

**TRUSTEES OF WESTERN AUSTRALIA (TRANSFER OF BUSINESS) BILL  
2002**

**Explanatory Memorandum**

**Overview of Bill**

At common law only natural persons may become executors and trustees. However, this sometimes leads to difficulties and additional costs to estates when executors and trustees die, resign or leave the State. The *Trustee Companies Act 1987* provides the companies listed in Schedule 1 of that Act with express statutory authorisation to administer estates in Western Australia.

Parliaments in the United Kingdom, New Zealand and Australia have enacted legislation providing that persons can appoint trustee companies to act as executors and trustees. This ensures continuity and expert attention to estates.

Trustees of Western Australia Limited was previously a wholly owned subsidiary of Bank of Western Australia Limited. Following the acquisition of all the shares in Trustees of Western Australia Limited from Bank of Western Australia Limited, Trustees of Western Australia Limited also became a wholly owned subsidiary of Plan B Financial Services Limited. In consideration for the sale of the shares Bank of Western Australia Limited acquired a half interest in Plan B Financial Services Limited.

The net effect of the new arrangement is that Bank of Western Australia Limited and the previous owners of Plan B Financial Services Limited own Plan B Financial Services Limited in equal shares. Plan B Financial Services Limited is a 100% owner of both Plan B Trustees Limited and Trustees of Western Australia Limited.

Plan B Financial Services Limited wishes to implement its stated intention of combining the operations of its wholly owned Western Australian subsidiaries with a view to increased efficiency and the provision of a better and expanded service to its clients.

The companies have requested the Government to facilitate the orderly transfer of the business and undertakings of Trustees of Western Australia Limited to Plan B Trustees Limited by legislation, rather than the more cumbersome, expensive and disruptive alternative of separate transfer, transmission and assignment of each and every executorship, mortgage, charge and security held by Trustees of Western Australia Limited.

The purpose of the legislation is to avoid the great inconvenience which would otherwise be suffered by the general public, by Government authorities, and by the staff of both trustee companies.

## **Clause Notes**

### **Clause 1 – Short title**

Clause 1 provides the short title of the proposed Act.

### **Clause 2 – Commencement**

Clause 2 provides that the proposed Act will come into operation on a day to be fixed by proclamation.

### **Clause 3 – Interpretation**

Clause 3 sets out the meaning of words and terms used in the Bill.

“TrustWest” and “Plan B Trustees” are defined to mean Trustees of Western Australia Limited and Plan B Trustees Limited, respectively.

“Appointment” is defined to mean the appointment of TrustWest as executor, manager, trustee, agent or attorney made by will, codicil, deed, agreement, declaration, nomination or other instrument; by the Supreme Court; or under any written law.

The “appointed day” is the day on which section 5 of the proposed Act comes into operation.

“Excluded assets” are defined to mean documents required by law to be kept by TrustWest and land held by or vested in TrustWest as beneficial owner and not as executor, trustee or in any capacity as trustee.

### **Clause 4 – Act binds Crown**

Clause 4 provides that the proposed Act binds the Crown.

### **Clause 5 – Undertaking vested in Plan B Trustees**

Clause 5 is the operative provision of the proposed Act. Subclause (1) provides that on the appointed day the business of TrustWest is vested in Plan B Trustees. Under subclause (2) provides that, on or after the appointed day, a reference to TrustWest in any instrument (except reference in an instrument to an excluded asset) is to be read and construed as a reference to Plan B Trustees. Subclause (3) provides that, on or after the appointed day, a reference to the holder for the time being of an office in TrustWest is to be read and construed as a reference to the Chief Executive Officer of Plan B Trustees or such other officer of Plan B Trustees as is designated by the Chief Executive Officer.

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Subsection (4) of the proposed Act provides that if TrustWest is the registered owner of land (other than an excluded asset) under the *Transfer of Land Act 1893* in a capacity as trustee or executor then Plan B Trustees is to be taken to be the registered proprietor. Under subsection (5) the Registrar of Titles must, on the application of Plan B Trustees and payment of the required fee, register Plan B Trustees as the proprietor of such land. Subsection (6) provides that, if land has been vested in Plan B Trustees but not yet registered in that name, an otherwise registrable instrument signed by Plan B Trustees must be registered of the Registrar of Titles upon the payment of the appropriate fee.

Subclause (7) provides that if, for any reason, any liability to TrustWest immediately before the appointed day remains a liability after that date TrustWest has, and may enforce, the same rights in respect of that liability as if the proposed Act had not been enacted.

**Clause 6 – Supplementary provisions as to vesting of undertaking**

Clause 6 provides for a number of supplementary matters. Subclause (1) provides that without prejudice to the generality of the proposed Act, subclauses (2) to (12) have effect on or after the appointed day.

Subclause (2) provides that an instruction, appointment, order, direction, power of attorney, mandate or authority given to TrustWest and in effect immediately before the appointed day is to be taken to have been given to Plan B Trustees.

Subclause (3) provides that an instrument given or addressed to TrustWest on or after the appointed day is to be taken to have been given to Plan B Trustees.

Under subclause (4) a security for a debt held by TrustWest before the appointed day in its capacity as trustee or executor is available to Plan B Trustees after that date.

Subclause (5) provides that after the appointed day Plan B Trustees is entitled to all the rights and priorities and is subject to all liabilities to which TrustWest would have been entitled if the proposed Act had not been enacted.

Subclause (6) provides that all rights and liabilities of TrustWest as bailee of documents or chattels, which existed before the appointed date, are transferred to, and assumed by, Plan B Trustees on that date.

Subclause (7) provides that a negotiable instrument or order for payment of money drawn on given to TrustWest immediately before the appointed day is to be taken to have been drawn on or given to Plan B Trustees.

Subclause (8) provides that the relationship that existed between TrustWest and a client, beneficiary or depositor of TrustWest immediately before the appointed day becomes a relationship of the same nature between Plan B Trustees and the client, beneficiary or depositor on or after the appointed day. The relationship includes rights of set-off.

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Subclause (9) relates to contracts, declarations of trusts, deeds of trust, appointments, agreements, powers of attorney, conveyances, deeds and all other forms of legal instrument. To the extent that such instruments are binding on, or enforceable by, TrustWest before the appointed day they are binding on, or enforceable by, Plan B Trustees on or after the appointed day.

Subclause (10) provides that legal proceedings commenced before the appointed day by, against or in favour of TrustWest and not ended, are not prejudiced by the proposed Act.

Subclause (11) provides that nothing effected by the proposed Act:

- is to be regarded as placing either trustee company in breach of trust, contract or confidence or otherwise rendering them liable for a civil wrong;
- is to be regarded as placing either of them in breach of any written law, or other contractual provision, prohibiting, restricting, or regulating the assignment or transfer of any property or the disclosure of information; or
- releases any surety wholly or in part from all or any of the surety's obligations.

Subclause (12) provides that nothing done or suffered by either trustee company under the proposed Act:

- is to be regarded as a breach of trust, contract or confidence or any other civil wrong;
- is to be regarded as a breach of any written law, or other contractual provision, prohibiting, restricting, or regulating the assignment or transfer of any property or the disclosure of information; or
- releases any surety wholly or in part from all or any of the surety's obligations,

if it would not have been so regarded or had that effect had it been done or suffered by TrustWest and the proposed Act not enacted.

**Clause 7 – Rights in respect of land that is an excluded asset**

Clause 7 provides that if immediately before the appointed day TrustWest had rights in respect of land which is an excluded asset (i.e., it is beneficially owned by TrustWest rather than as a trustee), the rights to the land may be exercised by Plan B Trustees on or after the appointed day.

### **Clause 8 - Proceedings**

Clause 8 provides for the continuation of legal proceedings. Subclause (1) provides for the continuation of legal proceedings to which TrustWest was a party immediately before the appointed day by or against Plan B Trustees. Under subclause (2) a judgment, order or award obtained by or against TrustWest in proceedings commenced before the appointed day may be enforced by or against Plan B Trustees.

### **Clause 9 - Evidence**

Clause 9 provides that evidence that would have been admissible for or against the interests of TrustWest if the proposed Act had not been enacted is admissible for or against Plan B Trustees.

### **Clause 10 – Transfer of employees**

Clause 10 provides for the transfer of employees from TrustWest to Plan B Trustees and the safeguarding of their entitlements. On the appointed day each employee of TrustWest ceases to be an employee of TrustWest and becomes an employee of Plan B Trustees. The contract of employment is taken to be unbroken and the period of service with TrustWest is taken to have been with Plan B Trustees. The terms and conditions continue with Plan B Trustees. A transferred employee is not entitled, by reason of the transfer, to receive any payment or benefit as a result of ceasing to be an employee of TrustWest.

Subclause (e) provides that the terms of transfer of an employee do not apply to a director, secretary or auditor of TrustWest. Such a person does not become a director, secretary or auditor of Plan B Trustees because of the proposed Act. This is to ensure that the officers must be renominated and reappointed by the members of Plan B Trustees.

### **Clause 11 – Prescribed securities**

Clause 11 provides that if prescribed securities are vested in Plan B Trustees by the proposed Act, a certificate signed by the Chief Executive Officer of Plan B Trustees or by an officer acting under a delegation, stating that the prescribed securities have so vested is, a sufficient duly stamped instrument of transfer of those prescribed securities. The clause ensures that stamp duty is not payable on any transfer of securities from TrustWest to Plan B Trustees.

### **Clause 12 – Officers to register documents**

Clause 12 provides that the Registrar of Titles, the Registrar of Deeds and Transfers, a mining registrar and any other person authorised to register documents must take cognisance of the proposed Act and are empowered to make the appropriate changes to give effect to the changes envisaged by the proposed Act.

**Clause 13 – Protection of persons dealing with Plan B Trustees or TrustWest**

Persons dealing with either trustee company, including the Registrar of Titles, are protected in those dealing. They are not required to make any enquiry about whether an asset is, or is not, an excluded asset (i.e., held beneficially by TrustWest not as a trustee) or is affected by any notice, express, implied or constructive about the nature of the asset. They are entitled to assume that TrustWest and Plan B Trustees have full power and authority to enter into a dealing or transaction in relation to the asset without enquiring whether it is an excluded asset.

**Clause 14 – Vesting of TrustWest common trust funds in Plan B Trustees**

Clause 14 of the proposed Act vests the Estate Common Trust Funds established under section 19 of the *Trustee Companies Act 1987* (WA) and the Investment Common Trust Funds established under section 20 of the *Trustee Companies Act 1987* (WA) and created by TrustWest in Plan B Trustees. The same terms and conditions continue to apply after the Funds are vested in Plan B Trustees.

**Clause 15 – Amendment of *Trustee Companies Act 1987***

Clause 15 amends Schedule 1 of the *Trustee Companies Act 1987* by deleting “trustees of Western Australia Limited”. This is done as the company will cease to be a trustee company after the appointed day. The Schedule is also amended to insert the name “Plan B Trustees Limited”. The company name is inserted as the company changed its name on 15 February 2001 from LAMP Management Limited. Accordingly, the name “LAMP Management Limited” is also deleted from Schedule 1.