

Trustee Corporations Association of Australia

National Council Dinner

8 September 2011

(Introduction)

Mr President (John Atkin – The Trust Company), distinguished guests, ladies and gentlemen.

It is my great pleasure to attend the Trustee Corporations Association National Council dinner tonight and to share with you some of the main challenges within my area of responsibility, including succession laws.

Like many other stakeholders, I am aware that the Trustee Corporations Association has been keen to see as much uniformity as possible in the introduction of the succession law reforms.

(Succession—national reform process)

As members are aware, the National Committee on Uniform Succession Laws was established by the Standing Committee of

Attorneys-General (soon to be known as the Standing Council on Law and Justice) to develop model laws to be used as the basis for the reform of succession law across Australian States and Territories.

The National Committee on Uniform Succession Laws was charged with examining four separate areas of succession law including the law of wills, family provision, intestacy and the administration of estates.

During this process, an expert committee was established to provide advice to the Department of Attorney General and Justice on the reforms to succession law. The Advisory Committee on Succession Law Reform comprised:

- Justice Young of the New South Wales Court of Appeal
- Justice Palmer, of the Supreme Court of New South Wales
- Representatives from the Supreme Court
- The Public Trustee (now NSW Trustee and Guardian)
- Representatives from the Law Society and Bar Association
- Ross Ellis, representing the Trustee Associations of Australia

- Les Handler and Richard Neal, co-authors of the loose leaf service on succession law
- a representative from the Guardianship Tribunal.

(Progress to date – first three reports)

To date NSW has implemented the National Committee's first three reports:

- a model bill on wills was implemented by the *Succession Act 2006*, with some modifications
- a model bill on family provisions was implemented by the *Succession Amendment (Family Provision) Act 2008*, with some modifications
- a model bill on intestacy was implemented by the *Succession Amendment (Intestacy) Act 2009*.

(Under consideration – final report)

My Department is currently considering the final report by the National Committee, *Administration of Estates of Deceased Persons: Report on the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General* (2009).

The main areas that were examined in relation to the administration of estates of deceased persons were:

1. general issues of administration such as personal representatives, the vesting of property on the death of a person, the order of payment of debts in an insolvent estate, the application of assets towards the payment of debts in a solvent estate, and the payment of legacies
2. the resealing of interstate and foreign grants
3. the automatic recognition of interstate grants without the need for resealing.

In late 2009, the NSW Law Reform Commission released its report, which provided a commentary on the model administration of estates legislation proposed in the National Committee's report.

I am aware that the Department wrote to stakeholders seeking comments on the reports of the National Committee and the NSW Law Reform Commission.

I can advise that the Department is currently considering the report, and will continue to consult with stakeholders while evaluating the reform proposals.

Given the scope of the proposals and the issues covered it is important that careful consideration is given before any legislative action is taken.

(upcoming review of the *Succession Act 2006*)

The Department will also be commencing a statutory review of this Act later in 2011.

This review will cover all of the provisions in the Act (including those parts that have been inserted as part of the national reform process).

(other challenges)

Of course this is an area where I am responsible for the administration of the Act.

Another challenge is to work across the whole of government to ensure that legislation meets the needs of people, particularly those people who are the most vulnerable in society.

Part of my Department, the NSW Trustee and Guardian (NSWTG) has an increasing client base.

In the ten years between 30 June 2002-30 June 2011 the total growth of people in NSW under financial management orders was 41 per cent, the growth in people under financial management orders with a private manager was 96.6 per cent and the growth in people being directly managed was 29.3 per cent.

The Government works together to protect these people. For example, the NSWTG has been closely involved in an ongoing review of the *Power of Attorney Act 2003* conducted by the Department of Lands. Along with the Guardianship Tribunal and the Law Society of NSW they have been members of a working group reviewing the

objectives of the Act, and any changes needed to ensure that those objectives continue to be achieved.

The issue of most concern is the prevention of financial abuse by an attorney. As all practitioners in this area know, powers of attorney are becoming more widely utilised by the general community. It is also an increasingly common method of financial abuse, particularly of the elderly. The NSW TG is often appointed as a financial manager in situations where the principal had lost mental capacity and could not monitor their attorneys' actions. The NSW TG see a number of incidences of an attorney misusing their position to their own financial advantage by making unauthorised withdrawals from the principal's bank accounts, unauthorised gifts to third parties and underspending on the principal's everyday living expenses.

In some cases, the acts were done without full regard for the principal, but in many cases the attorneys were simply misguided as to the nature and extent of their duties, or believed that their actions somehow benefited the principal. We are mindful that any reform that seeks to limit abuse by attorneys must be carefully considered to

ensure that it does not unduly impact on the benefits that a power of attorney can provide. A major appeal of a power of attorney is the low cost, flexible and, importantly, private arrangements that can be legally set in place to allow one person to assist in the financial affairs of another.

Options such as compulsory registration and compulsory monitoring of an attorney's actions, while superficially attractive as a means of redressing the opportunities for abuse, may be self defeating if they add to the cost and complexity of making a power of attorney.

Reforms such as this may in fact lead people to adopt cheaper, alternate arrangements outside the protections afforded by the legislation for powers of attorney, and thereby increasing risks for both principals and fair minded attorneys.

It is generally considered that the most effective way to limit the abuse of a principal by an attorney is through education. Many the agencies involved in this area have publications and websites which highlight the advantages to older people of the benefits of a power of attorney. The NSW TG runs campaigns and provides community

speakers seeking to educate the public as to what a power of attorney can and cannot do, make clear what rights principals have and the duties of an attorney.

Some of the ideas under consideration are: financial monitoring (at the option of the principal) and more stringent registration requirements (including a notice which is issued by the Department of Lands at the time that a power of attorney is registered, to alert the registered proprietor).

The current review includes redesign of the prescribed form, balancing the need to simplify but also ensure that the principal and attorney are sufficiently aware of the repercussions of signing it. It is hoped that the redesign (and any subsequent amendment to the Act) will also address other issues, such as:

- prescribed wording to provide for the appointment of substitute attorneys
- address whether the principal intends to revoke any pre-existing powers. This will remove confusion about how and when a power of attorney is revoked, with many mistakenly

assuming revocation occurs in a similar manner to wills (which contain a standard revocation clause).

- allow for the continuation of an appointment of a joint attorney where the other joint attorney has vacated office. This overcomes the current often unsatisfactory situation in which the power of attorney is terminated if one or more attorneys appointed jointly die or themselves become incapable.

(conclusion)

I trust that this has given you an insight into how Government works together, with stakeholders and the community to ensure that any legislation is carefully considered.

I look forward to a continuing discourse with the Trustee Corporations Association on these and other important matters.