

PUBLIC

upon tabling of Committee's Report

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3 May 2011

Hon Adele Farina MLC
Standing Committee on Uniform Legislation &
Statute Review
Parliament House
PERTH Western Australia 6000

Dear Madam,

Inquiry into Trustee Companies (Commonwealth Regulation) Amendment Bill 2010

I refer to your letter of 21 April 2011 addressed to Mr. Gary Riordan and have been asked to respond to it. Thank you for the opportunity to comment on the draft Trustee Companies Amendment Bill.

Our comments relate more to the wording and content of the Bill rather than any issues that have been raised by the Trustee Corporations Association in the past. An issue that we wish to raise is in relation to the wording of Division 3 - Voluntary Transfers and the possible impact it will have on Australian Executor Trustees Limited (AET Ltd).

We note that Section 33 (2) (b) of the Bill provides for the receiving company to be taken to be the successor in law 'in relation to estate assets and liabilities of the transferring company, to the extent of the transfer'.

We also note that in Part VIII of the Bill and in particular Section 47 it refers to the existing WA Schedule 1 of the Trustee Companies Act which names existing trustee companies licensed in WA. Schedule 1 refers, amongst others, to 2 trustee companies namely Australian Executor Trustees Limited and Australian Executor Trustees (SA) Ltd as being existing trustee companies. These companies are 2 of 6 trustee companies operating under the banner of AET Limited. The other 4 companies are set out in the enclosed Schedule 8AA of the Commonwealth regulations and these are highlighted.

As part of the voluntary transfer process that is to be implemented AET intends to transfer existing trustee companies noted on the Commonwealth schedule to Australian Executor Trustees Limited so that eventually only one trustee company will operate nationally.

One of the possible dilemmas that may arise from the current wording of your Bill arises from the fact that the current Western Australian Schedule 1 only refers to 2 of the current 6 trustee companies listed under the Commonwealth Schedule that we control.

A situation may arise where a Will that we currently hold nominates for example Bagot's Executor and Trustee Company Ltd (not currently mentioned in Schedule 1) as executor. Whilst the Bagot's trustee entity may have been voluntarily transferred into the entity Australian Executor Trustees Limited there may be a practical difficulty in your Probate office accepting that a grant should be given to AET Ltd given that this company is not the entity named in the Will. This could arise as a result of the following interpretation:

1. Section 33 (2) (b) of the Bill being read as only providing for the receiving company (eg AET Limited) to be taken to be the successor in law 'in relation to estate assets and liabilities of the transferring company...' but not the right to apply for a grant of probate in the receiving company's name, and
2. Given that Bagot's is not an existing Schedule 1 trustee company under your current legislation, a restriction in reading the Bill to apply to only those entities listed in Schedule 1.

This issue is more relevant to our position in South Australia as the company's trustee company history has been in this State. This issue has been dealt with by the South Australian parliamentary draftsman after considering our concerns and they agreed to insert a specific provision in their legislation that we believe resolves our concerns and will ensure complete certainty as to the effect of the voluntary transfer in relation to the obtaining grants of probate. A copy of the relevant section is enclosed for your perusal.

As you will see the provision has the effect of transferring not only the 'estate assets and liabilities of the transferring company to the receiving company' (as covered in Section 33 (2) (b)) but also transferring the "duties, obligations, immunities, rights and privileges...". It provides a specific example which highlights the issue we raise. This provision will put it beyond doubt that the voluntary transfer process will allow your Probate office to recognize AET Limited in place of any other trustee company that has been transferred into it.

We ask that you consider this submission and make a similar amendment to your current draft Bill. We would be happy to make further submissions in relation to this matter if requested.

Yours sincerely



NEIL PAGE
LEGAL COUNSEL (WILLS, ESTATES & TRUSTS)

- (b) specifying a mechanism for determining things that are to happen or are taken to be the case, things determined in accordance with that mechanism are taken to happen, or to be the case, as determined in accordance with that mechanism.

25D—Certificates evidencing operation of Division

- (1) An authorised ASIC officer may, by a certificate in writing signed by the officer, certify that a specified asset or liability of the transferring company has become an asset or liability of the receiving company under this Division.
- (2) For all purposes and in all proceedings, a certificate purporting to be issued under subsection (1) is evidence of the matters certified.
- (3) ASIC is empowered to authorise, in writing, a person who is a member of ASIC, or of its staff, to issue certificates under this section.

25E—Registration or record of transfer

The Registrar-General or any other person or authority required or authorised under a law of the State to register or record transactions affecting assets or liabilities, or documents relating to such transactions, must, on application under this section accompanied by a certificate issued under section 25D, register or record in an appropriate manner the transfer or transfers to which the certificate relates.

25F—Exemption from State taxes

No State taxes are chargeable under any Act in respect of a compulsory transfer of estate assets or liabilities facilitated under this Division.

Division 3—Voluntary transfers

25G—Voluntary transfer of transferring company's estate assets and liabilities

- (1) The Governor may make regulations to facilitate the voluntary transfer of estate assets and liabilities from 1 trustee company (the *transferring company*) to another trustee company (the *receiving company*) if ASIC has made a determination under the Commonwealth Act allowing the transfer.
- (2) Without limiting the generality of subsection (1), the regulations may—
 - (a) provide that the receiving company is to be taken to be the successor in law of the transferring company, to the extent of the transfer; and
 - (b) provide for the identification of estate assets or liabilities of the transferring company; and

- (c) provide for and give effect to the transfer of estate assets and liabilities of the transferring company from the transferring company to the receiving company; and
 - (d) provide for and give effect to the transfer of duties, obligations, immunities, rights and privileges of the transferring company from the transferring company to the receiving company, including by providing (for example) that—
 - (i) an appointment of the transferring company in a will, order of a court or instrument of any kind is to be taken to be an appointment of the receiving company (whether the appointment was made before, on or after the commencement of the regulation and whether the appointment is in effect on that date, takes effect after that date or has taken effect previously but some further act or thing is necessary to perfect the appointment or undertaking of the office); and
 - (ii) in each case where the transferring company is acting as a trustee, the receiving company is appointed as the trustee in place of the transferring company; and
 - (e) provide for the registration or recording of the transfer (with or without formal application) by the Registrar-General or any other person or authority; and
 - (f) provide for evidence of matters relating to the transfer; and
 - (g) provide for relief from the consequences of anything done or allowed under regulations made under this section; and
 - (h) provide for payment, or exemption from payment, of State taxes in respect of the transfer; and
 - (i) provide for the liquidation or dissolution of the transferring company; and
 - (j) provide for any other matter of a savings or transitional nature consequent on the transfer.
- (3) A regulation made under this section may, if the regulation so provides, take effect from the commencement of this section or from a later day.
- (4) A regulation made under this section has effect despite anything in a contract, deed, undertaking, agreement, will or other instrument.

Division 4—Relationship of Part with other laws

25H—Relationship of Part with other laws

- (1) This Part has effect despite anything in a contract, deed, undertaking, agreement, will or other instrument.

Schedule 1 Amendments commencing on commencement of Schedule 2 to Corporations Legislation Amendment (Financial Services Modernisation) Act 2009

[11] After Schedule 8A

insert

Schedule 8AA Trustee companies

(regulation 5D.1.01)

Item	Trustee companies
1	ANZ Trustees (Canberra) Limited
2	ANZ Trustees Limited
X 3	Australian Executor Trustees Limited
X 4	Australian Executor Trustees (Canberra) Limited
X 5	Australian Executor Trustees (NSW) Limited
X 6	Australian Executor Trustees (SA) Limited
X 7	Bagot's Executor and Trustee Company Limited
8	Elders Trustees Limited
9	Equity Trustees Limited
X 10	Executor Trustee Australia Limited
11	Mutual Trust Proprietary Limited
12	National Australia Trustees Limited
13	Permanent Trustee Company (Canberra) Limited
14	Perpetual Limited
15	Perpetual Trustee Company (Canberra) Limited
16	Perpetual Trustee Company Limited
17	Perpetual Trustees Consolidated Limited
18	Perpetual Trustees Queensland Limited
19	Perpetual Trustees S.A. Limited
20	Perpetual Trustees Victoria Limited
21	Perpetual Trustees W.A. Limited
22	Plan B Trustees Limited
23	Sandhurst Trustees Limited