

# Nothing lasts forever... or does it? New perpetuities legislation introduced in the Cayman Islands

**Briefing Summary:** After a lengthy period of drafting, review, and industry consultation, the Perpetuities (Amendment) Act, 2024 (the "**Act**") came into force on 22 August 2024. The introduction of the Act is welcome news for trust practitioners, trustees, and private clients who have previously encountered a number of practical drawbacks as a result of the 150 year perpetuity period presently applicable to most trusts in the Cayman Islands.

**Service Area:** Trusts and Private Wealth

**Location:** Cayman Islands

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## The "old" rule

The rule against perpetuities currently applicable in the Cayman Islands is derived from English law and is aimed at preventing individuals from 'tying up' their assets in trust indefinitely. Broadly speaking, the rule prescribes a set period – the perpetuity period – within which time the interest of each beneficiary must vest (i.e. each beneficiary must become absolutely entitled to the relevant property within a specified period). Where the rule is not adhered to, the trust will be void.

The general position is that trusts governed by Cayman Islands law which were settled on or after 1 August 1995 (when the Perpetuities Act 1995 (the "**Perpetuities Act**") first came into force) are subject to a 150 year perpetuity period. This means that before the Act came into force a Cayman Islands law governed trust could only be established for a maximum of 150 years, subject to certain exceptions. There is also a saving provision in the Perpetuities Act, known as the 'wait and see' rule, which means that a Cayman Islands trust will not be declared invalid from the outset for failing to specify an appropriate perpetuity period; instead it will become invalid at the time it becomes clear that the interest will not vest in its entirety by the end of the 150 year period.

There is an exception to this general rule for charitable trusts, pension trusts and for trusts established under the Special Trusts Alternative Regime (Part VIII of the Trusts Act (2021 Revision)): there is no need to specify a maximum duration in relation to such trusts.

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The position is more complicated in relation to older trusts (excluding charitable trusts) established before the Perpetuities Act came into force. For these trusts, the perpetuity period could only be defined by reference to the lifetimes of persons in being at the time the trust was settled. Typically, a Royal Lives clause was used to define the perpetuity period in such cases.

## Perpetuity problems

The rule against perpetuities creates a number of practical drawbacks from the perspective of settlors, trustees and beneficiaries, which are inconsistent with the 'trust-friendly' legislative approach generally in force in the Cayman Islands. The issues include the following:

- Many modern-day settlors do not wish to be constrained to a 150 year maximum period and prefer to establish 'dynastic' trusts for multiple generations of their family. This is permissible in many of the other international financial centres.
- The perpetuity rule can create difficulties when changing the governing law of trusts from and to Cayman Islands law – any mismatch in the perpetuity period must be resolved, and this causes issues if it is not properly addressed.
- Where the drafting of a trust deed is defective, such that the rule is infringed, the trust may be rendered void (either from the outset or at a later point in time depending on whether the 'wait and see' rule applies). This can have severe implications for the settlor and intended beneficiaries who may face significant tax liabilities and it could also result in liabilities for the intended trustees, particularly if they have been administering the trust for some time on the basis that it is valid.
- Although the 'wait and see rule' provides some protection against these risks the operation of the rule is not entirely clear and relying on this provision is less than ideal.
- For trusts drafted with a defective perpetuity period, although relief may possibly be obtained through an application to the Court this is likely to result in significant additional costs.

## The new Act

The Act introduces the following changes:

### New trusts

The general rule is that trusts established following commencement of the Act can be established with an unlimited perpetuity period, provided that the rule against perpetuities is expressly disapplied in the trust deed and any other instrument transferring an interest or a right over property to the trustees (each, a "**disposition**"). There is a minor exception for direct or indirect dispositions of Cayman Islands land (or interests therein). In the case of such dispositions the existing maximum perpetuities period (i.e. up to 150 years) cannot be disapplied. However, this limited exception does not apply to dispositions of a company (or other entity) which in turn holds Cayman Islands land for the purposes of its business. In such a case the perpetuities period can be disapplied.

## Existing trusts

For existing trusts to which a disposition may be made whether the disposition is dated prior to, on or after the date of the new legislation coming into force, an application can be made to the Grand Court to disapply the rule against perpetuities in relation to the disposition and the property which is subject to the disposition. The persons with the right to bring such an application to court are

- a) a trustee, settlor or enforcer;
- b) a person who has trust powers conferred on them by an instrument; or
- c) a person with a beneficial interest in the trust.

The exception discussed above in relation to Cayman Islands land and the carve out to the exception also apply in the case of such applications.

## Migration of non-Cayman Islands trusts

Where an existing foreign trust is amended to change the governing law to the Cayman Islands pursuant to section 89 of the Trusts Act (2021 Revision) and that trust is of unlimited duration and the rule against perpetuities does not apply to it under the foreign governing law, dispositions made in respect of the trust shall not be subject to the rule against perpetuities under Cayman Islands law. Again, the exception and the carve out apply.

## Looking to the future

The Act introduces some positive new developments for the trusts industry in the Cayman Islands:

- Trusts from other jurisdictions without the same rules on perpetuities will be more easily transferable into the jurisdiction. This will likely provide a boost to the Cayman Islands trusts sector, as the industry in the jurisdiction is already highly regarded internationally; with numerous quality, regulated trustees and a robust legal framework in place.
- Historical complexities created by the rule can be avoided for new trusts. There is also an option for a wide class of individuals to apply to the Grand Court to disapply the rule against perpetuities in relation to dispositions to existing trusts; this provides a greater degree of optionality with regard to wealth structuring in the jurisdiction.
- It is anticipated that, notwithstanding the new legislation, STAR trusts (introduced under the Special Trusts (Alternative Regime)) will remain a popular choice because of the other unique features of such trusts (i.e. the option to restrict rights to information and to establish trusts for non-charitable purposes).

In practice, trustees and their advisors will need to take care to ensure that any and all dispositions to trusts (whether made pursuant to the original trust deed or by way of supplemental deed) are appropriately drafted to implement the provisions uniformly and to avoid any inconsistencies or issues arising in the future.

Ultimately, the reforms will bring the Cayman Islands broadly in line with other jurisdictions which have introduced the option to settle perpetual trusts. The changes will create more options for settlors in the way that they structure their wealth, and give them more control over it as well, without the worry that future generations of their family will not be looked after.

## 开曼群岛信托引入新的永续法规

经过漫长的起草、审查和行业咨询过程，开曼群岛《永续法》（2024年修订版）（下称“新《永续法》”）自2024年8月22日起生效。《永续法》的出台对于信托从业者、受托人和私人客户而言是个好消息，因为目前开曼群岛大多数信托的最长期限只有150年，而此前在实际操作过程中屡现弊端。

### “旧”规则

开曼群岛目前沿用的禁止信托永续规则源自英国法律，旨在防止个人将其资产无限期地“捆绑”在信托中。概括来说，规则规定了一个固定期限，即信托期限，在规定的期限内，权益必须归属给受益人（即各受益人必须在指定期限内享有相关财产的绝对权利）。如果违反了该规则，则信托将会失效。

通常情况下，如果是在1995年8月1日（即1995年《永续法》（下称“旧《永续法》”）首次生效之日）或之后设立的开曼信托，则其信托期限为150年。这也就意味着，在新《永续法》生效以前受开曼群岛法律管辖的信托最长只能设立150年，某些例外情况除外。旧《永续法》中还有一项被称为“缓行”(wait and see)规则的保留条款，这是指即使没有在信托契约中写明符合法律规定的信托期限，开曼群岛信托也不会自动被宣布无效，而是只有在150年期限结束时，确认信托权益无法全部归属受益人的情况下，信托才会失效。

但例外规则适用于慈善信托、养老金信托以及根据特殊信托选择性机制（《信托法》（2021年修订版）第八部分）设立的信托（STAR 信托），这些信托无需规定信托的最长期限。

对于旧《永续法》生效前设立的早期信托（不包括慈善信托），情况就更为复杂了。这些信托只能参照信托设立时某些人的生存期来确定信托期限。在这类情况下，通常使用“皇室成员生存期”(Royal Lives)条款来定义信托期限。

### 永续性问题

从信托人、受托人和受益人的角度而言，禁止永续性规则在实践过程中屡现弊端，与开曼群岛普遍实行的“信托友好”的立法方法不符。其中包括以下问题：

- 现代许多信托委托人不希望受150年的最长期限限制，更倾向于设立家族多代传承的“传世”信托。许多其他国际金融中心都允许设立这种信托。
- 而在将信托的准据法从开曼群岛法律变更为其他法律，或者从其他法律变更为开曼群岛法律时，永续规则可能会形成阻碍因素——必须解决任何可能存在的信托期限不匹配的问题，如果处理不当，可能会造成麻烦。
- 如果信托契约起草时就存在缺陷，违反了该规则，则信托可能会被认定为无效（自始无效或自后续某时间点无效，具体取决于是否适用于“缓行”规则）。这就可能会对信托委托人和受益人产生重大影响，可能会导致他们面临巨额税负，也可能导致受托人承担责任，特别是如果他们已经在认为信托有效的基础上管理了这个信托一段时间。

- 虽然“缓行”规则提供了一些防范风险的保护措施，但该规则的应用并不完全明确，因此依赖于这项规定并非理想之举。
- 针对信托期限有缺陷的信托，虽然可向法院申请救济，但依旧可能导致产生大量额外费用。

## 新法案

法案发生以下变化：

**新设立信托**——只要在信托契约和将财产所有权或其它财产权利转移给受托人的法律文件中明确规定不适用禁止永续性规则，新《永续法》生效后设立的信托期限就是永久的。信托资产涉及开曼群岛土地（或其权益）是一种罕见的例外情况。在这种情况下，无法取消现有最长信托期限（即最长150年）的适用性。但是，如果有一家公司（或其他实体）为其业务目的持有开曼群岛土地，则不属于上述有限的例外情况。在这种情况下，该信托可以不受制于信托期限限制。

**存量信托**——针对新注入信托资产的存量信托，无论该信托资产的注入时间是在新法规生效日期之前、当日还是之后，均可向大法院申请取消信托期限限制。有权向法院提出此类申请的人员包括：a) 受托人、信托委托人或执行人；b) 拥有契约授予之信托权力的人；或c) 享有信托受益权的人。前文所述之关于开曼群岛土地的例外情况以及相关例外条款的规定也可进行此类申请。

**非开曼群岛信托的迁移**——如果根据开曼《信托法》（2021年修订版）第89条对现有外国信托进行修订，将其准据法更改为开曼群岛法律，且根据相关外国准据法的规定，该信托的期限不受限制，则根据开曼群岛法律处置该信托也不受禁止永续性规则的限制。例外情况也需遵循例外条款。

## 未来展望

新《永续法》为开曼群岛的信托业带来许多新的正向发展趋势：

- 将其他法律下设立的，不受永续性规则约束的信托转移到开曼群岛司法辖区将会更容易。鉴于开曼群岛的信托业已经在国际上享有很高的声誉，拥有众多高质量、受监管的受托人和健全的法律框架，因此这很可能会推动开曼群岛信托业的进一步发展。
- 新设立的开曼信托能够避免旧规则带来的历史性复杂问题。此外针对新资产注入存量信托的情况也可选择向大法院申请取消禁止永续性规则的适用；这使得开曼群岛司法辖区内的财富规划架构灵活度得到大幅提升。
- 尽管有了新法规，但预计STAR信托（开曼特殊信托）仍将是受欢迎的选项，因为此类信托还具有其他独特的特征（即可以选择限制信息披露权和建立非慈善用途信托）。

在实践中，受托人及其顾问需要注意确保对信托的任何和所有资产注入安排（无论是根据原始信托契约还是通过补充契约进行）都有相匹配的法律文件，以统一实施规定并避免将来出现任何不一致或问题。

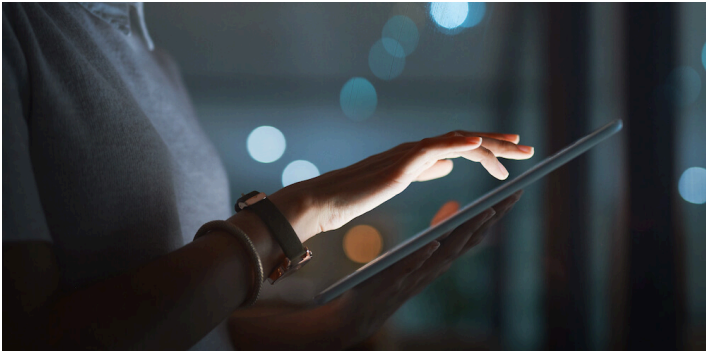
此次改革将使得开曼群岛与其他已引入信托永续性的司法辖区大致上保持同步。这些变化将在财富规划架构的构建方式上为信托委托人提供更多选项，并提高他们对于财富的控制权，让他们无需忧心家族后代得不到照顾。

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