Trusts Bill 2024

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Housing, Big Build and Manufacturing Committee
Parliament House
Cnr George and Alice Streets Brisbane Qld 4000
By email: hbbmc@parliament.qld.gov.au

Re: Call for submissions – Trusts Bill 2024

Submissions by Society of Trust and Estate Practitioners – Queensland Branch

1. Thank you for the opportunity to make submissions concerning the *Trusts Bill 2024* which has now been introduced to Parliament. STEP Queensland has provided submissions and feedback at various earlier stages of the Bill's genesis and acknowledge the consideration which has been given to those earlier comments. It is evident that considerable work has gone into drafting the Bill, and we are pleased to provide the following input – which is targeted to some fairly specific issues.

Clause 6 – Meaning of *trust*

2. The inclusion of paragraph (a) without any reservation could lead to a confusion later in relation to imposition of positive duties on trustees – for instance, if a constructive trust is imposed retroactively by court order, does the constructive trustee retroactively acquire duties under clause 67 to have historically managed what is now declared to be trust property with care, diligence and skill? Some further examples arise in our later submissions below. We consider that paragraph (a) is probably unnecessary, and could be deleted to avoid such confusions.

Clause 11(4) – Meaning of *charitable*

3. This is another area where attempting to restate the law in statutory form may cause confusion or difficulty. This subclause provides that "*nothing in this section limits the requirement that, in order to be charitable, a gift, trust or institution must be for the public benefit*". However, a trust for the relief of poverty is presumed to satisfy this requirement of public benefit, and imposing a statutory requirement that such a gift "must be for the public benefit" may upset this presumption. We suggest either that this be deleted, or the requirement be qualified providing a statutory presumption in favour of a gift for the relief of poverty being for the public benefit.

Clause 13 – Persons who cannot be appointed as trustees

4. This raises a question about the meaning of the word "appointed", connected to the earlier point about the definition of "trust" above. If by the word "appointed", all is meant that a person is

constituted as a trustee, then clause 13 would prevent the application of certain equitable remedies to certain wrongdoers. For example, a wrongdoer who is a bankrupt could not be held to account by means of a remedial constructive trust. Neither could a company which is in the course of being wound up, or a person who is say 17½ years of age who steals money and puts it in the bank.

5. Whether or not the definition of "trust" is amended, this clause should define "appoint" in relation to a trustee as an express appointment.

Clause 22 – Appointment of trustees – replacement of last continuing trustee with impaired capacity

6. We have previously expressed serious concerns about the potential of a clause of this nature to produce arbitrary and possibly harmful results. This is an appropriate case for a court to have final oversight, rather than to have a default provision which is inevitably arbitrary. As the Bill has entered a new stage of consultation, we set these concerns out below in full even though they have been made previously.

7. Attorney or administrator appointments are generally made with particular types of decisions in mind which are specific to the principal. There is no particular reason to think that an enduring attorney or tribunal-appointed administrator would have any knowledge of or relationship to a trust of which their principal simply happened to be the last continuing trustee. There is a real risk that, even with the best of intentions, an attorney or administrator would make an appointment which was irrelevant to the trust.

8. In our view, this is a greater risk than in the case of a deceased trustee. In our experience, decisions are often made faster and with less advice and oversight by attorneys/administrators than by executors/LPRs. That is probably related to the purpose of their appointment, being to make decisions (often somewhat urgently) on behalf of a living person – rather than the more systematic way in which estate administrations proceed (and in which it is much more common to obtain regular advice). The power in this clause might be exercised quickly and without proper consideration or advice, simply because the attorney or administrator is aware of the power existing.

9. There is also the evidentiary issue of whether the last continuing trustee does in fact have impaired capacity. Nothing in clause 22 provides for how this is to be determined. It is possible that an enduring attorney would simply exercise their power under this clause without any proper examination of whether the trustee had capacity or not – that is, in circumstances where the clause was not actually enlivened.

10. In addition, the reason for excluding the entirety of the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* "in relation to the exercise of the power of appointment" is opaque and raises potential concerns. These reasons could be spelled out as an example in the legislation, or as specific sections of the relevant Acts which do not apply. For example:

    (a) If the intent is to allow an attorney (often a relative of a person who has lost capacity), to appoint as trustee a company controlled by that attorney, this might be set out as an example in the legislation.

    (b) If the difficulty intended to be addressed is that section 87 of the *Powers of Attorney Act* might otherwise deem such a transaction to be affected by a presumption of undue influence, then s 87 could be excluded specifically.

    (c) Similarly, if there is a concern that such a transaction might be caught as a conflict transaction under s 73, then that could be identified specifically.

    (d) The *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* as twin pieces of legislation contain significant and well-understood powers and obligations (as well as oversight mechanisms), and careful thought should be given before excluding them completely.

11. As previously expressed, we consider that where the last continuing trustee may have impaired capacity, any appointment of a replacement trustee should be made by the court. This would enable consideration of whether or not the existing trustee *had* impaired capacity, and would also enable proper consideration of who might be an appropriate trustee in the circumstances.

Clause 55 – Function of custodian trustee

12. It should be made clear that a custodian trustee may insure and defend trust property.

Clause 68(b) – Duty to act honestly and in good faith

13. This subclause does not capture the needed flexibility for the modern trust. Commonly occurring trust clauses enable the appointment of an additional beneficiary, which cannot technically be for the benefit of the existing beneficiaries of the trust.

14. It is also common for there to be a power to exclude a beneficiary. This is necessary because of Australian, and foreign, tax laws which impose differential tax rates on trusts which have foreign beneficiaries. It is not for the benefit of the beneficiaries that are being excluded that the trustee acts to exclude them.

15. Because this is a complex area, it is better to omit subclause 68(b). The general law is well understood and provides ample protection.

Clause 69 – Duty to keep accounts and other records

16. The reality is that clause 69(1) sets up an unrealistic expectation that records and accounts might be kept for, say, 128 years (given that it will shortly to be possible to have a perpetuity period of 125 years). This is setting up our trustees to fail. It is imposing an obligation on citizens, where Parliament must know that it is impossible for the citizen to comply.

17. Trustees presently do have an open-ended obligation to hold trust records, but beneficiaries must also act in a timely fashion, which is the way the unwritten law balances obligations and rights. There is no reason to revisit this.

18. Further, it should be possible for a trustee to obtain acquittal from any obligation to beneficiaries to keep records by providing a copy of the accounts and records to the principal class of beneficiaries then remaining upon the termination of the trust. If a trustee has given the beneficiaries the records in, say, PDF format on a hard drive, it is unnecessary to require the trustees then to hold records for a further three years, incurring storage costs, where the trust has come to an end (and therefore there is no money to pay for the storage costs).

19. Finally, the 3 year limit stated accords with no time limit under tax or corporate law, and is apt to mislead.

Clause 70 – Duty to make accounts available for inspection and to provide copies

20. A more nuanced approach is required here, such as has been developed in the New Zealand Supreme Court in *Erceg* [2017] 1 NZLR 320. It recognises that sometimes information about a trust may be commercial and in confidence; sometimes not genuinely needed; sometimes hurtful or damaging to family members; sometimes harmful if given to a commercial competitor; and that a real balancing decision has to be made.

21. The balance of factors in *Erceg* is more subtle than giving the most remote beneficiary a right to inspect the books of a family's business.

22. Further in the circumstances, it may be better to provide further examples of where it is *not* reasonable to request such information, by reference to the examples to in *Erceg*.

Clause 80 – Power to provide residence for beneficiary to live in

23. This should be excludable in the trust instrument. It imposes a distracting discretionary power on the trustee of a commercially based trust, such as a unit trust where there are paid subscriptions

for units. Such a trustee would not have a discretion imposed on the trustee, which might be exercised theoretically to provide a residence for one of the unitholders. In short, this should be excludable.

Conclusion

24. Thank you for the opportunity to provide these comments on the Bill. We are of course happy to provide further comment if that would assist.

Sent by:

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About STEP:
We the Society of Trust & Estate Practitioners Queensland (STEP Qld) represent professionals from across Queensland who are specialists in trusts, estate planning and in supporting the needs of families (young and old, wealthy and modest). The objective of a STEP Professional is to advance the interests of families across generations. This often involves us in 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.