

Legal Services Council
Level 11, 170 Phillip Street
Sydney NSW 2000

By email to: submissions@legalservicescouncil.org.au

4 March 2015

Dear Legal Services Council,

Submission in respect of the draft Uniform General Rules

Thank you for allowing State Trustees Limited (**State Trustees**) and the New South Wales Trustee and Guardian (**NSWT&G**) the opportunity to make this submission in respect of the draft Uniform General Rules (**Draft Rules**).

This submission is made by State Trustees, with the support of the NSWT&G, which has been involved in its preparation. References to 'we' and 'us' in this submission refer to both entities. We have enclosed at Appendix 1 further background information in respect of both entities.

In this submission we only seek to address the 'public-trustee' exemption, that is, the exemption from compliance with section 10(a) of the Legal Profession Uniform Law detailed in rule 11(e) of the Draft Rules (**PT Exemption**).

The PT Exemption is currently expressed as follows:

11 Exemption from prohibition on engaging in legal practice

- (1) The following persons are declared to be exempt from the operation of section 10 (1) of the Uniform Law:

[...]

- (e) a public trustee (however named) or a company performing trustee work on behalf of the government in the course of preparing a will or carrying out any other activities involving the administration of trusts, the estates of the living or deceased persons, or the affairs of living persons;

It is our submission that the PT Exemption needs to be amended to ensure it more clearly covers:

1. those entities in Victoria and NSW that are the successors in law to the public trustee in each of those jurisdictions, namely State Trustees and the NSWT&G;
2. officers, employees and members of staff of those entities;
3. relevant activities not limited solely to those undertaken when 'providing trustee services to the government';
4. services related to will preparation (such as preparation of enduring powers of attorney), to align with the scope of s 20A of the *Trustee Companies Act 1984* (Vic.) (**TCAV**); and
5. activities provided in connection with the administration of trusts, estates, or an individual's affairs, for example where the entity is providing informal administration services (such as is

contemplated by s 13 of the *State Trustees (State Owned Company) Act 1994* (Vic.) (ST Act), acting with a co-executor or as a custodial trustee, or assisting an individual that is acting as executor or administrator.

Accordingly, it is our submission that the PT Exemption should be reworded along the following lines:

11 Exemption from prohibition on engaging in legal practice

- (1) The following persons are declared to be exempt from the operation of section 10 (1) of the Uniform Law:

[...]

- (e) each of the following persons:

- (i) a public trustee (however named) of a State or Territory;
 - (ii) a company that performs the function of a public trustee of a State or Territory;
 - (iii) a company performing trustee work on behalf of the government of a State or Territory or of the Commonwealth;
 - (iv) an officer, employee or member of staff of such an entity;
- to the extent that the person is performing work in the course of:
- (v) preparing a will or providing a related service; or
 - (vi) carrying out any other work involving, or in connection with, the administration of trusts, the estates of living or deceased persons, or the affairs of living persons.

We believe this approach is consistent with previous recommendations in this area, for example those put to the Victorian Attorney-General by Crown Counsel Dr John Lynch and Ms Susan Campbell in 2009.¹

We set out some further background in relation to these points below.

Coverage of public-trustee entities and the individuals through whom they act

The intent of the PT Exemption appears to be to exempt (as a minimum) State and Territory 'public-trustee' entities — whether in the form of a government agency, state owned corporation/company, other government-operated entity — and the individuals through whom those entities act (officers, employees and other staff) when performing their traditional will-preparation and administration-related roles.

However, we are concerned that the PT Exemption as currently worded may be insufficiently clear to ensure that it extends to:

¹ Dr John Lynch and Ms Susan Campbell, *Regulation of Government Lawyers: report to the Attorney General 2009*, Department of Justice (Victoria), 2009, available at: <https://assets.justice.vic.gov.au/justice/resources/924ab1be-a445-4fcd-b56f-8f3cb51d0baa/4188%2Bdoj%2Breggovlawyers%2Bv3.pdf>

1. State Trustees and the NSW&G as entities, given neither is formally referred to in legislation as a 'public trustee' (although each is the successor in law of the public trustee in its respective jurisdiction); and
2. their officers, employees and members of staff, given such persons are not expressly referred to in the PT Exemption.

It appears that the wording of the PT Exemption is based on the equivalent provision in the *Legal Profession Act 2007* (Tas.) (LPAT).

The relevant exemptions under the LPAT read as follows:

13. Prohibition on engaging in legal practice when not entitled
 - (1) A person must not engage in legal practice in this jurisdiction unless the person is an Australian legal practitioner.
 - (2) Subsection (1) does not apply to engaging in legal practice of the following kinds:

[...]

 - (k) *the drawing of instruments by an officer or employee in the service of the State in the course of his or her duties;*
 - (l) *work performed by –*
 - (i) *the Public Trustee established under the Public Trustee Act 1930; or*
 - (ii) *a trustee company as defined by the Trustee Companies Act 1953 –*

in the course of preparing a will or carrying out any other activities involving the administration of trusts, the estates of living or deceased persons, or the affairs of living persons;

Given a public trustee still exists by name in Tasmania, and the entity is not a Corporations-Act company, we believe it is more clearly the case in that jurisdiction that the LPAT exemption under s 13(2)(k) extends to officers and employees of that entity by operation of the *Carltona* principle.²

Given the variance in names and structures of the existing State and Territory public-trustee entities, we suggest a clearer term be used.

Another concern is whether the rider in the PT Exemption — 'performing trustee work on behalf of the government' — applies to public-trustee entities, or just to 'a company'.

The public-trustee entities administer trusts and estates, make pre-planning documents, perform attorney services and manage the affairs of people with impaired decision-making capacity, and this work is done for the relevant individuals in the State or Territory in which the public trustee entity operates. The work is not done 'on behalf of the government' in this sense.

For example, pursuant to sections 21-23 of the ST Act, the responsibility for provision of the community services that previously sat with State Trustees now sits with the responsible Minister, although in practice these services continue to be provided by State Trustees under a community services agreement (CSA). Some clients may begin as a CSA-funded client, but then subsequently cease to be so; it would present an impossible resourcing issue were the

² *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 (CA).

application of the PT Exemption to be dependent on the service being CSA funded. This would not be an outcome that would be in the best interests of the community.

By way of further example, it is not a statutory function of the NSW T&G to act as an enduring guardian; however, under the Guardianship Act certain accredited staff are recognised as authorized witnesses to such documents. It is unclear whether the preparation and witnessing of such documents therefore be considered to be work on behalf of the government.

In short, it should be made clearer that the PT Exemption applies, in respect of public-trustee entities, not only to 'trustee work performed on behalf of the government'.

Some core-services of the public-trustee entities may not be held to activities 'involving administration' of a relevant type. For example, when acting with co-trustees, or managing trustees (where the public-trustee entity is the custodian trustee), where providing informal administration or) assistance to individuals acting as executor or administrator, which may extend to locating and valuing assets; storing personal chattels and finalising utilities, council and/or government services. Some of the work involved in these services may be held to include engaging in legal practice (for example, providing legal advice), but not be exempted if it does not 'involve administration' of the relevant kind. We therefore believe words to the effect of 'in connection with' be included where suggested in our recommended wording above.

Conclusion

We would prefer that all the above aspects be put beyond doubt. In our view, wording aligned with our proposed amended wording above would achieve this.

Once again, thank you for the opportunity to make this submission.

If you have questions about this submission, please contact Alistair Craig, Senior Corporate Lawyer on ph. 03 9667 6441 or via email to alistair.craig@statetrustees.com.au

Yours sincerely,

A handwritten signature in black ink, consisting of a stylized capital 'A' followed by a long, horizontal, slightly wavy line that ends in a small loop.

Agata Jarbin
General Counsel

Appendix 1

About State Trustees Ltd

State Trustees is Victoria's public-trustee entity.

State Trustees and its predecessors have been serving the Victorian community for 75 years and have an even longer history dating back to the 1860s of involvement in administering deceased estates and managing the financial and legal affairs of people who are unable to do so due to disability, mental illness or other circumstance.

Previously constituted as a statutory corporation within the Victorian public sector, State Trustees became a state owned company in 1994, following the enactment of the ST Act. It is a public company under the *Corporations Act 2001*, and a trustee company under the TCAV.

State Trustees offers the following products and services to Victorians:

- deceased estate administration including intestacy and administrators of last resort.
- financial administration (voluntary and tribunal appointed) for nearly 10,000 Victorians.
- will preparation and secure storage of will and enduring powers of attorney documents.
- enduring powers of attorney preparation for financial, medical treatment and guardianship.
- trust preparation and administration for more than 2500 trusts with more than 7000 beneficiaries.
- administration of the State Trustees Australia Foundation Charitable Trust.
- provision of a comprehensive range of ancillary services for clients including:
 - funds management;
 - maximising Australian and overseas pension entitlements;
 - funeral funds;
 - taxation services;
 - financial planning;
 - client legal representation and litigation;
 - property management, including sale, leasing, maintenance, cleaning and property related asset management; and
 - genealogical searches.

Some services are provided under a CSA entered into by State Trustees and the Minister for Human Services for the administration of the legal and financial affairs of Victorians who would otherwise not have the funds to access these services, including Victorians who die intestate. The CSA applies to those services which are statutorily nominated, including tribunal appointed financial administration and deceased estate administration as well as some funding for vulnerable Victorians to access attorneyship and trust administration services.

About the NSW Trustee and Guardian

The NSW Trustee and Guardian is constituted by s 5 of the *NSW Trustee and Guardian Act 2009* (NSW) (**NSWT&G Act**) as a statutory corporation.

Pursuant to s 11(1) of the NSWT&G Act, the NSWT&G may be appointed to act in any of the following capacities:

- (a) trustee;
- (b) executor or administrator;
- (c) collector of estates under an order to collect;
- (d) agent or attorney;
- (e) *guardian* or receiver of the estate of a minor; or
- (f) receiver of any other property;

Pursuant to s. 11(2) of the NSWT&G Act, the NSWT&G may be appointed to and act in the capacity of a financial manager of the estate or a managed person.

The NSWT&G provides the following services:

- making of wills
- estate and trust administration
- managing the affairs of people under power of attorney
- managing the affairs of people under a financial management order and authorising and directing the performance of private managers

Ancillary services are also provided including funds management, taxation, genealogy research, client legal representation and property management.

By *virtue* of s 10(3) of the NSWT&G Act, the NSWT&G has no power to employ staff, however, such staff as are required to enable the NSWT&G to exercise its functions may be employed under Chapter 1A of the *Public Sector Employment and Management Act 2002* (NSW) in the *Government Service* and are attached to the NSWT&G so as to enable it to carry out its functions. Being a statutory corporation, the NSWT&G would act through such staff members.