such a class, however large, is not a section of the public.

142 *In re Douglas; Obert v Barrow* (1887) 35 Ch D 472; *Re Producers' Defence Fund* [1954] VLR 246 at 255.

143 *Re Gestetner*, above n11 at 688; *Re Gulbenkian's Settlements*, above n1 at 518 (Lord Reid); *Re Manisty's Settlement*, above n3 at 25; *Re Hay's Settlement Trusts*, above n3 at 209; *Karger v Paul* [1984] VR 161 at 164 (McGarvie J). It is also possible that in certain circumstances trustees might have a duty to exercise a mere power: *Mettoy Pension Trustees v Evans* [1990] 1 WLR 1587.

144 *Tatham v Huxtable*, above n57 at 650 (Fullagar J); *Re Manisty's Settlement*, above n3; *Re Hay's Settlement Trusts*, above n3; *Evans v FCT*, above n121; *Gregory v Hudson* (1998), above n122.

145 *Karger v Paul*, above n143 at 164 (McGarvie J).

making an appointment, which the members of the class have standing to enforce. However, where the power is exercisable in favour of almost anyone, there will be no one with a sufficiently distinctive prospect of benefiting to warrant a claim to be considered. In such a case, there should be no duty to consider owed to the potential appointees. Drawing again on the distinction made in the context of trust powers, it is suggested that the duty to consider should only be owed to potential appointees where they form a private, rather than a public, class. On this view, the duty to consider, owed to potential appointees, would not be an essential feature of a mere power. Accordingly, the beneficiary principle would pose no threat to the validity of a hybrid mere power or a power in favour of a section of the public.

## 6. *Testamentary Trusts and Powers*

The final issue to be considered is whether stricter rules for certainty apply to trusts and powers when created by will. The theory that the requirements are stricter can be traced to the decision in *Tatham v Huxtable*, where the High Court invoked the 'cardinal rule' that 'a man may not delegate his testamentary power. To him the law gives the right to dispose of his estate in favour of ascertained and ascertainable persons.'<sup>146</sup>

In that case, a majority of the High Court ruled invalid a testamentary provision by which the executor was authorised to distribute the residuary estate to the beneficiaries named in the will, or others who in the executor's opinion had rendered service meriting consideration by the testator. The decision itself is perfectly compatible with the view that conceptual certainty in the definition of objects is required for all trusts and powers, whether testamentary or inter vivos.<sup>147</sup> However, the reasoning of the court, particularly the objection raised by Fullagar J to testamentary hybrid powers, suggested a more restrictive approach to testamentary provisions, although different conclusions have since been drawn as to what extra requirements apply.

One interpretation ('the disposition theory') is that the testator must effect a disposition of his property in the will, in the sense of alienating it from the statutory next of kin; it cannot be left to someone else to decide whether the property goes to beneficiaries designated by the will or to the next of kin. This rationale was developed by Fullagar J in *Tatham v Huxtable*<sup>148</sup> and applied by a statutory majority of the High Court in *Lutheran Church of Australia South Australia District Inc v Farmers' Co-Operative Executors and Trustees Ltd.*<sup>149</sup> In *Tatham v*

146 Above n57 at 653 (Kitto J) citing *Chichester Diocesan Fund v Simpson* (1944) AC 341 at 371 (Lord Simonds).

147 *Lutheran Church of Australia South Australia District Inc v Farmers' Co-Operative Executors and Trustees Ltd.*, above n57 at 635 (Barwick CJ).

148 Above n57 at 649–650.

149 Above n57 at 644 (McTiernan & Menzies JJ).

*Huxtable*, Fullagar J explained that, because the *Wills Act*<sup>150</sup> enables a person to dispose of property by will, it follows that:

some powers of appointment, which would be perfectly good in any instrument other than a will, are ineffective in a will for the simple reason that they do not amount to a testamentary 'disposition' of property, or indeed to any 'disposition' of property at all.<sup>151</sup>

On this view, all testamentary trusts, which are otherwise valid, would satisfy the test.<sup>152</sup> Similarly, a testamentary gift made to the trustee of an existing trust would be valid.<sup>153</sup> Further, a general power<sup>154</sup> is reconciled with the rule on the basis that it is tantamount to a disposition of the property to the donee of the power;<sup>155</sup> a special power<sup>156</sup> with a gift in default disposes of the property either to the objects of the power or those entitled in default; but a mere special power, with no gift over, is anomalous, since it does not effect a disposition of property, but merely authorises one.

Where there is, as a matter of construction, no ... trust [in default of appointment], there does seem to be a departure from principle if we say that the creation by will of a special power to appoint among a class is a testamentary disposition of property, but to say so represents a natural enough "latitude" of view, which is perhaps characteristic of a system which has never regarded strict logic as its sole inspiration.<sup>157</sup>

Accordingly, Fullagar J's rejection of a testamentary hybrid mere power, where there is no gift in default of appointment,<sup>158</sup> is explicable on the basis that such a provision goes beyond what is allowed by way of 'latitude'. Similarly, McTiernan and Menzies JJ in *Lutheran Church of Australia South Australia District Inc v Farmers' Co-Operative Executors and Trustees Ltd*<sup>159</sup> invalidated a power to appoint to a specified individual with no gift over; that, too, went beyond the scope of judicial latitude.

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150 The legislation in each State derived from the *Wills Act 1837 (Imp): Wills Probate and Administration Act 1898 (NSW); Succession Act 1981 (Qld); Wills Act 1936 (SA); Wills Act 1840 (Tas); Wills Act 1958 (Vic); Wills Act 1970 (WA).*

151 *Tatham v Huxtable*, above n57 at 649.

152 'It is not a breach of the rule ... to constitute a trust which is sufficiently constituted according to the rules of certainty in trust law': *Gregory v Hudson*, above n129 at 586 (Young J).

153 *Gregory v Hudson* (1998), above n122. See further at page 115 below.

154 A general power is one which may be exercised in favour of anyone, including the donee of the power.

155 Even though the property would remain undisposed of if the power were not exercised. In his dissenting judgment in *Tatham v Huxtable*, above n57, Latham CJ classified the provision in question as a general power which therefore satisfied the rule.

156 A special power is one which may only be exercised in favour of members of a specified class.

157 *Tatham v Huxtable*, above n57 at 649 (Fullagar J).

158 As upheld in English cases such as *In re Park* and *In re Jones*, above n25.

159 Above n57, applied in *Public Trustee v Vodjdani* (1988) 49 SASR 236.

The disposition theory clearly raises an objection that includes, but extends beyond, uncertainty: while a provision which fails for uncertainty of objects will be ineffective to dispose of property, the decision in the *Lutheran Church* case shows that the principle can also invalidate provisions which are not uncertain. However, the theory has major weaknesses. First, there is no rational explanation of why 'latitude' is allowed in the case of special powers, but not hybrid powers or powers in favour of an individual. Secondly, any testamentary mere power, if exercised, will pass the property as from the testator and not as from the donee of the power; in that sense the will effects the disposition.<sup>160</sup> Thirdly, there was no case prior to *Lutheran Church* where a certain power failed on this ground. Finally, the theory rests upon a false assumption about the effect of the *Wills Act*. The better view is that the *Wills Act* only determines the form for an effective will, and does not restrict the substantive arrangements that may be made by will.<sup>161</sup>

A second explanation of *Tatham v Huxtable* ('the choice theory') is that the testator must exercise an effective, positive choice of beneficiaries, even if that choice consists of the designation of a class from which another person may make a selection. In *Tatham v Huxtable*,<sup>162</sup> Kitto J relied on the dictum of Lord Macmillan in *Chichester Diocesan Fund and Board of Finance Inc v Simpson and Ors* that

[t]he choice of beneficiaries must be the testator's own choice ... The only latitude permitted is that, if he designates with sufficient precision a class of persons or objects to be benefited, he may delegate to his trustees the selection of individual persons or objects within the defined class.<sup>163</sup>

Again, this approach includes but extends beyond uncertainty: there will be no effective positive choice where the class is defined in uncertain terms, nor where the class is so large as effectively not to amount to a choice by the testator at all. On this view, a general power is acceptable, if treated as a choice of the donee of the power as the beneficiary. Further, the testator can choose in favour of a special class, either by a trust power or a mere power with or without a gift over. In the case of a mere power without a gift over, the donee of the power is left to choose whether to appoint to anyone within the class, or to let the property pass to the next of kin, which is still a sufficiently circumscribed power of selection.<sup>164</sup> However, creating a hybrid power, whether a mere or trust power, is not a choice except in a negative

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160 *Lutheran Church of Australia South Australia District Inc v Farmers' Co-Operative Executors and Trustees Ltd*, above n57 at 636 (Barwick CJ).

161 Hutley, FC, 'The Delegation of Will-Making Powers' (1956) 2 *Syd LR* 93; Hardingham & Baxt, above n79 at 66–70.

162 Above n57 at 655.

163 Above n146 at 349.

164 *Lutheran Church of Australia South Australia District Inc v Farmers' Co-Operative Executors and Trustees Ltd*, above n57 at 654 (Windeyer J). Similarly, powers of encroachment or of advancement, where the trustee may in effect transfer property from one or more of the beneficiaries to other specified beneficiaries will not infringe the rule: *Langley v Langley* (1974) 1 NSWLR 46.

sense, and therefore not within the rule. The choice theory helps to explain why in *Tatham v Huxtable*,<sup>165</sup> Kitto J doubted, and Fullagar J rejected, the possibility that the designation of the objects could be achieved by exclusion rather than inclusion. It cannot, however, be reconciled with the decision in *Lutheran Church*, since a mere power to appoint to a named individual with no gift over amounts to a more definite choice by a testator than a special power with no gift over.

The choice theory appears to underlie the decision of the New South Wales Court of Appeal in *Horan v James*.<sup>166</sup> There, the court agreed that there was nothing uncertain about the hybrid trust power in question. Nor was there any suggestion that the testator had failed to make a 'disposition.' If, as the court assumed, the trust power would have been valid if made inter vivos, it would have complied with the disposition theory explained above.<sup>167</sup> However, despite its doubts as to the logical and historical basis for the supposed rule, the court concluded that it was constrained by precedent to invalidate the power on grounds of testamentary delegation. The objection taken by the court seems to have been simply that the discretion left to the trustee was so broad that the testator had not made a real or positive choice as to who should benefit under the will. Consistent with that interpretation, Mahoney JA found that it would not matter whether the hybrid power was mandatory or merely permissive, or whether there was a gift over or not.<sup>168</sup>

By contrast, in *Gregory v Hudson*,<sup>169</sup> a differently constituted New South Wales Court of Appeal cast doubt on the reasoning in *Horan v James* and implicitly rejected the Choice Theory. In that case, a testator left property to the trustee of an existing trust, to be held on the terms of the trust as varied from time to time before or after the testator's death. Under the terms of the trust, the trustee could add to the class of beneficiaries anyone other than members of a specified class.<sup>170</sup> Thus, in leaving property subject to this trust, the testator had not positively chosen the class of persons who might benefit under the will; as in *Horan v James*, the choice ultimately lay with the trustee. Yet the Court of Appeal upheld the bequest, on the basis that the gift to an existing trust was a complete exercise of testamentary power.

The decision in *Gregory v Hudson* may mark the demise of the choice theory. This would be desirable, as this theory is also flawed. First, it is unconvincing to say that a general power represents the testator's choice of the donee of the power as the beneficiary, since it is the donee's unrestricted choice which determines who will benefit. Secondly, and more importantly, there is nothing in the nature of a will, or in the Wills Act, that requires a positive, rather than a negative, choice: an intention to benefit anyone but X is still an expression of the testator's will.

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165 *Tatham v Huxtable*, above n57 at 655–656 (Kitto J), at 648–650 (Fullagar J).

166 Above n66.

167 *Gregory v Hudson* (1997), above n129 at 586 (Young J), affirmed in *Gregory v Hudson* (1998), above n122.

168 Above n66 at 389.

169 Above n122.

170 A similar provision was held valid in *Re Manisty's Settlement*, above n3.

The weight of judicial opinion now appears to accept that it is misconceived and unwarranted to impose additional requirements on trusts and powers simply because they are created by will.<sup>171</sup> The preferable approach, advanced in much of the literature,<sup>172</sup> is to treat the rule against testamentary delegation as one that merely emphasises or restates the need for certainty. After all, Kitto J in *Tatham v Huxtable*, as in the English precedents on which he relied,<sup>173</sup> explained the 'cardinal rule' against testamentary delegation in terms that reflected an insistence on certainty 'the persons or objects to benefit under the will shall be, by the will itself, ascertained or made ascertainable.'<sup>174</sup>

Further, although some commentators<sup>175</sup> have suggested that the primary test for certainty for testamentary trusts and powers must be stricter than for inter vivos provisions, there is no firm basis in principle or in the authorities to support this. The needs of the trustee and of the court in executing or enforcing the provision are no different whether the source of the power or trust is a will or an inter vivos settlement. It is true that in *Tatham v Huxtable*, Fullagar J concluded that a hybrid power, although 'a valid power as such', would be invalid if created by will, and expressed his objection in terms of uncertainty. However, his judgment offers no formulation of a stricter test of certainty for testamentary provisions, and his reasoning suggests that his real concern was with the 'disposition theory.'

Once the disposition and choice theories are rejected, and the supposed need for a greater degree of certainty dismissed, the testamentary delegation rule remains as a doctrine without substantive content, and one that could safely be interred. This conclusion would be welcome in principle. It would mean that the same rules as to the substantive requirements for trusts and powers would apply whether made inter vivos or by will. It would also bring the Australian law into line with other Commonwealth jurisdictions.<sup>176</sup> If accepted, it would be possible to create a hybrid mere power by will, although a hybrid trust power would

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171 *Lutheran Church of Australia South Australia District Inc v Farmers' Co-Operative Executors and Trustees Ltd*, above n57 at 635–636 (Barwick CJ); *Horan v James*, above n66 at 381 (Hutley), at 382 (Glass JA); *Gerhardy v South Australian Auxiliary to the British and Foreign Bible Society Inc* (1982), above n71 at 20–23 (Legoe J); *Re Blyth*, above n69 at 575 (Thomas J). In *Gregory v Hudson* (1998), above n122 at 304, Sheller JA, with whom Handley JA and Sheppard AJA concurred, acknowledged the criticism of the rule but concluded that it was for the High Court to consider whether to depart from or overrule it.

172 See for example Hutley, above n161; Campbell, 'The Enigma of General Powers of Appointment' (1955–1956) 7 *Res Judicatae* 244; Sundberg, 'The Status and Authority of the Decision in *Tatham v Huxtable*' (1974) 48 *ALJ* 527; Hardingham, 'The Rule Against Delegation of Will-Making Power' (1974) 9 *MULR*.

173 Analysed in detail in Gordon, 'Delegation of Will-Making Power' (1953) 69 *LQR* 334.

174 Above n57 at 653. Kitto J also stressed, at 656, that 'certainty in the description of the class or group of persons from which the selection may be made is the essential qualification' for exceptions to the rule.

175 Geddes, Rowland & Studdert, *Wills, Probate and Administration Law in NSW* at 53. The authors take the view that without the different standard of certainty, the rule against testamentary delegation would not exist.

176 *Re Park*, above n25; *Re Jones*, above n25; *Re Abrahams' Will Trusts*, above n25; *Re Beatty's Will Trusts*, above n25; *Re Nicholls* (1987) 34 *DLR* (4<sup>th</sup>) 321; *In Re McEwen* [1955] *NZLR* 575.

probably still fail, not for testamentary delegation, but on account of the beneficiary principle.<sup>177</sup> A power exercisable in favour of an individual would be valid, provided the individual were identifiable.

It may be that reform in this area will require uniform legislative measures of the kind already adopted by several Australian legislatures,<sup>178</sup> which treat as valid those testamentary trusts and powers which would have been valid if created *inter vivos*. Failing that, only a decision of the High Court<sup>179</sup> could sweep away the confusion that has arisen from *Tatham v Huxtable*. In making a fresh start, the court could use the more recent developments in the rules for certainty to explain and answer at least some of the objections raised by Kitto and Fullagar JJ in *Tatham v Huxtable*. As Young J pointed out in *Gregory v Hudson*,<sup>180</sup> the test of certainty was much stricter in 1950 than it has become since *McPhail v Doulton*. It was not until 1953 that English courts first recognised that mere powers required less certainty than that expected of trusts; before then it may well have been assumed that all powers given to trustees must satisfy the list certainty test. This might explain why Fullagar J would have thought that ‘the mere exclusion of one person or some persons from a class will [not] be enough to achieve the requisite certainty’<sup>181</sup> and concluded that a testamentary hybrid power would not have effected a disposition. Similarly, the recognition in *Re Manisty’s Settlement*<sup>182</sup> and *Re Hay’s Settlement Trusts*<sup>183</sup> that hybrid mere powers need not be uncertain, nor lacking in guidance to the trustees, may address any lingering concerns that the testator has given uncontrolled discretion to the trustee. In this way, the recognition in Australia of less stringent tests for trust powers and mere powers provides a means of liberating testamentary provisions from the shackles of *Tatham v Huxtable*.

## 7. Conclusion

In recent years, Australian courts have shown a willingness to relax the primary tests of certainty of objects for trusts and powers. In this, they are in step with the prevailing spirit of *McPhail v Doulton*, expressed by Lord Wilberforce in these terms:

a trust should be upheld if there is sufficient practical certainty in its definition for it to be carried out, if necessary with the administrative assistance of the court, according to the expressed intention of the settlor.<sup>184</sup>

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177 *Re Hay’s Settlement Trusts*, above n2.

178 *Succession Act* 1981 (Qld) s64; *Wills Act* 1968 (ACT) s14A; *Wills Act* (Vic) 1997, s48.

179 (1998), above n122.

180 (1997), above n129 at 584. See also Sundberg, above 172 at 528.

181 *Tatham v Huxtable*, above n57 at 648–649.

182 Above n3.

183 [1982] 1 WLR 202.

184 Above n2.

While it may be argued that liberalisation has been taken too far in the case of fixed trusts,<sup>185</sup> the approach is generally to be welcomed. It is an approach, which could usefully guide Australian courts as they confront other unresolved issues relating to objects. In particular, it is suggested that the courts should seriously question the need to limit the permissible range of objects on grounds of administrative unworkability or capriciousness, at least insofar as those objections exceed the demands of the beneficiary principle. It may also be hoped that the same liberating spirit will move the High Court, if presented with an opportunity to review the rule against testamentary delegation, to confirm that the substantive requirements for certainty of testamentary trusts and powers are no more extensive than those for inter vivos settlements.

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185 *West v Weston*, above n34.