

## **Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of the Macedonian Orthodox Community Church of Australia and New Zealand & Anor (2008) 237 CLR 66**

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### **Relevant Legislation**

*Trustee Act 1925* (NSW)

- (1) A trustee may apply to the Court for an opinion advice or direction on any question respecting the management or administration of the trust property, or respecting the interpretation of the trust instrument.
- (2) If the trustee acts in accordance with the opinion advice or direction, the trustee shall be deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in the subject matter of the application, provided that the trustee has not been guilty of any fraud or wilful concealment or misrepresentation in obtaining the opinion advice or direction.
- (3) Rules of court may provide for the use, on an application under this section, of a written statement signed by the trustee or the trustee's Australian legal practitioner, or for the use of other material, instead of evidence.
- (4) Unless the rules of court otherwise provide, or the Court otherwise directs, it shall not be necessary to serve notice of the application on any person, or to adduce evidence by affidavit or otherwise in support of the application.
- (8) Where the question is who are the beneficiaries or what are their rights as between themselves, the trustee before conveying or distributing any property in accordance with the opinion advice or direction shall, unless the Court otherwise directs, give notice to any person whose rights as beneficiary may be prejudiced by the conveyance or distribution.
- (9) The notice shall state shortly the opinion advice or direction, and the intention of the trustee to convey or distribute in accordance therewith.
- (10) Any person who claims that the person's rights as beneficiary will be prejudiced by the conveyance or distribution may within such time as may be prescribed by rules of court, or as may be fixed by the Court, apply to the Court for such order or directions as the circumstances may require, and during such

time and while the application is pending, the trustee shall abstain from making the conveyance or distribution.

(11) Subject to subsection (10), and subject to any appeal, any person on whom notice of any application under this section is served, or to whom notice is given in accordance with subsection (8), shall be bound by any opinion advice direction or order given or made under this section as if the opinion advice direction or order had been given or made in proceedings to which the person was a party.

## Quotes

*"... s 63 operates as "an exception to the Court's ordinary function of deciding disputes between competing litigants"; it affords a facility for giving "private advice". It is private advice because its function is to give personal protection to the trustee. Section 63(2) precludes any trustee, who acts in accordance with the private advice, from being held liable for breach of trust in the event that in conventional proceedings it is later held that the legal position does not correspond with the advice given, so long as the proviso to s 63(2) is satisfied. The possibility that the rights of beneficiaries under private trusts could be affected by judicial advice led the New South Wales Parliament in 1925 to introduce the protections given by s 63(8)-(11) and in that sense to strike a compromise. However, those protections did not alter the primary function of s 63 as creating a procedure for private advice to trustees. Even if notice of the application for private advice is given to other persons (by reason of rules of court, or a court direction under s 63(4), or by reason of s 63(8)), those persons are not strictly speaking "parties" to "proceedings" by reason of the closing words of s 63(11), although they are able to participate in the proceedings to some extent. Section 63 reflects a compromise between a procedure for affording private advice to trustees and the need for affected persons to be given a hearing in some cases."*

## Full Text

The full text is available here: <http://eresources.hcourt.gov.au/showCase/2008/HCA/42>

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