

## CHARITABLE TRUSTS BILL 1993

NEW SOUTH WALES



### EXPLANATORY NOTE

**(This Explanatory Note relates to this Bill as introduced into Parliament)**

The objects of this Bill are:

- (a) to clarify, and to some degree extend, the jurisdiction of the Supreme Court with respect to the protection of charitable property; and
- (b) to extend the circumstances in which the original purposes of a charitable trust fail and those purposes can be altered to allow the trust property to be applied cy pres (i.e. for similar purposes); and
- (c) to enable the Attorney General (as well as the Supreme Court) to establish schemes for the administration of charitable trusts, including cy pres schemes; and
- (d) to consolidate existing statutory provisions relating to charitable trusts; and
- (e) to make other minor amendments to the law relating to charitable trusts.

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### PART 1—PRELIMINARY

#### Short title and commencement

**Clauses 1 and 2** specify the short title of the proposed Act and provide for its commencement on a proclaimed day or days.

#### Definitions

**Clause 3** defines certain expressions for the purposes of the proposed Act. In particular:

“**Charitable trust**” is defined to mean a trust for purposes recognised by law as charitable. The definition provides for the exclusion of charitable trusts which are not subject to the control of the Court, e.g. a charitable trust established by an Act and subject to the control of a Minister (see *Construction Industry Training Board v. Attorney General* [1973] Ch. 173).

“**Court**” is defined to mean the Supreme Court of New South Wales.

**Application of proposed Act**

**Clause 4** ensures that the proposed Act applies in respect of a charitable trust even though it was established outside New South Wales, or the property of the trust is not situated in New South Wales or the trustees of the trust are not domiciled or resident in New South Wales. The clause also ensures that the proposed Act applies to trusts created before as well as after the commencement of the proposed Act.

The proposed Act will not exclude the operation of other Acts relating to charitable trusts (e.g. Acts which specifically authorise the variation of trusts on which Church property is held).

**PART 2—PROTECTION OF CHARITABLE PROPERTY****Taking of certain proceedings to be authorised by Attorney General**

Section 17 of the Imperial Acts Application Act 1969 is being repealed by clause 27 and clause 6 re-enacts (with modifications) the provisions of that section that are not obsolete. The section is itself a re-enactment of Sir Samuel Romilly's Act (Imp.) which provided, when it was introduced in 1812, a simplified summary procedure by way of petition for proceedings involving the administration of a charitable trust and required such proceedings to be authorised by the Attorney General. As a result of the introduction, by the Supreme Court Act 1970, of uniform and simplified procedures for all proceedings in the Supreme Court, section 17 of the Imperial Acts Application Act 1969 has, except with respect to the authorisation of the Attorney General, been superseded by the Supreme Court Rules 1970 (see Division 11 of Part 77).

The remaining requirement of Sir Samuel Romilly's Act which is being re-enacted in this clause is the requirement that proceedings involving the administration of a charitable trust must be authorised by the Attorney General (or by leave of the Court if the authority of the Attorney General is refused). This requirement is being retained to protect charitable trusts from costly legal proceedings which may dissipate their funds. Clause 6 is similar to section 28 of the U.K. Charities Act 1960 but does not restrict the persons who may bring charitable trust proceedings to those "interested in" the charitable trust. This restriction is criticised in Halsbury's Laws of England as unclear (see Vol. 5 4th ed. at para. 923). Clause 6 (3) provides that, if the Attorney General authorises trust proceedings, the plaintiff will no longer be required to establish that the proceedings affect the plaintiff's legal rights in order to have standing to bring the proceedings. By clause 6 (4), the power of the Attorney General to bring charitable trust proceedings with or without a relator is preserved.

**Clause 5** defines the charitable proceedings concerned, and makes it clear that they do not include proceedings on appeal or proceedings relating to the construction of a trust instrument (eg. whether a will creates a valid charitable trust).

**Extension of powers of Court to protect charitable property**

**Clauses 7 and 8** are intended to clarify and make specific the powers of the Court to deal with misconduct or mismanagement in the administration of a charitable trust. Generally those powers include:

- the removal of trustees and others involved in the affairs of a charitable trust;
- restrictions on dealings in trust property; and
- the appointment of a receiver.

The powers specifically conferred on the Court are similar to those conferred on the Charity Commissioners by section 20 of the U.K. Charities Act 1960.

### **PART 3—APPLICATION OF CHARITABLE PROPERTY CY PRES**

#### **Extension of the occasions for applying trust property cy pres**

**Clause 9** extends the circumstances in which the original purposes of a charitable trust fail and the trust property can be applied cy pres i.e. for a similar purpose. The circumstances are to extend to trusts whose original purposes have ceased to provide a suitable and effective method of using the trust property having regard to the spirit of the trust. A similar extension has been made in other States.

#### **Requirement for general charitable intention**

**Clause 10** preserves the requirement of the existing law that charitable property cannot be applied cy pres if it was given only for the purpose of the trust and without any general charitable intention. However, the clause creates a presumption in favour of a general charitable intention.

The presumption was recommended by the Legal and Constitutional Committee of the Victorian Parliament in its report on charitable trusts of May 1989.

#### **Duty of trustee to secure application of trust property cy pres**

**Clause 11** is being enacted to declare the duties of trustees of a charitable trust if the original purposes of a charitable trust fail. The duty to apply trust property cy pres was first stated in the *National Anti-Vivisection Case* (see *National Anti-Vivisection Society v. Inland Revenue Commissioners* [1948] A.C. at p. 74.) The clause is in the same terms as section 13 (5) of the U.K. Charities Act 1960 and section 2 (4) of the Charities Act 1978 of Victoria.

### **PART 4—SCHEMES BY ATTORNEY GENERAL FOR ADMINISTRATION OF CHARITABLE TRUSTS**

#### **Attorney General may establish schemes**

**Clause 12** authorises the Attorney General to establish a scheme for the administration of a charitable trust in certain limited cases so as to avoid the necessity for the trustees of the trust to approach the courts. Such a scheme may, among other things:

- (a) authorise the application of charitable property cy pres on a failure of the purposes for which it was given; or
- (b) authorise the application of charitable property for specific charitable purposes where property is given for a general charitable purpose; or
- (c) extend or vary the powers of the trustees of a charitable trust.

**Clause 13** authorises the Attorney General to establish a scheme on application by a trustee, on the Attorney General's own initiative (in special cases) or on referral by the Supreme Court.

**Restrictions on power of Attorney General to establish schemes**

**Clause 14** imposes restrictions on the exercise by the Attorney General of the power to establish schemes. A scheme cannot be established if the value of the trust property affected by the proposed scheme is more than \$500,000 or such other amount as is prescribed by the regulations. Nor can a scheme be established if the Attorney General considers that there are good reasons why the matter would be better dealt with by the Court. These restrictions do not apply to a referral by the Court.

**Publicity for schemes established by Attorney General**

**Clause 15** requires an intended scheme (except in certain circumstances) to be publicised and public comment to be invited, and requires the Attorney General to consider representations and suggestions made by any person in relation to the matter.

**Publication and commencement of schemes**

**Clause 16** deals with the due publication and commencement of schemes that are settled by the Attorney General.

**Revocation or variation of schemes**

**Clause 17** enables a scheme to be revoked or varied in the same manner as that in which it may be made.

**Appeal from order of Attorney General**

**Clause 18** provides an appeal to the Court against an order of the Attorney General that would establish, revoke or vary a scheme.

**Register of orders of Attorney General**

**Clause 19** requires the Attorney General to maintain a public register of orders made by the Attorney General.

**Immunity of Attorney General**

**Clause 20** affords the Attorney General, in respect of the establishment, variation or revocation of a scheme under this Part, the same immunities as a Judge of the Court would have if the scheme had been dealt with by the Court.

**Fees payable to Attorney General**

**Clause 21** authorises the Attorney General to charge fees for the costs and expenses incurred in establishing or varying a scheme.

**Determination of value of trust property**

**Clause 22** authorises the Attorney General to determine the value of trust property for the purposes of provisions of the Part that depend on the value of the trust property concerned.

**PART 5—MISCELLANEOUS****Inclusion of non-charitable purpose not to invalidate trust**

**Clause 23** re-enacts without modification the provisions of section 37D of the Conveyancing Act 1919, which was inserted into that Act by section 3 of the Conveyancing, Trustee and Probate (Amendment) Act 1938, in order that trusts which included charitable and non-charitable purposes were not invalidated but construed as trusts for the charitable purposes only. The clause preserves the requirement that the provisions of section 37D do not apply to trusts declared, or the wills of testators dying, before the commencement of the 1938 amending Act. The repeal of section 37D of the Conveyancing Act 1919 is effected by clause 27.

**Act binds the Crown**

**Clause 24** declares that the proposed Act binds the Crown.

**Regulations**

**Clause 25** confers a general regulation-making power on the Governor-in-Council.

**Saving of pending court proceedings**

**Clause 26** saves pending court proceedings.

**Consequential repeals**

**Clause 27** repeals provisions of other Acts that are to be replaced by the proposed Act.

**Review**

**Clause 28** requires the proposed Act to be reviewed within 5 years of its assent.

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