Submission No 22

INQUIRY INTO THE MACEDONIAN ORTHODOX CHURCH PROPERTY TRUST BILL 2010

Name: Mr Mark Leeming SC

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Submission to General Purpose Standing Committee No 3

Mark Leeming SC

1. **Background.** Since 1995 I have practised at the New South Wales Bar. For the same period I have taught Equity at the University of Sydney Law School, where (since 2004) I have been Challis Lecturer in Equity. I am a coauthor of two standard texts on Equity and Trusts, I am on the Editorial Board of the Journal of Equity, and I have published fairly extensively in the professional literature.

2. On 8 July 2010 I was invited to give evidence to the Committee. I do not have, and have not had, any involvement with any member of the Macedonian Orthodox Church, although I am familiar, like many practitioners, with aspects of the litigation in which members of the Church have been involved. I have treated the invitation to give evidence as one to provide legal advice on validity and operation of the Bill.

3. Because what follows is wholly technical, I thought it would best assist the Committee if I provided a written submission in advance. I have relied on the draft of the Bill as introduced by the Reverend the Hon Fred Nile on 10 June 2010. I have focussed attention on the provisions of the Bill which appear to be unusual or legally problematic. I do not have a view one way or the other as to the merits of the Bill.

4. **The Trust created by the Bill if enacted is a legal person.** The Bill if enacted would create a corporation called the Macedonian Orthodox Church Property Trust. Conventionally, a trust is *not* a legal person, instead it is a *relationship* between trustee, some trust property, and some beneficiaries (in the case of a private trust) or a charitable purpose (in the case of a public trust). Conventionally, because a trust is *not* a legal person, it is the *trustee* which owns the trust property. However, there is nothing wrong with Parliament creating a corporation and calling it a trust. Some examples (there are many others) are:

   (a) the "reserve trusts" which own Crown land under s92 of the Crown Lands Act 1989;

   (b) the corporation created by s6 of the Centennial Park and Moore Park Trust Act 1983 known as the "Centennial Park and Moore Park Trust", and

   (c) the corporation created by s12 of the Uniting Church in Australia Act 1977, s12, known as "The Uniting Church in Australia Property Trust (NSW)".

5. However, an obvious question created by the use of that name is whether the general law obligations of trustees apply to the Macedonian Orthodox Church Property Trust. Is it, for example, under an obligation to diversify the investments of property owned by it (cf Trustee Act s14C). May it seek judicial advice under s63 of the Trustee Act? If sued for breach of trust, may it seek to be excused under s85 of the Trustee Act? These are questions of policy. It might be thought desirable for those decisions to be made expressly on the face of the legislation, rather than the subject of litigation in and decision by the courts. It would be possible, for example, to provide that particular provisions of the Trustee Act 1925 or the Trustee Companies Act 1964 apply to the Trust in the exercise of its functions as a trustee.

6. **Extraterritorial operation.** Clause 17(2) purports to vest 4 particular parcels of land in the trust. One is located in New South Wales, but two are located in Victoria and one in South Australia. What is more, clause 21 purports to *require* the Victorian Registrar of Titles and the South Australian Registrar General to issue new certificates of title for those lands. No doubt that is part of the motivation for clause 4, which gives extraterritorial operation to the Bill if enacted.

7. Undoubtedly the Parliament has legislative competence to enact extraterritorial legislation: see *Union Steamship of Australia Pty Ltd v King* (1988) 166 CLR 1, and s2 of the Australia Acts 1986. However, two legal issues arise from what is proposed.

   (a) First, *unlike* the British Parliament, the New South Wales Parliament does *not* have complete extraterritorial competence; to use the classic

example, it cannot make it an offence to smoke cigarettes in Paris. It is clear law that that the New South Wales Parliament only has power to legislate where there is sufficient connection between the State and the circumstances on which the legislation operates. That is an easily satisfied test: the High Court has repeatedly said that it should be "liberally applied" and that "even a remote and general connection between the subject-matter of the legislation and the State will suffice". See *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at [9], [48], [122] and [189]. I do not know enough of the background to express a view as to whether the sufficient connection test is likely to be satisfied in respect of the vesting of Victorian and South Australian land in the new corporation, but it seems, to my mind, to be capable of giving rise to controversy.

(b) Secondly, assuming those provisions are within power, the Bill if enacted would conflict with the statute laws of Victoria and South Australia. That conflict would occur in two ways. First, and most directly, the law of those States provides that the Victorian Registrar of Titles and the South Australian Registrar-General has a *discretion* to issue a new certificate of title to the person entitled to be registered (Transfer of land Act 1958 (Vic), s32; Real Property Act 1886 (SA), s51C); the Bill purports to create an unqualified *obligation*. Secondly, the Bill if enacted purports to alter the rules applicable in Victoria and South Australia to determine the ownership of land in those States. In other words, whereas normally the Victorian Registrar of Titles would look to any applicable Commonwealth and Victorian law, and the common law, to determine whether someone is entitled to be registered proprietor of Victorian land, the Bill if enacted

(clause 4(2)) purports to require the Registrar of Titles to have regard to the New South Wales Act in order to answer that question.

8. Each of those matters, to my mind, is legally problematic. (The problems would disappear if Victorian and South Australian legislation were passed rendering applicable the New South Wales legislation in those other States, but I shall proceed on the basis that that will not occur, at least not in the short term.) First, at the level of policy, it is to my mind a very significant precedent for the Parliament of this State to purport to command a senior public servant of another State to do anything. Secondly, it is very unusual for the legislation of one State to be directed to particular parcels of land in another State. Thirdly, the Bill if enacted might raise acutely the unresolved constitutional question how to resolve a conflict between two State laws: see *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 at 374 and *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at [43]-[45]. Although that question has not finally been resolved by the High Court, it is fairly clear that at least where one State has a "predominant territorial nexus", that State's laws prevail. Although I am not aware of all of the factual background, that is likely, in my view, to be the State (a) where the land is located and (b) whose legislation appoints the Registrar-General or Registrar of Titles and establishes the system of ownership by registration.

9. I infer from clause 4(3) that the drafter of the Bill is aware of the potential for constitutional difficulties. Clause 4(3) purports to impose a personal obligation upon persons who hold property on trust for the Church. That may assist – it

would depend on the circumstances relating to each piece of property – but I doubt that that drafting technique could cure all difficulties.

10. In short, I think that there is real doubt about the efficacy of the Bill in respect of three of the four properties, absent legislation by Victoria and South Australia. I know that the Macedonian Orthodox Church (Victoria) Property Trust Bill 2009 was introduced in the Parliament of Victoria, but the Victorian legislative website states that it was withdrawn on 22 June 2010 "and is not proceeding". I do not know what the position is in South Australia.

11. **Validating breaches of trust.** Clause 13 of the Bill authorises "schemes of co-operation", which broadly speaking are directed to co-operative uses of property owned by the Trust with other denominations. Clause 13(5) provides that the Trust may choose to use Trust property in a scheme of co-operation "except to the extent that the property is subject to an express trust *expressly* forbidding its use in that manner" (my emphasis). Clause 13(6) provides that property held on trust for worship within, or for the purposes of, the Church, is not to be regarded as property the subject of an express trust expressly forbidding its use in a scheme of cooperation.

12. The basic presumption is that each provision in an Act is intended to have work to do: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71]. If subclauses 13(5) and (6) are not dead letters, they could apply in the following way. A donor gives by deed property to the Trust, on the basis that it is to be used for the purposes of the Church. The donor had no intention that

the Church would cause the property to be used, in part, for the purposes of another denomination, and absent subclause 13(5) and (6) a court would not construe the donor's words so as to authorise for such a use, but the language of the gift does not *expressly* forbid such a use. In those circumstances, subclauses 13(5) and (6) empower the Trust to use the property for a scheme of co-operation. It is a debatable point whether cl 13(5) merely excuses what would otherwise have been a breach of trust, or also prevents a Court from granting an injunction to enforce the terms of the promise; if the latter is the intention, consideration could be given to making the imunity of the Trust express.

13. Further, cl 13 has the potential to operate retrospectively. A person who gave property to the predecessors of the Trust on terms that it be used for the purposes of the Church, but which terms did not *expressly* prevent its use by another denomination, would be affected by cl 13 if the Trust entered into a scheme of co-operation with another denomination. Generally speaking, retrospective legislation should be avoided absent some special reasons. However, the most critical retrospective impact is confined to the 4 properties to be vested in the Trust; it would seem relevant to consider the operation of cl 13(5) and (6) upon those 4 properties in assessing the merits of the clause.

14. **Variation of trusts.** Clause 14 of the Bill if enacted gives the Trust the power by resolution to vary a trust if in its opinion it has become impossible or inexpedient to carry it out; the variation must be dealt with as nearly as possible for the purposes for which it was held prior to the variation. First, although not stated expressly, the reference to "purpose" in subclauses 14(3) and (5) suggests that

the power is to be confined to charitable trusts, rather than trusts for beneficiaries. Secondly, ordinarily a trustee of a charitable trust would be required to inform the Attorney-General and (if the amount in issue exceeds $500,000) be required to bring proceedings before the Supreme Court in order to determine what is the most appropriate replacement charitable trust: Charitable Trusts Act 1993, ss6 and 12-16. It is not clear to me whether it was intended impliedly to repeal the Charitable Trusts Act to permit this to happen, so as to give the Trust a power of variation which goes beyond that enjoyed by other trustees of charitable trusts. There is a presumption against implied repeal in modern parliaments (cf Bennion, *Statutory Interpretation* (4th ed 2002) p255); it is desirable to make it clear whether or not the Trust is to be exempt from, or subject to, the Charitable Trusts Act.

15. **The Trust is the successor of Bishop Petar Karevski, Father Jovica Simonovski and Father Tone Gulev.** Clause 17(3) may contain a drafting error. That clause makes the Trust the successor of those three men "for all purposes". I expect it was intended to confine the operation of the clause to the extent to which they hold property on trust for the Church (so that it mirrors cl 17(1)).

16. **Protection to other trustees.** I note that clause 32 gives different protection to trustees and executors dealing with trust property that would otherwise be available to them pursuant to s85 of the Trustee Act. Clause 32 (which gives protection to persons acting in good faith) is typical of the protection afforded to statutory officeholders (for example, s35 of the Director of Public Prosecutions

Act), but to my eyes a little unusual in connection with trustees, whose liability is normally more strict.

17. I hope that the foregoing assists members of the Committee in evaluating the Bill and understanding the evidence proposed to be obtained from me. I welcome the opportunity to provide any additional assistance the Committee's members might seek from me.

Mark Leeming SC

Selborne Chambers,

26 July 2010