



War on Trusts: The Essential Collection

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2026 WILLS AND ESTATES CONFERENCE - 13 OCTOBER

War on Trusts:

The essential collection

13 OCTOBER 2026

Paper presented for ACT Law Society
Wills & Estates Conference



AUSTRALIAN CAPITAL TERRITORY.

No. 14 of 1957.

AN ORDINANCE

To amend and consolidate the law relating to Trustees and Trust Property, and for other purposes.

I, THE GOVERNOR-GENERAL in and over the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby make the following Ordinance under the *Seat of Government (Administration) Act 1910-1955*.

Dated this eighth day of November, 1957.

W. J. SLIM
Governor-General.

By His Excellency's Command,
NEIL O'SULLIVAN
Attorney-General for and on behalf of the Minister
of State for the Interior.

TRUSTEE ORDINANCE 1957.

PART I.—PRELIMINARY.

1. This Ordinance may be cited as the *Trustee Ordinance* Short title. 1957.*

2. This Ordinance shall come into operation on the first day Commence: of December, One thousand nine hundred and fifty-seven.



1 MARCH 1926

Trustee Act 1925 (NSW) commences.



1 DECEMBER 1957

Trustee Ordinance 1957 (ACT) provides that the Trustee Act 1925 (NSW) is in force in the Territory.



10 NOVEMBER 1999

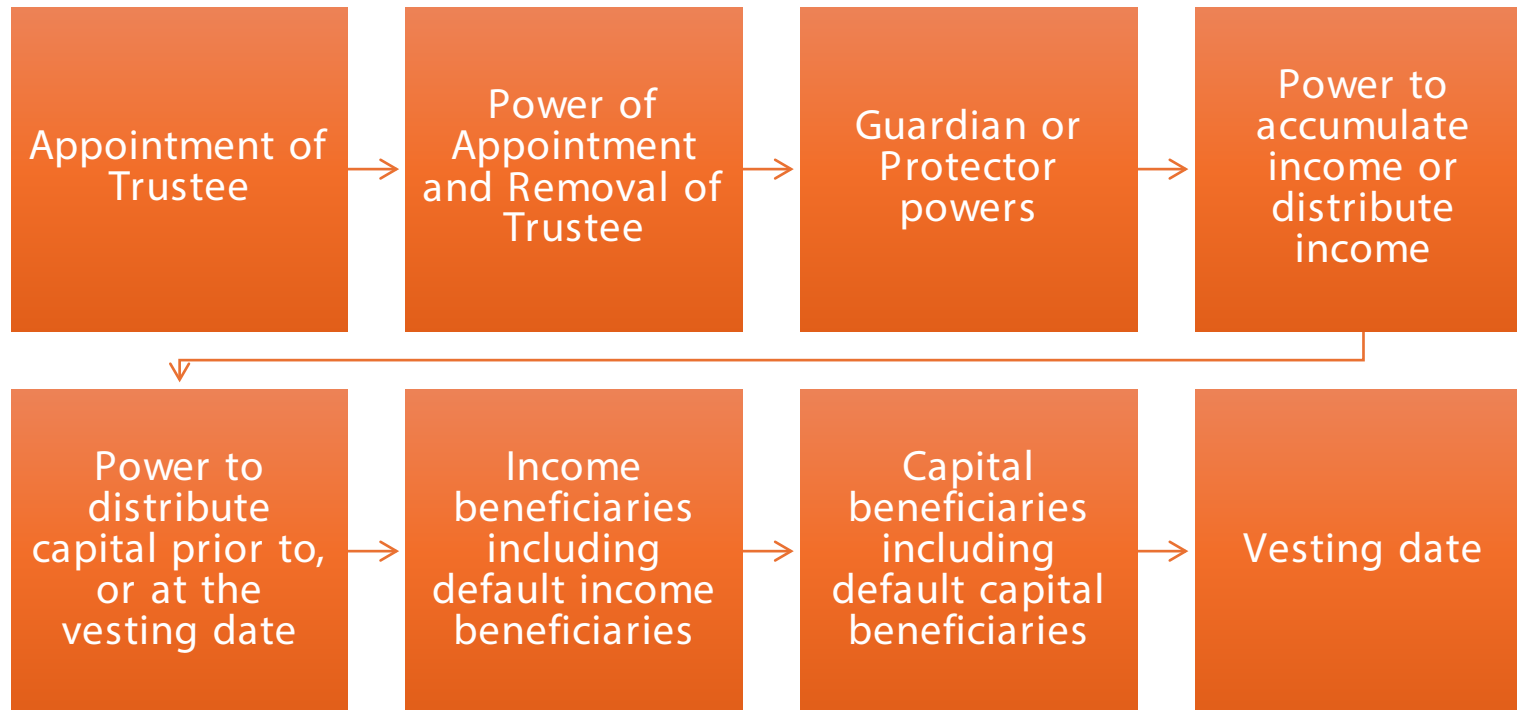
By virtue of s 65 of the Interpretation Act 1967 (ACT), former NSW Acts in force in the Territory become laws of the ACT.



28 SEPTEMBER 2020

NSW enacts variation of trusts legislation. No equivalent legislation in the ACT.

What to look for in a Trust Deed



Advantageous dealings S81(1) of the Trustee Act 1925 (ACT) [1]

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

Advantageous dealings S81(1) of the Trustee Act 1925 (ACT) [2]

(2) ... in particular the Court may authorise the trustees—

(a) to sell trust property...,

(b) to postpone the sale of trust property,

(c) to carry on any business forming part of the trust property during any period for which a sale may be postponed,

(d) to employ capital money subject to the trust in any business which the trustees are authorised by the instrument, if any, creating the trust or by law to carry on.

Limits of Advantageous Dealings

Re Dion Investments
Pty Ltd (2014) 87
NSWLR 753; [2014]
NSWCA 367

Cisera v Cisera
Holdings Pty Ltd
(2018) 98 NSWLR
747; [2018] NSWCA
286



Stronger Communities Legislation Amendment (Courts and Civil) Act 2020 (NSW) Second Reading Speech to the NSW Legislative Assembly on 16 September 2020 the Hon Mark Speakman said:

“...Section 81 of the Trustee Act currently empowers the court to make orders relating to the management and administration of trust property that can be seen to be expedient.

The Court of Appeal has held that section 81 does not authorise the court to make orders for the variation of trusts, which will be beneficial to the interests of the beneficiaries or to the fulfilment of the trust purpose but which are not concerned with the management or administration of the trust assets. This amendment will ensure that the court can approve arrangements to vary or revoke trusts in these circumstances. There are legitimate reasons for which a trustee may seek to modify the terms of a trust in order to discharge their duty to a beneficiary. Set laws (sic) often create trusts without consideration to future circumstances and there may be a need to amend the trust to accommodate those circumstances in a way that is consistent with the intention of the settler (sic). This would bring New South Wales law into line with the law in the United Kingdom and in other Australian States...”



s86A Trustee Act 1925 (NSW)



S86A Trustee Act 1925 (NSW) [1]

86A Court order to approve arrangement

- (1) If property is held in trust under any instrument creating the trust, the Court may, if it thinks fit, by order approve any arrangement to—
 - (a) vary or revoke all or any of the trust, or
 - (b) enlarge the powers of the trustees for the purpose of managing or administering any of the property subject to the purpose of the trust.

S86A Trustee Act 1925 (NSW) [2]

- (2) An order under this section may be made by the Court only on behalf of—
- (a) any person under the trust having an interest directly or indirectly, or vested or contingent, who by reason of being a minor or other incapacity is incapable of assenting, or
 - (b) any person who may become entitled, directly or indirectly, to an interest under the trust, and the entitlement is contingent on a future date or event that has not occurred at the time of application for an order under this section, or
 - (c) any unborn person, or
 - (d) any person in respect of any discretionary interest of the person under protective trusts where the interest of the principal beneficiary has not failed or determined.

Procedure

- Agreement should be sought with all adult beneficiaries of full capacity.
- Identify minor, incapable and unborn beneficiaries from whom consent cannot be sought.
- Consider whether amendments are a variation of the trust or a resettlement*.
- Consider whether evidence and submissions would satisfy the Court that the variation is in the interests of the minor, incapable or unborn beneficiaries from whom consent cannot be sought.



Substratum

Substratum [1]

On the difference between variation and resettlement, in *Cisera v Cisera* [2023] NSWSC 1507 the Court approved the substratum test of Megarry J in *Re Bell's Settlement Trusts* [1968] 1 WLR 899:

“... If an arrangement changes the whole substratum of the trust, then it may well be that it cannot be regarded merely as varying that trust. But if an arrangement, while leaving the substratum, effectuates the purpose of the original trust by other means, it may still be possible to regard that arrangement as merely varying the original trusts”.

Substratum [2]

EM McPherson Settlement [2024] VSC 744 at 124 – 126:

“The question of whether amendments or variations would destroy the substratum of the trust has continuing relevance

...

In determining that issue of whether there has been a variation rather than a resettlement, it is necessary to consider whether there is a degree of continuity of trust property, trust membership and the regime of trust obligation”.

S59C Trustee Act 1936 (SA) [1]

59C—Power of Court to authorise variations of trust

- (1) The Supreme Court may, on the application of a trustee, or of any person who has a vested, future, or contingent interest in property held on trust—
 - (a) vary or revoke all or any of the trusts; or
 - (b) where trusts are revoked—
 - (i) distribute the trust property in such manner as the Court considers just; or
 - (ii) resettle the trust property upon such trusts as the Court thinks fit; or
 - (c) enlarge or otherwise vary the powers of the trustees to manage or administer the trust property.

S59C Trustee Act 1936 (SA) [2]

- (3) Before the Court exercises its powers under this section, the Court must be satisfied—
 - (a) that the application to the court is not substantially motivated by a desire to avoid, or reduce the incidence of tax; and
 - (b) that the proposed exercise of powers would be in the interests of beneficiaries of the trust and would not result in one class of beneficiaries being unfairly advantaged to the prejudice of some other class; and
 - (c) that the proposed exercise of powers would not disturb the trusts beyond what is necessary to give effect to the reasons justifying the exercise of the powers; and
 - (d) that the proposed exercise of powers accords as far as reasonably practicable with the spirit of the trust.

...

S59C Trustee Act 1936 (SA) [3]

- (2) In any proceedings under this section the interests of all actual and potential beneficiaries of the trust must be represented, and the Court may appoint Counsel to represent the interests of any class of beneficiaries who are at the date of the proceedings unborn or unascertained.

Cases

Clarke v Ebdon [2020] SASC 67

Togethr Trustees Pty Ltd v Safai [2023] SASC 90

Jowell Nominees Pty Ltd v Cooper [2021] SASC 76

S 183 Trusts Act 2025 (QLD) [1]

- (1) The Court may make an order under this section approving an arrangement in relation to a trust for any of the following persons (each a “restricted beneficiary”)-
- (a) A person under a legal incapacity who has an interest under the trust, whether directly or indirectly and whether vested or contingent;
 - (b) A person (whether ascertained or not) who may become entitled, directly, or indirectly, to an interest...
 - (c) an unborn person; or
 - (d) any person who, if a protective trust failed or determined, would be a member of the class of persons (mentioned above).

S 183 Trusts Act 2025 (QLD) [2]

- (2) An arrangement may
 - (a) Vary or revoke all or any of the trusts; or
 - (b) Enlarge the powers of the trustees to manage or administer any of the trust property.
- (3) An arrangement may be approved only if carrying out the arrangement would be for the benefit of the restricted beneficiary.

Cases

Re Evangelista Family Trust [2025] QSC 83 (under former s 95 Trusts Act 1973 (Qld))

Asdew Pty Ltd (a trustee), Re [2026] QSC 202

NSW

QLD

VESTING DATE
9 JULY
2026

VESTING DATE
8 JULY
2101

Part 3 Variation of Trusts Act 1994 (TAS) [1]

13. Power of Supreme Court to vary or revoke trusts

- (1) If property, whether real or personal, is held on trusts ...under a will, settlement or other disposition or on the intestacy or partial intestacy of a person or under an order of a court exercising jurisdiction in Tasmania, the Court, subject to subsection (4) , may by order approve on behalf of a person specified in subsection (3) an arrangement –
 - (a) varying or revoking all or any of the trusts; or
 - (b) resettling an interest under the trusts; or
 - (c) enlarging the powers of the trustees of managing or administering any property subject to the trusts.

Part 3 Variation of Trusts Act 1994 (TAS) [2]

- (3) For the purposes of subsection (1) , a person on whose behalf the Court may approve a proposed arrangement is to be –
- (a) a person who has, directly or indirectly, an interest, whether vested or contingent, under the trusts and who by reason of minority or other incapacity is incapable of consenting to the arrangement; or
 - (b) a person, whether ascertained or not, who may become entitled to an interest under the trusts on being, at a future date or on the happening of a future event, a person of any specified description or a member of a specified class of persons; or
 - (c) a person who is unborn or unknown or whose whereabouts are unknown; or
 - (d) a person in respect of any interest that may arise by reason of a discretionary power given to a person on the failure or determination of an existing interest that has not failed or determined at the date of the application to the Court.

Part 3 Variation of Trusts Act 1994 (TAS) [3]

- (4) Before a proposed arrangement is submitted to the Court for approval, it must have the consent in writing of any person, other than a person on whose behalf the Court may approve an arrangement, who is beneficially interested under the trusts and who is capable of consenting to the arrangement.
- (5) In any proceedings under this section, the interests of all actual and potential beneficiaries of the trusts are to be represented.

Part 3 Variation of Trusts Act 1994 (TAS) [4]

14. Matters to be considered by Supreme Court

Before exercising its powers under section 13 , the Court must be satisfied that the proposed exercise of its powers would be in the interests of each person on behalf of whom the Court may approve the proposed arrangement ...the Court must have regard to –

- (a) any financial benefit to that person; and
- (b) the absence of any financial disadvantage to that person; and
- (c) any non-financial benefit to that person; and
- (d) the welfare of the family of that person; and
- (e) any other circumstances that are advanced for or against the proposed arrangement.

Part 3 Variation of Trusts Act 1994 (TAS) [5]

15. Effect of order

An order made by the Court under this Act is binding on all present and future trustees and beneficiaries of the trusts and by force of this section –

- (a) the trusts are varied or revoked by the order; and
- (b) the variation or revocation takes effect on the order being made.



S63A Trustee Act 1958 (VIC) [1]

63A Power of Court to vary trusts

- (1) Where property ... is held on trusts arising, ... under any will settlement or other disposition, the Court may if it thinks fit by order approve on behalf of—
- (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of minority or other incapacity is incapable of assenting; or
 - (b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trust
 - (c) any person unborn; or
 - (d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined—

S63A Trustee Act 1958 (VIC) [2]

any arrangement (by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees or managing or administering any of the property subject to the trusts:

Provided that except by virtue of paragraph (d) of this subsection the Court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person.

Cases

Re Pickering Family Trusts [2024] VIC 5

EM McPherson Settlement [2024] VSC 744

S90 Trustees Act 1962 (WA) [1]

90. Varying or revoking certain trusts, Court's powers as to
- (1) ...where any property is held on trusts arising under any will, settlement or other disposition, or on the intestacy or partial intestacy of any person, or under any order of the Court, the Court may, if it thinks fit, by order approve on behalf of —
 - (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who, by reason of infancy or other incapacity, is incapable of assenting; or
 - (b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts
 - (c) any unborn or unknown person; or
 - (d) any person, in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined,

S90 Trustees Act 1962 (WA) [2]

any arrangement (by whomever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts.

- (2) Except where the Court approves an arrangement on behalf of a person referred to in subsection (1)(d), the Court shall not approve an arrangement on behalf of any person if the arrangement is to his detriment; and, in determining whether any such arrangement is to the detriment of a person, the Court may have regard to all the benefits that may accrue to him directly or indirectly in consequence of the arrangement, including the welfare and honour of the family to which he belongs.

S90 Trustees Act 1962 (WA)[3]

- (4) Any rearrangement approved by the Court under subsection (1) is binding on all persons on whose behalf it was so approved, and thereafter the trusts as so rearranged shall take effect accordingly.

Cases

Harris v Public Trustee [2025] WASC 128

Dryandra Investments Pty Ltd v Hardie [2024] WASC 248

Williams v Public Trustee as executor of the will of Alan James Williams [2026] WASC 216

S86A Trustee Act 1925 (NSW) cases [1]

- Re PDC [2021] NSWSC 1701 (authorising the transfer of an incapable person's assets from a non-compliant Special Disability Trust to a regime of protected estate management under the NSW Trustee & Guardian Act 2009 (NSW)).
- Campbell v Campbell [2022] NSWSC 554 (authorising an arrangement for the vesting of a trust)
- In the Application of Nyasa No.19 Pty Ltd [2023] NSWSC 578 (authorising an arrangement whereby a trust was to be administered in accordance with a duplication of the deed of a trust established at the same time as a trust for which the trust deed was lost, but with expanded powers).

S86A Trustee Act 1925 (NSW) cases [2]

- *Cisera v Cisera* [2023] NSWSC 1507 (concerning the same trust as the earlier decision rejecting the application for approval of a variation as an advantageous dealing pursuant to s.81 but applying the new s.86A).
- *Reinhard v Denkel* [2024] NSWSC 925 (bringing forward the vesting date of a trust established in 1925 to 1 August 2024 instead of a date in 2034).
- *WFT Capital Pty Ltd v Windt* [2025] NSWSC 819 (extending the vesting date of a trust).

S86A Trustee Act 1925 (NSW) cases [3]

- Application of Dhuramein Nominees Pty Ltd [2025] NSWSC 1329 (appointment of new appointor and default beneficiary where the appointor and default beneficiary was a deregistered company).
- Michelakis v Kalumic Pty Ltd as trustee of the Michelakis Family Trust [2026] NSWSC 276 (appointment of new appointor).
- Deemhire Pty Ltd as trustee of the Vartuli Family Trust [2026] NSWSC 318 (appointment of an appointor in the inherent jurisdiction of the Court; variation to beneficial class to include living descendants at the time of the appointor's death. The application to vary the trust deed to give a general power of amendment did not succeed.)

The case for a variation of trusts power in the ACT



Fortifying the Defences

Alcazar of Segovia, Spain



Discretionary trusts

- The Court has jurisdiction to supervise and if appropriate, intervene in the administration of a trust, including a discretionary trust: *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 per Lord Walker at [36].
- The duties of a trustee with respect to a discretionary power to distribute income and/or capital are to consider periodically whether or not it should exercise the power, to consider the range of objects of the power, and to consider the appropriateness of individual appointments: *Re Hay's Settlement Trusts* [1982] 1 WLR 202 at 211; *McPhail v Doulton* [1971] AC 424.



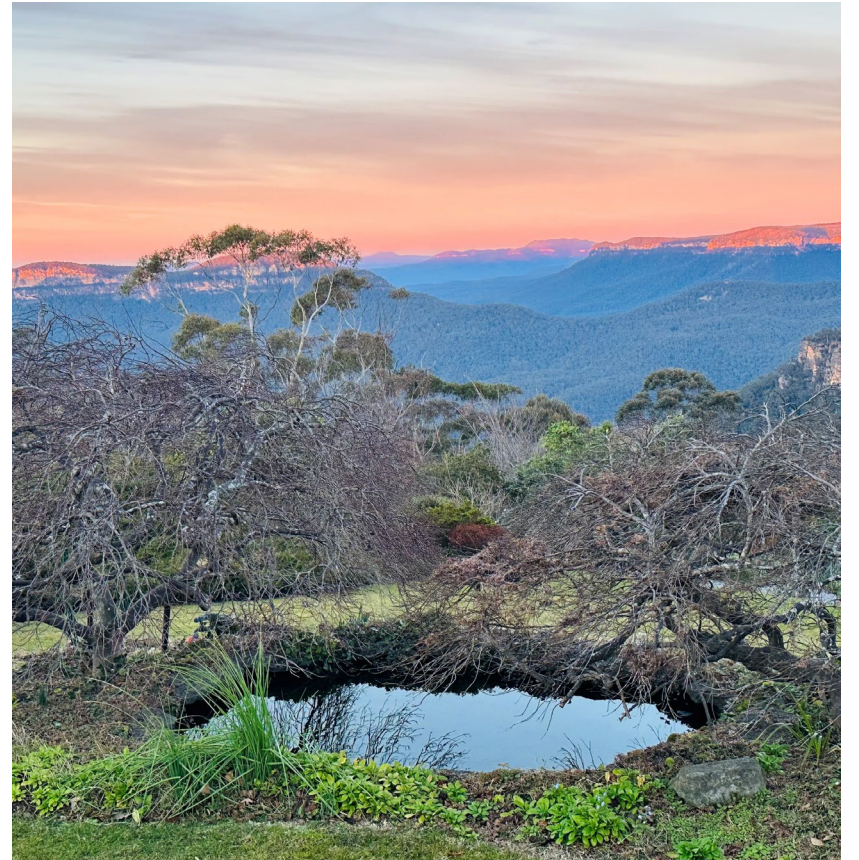
Karger v Paul [1984] VR 161

- The exercise of a discretion will not be examined or reviewed by the Courts so long as the essential component parts of the exercise of the particular discretion are present:
 - If the discretion is exercised by the trustees in good faith.
 - Upon real and genuine consideration.
 - In accordance with the purposes for which the discretion was conferred.
- The validity of the trustee's reasons will be examined and reviewed if the trustees choose to state their reasons for the exercise of discretion.



Karger v Paul [1984] VR 161

- It is relevant to look at evidence of the enquiries which were made by the trustees, the information they had and the reasons for, and manner of, exercising their discretion.
- Not for the purpose of impugning the exercise of discretion on the grounds the manner of exercise of the discretion fell short of what was appropriate or sufficient or, on the grounds the trustees were wrong and their appreciation of the facts or made an unwise or unjustified exercise of discretion.



Removal of Trustee

Pursuant to
legislation:

s 70 *Trustee Act* 1925 (ACT);

s 70 *Trustee Act* 1925 (NSW);

s 27 *Trustee Act* 1893 (NT);

s 12, Div 4, *Trusts Act* 1973 (Qld);

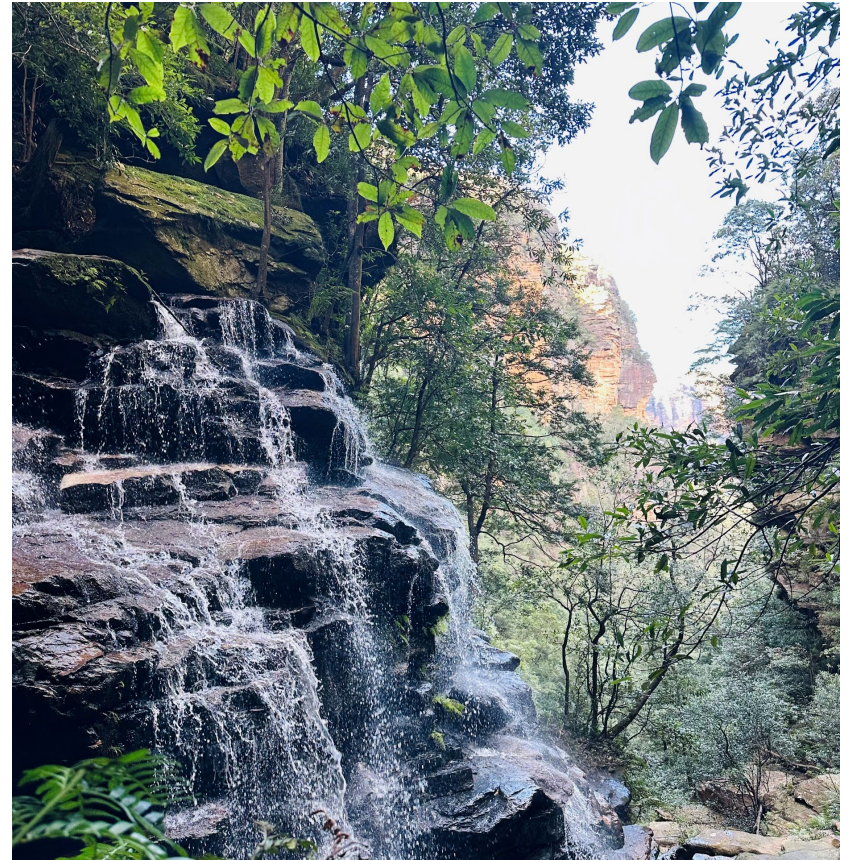
s 36 *Trustee Act* 1936 (SA);

s 32 *Trustee Act* 1898 (Tas);

s 48 *Trustee Act* 1958 (Vic);

s 77 *Trustees Act* 1957 (WA).

OR inherent jurisdiction



Removal of Trustee: Principles

Grounds

- Misconduct.
- Endangerment of trust property.
- Demonstrated dishonesty or want of proper capacity to execute duties or want of reasonable fidelity.
- The efficient management and implementation of the trust and the preservation of the trust property.

Consider

- The interests of the beneficiaries.
- The wishes of the persons by whom the trust was created if expressed, or implicit in the trust instrument.
- Whether the appointment would promote or impair the execution of the trust.



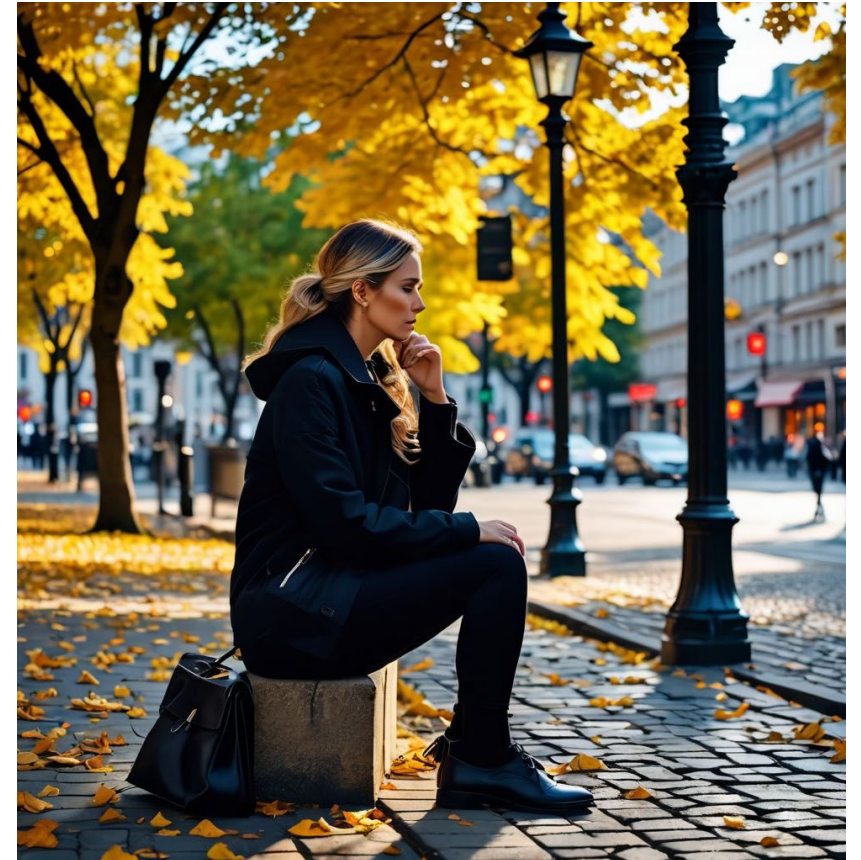
Frederiksborg Castle, Denmark

Fraud on a Power

In G Thomas, Thomas on Powers 2nd Ed, Oxford University Press 2012 the learned author describes at [9.02] the “slippery concept” as requiring proof of:

- a. A disposition beyond the scope of the power by the donee whose position is referable to the terms, express or implied, of the instrument creating the power; and
- b. Deliberate breach of the implied obligation not to exercise that power for an ulterior purpose.

The purpose may be to benefit a non-object, a corrupt purpose or another foreign purpose



Determining Purpose

Proper purpose or purposes of a power is to be objectively determined at the date of the instrument conferring the power, by reference to:

- (a) the rest of the instrument containing the power;
- (b) documents which objectively inform the context of the instrument; and
- (c) substantially contemporaneous documents intended to be read with the trust deed, such as a letter of wishes.

The Court determines first, as a matter of law, for what purpose or purposes the power may properly be exercised and secondly, as a matter of fact, whether the purpose for which the power was in fact exercised was within the category of permissible purposes.

Proper Purpose and Good Faith Distinguished

Good faith differs from the proper purpose rule as the latter also requires the powerholder to be correct in her belief according to the terms of the power

Hitchcock v Pratt [2024] NSWSC
1292 at [182]



Genuine Consideration

- Assess in a businesslike way the size of the problem: *Re Baden's Deed Trusts (No 2)* [1973] Ch 9 at 20; *Re Hay's Settlement Trusts* [1982] 1 WLR 202 at 211; *McPhail v Doulton* [1971] AC 424.
- The obligation of a trustee to be properly informed is universal, although the extent of the obligation will depend on the particular circumstances.
- What would a reasonable and responsible trustee take into account in order to be able to effectively consider whether and how to exercise the power or discretion.



Matters to consider

- Factors expressly or by implication required to be into account by the trust instrument.
- The settlor's intentions or wishes.
- Fiscal considerations:
 - The capital and income of the trust
 - The financial circumstances of the beneficiaries
- The wishes and needs of beneficiaries.
- Any other factually relevant matter.



Key Ingredients

Thomas on Powers 2nd Ed focuses on the construction of the trust document as the key ingredient to determining the width of enquiry required by a trustee. The learned author offered this formulation at [10.10]:

“The broad aim is to find the meaning which the document would convey to a reasonable person having all the background knowledge reasonably available to the parties, including anything which would have affected the way a reasonable man would have understood it, but excluding previous negotiations and declarations of subjective intent”.

Re Manisty's Settlement [1974] Ch 17

"If a settlor creates a power exercisable in favour of his issue, his relations and the employees of his company, the trustees may in practice for many years hold regular meetings, study the terms of the power and the other provisions of the settlement, examine the accounts and either decide not to exercise the power or to exercise it only in favour, for example, of the children of the settlor. During the period the existence of the power may not be disclosed to any relation or employee and the trustees may not seek or receive any information concerning the circumstances of any relation or employee. In my judgment it cannot be said that the trustees in those circumstances have committed a breach of trust and that they ought to have advertise the power or looked before the persons who are most likely to be the objects of the bounty of the settlor..."

The Duty to Enquire

- Identify those discretionary beneficiaries who are, in the circumstances, real candidates for benefit in the proper exercise of the discretion under the trust or power:

Lewin on Trusts 20th Ed at [21-010]

- Where the class of potential objects is small, the trustee should enquire and ascertain the personal and financial circumstances of each beneficiary:

Thomas on Powers 2nd Ed at [10.12]

- The duty of superannuation trustees has been described as more intense:

Finch v Telstra Super Pty Ltd [2010]
HCA 36.



Lincoln Castle, UK

- In *Re Hastings-Bass (deceased)* [1975] Ch 25 per Buckley LJ at 41

- “where by the terms of a trust... a trustee is given a discretion as to some matter under which he acts in good faith, the Court should not interfere with his action notwithstanding that it does not have the full effect he intended, unless (1) what he has achieved is unauthorized by the power conferred upon him; or (2) it is clear that he would not have acted as he did (A) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account.”

The Rule in Hastings-Bass Distinguished

- Hon JC Campbell paper “Should the rule in Hastings-Bass be followed in Australia? Trustees’ duty to enquire and trustee’ mistakes” (2011) 34 ABR 254.
- Pitt v Holt; Futter v Futter [2013] UKSC 26: sufficiently serious breach of fiduciary duty required.



Re Owies Family Trust [2020] VSC 716

- Owies Family Trust, established by deed made in 1970.
- Assets in excess of \$23million.
- Annual income of hundreds of thousands of dollars.
- Beneficiaries: the late Dr John and Dr Eva Owies and their (adult) children Michael, Deborah and Paul.
- Preamble the settlor settled the sum “being desirous of making provision for the Primary Beneficiaries and the General Beneficiaries”.

Clause 17 provided, subject to provision to the contrary “every discretion vested in the Trustees shall be absolute and uncontrolled and every power vested in them shall be exercisable at their absolute and uncontrolled discretion”.

Clause 22 was a power to appoint and remove the trustee. The initial appointor was John and after his death Eva.

Re Owies Family Trust [2020] VSC 716

Income

Clause 3 - in each accounting period pay apply or set aside the whole or such part (if any) as they shall think fit of the net income of the Trust Fund for such charitable purposes and/or to or for the benefit of or for all or such one or more exclusive of the others or other of the General Beneficiaries living from time to time in such proportions and in such manner as the Trustees in their absolute discretion and without being bound to assign any reason therefor (but after considering the wishes of the Guardian) shall think fit;

There was also a power to accumulate.

The three children were the Primary Beneficiaries.



Re Owies Family Trust [2020] VSC 716

Capital

Clause 4: “As from the Vesting Day the Trustees shall stand possessed of the Trust Fund and the income thereof in trust for such charitable purposes and/or for such of the General Beneficiaries for such interests and in such proportions and for one to the exclusion of the other or others as the Trustees may with the consent of the Guardian by instrument in writing revocable or irrevocable before the Vesting Day appoint PROVIDED ALWAYS that the Trustees shall not without such consent revoke any revocable appointment AND PROVIDED FURTHER that if there is no Guardian alive the Trustees shall have no such power of appointment and in default of and subject to any such appointment in trust –

(a) for such of the Primary Beneficiaries as shall be living on the Vesting Day and attain the age of twenty-one years as tenants-in-common in equal shares absolutely...

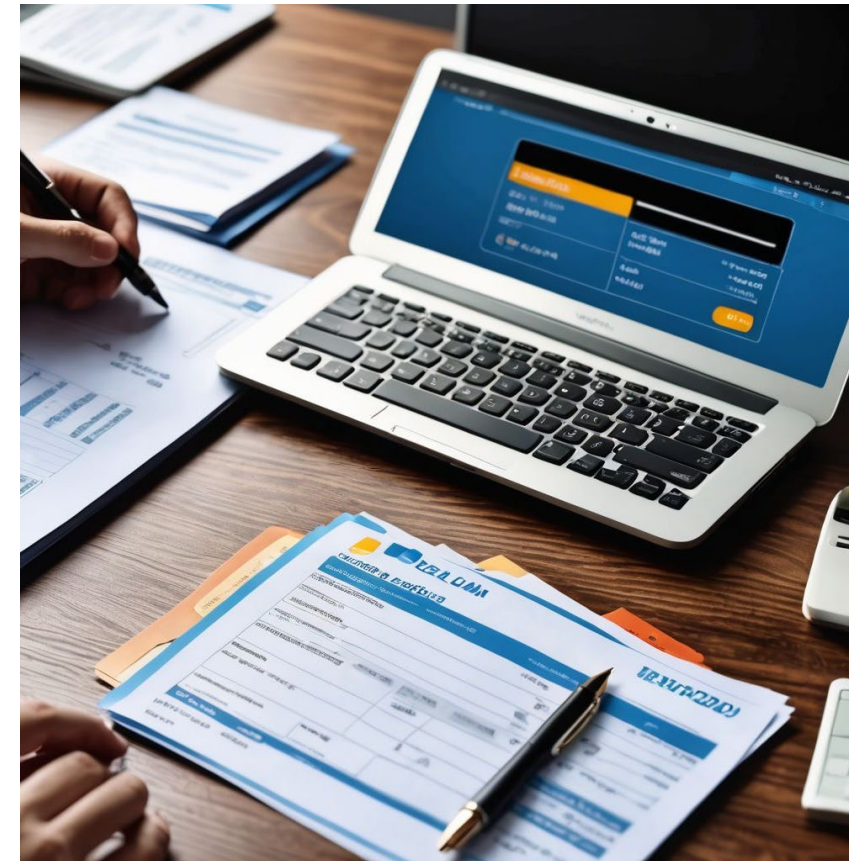


Re Owies Family Trust [2020] VSC 716

In a deed made in 2002 John and Eva were appointed as joint appointors and guardians. In a deed made in 2010, John was given those roles, after his death Eva, and after her death Michael.

In a deed made in 2017, Michael was given those roles and after his death his legal personal representative. The trial judge found these deeds were invalid as the trust deed did not permit amendment to the identity of the appointor and guardian.

From 2011 to 2018 the income of the trust was paid as to 40% to each of John and Michael and 20% to Eva. None was paid to Deborah or Paul. In 2019 all of trust income was paid to John.



Re Owies Family Trust [2020] VSC 716

The evidence was that Deborah had a low income, and various health conditions. She lived in a unit owned by the trust, which the trustee later resolved to distribute to her. Deborah was estranged from Eva from 1986 to 1998. After that there were some periods of close contact and annual phone contact but there were some periods where Deborah did not see her mother for years.

Paul was financially independent from his parents. He saw them most weeks from 1993 and 2013. His evidence was that he had a good relationship with John until 2013 and a somewhat distant relationship with Eva between 2010 and 2013. He had no contact with his parents between January 2014 and October 2016. He saw John in an aged care facility on 30 November 2016. He met with Eva on 20 January 2017 but then did not see her until July 2017.

Re Owies Family Trust [2020] VSC 716

Alleged the trustee had not made resolutions concerning the trust income. No copies of the trust resolutions were produced, but the accountant gave evidence that they had been made, and the financial statements recording the income distributions were presumed to be an accurate record of their contents: s 1305 Corporations Act 2001 (Cth).

Alleged the trustee had not given proper consideration to the circumstances of Paul and Deborah and had not exercised the income discretion with due and proper consideration were successful in respect of Paul and Deborah for the years 2015, 2016 and in the case of Deborah 2018. This was found to be a breach of trust.

Claims for the other years were not made out, because of contact between Paul and Deborah and Eva and/or John during that time, and the likelihood of personal or financial information being communicated during that time (the information imputed to the trustee through Eva and/or John).

Re Owies Family Trust [2020] VSC 716

Remedy

The Court dismissed the claim for one third of the income distributions for the years 2015, 2016 and 2018. The Court found that the income distributions were voidable rather than void, and no application had been paid in the originating process for orders setting them aside. A late application for leave to amend was refused.

The application to remove the trustee and appoint a new trustee was dismissed.



Owies v JJE Nominees Pty Ltd [2022] VSCA 142

The Appeal

The Victorian Court of Appeal after referring at [85] to *Karger v Paul* [1984] VR 161, said at [89] *Wareham (v Marsella)* (2020) 61 VR 262; [2020] VSCA 92) provides an illustration of a failure to give real and genuine consideration by a trustee. In that case, the trustee misapprehended the identity of a beneficiary and proceeded on an incorrect basis that had the effect of excluding a potential beneficiary from consideration for the payment of a death benefit.

[90] The Court explained that the application of the ground in a given case requires consideration of three matters. First, what are the relevant matters that must be considered? Second, what standard of review should the Court adopt in assessing whether there has been non-compliance with the obligation? Third, what is the consequence of a failure by the trustee to give real and genuine consideration?"

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At [92] the Court said that the nature of the trust and the terms in which the power is expressed will be important in determining the matters to which the trustee must have regard in the exercise of the power.

At [93] and [94], after referring to *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254; [2010] HCA 36, the Court said the obligation of a trustee to be properly informed is universal, although the extent of the obligation will be dependent on the particular circumstances, including the nature of the trust. The size and scale of the trust, the nature of the relationships that may subsist, and the purpose of the power will all be relevant.

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At [95] the Court said:

“In the case of some trusts, the number of potential objects might be very large and a requirement to undertake a detailed analysis of the identity and needs of each would be unworkable. Having considered whether or not to exercise the power and understood the range of objects that might benefit, the trustee is required to give adequate consideration as to how to exercise the power.”

The Court had regard to the Preamble to the trust, the settlor “being desirous of making provision for the Primary Beneficiaries and the General Beneficiaries” in determining the content of the trustee’s fiduciary duty to give real consideration to the exercise of the power to distribute income.

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The Court allowed the appeal, finding that the trustee had not given real consideration to the discretion to distribute income for the whole of the 2011 to 2019 period having regard to:

- a. The absence of enquiry of Deborah and/or Paul as to their circumstances during that time.
- b. The substantial income generated by the trust, which Eva and John had no need for in light of their substantial credit loan accounts.
- c. Deborah's parlous financial circumstances.
- d. The discernible pattern of trust distributions.
- e. The antipathy between Eva and Paul and Deborah at different times.

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The Court determined that the trustee should be removed and an independent trustee appointed.

The Court did not order that Paul and Deborah receive one third of the income distributions for the years in which the breach occurred, because the distributions were voidable rather than void, and the appellants sought no orders setting them aside or for equitable compensation.



Serranos Towers (city gates), Valencia

Fortifying the defences



Drafting.



Process.



Judicial advice.

Drafting

1. Have a narrower class of discretionary objects.
2. Include specific terms in the trust deed giving more guidance around the matters a trustee must, or may, consider or define the circumstances in which beneficiaries, other than the primary beneficiaries, are required to be considered.
3. Define (or exclude) the duty to enquire.
4. A letter of wishes.



Process

- The terms of the trust instrument are the starting point.
- Survey the field of discretionary objects.
- Exercise the duty to enquire having regard to the extent of the duty as a matter of construction in light of the surrounding circumstances.
- Assess, in a businesslike way, the size of the problem.
- Keep trust minutes



Judicial Advice

- Judicial advice is available in each jurisdiction:
- S 63 Trustee Act 1925 (ACT);
- SS 96-97 Trusts Act 1973 (Qld);
- S 63 Trustee Act 1925 (NSW);
- O 54 Supreme Court Rules 1987 (NT);
- S 95 Succession Act 2023 (SA);
- R 604 Supreme Court Rules 2000 (Tas);
- SS 92, 95 Trustees Act 1972 (WA)
- In Victoria similar applications may be made pursuant to r 54.02 Supreme Court (General Civil Procedure) Rules 2025 (Vic).

Judicial advice

- If the trustee acts in accordance with the opinion, advice or direction, the trustee will be regarded to have discharged his or her duty provided there is no fraud or willful concealment or misrepresentation.
- Distinct from other forms of relief (“partial administration suit”).
- The only jurisdictional bar is to demonstrate the existence of a question respecting the management or administration of trust property.

Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand (2008) 237 CLR 66; [2008] HCA 42 at [71]:

“... provision is made for a trustee to obtain judicial advice about the prosecution or defence of litigation in recognition of both the fact that the office of trustee is ordinarily a gratuitous office and the fact that a trustee is entitled to an indemnity for all costs and expenses properly incurred in performance of the trustee’s duties. Obtaining judicial advice resolves doubt about whether it is proper for a trustee to incur the costs and expenses of prosecuting or defending litigation. No less importantly, however, resolving those doubts means that the interests of the trust will be protected; the interests of the trust will not be subordinated to the trustee’s fear of personal liability for costs”.

Counsel's Opinion

- In *The application of the NSW Trustee & Guardian* [2014] NSWSC 423 at [3] Kunc J described the proper approach to these types of applications is as follows:

“The trustee (to which I shall refer for convenience alternatively in the neuter gender), with the assistance of such advice as it may think appropriate, must first decide what it is going to do in a given situation and then, if it wishes, seek judicial advice as to whether it is justified in acting in accordance with that decision. In almost all circumstances any application for judicial advice should be accompanied by counsel's opinion fully dealing with all the facts known to the trustee, all of the relevant legal issues and expressing a reasoned opinion in support of the particular decision which the trustee has made...”

Question to be addressed

“Counsel’s Opinion must address the facts necessary to support the legal conclusions reached and must demonstrate that the propositions of law relied upon for those conclusions are properly arguable. Whether, in the light of Counsel’s Opinion, there are “sufficient” prospects of success calls for another judgment, founded upon such considerations as:

- the nature of the case and the issues raised;
- the amounts involved, including likely costs
- whether the likely costs to be incurred by the trustee are proportionate to the issues and the significance of the case;
- the consequences of the litigation to the parties concerned;
- in the case of a charitable trust, any relevant public interest factors”.

The Interests of the Trust Estate

- The Court has a discretion as to whether or not to provide the advice.
- It may decline to do so in a beneficiary dispute: *Re Lidgett* **[2023] VSC 673**.
- Surrounding circumstances and the importance of the particular trustee to the business of the trust may be important: *Re Mary Donald Nominees Pty Ltd as trustee for the DJ Maccormick Family Trust* [2024] WASC 284 at [53].
- “Sufficient prospects” requires reflection concerning the dispute, the interests involved and whether pursuit of litigation or a compromise position should be pursued.



CLOSING REMARKS