STANDING COMMITTEE ON
UNIFORM LEGISLATION AND STATUTES REVIEW

TRUSTEE COMPANIES (COMMONWEALTH REGULATION) AMENDMENT BILL 2010

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 25 MAY 2011

Members

Hon Adele Farina (Chairman)
Hon Nigel Hallett (Deputy Chairman)
Hon Linda Savage
Hon Liz Behjat

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Hearing commenced at 11.01 am

RICHARDS, MR PETER GERALD
Legal Policy Officer, Department of the Attorney General, sworn and examined:

The CHAIRMAN: On behalf of the committee, we welcome you, and I need to ask you whether you would like to take the oath or affirmation.

[Witness took the affirmation.]

The CHAIRMAN: You will have signed a document entitled "Information for Witnesses". Have you read and understood the document?

Mr Richards: Yes; I have signed and read the document, and I understand it.

The CHAIRMAN: Thank you. The proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, could you please quote the full title of any document you refer to during the course of the hearing. Please be aware of the microphones and speak into the microphones, and do not place any papers over the microphones. I remind you that the transcript will become a matter of public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. I note that there are no public or media in the room at the moment, but, nevertheless, if you wanted us to take evidence in closed session, you would still need to make that request. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that publication or disclosure of your uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

Having gone through that, are there any questions or comments you would like to make to start with?

Mr Richards: No, thank you, Chair.

The CHAIRMAN: I understand you have actually been provided with a list of the questions we propose to run through and place on the record today.

Mr Richards: Yes, I have a list of the questions.

The CHAIRMAN: I will just start the process now.

How has the scheme been operating since it was introduced by the commonwealth act? Have there been any issues or problems arising at the commonwealth level or in other states?

Mr Richards: My understanding is that the scheme has been operating satisfactorily. I cannot comment on what the commonwealth is doing, but I have not heard any complaints. There have been two issues that have arisen, but I am not sure how deeply I should go into them. Is the committee aware of the recent amending legislation?

The CHAIRMAN: I am not.

Mr Richards: It is the Corporations and Other Legislation Amendment (Trustee Companies and Other Measures) Act 2011.

The CHAIRMAN: Yes, sorry; that does ring a bell. Yes, we are aware of that.

Mr Richards: You are aware of it? That legislation was assented to on 12 April, and I think it is now in operation. The legislation contains a provision that provides that the commonwealth can

make a transfer to the public trustee. The Attorney General is unhappy with that, understandably, and considers that he should have been advised and he should have received a notification from the commonwealth seeking the clearance, approval or consent of the state minister. The commonwealth was asked to amend the legislation, but it did not. The only other issue is that the states believe that the commonwealth should obtain a section 109 advice in relation to how the two pieces of legislation interact; in other words, the state legislation—not necessarily for Western Australia, but how a section 109 would apply to this legislation.

The CHAIRMAN: Has the state retained a section 109 advice?

Mr Richards: No, not that I am aware of; no, it has not.

The CHAIRMAN: What action is being taken in relation to the minister's concern about the fact that approval from the state minister is not required?

Mr Richards: There has been correspondence between the Attorney General and the commonwealth minister responsible, and the Attorney General for South Australia has also expressed the same concerns. There are continuing negotiations and continuing discussions between the states and the commonwealth; I am not aware of any outcome as yet.

The CHAIRMAN: There is no intention by the Attorney General to withdraw from the scheme until that matter has been resolved?

Mr Richards: No, not that I am aware of. By way of further information, I think it should be noted that the state trustee companies legislation covers only a small portion—probably under 10 per cent—of all the business of a trustee company. Most of the stuff, of course, that is done by trustee companies is superannuation funds, life insurance stuff, and management investment schemes, which is all commonwealth legislation, so it only makes sense to put the whole thing off to the commonwealth.

The CHAIRMAN: Clause 2(b) of the bill provides for the bill, with the exception of clauses 1 and 2, which are the short title and commencement, to come into operation on a day to be fixed by proclamation. Given that these constitute the substantial provisions of the bill, what is the anticipated time frame for the introduction of the substantive provisions of the bill, and why are they not being introduced now?

Mr Richards: There is a possibility and a likelihood that regulations will be required. Regulations have not been drafted yet. Parliamentary Counsel will not draft regulations until he is fairly sure that the bill is going to pass in the form it is in. It is a drafting issue for the drafter.

The CHAIRMAN: What is the process for granting a trustee company an Australian financial services licence; and, are there any conditions that would customarily attach to the licence?

Mr Richards: I really do not know how to get a financial services licence. It is something that is under the Corporations Act. There are a number of questions in this that I would like to run past the commonwealth and get the commonwealth response, and then advise the committee. Also, I have been away for two days and I have just come back and I have been hit with this.

The CHAIRMAN: Sorry, Peter.

Mr Richards: I would like to run that question past the commonwealth and find out just what is required.

The CHAIRMAN: Sure. Can we take that as question on notice 1?

Mr Richards: Yes; I think there will be a couple of those sorts of thing. Also, the grounds on which they can be cancelled falls into the same category.

The CHAIRMAN: We will take that as question on notice 2.

Mr Richards: I think question 1.4 falls into the same category.

The CHAIRMAN: Is that all of them—Q5 to Q8?

Mr Richards: Wait a moment; sorry, Chair.

The CHAIRMAN: Perhaps, Peter, I might just put the questions, and then you can let me know if you are able to answer them or whether we need to take them on notice.

Mr Richards: That is fine.

The CHAIRMAN: The next question is: the explanatory memorandum states that the compulsory transfer provisions in the commonwealth act can be used to ensure that failing trustee companies remain viable. Given that "failing" is not defined in either bill or the commonwealth act, what is the rationale behind the compulsory transfer provisions and any benefits they provide?

Mr Richards: The term "failing" is not defined. The explanatory memorandum of more recent commonwealth legislation has used the term "unviable", possibly to ensure that unviable trustee companies remain viable. The rationale behind them having those provisions in the state legislation is, I think, a belt-and-braces approach. There is similar provision in the commonwealth legislation, and it is just a case of ensuring that it does not fall between the state legislation and the commonwealth legislation. As for the benefits, the benefit is that if there is a transfer to be made, then it will not fail; it will either succeed under the commonwealth legislation or it will succeed under the state legislation.

[11.10 am]

The CHAIRMAN: Given that there is no definition for the term "failing", how is the reader of the legislation supposed to get some idea in which circumstances that provision might come into effect? Is there a set of criteria or guidelines that we, the committee, can look to, or some legal definition that has been determined by the courts?

Mr Richards: There is no legal definition that I am aware of. As a matter of practice, trustee companies are required to provide financial information, and there are tests of capital adequacy and the like that are provided. These were provided by the state when they regulated them; they are now provided to the commonwealth so that the commonwealth, or the state, know how trustee companies are tracking. There comes a point where, as a financial issue, you can look at it and say, "This is an unviable company now. Something has to be done", or, as a practical issue, the company will come to you and say, "We have a problem." But there is nothing in the act that defines what is viable and what is unviable. Indeed, I would suggest that it is a term that I would not want to have defined, because it is something that happens on a practical level based on the financials of the company and on the knowledge of the company of what is happening.

The CHAIRMAN: To me, that makes it a very subjective rather than objective decision, which is a bit of a concern. What sort of indicators do you need to determine that a trustee company is failing?

Mr Richards: There are capital ratio provisions, there are all sorts of accounting tests that can be provided in relation to whether a company is failing or not. It becomes an accounting issue, a liquidator issue—something that an accountant can test and say, "This is a failing company." In other words, it is an accounting issue more than a legal issue, I think, would be the response.

Hon LINDA SAVAGE: I will just echo the concerns that the Chairman has raised. I am just wondering if, perhaps, you would be able to point to any other bills or legislation that use that term "failing". "Unviable", to me, is a step further than failing.

Mr Richards: Yes.

Hon LINDA SAVAGE: I am not talking about semantics, but given that it seems that there is no objective criteria we are aware of in relation to this bill, that does raise, naturally, if not concerns, I suppose the potential for quite differing opinion perhaps from the point of view of the trustee

company. I suppose that then goes to how that issue itself would be resolved when there is a difference of views as to whether they are failing.

Mr Richards: Yes, I agree that "unviable" is a step further.

Hon LINDA SAVAGE: Yes.

Mr Richards: However, the only thing I could say is that you can see when your trustee company is failing. Trustee companies in the past have failed. I think a number of years ago there was Pyramid—or was that a building society? There have been a number of trustee companies that have failed and transfers have been made. I think there have been building societies that have had difficulties arise, and there have been credit unions when the state used to control those. I do not think the term was defined in that legislation either, but the process worked.

Hon LINDA SAVAGE: I am not querying the motivation for having this, but, as I said, I am just echoing that that could prove to be problematic in practice.

Mr Richards: In practice it can lead to issues.

The CHAIRMAN: Peter, is there any intention of actually defining that in some way in the regulations or setting some criteria in the regulations that you are aware of? I appreciate they have not been drafted yet.

Mr Richards: Not that I am aware of, no. As I said, I would rather leave this a little bit unclear or leave it to the commonwealth to decide, because the trustee companies are going to be their companies.

The CHAIRMAN: Do you know if there are any commonwealth regulations in place?

Mr Richards: I do not think the regulations cover this issue. I think there are regulations, but I do not think they cover this issue. The commonwealth does a lot of regulations in relation to corporations; the regulations, I think, are probably longer than the act.

The CHAIRMAN: The act is not long enough? Why is there no requirement for the consent of the transferring trustee company to be obtained by ASIC before a determination is made transferring its assets and liabilities to the receiving trustee company?

Mr Richards: Could I take that as question on notice 3? That is a question to go ASIC. In point of fact, rather than ASIC, what I will do is approach my commonwealth counterpart who is responsible for getting this stuff through the commonwealth. If he requires it, he will go to ASIC and ask those questions.

The CHAIRMAN: That is fine; thank you. The next question is: is there any process for appeal from such a decision of ASIC? For example, if ASIC determines that a condition has been breached but that is disputed by a trustee company, can it appeal to a court to have the decision reviewed?

Mr Richards: Again, I would like to put that one to the commonwealth.

The CHAIRMAN: That is question on notice 4. I suppose you will need to take Q8 on notice as well: if so, what provisions in the Corporations Act provide for this? That will be question on notice 5.

Mr Richards: Yes.

The CHAIRMAN: The committee notes commonwealth legislation dealing with the voluntary transfer of trustee business between entities is pending; accordingly, is division 3 of the bill necessary? Would it not be preferable to wait until this legislation is in force and then resume the passage of the legislation?

Mr Richards: My understanding is that this more recent legislation covers this voluntary transfer of trustee business. I think it just talks about the transfer of trustee business, and deletes "compulsory". Division 3 is necessary as a belt-and-braces approach, and I do not think we should wait for the

legislation. Before introducing this legislation, the commonwealth was approached and it was happy with the state legislation.

The CHAIRMAN: So what is the rationale behind including division 3 in the bill?

Mr Richards: A belt-and-braces approach, just to make sure that there is no failure in the transfer of a trustee company. If the commonwealth does not pick it up, the state will pick it up.

The CHAIRMAN: Peter, you made a comment just a few minutes ago about voluntary or compulsory. Can I just clarify that? Is the intention of this amending piece of legislation that it will deal with voluntary transfer?

Mr Richards: Yes. It is always a little difficult to follow the commonwealth legislation because they make little amendments to amendments and things like that. But it reads to me that they are talking about transfers of estate assets and liabilities and things like that.

The CHAIRMAN: Is that a fundamental shift then? This is proposing compulsory transfer, and the amending legislation will move it from a compulsory setting to a voluntary setting?

Mr Richards: No, it will just be a transfer, so it will cover both voluntary and compulsory. If you have a look at some of the sections, they are omitting the word "compulsory", and in other places they are omitting "compulsory transfer" and substituting "transfer". So what will just happen is a transfer of the undertaking of a trustee company to another trustee company. I think it might be to remove the odium of a compulsory transfer.

Hon LINDA SAVAGE: Just the use of that term "compulsory"; is that what you mean?

Mr Richards: Yes.

Hon LINDA SAVAGE: I seriously mean that.

Mr Richards: You just have a transfer and no-one will know why.

Hon LINDA SAVAGE: Yes; it is not reported as a compulsory transfer?

Mr Richards: Yes. I, frankly, have no objection to that sort of thing. It means that if you transfer, you just transfer. The reasons are going to remain quiet. Like it or not, that is the way it will be done. That is probably seen to be a better way of moving than shotgun marriages.

[11.20 am]

The CHAIRMAN: I do not quite understand why that should be withheld, if it is a compulsory transfer.

Mr Richards: Most of these companies are tied up with public companies. I think all of the trustee companies are subsidiaries of public companies—banks, insurance companies and the like. I do not know that I would want to attack the share price of these companies.

Hon LINDA SAVAGE: So is it face-saving to an extent, really, we are talking about here?

Mr Richards: Maybe I am going a step too far, but I would suggest that that is the reason; to allow the trustee companies and the holders of those trustee companies to save face. That is just a thought of mine as to why it is happening.

The CHAIRMAN: Is it not in the public interest for that information to be disclosed if there has been a financial failing of that trustee company?

Mr Richards: I would suggest that it is probably not in the public interest. I can only refer back to one I was involved with a long, long time ago, which was Teachers Credit Society, and the nightmare that that was. That was entirely with a trustee company, but it did not help when the state stepped in and had to force a transfer, which is what happened. It forced the issue, liquidating the company. I can just see that it is maybe better to just have a transfer than a compulsory transfer, from a practical point of view.

Hon LINDA SAVAGE: Could we perhaps put that as a question on notice if there is some rationale that has actually been discussed about that? I would like to find out whether there is anything available to the committee to help us better understand what led to that. Why is it not in the public interest to know about a transfer that is compulsory, which means it is compelled, which suggests something entirely different to me to a voluntary transfer?

The CHAIRMAN: The rationale for not disclosing that it was a compulsory transfer: that will be question on notice 6.

Mr Richards: Q10.

The CHAIRMAN: It is Q10, but we are being a little bit specific here; it is the issue about the rationale behind non-disclosure of compulsory transfer of assets and liability, and whether that is in the public interest.

Turning to clause 33 of the bill: does clause 33(2) not have the same provisions as clause 29(4)(c) of the bill?

Mr Richards: No, it does not.

The CHAIRMAN: What is the reason for that?

Mr Richards: I have no idea. I can only suggest that it is a drafting issue.

The CHAIRMAN: Could we take that as question on notice 7?

Mr Richards: I will just clarify this: clause 33(2) talks about a list of things the regulations can provide.

The CHAIRMAN: Yes.

Mr Richards: Clause 29(4)(c) talks about the duties, obligations, immunities, rights and privileges. Have I got the right clause?

Hon LIZ BEHJAT: It should have been clause 33(2)(b) perhaps; that seems to be the one that matches up with clause 29(4)(c).

Mr Richards: Sorry?

Hon LIZ BEHJAT: I was looking at that, too. I thought perhaps clause 33(2)(b) might be the clause more specifically that would match clause 29(4)(c), which talks about the transfer of the duties, obligations, immunities and rights.

Mr Richards: I have to admit that I am a little bit lost on this one, because clause 29(4) does not talk about regulations at all; clause 33(2) just lists what regulations may provide. The other one talks about the duties of the transferring company. I am not sure that I see a correlation at all between the two.

The CHAIRMAN: Peter, can I just clarify whether clause 33(2)(b) intends to capture the circumstances of an executor of a will? There is just some concern that it does not.

Mr Richards: The executor of a will?

The CHAIRMAN: Acting as a trustee.

Mr Richards: Do you mean a trustee company acting as an executor?

The CHAIRMAN: Yes.

Mr Richards: This legislation covers trustee companies; it does not cover trusts per se.

The CHAIRMAN: Yes.

Mr Richards: I think it is intended that clause 33(2) will cover circumstances where a trustee company holds an estate asset or is subject to a liability. In other words, if ANZ Trustees is named as the executor and trustee of Bill Bloggs' estate, then that trust arrangement will be caught. If

someone else is a trustee, it will not be caught; it is something that is entirely separate. It is purely a trustee company relationship. In other words, if the trustee company is the executor and trustee of the estate, then the regulations can provide that the undertaking is transferred to the transferring company. Is that what you are after?

The CHAIRMAN: The issue with clause 29 is that it covers immunities, obligations, rights and privileges, and duties, yet clause 33(2) does not appear to do that. In the issue where you have a trustee company acting as an executor and there is a decision made to transfer the assets and liabilities to another company because it is failing, do the immunities, duties et cetera that apply to the trustee company as the executor of the will transfer across?

Mr Richards: To my understanding, the answer is yes.

The CHAIRMAN: And do you think that is sufficiently covered in clause 33(2)(b), and you do not need to add the words "immunities, duties, obligations, rights and privileges"?

Mr Richards: To the extent of the transfer, including the duties, obligations, immunities, rights and privileges applying to a transfer company, that sort of thing? I would like to put that to the draftsman. Personally, I have no objection to that sort of amendment being made; I just think it is pretty self-evident.

The CHAIRMAN: We will take that as question on notice 7, if you could just clarify that with the draftsperson. I am just noting that you, personally, do not see any objection to an amendment along those lines. Do you believe there is any scope for clause 33(2)(b) of the bill being read as only providing, or the receiving company to be the successor in law in relation to estate, assets and liabilities of a transferring company, but not the right to apply for a grant of probate in the receiving company's name? This is connected to what we have just covered.

Mr Richards: I think it is the same response. The question is: should the transferring company have the right to apply for probate in the receiving company's name?

The CHAIRMAN: Yes. Would you like to take that on notice?

Mr Richards: In other words, if the will, which provides—for example, if ANZ Trustees is the executor trustee and ANZ, for some reason, fails and it goes to another company, then there needs to be a comment in the legislation that this includes grant of probate.

The CHAIRMAN: Yes.

Hon LINDA SAVAGE: That capacity.

Mr Richards: I think it is understood. I will put it to the drafter.

The CHAIRMAN: The reason the committee raises that is that South Australia has a specific provision, and we are wondering why it has not been included in the WA bill, given that South Australia, at least, thought it was necessary. Given the belt-and-braces approach to this piece of legislation, it would seem to follow that that should happen. This is section 25(g) of the South Australian legislation.

Mr Richards: The only comment I would make there is that the legislation of each state is different; all states do not have the same trustee legislation, and possibly there is a specific requirement in South Australia for that to occur. I have no idea. It is a drafting issue; I do not think it is required. However, I do not believe there would be any problem with making some sort of an amendment to that. I will run it past the draftsman.

Hon LINDA SAVAGE: You have said you will run it past: can I add that that issue has been considered and has not been considered to be of concern. The issue has actually been considered.

Mr Richards: I do not think it is a matter of concern. A trust will not fail for want of a trusteeequity rule. If there is any doubt, an application will be made in the Supreme Court, and I am sure that the

Supreme Court will look and say, "This is what has happened", and grant the probate to the trustee company. I do not see it as being a practical issue or a worry.

[11.35 am]

The CHAIRMAN: Do you want to take that as a question on notice to discuss it with anyone else, or are you satisfied that —

Mr Richards: More and more I am happy with it, because I just do not think it is going to fail. A court would not allow such a situation to arise. I believe that the new trustee company would be ready. If you want to get a more definitive answer, I will take it on notice, but I do not think it is necessary.

The CHAIRMAN: I think we might take that as a question on notice, just so that we have that clarity in writing. That will be question on notice 8.

There are some provisions in the 1987 Trustee Act, which the bill seeks to repeal, which deal with matters that do not appear to be covered in the commonwealth act. They are—bear with me; there are a number of sections here—section 24, "Separate accounts of each estate to be kept"; section 29, "Borrowing by trustee companies"; section 30, "Prohibition of loans from estates to related bodies"; section 31, "Estate only liable for guarantees given by trustee companies on behalf of the estate"; section 32, "Trustee company to give information to Minister where directed"; section 33, "Returns to be made by the trustee company"; and section 34, "Audit requirements in respect of Common Trust Funds". What provisions in the commonwealth act or the Corporations Act cover these matters; and, if there are none, would you explain why they have not been incorporated in the bill?

Mr Richards: I would like to take that on notice and to contact the commonwealth on this. I think a lot of these things are dealt with in the commonwealth regulations. It also needs to be borne in mind that trustee companies when they move to the commonwealth will become subject to superannuation legislation. I honestly do not know the answer to that question. I would just like to say that I will run that through the commonwealth and ask it to provide the answers, because that would get you a more direct and accurate response than I could possibly give by trawling through the regulations.

The CHAIRMAN: That is fine. We appreciate that. That will be question on notice 9.

With respect to section 32, given that the state minister formerly had this power, if the commonwealth act does cover this, would ASIC now have the power to require this information?

Mr Richards: If not ASIC, then the Australian Prudential Regulation Authority, which is also tied up in this thing as one of the regulators. How that is, I am not aware, but my understanding is that ASIC would have that power, and it is pretty obvious that it should have that power. This is the power to seek information?

The CHAIRMAN: Yes. Given that, what is the department's position on the extent to which this impinges upon the sovereignty of the state, as well as the power of the minister?

Mr Richards: I am not aware of any position of the department on this.

The CHAIRMAN: Has the department sought any legal advice on this issue?

Mr Richards: No.

The CHAIRMAN: Is the department at all concerned about this issue?

Mr Richards: No.

The CHAIRMAN: Has the department given any consideration at all to this issue?

Mr Richards: No. Can I just clarify one point? The minister in this case will be the commonwealth minister.

The CHAIRMAN: Yes, but currently the state minister can require that information. Will the state minister still be able to do that?

Mr Richards: No.

The CHAIRMAN: And the state minister has no concern about that?

Mr Richards: Not that I am aware of. I cannot speak for the Attorney, but he has not expressed any concern to me.

Hon LIZ BEHJAT: Can I seek clarification of that?

The CHAIRMAN: Peter might find it a bit difficult to speak for the Attorney General. If you are asking Peter to express an opinion on that, it might be easier for the committee to just ask the Attorney General about that.

Hon LIZ BEHJAT: Whichever way we think is best to do it, but I do not want to let it just stay at that. I am not satisfied about that. Perhaps we need to talk to the Attorney General separately.

The CHAIRMAN: We can consider that in a closed session and make a decision on that.

The explanatory memorandum states that part VI of the 1987 act is deleted because it is redundant due to the Corporations Act regulating takeovers. However, chapter 6 of the Corporations Act is only expressed to apply to a "listed company" or "unlisted company that has 50 members". So, will all private trustee companies be covered by the scope of chapter 6; and, if not, why not?

Mr Richards: I am not aware of any private trustee companies. Almost invariably trustee companies are subsidiaries of major banks' life insurance companies. I think that part VI of the 1987 act has actually been redundant for many, many years, because the Corporations Acts deals with takeovers.

The CHAIRMAN: Is it possible that there might be small private trustee companies that would fall within the scope of the commonwealth act to which chapter 6 should apply?

Mr Richards: I am not aware of any, no.

The CHAIRMAN: The committee notes that a compulsory transfer does not attract state tax, whereas it appears that were it not for clause 32 of the bill, it would otherwise do so pursuant to the Duties Act 2008. There does not appear to be any exemption in the corresponding legislation in Queensland and the Northern Territory. Why are compulsory transfers exempt from the payment of state tax, and why are there not corresponding exemptions in the Queensland and Northern Territory legislation? That might be asking a bit much!

Mr Richards: I cannot comment on Queensland and the Northern Territory legislation. But I would suggest that there is no exemption in those states because the exemption is actually in their equivalent duties legislation, rather than being available to be placed in this legislation. They are exempt from the payment of state tax because it is a compulsory transfer. It is not as though you get up and you say, "I want to sell this block of land". It is because it is something that is imposed on you by the state. The state traditionally has provided an exemption in those circumstances.

The CHAIRMAN: So currently there is no tax that is —

Mr Richards: I am not aware of any. Even under the old building societies, credit unions, friendly societies regime there was always an exemption from state tax.

The CHAIRMAN: So the adoption of this bill will not result in any loss of revenue to the state?

Mr Richards: The state taxation office has not complained about it!

The CHAIRMAN: That is usually a good guide!

Can you justify the requirement that a certificate signed by an authorised officer will be evidence that a matter is certified, rather than having ASIC bear the usual onus of proof? Why is it necessary to have this reversal of the onus of proof?

Mr Richards: This is something that happens in a number of these pieces of legislation. As a matter of fact, I have had a look at the corresponding provision in the commonwealth, and it provides that a certificate is prime facie evidence. Section 601WCA just provides that for all purposes and in all proceedings, a certificate under subsection (1) is prime facie evidence of the matters certified. Quite often these sorts of provisions are included in this legislation. Just because it says the certificate is evidence does not mean it is not rebuttable. This provision is infinitely more rebuttable than the commonwealth legislation provides. There is a certificate provided, which is evidence of the matters that are certified. That can be done by ASIC or its staff, and it can be rebutted in court by evidence being led. It is as simple as that. I think it is perfectly justified in the circumstances, and it is not an uncommon provision in these sorts of circumstances.

The CHAIRMAN: You do not think that the requirement or the onus to rebut is an unreasonable burden, rather than placing on ASIC the onus of establishing the matters in the certificate?

Mr Richards: Not in the context of transfers and compulsory transfers. It is a rebuttable certificate, and it is very often used. As I say, there is a provision in the commonwealth legislation that provides that it is prima facie evidence, which as you are aware is again a higher level of evidence. Prima facie evidence is regularly used in the Corporations Act.

[11.45 am]

The CHAIRMAN: Just looking at the deletion of section 39 of the 1987 act, the committee notes that the explanatory memorandum does not explain why this section, which provides for property that is jointly vested in a trustee company and another entity to be held in a joint tenancy rather than a tenancy in common, has been deleted, and how the commonwealth act covers this. Could you please explain the reasons for that?

Mr Richards: Section 39 provides that if trustee companies hold land jointly, they are held as joint tenants and not tenants in common, unless otherwise provided. It is pretty self-evident that a trustee company is just another company that holds land as a joint tenant. I do not think the legislation is any less for having repealed section 39, which merely states the law relating to joint tenancy and tenants in common.

The CHAIRMAN: So there is no intention to change the law? It was just a decision that it is not necessary?

Mr Richards: I do not think section 39 adds anything.

The CHAIRMAN: I turn now to the transitional provisions. For how long will part VIII of the bill be in effect? We do not have a termination date for the transitional provisions.

Mr Richards: I have no idea for how long the transitional provisions will be in effect. I think all the states have got transitional legislation. What normally happens is that the states will get together about the commonwealth at some time and say, "How about it", and they will decide that it is to be repealed or not to be repealed, or how it is to be altered or otherwise dealt with. It will be dealt with in cooperation with the commonwealth and all the other states. How long? I have no idea.

The CHAIRMAN: Do you think that the lack of any termination of that transitional provision creates any uncertainty?

Mr Richards: I cannot see it, no. Is there any particular clause that you would like to point out?

The CHAIRMAN: No. It is just a general question.

Mr Richards: I do not think it will hang around for very long.

The CHAIRMAN: Are there any plans for the transitional provisions to become part of the act when it is passed? I am aware that that sometimes occurs.

Mr Richards: Not that I am aware of, no.

The CHAIRMAN: I turn now to the commonwealth regulations. Would it be fair to say that with the commonwealth already having regulated to govern the licensing of trustee companies, and section 109 of the commonwealth Constitution operating to override state laws, the bill is merely machinery legislation? This might go back to your point earlier that the commonwealth should get legal advice on the application of section 109.

Mr Richards: It is machinery in a way. However, the state has been, I hope, very zealous in this legislation in preserving one particular thing out of the Trustee Companies Act 1987. That is the role of the Supreme Court. The view was taken fairly early in the piece, by all the states, I understand, that because natural persons acting as trustees were subject to the Supreme Court, therefore trustee companies should also be subject to the Supreme Court of the state. The intention has been to ensure that the Supreme Courts in all the states retain the power to regulate trustee companies in the manner in which they were regulating them beforehand. To that extent I would say that by and large it is machinery.

The CHAIRMAN: What would be the consequence for the participation of Western Australia in this scheme if Parliament wished to make amendments to the bill that affected the facilitation of matters such as compulsory transfers?

Mr Richards: I honestly do not know. I think they would probably be fairly minimal. Having regard to section 109, if any amendments are proposed I will of course be running them past and seeking the commonwealth's views on them, because the legislation that we enact may well have an impact on the commonwealth.

The CHAIRMAN: Are there any proposals to table further amendments to the bill?

Mr Richards: No.

The CHAIRMAN: I think you have already answered this question, but regulations have not been drafted yet?

Mr Richards: Parliamentary counsel will not draft them until such time as it is fairly short and they have a good idea of what the final legislation is going to provide.

The CHAIRMAN: Do members want to raise with Peter any matters arising from these questions? I have just been given a note to remind me to advise you that the committee will provide you with a letter, probably by fax, to detail each of the questions that have been taken on notice, just to clarify that for you, and so that we are all on the same page.

Mr Richards: I have got them noted, but that would be very handy.

The CHAIRMAN: I also need to advise you that there will be a one-week return on the answers. So that will be Wednesday, 1 June, and that will also be detailed in the letter. That will need to be returned to Alex.

Mr Richards: Could I give Mr Hickman my email address? I would like to do it by email because I can get it to the commonwealth a lot more quickly that way.

The CHAIRMAN: No problem. We can do that at the conclusion of the hearing. Just as a matter of parliamentary privilege, because you have indicated that you will be talking to your commonwealth counterpart in relation to these questions, the committee needs to authorise you to do so. But that is a deliberation that the committee needs to have in closed session. So I will adjourn the hearing for a couple of minutes so that the committee can deliberate on that matter, and then we can advise you of the committee's decision. So if you could please leave the room for a couple of minutes —

Mr Richards: Could you make that the commonwealth and also ASIC?

The CHAIRMAN: Yes; no problem.

Hearing suspended from 11.53 to 11.59 am

The CHAIRMAN: Peter, while the committee was in closed session, we considered the issue of the people you will need to consult, and providing you with authorisation to do that. The committee has resolved that you are authorised to speak with your commonwealth counterpart, with ASIC, with APRA, and with the Attorney General and members of his office, in relation to the questions on notice that we have asked you. So you have that authorisation. Have we covered everyone?

Mr Richards: Thank you, Madam Chair. I think that has covered everyone.

The CHAIRMAN: Thank you. Hon Liz Behjat has one additional question that she would like to put to you on the record.

Hon LIZ BEHJAT: With regard to compulsory transfers and voluntary transfers in sections 29 and 33 of the bill, could you explain to me why compulsory transfers are dealt with under the act and voluntary transfers may be dealt with by regulation? Why would you not also put voluntary transfers under the act? What is the difference?

Mr Richards: Subsection 33(2) provides that regulations can be made for a voluntary transfer. I think that is likely to be because a compulsory transfer is one where the transfer is imposed on them, and therefore it is thought to be better stated in the legislation, whereas a voluntary transfer is where two companies mutually agree to get together, and the assets and liabilities of one are transferred to the other on a handshake or under a written agreement, and therefore it is considered less likely to be subject to challenge and something that can be dealt with by regulation. That is the only reason I can suggest.

Hon LIZ BEHJAT: Thank you.

The CHAIRMAN: Peter, do you have any further comments that you would like to make to the committee?

Mr Richards: Maybe as a matter of background, I would like to make one comment. This is an initiative that arose out of a COAG meeting in March 2008, where the commonwealth and the states are harmonising legislation. The intent is to ensure that because most trustee companies are national bodies, they are subject to one body of law rather than eight separate bodies of law. Also, having regard to the fact that they are mostly involved with superannuation, it seemed most practical to send them to the commonwealth.

The CHAIRMAN: Peter, thank you very much for your time and your forbearance, and for taking on board securing answers to those questions on notice.

Mr Richards: Thank you very much for being so kind to me!

Hearing concluded at 12.02 pm