

Ms Megan Pitt
Chief Executive Officer
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By email to: submissions@legalservicescouncil.org.au

6 March 2020

Dear Ms Pitt,

Consultation paper: Proposed amendments to the Legal Profession Uniform Law (LPUL)

I refer to your letter dated 31 January 2020 to Mr Matt Carrick, the CEO of State Trustees Limited (**State Trustees**), which has been referred to me for response. I also refer to my subsequent telephone discussion with Ms Chelly Milliken, Senior Principal Policy Officer, in which she graciously allowed me some additional time for submitting these comments.

Your letter highlighted three recommendations, namely recommendations 5, 18 and 23, on which I will focus my brief comments below.

Recommendation 5

This recommendation proposes expansion of s 51 to include (inter alia) circumstances where the holder has been made subject to 'a financial management or guardianship order'. This is a prudent proposal.

I would note that, for the purposes of Victorian law, the relevant terminology would be: "a guardianship order or an administration order under the *Guardianship and Administration Act 2019* (Vic.)". For New South Wales, I understand the relevant terminology to be "a guardianship order or a financial management order under the *Guardianship Act 1987* (NSW)". Appropriate terminology could be included to cover an equivalent order under an equivalent Act of another jurisdiction.

Recommendation 18

This recommendation proposes adding 'beneficiaries of deceased estates or potential beneficiaries arising from intestacy' to s 198(1) for the purpose of permitting a person within either of those categories to apply for the assessment of legal costs.

An issue here is the scope of the term 'beneficiary'. For an intestacy, the applicable law means the position as to who does or does not have an entitlement to the net estate, or a share of it, will generally be clear cut, or at least ascertainable. For a will, the issue may be less straightforward: for example, wills often contain contingent gifts, or gifts of life interests, for which the entitlement if the contingency is not fulfilled, or the entitlement to the remainder interest, may not be able to be determined until many years later.

The consultation paper states that 'the beneficiaries will ultimately pay the legal costs which are borne by the estate'. However, not all persons that may be described as 'beneficiaries' will 'ultimately pay' such costs. A person who receives, say, only a specific legacy or a gift of personal estate, would generally not have their entitlement reduced by the legal costs. It may be unlikely

that such a 'beneficiary' would apply for an assessment of costs, but it is not uncommon for the administration or a deceased estate (through no fault of the executor or legal practitioner) to give rise to spitefulness amongst the beneficiaries, thus increasing the risk of a mischievous application being brought.

Suffice it to say that, if it is desired that there be clarity as to who is or is not to be entitled to apply for an assessment of costs under the proposed amendment, consideration could be given to delineating the scope of the term 'beneficiary' (if that is the term to be used), and, in particular, delimiting the scope to such beneficiaries whose share in the deceased estate will in fact ultimately bear the relevant legal costs.

An alternative, adopted — in relation to the regulation of trustee companies — by the drafters of Chapter 5D of the *Corporations Act 2001* (Cwth) (**CA**) and its related regulations in the Corporations Regulations 2001 (**CR**), would be to use only high-level definitions: see, for example, the duty to provide an account of an estate in the CA, s 601SBB(1), and the non-exclusive definition of 'person with a proper interest' in the CA, s 601RAD, esp. 601RAD(1)(c)(i) and (ii); also, the list of persons entitled to request an annual information return under the CR, r 5D.2.01(3)(i)-(iii). These definitions effectively leave any closer clarification to the regulator, in this case, the Australian Securities and Investments Commission (**ASIC**), to sort out via regulatory guidance or other intervention when the need arises. It is not clear that the relevant designated regulatory authorities for the LPUL would have powers equivalent to those of ASIC for such purposes.

Recommendation 23

This recommendation proposes expansion of the definition of 'consumer matter' in s 269 to include complaints by beneficiaries.

The considerations I have set out under Recommendation 18 above apply equally, and perhaps more so, in relation to this proposal.

Conclusion

I hope the comments above are of assistance. I would be happy to discuss these matters further if the LSC so desires. In this regard, I am available on

Yours faithfully,

Alistair Craig
General Counsel
Head of Corporate Legal