

STEP AUSTRALIA *NEWSLETTER*

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A MESSAGE FROM THE STEP AUSTRALIA CHAIR

Welcome to this edition of the quarterly *STEP Australia Newsletter*. It is so exciting to see that 2023 has started off so strongly for members across all Australian branches. Details of branch events and plans were shared at our recent annual STEP Australia board meeting in Sydney. It is always so fantastic to learn from other branches and to see the level of enthusiasm and drive across the STEP community throughout Australia.

The STEP Australia board is here foremost to support branches and membership across the country. So, I am very pleased to report that the board's committees have started the year in full swing, with multiple advocacy submissions already made; our membership committee focusing on relationships and professional development accreditation with other professional bodies; the delivery of this newsletter and our sensational STEP Australia National Incapacity Conference. Meanwhile, planning is already well underway for the 2024 National Conference in Melbourne. It is also extremely pleasing to see that our mentorship committee has launched another successful mentorship programme, which is now up and running across Australia. If you are not part of this year's programme, I would highly encourage you to consider getting your name down for 2024.

I am also very pleased to announce the launch of our inaugural STEP Australia Excellence Awards, which will recognise exceptional and outstanding Australian TEPs. By the time you read this, the winners will have been announced at our National Incapacity Conference, which is being held on the Gold Coast on 4–6 June.

There are so many different ways you can get involved with STEP in Australia, all of which could assist in continuing to build and support our organisation and our amazing members. I would encourage you to reach out to your branch chair or committee, speak to a member of our National Advocacy Committee about any ideas or issues you have, or consider contributing an article to the *STEP Australia Newsletter*. ■



With best wishes,

Ian Raspin TEP,
STEP Australia Chair



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An update on STEP Australia's advocacy and policy submissions to government

LYN FRESHWATER TEP, SENIOR TAX CONSULTANT, BNR PARTNERS
JENNIFER SHEEAN TEP, BARRISTER, INNS OF COURT

One of the many important functions that STEP performs in Australia (either nationally or through its branches) is advocating for law or other change in respect of the wide range of issues that affect our members and their clients.

Generally, STEP Australia advocates in respect of issues that affect the entire population, such as tax and superannuation. However, it also endorses branch submissions, particularly those likely to impact a number of state jurisdictions. All STEP Australia advocacy pieces are available on the STEP Australia website.

PRE-BUDGET SUBMISSION

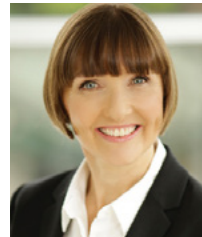
Each year, the federal government calls for public submissions in relation to issues that should be considered in the context of the annual budget. This year, STEP Australia made a submission in respect of a recommendation made by the Inspector-General of Taxation and Taxation Ombudsman in her 2021 report on deceased estates. The submission noted that, at present, the residency status of a deceased estate is determined by the residency of the deceased person's legal personal representative (PR). This produces unintended results for both beneficiaries and the Australian revenue.

The submission called for a change to the law such that the estate has the same tax-residency status as the deceased individual. STEP Australia considers that this is a fair and even-handed approach that results in predictable tax outcomes – i.e., it is good for the tax system as a whole and not just certain players in it.

SUBMISSION TO THE ATO ON REVIEW OF PRACTICAL COMPLIANCE GUIDELINE PCG 2018/4

The Australian Taxation Office (ATO) is undertaking a review of practical compliance guideline *PCG 2018/4*, which seeks to limit the personal liability of a legal PR in respect of the outstanding tax liabilities of a deceased individual. At present, *PCG 2018/4* applies to small estates with a value of AUD5 million or less (subject to a variety of other exclusions).

Among other things, STEP recommended that the AUD5 million threshold be removed. Valuations bring with them unnecessary compliance costs and can lead to disputes with the ATO about valuation methodologies. The submission noted that the other exclusions effectively make the AUD5 million threshold redundant. That is, the most significant risks to the revenue are likely to arise in respect



of the excluded issues – e.g., from the deceased person's interactions with entities that they control or from any business that they may carry on.

PUBLIC BENEFICIAL OWNERSHIP REGISTER

The government has undertaken a consultation on the implementation of the first stage (for companies) of its beneficial ownership register. The register is intended to record who ultimately owns, controls and receives benefits from a company or legal vehicle operating in Australia. It is intended to support stronger regulatory and law enforcement responses to tax and financial crime, assist foreign investment applications and facilitate the enforcement of sanctions.

Implementation of a beneficial ownership register will broadly align Australia with international approaches to transparency of beneficial ownership information (BOI). Currently, Australia is not ranked highly against international benchmarks for the collection and disclosure of BOI.

Although it did not make its own submission on this stage of the register, STEP Australia endorsed the comments of The Tax Institute, which raised several concerns about the proposed policy and the implementation of a beneficial ownership register. The submission of The Tax Institute is attached to our supporting submission, which is available on the STEP Australia website.

STEP has indicated that it will be seeking to make submissions in respect of a register of trusts.

STEP WESTERN AUSTRALIA SUBMISSION: PROPOSAL TO EXTEND LEGISLATIVE PERPETUITY PERIOD

STEP Australia recently endorsed a submission of the Western Australia Branch in relation to the perpetuity period in Western Australia, with a view to emphasising the importance of this issue. Essentially, the submission is to extend the Western Australian perpetuity period to 125 years.

GET IN TOUCH

The value of advocacy work cannot be underestimated. The STEP Australia Advocacy Committee meets monthly and is always keen to hear from members about areas in need of reform.

If you have any ideas, please direct them to Jennifer Sheean TEP, committee Chair, at sheean@qldbar.asn.au or to Dior Locke, STEP Australia's Operations Manager, at dior.locke@step.org ■

New Zealand's new trusts legislation: lessons for Australia

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The New Zealand *Trusts Act 2019* (the Act) came into force on 30 January 2021, replacing the archaic *Trustee Act 1956* and the *Perpetuities Act 1964*. The Act is a culmination of an overhaul that began in 2002 when the New Zealand Law Commission (the Commission) issued an initial report that led to the *Trustee Amendment Bill 2007*.¹ The Commission restarted the project in 2009 by issuing five papers before publishing an initial recommendatory paper in 2010.² After receiving feedback from practitioners, the Commission published the *Review of the Law of Trusts: A trusts act for New Zealand* (the Report).³ After considering the Report, parliament agreed that a new trusts act was necessary. The Report, public consultation and feedback on the initial draft Bill form a substantial basis of the Act.

HURDLES TO IMPLEMENTATION

Although New Zealand has, at times, led the way to the adoption of widely accepted international legislative reforms,⁴ the introduction of the Act was arguably an unlikely outcome. In its 2002 report, the Commission noted remarks made by Justice Blanchard, a judge of the Court of Appeal of New Zealand, in a 2001 keynote address to the New Zealand Law Society, where he called for 'a quiet review' of trustee law 'to see what improvements can be made'. He added that: 'The trouble with quiet reviews, of course, is that they do not generate headlines and therefore can come to be as neglected as their subject matters.'⁵

Of course, this is not a problem unique to New Zealand. In the English context, the Commission noted Professor Clark's comments:

*'A Parliament with members who are subject to re-election every few years prefers to spend time and energy on legislation that is attractive to a significant section of the electorate. In a democracy such as ours, lawyers' law lacks political "sex appeal" ... Statutory reform in England today is likely to be limited to what has been called legislative microsurgery: statutes to correct particular defects.'*⁶



A CATALYST?

Identifying a single event that provided New Zealand's legislature with the impetus to bring the Act into being is problematic. The more likely scenario is that it was a multiplicity of factors working in concert.

Although there are currently no exact figures, the nation has an unmatched appetite for trusts among comparable common-law jurisdictions.⁷ It is estimated that more than half of families have settled trusts and many businesses and asset-holding enterprises are held or managed by trustees. Commercial trusts include unit trusts, superannuation trusts and custodian trusts (holding securities). The country also has a flourishing foreign trust industry enabling a foreign settlor to establish a New Zealand-resident trust exempt from tax on its worldwide income. This means that not only is a large number of the electorate affected by the country's trust law but also many of its politicians are also likely to either have settled trusts themselves, or be beneficiaries of trusts, or both.

The Commission's work and determination between 2002 and 2019 is also commendable, particularly as the scale of the project grew over the years. In its 2002 report,⁸ nine features of the then current law were identified by the Commission as lacking and defective. When the resulting *Trusts Bill 2007* was submitted to parliament on 21 September 2007, it was subsequently referred to the Justice and Electoral Committee (the Committee). The Committee reported back to the New Zealand House of Representatives on 9 July 2008, stating that the Bill's scope needed to be broadened because further issues outside the Bill's ambit had been identified. The Committee recommended a widespread review of the law of trusts that resulted in the government referring such a review to the Commission.⁹ The work conducted by the Commission, with the aid of a select committee, resulted in the issues being saliently identified.

NEED FOR CHANGE

One of the primary rationales for the Commission's decision to embark on this journey was that 'trusts are today used,

and some would say at times misused, for purposes some of which were undreamt of when the current rules were settled, and that in this as in so many other contexts the time is well overdue for the law to catch up with what is actually happening in the world¹⁰

Justice Blanchard, in his keynote address mentioned above, described the *Trustee Act 1956* as containing 'large slabs of undigested text on obscure topics' which fail to state concepts 'in the crisp, clear way which would be regarded as essential in a commercial context'.¹¹

Australia

In Australia, the Queensland Law Reform Commission produced a report in 2013 on the state's *Trusts Act 1973*, noting similar reasons for a need for reform:

*'It has been more than 40 years since a comprehensive review of the trusts legislation has been undertaken. Many of the provisions of the current Act have their origins in English trustee legislation of the mid to late 1800s and have remained relatively unchanged since that time. As a consequence, the current legislation is replete with lengthy, densely drafted provisions and outdated language.'*¹²

Despite the Queensland Law Reform Commission recommending new legislation and drafting a new trusts Bill in 2013, no further progress has been made in Queensland some ten years later.

KEY FEATURES OF THE ACT

The Act is not a legislative code and provides flexibility for continued judicial development of trust law.¹³ The purpose of the Act is to set out core trust law principles, provide clear rules and mechanisms for the administration of trusts and trust-related disputes, and make the law of trusts more accessible.

The key features of the Act include clarifying the powers, duties, roles and requirements of trust parties, and streamlining various processes. The processes include beneficiaries' requests for information; appointing agents (and reviewing their performance); the appointment of special trust advisors; the appointment and removal of trustees; variation and termination of trusts and mechanisms for alternative dispute resolution.

Other key features include:

- An express trust has become a statutorily defined concept.
- Trustee duties are divided into two categories: mandatory duties and default duties, with the former forming part of every trust relationship, irrespective of any provisions to the contrary in the trust deed. The default duties form part of a trust relationship, except to the extent they are specifically modified or excluded by the trust deed.
- Trustees can delegate all of their administrative functions, subject to the obligation to monitor the actions of the agent appointed for the performance of those functions.

‘Despite the Queensland Law Reform Commission recommending new legislation and drafting a new trusts Bill in 2013, no further progress has been made in Queensland some ten years later’

- The maximum duration of a trust under New Zealand law has been extended to 125 years.
- The common-law rule against perpetuities has been abolished.
- A trust deed cannot limit a trustee's liability nor indemnify a trustee for a breach of trust arising from the trustee's own dishonesty, wilful misconduct or gross negligence.

THE INTERNATIONAL APPROACH

Notwithstanding the unique features of New Zealand's social, political and legal landscape that may have contributed to the enactment of the Act, it could also be argued that the nation is following a wider international trend. England and Wales enacted the *Trustee Act 2000*, which implements recommendations made by the Law Commission of England and Wales.¹⁴ In 2012, the Uniform Law Conference of Canada resolved to adopt the *Uniform Trustee Act*, which aims to provide a 'modernized statute that addresses as comprehensively as is practicable the administration of trusts'.¹⁵ In the United States, at least 35 states have adopted the *Uniform Trust Code*, which represents a modernisation of trust law. More recently, on 23 November 2022, the *Trusts and Succession (Scotland) Bill 2022* was published by the Scottish Parliament based on recommendations from the Scottish Law Commission in 2014.

In this regard, in not updating their own trust laws, the Australian states could be falling behind. ■

¹ The Commission, *Some Problems in the Law of Trusts* (NZLC R79, 2002)
² The Commission, *Review of the Law of Trusts – Introductory Issues Paper* (NZLC IP 19, 2010) ³ The Commission, *Review of the Law of Trusts – A Trusts Act for New Zealand* (NZLP LCR no. 130) ⁴ Most notably, on 19 September 1893, a new *Electoral Act* was passed defining the nation as the first self-governing country in the world to grant all women the right to vote in parliamentary elections. ⁵ Above, note 1. ⁶ Malcolm Clarke, *Doubts from the Dark Side – The Case Against Codes* [2001] JBL 605, 613 ⁷ For example, a 2008 estimate by the Commission put the figure at one trust for every 18 people, compared with one for every 34 people in Australia in the 2008/2009 tax year. See above, note 2. ⁸ Above, note 1. ⁹ Above, note 2. ¹⁰ Above, note 1. ¹¹ Above, note 1. ¹² Queensland Law Reform Commission, *A Review of the Trusts Act 1973* (QLRC Report No 71) ¹³ s.5, the Act ¹⁴ Above, note 3. ¹⁵ *Uniform Trustee Act – Final Report of the Working Group* (Uniform Law Conference of Canada, Whitehorse YK, August 2012) at [12], accessible at www.ulcc.ca

Case note: Application of MLC Investments Ltd

ESTERINA AZZI, SENIOR ASSOCIATE, MCCULLOUGH ROBERTSON LAWYERS

The recent decision of *Application of MLC Investments Ltd (ACN 002 641 661)*¹ discussed the relevance of a corrupt purpose to s.249E of the New South Wales *Crimes Act 1900* (the Crimes Act). This section outlines when the giving and receiving of a benefit upon changes to 'a person entrusted with property' will constitute a criminal offence and applies to trustees, executors and administrators of deceased estates, attorneys and financial managers. Similar legislation exists in Queensland, Victoria and Western Australia. In advising clients, practitioners Australia-wide ought to be mindful of the decision to avoid the inadvertent commission of an offence.



MLC already had a right of indemnity out of the scheme assets.

MLC apprehended that s.249E of the Crimes Act might prohibit the proposed course.

SECTION 249E OF THE CRIMES ACT

The critical part of s.249E of the Crimes Act provides:

'(2) Any person who offers or gives a benefit to a person entrusted with property, and any person entrusted with property who receives or solicits a

benefit for anyone, without the consent—
(a) of each person beneficially entitled to the property, or
(b) of the Supreme Court,
as an inducement or reward for the appointment of any person to be a person entrusted with the property, are each liable to imprisonment for 7 years.'

For the purposes of the section, 'a person entrusted with property' includes trustees, executors and administrators, attorneys under a power of attorney, persons with a power of appointment under a power of attorney, and persons managing or administering property under the *NSW Trustee and Guardian Act 2009*.²

Further, the 'appointment of a person' within the section includes joining or assisting in the appointment.³

MLC applied to the Supreme Court of New South Wales (the Court) under s.249E, seeking the Court's consent to the soliciting and receiving by MLC, and the offering and giving to MLC by Channel and JANA, the benefit of the Implementation Expenses and the Indemnities.

BACKGROUND

MLC Investments Ltd (MLC) sought to retire as the responsible entity of 19 registered managed investment schemes and the trustee of 18 unregistered managed investment schemes in favour of Channel Investment Management Ltd (Channel), upon the recommendation of the investment advisor for each of the schemes, JANA Investment Advisors Pty Ltd (JANA). The proposed course was thought to be in the best interests of the scheme members as Channel had lower costs, more flexibility in its investment options and improved technology, leading to faster enactment of instructions.

To implement the proposal, MLC would incur costs to third parties of approximately AUD560,000–600,000 (the Implementation Expenses). Although MLC was entitled to be indemnified for the Implementation Expenses from the scheme property, JANA intended to reimburse MLC to avoid the cost burden falling on the scheme members.

Additionally, Channel would provide various indemnities to MLC (the Indemnities) under an implementation deed and a deed of retirement and appointment between MLC, Channel and JANA. The Indemnities related to defined 'claims' that were limited in scope as

'Indemnities and costs coverage which are commonly provided for in, for example, deeds of retirement and appointment of trustee, may be captured by the section even if seemingly innocuous'

APPLICATION OF S.249E

Stevenson J found the proposed conduct did fall within the ambit of s.249E⁴ and constituted an 'inducement or reward' for the appointment of Channel as the new responsible entity and trustee.⁵

Ultimately, the Court gave its consent to the Implementation Expenses being paid and

the Indemnities being provided, and it was satisfied that the proposed course was in the best interests of the beneficiaries.⁶

However, the Court's consideration of the *mens rea* of the offence is noteworthy. In the context of s.249E, this was 'a specific intent to offer, give, receive or solicit a benefit without consent as an inducement or reward for the appointment of any person to be entrusted with property'.⁷ However, the question arose as to whether it is also a feature of the offence for the purpose to be 'dishonest or corrupt in some way'.⁸

His Honour attributed weight to the fact that the word 'corruptly' appears elsewhere in the Crimes Act but is not present in the body of s.249E.⁹ Further, under s.249E(4), proceedings for an offence cannot be commenced without the consent of the Attorney General. His Honour found that the absence of this caveat elsewhere in the Crimes Act suggested s.249E is 'intended to operate broadly and capture conduct which may not necessarily warrant prosecution'.¹⁰ Moreover, His Honour noted it would not be possible for beneficiaries or the Court to consent, as contemplated by the section, to corrupt conduct.¹¹ As such, Stevenson J found that a corrupt purpose is not an element of the offence.¹²

IMPLICATIONS OF THE DECISION

If a corrupt purpose is not a feature of s.249E, then arguably any change to 'a person entrusted with property' that includes, for example, indemnities to an incoming trustee, or expense reimbursement to an outgoing trustee, will require the consent of each person beneficially entitled to the trust property or the Court to avoid the commission of an offence. Accordingly, indemnities and costs coverage which are

commonly provided for in, for example, deeds of retirement and appointment of trustee, may be captured by the section even if seemingly innocuous.

The case has a potentially broad ambit due to the wide definition of 'a person entrusted with property', which encompasses not only trustees but also, for example, legal personal representatives of deceased estates and attorneys under a power of attorney.

Further, it may have a bearing on future decisions in Queensland, Victoria and Western Australia where similar legislation exists.¹³

At the time of writing, STEP Australia has made a submission to the Attorneys General of New South Wales, Queensland, Victoria and Western Australia raising its concerns about the effect of the decision.¹⁴ It remains to be seen whether this will translate into legislative reform.

In the meantime, practitioners across Australia must be careful to advise clients appropriately in the circumstances contemplated by the relevant legislation and, where necessary, obtain the consent of all those beneficially entitled to the trust property or the Court, to avoid the inadvertent commission of an offence. ■

¹ [2022] NSWSC 1541 ² *Crimes Act 1900* (NSW), s.249E(1) ³ *Crimes Act 1900* (NSW), s.249E(3) ⁴ *Application of MLC Investments Ltd* (ACN 002 641 661) [2022] NSWSC 1541, [13] ⁵ *Id.*, [14] ⁶ *Id.*, [47] ⁷ *Id.*, [21] ⁸ *Ibid* ⁹ *Id.*, [31] ¹⁰ *Id.*, [32] ¹¹ *Id.*, [33] ¹² *Id.*, [34] ¹³ See *Criminal Code Act 1899* (Qld) Sch 1s 442F; *Crimes Act 1958* (Vic), s.180; and *Criminal Code Act Compilation Act 1913* (WA), s.535 ¹⁴ See www.stepaustralia.com/wp-content/uploads/2023/01/Letter-The-Hon.-Mark-Speakman-SC-MP_25.01.23.pdf

STEP Australia Mentorship Programme 2024

The STEP Australia National Mentorship Pilot Programme launched in 2021. STEP Australia is currently running its second Mentorship Programme, and we are now seeking applications for the 2024 programme.

Find out more by heading to www.stepaustralia.com/step-mentorship-program. STEP Australia is committed to providing highly relevant learning and development opportunities for members to connect with and learn from other members across their lifelong career journey.



OUR MENTORSHIP PROGRAMME SPONSOR

STEP Australia is grateful for the support of our programme sponsor, The College of Law.



Mentorship testimonial

'It has allowed me to deepen my knowledge in a particular area of the law of which I had only a passing knowledge. I'm very grateful for the opportunity to participate.'

Jennifer Sheean TEP,
Mentee, STEP Australia National Mentorship Programme 2022



EVENTS AND RESOURCES

STEP AUSTRALIA WEBSITE

Keep up-to-date with news, events and national initiatives by visiting the STEP Australia website.

You can find out more about STEP's advocacy work, upcoming events and conferences, industry news, the latest webinars on demand and national newsletters. You can also access our members' technical resource library and see what's happening with our international connections.



www.stepaustralia.com

WEB LINKS AND CONTACTS



View the full events programme at www.stepaustralia.com/events

We welcome all STEP members to attend events hosted by other branches.

For more information on the STEP Australia events calendar, or to register your interest to be a speaker at STEP Australia events, contact Dior Locke at dior.locke@step.org

Can't make an event? Many speakers provide a paper for members. Get in contact to find out more.

SEE MORE ON EVENTS AND KEEP UP-TO-DATE

Keep informed about upcoming worldwide STEP events at www.step.org/events

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