

29 January 2004

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Our reference  
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Dear Michael

**THE TRUSTEES FOR THE ROMAN CATHOLIC ARCHDIOCESE OF SYDNEY - ADVICE**

- 1 Thank you for your instructions of 2 December 2003. Please find below our advice in final form. In this advice we:
  - (a) provide you with a general survey of the legislation which establishes the Trustees for the Roman Catholic Archdiocese of Sydney ("**Trustee**");
  - (b) provide you with advice as to whether this legislation permits delegation of the powers of the Trustee in some form;
  - (c) consider whether or not it would be prudent to identify the Trustee as the defendant for the Archdiocese of Sydney ("**Archdiocese**") in any legal proceedings; and
  - (d) in light of the foregoing, consider whether there are any legislative amendments that may be necessary or opportune.
- 2 For reasons of completeness, we have considered the provisions of both the *Trustee Act 1925* (NSW) ("**the Trustee Act**") and the *Roman Catholic Church Trust Property Act 1936* (NSW) ("**the NSW Church Act**"). Where appropriate, we have also referred to the legislation under which the Roman Catholic Trust Corporation for the Diocese of Melbourne ("**RCTC**") was established, being the *Roman Catholic Trusts Act 1907* (Vic) ("**the Vic Church Act**").

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**Executive Summary**

3 In summary, our advice in relation to the issues set out in paragraphs 1(b), 1(c) and 1(d) above is as follows:

- (a) The Trustee is able to delegate, in defined circumstances, certain powers, authorities, duties and functions to the person administering the Archdiocese, whether as Archbishop or Bishop, Coadjutor Archbishop or Coadjutor Bishop, Vicar Capitular or Administrator.<sup>1</sup> In addition, it is arguable that where the Trustee is absent from New South Wales, or is about to depart therefrom, (and so long as numerous conditions are met), the Trustee is able to delegate the execution of the trust,<sup>2</sup> and the power to consent to the exercise of a trust or power.<sup>3</sup> As a matter of commercial practicality, it is only the ability to delegate to the person administering the Archdiocese that is of relevance to the Trustee. Our detailed analysis of the relevant legislation concludes that in all probability, it is not open to the Trustee to delegate its powers to the Vicar General or Business Manager.
- (b) We would counsel against the Archdiocese adopting the practice of naming the Trustee as the defendant in legal proceedings, because this may deprive the Archdiocese of the use of various "technical defences". In addition, we also believe that it would be in the Archdiocese's interests to adopt an approach consistent with that of the Archdiocese of Melbourne. Accordingly, the most appropriate approach for the Archdiocese to adopt is to let the potential plaintiffs work out for themselves who they think they should sue, let them plead their claims, and then take steps, if they be available, to strike out or summarily dismiss any such claim.

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<sup>1</sup> Section 9B of the NSW Church Act permits delegation to the Bishop. Section 2 of the NSW Church Act defines "Bishop" as the person administering the Archdiocese, whether as Archbishop or Bishop, Coadjutor Archbishop or Coadjutor Bishop, Vicar Capitular or Administrator.

<sup>2</sup> Section 64 of the Trustee Act.

<sup>3</sup> Section 65 of the Trustee Act.

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- (c) Depending upon the Archdiocese's commercial needs, it may be desirable to take steps to seek to have the NSW Church Act amended to extend the Trustee's powers of delegation beyond those circumstances that are currently permitted. In particular, it may be useful to be able to delegate to people such as the Vicar General, or the Business Manager, so that they are able to efficiently deal with day-to-day management issues.

**The NSW Legislative Regime**

- 4 Before commencing our analysis, it is necessary to consider how the NSW Church Act and the Trustee Act interact. The NSW Church Act is the instrument which creates the Trustee and which regulates it in a number of key respects. The Trustee Act, on the other hand, provides the overarching legislative framework for trusts in New South Wales, and is the backdrop against which the provisions of the NSW Church Act must be read.<sup>4</sup> Accordingly, it is critical that when considering the impact of the Trustee Act upon the Trustee, close attention is paid to the NSW Church Act, and, in particular, to whether it acts to override or limit the provisions of the Trustee Act.
- 5 In this regard, the Trustee Act provides that, in relation to a considerable number of its provisions, a provision will apply only if, and as far as, a contrary intention is not expressed in the NSW Church Act. For example,<sup>5</sup> the Trustee Act provides that this occurs in relation to:
- (a) the appointment<sup>6</sup> and retirement<sup>7</sup> of a new trustee;
  - (b) the duties of a trustee in respect of his or her power of investment;<sup>8</sup>

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<sup>4</sup> Section 5 of the Trustee Act provides that, for the purposes of the Trustee Act, an instrument can be either a deed, a will or an Act of Parliament.

<sup>5</sup> For reasons of brevity, we have not dealt with all of the provisions of the Trustee Act which provide that the instrument will limit the provisions of the Trustee Act here. If you would like us to consider the interaction of the Trustee Act and the NSW Church Act in greater detail, please do not hesitate to contact us.

<sup>6</sup> Section 6(13) of the Trustee Act.

<sup>7</sup> Section 8(8) of the Trustee Act.

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- (c) powers incidental to sale,<sup>9</sup> and
- (d) delegation of the execution of the trust.<sup>10</sup>

6 Furthermore, the Latin maxim *leges posteriores priores contrarias abrogant*, which means “later Acts repeal earlier inconsistent Acts”, has been relied upon in a number of cases as a basis to argue that a later statute (such as the NSW Church Act) has repealed an earlier statute (such as the Trustee Act) by implication. In this regard, in *Goodwin v Phillips*,<sup>11</sup> Griffiths CJ stated:

“... where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication. It is immaterial whether both Acts are penal Acts or both refer to civil rights. The former must be taken to be repealed by implication. Another branch of the same proposition is this, that if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act.”

7 In this case, the Trustee Act and the NSW Church Act are not wholly inconsistent. It is therefore necessary to consider, on a case-by-case basis, whether or not the provisions will become inconsistent in their application to particular cases. In addition, there appears to be a strong presumption that the legislature intends for both Acts to apply within their given sphere,<sup>12</sup> and that in order to assert implied repeal it will be necessary to demonstrate that the legislature intended to contradict itself.<sup>13</sup>

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<sup>8</sup> Section 14A of the Trustee Act.

<sup>9</sup> Section 26(5) of the Trustee Act.

<sup>10</sup> Section 64(8) of the Trustee Act.

<sup>11</sup> (1909) 7 CLR 1.

<sup>12</sup> See *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 & *Re Chance* [1936] Cd 266.

<sup>13</sup> Pearce, D.C., (1981), *Statutory Interpretation in Australia* (2<sup>nd</sup> Ed.), Butterworths, Australia, p.123.

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**THE ROMAN CATHOLIC CHURCH TRUST PROPERTY ACT 1936 (NSW)**

- 8 The NSW Church Act establishes a scheme whereby bodies corporate (such as the Trustee) are created to hold, manage, and deal with property on trust for the Archdiocese (“**Church trust property**”).<sup>14</sup> In this regard, the preamble of the NSW Church Act states:

*WHEREAS lands held on trust for or the use or benefit or for purposes of the Roman Catholic Church in New South Wales are vested in many different bodies of trustees, and owing to deaths and other causes, the necessity for the appointment of new trustees frequently arises: AND WHEREAS it is expedient that bodies corporate be created for the purpose of holding, managing and dealing with lands so held, that provision be made for the vesting in bodies corporate to be created by this Act of lands so held, that conveyancing transactions in respect of lands so held be facilitated and rendered less expensive and also that other activities which are or may be for the benefit of the Roman Catholic Church may be conducted by those bodies corporate.*

- 9 The NSW Church Act provides for the creation of a trustee of Church trust property for each diocese,<sup>15</sup> each being a body corporate with perpetual succession and a common seal, that is capable of acquiring, holding and disposing of any property, of suing and being sued in its corporate name, and doing all acts and things as bodies corporate may do at law or suffer.<sup>16</sup> It also deals with the creation of new dioceses,<sup>17</sup> the effect of dioceses changing their names,<sup>18</sup> the common seal and quorum

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<sup>14</sup> Section 2 of the NSW Church Act defines “Church trust property” as “land situated in New South Wales. For the time being subject to any trust created before or after the commencement of this Act, for the Church or for the use or benefit or for any purpose of the Church, including the land the subject of the provisions of the *Saint Patrick’s College (Manly) Act 1914*, but does not include land held on any trust, created before or after the commencement of this Act, for any Order or Community of the Church or for any association of members of the Church for the use or benefit of or for any purpose of any such Order, Community or association”.

<sup>15</sup> Section 3 of the NSW Church Act.

<sup>16</sup> Section 4(1) of the NSW Church Act.

<sup>17</sup> Section 5 of the NSW Church Act.

<sup>18</sup> Section 5A of the NSW Church Act.

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of each body corporate created by the NSW Church Act,<sup>19</sup> and the effect of vacancies in membership of any such body corporate<sup>20</sup>.

- 10 Apart from those provisions which deal with the creation of bodies corporate, it is arguable that the most important provisions in the NSW Church Act relate to the powers of those bodies corporate.<sup>21</sup> The NSW Church Act imparts considerable powers in relation to Church trust property, including the power to sell it, let it, use it to raise money on security, and declare a trust in respect of it.<sup>22</sup> Bodies corporate are also able to purchase, enter a lease, acquire by gift, devise, bequest, exchange or otherwise take on real or personal property generally.<sup>23</sup>
- 11 The NSW Church Act also empowers bodies corporate that have been established under its provisions to:
- (a) delegate, in certain circumstances, particular powers, authorities, duties and functions;<sup>24</sup>
  - (a) cause a trust to cease existing, and to be replaced by another trust;<sup>25</sup> and
  - (b) invest moneys held on trust for different purposes as one fund.<sup>26</sup>
- 12 Furthermore, the NSW Church Act provides for the vesting of Church trust property in bodies corporate;<sup>27</sup> states that any instrument bearing the

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<sup>19</sup> Section 6 of the NSW Church Act.

<sup>20</sup> Section 7 of the NSW Church Act.

<sup>21</sup> Section 9 to 9D.

<sup>22</sup> Section 9(b)(i) to 9(b)(v).

<sup>23</sup> Section 9 of the NSW Church Act.

<sup>24</sup> Section 9B of the NSW Church Act. This power will be discussed in greater detail below.

<sup>25</sup> Section 9C of the NSW Church Act.

<sup>26</sup> Section 9D of the NSW Church Act.

<sup>27</sup> Section 8 of the NSW Church Act.

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common seal of a body corporate created under the NSW Church Act shall be presumed to have been duly executed;<sup>28</sup> protects purchasers dealing with a body corporate or its delegate;<sup>29</sup> validates grants of land;<sup>30</sup> and exempts bodies corporate from stamp duty in certain circumstances.<sup>31</sup>

**THE TRUSTEE ACT 1925 (NSW)**

- 13 The Trustee Act regulates trusts in New South Wales in a general sense, and its provisions are necessarily of secondary significance to those in the NSW Church Act. However, the NSW Church Act does not explicitly exclude the provisions of the Trustee Act from operation in the case of trusts established under its provisions, and as discussed above, the effect of the provisions in the Trustee Act upon the Trustee must be addressed on a case-by-case basis.

**Historical Introduction**

*"The general aim of the [Trustee Act 1925 (NSW)] is to facilitate the administration of trust estates, and to enable them to be administered as economically as possible".<sup>32</sup>*

- 14 The roots of modern day trust law, including the Trustee Act, lie deep in medieval English legal principle. In particular, it was the equitable jurisdiction of the Court of Chancery, which was first established in the fourteenth century, that was chiefly responsible for the recognition, protection and development of trusts and their predecessor, the use.<sup>33</sup>

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<sup>28</sup> Section 10 of the NSW Church Act.

<sup>29</sup> Section 11 of the NSW Church Act.

<sup>30</sup> Section 14 of the NSW Church Act.

<sup>31</sup> Section 16 of the NSW Church Act.

<sup>32</sup> *Trustee Bill 1925 (NSW)*, Explanatory Memorandum.

<sup>33</sup> Meagher (et al.), (2002), *Meagher Gummow & Lehane's Equity Doctrines & Remedies*, Butterworths LexisNexis, p. 5.

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- 15 Prior to the Trustee Act being passed by the New South Wales Parliament in 1925,<sup>34</sup> New South Wales law in so far as it related to trusts consisted of judge made law, and three separate pieces of legislation, which were themselves the product of consolidation attempts during the period 1849 until 1862. It was against this background that the Trustee Act attempted to further consolidate and modernise New South Wales law relating to trustees and trust property, and to bring it into line with that of other Australian states and Commonwealth nations. In particular, legislative reform that had taken place in the United Kingdom, New Zealand, and other Australian states during the late 1800's and early 1900's, was perceived as being worthy of emulation, and, alongside general principles of equity which had been developed by judges over the preceding centuries, formed the framework for the approach adopted in the Trustee Act.
- 16 Since its enactment, the Trustee Act has not been amended significantly, and it remains today largely as it was in 1925, in respect of both form and content.<sup>35</sup>

**The Trustee Act**

- 17 The Trustee Act is divided into five parts: Part One is titled 'Interpretation', Part Two 'Trustees', Part Three 'Powers of the Court', Part Four 'Payment into Court', and Part Five 'Miscellaneous Provisions'. Of the five parts, it is Part Two and Part Three which are of most significance, and which will be considered in greater detail below.
- 18 At the outset, it is worth noting that for the purposes of the Trustee Act, a "trust" refers to:
- (a) implied and constructive trusts;
  - (b) cases where the trustee has a beneficial interest in trust property; and

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<sup>34</sup> The Trustee Act commenced operation on 1 March 1926.

<sup>35</sup> It is relevant to note that the most significant amendments have been occasioned to Division 2 of Part 2, and, in particular, those legislative provisions which deal with the trustee's power to invest.

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- (c) duties which are incidental to the office of legal representative of a deceased person.<sup>36</sup>

However, duties which are incidental to an estate that has been conveyed by a mortgage are excluded from this definition.<sup>37</sup>

**The Key Provisions**

*Part Two - Trustees*

- 19 Part Two of the Trustee Act contains three classes of matters, each of which is dealt with in separate Divisions, namely:

- (a) Division One – Appointment, Retirement, Disclaimer and Ceasing to be Executor<sup>38</sup>

Division One of Part Two contains provisions which deal with the appointment of new trustees;<sup>39</sup> the appointment of additional trustees;<sup>40</sup> the retirement of trustees;<sup>41</sup> disclaimer of trusteeship by renouncing or failing to apply for probate;<sup>42</sup> and ceasing to hold property as an executor where a person is both executor and trustee, or both executor and beneficiary.<sup>43</sup> The Trustee Act provides that the appointment of a new or additional trustee, and the retirement of a trustee, is to be by registered deed,<sup>44</sup> and

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<sup>36</sup> Section 5 of the Trustee Act.

<sup>37</sup> Section 5 of the Trustee Act.

<sup>38</sup> Sections 6 to 13 of the Trustee Act.

<sup>39</sup> Section 6 of the Trustee Act.

<sup>40</sup> Section 7 of the Trustee Act.

<sup>41</sup> Section 8 of the Trustee Act.

<sup>42</sup> Section 10 of the Trustee Act.

<sup>43</sup> Section 11 of the Trustee Act.

<sup>44</sup> Sections 6(1), 7(1), and 8(1) of the Trustee Act.

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furthermore, the Division makes provision for the vesting of trust property in such cases.<sup>45</sup>

(b) Division Two – Powers and Duties of Trustees<sup>46</sup>

Division Two sets out the powers and duties of trustees. Approximately half of the Division deals with the investment of trust property,<sup>47</sup> and the sale of trust property and other such transactions<sup>48</sup>. Other particularly significant provisions relate to the insurance of trust property;<sup>49</sup> money that is held on trust for infants;<sup>50</sup> the payment of money by advancement to a person who is to be entitled at a particular age;<sup>51</sup> trust property that is not vested in the trustee,<sup>52</sup> “protective trusts”;<sup>53</sup> and the protection of a trustee from liability.<sup>54</sup>

There are also a number of provisions in Division Two which relate to the administration of trusts generally. Provision is made for depositing documents with a bank for safe custody;<sup>55</sup> applications to the Supreme Court of New South Wales (“Court”) for an opinion, advice or direction on any question relating to the administration of trust property or the

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<sup>45</sup> Section 9 of the Trustee Act.

<sup>46</sup> Sections 14 to 63 of the Trustee Act.

<sup>47</sup> Sections 14 to 25 of the Trustee Act.

<sup>48</sup> Sections 26 to 39B of the Trustee Act.

<sup>49</sup> Sections 41 and 42 of the Trustee Act.

<sup>50</sup> Sections 43 and 47 of the Trustee Act.

<sup>51</sup> Section 44 of the Trustee Act.

<sup>52</sup> Section 40 of the Trustee Act.

<sup>53</sup> Section 45 of the Trustee Act.

<sup>54</sup> Sections 58, 59, 60, 61 and 62 of the Trustee Act.

<sup>55</sup> Section 50 of the Trustee Act.

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interpretation of the trust instrument;<sup>56</sup> auditing trust accounts;<sup>57</sup> valuation of trust property;<sup>58</sup> the employment of agents;<sup>59</sup> authorising two trustees to sign cheques;<sup>60</sup> realising and managing trust property which is outside of New South Wales;<sup>61</sup> realising an undivided interest which forms part of the trust estate;<sup>62</sup> and the powers of a surviving trustee<sup>63</sup>.

(c) Division Three – Delegation<sup>64</sup>

Division Three of the Trustee Act deals with the ability of a trustee to delegate the execution of the trust,<sup>65</sup> and the right of consent,<sup>66</sup> by registered deed. The nature and effect of these provisions will be considered in greater detail below.

*Part Three – Powers of the Court*

20 The powers of the Court as they relate to trustees and trusts, are contained in five divisions within Part Three of the Trustee Act:

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<sup>56</sup> Section 63 of the Trustee Act.

<sup>57</sup> Section 51 of the Trustee Act.

<sup>58</sup> Section 52 of the Trustee Act.

<sup>59</sup> Section 53 of the Trustee Act.

<sup>60</sup> Sections 54 and 54A of the Trustee Act.

<sup>61</sup> Section 55 of the Trustee Act

<sup>62</sup> Section 56 of the Trustee Act.

<sup>63</sup> Section 57 of the Trustee Act.

<sup>64</sup> Section 64 to 68 of the Trustee Act.

<sup>65</sup> Section 64 of the Trustee Act.

<sup>66</sup> Section 65 of the Trustee Act.

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(a) Division One – New Trustees and Vesting Orders<sup>67</sup>

Division One empowers the Court to appoint new trustees,<sup>68</sup> and make vesting orders with respect to trust property in a number of defined circumstances.<sup>69</sup> The Trustee Act also clearly sets out the effect of a vesting order, and empowers the Court to vest property in a trustee of a charity or society over which the Court would have jurisdiction in proceedings which have been duly instituted.<sup>70</sup>

(b) Division Two – Dealings and Improvements<sup>71</sup>

According to the Explanatory Memorandum accompanying the *Trustee Bill 1925*, Division Two is “*the specially important Division*” of Part Three.

Division Two provides that where the Court is of the opinion that any transaction in relation to trust property would be advantageous in its management or administration, the Court may confer on the trustee the necessary authority to perform that transaction. This power extends to the power to give authority to do or abstain from doing anything which would otherwise be a breach of trust, if the trustee acted or abstained from acting without the authorisation of the Court or the consent of the

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<sup>67</sup> Sections 70 to 80 of the Trustee Act.

<sup>68</sup> Section 70 of the Trustee Act.

<sup>69</sup> See sections 71, 72, 74, 75, 76, 77 of the Trustee Act.

<sup>70</sup> Section 80 of the Trustee Act.

<sup>71</sup> Sections 81 to 84 of the Trustee Act.

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beneficiaries.<sup>72</sup> The Court can also authorise the sale of property that is held on trust for a minor.<sup>73</sup>

(c) Division Three – Relief and Indemnity<sup>74</sup>

This Division empowers the Court to relieve a trustee for personal liability for breach of trust where it appears that he or she has acted honestly and reasonably, and ought fairly be excused for the breach.<sup>75</sup> In addition, where a trustee commits a breach of trust at the instigation, request, or with the written consent of a beneficiary, the Court may make an order impounding all or any part of the interest of the beneficiary in the trust by way of indemnity to the trustee.<sup>76</sup>

(d) Division Four – Miscellaneous Powers<sup>77</sup>

(e) Division Five – Applications and Orders<sup>78</sup>

**DELEGATION**

21 To delegate has been defined as meaning “to hand down, grant, assign, or relinquish certain powers, duties and authority to another to act on one’s behalf for the implementation of a specific task”.<sup>79</sup> You have indicated

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<sup>72</sup> Section 81 of the Trustee Act. Section 82 of the Trustee Act extends the power of the Court to authorise improvements and repairs to effect repairs/improvements to existing buildings, dams, fences or other erections on the land; effecting improvements on the land; erecting new buildings/dams/fences or other erections; erect a ‘give and take fence’; restock the land with sheep, cattle and horses, and replace machinery or required implements.

<sup>73</sup> Section 84 of the Trustee Act.

<sup>74</sup> Sections 85 to 86 of the Trustee Act.

<sup>75</sup> Section 85 of the Trustee Act.

<sup>76</sup> Section 86 of the Trustee Act.

<sup>77</sup> Sections 87 to 90A of the Trustee Act.

<sup>78</sup> Sections 91 to 94 of the Trustee Act.

<sup>79</sup> *Butterworths Australian Encyclopedic Legal Dictionary*, online edition. See, for example, *Jones v Thiess Bros Pty Ltd* (1977) 15 ALR 501.

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that as a matter of commercial practicality, it would be desirable for the Trustee to be able to delegate its powers to, for example, the Vicar General or the Business Manager. This section of our advice considers the circumstances in which delegation is possible, and the steps that would need to be taken to ensure that any purported delegation is lawful.

**Delegation under the NSW Church Act**

- 22 Amongst other things, the NSW Church Act invests in the Trustee “*the capability of doing and suffering all such acts and things as bodies corporate may by law do or suffer*”.<sup>80</sup> In this regard, the NSW Church Act sets out a number of powers which fall within the scope of the powers of a body corporate.<sup>81</sup>
- 23 The NSW Church Act provides that the Trustee can, by resolution, delegate to the Bishop who is a member of the body corporate “*all or any of its powers authorities, duties and functions, other than a power conferred on it by this section or section 9C*”,<sup>82</sup> and defines “Bishop” as the person administering the Archdiocese, whether as Archbishop or Bishop, Coadjutor Archbishop or Coadjutor Bishop, Vicar Capitular or Administrator.<sup>83</sup>
- 24 The NSW Church Act prevents the Trustee from delegating the power to:
- (a) delegate; or
  - (b) cause a trust to cease existing, and to be replaced by another trust.<sup>84</sup>

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<sup>80</sup> Section 4(1) of the NSW Church Act.

<sup>81</sup> Section 4(1) of the NSW Church Act provides that “*The trustees of Church property for each Diocese shall, by virtue of this Act, be a body corporate*”.

<sup>82</sup> Section 9B(1) of the NSW Church Act. Section 2 of the NSW Church Act provides that a “Bishop” is the person for the time being administering a diocese, whether as Archbishop or Bishop, Coadjutor Archbishop or Coadjutor Bishop, Vicar Capitular or Administrator. We note that the Vic Church Act does not enable the RCTC to delegate its powers.

<sup>83</sup> Section 2 of the NSW Church Act.

<sup>84</sup> Section 9C of the NSW Church Act.

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- 25      Furthermore:
- (a)      any delegation under the NSW Church Act may be made either generally or for a particular case or class of cases;<sup>85</sup>
  - (b)      unless delegation under the NSW Church Act is expressed to be otherwise limited, it shall be deemed to be in favour of the person for the time being administering the diocese for which the body corporate was created, whether he is doing so as Archbishop or Bishop, Coadjutor Archbishop or Coadjutor Bishop, Vicar Capitular or Administrator;<sup>86</sup>
  - (c)      notwithstanding any delegation, the Trustee may continue to exercise and discharge the powers, authorities, duties and functions which are the subject of the delegation;<sup>87</sup>
  - (d)      a person acting within the scope of any such delegation will be deemed to be the body corporate by which such delegation was made,<sup>88</sup> and
  - (e)      any delegation made under the NSW Church Act may be revoked by resolution of the relevant a body corporate.<sup>89</sup>
- 26      Clearly therefore, the Trustee is able to delegate its powers, authorities, duties and functions in the circumstances, and by the method described above. If the Trustee was to require a broader power to delegate (such as to the power to delegate to the Vicar General or Business Manager), steps would need to be taken to amend the NSW Church Act in this regard.

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<sup>85</sup> Section 9B(2) of the NSW Church Act.

<sup>86</sup> Section 9B(2) of the NSW Church Act.

<sup>87</sup> Section 9B(3) of the NSW Church Act.

<sup>88</sup> Section 9B(4) of the NSW Church Act.

<sup>89</sup> Section 9B(5) of the NSW Church Act.

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**Delegation Under the Trustee Act**

27 The provisions within the Trustee Act which relate to delegation apply only if, and in so far as, a contrary intention is not expressed in the NSW Church Act.<sup>90</sup> Furthermore, such provisions only have effect subject to the terms of NSW Church Act, and the provisions contained therein.<sup>91</sup> Accordingly, it is necessary to consider the provisions of the NSW Church Act to determine whether, and if so, the circumstances in which, the Trustee can delegate its powers.

28 On our reading of the NSW Church Act, there is no intention to exclude the provisions of the Trustee Act in so far as they relate to delegation, or the Trustee's powers generally. In addition, it is arguable that the mechanism of delegation which is set out in the NSW Church Act can coexist with the provisions in the Trustee Act, and therefore that the methods of delegation within both acts are open for the Trustee to adopt. In this regard, it is significant to note that the Trustee Act is not explicitly mentioned by the NSW Church Act, and that the provisions within the NSW Church Act which set out the powers of the Trustee are particularly broad and do not purport to be exclusive. We note that section 9 of the NSW Church Act provides that:

*A body corporate created by the this Act has all the powers of a natural person, including (without limiting the scope of those powers) the power...*  
(our emphasis)

29 However, there is a contrary argument that because Parliament has seen fit to enact the NSW Church Act, and make provision in that Act for the circumstances in which the Trustee can delegate its powers, the operation of section 64 of the Trustee Act has no part to play.

30 In the context of the Trustee Act, the ability of a trustee to divest its authority is dealt with by Division 3 of Part 2 of the Trustee Act. The Trustee Act provides that it is possible to delegate two powers: the first being "the execution of the trust",<sup>92</sup> and the second, the power to consent

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<sup>90</sup> Section 64(8) of the Trustee Act.

<sup>91</sup> Section 64(8) of the Trustee Act. It is relevant to also note that section 64(8) also provides that nothing in that subsection is able to affect the jurisdiction or powers of any Court.

<sup>92</sup> Section 64 of the Trustee Act.

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to the exercise of a trust or power, where that consent is required by an instrument.<sup>93</sup> Each circumstance will be addressed in turn.

*Delegation of the Execution of a Trust*

31 The Trustee Act permits the delegation of the execution of a trust where that delegation accords with:

- (a) section 64 of the Trustee Act; or
- (b) the terms of instrument creating the trust.

32 Before addressing the requirements which flow from each of these approaches to delegation, it is necessary to consider what falls within the scope of the term the "execution of the trust". There have been no cases which have directly considered section 64 of the Trustee Act, nor the phrase the "execution of the trust". However, the meaning of "in the execution of" has been considered elsewhere, and the approach adopted in relation to this phrase is arguably analogous to the current context.

33 In *Rogers v Jordan*,<sup>94</sup> members of the High Court considered the meaning of a legislative provision which empowered a person to do those things as are "in the execution of [an Act]". In this regard, Barwick CJ stated that the provision is:

*"an ancillary provision to enable the Act to be effective and its purposes to be achieved".<sup>95</sup>*

Similarly, Taylor J suggested that for something to be in the execution of the Act, it must be

*"exercised in good faith for a purpose associated with the due administration of the Act".<sup>96</sup>*

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<sup>93</sup> Section 65 of the Trustee Act.

<sup>94</sup> (1965) 112 CLR 580.

<sup>95</sup> at p. 568.

<sup>96</sup> at p. 590.

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- 34 Following the approach adopted by Barwick CJ and Taylor J, it is arguable that something will be viewed as being in “the execution of the trust” where that thing is necessary for the trust to be operative, in so far as it is compatible with the Trustee Act and the NSW Church Act.
- 35 Delegation of the execution of a trust can only be achieved in extremely limited circumstances.<sup>97</sup> In this regard, section 64 of the Trustee Act provides that the “execution of the trust” can be delegated in respect of the whole, or any part of a trust,<sup>98</sup> so long as the following conditions are met:
- (a) the trustee is absent from New South Wales, or is about to depart from New South Wales;
  - (b) the delegation takes place by registered deed;
  - (c) the trustee’s co-trustees or co-trustee, and any such other person (if any) that is empowered to appoint trustees, consent by registered deed;
  - (d) the delegation is to:
    - (i) the public trustee;
    - (ii) a trustee company; or
    - (iii) a person residing in New South Wales who is a co-trustee or is capable of being appointed a trustee of the trust; and
  - (e) there will be remaining in New South Wales to perform the trust:
    - (i) the public trustee;
    - (ii) a trustee company; or

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<sup>97</sup> Section 64 of the Trustee Act.

<sup>98</sup> Sections 64(1), 64(2) and 64(3) of the Trustee Act.

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(iii) two persons whether as trustee or as delegate.

36 Clearly therefore, the circumstances in which it would be possible for a trustee to delegate its powers of execution under the Trustee Act are extremely limited, and would necessarily require, at the very least, that the trustee is absent from New South Wales, or be about to depart therefrom. As the Trustee is a body incorporated in New South Wales, the Trustee cannot be absent from New South Wales, and therefore as a matter of commercial practicality, this mechanism of delegation is not of any assistance.<sup>99</sup>

*Delegation of Consent to Exercise of Trust or Power*

37 In circumstances where an instrument requires that a person give a consent to the exercise of a trust or power, and that person is absent from New South Wales or is about to depart therefrom, the Trustee Act provides that that person may delegate that right to consent to the public trustee, or a trustee company.<sup>100</sup> If the delegate improperly exercises his or her consent, the delegate and the delegator will be jointly and severably liable.<sup>101</sup>

38 As in the case of the delegation of the execution of a trust, provisions in the Trustee Act which relate to the delegation of a consent to the exercise of a trust or power apply only in so far as the NSW Church Act does not express a contrary intention. However, like the delegation of the

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<sup>99</sup> We note also, that section 64 provides that any such delegation can only operate for two years from the date of the deed conferring the delegation, and can be made only once, unless the trustee has returned to New South Wales and is again absent or is about to depart again; in the event of a delegate dying or a delegation being revoked, the Trustee Act permits another delegation to be made for the balance of the period of two years; in circumstances where a delegation is made under the authority of section 64 by a trustee who is the legal representative of a deceased person, unless the contrary intention is expressed in the deed of delegation, the deed will delegate not only the duties which are incidental to the office of legal representative of the deceased person, but also the execution of the trusts associated with the administration of the estate of the deceased; a trustee that delegates his or her trust remains answerable for all acts and omissions of the delegate within the scope of the delegation as if they were the acts and omissions of the trustee; and a delegate will be subject to the jurisdiction and powers of the Court in the same manner as if he or she were the trustee.

<sup>100</sup> Section 65(1) of the Trustee Act.

<sup>101</sup> Section 65(3) of the Trustee Act.

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execution of the trust, the relevance of this provision to the Trustee is minimal because of the requirement that the Trustee is absent from New South Wales or is about to depart.<sup>102</sup>

**Delegation and the *Acts Interpretation Act 1901* (Cth)**

39 The effect of the provisions of both the Trustee Act and the NSW Church Act must be read against the backdrop of the *Acts Interpretation Act 1901* (Cth) (“AI Act”). In this regard, the AI Act sets out how to interpret an Act’s conferral of a power to delegate, the effect of any such conferral, and the effect of the exercise of a power or function which is dependant upon the opinion, belief, or state of mind of that person.

40 In particular, the AI Act relevantly provides that:

- (a) unless a contrary intention appears, the power of delegation shall not be construed as being limited to delegating the function or power to a specified person but shall be construed as including a power to delegate the function or power to any person from time to time holding, occupying, or performing the duties of, a specified office or position, even if the office or position does not come into existence until after the delegation is given;<sup>103</sup>
- (b) the powers that may be delegated do not include that power to delegate;<sup>104</sup>

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<sup>102</sup> It is also relevant to note that that Trustee Act provides that: any person who deals in good faith with a delegate under any deed of delegation authorised by the Trustee Act shall not, by reason only that by the delegation or any evidence or document in connection therewith it appears that the delegate is acting in the execution of the trust, be affected for any purpose with notice of the trust (section 66); every delegation under the Trustee Act is deemed to be a power of attorney within the meaning of Part 16 of the *Conveyancing Act 1919* (NSW) (section 67); and any instrument by which a trust or the right to consent to the exercise of a trust or power may be registered in the office of the New South Wales Registrar General (section 68).

<sup>103</sup> Section 34AA of the AI Act.

<sup>104</sup> section 34AB(b) of the AI Act.

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- (c) a function or power so delegated, when performed or exercised by the delegate, shall, for the purposes of the AI Act, be deemed to have been performed or exercised by the delegator;<sup>105</sup>
- (d) a delegation by the delegator does not prevent the performance or exercise of a function or power by the delegator;<sup>106</sup> and
- (e) the delegation may be made either generally or as otherwise provided by the instrument of delegation.<sup>107</sup>

**IDENTIFICATION OF DEFENDANTS**

- 41 In your instructions of 2 December 2002, you asked us to consider the prudence of identifying the Trustee as the defendant in any legal proceedings that are commenced against the Archdiocese. In this respect, you also asked for our advice in relation to any alternative approaches that may be available to the Archdiocese.
- 42 Our response to these issues has been developed in light of Corrs Chambers Westgarth's past experiences with the RCTC, which is established by the Vic Church Act, and whose legal position is directly analogous to that of the Trustee.
- 43 You suggest that in recent years, a practice has developed among the plaintiff firms in Melbourne to name the RCTC as defendants in an attempt to sue the Archdiocese of Melbourne. Generally speaking, the RCTC is named as the defendant on the basis that it is the registered proprietor of land upon which a tort, criminal act or assault allegedly took place and therefore, the plaintiffs argue that in these cases an occupiers liability arises. The practice in Melbourne is to defend these claims on the basis that occupiers liability does not extend to these situations.
- 44 There are clear parallels between the situation in Victoria and in New South Wales. The NSW Church Act and the Vic Church Act are directly

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<sup>105</sup> section 34AB(c) of the AI Act.

<sup>106</sup> section 34AB(d) of the AI Act.

<sup>107</sup> section 34AB(a) of the AI Act.

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comparable, both establishing a scheme whereby the RCTC and the Trustee are the registered proprietors of a significant portfolio of properties. Based on our experience in Victoria, we believe that it is likely that plaintiff firms in New South Wales will, with increasing frequency, seek to name the Trustee as the defendant in litigation. Undoubtedly, this approach is motivated principally by a perception that the Trustee would be able to satisfy any judgment against it.

45 However, we would counsel against the Archdiocese adopting the practice of naming or volunteering the Trustee as the appropriate defendant in relation to sexual and physical abuse cases for two reasons, namely:

(a) This would deprive the Archdiocese of the use of various “technical defences” in relation to such claims. In this regard, it is likely that a plaintiff will allege that the Trustee is liable for acts of, for instance, a teacher or a priest, on the basis that the Trustee operated a school or an orphanage, or employed priests or nuns. However, our experience in Victoria is that any such claims can be defeated by a summary judgment application, and by arguing that the Trustee is not an “operating entity” as such, but simply holds property on trust, as well as arguing that clergy are not employees.

We note however, that the powers of the Trustee, as set out in the NSW Trust Act are significantly broader than those of the RCTC as are contained in the Vic Trust Act.<sup>108</sup> Accordingly, depending upon the specific powers which are exercised by the Trustee, it may be more difficult to argue in NSW than Victoria that the Trustee is not an “operating entity”.

(b) We also believe that it would be in the Archdiocese’s best interests to adopt an approach which is consistent with that which is adopted in other jurisdictions. The rationale for this belief is threefold:

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<sup>108</sup> Compare section 4(1) and 9 of the NSW Trust Act with sections 3, 6 and 15 of the Vic Trust Act.

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- (i) in our view, the approach that has been adopted by the Archdiocese of Melbourne has been successful, and while there are some differences between Victoria and New South Wales, we do not see any reason why it would not also be successful in New South Wales;
- (ii) by adopting an approach which is consistent with that in Melbourne, the Trustee and the Archdiocese will be able to draw upon the Melbourne experiences. The experience of our Melbourne Office is available to the Archdiocese in addressing all of these issues; and
- (iii) consistency will make it more difficult for plaintiff firms to play one Archdiocese off against another.

46 Accordingly, we believe that the most appropriate approach for the Archdiocese to adopt is to simply let the potential plaintiffs work out for themselves who they think they should sue, let them plead their claims, and then take such steps as may be available to strike out or summarily dismiss any such claim.

*Criminal Liability of the Archdiocese*

47 In light of three recent High Court cases: *Lepore v State of New South Wales*, *Samin v State of Queensland*, and *Rich v State of Queensland*,<sup>109</sup> (“*Lepore*”) it is also worth briefly considering whether the Archdiocese could be found liable for the criminal acts of clergy or its employees. As this issue is outside the scope of your instructions, we have not considered it comprehensively. However, if you would like us to advise you on this matter further, please do not hesitate to contact us.

48 In *Lepore*, the High Court concluded in that in the absence of fault, a school authority would not be held liable for the intentional criminal conduct of an employee. While stating that State education departments owe a general duty to take reasonable care for the safety of students, sexual abuse was considered to fall outside of the scope or course of employment. Accordingly, the Court characterised these actions as misconduct in breach of contractual duties and concluded that that

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<sup>109</sup> (2003) 195 ALR 412. These three matters were decided together.

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intentional and criminal acts by teachers precluded the imposition of liability on school authorities.

- 49 The ramifications of the approach adopted in Lepore for the Archdiocese are significant. It is arguable on this basis that, unless it can be demonstrated that clergy or an employee of the Archdiocese were acting in the course of employment (for example, by administering discipline), or that the Archbishop had the means of foreseeing the potential for criminal conduct to occur but failed to take steps to avoid this risk, the Archdiocese will generally be able to avoid liability.

**NECESSARY AMENDMENTS**

- 50 In light of the foregoing, the only amendments to the NSW Church Act which may be considered to be necessary or opportune would be to extend the Trustee's power to delegate to the Vicar General or the Business Manager. Clearly, whether or not such amendment is necessary will depend upon whether the Archdiocese is happy for the person administering the Archdiocese, (whether as Archbishop or Bishop, Coadjutor Archbishop or Coadjutor Bishop, Vicar Capitular or Administrator), to take responsibility for the day-to-day management of matters such as the execution of a lease for a car parking space.
- 51 Consideration should also be given to the potential political implications of seeking amendments to the New South Wales Church Act. An attempt to open up this issue could lead to unwelcomed scrutiny of questions of liability, such as the Corporation Sole arguments. The New South Wales Church Act gives the Archdiocese special recognition and it might be unwise to prompt any reconsideration of the current position.
- 52 If you have any questions in relation to this advice, or would like to discuss the issues we have raised, please do not hesitate to contact me on (02) 9210 6232.

Kind regards

**Paul McCann**  
Partner