Treasurer; Attorney General

LEGISLATIVE COUNCIL
Received
27 JUL 2011
Time: 12-00pm

27 JUL 2011

Our Ref: 35-15502

Ms Renae Jewell
Committee Clerk
Standing Committee on Uniform Legislation and Statutes Review
Parliament House
PERTH WA 6000

LEGISLATIVE COUNCIL OF WA

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Dear Ms Jewell

TRUSTEE COMPANIES (COMMONWEALTH REGULATION) AMENDMENT BILL 2010 (WA)

On 21 June 2011, the report of the Legislative Council Standing Committee on Uniform Legislation and Statutes Review into the Trustee Companies (Commonwealth Regulation) Amendment Bill 2010 (WA) (the Bill) was tabled in the Legislative Council (Report 62).

The Bill makes amendments to the *Trustee Companies Act 1987* (WA) (the Act) to accommodate an in-principle agreement made by COAG, in March 2008, that the Commonwealth would assume responsibility for regulating mortgage credit, margin loans and trustee companies.

In October 2008, COAG agreed that legislation giving effect to Commonwealth regulation of trustee companies would be enacted by the Commonwealth Parliament; the *Corporations and Other Legislation Amendment (Trustee Companies and Other Measures) Act 2011* (Cth). The Bill effectively withdraws State control of most aspects of the regulation of trustee companies so that the sole prudential regulator of trustee companies in Australia will be the Commonwealth rather than having them reporting under 8 different regimes.

Essentially the sole State power to be retained in the Act is the power of the Supreme Court of Western Australia to regulate trustee companies. The result is that trustee companies are regulated by the same court that controls natural persons acting as trustees.

The Report recommended a number of amendments be made to the Bill. I note that the Report is subject to Standing order 337 and that the Government's response is required to be made four months after the date of tabling, i.e., 20 October 2011.

I propose to respond on behalf of the Government in the order of the recommendations made in Report 62.

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***Recommendation 1**: The Committee recommends clause 9 of the Trustee Companies (Commonwealth Regulation) Amendment Bill 2010 be amended in the following manner:*

Page 4, line 6 - To delete the line and insert instead -

Delete sections 28, 29, 30, 31, 33 and 34.

As presently drafted clause 9 proposes to delete sections 28 to 34, inclusive, of the Act.

The amendment recommended by the Committee will effectively retain section 32 which is a provision requiring a trustee company to furnish to the (State) Minister in writing such information as the Minister directs.

The Committee raises two arguments to support this recommendation. First it considers that State Parliamentary sovereignty is diminished by the repeal of section 32. It argues that even though the Minister will be able to ask for information this is no substitute for a statutory right enshrined in State legislation. Second, the Committee suggests that if the Supreme Court of Western Australia will retain the power to generally supervise trustee companies then it is not clear why the Minister should not also have the power to require information.

However, the reason for deleting section 32 is the fact that trustee companies are companies registered or deemed registered under the *Corporations Act 2001* (Cth). As such they are created under Commonwealth law and administered by the Australian Securities and Investment Commission. To the extent that the Commonwealth Minister has a power to require information then it may well be that either the Commonwealth legislation in this respect intends to cover the field or if a State Minister attempted to exercise such a power it might be directly inconsistent with an exercise of Commonwealth power. In any case the State law may be inconsistent and invalid under section 109 of the Commonwealth *Constitution*. So far as the power of the Supreme Court is concerned this is a power that has been specifically allowed to the States in the Commonwealth legislation and there will be no inconsistency.

At paragraph 6.8 of the Report the Committee considers that there is "scope for ...a discussion" with the Commonwealth in relation to this matter. However, the Commonwealth Parliament has had the power to regulate companies since 2001 and that any such power that the States had was referred by the State Parliament to the Commonwealth Parliament many years ago. The Commonwealth is not prepared to accommodate the State in relation to section 32.

Consequently the Government does not accept the amendment proposed in Recommendation 1.

***Recommendation 2**: The Committee recommends the Parliamentary Secretary representing the Attorney General explain why some provision in the Trustee Companies Act 1987 was not retained to cover small private trustee companies that would fall within the scope of the Corporations Act 2001 (Cth) to which chapter 6 should apply.*

There are two reasons why no such provisions are being retained.

First, recommendation 2 arises in relation to the deletion of Part VI of the Act dealing with takeovers – sections 35 to 37 of the Act. Section 35 effectively provides that no person can acquire more than 10% of the voting shares of a trustee company. Subsection (7) makes it clear that a reference to a trustee company in the section is a reference to a company within the meaning of the *Corporations Act 2001* (Cth). Section 36 provides that section 35 does not apply if the takeover is in accordance with the *Corporations Act 2001* (Cth), is made in a prescribed manner or in prescribed circumstances, or is approved by the State Minister. There are no circumstances or manners that have been prescribed.

Clause 507 of the Corporations Agreement 2002 provides that takeovers are matters in relation to which only the Commonwealth can make laws and the States have no vote in relation to them. This has been the case since 2001 when the *Corporations Act 2001* (Cth) was commenced.

In fact, all trustee companies are created as subsidiaries of banks and insurance companies with 100% ownership and therefore Part VI has no application. The situation is, therefore, that since 2001, Part VI of the Act has had no legal or practical effect and accordingly should be repealed.

Secondly, the issue as to whether Part VI should be retained in relation to small private trustee companies is irrelevant. The need is to protect the trusts and estates administered. Therefore trustee companies with $2 nominal capital are not permitted to be created. Rather, all trustee companies are required to be created with equity of at least $5 million (and ability to access far more than that from their parent companies). Consequently, there are currently no small private trustee companies and none will be created in the future.

> ***Recommendation 3**: The Committee recommends the Parliamentary Secretary representing the Attorney General explain to the House what the term "failing" means at page 4 of the Explanatory Memorandum and to explain to the House what issues may arise by providing a definition of failing within the Bill.*

Trustee companies are trustees for superannuation funds, managed investment funds and individual estates. It is not in the interests of anyone for a trustee company to collapse. In practice, the authorities closely monitor the financial strength and weaknesses of trustee companies and ensure that to prevent any collapse the trusts and estates are protected by arranging, voluntarily or by compulsion, for the trustee companies in jeopardy to transfer their business to another trustee. This also protects beneficiaries.

> ***Recommendation 4**: The Committee recommends that the Parliamentary Secretary representing the Attorney General explain the rationale for not publicly disclosing whether it was a voluntary or compulsory transfer and if compulsory the reasons for the compulsory transfer.*

By their very nature a voluntary transfer and a compulsory transfer are different. However, it is obvious to the participants whether a transfer is voluntary or compulsory. There is no objection to disclosing what has occurred either in relation to voluntary or compulsory transfers.

***Recommendation 5**: The Committee recommends that clause 11 of the Trustee Companies (Commonwealth Regulation) Amendment Bill 2010 be amended in the following manner:*

Page 8, line 8 To delete the full stop and insert:

"; and

(k) and 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."

The matters encompassed are already covered particularly by subclauses (b) and (e). However, the Government does not propose to object to the proposed amendment.

***Recommendation 6**: The Committee recommends that the Parliamentary Secretary representing the Attorney-General update the House on the inclusion of the Public Trustee generally, the nature of any discussions with the Commonwealth; and implications for the participation of Western Australia in the scheme.*

The Public Trustee continues to be regulated under the *Public Trustee Act 1941* (WA). However, under amendments to the Commonwealth legislation it is now open for the business of a trustee company to be transferred to another trustee company or to the Public Trustee. During the negotiations I suggested to the Commonwealth that transfers of businesses to the Public Trustee should only be done with the consent of the State Attorney General. A majority of States agreed with the Commonwealth amendment and, under the Corporations Agreement 2002, the Commonwealth enacted the legislation without incorporating my suggestion.

***Recommendation 7**: The Committee recommends, subject to the recommendations made in this report, the Trustee Companies (Commonwealth Regulation) Amendment Bill 2010 be passed by the Legislative Council.*

The recommendation is noted.

Thank you for the opportunity to comment on the Report.

Yours sincerely

Hon C. Christian Porter MLA
TREASURER; ATTORNEY GENERAL

26 JUL 2011