Trusts Bill 2024

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Office of the President

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Our ref: [LP:MC]

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Committee Secretary
Housing, Big Build and Manufacturing Committee
Parliament House
George Street
BRISBANE QLD 4000

By email: hbbmc@parliament.qld.gov.au

Dear Committee Secretary

Trusts Bill 2024

Thank you for the opportunity to provide feedback on the Trusts Bill 2024 (**Bill**). The Queensland Law Society (**QLS**) appreciates being consulted on this important piece of legislation. We also appreciate the additional time to deliver this submission.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 14,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Succession Law Committee and Not for Profit Law Committee, whose members have substantial expertise in this area.

QLS supports the Bill's objectives of modernising and simplifying the current *Trusts Act 1973* (Qld) (**Act**) and addressing gaps in the Act. QLS acknowledges the significant work of the Department of Justice and Attorney-General in developing the Bill and particularly appreciates being given the opportunity to comment on consultation drafts of the Bill.

Part 2 – Restrictions on appointment of trustees and related matters

Clause 15 Court approval of more than 4 trustees for particular trusts

QLS supports the approach taken in the Bill to limit the number of trustees to four, while making provision for situations where more than four trustees have been named. However, we suggest implementing a concurrent jurisdictional power in clause 15 of the Bill to appoint additional trustees granted to both the Attorney-General and the Supreme Court. In our view, this will save costs in straightforward matters as it avoids the necessity of an application to court, which will

attract additional costs in facilitating the application to court and resources of the court to hear such applications. This will reserve the court's resources for more complex applications.

Similar to the mechanism in clause 208 of the Bill, an applicant could choose whether it wishes to apply to the Attorney-General or the Supreme Court.

Part 3 – Appointment, discharge and removal of trustees and devolution of trusts

Clause 27 Meaning of *minimum trustee requirements*

QLS suggests the 'minimum trustee' requirement should be amended to one trustee who is an individual, rather than two individuals, unless otherwise required by the instrument.

In our Committee members' experience, many difficulties can arise when one of two individuals pass away or, in cases of family trusts, where two married trustees subsequently divorce and one of them wishes to resign as trustee. If a minimum of two individual trustees is required, the resigning trustee will not be discharged from the trust until a replacement trustee is appointed. Whereas, if a minimum of one trustee is required, the trustee who resigns can be immediately discharged from the trust and the remaining trustee can continue to act on their own.

The requirement for two individual trustees can also be difficult for individuals who are not married or in a long-term relationship but wish to set up a family trust for their own personal affairs. In these cases, it would be artificial to require the individual to appoint a second trustee.

We also note the requirement for two individual trustees is inconsistent with the *Corporations Act 2001* (Cth), which permits a sole individual to establish a corporation and take the benefit of the 'corporate veil'.

Part 5 – Trustees' duties

Clauses 69 and 70 Duties relating to accounts and other records

QLS welcomes the statutory identification of the common law requirement to keep accounts. However, an opportunity has been missed to provide an expansive requirement for accounts with specificity of items that should be included. This would give greater clarity to the rights and responsibilities of the parties.

There will remain a litigation risk for disputes concerning the shape, form and contents of accounts.

We also suggest the drafting of these clauses makes it clear that they do not create any new rights for beneficiaries, other than as provided for in an Act or at law, to otherwise obtain information from the trustee.

It is important to ensure that any changes do not alter the common law, so that beneficiaries do not seek to misuse the legislation to obtain more information than the information to which they are currently entitled. Beneficiaries should be required to pursue their rights under the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**) for any additional information.

Part 12 – Charitable trusts

Cy pres applications

QLS welcomes the drafting approach in the Bill in relation to cy pres applications.

We particularly support the inclusion of the definition of '*relevant considerations*' in clause 205(2) of the Bill, which introduces the element of considering "the social and economic conditions prevailing at the time of the proposed change to the purposes of the trust."

However, QLS recommends these provisions be reviewed in five years' time to assess two aspects of their operation:

- QLS is aware that the legislative approach for cy pres applications has recently been updated in the United Kingdom and in Alberta, Canada. The approach in those jurisdictions is slightly more liberal than in the drafting of Part 12, Division 3 of the Bill and recognises the rapidly changing social conditions of our communities.

  QLS acknowledges the Bill introduces a significant modernisation to this framework, but suggests that these provisions be reviewed in five years' time with particular regard to the experience in the UK and Canada. It may be that Queensland could benefit from the experience of these jurisdictions and further modernise its cy pres framework.

- Clause 208(1)(b) of the Bill enables application to the Attorney-General for approval of a scheme to change the purposes of a trust if the purposes of the trust have not previously been changed by the Court. We suggest this eligibility requirement be removed. Under the current Act, there is no option to apply to the Attorney-General so all charities, regardless of size, will have had to apply to the Court in the past. We suggest smaller charities, which have obtained cy pres orders in the past, should not be denied the opportunity to access the more affordable Attorney-General option after the Bill is passed, provided they otherwise meet the criteria.

  We note clause 211(4) confers a discretion on the Attorney-General to refuse to approve the scheme if the Attorney-General considers it more appropriate that the application be dealt with by the Court. This clause provides a level of protection for the public interest in contentious matters, whilst ensuring that smaller charities can still access the Attorney-General process in appropriate cases.

Part 13 – Gifts by particular trustees for philanthropic purposes

QLS welcomes the inclusion of Part 13 in the Bill. As outlined at page 24 of the Explanatory Notes, this part addresses issues arising due to changes in the Commonwealth deductible gift recipient framework under the *Income Tax Assessment Act 1997* (Cth).

However, QLS recommends that these amendments be retrospective, to ensure that the amendments adequately address any breaches which might have inadvertently occurred since the introduction of the *Charities Act 2013* (Cth). In this regard, we refer to the paper prepared by Alice Macdougall and Marla Cowen of Herbert Smith Freehills.[1]

[1] Macdougall, A and Cowen, M, "Simplifying giving to government DGRs", annexure to Law Council of Australia's submission dated 19 May 2023 to Productivity Commission on the Review of Philanthropy, available at https://www.pc.gov.au/__data/assets/pdf_file/0019/360442/sub255-philanthropy.pdf

Retrospective effect will also mean ancillary funds and charitable trusts do not need to take any additional administrative steps to enjoy the benefit of these new provisions, as discussed in paragraph 4.3 of the Macdougall and Cowen Paper.

QLS recommends that the provisions of Part 13 clearly state that these amendments will have retrospective effect, using the approach taken in section 52 of the *Charitable Trusts Act 2022* (WA) – Validation provisions for period preceding former commencement day.

Drafting considerations

QLS would like to make the following drafting suggestions for the Committee's consideration.

1. Clause 3(2): we suggest removing the double negative in this subclause as it may cause confusion.
2. Clause 3(3): we recommend replacing the words "additional to or greater than" with "different to". This will remove any uncertainty about whether a particular power is actually additional to or greater than those conferred by the draft Bill.
3. Clause 20(1)(f): while we agree with bankruptcy nullifying an existing appointment, we suggest that bankruptcy is a prohibition only for the duration of the bankruptcy.
4. Clause 22(1)(d): we suggest removing the word "all" from "all financial matters for the trustee". This is because some of a trustee's financial responsibilities may be split between different financial attorneys.
5. Clause 25(2): we suggest the wording "If a new trustee may be appointed..." be amended to "Where a new trustee may be appointed... ".
6. Clause 49(1):
    - We suggest clause 49(1) be amended to state: "This section applies if a person who is appointed by will as both executor of the will and, because of their appointment as executor, trustee—". This will clarify that the clause applies where the person is appointed as trustee because of their appointment as executor.
    - We suggest replacing the words "renounces probate of the will" in clause 49(1)(a) with "renounces trusteeship of the testamentary trust". This is because the current phrasing could lead to the automatic consequence of all testamentary trusts being disclaimed, whereas our suggestion excludes those trusts that are not intended to be disclaimed.
    - We recommend amending clause 49(1) to include situations where there is a court order removing the executor, but it is silent about any outcome in relation to the trusts.
7. Clause 49(2): we recommend this clause also be amended to include a reference to a court order.
8. Clause 50: we suggest this clause also reference a court order.
9. Clauses 53-57 and 59: we suggest removing the requirement for an "express" contrary intention. In our view, reference to a contrary intention will suffice. This keeps the phrasing consistent with other parts of the Bill and other Acts, which only require a "contrary intention".

10. Clause 122(2): we recommend adding a benchmark to remove the unlimited discretion conferred on the trustee.
11. Clause 133: we suggest the clause should include provision for a contrary intention in the trust instrument, similar to the drafting in clause 130(7) of the Bill.
12. Clause 140(3)(b)(ii): we suggest notice be published via a practice direction, which is consistent with how other notices are published under the UCPR.
13. Clause 182: we suggest extending this clause to anyone who lacks capacity rather than just children.
14. Clause 205(2): we query whether in the definition of 'relevant considerations', the use of the connector 'and' should be replaced with 'or', as shown below. The intent of adding *relevant considerations* to the cy pres framework is to ensure there is capacity to consider the changed circumstances of society and economy. By adding "and", it may actually imply an additional condition that needs to be met, rather than an alternative consideration permitting the application of the regime:

    "For subsection (1), the ***relevant considerations*** are—

    (a) the spirit of the trust; ~~and~~ **or**

    (b) the social and economic conditions prevailing at the time of the proposed change to the purposes of the trust."

15. Clause 234: we suggest clauses 22 and 23 should not be limited to trust deeds created after commencement, as this would be inconsistent with clause 3(1) of the Bill.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted].

Yours faithfully

[redacted]

Rebecca Fogerty
President