

# Estate Planning

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#### St Vinnies CEO Sleepout

On 23 June 2016 firm Director James Govan will be braving the cold winter's night to sleep homeless for one night to get a first-hand experience of what the 1000 people who are homeless in Wollongong go through each night. This is a great cause and all the money raised from the sleepout will go directly back into the Illawarra community by supporting the St Vinnies food van. You can sponsor James via this link

<https://www.ceosleepout.org.au/ceos/nsw-ceos/james-govan->



## Trust's Jurisdiction – An Important Issue

### The Family Discretionary Trust & Jurisdiction Issues

All too often NSW land trusts are established with a non-NSW jurisdiction. Recently I found that a land rich client company had a family discretionary trust with the South Australian jurisdiction to avoid the Rule against Perpetuities. This rule applies in all states except SA. Creating a trust like this incurs a number of jurisdictional issues. But does the main purpose – avoiding the Perpetuity period work? The Rule against Perpetuities means the trust must usually vest within 80 years of the date of the deed potentially then creating stamp duty and CGT issues.

In our general current opinion, the South Australian jurisdiction in respect of land in NSW does not gain this benefit.

The primary reason of this current opinion is that a trust's jurisdiction is in equity established by the *lex situs* or to put more simply the location of the real property.

Note it is unlikely that the South Australian perpetuity rule will be subject to a High Court decision for approximately 50 years. This is because of the period from the date of the South Australian legislation to the date of vesting or rather the failure to vest real property in Victoria or New South Wales before the Perpetuity date. This is when an appropriate referral to the courts could be required.

Also, the promoters of the schemes such as the ones availed of by non-South Australian residents to gain an extended life of the trust are not usually long-term promoters. They come and go and their opinion is merely an opinion and not based on legal substance.

The writer opines for that reason that we are better to rely on the general principles of equity and the common law. While there is English and local case law to consider in this regard, our general view must not be taken as general legal advice to anyone.

In the matter of *Akai Pty Ltd v The People's Insurance Co. Ltd* the High Court held that a court will not give effect to a choice of law in order to evade the application of the law which would have applied had the parties not chosen some other governing Law.

In *Graeme William Ballard v The Attorney General for the State of Victoria* the Supreme Court of Victoria held, as delivered by Mr Justice Kyrou, that in the absence of an express or implied choice of the **proper** law of the trust by the said law, the **proper** law is that law with which the trust has its closest and most real connection. In ascertaining that law, the following considerations are particularly relevant:

- The place of trust administration
- The place the trusts are situated
- The place of the trustees
- The objects and purposes of the trusts and where they are to be fulfilled.

Some deeds are established out of the State merely to save the \$500 stamp duty. The potential of future dangers and costs far outweigh the saving.

### It's Good News Week!!!

Is it 14 or 20 years too late? In any event the State Government has now partially honoured those post GST promises.

NSW State Government has abolished duties on:

1. Transfer of marketable securities and commercial fishing shares,
2. Shares in a NSW company and units in certain unit trusts,
3. Mortgage duty,
4. Transfer of statutory licences or permissions and gaming licences,
5. Transfer of businesses (including goodwill) but not land.)

We still wait the abolition of stamp duty on the sale of land.

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