HOUSING, BIG BUILD AND MANUFACTURING COMMITTEE

Members present:
Mr CG Whiting MP—Chair
Mr JJ McDonald MP
Mr DJ Brown MP
Mr MJ Hart MP
Mr TJ Smith MP (via videoconference)

Staff present:
Dr A Ward—Committee Secretary
Dr V Lowik—Assistant Committee Secretary

PUBLIC HEARING—INQUIRY INTO THE TRUSTS BILL 2024

TRANSCRIPT OF PROCEEDINGS

Wednesday, 10 July 2024

Brisbane

WEDNESDAY, 10 JULY 2024

The committee met at 9.29 am.

CHAIR: Good morning. I declare open this public hearing for the committee's inquiry into the Trusts Bill 2024. My name is Chris Whiting. I am the member for Bancroft and chair of the committee. I would like to respectfully acknowledge the traditional custodians of the land on which we meet today and pay our respects to elders past and present. We are fortunate to live in a country with two of the oldest continuing cultures in Aboriginal and Torres Strait Islander peoples, whose lands, winds and waters we all share. With me here today are: Jim McDonald, member for Lockyer and deputy chair; Don Brown, member for Capalaba; Michael Hart, member for Burleigh; and Tom Smith, member for Bundaberg, via videoconference.

This hearing is a proceeding of the Queensland parliament and is subject to the parliament's standing rules and orders. Only the committee and invited witnesses may participate in the proceedings. Witnesses are not required to give evidence under oath or affirmation, but I remind witnesses that intentionally misleading the committee is a serious offence. I also remind members of the public that they may be excluded from the hearing at the discretion of the committee.

These proceedings are being recorded and broadcast live on the parliament's website. Media may be present and are subject to the committee's media rules and the chair's direction at all times. You may be filmed or photographed during the proceedings and images may also appear on the parliament's website or social media pages. I ask everyone to turn their phones off or on to silent and their computers on to silent mode.

WILLIAMS, Ms Kathryn, Official Solicitor, Corporate Legal Services, Public Trustee of Queensland

CHAIR: Good morning. Would you like to make an opening statement before we ask some questions of you?

Ms Williams: Thank you for the invitation to come and speak to you all today on an issue that we have identified in the current drafting of clause 47 of the Trusts Bill 2024. This clause specifically relates to the vesting of trust property in the Public Trustee of Queensland when a trustee has an incapacity.

I do wish to acknowledge that the Department of Justice and Attorney-General has consulted with the Public Trustee in relation to the bill. However, it was at a very late stage that a practical difficulty with the current drafting was identified. I also wish to acknowledge it is a very narrow set of circumstances that we believe will cause any difficulty. Nevertheless, if that potential difficulty can be avoided by a minor change to the drafting of the bill, it will be a better result for Queenslanders.

The Public Trustee manages the financial affairs of over 10,000 customers with impaired capacity and is the trustee of over 4,000 trusts. Accordingly, the Public Trustee is very familiar with the difficulties that can arise when a trustee is found to have impaired capacity. The Public Trustee supports the changes that are included in the bill which are intended to avoid the need for the cost of applying to a court for the appointment of a new trustee. I will now turn briefly to the specific clauses that are relevant to the issue we wish to raise.

The first relevant clause is clause 22, which is the clause that allows an administrator or an attorney for a trustee to appoint a new replacement trustee in quite discrete circumstances. The heart of the matter is clause 47, which is found in part 3, division 8, which is headed in the department document 'Vesting of trust property and devolution of trusts in public trustee on last continuing trustee with impaired capacity' for particular matters. Whereas the focus of clause 22 is on the appointment of a replacement trustee, clause 47 is focusing on the vesting of the trust property when the last continuing trustee has impaired capacity.

To get to the kernel of the issue, it is as simple as this. The drafting of division 8 has been based on the drafting of division 7. Division 7 is drafted on the basis that the last continuing trustee has died, whereas division 8 is about the last continuing trustee having impaired capacity. We believe that there are some additional considerations that are necessary when the last trustee is alive as against the trustee has died. For example, when the last continuing trustee has died, there is no need

to consider any mechanism to remove them because, by their death, they have already ceased to be the trustee and there is no need to consider whether the person regains capacity because, of course, they have already died.

We believe that the drafting of division 8 was on the basis that the last continuing trustee was going to have a permanent and complete loss of capacity, but we are keenly aware that people often have only temporary incapacity. At that point I will stop and I will inquire if you have any questions. I have some scenarios I can go through to explain a little bit more as to the practical impact. I also have some solutions for the drafting. I have prepared a more fulsome letter that explains what the issues are if at some stage you would like to consider that.

CHAIR: Thank you. We can have that tabled. Is that in addition to your submission that you have made?

Ms Williams: Yes, that is right. It goes into more detail. It highlights another technical issue with division 8.

CHAIR: We are happy to table that.

Mr McDONALD: Just as a clarification, is the example you just talked about and the solutions all included in that?

Ms Williams: That is right, yes.

CHAIR: I note in your solution to that issue you talked about a further clarifying subclause in those circumstances. I note—and this is published in the documents for this—that I found the departmental response to your specific point encouraging. They said—

> The submission is noted and consideration will be given to explicitly providing that if the last continuing trustee regains capacity, prior to being replaced by a new trustee under clause 47, then the last continuing trustee will remain as trustee on their regaining capacity ...

I found that encouraging from the department in dealing with what you had raised. I noted that it is something we will discuss as we draft the report for this. If the committee is happy, would you like to talk about some of those scenarios you mentioned that further establish your case?

Ms Williams: I will set out a scenario, if I could. It is scenario 1 that is in the paper that I have handed up. The scenario is that a QCAT order has been made over the last continuing trustee and that QCAT order is over the full financial matters for that adult. This is in circumstances where the trust documents do not provide for the easy removal of the person if they have impaired capacity. It is also in a situation where the administrator has chosen not to exercise their powers to appoint a new trustee. It is not mandatory; they do not have to exercise their powers in clause 22 to appoint a new trustee. Assume that has occurred and perhaps a few months later the matter goes back to QCAT and the adult is found to have full capacity; it was only a temporary incapacity and they get their affairs back. That is the scenario I am speaking to. In that scenario when the first QCAT order was made, that is the trigger for the trust property to vest in the Public Trustee under division 8. Despite the fact that there is that finding under the first QCAT order that the adult has incapacity, by law they still are the trustee.

Clause 47 envisages that the Public Trustee could appoint a new trustee to replace the last continuing trustee, and they are the key words: 'new' and 'replace'. However, we cannot appoint a new trustee to replace that person because, in fact, they continue to be the trustee. The problem is when the adult regains their capacity they will be trustee in name only because there has not been any divestment of the trust property back to—it is not re-vested back in the trustee, as the clause provides now. That is what we say is a problem.

The second scenario, if you go to scenario 2, is slightly different. This will assume that there has not been the second QCAT hearing and that the person continues to have an incapacity and we will assume there is an urgent need for the Public Trustee to take action, which we certainly have the power to under division 8. The problem is: under the common law, trustees must act unanimously. Therefore, the Public Trustee exercising those powers under the trust instrument would have to, by law, act unanimously with the trustee who has incapacity. We also say that there need to be some minor drafting changes so that there is not a situation where the actions of the Public Trustee would be arguably not binding on the trust because the decisions were not unanimous. They are the scenarios. I am aware of the time. If you wanted me to speak to the potential solutions—

CHAIR: Just briefly, that would be good.

Ms Williams: The starting point is that the Public Trustee does not want to be involved in the private affairs of Queenslanders unnecessarily. On that basis, the Public Trustee favours the solution that does not involve the legislative removal of the trustee on their incapacity because this will likely always require a document to be prepared to appoint them again. Also, the legislation is drafted on the basis that the trustee is to be replaced and so there would be no ability to replace them if they were automatically removed.

The change to the drafting that we see is needed is: when there is the set of circumstances that are outlined in clause 44, we say suspend the trustee's powers. In that way we are not having to act jointly with them. We say that there needs to be an additional trigger in clause 47 so that there is a divestment of the trust property from the Public Trustee back to the original trustee when they regain capacity. We say there needs to be a slight change to 47(2)(b) to make it clear that the property devolves to and re-vests back in that original trustee. We say the changes that I have proposed to 47(1) and (2) of course only apply if there has not been any new trustee appointed.

Another minor drafting change which allows for consistency—and what I am speaking to is in clauses 28 and 171(5). Both refer to the original trustee being discharged from their obligations under the trust when they are replaced. However, division 8, which speaks to the Public Trustee replacing the trustee, does not make any reference to the original trustee being discharged. We think that can be easily rectified by the addition of the words 'and division 8' in clause 28(1). I would submit that they are relatively minor drafting changes which would overcome the need for the Public Trustee to perhaps have to apply to a court for directions on such matters to overcome these difficulties.

Mr McDONALD: Thank you for your appearance and investigation into this matter and those suggestions. Do you as the Public Trustee look after the interests of children?

Ms Williams: Not generally. There is a provision in the Child Protection Act that if the child has some property the chief executive can refer a matter to the Public Trustee under section 93 of the Child Protection Act, but generally no.

Mr McDONALD: I was interested in some questions about the removal of a child as a trustee and what have you.

Ms Williams: No, we have many matters where the child is a beneficiary but not where they are the trustee.

Mr HART: Kathryn, are these issues that you presently have or are they triggered by the implementation of this?

Ms Williams: No, they will only come about as a result of the new bill.

Mr HART: As the chair said, the government response says they will consider that. Have you had an opportunity to look at the government response?

Ms Williams: Yes.

Mr HART: You said this is something that has only recently come to light. This bill has been under work for 10 years or something.

Ms Williams: Yes.

Mr HART: When did you discover these particular issues?

Ms Williams: I only identified them a day or two before the letter was written to the committee.

Mr HART: Have you had any discussions with the department about fixing this?

Ms Williams: We did at a late stage but it was too late by then. That is why it was necessary to come to the committee.

Mr HART: I think what you are suggesting sounds sensible to me, but I am not a lawyer.

Mr McDONALD: I do not know if you would be able to answer this, Kathryn, but, in terms of changing these matters, would that require the matter to go back to QCAT to have something signed or would it be a matter of a document being lodged with the court and are there timeframes that you would be aware of regarding that?

Ms Williams: Do you mean in relation to the trustee regaining capacity?

Mr McDONALD: Not being removed and the scenario that you have outlined, so losing capacity and then regaining capacity, and are you relying on QCAT or some other tribunal to say—

Ms Williams: Or the court, yes, that is right.

Mr McDONALD: What sort of timeframe are we looking at in terms of getting that before a court?

Ms Williams: It would depend on how quickly the adult could get the matter back before QCAT. For example, if it was a very temporary incapacity while someone was in hospital and they were able to then get a new medical report, it would be a matter of the availability of QCAT to have the matter brought back on. That would be brought back on by the adult.

Mr McDONALD: Do you know what the timeframe for those matters to get to QCAT is now?

Ms Williams: No, I could not speak to that. I know they are extremely busy.

CHAIR: As there are no other questions, that concludes this part of the hearing. Thank you very much, Kathryn, for your input.

Ms Williams: Thank you, members.

CHESTERMAN, Dr John, Public Advocate, Office of the Public Advocate

MATSUYAMA, Mr Yuu, Senior Legal Officer, Office of the Public Advocate

CHAIR: Good morning and welcome. Thank you for being a part of this hearing. Would you like to make an opening statement? After that we will have some questions for you.

Dr Chesterman: Good morning, committee members, and thank you for the opportunity to be here. I acknowledge that we are on the traditional lands of the Turrbal and Yagara peoples and I pay my respects to elders past, present and emerging.

As members of the committee know, as the Public Advocate for Queensland I undertake systemic advocacy to promote and protect the rights and interests of Queensland adults with impaired decision-making ability. There are several conditions that may affect a person's decision-making ability including intellectual disability, acquired brain injury, mental illness, neurological disorders such as dementia, or alcohol and drug misuse. As members would note from my submission, my contribution to today's discussion is on a relatively narrow issue which is relevant to adults with impaired decision-making ability.

As I noted in my submission, clause 22 of the bill proposes to create a new power for an administrator or attorney to appoint a trustee. This is proposed to occur when the trustee, or the last remaining trustee where there is more than one, no longer has the capacity to administer a trust. If an administrator has been appointed under the Guardianship and Administration Act or an attorney exists as a result of their appointment under an enduring power of attorney and they have been appointed to make all decisions for all financial matters, the effect of clause 22 would be that they are then able to appoint a trustee and that the provisions of the guardianship legislation and the powers of attorney legislation would not apply to their appointment of a trustee. There are a number of problems here.

In a nutshell, the main concerns are these: a person who is appointed by a tribunal as administrator or by a person as their attorney will rarely know they might have the role of appointing a trustee in the circumstances envisaged by clause 22; nor, quite likely, would the tribunal or the principal, in making the appointment of the administrator or attorney, know that the person they are appointing could themselves one day be able to appoint a trustee. This is an automatic appointment that the attorney or administrator would be able to exercise even though the principal in the case of an attorney, or the tribunal in the case of an administrator, may never have intended this. This goes against the idea of only appointing substitute decision-makers to roles either specifically envisaged by the principal or that the tribunal determines are needed.

Clause 22 specifies, as I mentioned, that neither the guardianship legislation nor the powers of attorney legislation applies to the attorney or administrator when it comes to their role of appointing the trustee. This creates other problems. This means the legislation governing the roles of administrator and attorney, indeed the legislation responsible for their appointment, would be irrelevant to their role in appointing a trustee. That would be odd.

There are other flow-on concerns to which this gives rise. The responsibilities of administrators and attorneys under the guardianship and powers of attorney legislation are slightly different to their potential role under the Trusts Bill. I can elaborate on that if need be. If the guardianship and powers of attorney legislation do not apply to the appointment by an administrator or attorney of a trustee, where do you go, if there are problems with the appointment or nonappointment of a trustee, what role would QCAT have?

In terms of a potential solution, I note in my submission that the ideal solution would be for the new trusts legislation to develop a system, including principles and a framework, specifically made to reflect the specialised nature of trusts and the appointment of trustees when a person loses capacity to act as a trustee. An alternative is simply to remove the clause 22 process and utilise the existing bill's clauses 44 and 45 and following process that sees the Public Trustee put in place where the last trustee is determined by a court or QCAT or interstate equivalent to have impaired capacity in relation to all financial matters or in relation to administering the trust.

Having said that, I note the Public Trustee's submission that the bill does not cater for a trustee potentially regaining the capacity to make financial decisions. I know that the committee has just been engaging with the Public Trustee representative on this. That could be addressed, as the Public Trustee suggests, by enabling the Public Trustee to withdraw and the trustee to regain their role where a court or QCAT makes an appropriate determination.

Thanks again for the opportunity to comment on the Trusts Bill. I welcome members' questions and observations.

CHAIR: Thank you very much. You would have read the departmental response to your submission. Is there anything in that that assuaged any of the concerns that you may have had?

Dr Chesterman: I have read the departmental response. I agree with the department that we are talking about reasonably rare scenarios in which the clause 22 appointment process would be used. The argument is, for instance, there is no conflict between an attorney's or administrator's roles under the trusts legislation as against their roles under the powers of attorney and guardianship legislation because guardianship and powers of attorney legislation would not apply. However, it still sits uncomfortably with me the idea that an appointment is under those pieces of legislation which do not then govern the way that a person acts in this role. It is just odd.

CHAIR: Probably the crux of the response there is that there are other albeit more expensive mechanisms that can be used such as applying to a court. One of the important things for you is that there is a greater liquidity, shall we say, or something that can work in a rapid manner and not such an expensive manner; would that be correct?

Dr Chesterman: Yes. I share the department's concerns about trying to find faster and less costly solutions to the situation where the trustee or the last remaining trustee loses decision-making ability. It is a matter of finding a solution that sits more comfortably. In its response, the department also made the correct point that the attorney or administrator would not have to exercise their power if they did not feel comfortable doing so, but I suggest that there would be quite a bit of pressure for the reasons we are just talking about now, that the alternative is to have an expensive application to a court. In my submission I raised the possibility that someone could apply to QCAT to be appointed as administrator for all financial decisions in order to then have the power to appoint a trustee. The department response was that this was not envisaged by the legislation. I still do not see how it would not be possible. That is another problem in how these multiple pieces of legislation fit together.

Mr HART: In the government response they have suggested that clause 22 only applies to trusts that are made after the commencement of the bill, so a new trust, and that in writing the trust you can overcome clause 22 anyway. Does that solve the issue?

Dr Chesterman: Yes, that is a preventive step that could be taken—absolutely. Perhaps I should have mentioned that in response to the previous question. That is where we would want the emphasis to be placed, to make sure people are aware of what might happen if the last remaining trustee becomes unable to make decisions.

Mr HART: Again, I am not a lawyer, but I would imagine that someone writing a trust would become aware that this might be an issue and maybe consider writing the trust in such a way to overcome that if they foresee that being an issue. Do we need to consider any sort of education process moving forward to make sure people are aware of that, or is it just a natural thing that we write trusts?

Dr Chesterman: I know that the committee will be hearing from the Queensland Law Society next. I would think the focus of education would be on lawyers who are assisting people to draft trust documents to cater for all contingencies, including the one that we are talking about now.

CHAIR: There being no further questions, I thank you very much, Dr Chesterman and Mr Matsuyama, for your contribution to this hearing. I know it is a big bill and a lot has gone into it. We really appreciate your insight.

Dr Chesterman: Thanks for having us here.

GASTON, Ms Karen, Member, Succession Law Committee, Queensland Law Society

LIPSETT, Ms Jessica, Member, Not for Profit Law Committee, Queensland Law Society

SMITH, Ms Sonia, Special Counsel Legal Policy, Queensland Law Society

CHAIR: Good morning. I invite you to make an opening statement, after which we will have some questions.

Ms Smith: Thank you for inviting the Queensland Law Society to appear today. In opening, I would like to respectfully recognise the traditional owners and custodians of the land on which we meet. As the committee may be aware, the Queensland Law Society is the peak professional body for the state's legal practitioners. We are an independent, apolitical representative body that promotes good, evidence-based law and policy.

The society generally supports the objectives of the bill to modernise and simplify the Trusts Act and address the gaps in the act. The society has advocated for reform to the Trusts Act over many years, including supporting the Queensland Law Reform Commission's call for new trust legislation that does not codify the existing law. The society appreciates being given the opportunity to comment on earlier drafts of the bill; however, we believe there are aspects of the bill that require additional consideration. In this respect, I refer to our submission dated 26 June 2024.

I would like to briefly mention an opportunity for modernisation that has been missed, which is in relation to prescribing the minimum number of trustees under clause 27 of the bill. In the society's view, the minimum trustee requirement under subclause 27(b) should be one individual, rather than two individuals, to reflect modern family structures. Our members are often approached by individuals such as sole parents who may have been divorced or widowed who wish to set up a trust for their children or remove an ex partner as trustee. It would be artificial to require a sole parent to appoint a second person as trustee or set up a company to act as trustee for the management of their financial affairs. In our view, the minimum requirement under the bill should be one individual, unless a trust instrument specifically requires two or more.

There is a second issue which requires further clarification regarding part 13 of the bill. Having opportunity to consider the department's response to submissions on this point, the society continues to recommend a further amendment to the bill. The transitional provisions in the bill are only part of the solution. An additional section is needed to maintain the validity of distributions by certain ancillary funds after this bill is passed. This is a highly technical issue and we can speak to this further today if time permits, or we can provide a supplementary submission after the hearing.

One further point for clarification arises from the department's response to our submission in relation to clause 49 of the bill which raises technical, estate and trust related issues. Again, we would be happy to speak about this in more detail today, if time permits, or we can provide a supplementary submission.

Today I am joined by Karen Gaston, a member of our Succession Law Committee, and Jessica Lipsett, a member of our Not for Profit Law Committee, who can elaborate further on these matters and the other matters in our written submission. We welcome any questions the committee may have.

CHAIR: Thank you very much. On the issue of minimum trust requirements, as you can see by their response, the department have said there is a longstanding position, that the QLRC recommended there still be two trustees and that it can be varied by a trust instrument. These are legitimate responses by the department. However, what you have said is, 'Let's reflect modern society, where it is more common to have one person as trustee.' That is something that has moved beyond consideration of the black-letter law, saying, 'Let's take in the wider societal trends so we can really modernise that.' Do I have that right, or do you want to elaborate further—we do have a little bit of time—on your point on this particular clause?

Ms Smith: Yes, that is right. My colleague Karen would be happy to elaborate further on that point.

Ms Gaston: What you say is correct. We have moved beyond black-letter law, but, in respect of black-letter law, having seen the department's response, I did take the opportunity to sit down and have a look at our current Trusts Act to try to identify a requirement such as the one that is put in the bill that is presently before the House which requires, from the establishment of a trust, that there be a minimum number of two individual trustees, and that requirement is not in our current Trusts Act. What there are, though, are various requirements. For example, under clauses 12, 14 and 16, if you wish to make any changes using the Trusts Act to trustees—you want to change trustees; people

want to retire—there is a requirement that there remain two individual trustees. However, this bill proposes, from the get-go, that you cannot adequately establish a trust unless there are two trustees. It is a fine distinction, but I thought it was one worth making. I understand why the response from the department has been as they have framed it, but it is a subtle difference. I do think it is a policy consideration, obviously, for the House to determine whether they want to move beyond those recommendations.

Mr BROWN: Are there any other jurisdictions that have gone down to one in Australia?

Ms Smith: I am not aware of that, but we could have a look into it.

Ms Gaston: We might have to take it as a question on notice.

Mr BROWN: Yes, please. Thank you.

Mr HART: With regard to there being only one trustee, right at the start, are there any consequences then to replacing that trustee if there is only one of them? I can see the advantage of there being two trustees—if something happens to one of them, the other one can appoint another trustee to take their place—but what happens when there is only one and that trustee is gone, for one reason or another—impairment or incapacity? Do you have to go to court or somewhere else to appoint that trustee? What if the beneficiary is not in a position to appoint that trustee? You have me at a disadvantage; I am not a lawyer.

Ms Gaston: No, but they are very sensible questions and I understand perfectly the point you are making. The short answer to that question is: for the members of the Law Society who regularly practise in the estate planning space, this is absolutely one of the things they are talking to their clients about. For example, they might put in place a succession for the role of that trustee. They realise they have one individual trustee and what they can do is prepare a deed ahead of time, a bit like you would prepare a will, that says what you want to happen on your death and, in terms of a power of attorney, what you would like to happen on your incapacity. You can do that in a deed and you can set that up ahead of time, so that you have already put that in place and you do not need to rely on the provisions of the Trusts Act—the current one or the proposed one—to assist you to change trustee, for example. That is a regular thing that happens in solicitors' offices all around Queensland.

In the circumstances where that deed has not been done, many trust deeds say that the legal personal representative of the last surviving trustee can appoint a new trustee, and in that gap in between there being a named trustee who has died and a new trustee who takes up the appointment, it is actually the Public Trustee who sits in that space for a little period of time until a new person is appointed.

Mr HART: In the instance of a married couple having some form of trust over one of their children or something like that, and they split up, or there is only one right at the start, what would happen? Our job is to make sure there are no unintended consequences of these things coming into play.

Ms Gaston: Of course.

Mr HART: I am a bit concerned about there just being one trustee and I consider the department's response that says we should have two for that very reason. Do you think that can be overcome just with the normal processes of solicitors writing trusts?

Ms Gaston: It has certainly been my experience over 20-odd years of practice. Of course, if people are interested in setting up a trust, they are usually interested in their estate planning and making sure their affairs are in order. Of course there are no guarantees.

Mr HART: Let's go the other way, then: what is the problem with there being two people as a minimum for a trust? What do you see as a real issue there?

Ms Gaston: I think the real issue is finding a second person. In an example where you have had a spouse pass away or you have separated and you are now the person who has control of a trust, you have to now find a second trustee. Who is that going to be? You do not want it to be a new partner. With children, for example, that it is set up to benefit, together with that person you end up with perhaps one child being appointed and then you start to get divisions amongst children because there is only one person can make a decision. What happens when we have—it is another part of the submission—a minimum of four trustees? What happens if you have five children? How do you deal with that sensibly if you want to appoint all of your children to that role? There are things that start to emerge mostly that then fall into a dispute space. You can imagine that if, for example, a natural parent appointed their new partner, it could lead to a lot of issues if then something happened to the natural parent.

Really, a trustee is the gatekeeper of the trust, and it is very hard sometimes to find the right person for that role that then does not end up with a number of disputes. My area of practice is predominantly in the area of disputes. I probably see a disproportionately large number of those, but certainly that is a growing area, a growing trend.

Mr McDONALD: I really want to continue that conversation. Sonia, earlier you said that it really creates an artificial situation where you have to grab somebody—a lone parent or whatever, as another example. Am I right to understand that when you have two trustees they both have to agree?

Ms Gaston: Correct. That is my understanding.

Mr McDONALD: So you have to have a unanimous decision. Is there some rationale of applying that sort of thinking to this space as well, from the government's response?

Ms Gaston: Partly. That is potentially another issue. There is not an express provision in the Trusts Act that I am aware of—I might have to take that as a question on notice—but there certainly is in the Succession Act that executors must make a unanimous decision. If you have up to four of them, it is really hard to get agreement sometimes, particularly if they are not as aligned as a parent would be looking after their children, for example. It can create issues. That is also sitting behind that submission.

Mr HART: It can also cause a problem if there is only one that does not have the best interests of the beneficiary—

Ms Gaston: That is also a really good point. While you get some certainty and you minimise disputes, you also increase the chances of having an autocrat appointed to that role. You are right. There is safety in having a check and a balance, but it is nevertheless a consideration that we raise.

Mr McDONALD: They are great points.

CHAIR: There was another issue that you wanted to talk about in detail.

Ms Lipsett: Thank you for the opportunity to provide some further clarification on this issue. Effectively, in respect of charitable trusts, our submissions regarding part 13 of the bill sought for that part to operate with retrospective effect but then also recommended that the approach taken in Western Australia and their Charitable Trusts Act 2022, and specifically section 53 of that act, be implemented. With the benefit of reviewing the department's response, it would actually be more correct to say that we would be seeking an equivalent provision of section 53 of the WA act to be incorporated into part 13 of the bill and for that provision to have both retrospective and prospective effect.

I will just explain the history and the effect of the issue as simply as possible. There are a small number of ancillary funds. An ancillary fund is effectively a type of charitable trust which distributes money to deductible gift recipients which have been operating under a power that is conferred by the current Trusts Act which allows them to distribute to DGRs which are not charitable and would not be charitable but for their connection to government but remain a charitable trust at Queensland law.

There are changes to the Charities Act and the Income Tax Assessment Act at the federal level which have preserved the status of those charitable trusts under federal law, but the effect of the new bill without that section 53 that we are seeking is that that small subset of ancillary funds will no longer be considered a charitable trust under Queensland law unless that equivalent provision is incorporated.

The change we are seeking is effectively to preserve the status quo for those particular ancillary funds or charitable trusts so that they can continue to distribute, as they have under the current Trusts Act, and still maintain their eligibility to federal income tax exemptions as well as their status as a charitable trust under Queensland law.

The basis of those submissions, though, is fairly technical and really does get into the history of our current Trusts Act as well as the Charities Act and the Income Tax Assessment Act. If it would be helpful, we would be happy to provide a further submission on this issue alone.

CHAIR: Yes. It would be useful if you could provide a further submission on that and the issue we just discussed about the minimum number of trustees. If you could get back to us, that will essentially be a question on notice.

Mr BROWN: If this comes into effect, what sorts of organisations would miss out?

Mr HART: Just be careful about how you answer that. That was going to be my question.

Mr BROWN: Can you give us some specific examples?

Mr HART: Or types of charities.

Ms Lipsett: Absolutely. Ancillary funds are a particular type of charitable trust. Where you see that is in your large foundations, for example. An ancillary fund is effectively a vehicle for fundraising and philanthropy. Their sole purpose is to raise money which they are able to issue a tax receipt for. They are endorsed deductible gift recipients under federal income tax legislation. Then they distribute money to other charitable deductible gift recipients.

There have been, however, charitable trusts and ancillary funds which have this power under the current Trusts Act to distribute to DGRs which are not in fact charitable. There are some notable examples there, particularly under the sports and recreation categories in the Income Tax Assessment Act. The Australian Sports Foundation is a good example of the types of DGRs that would no longer be able to receive distributions from a charitable trust that is relying on these provisions in Queensland under the new bill.

Mr HART: Could that be some form of gambling trust or distribution mechanism?

Ms Lipsett: I do not believe so, no, but I would have to take that question on notice.

Mr HART: You said 'government related' in your opening statement.

Ms Lipsett: Yes. Under federal income tax law—again, the Income Tax Assessment Act—there are categories of deductible gift recipient. Most deductible gift recipients, as I said, are required to be a charity. Under the Charities Act—again at the federal level—government entities or entities that have a connection to government cannot be charities, but there is the permission or the ability for ancillary funds to distribute to DGRs that would be charities but for their connection to government. Primarily, the examples that we would be looking at there are things like hospital foundations or museums or art galleries—those types of organisations that do have that government connection but are otherwise charitable in nature.

Mr HART: That is important.

Mr BROWN: P&Cs?

Ms Lipsett: P&Cs—again, I would have to take that on notice.

Mr BROWN: Private schools?

Ms Lipsett: Private schools are charities in their own right because they are not directly connected to government.

Mr HART: Is the society happy with the department's response around this particular issue?

Ms Lipsett: The department's response effectively refers to one of the transitional provisions, which is clause 307 of the current bill. That addresses the issue retrospectively but it does not preserve the status quo prospectively for this particular type of ancillary fund. It does regularise issues that have occurred in the past but it does not preserve that status quo moving forward and the ability of those trusts to make these distributions, as is permitted by their trust deed and as has been allowed under the current Trusts Act.

Mr HART: It sounds pretty important.

CHAIR: It does.

Mr McDONALD: I am thinking of the example of what happened with the chaplaincy. Scripture Union lost their tax deductible status and then there were changes in arrangements there. Are these provisions going to be more restrictive or less restrictive?

Ms Lipsett: They will be less restrictive in a sense because it does allow the ancillary funds that exist in Queensland as charitable trusts to distribute to a broader group of deductible gift recipients than is currently reflected in the charities law and in the income tax law at the federal level, but that status quo has specifically been reserved under those pieces of federal legislation for these types of trusts. The changes that we are proposing would be consistent with the federal law in this area.

To your question about the example where an organisation lost its deductible gift recipient status, the trusts that we are talking about would still be restricted to donating to endorsed DGRs. If an organisation were to lose its DGR status, be it charitable or not, an ancillary fund would not be able to make distributions to that organisation.

Mr HART: Jessica, what happens if this bill goes through as written and one of these groups does make a donation to somebody who is not eligible to receive it under their trust? What are the consequences of that?

Ms Lipsett: Effectively, that organisation would no longer be considered a charitable trust in Queensland law, regardless of whether they made that distribution or not after this bill is passed, so the provisions and the powers conferred by the act in relation to charitable trusts would no longer apply. Arguably, you have the jurisdiction of the court, and also the powers of the Attorney-General, as the protector of charitable trusts in Queensland, would no longer be applicable to that trust.

Mr McDONALD: Should we change that, though, to allow that to still happen even though they lose their tax deductible status?

Ms Lipsett: Just to clarify, these organisations would be able to maintain their tax deductible status. That has already been preserved at federal law. What we are proposing is a change to the Queensland law that would maintain their status as a charitable trust in Queensland in conjunction with that.

CHAIR: Thank you for that. Are there any further questions on that?

Mr HART: Not on the record, no.

CHAIR: Are there any other issues in your submission that you wanted to raise in light of the departmental response?

Ms Smith: Yes, we have one more point we would like to raise which Karen will speak about.

Ms Gaston: It is again a technical one and it relates to clause 49, which is dealing with renunciation of probate. The point that the society wishes to make there is that all estates are, in effect, a bare trust. If one renounces probate, one should also be renouncing trusteeship of the bare trust that is associated with that estate. Estates themselves sometimes also establish then out of that estate a further testamentary trust. At the conclusion of the estate administration, what happens is another trust is established and the estate is distributed into that new testamentary trust.

The QLS submission was really directed to making sure that if somebody renounces probate they are not also renouncing the trusteeship of those later testamentary trusts that might be set up within a will. As I said, it is a fairly technical point. We could just see in the response from the department that perhaps they might not have appreciated the fine point we were endeavouring to make.

CHAIR: I am looking at the response. It is just a couple of sentences. You might want to provide a further submission on that, bearing in mind what the department have said there.

Ms Gaston: Certainly, yes. Other than that, that is all I wish to say on that point.

Mr McDONALD: I asked a question earlier of the Public Trustee around the court process and tribunals and the delays that are being experienced at the moment with the workload of QCAT. Have you turned your mind to that or can you help the committee with some processes in this area—gaining instruments or whatever it might be—that could alleviate some of those timeframes?

Ms Gaston: The difficulty is that the jurisdiction of QCAT is not something that we are usually dealing with when we are dealing with trusts. It is usually a matter that is dealt with in the Supreme Court. That is not to say there are no examples of that, but if there is an increase and a need to approach the court it is the Supreme Court rather than QCAT. I am not sure that there are any particular savings to alleviate the workload of QCAT—which is, of course, enormous.

Mr SMITH: I want to go back to clause 27 around the minimum trustee requirements. I think you said that under the current act there is not a requirement for more than one trustee to create a trust; is that correct?

Ms Gaston: When a trust is established—that is right. There are provisions in clauses 12, 14 and 16 that talk about if you are going to change a trustee there is a requirement to fill up numbers, but there is no section in that act I think that says, 'When you begin a trust you must have two trustees.'

Mr SMITH: Clause 27 of this bill does not change that. Clause 27(c) states, 'If only 1 trustee was originally appointed'. You have to have a minimum of 'at least' one trustee. This bill does not say that you must have a minimum of two trustees to create a trust, though, does it?

Ms Gaston: Let me just go to that provision so that I can address your question directly.

Mr SMITH: It is just on the discharge and removal of trustees, not on the creation of trusts.

Ms Gaston: Clause 27 talks about if only one trustee was appointed, but we are really talking about from the commencement of a new trust. I am not sure how that provision applies in those circumstances.

Mr SMITH: I am asking: is there anything in this bill that says that there must be a minimum of two trustees to a new trust?

Ms Gaston: That is what I understood clause 27 to be directed towards. It is a minimum trustee requirement.

Mr SMITH: The way I am reading it is that division 3 relates to the discharge and removal of trustees, not the creation of a trust. My understanding is that 27(c) is just saying that if you are going to discharge one trustee from one trust it must be replaced with at least one trustee. It is not saying that you have to create a minimum of two trustees to the new trust. Perhaps you might be able to take that on notice and get some further clarification.

Ms Gaston: Yes, of course.

CHAIR: We will communicate fully with you afterwards about the parameters of the questions on notice.

Mr HART: Jess, if I can go back to the charitable trusts, I am not sure if the community gambling fund is set up under a trustee system or anything like that. Would this issue impact on it being able to distribute funds to some of the entities it does presently?

Ms Lipsett: I must admit I am not entirely sure about whether the community gambling fund is an endorsed ancillary fund or not. I would need to understand that before addressing the question, but I am happy to take that on notice.

Mr HART: Thank you. That would be good.

Ms Lipsett: There is potentially one more issue from a charitable trust perspective which, again, if we have the time—

CHAIR: Yes, we are happy to hear that.

Ms Lipsett: There was one issue in relation to clause 208(1)(b) of the bill which deals with cy pres applications. Having seen the department's response, effectively the issue we raised was an eligibility threshold for cy pres applications to the Attorney-General. That is a very welcome inclusion in the bill, but the eligibility criteria there was that the purposes of the trust had not previously been changed by a court. The department's response states that if a cy pres scheme had previously been ordered by a court then the court would have familiarity and jurisdiction in relation to the matter. Our view on that would be that it perhaps does not fully appreciate the nature of charitable trusts being a trust that can exist in perpetuity, so you do not have any time limit on the number of years that a charitable trust can operate.

If the expectation is that the court will have familiarity with the matter, what that is probably not appreciating is the fact that a charitable trust could have sought a cy pres application quite literally decades prior. We would still maintain that it would be appropriate to review that eligibility criteria. The ability to apply to the Attorney-General rather than the court will be a significant cost saving for smaller charities, so it does not strike us as entirely fair that they would be excluded from the ability to make that application on the basis of a historical application that, quite frankly, they may not even be aware of, given the amount of time that has passed.

Mr HART: What is the consequence, then, of the Attorney-General making a decision on something that has been decided by the court recently?

Ms Lipsett: That is a good question and one that we can take on notice and make a further submission on, given that we are making one already.

Mr HART: It is a conflict of the two things, isn't it?

Ms Lipsett: I appreciate that. Absolutely.

CHAIR: We have essentially four issues which we would appreciate further submission on. We are quite happy to raise those with the department once we get those. Dr Ward will be going through the transcript and will specifically communicate with you what we are after. Are there any other questions?

Mr HART: No, you have totally confused me.

Mr McDONALD: Thank you for your attention.

CHAIR: Thank you very much for that. Dr Ward, what time do we need those back by? They might be substantial, so we may need a little bit more time.

Dr Ward: I was going to say tomorrow, but I will work with you on getting it to us as soon as possible, please.

Ms Gaston: Okay.

CHAIR: Thank you very much for your detailed consideration of this. We will be happy to take up those issues that you have highlighted.

RAE, Ms Angela, Chair, Society of Trust and Estate Practitioners

CHAIR: Thank you very much for your patience today. We notice you have been watching this unfold today and you have probably taken in a lot of what has been said.

Ms Rae: Thank you for allowing me to observe. I could see in the departmental response that there were some similarities in issues raised by a number of organisations and I was interested to see what they had to say. Thank you.

CHAIR: I invite you to make an opening statement. After that, we will have some questions for you.

Ms Rae: Thank you very much to the committee. I acknowledge the traditional owners of the land on which we are meeting today. STEP is a global organisation that is composed in Queensland principally of lawyers but also a number of accountants and financial planners and on a global basis of a mixture of those three professions. The Queensland branch has engaged at various stages of the consultation with the bill. I thank the committee and the department for enabling us to participate in that.

There are really two broad categories of things that I wanted to raise before the committee in relation to the bill. One is specific to clause 22, which the committee has heard quite a bit about this morning. There are some further things I want to say about that. The first thing I would say is that trusts are a very broad area and encompass a very wide range of purposes and structures. A single piece of legislation that encompasses all of those types of structures inevitably has a lot of work to do, sometimes in different areas, because people establish trusts or have them established for them—and sometimes imposed by the court—for all sorts of reasons.

A lot of the things the committee has heard about this morning are particularly family related, but some are very large trading trusts or commercial trusts and some are very large charitable trusts that, again, are established for quite different purposes. It is entirely appropriate that there is a single point where all of the obligations and duties, and rights and responsibilities, about that are collected, in the same way as we do for corporations. There are a number of things that we have said in our written submission where there is perhaps a degree of uncomfortableness in applying a particular provision across all types of trust. The departmental response has acknowledged that to an extent, but I wanted to raise that explicitly.

Beginning at clause 6, the bill defines trusts to include implied, resulting, bare and constructive trusts, and implied, resulting and constructive trusts in particular tend to be creatures of court creation. Resulting trusts and particularly constructive trusts are often applied remedially to solve a particular problem that might involve a wrongdoer, for example, absconding with or misappropriating funds that ought to belong to another person. We have mentioned in our submissions that, by limiting the types of people who can be trustees to exclude, for example, bankrupts, that might limit the ability of the court to impose constructive trust remedies over, for example, a bankrupt who has absconded with funds who might then be directed to hold funds on constructive trust for the benefit of whoever the victim of the wrongdoing was. The department have acknowledged in their response that that is a potential issue, and we thank them for that acknowledgement.

There are some other areas, for example, in section 80, where there is a power for a trustee to provide a residence for a beneficiary to live in. In our submission that is entirely appropriate for many types of trusts but, for example, in a trading trust or perhaps even in a constructive trust that would not be an appropriate power to be exercised. The department's response is largely that that power is bounded by the purpose and the nature of the trust itself. That to an extent is true, but our concern is that, by providing a blanket power that cannot be excluded by a trust instrument, if a trustee then exercises the power inappropriately that can only be remedied by application to a court, which is expensive and difficult.

Where in our submissions we have identified that particular powers or rights or responsibilities might need some more nuanced application in particular types of trust there is no criticism of the bill; it is simply an acknowledgement that this is dealing with a very broad range of structures that are created, sometimes for express and well-identified purposes and sometimes by the court for remedial purposes and sometimes for historical or almost accidental reasons. Where that is the case, we have identified in our submission as best we can—and there are not many instances—where we think a little bit more nuance might need to be provided or particular powers or rights ought to be excludable by the trust instrument.

That is what I wanted to say about that. The other thing I wanted to raise is in relation to clause 22. That is the clause that the committee has heard a great deal about today and that is the power to replace the last surviving trustee who has lost capacity. We acknowledge the intent behind this

clause. It appears in a suite of clauses relating to replacing the last surviving trustee in particular circumstances. In my organisation's submission, this is different from, for example, the situation where the last surviving trustee has died or the last surviving trustee is a bankrupt.

The situation where the last surviving trustee has lost capacity is different for a couple of reasons: firstly, because they are still alive; and, secondly, because there is often a question, a real factual question, about whether, in fact, capacity has been lost—and I note that some of the other bodies have talked about capacity being fluctuating and perhaps returning, and that is a live issue. A further problem that we see is where there is a borderline question of capacity that is sometimes resolved on an informal basis and then steps taken that can really only be overseen by the court or QCAT.

I will put our position this way. We acknowledge that clause 22 deals with a very limited set of circumstances and we acknowledge that the intention is to avoid a costly court application and we acknowledge—and I am a barrister; I entirely understand the difficulty and expense involved in a court application. However, this is a very confined set of circumstances in which clause 22 could apply. There needs to be only one surviving trustee; they need to have lost capacity—and that is a factual question that is frequently difficult to determine, even for QCAT and the court; there needs to be no appointor or no appointor who has been prepared to exercise their power of appointment or to do so within a reasonable period of time; and the person with impaired capacity or putatively impaired capacity needs to have an enduring attorney or an administrator who has been appointed by the tribunal who has power for all financial matters for that trustee. That is already a limited set of circumstances.

The types of situations where that would arise would potentially involve quite vulnerable people. An example would be a family trust that is perhaps a discretionary trust where the principal beneficiary of the trust is mum or dad who happens also to be the sole trustee. Their capacity is going downhill. They have an enduring attorney who is one but not all of their children whose power commences immediately. Their ability to exercise power for their principal exists under the terms of the instrument before they have lost capacity, so that enduring attorney is perhaps in the habit of making decisions already because they are empowered to do so.

They discover that clause 22 exists and think, 'Oh well, mum or dad is going downhill. Perhaps I should replace them as trustee while I know that I can.' They might not take a very nuanced examination. There is no oversight about the question of whether their principal has in fact lost capacity. They replace the trustee, and the trustee is then replaced. They may replace the trustee by themselves, who is one out of a number of children. They might be secondary beneficiaries of this family discretionary trust and then exercise their powers of discretion for their own benefit rather than the benefit of the person they have replaced. This could be a problem where you have somebody who is of borderline capacity and is increasingly vulnerable. That power is exercisable with no oversight at all.

I appreciate that I am speaking at some length here. We acknowledge the intent to avoid an expensive court application, but it seems to us that this has the potential to impact disproportionately upon living vulnerable people and could only then be remedied by application to QCAT, which is extremely busy and the wait times are often, I hesitate to say, prohibitive but very long—or the court, which is, again, very expensive. It is possible that, by trying to avoid the need for an expensive court process, the only way to introduce any oversight is to have a court application at a later stage which is probably more expensive than what might be an unopposed application simply to authorise the replacement of a trustee, as opposed to engaging in a detailed examination of things that have now already happened and need to be unwound.

Mr HART: What happens now?

Ms Rae: At present, there is no provision like clause 22, or indeed clause 21, which provides for replacement of the last trustee who is dead—so their executor could provide a replacement—or last surviving trustee who is bankrupt. Again, none of those provisions presently exist.

We think allowing an executor to replace the last trustee who has now died is probably appropriate, and likewise with a bankrupt trustee. In the case of a trustee who has died, they are dead. To the extent that there are vulnerability concerns that I have expressed, that no longer applies so much. Also, in our experience, executors tend to act more cautiously and obtain more advice as they go along. There is a well-understood process, a fairly systematic process, for dealing with an estate and it is very common for executors to get advice in a systematic way throughout that process. If replacing a trustee formed part of that process, it would happen in a fairly systematic way most of

the time. Likewise, bankruptcy trustees are professional trustees and understand their obligations and are unlikely to make arbitrary decisions off the cuff because they have suddenly discovered that they have a power they did not know they had.

Presently, if you had a last surviving trustee who is thought to have potentially lost capacity, you would need a determination of capacity, which could happen in QCAT or in the court, and there would be some oversight about that. That would be heavily informed by medical evidence. If the tribunal or the court were satisfied that they had lost capacity, it would be necessary for them to be replaced and the court could replace that. That could be done by a fairly straightforward application with fairly straightforward evidence and may well be unopposed. I am not saying that there is no cost to that—of course there is a cost to that—but it is a lower cost than discovering after the fact that somebody has been replaced perhaps in a kneejerk fashion. Again, in our experience, for attorneys under enduring powers, the purpose of their appointment is to make decisions sometimes quickly and sometimes on the fly for the protection of a living person, so the way they go about making their decisions is often quite different from the way an executor goes about making their decisions.

Mr HART: To summarise all of that, if I am right, presently you would have to go to the court on some fast-track process.

Ms Rae: And you can get before the court within three days.

Mr HART: This change means that, if there is a mistake or something goes wrong in the process under clause 22, you would go back to the court in a longer sort of process; is that correct?

Ms Rae: Much longer. What we fear could happen is that a trustee might be replaced by somebody whose interests were in conflict with the existing beneficiaries. That replacement might not be discovered for some time. Even if it were discovered within a matter of days or weeks, that is a period of time within which assets can be distributed or depleted or dealt with in some way that is not for the benefit of the principal beneficiary. By the time that is discovered, that would need to be unwound. There is quite a bit of forensic evidence that would then be required to work out what had happened, why it had happened and whether, and if so how, it could be unwound.

Mr HART: When someone passes away at the moment, isn't everything sort of frozen?

Ms Rae: Yes. When somebody passes away, we do not have any problem with clause 21—

Mr HART: I get the difference with clause 22.

Ms Rae: When somebody passes away, things are not entirely but largely held in a status quo, but where you have a living person that is not the case. Our position is that clause 22 is a nice idea but not good in practice and we do not support the inclusion of it in the bill. In our view, it deals with a very small set of circumstances where court oversight is actually very important. While that comes with a cost, we think there is a protective aspect to that which is very important.

Mr McDONALD: Thank you for your summary, Angela. It is very enlightening. In terms of your address before, you said that QCAT was prohibitive with the timeframes.

Ms Rae: Sorry, that is a very big word that I am reluctant to use. QCAT's ability to hear matters quickly is variable throughout the year, and at certain times it is very difficult to get hearings within a quick timeframe. It is always possible to get an urgent hearing on a very limited basis, although the process for getting an urgent hearing is sometimes opaque. QCAT does an incredible job with very limited resources. I appear in QCAT; it is always a pleasure to appear in QCAT. However, because of the range of things that it deals with and the limits on its resources, given the wide range of things it needs to deal with, it is not always capable of moving quickly. This is no criticism of QCAT at all, but because it is a forum which is designed to be used without legal representation, they have to go through entirely appropriately very detailed procedures to ensure that all parties who are unrepresented understand what they need to do and by what timeframe and so on and all of that adds to the time. All of that is very important, but it does mean that it is not a quick route to a solution.

Mr McDONALD: Could you give us some examples of time with QCAT? Are we talking two months or 18 months?

Ms Rae: Depending on the particular type of matter, either of those things is possible, and longer than 18 months is possible. That should not be taken as any criticism of QCAT at all. As I said, I appear before QCAT and it is always a pleasure to do it. They do an incredible amount of work with very limited resources.

CHAIR: Before we finish, are there any other issues that you want to touch on again after having a look at the government submission?

Ms Rae: There was one thing. In relation to clause 55, we made a very short point submission that there should be a provision that says that a custodian trustee may insure and defend trust property. From the department's response, I wonder whether that was taken as a submission that they should be required to do so rather than simply enabled to do so.

CHAIR: That is a subtle but important point.

Ms Rae: Yes. To clarify, we do not submit that they should be required to do so—simply that if the managing trustee for any reason is not able to do so in a timeframe the custodian trustee should have the ability to insure and defend trust property.

CHAIR: We might communicate to the department to ask that specific question—whether they were under the impression that the submission was about the requirement to insure instead of enabling them to do so if they wish. We might send a letter to the department asking them to clarify their particular response in light of the information that Angela has given today.

Ms Rae: To be clear, I do not think that is a critical point. I am just not sure it was taken in the manner that we intended it to be taken.

CHAIR: Let us clarify that.

Mr McDONALD: I have two questions. I had a matter the other day where a trustee now has to pay land tax. There are two trustees in this trust, and one of those trustees owns other land and the trustee in this trust is actually a vulnerable person who is now being caught up in the whole land tax thing. Have you come across that sort of circumstance in your own work?

Ms Rae: To clarify, there are two trusts?

Mr McDONALD: There are two trustees on one trust. Because of the assets that one of the trustees has across their whole portfolio, this trust is actually being triggered by land tax because of the interpretation—

Mr HART: On a percentage basis?

Mr McDONALD: It is actually just the volume. The question I want to ask, not to solve that problem: does anything in this bill allow for the separation of the individual trusts, to be not joined?

Ms Rae: Without knowing the specific facts, and I can take this on notice, that surprises me a little in the sense that if a person holds assets on trust they have the legal ownership but not the beneficial ownership, which is a different thing from having the entirety of the ownership of other assets. Generally speaking, one would not aggregate all of the assets held by a person in every capacity into one pool, so that scenario surprises me a little. It would be interesting to know how that came to be and whether there were other assets in the trust or multiple trusts that had identical—

Mr McDONALD: Multiple trusts.

Ms Rae: Perhaps if there were identical trusts that had identical trustees and identical beneficiaries, that might be the situation. I can take that question on notice.

Mr McDONALD: That is exactly the circumstance.

CHAIR: This sounds like it may be outside the scope of the bill.

Mr McDONALD: It could well be. I appreciate your advice.

Ms Rae: I suspect it might be an OSR question.

Mr McDONALD: I suspect it will be. You said that you appreciate the government consulting with you on this bill. The review was 10 years ago. How long have you been involved in the consultation?

Ms Rae: I was actually living overseas 10 years ago so I was not even a member of the Queensland branch of STEP at the time. I am aware that during various points during the genesis of the bill STEP Queensland has made various submissions, both itself and through our memberships. Many of our members are members of the Law Society, the Bar Association and so on. During the drafting process for the bill we made a number of submissions at both public consultation and targeted consultation periods.

Mr HART: You might have heard a question I asked about the education process for writing new trusts. Do you have any comments about that? Is that something you would just pick up and know that you need to look at a new trust to reflect the changes that are being made here?

Ms Rae: I would say two things about that. With any new piece of legislation, educating professionals and the public is critically important. With something as wideranging and impactful as this, that is going to be a very important part of the process. Certainly, STEP Queensland and I know the Law Society, and I am sure the Bar Association as well, will conduct various education campaigns. A large part of our purpose at STEP is education of our members.

However, as I said at the beginning, trusts are established by all sorts of people and for all sorts of purposes and it is not necessary to use a lawyer to create a trust. It is not necessary to use an accountant to create a trust or a financial planner or anybody at all. You can get a trust deed off the internet and create your own trust with no oversight. There is no register of trusts in the way that there is a register of companies, so these things get created regularly—and I do not know how often as a percentage, but it is often enough—with no professional oversight at all. To that extent, whatever the education of professionals is and however much we try to educate the public, there will be people who miss out.

One thing that I see in my personal practice—and I work both in the succession and trust space and in commercial law—is that commercial trusts are established by small businesses because it seems like a good idea. They might have a tax accountant, a tax adviser or an accountant who says, 'Have you thought about this?' so they go away and download a deed from the internet without telling anybody that that is what they are doing and the deed is entirely inappropriate for the situation that they are in. That is one example, for instance, of our concern with clause 80 and the power to purchase a residence for a beneficiary. That ought to be excludable by a trust instrument because it is just not an appropriate power for many commercial or trading trusts. It is irrelevant.

Just because that might be excludable or excluded by subclause 80(3), that can only be impacted or put into effect by court oversight so, if there are going to be deeds floating around on the internet that people might download and use for their own purposes without very much oversight, we would prefer that they are well-structured deeds that could be classified perhaps a bit.

Mr HART: Most accounting firms would have a big lawyer that provides a shelf sort of trust.

Ms Rae: Absolutely.

Mr HART: That is a good point. Has your society ever suggested to the government that they should tighten up the regulation around the control of trusts, as in keeping a record of them and whether they are suitable?

Ms Rae: It is a big issue.

CHAIR: I am assuming that is huge administratively in terms of effort and time.

Ms Rae: It is, and the other thing is that trusts exist for all sorts of purposes, many of which do not have any written record. For example, a constructive trust might be imposed on a court where a wrongdoer has absconded with money belonging to somebody else or they have registered land in their own name when it ought to have been registered for somebody else's benefit. The court might grant a remedy that effectively declares that the wrongdoer holds that asset on trust for the victim. All that exists to create that trust is the court order.

Mr HART: No document.

Ms Rae: The court order is a document. That is one example. Another example would be—and this might be a silly example—that I give $1,000 to my mother-in-law because I know that she is going to Sydney next week and I ask her to buy something that I saw online at a shop in Sydney but is hard to transport back so I give her the $1,000. There is nothing written about that but arguably that $1,000 that I have given her is impressed with a trust to carry out that transaction on my behalf and bring that fancy glass vase back on the plane or whatever. That is a trust. There is absolutely no documentation for it and it would be very difficult to create a register of all of those things. I am not saying it is impossible, but that is a much broader issue than this new piece of legislation.

CHAIR: Thank you. We have gone over time but it is because we have appreciated your depth of knowledge on this issue. Thank you for your insight into all of these things. We will get the wording for the questions on notice. Once we have that, we will talk about the amount of time you have to respond.

Ms Rae: Thank you.

CHAIR: Thank you for appearing before us today. That concludes the hearing. Thank you to everyone who has participated today. Thank you to Hansard and thank you to our secretariat. A transcript of these proceedings will be available on the committee's webpage in due course. I declare the public hearing closed.

The committee adjourned at 11.06 am.