



THIRTY-EIGHTH PARLIAMENT

REPORT 62

**STANDING COMMITTEE ON UNIFORM
LEGISLATION AND STATUTES REVIEW**

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

Presented by Hon Adele Farina MLC (Chairman)

June 2011

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“8. Uniform Legislation and Statutes Review Committee

8.1 *A Uniform Legislation and Statutes Review Committee* is established.

8.2 The Committee consists of 4 Members.

8.3 The functions of the Committee are -

- (a) to consider and report on Bills referred under SO 230A;
- (b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;
- (c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
- (d) to review the form and content of the statute book;
- (e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and
- (f) to consider and report on any matter referred by the House or under SO 125A.

8.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the Parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting.”

Members as at the time of this inquiry:

Hon Adele Farina MLC (Chairman)

Hon Liz Behjat MLC

Hon Nigel Hallett MLC (Deputy Chairman)

Hon Linda Savage MLC

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Government Response

This Report is subject to Standing Order 337:

After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government's response within 4 months.

The four-month period commences on the date of tabling.

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**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES
REVIEW**

IN RELATION TO THE

TRUSTEE COMPANIES (COMMONWEALTH REGULATION) AMENDMENT BILL 2010

1 REFERENCE AND PROCEDURE

- 1.1 On 13 April 2011, Hon Michael Mischin MLC, Parliamentary Secretary representing the Attorney-General, introduced the Trustee Companies (Commonwealth Regulation) Amendment Bill 2010 (**Bill**) into the Legislative Council.
- 1.2 Following its Second Reading on 13 April 2011, the Bill stood automatically referred to the Uniform Legislation and Statutes Review Committee (**Committee**) pursuant to Standing Order 230A. Under Temporary Standing Orders of the Legislative Council, the Committee must report to the Legislative Council within 45 days of referral of a bill.
- 1.3 Due to 28 May 2011 (45 days from 14 April) being a non-sitting period and the Legislative Council Budget Estimates hearings, this extended the reporting date to 21 June 2011.

2 INQUIRY PROCEDURE

- 2.1 The Committee's inquiry was advertised in *The West Australian* on 23 April 2011. Details of the inquiry are published on the Committee's webpage.
- 2.2 The Committee wrote to stakeholders inviting submissions. Submissions were provided by Australian Executive Trustees Limited and the Trustee Corporations Association of Australia. The Committee thanks them for providing submissions.

Hearing

- 2.3 The Committee held a hearing on 25 May 2011, which was attended by Mr Peter Richards, Legal Policy Officer, Department of the Attorney General (**Department**).
- 2.4 Answers to questions taken on notice at the hearing were provided on 1 June 2011.

3 UNIFORM LEGISLATION

- 3.1 The Bill is Structure 1, whereby each State and Territory amends their State Trustee Companies Acts to facilitate the Commonwealth legislation. This suggests co-operative legislation is being passed. The structures are set out in **Appendix 1**.
- 3.2 When scrutinising uniform legislation, the Committee considers various ‘fundamental legislative scrutiny principles’. Although not formally adopted by the Legislative Council as part of the Committee’s terms of reference, the Committee applies the principles as a convenient framework. These principles are set out in **Appendix 2**.

4 SUPPORTING DOCUMENTATION

- 4.1 A letter was sent to the Attorney-General on 14 April 2011 requesting the usual supporting documentation.¹ On 19 April 2011 the Committee received a letter from the Attorney General containing some background to the Bill as well as attaching a copy of a communiqué of the Council of Australian Governments (**COAG**) meeting held on 19 and 20 April 2010 and an extract from the final report of the Wallis Inquiry into the Financial System dated March 1997. The Attorney General advised there is no relevant intergovernmental agreement.²
- 4.2 However, it is notable the Committee was not provided with the following.
- 4.2.1 Communiqué of COAG meeting of 26 March 2008 where it was agreed the Commonwealth would assume responsibility for the regulation of trustee companies.
- 4.2.2 The outcomes of the Business Regulation and Competition Working Group of COAG of 3 July 2008, which recorded this agreement.
- 4.2.3 Any documentation recording the agreement by COAG that legislation giving effect to Commonwealth regulation of trustee companies would be introduced into the Commonwealth Parliament in the first half of 2009, despite reference being made to this in the Explanatory Memorandum (**EM**) to the Bill.
- 4.3 The letter from the Attorney General should have attached this information (which has subsequently been obtained by the Committee).
- 4.4 It is also notable that:
- 4.4.1 The *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009*, which made significant amendments to the *Corporations Act* (together, the *Cth Act*) is a 2009 Act, so it is unclear why the Committee was

¹ Letter from Hon Adele Farina MLC, to Hon Christian Porter MLA, Attorney General, 14 April 2011.

² Letter from Hon Christian Porter MLA, Attorney General to Ms Renae Jewell, 19 April 2011 p1.

only provided with a communiqué of 19 and 20 April 2010 (given that the Act was passed on 6 May 2010); and

4.4.2 The passing of this draft legislation is a milestone under the National Partnership to Deliver a Seamless National Economy.

5 BACKGROUND TO THE BILL

5.1 In March 2008, COAG reached an in principle agreement that the Commonwealth would assume responsibility for regulating mortgage credit and advice, margin loans and trustee companies. In October 2008, COAG agreed that legislation giving effect to Commonwealth regulation of trustee companies would be introduced into the Commonwealth Parliament in the first half of 2009.

The legislative scheme

5.2 The *Cth Act* provides for Commonwealth regulation of trustee companies. Under this legislation there is a single licensing and reporting regime for trustee companies administered by a single regulator - the Australian Securities and Investments Commission (ASIC). Under the new regime, trustee companies are required to have a trustee company Australian financial services licence.

5.3 The main stated purpose of the Bill is to facilitate the regulation of trustee companies by the Commonwealth by amending the *Trustee Companies Act 1987 (1987 Act)*.

5.4 The Bill is largely machinery / facilitative in nature, with its central provision covering compulsory transfers deriving from section 601WBA(2)(b)(iv) and section 601WBC of the *Cth Act*.

5.5 The introduction of the Bill preceded the coming into force of the *Corporations and Other Legislation Amendment (Trustee Companies and Other Measures) Act 2011 (amending Cth Act)*, which made significant amendments to the *Cth Act*, including in relation to the voluntary transfer of assets and liabilities from one trustee company to another (see paragraph 6.36 below).

6 ISSUES RAISED BY THE BILL

Clause 9

6.1 Clause 9 states:

Sections 28 to 34 deleted

Delete sections 28 to 34

- 6.2 Section 32, the proposed deletion of which the Committee has a concern, gives the State Minister responsible for the Act, the power to obtain information from a trustee company.

Parliamentary sovereignty

- 6.3 During the hearing with the Department, an issue arose about the possible effect the deletion of section 32 of the *1987 Act*, by clause 9 of the Bill will have on the sovereignty of the Western Australian Parliament. The Department has informed the Committee ASIC will now have this power.³

- 6.4 The Committee wrote to the Attorney General seeking his views on the possible effect the deletion of section 32 will have on the sovereignty of the Western Australian Parliament and any consideration that had been given to the issue or concerns expressed.

- 6.5 The Attorney General cited two reasons why sovereignty has not been diminished. Firstly, even if section 32 was not to be repealed, section 109 of the *Commonwealth Constitution* would invalidate it by reason of inconsistency with the *Cth Act*. Secondly, by reason of the Commonwealth Parliament, under the corporations power in section 51(20) of the *Commonwealth Constitution*, having constitutional power to make laws about trading and financial corporations, which include trustee companies.⁴

- 6.6 The Attorney General also noted:

6.6.1 section 32 has never been utilised;

6.6.2 the Western Australian Supreme Court will remain able to make extensive and intensive enquiries regarding the activities of a trustee company; and

6.6.3 because the *1987 Act* will remain within the Ministerial portfolio responsibilities of a Western Australian Minister, that Minister will, as a practical matter, be able to request that a Western Australian trustee company provide the Minister with information.⁵

- 6.7 While noting the reasons given by the Attorney General, the Committee is of the view there is no adequate substitute to a Western Australian Minister having the legal power to require information to be furnished from a trustee company. A practical ability to request information is not the same as a right enshrined in legislation.

³ Letter from Mr Peter Richards, Legal Policy Officer, Department of the Attorney-General to Ms Renae Jewell, 1 June 2011, p5.

⁴ Letter from Hon Christian Porter MLA, Attorney General, 30 May 2011 to Hon Adele Farina MLC, p1-2.

⁵ Ibid.

- 6.8 Furthermore, if the power of the Supreme Court has been retained to supervise trustee companies, the Committee is of the view there was scope for the State, in consultation with the Commonwealth during discussions at COAG which led to the creation of the scheme, to have retained the power set out in section 32, concurrently with the Commonwealth. There is still scope for such a discussion.
- 6.9 Accordingly, the Committee draws clause 9 to the attention of the House given its effect of diminishing State sovereignty and makes the following recommendation.

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.**

Clause 10

- 6.10 Clause 10 states:

Part VI deleted

Delete Part VI

- 6.11 Part VI deals with the acquisition of shares in trustee companies.

Takeovers of trustee companies under the *Cth Act*

- 6.12 The EM states Part VI of the *1987 Act* is deleted because it is redundant due to the *Corporations Act 2001* regulating takeovers. However, Chapter 6 of the *Corporations Act 2001* is only expressed to apply to a 'listed company' or 'unlisted company that has 50 members'. While, currently, most private trustee companies appear to be large enough to be covered, there may be smaller companies that do not fit within this description that may wish to offer traditional trustee company services in the future and may not be regulated by the national laws covering takeovers.
- 6.13 When this issue was put to the Department, the response was as follows.

Almost invariably trustee companies are subsidiaries of major banks' life insurance companies. I think that part VI of the 1987 act has actually been redundant for many, many years, because the Corporations Acts deals with takeovers⁶.

⁶ Mr Peter Richards, Legal Policy Officer, Department of the Attorney General, *Transcript of Evidence*, 25 May 2011 p 9 (*Transcript of Evidence*).

6.14 The following question was also put to the Department.

The CHAIRMAN: Is it possible that there might be small private trustee companies that would fall within the scope of the commonwealth act to which chapter 6 should apply?

*Mr Richards: I am not aware of any, no.*⁷

6.15 The Committee did not receive a satisfactory explanation for why a provision in the 1987 Act was not retained to cover such companies, despite any perceived unlikelihood of them offering trustee services. The Committee therefore makes the following recommendation.

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.

Clause 11, proposed section 29

6.16 Clause 11 inserts a proposed new section 29 as follows:

29. Compulsory transfers

(1) The purpose of this section is to facilitate compulsory transfers of estate assets and liabilities under the Corporations Act Part 5D.6.

(2) This section applies when a certificate of transfer issued by ASIC under the Corporations Act section 601WBG comes into force.

(3) The receiving company is taken to be the successor in law of the transferring company, to the extent of the transfer.

(4) In particular --

(a) if the transfer is a total transfer -- all the assets and liabilities of the transferring company become respectively the assets and liabilities of the receiving company without any transfer, conveyance or assignment; and

(b) if the transfer is a partial transfer -- all the assets and liabilities of the transferring company that are included in the list (referred to in the Corporations Act section

⁷ Ibid.

601WBG(2)(c)) included in, or attached to, the certificate of transfer become respectively assets and liabilities of the receiving company without any transfer, conveyance or assignment; and

(c) to the extent of the transfer -- the duties, obligations, immunities, rights and privileges applying to the transferring company apply to the receiving company.

(5) If the certificate of transfer includes provisions of a kind referred to in the Corporations Act section 601WBG(3) --

(a) specifying that particular things are to happen or are taken to be the case, those things are taken to happen, or to be the case, in accordance with those provisions; or

(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.

Compulsory transfers

6.17 The EM states compulsory transfer provisions in the *Cth Act* can be used to ensure ‘failing’ trustee companies remain viable. ‘Failing’ is not defined in either the Bill or the *Cth Act*. The Department provided comprehensive information in its answers to questions on notice from the Committee covering the process of granting an Australian financial services licence, the conditions that attach to it and the grounds upon which a trustee company’s licence can be cancelled. However, the Committee is of the view, to ensure more complete information is provided to the House, an explanation should be given to the House about what the term ‘failing’ means.

6.18 It is also significant that the Department stated, in response to a remark by Hon Linda Savage MLC on the lack of a definition of ‘failing’:

*In practice it can lead to issues.*⁸

6.19 The Department did not identify any issues.

6.20 The Committee makes the following recommendation.

⁸ *Transcript of Evidence, p4.*

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.

Disclosure of reasons for transfer

6.21 The Committee also expressed its concern, during the course of the hearing, about there appearing to be no scope for the public disclosure of the reasons behind a transfer of assets and liabilities from one trustee to another by ASIC in the case of compulsory transfers. In response to a question about whether this was in the public interest, the Department responded:

*I would suggest that it is probably not in the public interest.*⁹

6.22 The following question was taken on notice by Mr Richards.

*What is the rationale behind there being no disclosure of the reasons behind a transfer of assets and liabilities from one trustee to another by ASIC?*¹⁰

6.23 The Department’s response was as follows.

*The legislation is principally aimed at facilitating the consolidation of the industry and enabling the timely transfer of trustee company business in the event of a trustee company failure. In both cases it was considered that the reason for the transfer would be readily apparent.*¹¹

6.24 This answer does not address the issue of whether there will be any public disclosure of the reasons behind the failure of a trustee company. In the interests of transparency as well as the various stakeholders of trustee companies and the public interest imperative, the Committee is of the view the Parliamentary Secretary representing the Attorney General should provide an explanation to the Parliament about how transfers will be reported and, if the reasons are not disclosed publicly, the rationale behind non-disclosure. The Committee makes the following recommendation.

⁹ Ibid, p5.

¹⁰ Letter from Hon Adele Farina MLC to Mr Peter Richards, Legal Policy Officer, Department of the Attorney General, 25 May 2011, p1.

¹¹ Letter from Mr Peter Richards, Legal Policy Officer, Department of the Attorney General to Ms Renae Jewell, 1 June 2011, p4.

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.

Clause 11, proposed section 30

6.25 Clause 11 inserts a proposed new section 30 as follows:

30. Certificates evidencing operation of Division

(1) An authorised ASIC officer may, by a certificate in writing signed by the officer, certify that a specific asset or liability 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.

Reversal of onus of proof

6.26 Were it not for proposed section 30, ASIC would bear the usual onus of proving an asset or liability of the transferring company has become an asset or liability of the receiving company.

6.27 This proposed section amounts to an averment, which provides for a statement containing certain matters to be prima facie evidence of those matters, thereby placing the onus on those affected by these matters to disprove them. There have been suggestions averments are in conflict with fundamental legal scrutiny principles that require the Crown to prove every element of its case to the appropriate standard.¹²

6.28 In this context, the onus would be on the transferring trustee company to provide evidence rebutting what was being certified by ASIC.

6.29 When the Committee asked the Department to justify the insertion of this proposed section, the Department pointed out the common occurrence of such a provision, including in the *Cth Act* (a corresponding provision appearing in section 601WCA) and the fact it is rebuttable.¹³

¹² Commonwealth of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Modern-day Usage of Averments in Customs Prosecutions, May 2004*, p1.

¹³ *Transcript of Evidence*, p10.

6.30 The Committee draws proposed section 30 to the attention of the House given that the proposed section reverses the onus of proof.

Clause 11, proposed section 32

6.31 Clause 11 inserts a proposed new section 32 as follows:

32. Exemption from State tax

(1) In this section —

State tax includes duty chargeable under the Duties Act 2008 and any other tax, duty, fee, levy or charge under a law of the State.

(2) State tax is not payable in respect of a compulsory transfer of estate assets or liabilities facilitated under this Division.

State tax

6.32 Proposed section 32 provides a compulsory transfer does not attract state tax, which, it appears, would be payable were it not for this clause.¹⁴ This is despite there not appearing to be any exemption in the corresponding legislation in Queensland.¹⁵

6.33 The Department said this was due to the compulsory nature of the transfer and that the State would ordinarily provide an exemption in these circumstances.¹⁶ Accordingly, the effect is no loss of revenue to the State.

6.34 Despite this, the Committee draws proposed section 32 to the attention of the House given that trustee companies have over \$500 billion of assets under administration or management in Australia¹⁷ and a large amount of revenue is potentially being forsaken.

Clause 11, proposed section 33

6.35 Clause 11 inserts a proposed new section 33 as follows:

33. Voluntary transfers

(1) The Governor may make regulations to facilitate the voluntary transfer of estate assets and liabilities from one trustee company (the

¹⁴ The *Duties Act 2008* (WA) provides that a ‘Western Australian business asset’ is dutiable property (Section 15(d); transfer duty is imposed on ‘dutiable transactions’ (Section 10) and a dutiable transaction includes a transfer of dutiable property (Section 11(1) (a)).

¹⁵ See the *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld) Part 4.

¹⁶ *Transcript of Evidence*, p 9.

¹⁷ Michelle Rowland MP, House of Representatives, *House Debates*, 2 March 2011, p2185.

transferring company) to another trustee company (the *receiving company*) if ASIC has made a determination under the Corporations Act allowing the transfer.

(2) Without limiting the generality of subsection (1), the regulations may —

(a) give effect to the transfer of estate assets and liabilities from the transferring company to the receiving company; and

(b) provide that the receiving company is 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; and

(c) provide for the liquidation or dissolution of the transferring company; and

(d) provide for the identification of estate assets or liabilities of the transferring company; and

(e) provide for the transfer of estate assets and liabilities of the transferring company; and

(f) provide for the registration or recording of the transfer (with or without formal application) by the Registrar of Titles or any other person or authority; and

(g) provide for evidence of matters relating to the transfer; and

(h) provide for relief from the consequences of anything done or allowed under regulations made under this section; and

(i) provide for payment, or exemption from payment, of a State tax, as defined in section 32(1), in respect of the transfer; and

(j) provide for any other matter of a savings or transitional nature consequent on the transfer.

(3) Regulations made under this section have effect despite anything in a contract, deed, undertaking, agreement or other instrument.

Voluntary transfers

6.36 The Committee received a submission from Australian Executor Trustees (**AET**) that there is a risk of proposed section 33(2)(b) of the Bill being read so as to not cover the right to apply for a grant of probate in the name of the receiving company. This was

coupled with a suggestion the Bill be amended by incorporating wording appearing in section 25G(2)(d)(i) of the *Trustee Companies (Commonwealth Regulation) Amendment Act 2010 (SA)* to provide clarity.¹⁸

- 6.37 While proposed section 29(4)(c) provides for the duties, obligations, immunities, rights and privileges applying to the transferring company to apply to the receiving company upon the transfer, there is no equivalent provision in proposed section 33(2).
- 6.38 The following questions were taken on notice by Mr Richards. References to clauses are to proposed sections.

*Why does clause 33(2) not have the same provision as clause 29(4)(c) of the Bill?*¹⁹

*Do you believe there is any scope for clause 33(2)(b) of the Bill being read as only providing for the receiving company to be the successor in law 'in relation to the 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?*²⁰

- 6.39 The Department's responses were as follows.

*Clause 29(4)(c) relates to compulsory transfers while clause 33(2) relates to voluntary transfers. In a compulsory transfer it is required as a matter of law set out in the legislation that duties, obligations, immunities, rights and privileges applying to the transferring company apply to the receiving company. In relation to a voluntary transfer, regulations made under the legislation may, but also may not, make reference to the rights of the successor in law. The matter is drafted differently as the matters that may apply to voluntary transfers are subject to regulations and therefore the powers to make regulations are listed.*²¹

*No. the successor in law would be entitled to apply for probate. In the unlikely event of any uncertainty the Supreme Court would determine the matter.*²²

¹⁸ Letter from Neil Page, Legal Counsel (Wills, Estates & Trusts), Australian Executive Trustees Limited to Hon Adele Farina MLC, 3 May 2011.

¹⁹ Letter from Mr Peter Richards, Legal Policy Officer, Department of the Attorney General to Ms Renae Jewell, 1 June 2011, p4.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

- 6.40 However, the Committee notes section 601WBC(c) requires state legislation to contain the wording appearing in proposed section 29(4)(c) to apply to all transfer determinations. Given this now covers voluntary transfers by virtue of amendments to the *Cth Act* by the *amending Cth Act*, proposed section 33(2)(b), if enacted, will need to be amended in any event.
- 6.41 A failure to make such an amendment will not only run the risk of failing to satisfy the requirements of the *Cth Act*, but any subsequent regulations made pursuant to proposed section 33(2) which contain the wording in proposed section 29(4)(c), which, while satisfying the *Cth Act*, may be subject to disallowance as not authorised by proposed section 33(2), should the proposed section be read in the way AET suggests.

Finding 1: The Committee finds that, due to the wording of section 601WBC(c) of the Corporations Act 2001 (Cth), clause 11, proposed section 33(2)(b) will need to be amended.

- 6.42 The Committee makes the following recommendation.

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.”

7 THE PUBLIC TRUSTEE

- 7.1 Since the Bill was introduced, by virtue of amendments made by the *amending Cth Act*, the *Cth Act* now provides a compulsory transfer can be made to the Public Trustee of a State or Territory.²³ This is contrary to what the Explanatory Memorandum states.
- 7.2 The EM states ‘the new regulatory regime will not include the Public Trustee.’ However, at the hearing the Department said:

The legislation contains a provision that provides that the commonwealth can make a transfer to the public trustee. The Attorney

²³ Section WBA(2)(aa) *Cth Act*.

*General is unhappy with that, understandably, and considers that he should have been advised and he should have received a notification from the commonwealth seeking the clearance, approval or consent of the state minister. The commonwealth was asked to amend the legislation, but it did not.*²⁴

- 7.3 The Committee queried the lack of consultation by the Commonwealth with the Attorney General for clearance, approval or consent of the Attorney General to include the Public Trustee.

The CHAIRMAN: What action is being taken in relation to the minister's concern about the fact that approval from the state minister is not required?

*Mr Richards: There has been correspondence between the Attorney General and the commonwealth minister responsible, and the Attorney General for South Australia has also expressed the same concerns. There are continuing negotiations and continuing discussions between the states and the commonwealth; I am not aware of any outcome as yet.*²⁵

- 7.4 The Committee is of the view that the Commonwealth's unilateral action has diminished the opportunity of the Attorney General to consult with COAG and to consider the impact of the *amending Cth Act* on the State Public Trustee. As a consequence, the sovereignty of the Western Australian Parliament has been diminished.

- 7.5 The Committee is of the view the inclusion of the Public Trustee in the regime requires further clarification and therefore makes the following recommendation.

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.

8 FURTHER AMENDMENTS TO THE BILL

- 8.1 The Committee was advised by the Department no further amendments to the Bill are anticipated. However, in light of Finding 1 and Recommendation 5, the Committee anticipates further amendments will be made before the Bill is passed by the House.

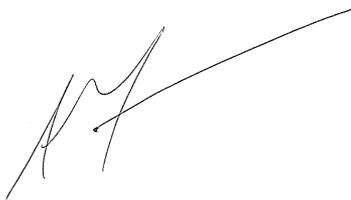
²⁴ *Transcript of Evidence*, p2.

²⁵ *Ibid.*

9 CONCLUSION

- 9.1 The Committee finds the Bill, subject to its recommendations, adequately amends the *1987 Act* to facilitate the *Cth Act* and, thereby, the regulation of trustee companies by the Commonwealth.

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.



Hon Adele Farina MLC
Chairman

21 June 2011

APPENDIX 1
IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

APPENDIX 1

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements identified and classified nine legislative structures relevant to the issue of uniformity in legislation which were endorsed by the 1996 Position Paper. A brief description of each is provided below.

Structure 1: *Complementary Commonwealth-State or Co-operative Legislation.* The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.

Structure 2: *Complementary or Mirror Legislation.* For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.

Structure 3: *Template, Co-operative, Applied or Adopted Complementary Legislation.* Here a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.

Structure 4: *Referral of Power.* The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51 (xxxvii) of the Australian Constitution.

Structure 5: *Alternative Consistent Legislation.* Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.

Structure 6: *Mutual Recognition.* Recognises the rules and regulation of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.

Structure 7: *Unilateralism.* Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.

Structure 8: *Non-Binding National Standards Model.* Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.

Structure 9: *Adoptive Recognition.* A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.

APPENDIX 2
FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

APPENDIX 2

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

Does the legislation have sufficient regard to the rights and liberties of individuals?

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?
2. Is the Bill consistent with principles of natural justice?
3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons? Sections 44(8)(c) and (d) of the *Interpretation Act 1984*. The matters to be dealt with by regulation should not contain matters that should be in the Act not subsidiary legislation.
4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?
5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?
6. Does the Bill provide appropriate protection against self-incrimination?
7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?
8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?
9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?
10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?
11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?
13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?
14. Does the Bill allow or authorise the amendment of an Act only by another Act?
15. Does the Bill affect parliamentary privilege in any manner?
16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?