

25 January 2023

The Hon. Mark Speakman SC MP
Attorney General of New South Wales
GPO Box 5341
SYDNEY NSW 2001

Dear Mr Speakman

Application of MLC Investments Limited (ACN 002 641 661) [2022] NSWSC 1541 and Crimes Act 1900 (NSW) s 249E

The Society of Trust & Estate Practitioners (STEP) is a global professional body, comprising lawyers, accountants, trustees and other specialist practitioners. STEP Australia, comprised of State branches, represents professionals from across Australia whose objective is to advance the interests of families by bringing a multidisciplinary approach. This often involves us identifying issues of relative importance to families and bringing these to the attention of those who can make a positive difference. This is the purpose of this submission.

STEP Australia seeks your government's support for a review of s 249E of the *Crimes Act 1900 (NSW)* (**Crimes Act**) in light of the recent decision of Stevenson J in the Supreme Court of New South Wales, namely *Application of MLC Investments Limited (ACN 002 641 661) [2022] NSWSC 1541 (MLC Case)*.

The MLC Case considered the application of s 249E of the Crimes Act to trustees. However, the decision has a much wider impact as it would apply to financial managers appointed under the *NSW Trustee and Guardian Act 2009 (NSW)*, executors and attorneys acting under a Power of Attorney document.

Section 249E of the Crimes Act

The present s 249E of the Crimes Act sits within Part 4A (*'Corruptly receiving commissions and other corrupt practices'*) and provides:

'249E Corrupt benefits for trustees and others

- (1) *In this section, a reference to a person entrusted with property is a reference to—*
- (a) *a trustee of the property,*
 - (b) *an executor or administrator appointed for the purpose of dealing with the property,*
 - (c) *a person who, because of a power of attorney or a power of appointment, has authority over the property, and*
 - (d) *a person managing or administering the property (or appointed or employed to manage or administer the property) under the NSW Trustee and Guardian Act 2009.*
- (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.
- (3) In this section, a reference to the appointment of a person includes a reference to—
- (a) joining in the appointment of the person, and
- (b) assisting in the appointment of the person.
- (4) Proceedings for an offence under this section shall not be commenced without the consent of the Attorney General.
- (5) A consent to commence any such proceedings purporting to have been signed by the Attorney General is evidence of that consent without proof of the signature of the Attorney General.'

Findings in the MLC Case

In the MLC Case, Stevenson J made orders, *inter alia*:

- (a) consenting to MLC Investments Limited (**MLC**) soliciting and receiving the 'Implementation Expenses' from JANA Investment Advisors Pty Ltd (**JANA**), a third party, and JANA offering and giving the Implementation Expenses to MLC; and
- (b) consenting to MLC soliciting and receiving various indemnities from Channel Investment Management Limited (**CIML**), the incoming responsible entity of 19 registered management investment schemes and incoming trustee of 18 unregistered management investment schemes, and CIML offering and giving the indemnities to MLC.

The 'Implementation Expenses' referred to in point (a) above constituted disbursements to third parties in respect of which MLC would otherwise be entitled at general law to recover by way of indemnity from the scheme property, if JANA were not independently covering the cost.

In making the above orders, Stevenson J made findings, *inter alia*, that:

- (a) all the conduct in respect of which the Court consented would, without that judicial consent or the consent of all persons beneficially entitled to the relevant property as required by s 249E(2), likely fall within the ambit of s 249E so as to constitute a criminal offence on the part of MLC, JANA and CIML. This is because:

'...those provisions make it a crime for a person entrusted with property to receive or solicit, or for another person to offer or give that person, a benefit as an inducement or reward for the appointment of a new trustee without the consent of the beneficiaries, or the Court';¹

- (b) the requisite *mens rea* for the offence is:

'...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 a person entrusted with trust property';²

¹ *Application of MLC Investments Limited (ACN 002 641 661)* [2022] NSWSC 1541 (**MLC Case**), [11].

² *Ibid* [35].

- (c) a corrupt purpose is not an element of the offence, given that:
- (i) the word 'corruptly', used by the legislature in other sections including s 249B of the Crimes Act, is not replicated in s 249E;³
 - (ii) s 249E(4) provides that proceedings for an offence under the section may not proceed without the Attorney General's consent, suggesting the section was intended to operate broadly subject to this caveat;⁴ and
 - (iii) s 249E(2) contemplates that the Court or those beneficially entitled to the relevant property might consent to the conduct otherwise proscribed by the section, which would present difficulties if the offence required that there be a corrupt purpose.⁵

Stevenson J agreed with Ball J in the earlier decision of *BT Funds Management Limited (ACN 002 916 458) as trustee for the Retirement Wrap Superannuation Fund* [2022] NSWSC 401 (**BT Funds Case**). In that case, Ball J said:

*'The evident purpose of the Provisions is to prevent a trustee from being persuaded by the prospect of personal gain to exercise its power to appoint a substitute trustee. It would, therefore, normally be appropriate for the Court to give its consent to the proposed conduct if it was satisfied that the appointment of the new trustee was in the best interests of beneficiaries or if it was satisfied that the proposed conduct did not provide an inducement to the transferor to act other than in the best interests of the beneficiaries. In either case, the object of the prohibition contained in the Provisions would not be undermined.'*⁶

Concerns arising from effect of the MLC Case

By virtue of the interpretation of s 249E in the MLC Case that a corrupt purpose is *not* an element of the statutory offence, it would now appear that *any* change to a trustee that, for example, involves the giving of indemnities and the payment or reimbursement of expenses, must have the consent of all of the beneficiaries of the trust or the consent of the Supreme Court to avoid an offence being committed, even if there is no corrupt or dishonest purpose or intention.

The practical effect of the MLC Case (and the earlier BT Funds Case upon which it relies), and the consequent interpretation of s 249E, potentially has far-reaching and burdensome implications not only for large trusts including managed investment schemes but also for *inter vivos* family trusts, testamentary trusts, superannuation funds, funds under the management of licensed trustee companies and funds managed by NSW Trustee and Guardian. This is particularly so given that it is often a commonplace expectation that indemnities will be given to an incoming trustee and for an outgoing trustee's expenses (including the cost of implementation of the change in trusteeship) to be funded by someone other than the trustee personally.

It is important to note that trustees stand in a position of fiduciary responsibility towards the beneficiaries of the trust, trustees often act for little or no reward, and that the change in trusteeship may well be in the interests of the beneficiaries (as in the MLC Case).

Although the commission of an offence may be avoided if all of the beneficiaries consent to the benefit being paid and received, this can nevertheless be problematical. For example, in circumstances where it is not possible

³ Ibid [27] and [31].

⁴ Ibid [32].

⁵ Ibid [33].

⁶ Ibid [40], quoting Ball J in *BT Funds Management Limited (ACN 002 916 458) as trustee for the Retirement Wrap Superannuation Fund* [2022] NSWSC 401 at [18].

to obtain consent as a beneficiary is under a legal incapacity, including being a minor or suffering from impaired mental capacity.

Where consent cannot be obtained, the alternative course is for an application to be made to the Supreme Court. However, for small trusts (including many trusts administered or intended to be administered by NSW Trustee and Guardian) the legal costs of the application may be prohibitive. If the application is unsuccessful, there is the attendant problem of who may ultimately bear the costs of the application.

The effect of the decision may make the process of transition of trusteeship very difficult and, in some cases, not feasible.

Additionally, given that certain rights of indemnity are available to trustees at general law in any event,⁷ it is somewhat incongruous that the same indemnities, however innocently given and received, nevertheless may be captured within the scope s 249E.

Although the MLC Case focused on trustees, we note that the definition of 'a person entrusted with property' within s 249E(a) also includes executors, attorneys acting under a Power of Attorney document, and financial managers appointed under the *NSW Trustee and Guardian Act 2009* (NSW). Therefore, the possible ambit of the decision may extend to deceased estates, attorneys, financial managers and (as mentioned earlier) NSW Trustee and Guardian.

Further, it does not appear that the question of whether there were any people who could be identified as being "beneficially entitled" to the trust property has been considered in relation to s 249E, nor the broader effect on the need for consent if there is not currently in existence any person who is beneficially entitled. That issue may arise in deceased estates, as residuary legatees do not have a beneficial interest in the assets of an estate during the course of administration.⁸ The same issue also arises in trusts more broadly until the trustee's right of exoneration is satisfied.⁹ In such cases, with the trustee in a position of conflict, it appears that the consent of the Court would be required to avoid criminal consequences.

We consider that these issues require further analysis and that reform of the section would appear to be necessary to avoid unintended or overly burdensome consequences to the potentially broad group affected by the decision. Given the implications, we respectfully request that the issues be investigated as a matter of priority.

We note that similar provisions to s 249E(a) are present in legislation in Queensland, Victoria and Western Australia, such that a similar issue may arise.¹⁰

If you would like to discuss any of the above, please contact:

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⁷ Ibid [10] and [46].

⁸ *Commissioner of Stamp Duties (Q) v Livingston* (1964) 112 CLR 12, [15].

⁹ *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] 192 CLR 226, [48]

¹⁰ *Criminal Code Act 1899* (Qld), Sch 1, s 442F; *Crimes Act 1958* (Vic), s 180; *Criminal Code Act Compilation Act 1913* (WA), s 535. Both the Qld and Vic legislation were considered in *H.E.S.T Australia Ltd v Attorney-General (Qld) & Anor; Mercy Super Pty Ltd v Attorney-General (Qld) & Anor* [2022] QSC 221 but it was held that the proposed transaction did not involve a substituted appointment of a trustee.

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STEP Australia welcomes the opportunity to comment on any proposed reform.

Thank you for your consideration of the matter.

Yours faithfully

Your faithfully

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