

Charitable Trusts Act 1993 No 10

[1993-10]



New South Wales

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The provisions displayed in this version of the legislation have all commenced.

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Charitable Trusts Act 1993 No 10



New South Wales

An Act to make further provision for the protection of charitable trusts; to authorise the Attorney General to establish schemes for the administration of charitable trusts; and for other purposes.

Part 1 Preliminary

1 Name of Act

This Act may be cited as the *Charitable Trusts Act 1993*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

In this Act:

charitable trust means any trust established for charitable purposes and subject to the control of the Court in the exercise of the Court's general jurisdiction with respect to charitable trusts.

Court means the Supreme Court of New South Wales.

trust property means any property subject to the charitable trust concerned.

4 Application of Act

(1) This Act applies in respect of a charitable trust even though:

- (a) it was established outside New South Wales, or
- (b) the trust property is not situated in New South Wales, or
- (c) the trustees are not domiciled or resident in New South Wales.

(2) This Act applies to a trust created before or after the commencement of this section, except as otherwise provided by this Act.

- (3) This Act does not apply to the exclusion of the provisions of any other Act relating to charitable trusts.

Part 2 Protection of charitable property

5 Definition of “charitable trust proceedings”

- (1) In this Part, **charitable trust proceedings** means proceedings in the Court brought, whether by any trustee of a charitable trust or by any other person, under the Court’s statutory or general jurisdiction with respect to any breach or supposed breach of a charitable trust, or with respect to the administration of a charitable trust.
- (2) However, in this Part **charitable trust proceedings** does not include:
- (a) proceedings for the bringing of any appeal, or
 - (b) proceedings relating merely to the construction of a trust instrument.

6 Bringing of certain charitable trust proceedings to be authorised by Attorney General or by leave

- (1) Charitable trust proceedings are not to be commenced in the Court unless:
- (a) the Attorney General has authorised the bringing of the proceedings, or
 - (b) leave to bring the proceedings is obtained from the Court.
- (2) The Court is not to give such leave unless satisfied that the Attorney General has been given an opportunity to consider whether to authorise the proceedings or that the referral of the matter to the Attorney General is not appropriate because of the urgency of the matter or other good cause.
- (2A) Any such authority or leave may also be given after charitable trust proceedings have been brought so as to enable the continuation of those proceedings.
- (3) A person who does not otherwise have standing may bring charitable trust proceedings if authorised by the Attorney General to bring those proceedings.
- (4) Nothing in this section applies to the bringing by the Attorney General, with or without a relator, of charitable trust proceedings or any other proceedings relating to a charitable trust.

7 Extension of powers of Court to protect charitable property

- (1) If the Court, in charitable trust proceedings, is satisfied that:
- (a) there has been any misconduct or mismanagement in the administration of a charitable trust, and
 - (b) it is necessary or desirable to act for the purpose of protecting existing or future

trust property or securing a proper application, for the purpose of the charitable trust, of existing or future trust property,

the Court may, without limiting any other powers of the Court, make one or more of the orders specified in subsection (2).

- (2) The orders which may be made by the Court are as follows:
- (a) an order removing any or all trustees of the charitable trust,
 - (b) an order appointing a person as a trustee of the charitable trust,
 - (c) an order precluding the employment or engagement of a person in the affairs of the charitable trust,
 - (d) an order directing any bank or person who holds property of the charitable trust not to part with the property without the approval of the Court or the Attorney General (or a person authorised by the Attorney General) or of some other person,
 - (e) an order restricting the transactions which may be entered into or the nature or amount of the payments which may be made, in the administration of the charitable trust, without the approval of the Court or the Attorney General (or a person authorised by the Attorney General) or of some other person,
 - (f) an order appointing a receiver of the property of the charitable trust,
 - (g) an order which is necessary or convenient to be made for giving effect to an order referred to in this subsection.
- (3) A person appointed by order of the Court under this section as a receiver of the property of a charitable trust:
- (a) may require the trustees to deliver to the receiver any property of which the person has been appointed receiver or to give to the receiver all such information concerning that property as may reasonably be required, and
 - (b) may acquire and take possession of any property of which the person has been appointed receiver, and
 - (c) may deal with any property that the person has acquired or of which the person has taken possession in any manner in which the trustees might lawfully have dealt with the property, and
 - (d) has such other powers and duties in respect of the property as the Court specifies in the order.
- (4) Nothing in the terms of any charitable trust precludes the Court from making any order it is empowered by this section to make or affects the operation of any such

order.

- (5) In this section and section 8, ***misconduct or mismanagement*** includes the remuneration of persons acting in the affairs of the charitable trust concerned, or for other administrative purposes, by payments which are excessive in relation to the duties of the persons so acting.

8 Provisions relating to removal of trustees etc

Without limiting the powers of the Court, the Court may, under section 7, remove a trustee of a charitable trust:

- (a) if the trustee has been responsible for or participated in misconduct or mismanagement in the administration of the charitable trust or has by the trustee's conduct contributed to it or facilitated it, or
- (b) if the trustee has been convicted, whether in New South Wales or elsewhere, of any offence involving fraud or dishonesty, or
- (c) if the trustee has become mentally incapacitated, or
- (d) if the trustee has become bankrupt, has applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, has compounded with his or her creditors or has made an assignment of his or her remuneration for their benefit, or
- (e) if the trustee is a corporation:
 - (i) which is in the course of being wound up, or
 - (ii) which is under official management, or
 - (iii) in respect of which a receiver or manager has been appointed, whether by the Court or pursuant to the powers contained in any instrument or otherwise, or
 - (iv) which has entered into a compromise or scheme of arrangement with its creditors, or
 - (v) in respect of which a writ of execution or other process has been issued on a judgment, decree or order of any court in favour of a creditor of the corporation and has been returned unsatisfied in whole or in part.

Part 3 Application of charitable property cy pres

9 Extension of the occasions for applying trust property cy pres

- (1) The circumstances in which the original purposes of a charitable trust can be altered to allow the trust property or any part of it to be applied cy pres include circumstances in which the original purposes, wholly or in part, have since they were laid down ceased to provide a suitable and effective method of using the trust property, having

regard to the spirit of the trust.

- (2) References in this section to the original purposes of a charitable trust are to be construed, if the application of the trust property or any part of it has been altered or regulated by a scheme or otherwise, as references to the purposes for which the trust property are for the time being applicable.

10 Requirement for general charitable intention of donor

- (1) This Part does not affect the requirement that trust property can not be applied cy pres unless it is given with a general charitable intention.
- (2) However, a general charitable intention is to be presumed unless there is evidence to the contrary in the instrument establishing the charitable trust.

11 Duty of trustee to secure application of trust property cy pres

A charitable trust places a trustee under a duty, if the case permits and requires the trust property or any part of it to be applied cy pres, to secure its effective use for charitable purposes by taking steps to enable it to be so applied.

Part 4 Schemes by Attorney General for administration of charitable trusts

12 Attorney General may establish schemes

- (1) The Attorney General may by order establish a scheme for the administration of any charitable trust. In particular, the Attorney General may by such an order:
 - (a) establish a scheme for the alteration of the original purposes of a charitable trust so as to enable the trust property or any part of it to be applied cy pres if it appears to the Attorney General that the trust property or any part of it may be so applied, or
 - (b) establish a scheme to extend or vary the powers of trustees of a charitable trust or prescribe or vary the manner or mode of administration of any charitable trust, either generally or in a particular case, if it appears to the Attorney General that it is expedient to do so in the interests of the administration of the charitable trust, or
 - (c) in the case of 2 or more charitable trusts, establish a scheme to authorise the trustees to use common premises or employ common staff in the administration of the trusts, to pool the trust property for the purpose of investment, or otherwise to combine for any purpose of administration of the trusts.
- (2) Without limiting the generality of any provision of this Part, a scheme under this Part may vest in any trustees of a charitable trust who desire to sell, mortgage or lease the trust property or any part of it, but who cannot do so for lack of power vested in them

by the instrument (if any) creating the trust or by law, the necessary power for such a sale, mortgage or lease.

- (3) If there are no trustees of a charitable trust, a scheme under this Part may appoint trustees for the purposes of the scheme.
- (4) A scheme for the administration of a charitable trust established by the Attorney General under this Part has the same effect as it would have if it had been established by the Court.

13 Application etc for establishment of scheme by Attorney General

- (1) The Attorney General may establish a scheme under this Part:
 - (a) on the application of all or any of the trustees, or
 - (b) in a special case—on the Attorney General’s own initiative, or
 - (c) in accordance with a referral from the Court under subsection (2).
- (2) If the Court directs that a scheme for the administration of a charitable trust be established, the Court may, by order, refer the matter to the Attorney General for the Attorney General to establish the scheme in accordance with the directions (if any) of the Court.

14 Restrictions on power of Attorney General to establish schemes

- (1) The Attorney General is not to establish a scheme under this Part if:
 - (a) the value of the trust property affected by the scheme exceeds \$500,000 or, if another amount is prescribed by the regulations, that other amount, or
 - (b) the Attorney General is satisfied that the subject matter is, because of its contentious character or any special question of law or fact or for other reasons, more fit to be dealt with by the Court.
- (2) This section does not apply to the establishment of a scheme in accordance with a referral from the Court.

15 Publicity for schemes proposed to be established by Attorney General

- (1) The Attorney General is not to establish a scheme under this Part unless:
 - (a) the Attorney General (or a person authorised by the Attorney General) has, not less than 1 month previously, published in the Gazette or in a newspaper circulating throughout New South Wales a notice about the proposed scheme, and
 - (b) the Attorney General has given due consideration to any representations or suggestions made in respect of the proposed scheme by any person.

- (2) A notice about a proposed scheme must:
 - (a) specify that the Attorney General proposes to establish a scheme under this Part, and
 - (b) give details of the proposed scheme or specify a place at which a copy of the proposed scheme may be inspected, and
 - (c) specify a period within which any person may make representations or suggestions to the Attorney General in respect of the proposed scheme.
- (3) This section does not apply to the establishment of a scheme if:
 - (a) the scheme does not alter the original purposes of the charitable trust and the Attorney General is satisfied that the scheme should be established as a matter of urgency, or
 - (b) the value of the trust property affected by the scheme does not exceed \$2,000 or, if another amount is prescribed by the regulations, that other amount, or
 - (c) the scheme is established in accordance with a referral from the Court.

16 Publication and commencement of schemes

- (1) If the Attorney General makes an order under this Part establishing a scheme, the Attorney General must publish in the Gazette or in a newspaper circulating throughout New South Wales a copy of the order or brief details of the order and the address of the place at which a copy of the order may be inspected.
- (2) Any such order does not take effect:
 - (a) until 21 days after its publication in accordance with this section or such later time as is specified in the order, or
 - (b) if an appeal against the order is duly made to the Court under this Part within that time, unless the order is confirmed or the appeal is withdrawn or lapses.
- (3) An order establishing a scheme referred to in section 15 (3) may, despite anything in this section, specify that it takes effect on or at any time after its publication.

17 Revocation or variation of schemes

- (1) The Attorney General may revoke a scheme established under this Part by a further order published in the same manner as the order establishing the scheme.
- (2) The Attorney General may vary a scheme established under this Part by a further order published in the same manner as the order establishing the scheme. The provisions of this Part relating to the establishment of a scheme apply to any such variation of the scheme.

18 Appeal from orders of Attorney General relating to schemes

- (1) If the Attorney General makes an order under this Part:
 - (a) any trustee of the charitable trust concerned, or
 - (b) with the leave of the Court, any other person,may appeal to the Court against the order within 21 days after the order is published under this Part or, with the leave of the Court, at any time after the order is so published.
- (2) An appeal is to be made in accordance with the rules of the Court.
- (3) The Court may, in determining the appeal, confirm, vary or quash the order.
- (4) If the Court quashes the order, it may establish another scheme for the administration of the charitable trust or direct the Attorney General to establish another such scheme in accordance with the directions (if any) of the Court.
- (5) A scheme purporting to be established by the Attorney General under this Part may not be challenged because of any alleged contravention of this Part, except in an appeal to the Court under this section.

19 Register of orders of Attorney General relating to schemes

- (1) The Attorney General is to maintain a register of all orders made by the Attorney General under this Part.
- (2) The register is to be open to inspection by any person during ordinary office hours.
- (3) The regulations may make provision for or with respect to the maintenance and inspection of the register.

20 Immunity of Attorney General

The Attorney General has, in relation to any matter or thing done or omitted by the Attorney General in connection with any scheme under this Part, the same immunities from liability as a Judge of the Court would have if the matter or thing were done or omitted by the Court.

21 Fees payable to Attorney General

- (1) The Attorney General may, by the order establishing or varying a scheme under this Part, charge fees for the costs and expenses (including legal costs and disbursements) incurred by the Attorney General in connection with the establishment or variation of the scheme.
- (2) Any such fees may be fixed as a percentage of the value of the trust property affected

by the scheme (with or without any minimum fee).

- (3) Any fees payable under this section are (unless paid by the applicant for the establishment or variation of the scheme) payable from the trust property concerned.
- (4) An appeal may be made to the Court against an order under this Part in connection with the fees required to be paid under the order.

22 Determination of value of trust property for purposes of this Part

For the purposes of this Part, the determination of the value of trust property is to be made by the Attorney General. The value is to be determined as at the date of the application for the scheme concerned or any other date the Attorney General considers convenient.

Part 4A Gifts by certain trusts for philanthropic purposes

22A Definitions

In this Part:

commencement day means the date of assent to the [Charitable Trusts Amendment Act 2006](#).

eligible recipient means a deductible gift recipient within the meaning of the [Income Tax Assessment Act 1997](#) of the Commonwealth, whether or not the deductible gift recipient is a charity at law or (without limitation) is established for a charitable purpose or purposes.

prescribed trust means a trust:

- (a) that establishes and maintains a fund referred to in item 2 of the table in section 30-15 of the [Income Tax Assessment Act 1997](#) of the Commonwealth, or
- (b) that is established for charitable or philanthropic purposes and is of a class prescribed by the regulations,

whether created before, on or after the commencement day.

trust instrument means the initial instrument establishing a prescribed trust, as modified by all validly executed amendments.

22B Prescribed trust—trust instrument containing express power to give to eligible recipients

The trust instrument of a prescribed trust may include an express power for the trustees to provide money, property or benefits to or for an eligible recipient or for the establishment of an eligible recipient.

22C Prescribed trust—trust instrument not containing express power to give to eligible recipients

- (1) The powers of the trustees of a prescribed trust, whose trust instrument does not contain an express power to do so, include a power to provide money, property or benefits to or for an eligible recipient or for the establishment of an eligible recipient.
- (2) Subsection (1):
 - (a) applies despite any provision to the contrary in the trust instrument, but
 - (b) does not apply in relation to a particular eligible recipient or a particular class of eligible recipients to the extent that there is an express prohibition in the trust instrument against the provision by the trustees of money, property or benefits:
 - (i) to or for that eligible recipient or class of eligible recipients, or
 - (ii) for the establishment of that eligible recipient or class of eligible recipients.
- (3) Subsection (1) does not apply to the trustees of a prescribed trust unless there is in force a declaration substantially to the effect of the form in Schedule 1 in respect of the prescribed trust.
- (4) For the purpose of making a declaration under this section, the form in Schedule 1 may be modified so as to limit the application of the declaration to a specified eligible recipient or specified class of eligible recipients. If the declaration made in respect of a prescribed trust is so limited, subsection (1) in its application to the prescribed trust has effect only in relation to the specified eligible recipient or specified class of eligible recipients.
- (5) The trustees must ensure that the declaration, or a certified copy of it, is retained with the records of the prescribed trust.
- (6) The trustees are not under a duty to make a declaration under this section, nor are the trustees in breach of a duty in making a declaration under this section.

22D Ancillary provisions

- (1) In this section:

prescribed power, in relation to a prescribed trust, means:

 - (a) a power referred to in section 22B included in the trust instrument, or
 - (b) the power referred to in section 22C as applying to the prescribed trust.
- (2) This Act applies to a prescribed trust as if the prescribed power were a power exercisable for a charitable purpose.
- (3) Without limiting subsection (2):

- (a) neither the existence nor the exercise of the prescribed power affects the validity or status of a charitable trust as a charitable trust, and
 - (b) a prescribed trust is to be construed and given effect to in the same manner in all respects as if:
 - (i) the prescribed power were a power exercisable for a charitable purpose, and
 - (ii) any payment or application of the trust property or the trust income, or any part of either of them, in the manner allowed by the power were to or for a charitable purpose, and
 - (c) the existence or exercise of the prescribed power does not affect the control of a prescribed trust by the Court in the exercise of the Court's general jurisdiction with respect to charitable trusts, and
 - (d) the jurisdiction referred to in paragraph (c) extends to the prescribed power as if the power were exercisable for a charitable purpose.
- (4) The provision, before the commencement day, by the trustees of a prescribed trust of money, property or benefits to or for an eligible recipient or for the establishment of an eligible recipient:
- (a) is taken to be, and always to have been, a provision for an authorised and valid purpose of the prescribed trust, and
 - (b) does not affect, and is taken never to have affected, the status of the prescribed trust as a charitable trust.

This subsection applies despite anything to the contrary in the trust instrument.

- (5) The inclusion of a power referred to in section 22B in the trust instrument of a prescribed trust before the commencement day is taken to be, and always to have been, validly included.

Part 5 Miscellaneous

23 Inclusion of non-charitable purpose not to invalidate trust (cf former s 37D of [Conveyancing Act 1919](#))

- (1) A trust is not invalid merely because some non-charitable and invalid purpose as well as some charitable purpose is or could be taken to be included in any of the purposes to or for which an application of the trust property or of any part of it is directed or allowed by the trust.
- (2) Any such trust is to be construed and given effect to in the same manner in all respects as if no application of the trust property or of any part of it to or for any such non-charitable and invalid purpose had been or could be taken to have been so

directed or allowed.

- (3) This section does not apply to any trust declared before, or to the will of any testator dying before, 1 January 1939, being the date of commencement of the *Conveyancing, Trustee and Probate (Amendment) Act 1938*.

24 Act binds the Crown

This Act binds the Crown.

25 Regulations

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

26 Effect on pending charitable trust proceedings

- (1) Nothing in any provision of this Act affects any proceedings relating to a trust that were commenced in the Court before the commencement of the provision concerned.
- (2) Despite subsection (1), the Court may make a referral under section 13 (2) of a matter in relation to proceedings relating to a trust that were commenced in the Court before 15 April 1994 (the date of commencement of this Act) as well as in relation to proceedings commenced after that date.

27 Consequential repeals

The following provisions are repealed:

Division 6 of Part 2 of the *Conveyancing Act 1919* (**Trusts for charitable purposes**)

Division 3 of Part 3 of the *Imperial Acts Application Act 1969* (**Charities**).

28 Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

Schedule 1 Declaration by trustees

(Section 22C)

The trustees of the [*insert name of trust*], after having regard to the effect of this declaration (including its effect

on the liability of the trustees to income tax), declare that the power conferred by section 22C of the *Charitable Trusts Act 1993* to provide money, property or benefits to or for an eligible recipient, or for the establishment of an eligible recipient, within the meaning of section 22A of that Act, is approved as a power that the trustees for the time being of the [*insert name of trust*] are authorised to exercise.

Deed dated