

Serial 308
Trustee Amendment
(No. 2)
Mr Manzie

NORTHERN TERRITORY OF AUSTRALIA
TRUSTEE AMENDMENT BILL (NO. 2) 1994

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NORTHERN TERRITORY OF AUSTRALIA

A BILL for AN ACT

to amend the *Trustee Act* consequential
on the passing of the *Perpetuities Act 1994*

BE it enacted by the Legislative Assembly of the Northern Territory of Australia, with the assent as provided by the *Northern Territory (Self-Government) Act 1978* of the Commonwealth, as follows:

1. SHORT TITLE

This Act may be cited as the *Trustee Amendment Act (No. 2) 1994*.

2. COMMENCEMENT

This Act shall come into operation on the commencement of the *Perpetuities Act 1994*.

3. PRINCIPAL ACT

The *Trustee Act* is in this Act referred to as the Principal Act.

4. NEW SECTION

The Principal Act is amended by inserting after section 21 the following:

"21A. POWER TO APPLY TO SUPREME COURT FOR DECLARATION AS TO VALIDITY, &c.

"(1) An executor or trustee of property, or a person interested under, or in the invalidity of, a disposition of property, whether made before or after the commencement

of this section, may at any time apply to the Supreme Court for a declaration as to the validity, in respect of the rule against perpetuities, of the disposition.

"(2) The Supreme Court may, on an application under subsection (1), make a declaration, having regard to facts existing and events that have occurred at the time the declaration is made, as to the validity or otherwise of the disposition in respect of which the application is made.

"(3) The Supreme Court shall not make a declaration under subsection (2) in respect of a disposition the validity of which cannot be determined at the time the Court is asked to make the declaration.

"(4) If the Supreme Court refuses to make a declaration under subsection (2) relating to a disposition, it may give such directions as it thinks fit on -

- (a) the construction of the instrument by which the disposition is made;
- (b) the determination of a person who is a measuring life for the purposes of the disposition;
- (c) whether a person who is a measuring life is to be presumed dead;
- (d) whether, before the determination of the perpetuity period applicable to the disposition, an interest is to be treated as incapable of vesting during the period; and/or
- (e) any other matter on which an application could properly be made to the Court apart from under this Act."

5. NEW SECTIONS

The Principal Act is amended by inserting in Part III, after section 50, the following:

"50A. CY-PRES MODIFICATION IN CERTAIN CASES

- "(1) Subject to this section, where -
- (a) the Supreme Court has, under section 21A, declared a disposition of property to be invalid; or
 - (b) it appears to the Court that a disposition, whether made before or after the commencement of this section, would be invalid solely on the ground that it conflicts with the rule against perpetuities,

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and the general intentions originally governing the disposition can be ascertained, the Court shall reform the disposition so as to give effect as far, as possible to those general intentions within the limits permitted under the rule against perpetuities as affected by this section.

"(2) A disposition of property made before the commencement of this section shall not be reformed under subsection (1) -

- (a) where the disposition has been declared invalid before that commencement by an order or judgment made or given in legal proceedings;
- (b) where any property comprised in the disposition has, before that commencement, been paid or transferred to, or applied for the benefit of, or set apart for, a person entitled by reason of the invalidity of the disposition; or
- (c) so as to prejudice a person who has, before that commencement, reasonably altered his or her position in reliance on the invalidity of the disposition where, in the opinion of the Supreme Court, having regard to all possible implications in respect of other persons, it is inequitable to reform the disposition wholly or in part.

"(3) In hearing an application to reform a disposition under this section, the Supreme Court -

- (a) may admit extrinsic evidence of the general intentions originally governing the disposition and shall apply liberal rules of construction for the purpose of ascertaining them; and
- (b) shall have no regard to the rights of a person other than -
 - (i) a person born or *en ventre sa mere* when the disposition was made; and
 - (ii) a person entitled on the death of a such person,

and in reforming the disposition the Court may specify the perpetuity period in accordance with section 7 of the *Perpetuities Act*.

"(4) An application for reformation under this section may be made by -

- (a) a trustee of property comprised in the disposition;

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- (b) the settlor or the settlor's personal representative; or
- (c) a person having an interest, whether vested or contingent, under the disposition or the personal representative of the person to whom the interest passes.

"(5) Where a trustee of property comprised in a disposition becomes aware that the disposition requires to be reformed under subsection (1), the trustee has a duty to make an application under this section.

"(6) A disposition that has been reformed under this section -

- (a) is valid notwithstanding that it would have been invalid under a rule of law or construction if it had been effected in any other way; and
- (b) shall be construed as if it had not been effected under this section.

"50B. VESTING ORDERS ARISING FROM RESULTING TRUSTS

"(1) Where the Supreme Court has refused to reform a disposition under section 50A, it may, if satisfied that the person who made the disposition, or his or her personal representative, has become entitled under a resulting trust, make an order vesting the property comprised in the disposition absolutely in the person or, if the person has died, in his or her personal representative on the trusts of the estate of the deceased person.

"(2) In the case of a disposition referred to in subsection (1), where a person other than a donor of property given to the trustee on trust, has sold other property to the trustee, or has assisted the trustee, by loan, guarantee or otherwise, to acquire other property -

- (a) the power of the Supreme Court to make a vesting order under that subsection is restricted to so much of the property comprised in the disposition as was given by the donor or fairly attributable to the donor's gift; and
- (b) the Court may make such order as it thinks fit regarding the remainder of property comprised in the disposition.

"(3) An application for a vesting order under this section in respect of property comprised in a disposition may be made by -

- (a) a trustee of the property;

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- (b) a vendor of the property to the trustee or the personal representative of such a vendor; or
- (c) a person who assisted the trustee, by loan, guarantee or otherwise, to acquire the property, or the personal representative of the person."

6. DEFINITIONS

Section 82 of the Principal Act is amended by inserting after the definition of "devisee" the following:

"The expression 'disposition' includes -

- (a) the conferring or exercising of a power of appointment or any other power or authority to dispose of property; and
 - (b) an alienation of property;"
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