



Equity Division Supreme Court New South Wales

Case Name: **In the matter of Aboriginal Community Benefit Fund Pty Ltd**

Medium Neutral Citation: [2025] NSWSC 1394

Hearing Date(s): 3 September and 20 November 2025

Date of Orders: 20 November 2025

Date of Decision: 26 November 2025

Jurisdiction: Equity – Corporations List

Before: Black J

Decision: Orders made appointing Applicant as trustee of the Aboriginal Community Benefit Fund and associated orders made concerning advice as to the Applicant's proposed distribution of the Fund's assets to members.

Catchwords: EQUITY — trusts and trustees — court's supervision of — appointment and removal of trustees — where applicant seeks appointment as trustee to effect distribution of trust assets — where applicant seeks direction pursuant to s 63 *Trustee Act* 1925 (NSW) that he would be justified in not indemnifying the company from trust assets in respect of misleading and deceptive conduct — where applicant seeks order under s 81 of the *Trustee Act* 1925 (NSW) permitting distribution of trust assets to members under certain conditions — applicant appointed as trustee — associated direction and orders made

Legislation Cited: - *Trustee Act* 1925 (NSW) ss 63, 70, 71, 81

Cases Cited: - *Arakella Pty Ltd v Paton* (2004) 60 NSWLR 334; [2004] NSWSC 13
- *Equititrust Ltd (in liq) (rec apptd) (recs and mgrs apptd) v Equititrust Ltd (in liq) (rec apptd) (recs and mgrs apptd) (No 4)* [2017] FCA 1133
- *Hancock v Rinehart* (2015) 106 ACSR 207; [2015] NSWSC 646

- *Ku-ring-gai Municipal Council v Attorney-General* (1954) 55 SR (NSW) 65
- *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66; [2008] HCA 42
- *Re Estate Late Chow Cho-Poon; Application for Judicial Advice* [2013] NSWSC 844
- *Re Absolute Vision Technologies Pty Ltd (subject to deed of company administration)* [2024] NSWSC 1010
- *Re Dion Investments Pty Ltd* (2014) 87 NSWLR 753; [2014] NSWCA 367
- *Re Go Energy Group Ltd* [2019] NSWSC 558
- *Re The Project Volar Creditors' Trust established in the administration of Virgin Australia Holdings Ltd & Ors* (2021) 152 ACSR 540; [2021] NSWSC 425
- *Riddle v Riddle* (1952) 85 CLR 202

Texts Cited:

Category: Principal judgment

Parties: David Stimpson as liquidator of The Aboriginal Community Benefit Fund Pty Ltd and receiver of the property of the Aboriginal Community Benefit Fund (Plaintiff/Applicant)
Australian Securities and Investments Commission (Amicus Curiae)

Representation: Counsel:
RD Marshall SC (Plaintiff/Applicant)
SJ Maiden KC / B Chen (Amicus Curiae)

Solicitors:
Cornwalls (Plaintiff/Applicant)
Ashurst (Amicus Curiae)

File Number(s): 2022/81633

Publication Restriction:

JUDGMENT

- 1 By Amended Notice of Motion filed on 14 November 2025, Mr David Stimpson as liquidator of Aboriginal Community Benefit Fund Pty Ltd ("ACBF") and as receiver of the property of the Aboriginal Community Benefit Fund ("Trust")

seeks orders, broadly, that he be appointed as trustee of the Trust and that he would be justified in taking certain decisions and to assist with a distribution of the Trust's assets to its members. The Australian Securities and Investments Commission ("ASIC") appeared as Amicus Curiae in the application and made detailed submissions. With the benefit of those submissions, the nature of the relief sought by Mr Stimpson was further amended, in draft orders put before the Court at the hearing, which I made, following the hearing, with relatively minor amendments noted below.

Affidavit evidence

- 2 Mr Stimpson reads his affidavit dated 21 March 2022 which refers to his appointment as liquidator of ACBF on 11 March 2022, by resolution of its directors and by special resolution of its shareholders. Mr Stimpson there noted that ACBF had operated a business providing funeral benefits and the evidence indicates that it provided its products to members of indigenous communities. Mr Stimpson notes that the Trust was established on 9 May 1994 and he refers to the terms of the Trust Deed, which is exhibited to his affidavit. He also outlines the investigations he has undertaken in respect of ACBF's affairs and addresses its assets and financial position.
- 3 By a second affidavit dated 8 May 2025, Mr Stimpson again addressed the circumstances of his appointment to ACBF and other companies within the Youpla Group. He again addressed the position as to the Trust and noted that his investigations had indicated that ACBF only acted as trustee of the Trust and did not trade in its own right or in any other capacity. He expresses the view, and there is no reason to doubt, that all of ACBF's assets were held as trustee of the Trust and all its liabilities were incurred in that capacity. He also referred to issues which had arisen in respect of the conduct of ACBF's business by ACBF, which had been the subject of earlier court proceedings and of adverse comments in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry ("Royal Commission"). Mr Stimpson noted that the Trust had assets in excess of \$11.6 million which he sought to distribute to persons properly entitled to them.

- 4 Mr Stimpson also referred to the steps he and his staff had taken to secure ACBF's books and records and prepare a cohesive and searchable record of member data, which it appears will be sufficient to support a distribution to members on the basis that will be authorised by this application. Mr Stimpson also there set out a history of ACBF's dealings, through the Trust and a relevant fund, with its members. He noted that those members were primarily indigenous persons and many of them lived in remote or rural areas and typically received Commonwealth Government assistance, including payments from Centrelink, from which amounts payable to ACBF could be deducted until August 2015. Mr Stimpson also referred to his conclusion, by reference to ACBF's records, and consistent with the history of Court proceedings against it, that ACBF and its related entities within the Youpla Group had engaged in deceptive and misleading conduct, including in respect of whether it was connected with Government or an Aboriginal and Torres Strait Islander organisation and in respect of the amounts that would be paid by members to obtain relevant benefits.
- 5 Mr Simpson also referred to provisions in the Trust Deed dealing with the payment of surplus, on a vesting of the Trust. ASIC has made clear that it will contend that, if a surplus emerges after distributions made to members of the Trust made in accordance with this judgment, any surplus should be distributed to members of the Trust, whose payments have brought it about, rather than to any residual beneficiary under the Trust Deed. Mr Stimpson also there addresses matters relating to his remuneration, which he did not seek to have determined at this hearing.
- 6 By a third affidavit dated 24 October 2025, Mr Stimpson again referred to an amount, then approximately \$11.7 million, that was available for distribution, and exhibited a memorandum recording his decision as to the manner in which those funds should be distributed and the basis on which that would occur. He there recorded his view that ACBF, as trustee of the Trust, had acted in breach of its obligations as trustee and had used its position to exploit the vulnerability of members of the Aboriginal and Torres Strait Islander community in encouraging them to complete application forms to become members of the

Trust; had misled members and the public generally by implying that it was an Aboriginal and Torres Strait Islander community-owned organisation; and had misled members as to the form of the relevant products. He notes that ACBF was automatically removed as trustee of the Trust, by operation of cl 18.1 of the Trust Deed, upon his appointment of liquidator of ACBF and presently held relevant funds on bare trust. He indicates that, if he is appointed as trustee of the Trust as he proposes, he does not propose to indemnify ACBF for any liability arising from the conduct to which he referred and that he would distribute the Trust funds, after payment of the costs and expenses of the receivership, to members who were validly members of the Trust. There was a question, at that point, as to whether such a distribution should be limited to members who were "financial members" of the Trust at the date of Mr Stimpson's appointment, and not in default as to payment of contributions. Mr Stimpson and ASIC have now reached common ground, which I will accept below, that the relevant distribution should be made to all members of the Trust, on a pari passu basis by reference to their entitlements and subject to a minimum distribution threshold, and not only to financial members of the Trust at the date of Mr Stimpson's appointment. Mr Stimpson also there addressed the manner in which any surplus after the distribution would be treated; however, his evidence as to that matter is now of lesser relevance because it is less likely (although not impossible) that there will be a surplus after that distribution, when all members of the Trust will participate in that distribution, subject to the minimum contribution threshold and because no distribution of a surplus may take place without leave of the Court under the orders that I make below.

- 7 Mr Stimpson also there exhibited the Trust Deed for the Trust and I have had regard to its terms in reaching the conclusions to which I refer below. Relevantly, cl 5.1 provides that:

"Each Member shall pay to the Trustee such amount by way of periodical contributions to the Fund as is calculated by reference to the Membership Application Form signed by the Member and in the manner therein set out."

- 8 The terms of the Membership Application Forms have changed from time to time, and examples of those forms are in evidence. I will address a construction question arising in respect of those forms and Mr Stimpson's proposed approach to it below. I address cl 7 of the Trust Deed, which allows members to terminate their membership of the Trust and receive a partial refund of contributions below. The exhibit to Mr Stimpson's affidavit dated 24 October 2025 also includes several Membership Application forms, in somewhat different terms over time, which each provide a description of contributor's entitlement to a partial repayment of contributions on termination of their membership. I will address an ambiguity in those forms below.
- 9 Clause 9 of the Trust Deed deals with the circumstances in which a member of the Trust who did not make payments would be treated as a "non-financial member", although he or she, after receiving a letter from the trustee advising of the amount of arrears of contributions, could elect to recommence regular payments so as to resume his or her financial membership. Nothing turns on that matter where, as I have noted above, the trustee's obligation to (partly) repay contributions on a termination of membership is not limited to financial members of the Trust. I refer below to cl 14 of the Trust Deed which deals with the trustee's right of indemnity. Clause 17 in turn seeks to limit liability of the trustee, but it is not necessary to determine the scope of that exclusion for present purposes. I refer to cl 18.3 of the Trust Deed which allows members to appoint a substitute trustee and cl 19 which provides for variations of the Trust Deed below. Clause 26.1 of the Trust Deed provides for termination of the trust on the Vesting Day, as defined, cl 26.2.3 provides for a distribution to, inter alia, financial members of such a termination on a specified basis and cl 26.2.4 provides for the distribution of any remaining surplus in the Trust to a nominated charity. The operation of those clauses will be modified here by the orders that I make below.
- 10 This affidavit also exhibits a case study of ACBF undertaken by the Royal Commission to which I was taken in the course of submissions. The Royal Commission's report referred, inter alia, to issues as to the marketing of ACBF's products and as to aspects of its premium structure which were plainly adverse

to members and expresses the view that ACBF's conduct likely involved misleading and deceptive conduct, including as to failure of disclosure of the costs of the relevant products. The Royal Commission's report is not, of course, evidence of the fact in these proceedings. However, Mr Stimpson may properly take that report into account, concluding, as he has, that ACBF's conduct in respect of these matters was wilful or negligent, such that he should not indemnify it for any liabilities incurred in that regard when he is appointed as trustee of the Trust.

- 11 By a further affidavit dated 10 November 2025, Mr Stimpson points to his willingness to be appointed as trustee of the Trust, and points to the practical difficulties which would be involved in convening a meeting of members in that regard. By his affidavit dated 18 November 2025, Mr Stimpson addressed an alternative mechanism of distribution of funds held in the Trust. As I have noted above, common ground has now developed between Mr Stimpson and ASIC as to the approach to be adopted. By his affidavit dated 11 November 2025, Mr Van der Velde, who is a registered liquidator, gives evidence to establish that Mr Stimpson is a fit and proper person to act as trustee of the trust.
- 12 By her affidavit dated 20 November 2025, Ms Patel, who is a senior manager in Mr Stimpson's office, addressed the process which would be adopted to make a distribution to members of the Trust in the manner that is now proposed. She noted that some 5,800 people would qualify for a payment under those criteria that:
 - “(a) Only members, financial or non-financial, that qualify under the provisions of their respective application form for repayment on termination by having paid the minimum number of contributions;
 - (b) Paying people that have not already received a termination payment from [ACBF], or being paid a benefit on death under clause 8 of the Trust Deed;
 - (c) Paying people that have contributed at least \$1,000.”
- 13 She notes that, of those 5,800 members, 1,678 were current financial members as at the date of liquidation and would not require further inquiry. It would be necessary to check about 4,100 members' records to determine whether those

persons had already terminated their membership and been repaid, rather than their memberships having been cancelled by reason of a failure to pay for contributions, and she estimated the time and cost that would be involved in that process. She noted that, if the minimum contribution amount was lowered to \$500, then 11,500 members may be eligible for payment, and about 9,800 additional members' records would be required to be checked. I return to this matter below.

- 14 Mr Stimpson also tendered a statement of facts and supplementary statement of facts (Ex P3 and P4) to which I have regard in providing the advice that is sought below. The statement of facts addresses the nature of ACBF's business; its members; determinations made by the Australian Financial Complaints Authority ("AFCA") in respect of a number of members; the misleading and deceptive conduct which the liquidator has identified on ACBF's part; and the decision then made by Mr Stimpson as to how a distribution should proceed, which has been varied at this hearing. The supplementary statement of facts addressed the terms of the Trust Deed. Mr Stimpson also tendered (Ex P5) and I have regard to, a very detailed opinion of Mr Bruckner which addressed the issues arising on the application and a number of complexities that arose, not all of which have been addressed by the developments that have occurred at the hearing. Mr Bruckner's helpful opinion provides support for the approach which Mr Stimpson now proposes to adopt.
- 15 Mr Stimpson also tendered a letter dated 19 November 2025 (Ex P6) from the solicitors acting for the Financial Rights Legal Centre, which operates the "Mob Strong Debt Help" service ("Mob Strong"), and represents a member and creditor of the Trust generally and on the ACBF's committee of inspection. Mob Strong requested that that letter be put before the Court by way of submission, as Mr Stimpson properly did. Mob Strong there expressed the view that a separate application should be made to the Court to obtain directions in respect of the distribution of any surplus from the Trust, if a surplus became available. In the event, that position is now common ground between the liquidator and ASIC and is reflected in the orders which I make below.

The parties' submissions and orders

16 By submissions dated 11 and 19 November 2025, Mr Marshall, who appears for Mr Stimpson, addressed a range of issues arising at the hearing. Several matters addressed by those written submissions have now developed further by Mr Stimpson's response to ASIC's submissions and developments at the hearing. By his submissions dated 19 November 2025, Mr Marshall addressed the scope of the Court's powers under ss 70 and 81 of the *Trustee Act* 1925 (NSW) ("*Trustee Act*"), to which I refer below, and set out reasons why the Court should exercise the power under s 81 of the *Trustee Act* as proposed by the liquidator.

17 Mr Maiden, with Ms Chen appeared for ASIC, referred to ASIC's submissions dated 18 August 2025, which provide helpful background, but have been largely superseded by a change in Mr Stimpson's approach so as to make distribution to members of the Trust as noted above rather than to creditors, although there would have been a significant overlap between the two categories in any case. Importantly, ASIC there referred to the scope of relevant provisions in the Trust Deed, although it further developed its analysis of those provisions in its further submissions noted below. ASIC there advanced the position that it would contend that:

"The Trust Fund appears to have been entirely created by the contributions made largely (albeit not exclusively) by or on behalf of Members, with the expectation that their next of kin would eventually receive funeral benefit payments. That venture having failed, any surplus should be returned to those members."

The orders that will be made, which prevent a distribution of surplus without further leave of the Court, will preserve ASIC's ability to advance that position at a further hearing if a surplus arises.

18 By further submissions dated 18 November 2025, Mr Maiden rightly identified the adverse effect which the appointment of 7 March 2022 as the "Vesting Day" under the Trust Deed (as distinct from a vesting order under s 71 of the *Trustee Act*) would have upon non-financial members of the Trust, if it had the

consequence that they were excluded from a distribution. As events have developed, Mr Stimpson does not now propose to take an approach which would have that consequence. Mr Maiden also there addressed the scope of s 81 of the *Trustee Act* and relevant authorities.

Determination and orders sought

- 19 As I noted above, Mr Stimpson's position is now reflected in the orders which the liquidator sought at the hearing.
- 20 First, Mr Stimpson seeks an order that he be appointed as trustee of the Trust pursuant to s 70 of the *Trustee Act*. That section relevantly permits the Court to make an order for the appointment of a new trustee, including where there is no existing trustee, whenever it is expedient to appoint a new trustee, and it is inexpedient, difficult or impracticable to do so without the Court's assistance. Mr Stimpson recognises that cl 18.3 of the Trust Deed provides for the appointment of a substitute trustee, including where ACBF is removed as trustee by its liquidation, by simple majority at a meeting of unitholders. However, Mr Stimpson submits, and I accept, that it is plainly not practicable to conduct a meeting of unitholders here, given their location in remote communities, and that provides sufficient basis for the Court to exercise its powers in that respect. Clause 19 in turn provides for variation of the Trust Deed, by consent in writing of at least 75% of members but that is also not practicable here given the same issues.
- 21 I am satisfied that such an order should be made here, where the office of trustee of the Trust has been vacated on ACBF's liquidation. It is plainly expedient to appoint Mr Stimpson as trustee of the Trust, where he has already been appointed as receiver of trust assets and that approach will facilitate a vesting of trust assets now held by ACBF in him in that capacity, and a distribution in accordance with orders made by the Court under s 81 of the *Trustee Act*. It is also plainly difficult or impracticable to appoint a new trustee by the mechanism set out in the Trust Deed, given the practical difficulties in convening a meeting of members to which I have referred.

22 Second, Mr Stimpson seeks an order that the assets of the Trust vest in him in his capacity as new trustee of the Trust under s 71 of the *Trustee Act*, which permits the Court to make a vesting order, where, inter alia, the Court appoints a new trustee, as has occurred here. Mr Stimpson accepts that that order should be conditional on there being no distribution of any surplus after compliance with order 4 made by the Court (noted below) without the Court's leave. I am satisfied that such an order should be made here, the making of that order will facilitate an appropriate distribution of trust assets to members of the Trust.

23 Third, Mr Stimpson seeks a direction, under s 63 of the *Trustee Act*, that he would be justified in deciding that ACBF should not be indemnified from the assets of the trust for any liability it incurs or has incurred as a result of specified misleading and deceptive conduct. Section 63(1) of the *Trustee Act* relevantly provides that:

"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."

24 That section authorises the Court to give advice or a direction to resolve legitimate doubts held by a trustee as to the proper course of action. In *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66; [2008] HCA 42, the plurality of the High Court observed (at [56]–[59]) that there are no express words and no implications from the express words of s 63 of the *Trustee Act* limiting the power to give advice or on the discretionary factors relevant to the giving of advice, but that the discretion is confined only by the subject matter, scope and purpose of the *Trustee Act*. The plurality also noted (at [64]) that the procedure operates as "an exception to the Court's ordinary function of deciding disputes between competing litigants" and affords a facility for providing "private advice" to trustees although the Court is not bound to give such advice. Kiefel J (as her Honour then was) also observed (at [196]) that:

“The principal purpose of the section, and the opinion, advice or direction given under it, is the protection of the interests of the trust. Another purpose is the protection of a trustee who is acting in that regard and upon advice. Securing the latter purpose may ensure the attainment of the principal purpose, by removing the concern of a trustee about exposure beyond their usual indemnity.”

- 25 In *Re Estate Late Chow Cho-Poon; Application for Judicial Advice* [2013] NSWSC 844 at [23], Lindsay J similarly observed that:

“Section 63 provides a flexible means (and not the only means) by which the Court’s jurisdiction relating to trusts can be enlivened. That jurisdiction includes as one of its purposes the due administration of trusts, including the protection of trust property and, incidentally, protection of trustees who, on the other side of the ledger, are subject to obligations enforceable by the Court.”

- 26 In *Equititrust Ltd (in liq) (rec apptd) (recs and mgrs apptd) v Equititrust Ltd (in liq) (rec apptd) (recs and mgrs apptd) (No 4)* [2017] FCA 1133 at [7], Jagot J summarised the applicable principles as including, inter alia, that (1) the jurisdiction or power to give judicial advice is not constrained by any implications or limitations not found in the express words of the section; (2) the Court’s discretion is confined only by the subject matter, scope and purpose of the legislation, and there are no implied limitations on the discretionary factors that may arise or rules governing the relative importance of such factors; (3) the judicial advice procedure is intended to be summary in character; (4) a judicial advice application is in the nature of “private advice” and a departure from usual Court proceedings in which there are multiple, adversarial parties and a person served with documents in respect of a judicial advice application is not thereby a “party” to the application; (5) the right to obtain judicial advice protects the trustee, but it thereby also protects the interests of the trust, by enabling the trustee to act in the interests of the trust without fear of being personally liable for costs; (6) the function of the Court in a judicial advice application is to determine what should be done in the best interests of the trust; and (7) the usual form of order is that the trustee “would be justified” in taking the relevant course of action. I have summarised the applicable principles in *Re Go Energy Group Ltd* [2019] NSWSC 558 at [18]ff; *Re The Project Volar Creditors’ Trust established in the administration of Virgin Australia Holdings Ltd & Ors* (2021) 152 ACSR 540; [2021] NSWSC 425 at [2]ff (“Volar”) and *Re Absolute Vision*

- 27 I am satisfied that such a direction should be made. As I noted above, cl 14 of the Trust Deed provides for the trustee's indemnity and remuneration and relevantly provides that:

"The Trustee shall not be entitled to be paid by way of remuneration but shall be indemnified out of the assets for the time being comprising the Trust Fund against liabilities incurred by it in the execution or attempted execution of any of the Trusts ... or as a consequence of the failure (except wilful or negligent failure) to exercise any of the authorities powers and discretions thereof or by virtue of being the Trustee hereof."

- 28 It seems to me that Mr Stimpson has rightly concluded that the exclusion from this clause, in respect of wilful or negligent failure by ACBF to comply with its obligations, is established here such that ACBF should not be indemnified against any liability to which it may be exposed by reason of its previous conduct of the Trust. I recognise that this direction will have the consequence that it would be practically unlikely that ACBF could meet claims for misleading or deceptive conduct or other wrongdoing brought by members of the trust or third parties against it, where it is in liquidation and will not have access to assets of the Trust to do so. Here, however, members of the Trust who have not already obtained such judgments or determinations in their favour will (on the basis set out below and subject to the minimum contribution limit) receive a distribution referable to their contributions to the Trust.

- 29 Mr Stimpson seeks an order, under s 81 of the *Trustee Act*, that he be empowered to distribute *pari passu* to members of the Trust who are financial or non-financial at the date of his appointment as liquidator, provided that each such member qualifies under the provisions of their application form for repayment on termination by having made the minimum number of contributions so provided; has not already received a termination payment or a payment required by AFCA on the premise that the complainant would not have taken out a policy or been paid a benefit on death under cl 8 of the Trust Deed and has contributed at least \$1,000.

30 Section 81 of the *Trustee Act* relevantly provides that:

- (1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust, or by law, the Court-

- (a) may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, including adjustment of the respective rights of the beneficiaries, as the Court may think fit

...

- (2) The provisions of subsection (1) shall be deemed to empower the Court, where it is satisfied that an alteration whether by extension or otherwise of the trusts or powers conferred on the trustees by the trust instrument, if any, creating the trust, or by law is expedient, to authorise the trustees to do or abstain from doing any act or thing which if done or omitted by them without the authorisation of the Court or the consent of the beneficiaries would be a breach of trust..."

31 In *Riddle v Riddle* (1952) 85 CLR 202, Dixon J (as his Honour then was) noted (at 214) that the power conferred by this section is also not to be restricted by any implications and that the term "expedient" in the section is "a criterion of the widest flexible kind" and means expedient "in the interests of the beneficiaries" and Williams J (at 220) noted that the provision "is couched in the widest possible terms" and the term "expedient" refers to a course that is "advantageous", "desirable" or "suitable to the circumstances of the case". Williams J also there observed (at 223–224) that:

"Section 81 authorises the Court to step in whenever it is of opinion that sound practical business considerations make it expedient that trustees should have administrative powers in addition to or overriding the powers derived from the trust instrument or the general law...Section 81 recognizes that trust instruments and the general law may often prove inadequate to clothe trustees with the requisite powers to manage and administer trust estates over a period of years to the best advantage and authorizes the Court to supplement or override these powers so far as may be expedient."

- 32 In *Ku-ring-gai Municipal Council v Attorney-General* (1954) 55 SR (NSW) 65 at 74, the Full Court noted that the power conferred by this section is available where:
-

"[A] question has arisen in the management or administration of property vested in a trustee and that the making of an order such as the section authorizes is expedient - that is, expedient in the management or administration of the property."

- 33 In *Arakella Pty Ltd v Paton* (2004) 60 NSWLR 334; [2004] NSWSC 13 at [81]–[82], Austin J observed that:

"Section 81(1) imposes two conditions upon the exercise by the Court of its statutory jurisdiction to make an order conferring power on trustees to enter into a transaction. They are:

- (i) the Court is of the opinion that the proposed transaction is expedient in the management or administration of any property vested in the trustees; and
- (ii) the transaction cannot be effected by reason of the absence of any power for that purpose vested in the trustees.

In its terms, s 81 does not impose any other limitation upon the exercise of the Court's power. The Court may make any order it thinks fit, to confer upon the trustees, either generally or in any particular instance, the necessary power to implement the transaction."

- 34 His Honour also observed (at [88]) that:

"...The words "management or administration", in a context such as appears in s 81, refer to both the manner in which trust property is managed, administered, handled, directed or controlled and the actual carrying out of those functions. In *Re Downshire Settled Estates* [1953] Ch 218, 247, Evershed MR and Romer LJ said that "the application of both words is confined to the managerial supervision and control of trust property on behalf of beneficiaries". Those observations, made about s 57 of the *Trustee Act 1925* (UK), were applied to s 81 of the *New South Wales Act* by Rath J in *Perpetual Trustee Limited v Godsall* [1979] 2 NSWLR 785, 791."

- 35 In *Re Dion Investments Pty Ltd* (2014) 87 NSWLR 753; [2014] NSWCA 367 at [92], Barrett JA there observed (at [96]–[97]) (Beazley P and Gleeson JA agreeing) that s 81 does not confer a power on the Court to vary the trust instrument, but rather to override or supplement its provisions in respect of a particular transaction or class of transactions and that:

"...When the court, acting under s 81(1), confers on a trustee power to undertake a particular dealing (or dealings of a particular kind), "it must be taken to have done it as though the power which is being put into operation had been inserted in the trust instrument as an overriding power": *Re Mair* [1935] Ch 562 at 565 per Farwell J. The substantive power that the court gives comes into existence by virtue of the court's order. It does not have its source in the terms of the trust. There is no addition to the content of the trust instrument. That content is supplemented and overridden "as though" some addition had been made to it. The terms of the trust are reshaped accordingly.

Conferral of specific new powers pursuant to s 81(1) should not be by way of purported grant of authority to amend the trust instrument so that it provides for the new powers. Rather, the court's order should directly confer (and be the sole and direct source of) the powers which then supplement and, as necessary, override the content of the trust instrument. And, of course, the only specific powers that can be conferred in that direct way are those that fall within the s 81(1) description concerned with management and administration of trust property..."

- 36 In *Hancock v Rinehart* (2015) 106 ACSR 207; [2015] NSWSC 646 at [183], Brereton J in turn observed that:

"[W]hat the section authorises is an order conferring upon the trustee, either generally or in any particular instance, the necessary power for the purpose of effecting "the disposition or transaction". The Court's order does not amend the trust instrument, but confers the requisite power on the trustee despite the terms of the trust instrument."

- 37 I have here drawn on my summary of the applicable case law in *Volar* at [8]ff.

- 38 I am satisfied that I should make the order sought by Mr Stimpson under s 81 of the *Trustee Act*. First, it seems to me that the appropriate time to determine the entitlement of members of the Trust to a distribution is at the date of his appointment as liquidator.

- 39 Second, it is appropriate that no distinction be drawn between financial or non-financial members, where a well-informed member of the Trust would have taken steps to terminate his or her membership so as to qualify for a distribution on termination of that membership, prior to a termination of the Trust. As I noted above, Clause 7 of the Trust Deed relevantly provides that:

"Members may terminate their membership by one month's notice in writing to the trustee, whereupon the trustee shall no later than the expiration of that notice period repay the contributions in accordance with the Membership Application Form signed by that Member."

40 This clause is significant to the approach which should be adopted in a distribution to members of the Trust. Importantly, members' right to receive a (partial) repayment of contributions under cl 7 of the Trust Deed is not limited to financial members of the Trust. As Mr Maiden rightly points out, a well-informed member of the Trust, who was given notice of a proposed termination of the Trust, would likely give notice of termination of his or her membership in writing to the trustee, so as to ensure that he or she could receive a (partial) repayment of contributions under cl 7 of the Trust Deed. Here, members of the Fund did not have the practical opportunity to give that notice, because they were not advised of the liquidation or the consequential termination of the Trust in advance; and because many members of the Fund would not have access the terms of the Trust Deed or the professional advice about those terms that would be necessary to allow them to decide to take that course. It is now common ground between Mr Stimpson and ASIC that Mr Stimpson, on appointment as trustee of the Trust, should proceed on the basis that members of the Fund, including those who were less well educated or disadvantaged, would be treated as doing what a well-informed member of the Fund would have done, so as to secure their entitlement to a (partial) repayment of contributions under that clause. I will note below that that seems to me to be an appropriate approach to that issue.

41 Third, it is appropriate to determine members' entitlement to a distribution by reference to whether they qualify for that distribution under the relevant Membership Application form, where that reflects the terms on which they acquired the relevant interest in the Trust. The Membership Application forms, to which I referred above, provide that a member's entitlement to repayment on termination of his or her membership arises after a person has contributed for two or more years ("qualification period") or a longer period in subsequent forms. Mr Stimpson will have regard to whether a member has satisfied the qualification period, as set out in the application form for the particular member, in determining whether that member is entitled to a refund of contributions on termination of his or her membership. There is then a degree of ambiguity in the Membership Application forms as to whether the amount of contributions to be repaid is the specified percentage of the whole of the member's

contributions, once he or she is satisfied the qualification period, or only contributions made after that qualification period. Mr Stimpson proposes, rightly in my view, to proceed on the basis that he should adopt the construction of that clause that is more favourable to members, by determining the amount of contributions to be refunded by reference to all contributions made, and not only contributions made after the qualification period.

42 Fourth, it is plainly appropriate to exclude persons who have already received a termination payment or a payment required by AFCA on the premise that they would not have become a member of the Trust, where that would be inconsistent with now obtaining a benefit as a member of the Trust and where they have already received the relevant death benefit.

43 Fifth, the minimum contribution limit of \$1,000 proposed by Mr Simpson is appropriate. I have referred above to Ms Patel's evidence as to the effect of a minimum contribution limit on distributions from the Trust above. The proposed minimum contribution limit has the consequence that some members who would receive a payment, if that limit was not imposed, will not receive that payment, although it would not adversely affect members who had not satisfied the qualification period to be eligible for a partial refund of contributions in any event, or who satisfy both the qualification period and the minimum contribution limit. Mr Maiden pointed to the fact that the impact of such a limit on an individual member would differ, depending upon contribution rates which varied with age, so that it is possible that a member making lesser contributions will satisfy the qualification period but not the minimum quantification limit. I also recognise that the amount of any distribution would be affected by the costs incurred in undertaking the relevant review, which would reduce the pool of funds available to make a distribution to all members, and by any pro-rating of distributions if the funds available to make a distribution are less than the total amount which would be paid out on a distribution. On balance, it seems to me that the figure of \$1,000 for the minimum contribution limit provides a reasonable compromise between the desirability of providing a distribution to as many members as possible, and the need to minimise the costs of making a distribution for the benefit of all members of the Trust. I also bear in mind

that, here, the approach which is adopted does not deprive a member of any vested entitlement to a refund, where he or she has not in fact terminated his or her membership so as to give rise to such an entitlement; rather, it places a limit on an assumption that is made favourably to members, to permit a distribution in accordance with the orders made by the Court.

- 44 I have also made orders providing for future steps in the proceedings, and I note that Mr Stimpson proposes a distribution in two stages, the first being a substantial distribution. I also note Mr Stimpson's position that he will not seek to recover certain previous costs of the proceedings, prior to the development of the approach which he has now adopted.

Orders

- 45 For these reasons, I made orders, following the hearing, in the form initialled by me and placed on the file.

*I certify that this and the preceding 18 pages
are a true copy of the reasons for judgment herein
of his Honour Justice Black,*

MS

Associate

Date: 26 November 2025

