

STEP Perth Newsletter

November 2009

Welcome to STEP Perth's first newsletter!

It has been a busy year for us and we are just finding our feet. We hope that this newsletter gives you an insight into what we have been doing and what we plan to do in the future. This newsletter will be published every two months so if you have any ideas for content please let us know. Merry Christmas and all the best for 2010! **STEP Perth**

STEP membership around Australia and New Zealand

It is a great pleasure to confirm that in our first year we have 28 members. We are happy to welcome new members so spread the word!

Melbourne: 54 members
Sydney: 88 members

Queensland: 46 members
New Zealand: 114 members

Recent Events

Launch - 22 July 2009

The Supreme Court of Western Australia was an inspiring backdrop for the launch of the Perth branch of STEP, hosted in the Court's foyer on 22 July 2009.

The evening cocktail function was a gathering of almost 100 professionals with an interest in trust and estate practice. The launch brought together judges and registrars, barristers, lawyers, accountants, bankers and professional trustees amongst others.

The launch was an excellent forum in which to introduce STEP to the professions in Perth. Honoured guests and speakers at the launch included the Hon Chief Justice Robert French, the Hon Chief Justice Wayne Martin of the Supreme Court of WA and the Hon Justice Ian Gzell of

STEP

Society of Trust and
Estate Practitioners



www.step.org

UPCOMING EVENTS

STEP Christmas Party

Please join us for a brief review of the trust and estate planning year and a whisky tasting Christmas wind up!

Date: **2 December 2009**

Time: 5.30 - 7.30pm

Venue: Jackson McDonald Boardrooms

Educational Event: International Speaker

Special guest speaker: Ian Marsh of *familydr*

Date: **21 January 2010**

Time: 5.30 - 7.30pm

Location: Jackson McDonald Boardrooms

(See page 3 for more details)

Watch this space for information on future events!

the Supreme Court NSW and Chairman of STEP Sydney.

A notable theme of the evening was the breadth of law that touches upon the areas of trusts and estates including equity, common law, probate and taxation and the impact this has on practitioners.

The significance of STEP's purpose and function was still conveyed in a light-hearted

manner, including a few somewhat expected puns, "one small STEP for man, one giant leap for mankind", in light of a certain 40 year anniversary that took place the preceding day.



L to R: Chief Justice French of the High Court of Australia, Adam Levin Chairman of STEP Perth, Chief Justice Martin of the Supreme Court of Western Australia and Justice Gzell of the Supreme Court of NSW and Chairman of STEP Sydney

Roundtable Workshop - 16 September 2009

Is there a future in discretionary trusts? Are trustees in the firing line?

In keeping with STEP Perth's desire to deliver events not otherwise available in Perth and to raise the level of expertise of our members, we hosted a round table workshop.

The facilitators of the workshop, Adam Levin and Andrew Davies, introduced specific issues and invited participants to explore collectively the options available to practitioners advising on discretionary trusts. The concern was even greater when family law considerations were raised in respect of the discretionary trust of a parent. Participants enjoyed very lively discussions regarding

the outcomes of *Spry's case*. The workshop focused on developing practical and sensible practices and solutions for use by practitioners in their day to day practices. Participants were provided with a Resources Register that makes reference to authorities, articles, publications, texts and other materials that may be of interest. The outcome of the workshop will be recorded in a Good Practice Guide prepared in the spirit of collaboration and will reflect the consensus view of the issues raised at the workshop.

The Good Practice Guide and Resources Register will be distributed to participants and STEP Perth members shortly. The feedback from this event suggests that there is a great deal more to consider in this area and we will revisit this topic in 2010.

Topics discussed at the workshop included:

- *Kennon v Spry*
- *unpaid entitlements*
- *default beneficiaries*
- *removal of trustees*

International Speaker: Ian Marsh of familydr, UK

Location: Jackson McDonald Boardrooms

Date: 21 January 2010

Time: 5:30 - 7:30pm

Cost: \$20 members \$50 non members

Topic: *Building bespoke conflict management procedures into all key family arrangements like family charters, constitutions, share holder agreements and where appropriate, wills and trusts.*

Format: In keeping with STEP Perth's desire to deliver educational events not otherwise available in Perth, we present a seminar presentation by international speaker, and STEP London member, Ian Marsh TEP.

Speaker: Ian is a long standing member of STEP in the UK. Ian practised law for over 30 years and was a private client partner with law firms in London and New York for 16 years before founding familydr Limited in June 2006.

Ian acts variously as a mentor, facilitator, conciliator and mediator to family enterprises, helping them to manage change more effectively, to deal with their differences more constructively and to resolve crises that inevitably occur from time to time.

Ian writes and speaks regularly on effective communication, conflict management and dispute resolution and is the author of the Conflict Management and Dispute Resolution Chapter in Business Families and Family Business; the STEP Handbook for Advisers published by Globe Business Publishing Limited.

Ian has clients around the world, including in Perth.

For further information on this event please contact:

Julia Fanali on (08) 9426 6618 or jfanali@jacmac.com.au

*A message from our
sponsors...*

Perpetual 

Perpetual Private Clients is proud to be a supporter of STEP in WA.

Since 1886, we have been a leading provider of financial management and fiduciary services to generations of Australians.

Today, we work in alliance with many STEP members to service their clients.

To find out more please call Ray Knight or Wayne Rimmer on (08) 9224 4420.

Publications of Interest

Australian Succession and Trusts Law Reports

Australian Succession and Trusts Law Reports is Australia's first law report series meeting the specialised needs of succession and trusts lawyers with convenient and centralised reporting of the most recent and relevant decisions of the State Supreme Courts, the Federal Court and the High Court.

The series is edited by an editorial panel comprising succession and trusts law specialist **David Haines QC**, academic **David Wright** and Professor **Rosalind Croucher** of the Australian Law Reform Commission. The Panel selects the most relevant cases from across Australia. The cross jurisdictional coverage of the series meets the needs of busy succession and trusts lawyers

as cross border issues and inter-state perspectives rise in importance. Other issues addressed include the increased frequency of estate assets spread across multiple jurisdictions; and State and Territory parliaments moving towards harmonising succession laws covering wills, intestacy, family provision and probate and administration. Practitioners can save time and research effort with concise

headnote précis written by people with knowledge of these specialist areas. Practitioners can reduce risk with editor's comments placing each case in a practice context, identifying potential practice risks and pointing to suggested solutions to help succession and trusts lawyers understand the implications of each decision for their day to day practice. For a free trial visit: www.thomsonreuters.com.au

STEP Journal

The STEP Journal is the official magazine of the Society of Trust and Estate Practitioners. The STEP Journal is published 10 times a year and currently has a worldwide circulation of 14,500 and a readership of over 28,000.

STEP Journal was recently judged as 'Magazine of the Year' at the 2009 Trade Association Forum Best Practice Awards in the United Kingdom. The Best Practice Awards are now firmly established as a showcase event to recognise and reward the achievements of Trade Association Forum members. The judges described the STEP Journal as "an exemplar in Trade Associations magazines", which "provides high quality articles of specific relevance to the members in a clear format and is cost effective in communicating the organisation's messages".

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SEMINARS

Special offer for new members of STEP Perth

All new members of STEP Perth receive 1 free Legalwise seminar paper and 20% off all Legalwise seminars and future seminar papers.

Please contact Legalwise direct on (02) 9387 8133

Your guide to the STEP Journal

by Craig McKie

Trusts & Insolvency

by Paul Buckell, Partner, Kerry Olsen, Channel Islands
STEP Journal, September 2009, page 79

This article addresses issues material to trusts or underlying investments in circumstances of insolvency. The English concept of “reflective loss” is discussed as is the question of the extent to which the trustee as shareholder is bound to place the company into administration or liquidation.

The article also briefly addresses the issue of an insolvent trustee. Issues of control are considered as are rights of indemnity and rights of subrogation as well as proprietary claims against trust assets. In summary, this article touches on issues that may arise for trustees in Western Australia from time to time.

On the Buses...

by Chris Young, Solicitor, Teece Hodgson & Ward, Sydney
STEP Journal, October 2009, page 71

In this article Chris Young addresses the recent statutory provisions which deal with the creation of statutory Wills in England & Wales and New South Wales. New South Wales did not have legislation dealing with the creation of statutory Wills for adults lacking testamentary capacity. The *Succession Act 2006* (NSW) came into force on 1 March 2008. Legislation was recently considered in a case *Re: Fenwick* [2009] NSWSC 530. Palmer J applied an interpretation to the principle that the proposed Will, alteration or revocation is, or is reasonably likely to be one that would have been made by person if he or she had testamentary capacity. Palmer J felt that different approaches should be taken for those persons who have lost capacity and for those persons who never had capacity.

The article also considers the England & Wales legislation being the *Mental Capacity Act* of 2005 which came into force on 1 October 2007. The WA legislation is not considered. In WA Part X1 of the *Wills Act 1970* vests the Supreme Court with jurisdiction to authorise and make, alter and revoke Wills from 9 February 2008. It is interesting to compare and contrast how other jurisdictions approach the rising world-wide incidence of the incapacity of persons to make Wills. From an Australian perspective, it seems that uniform legislation, although desirable, is not forthcoming.

Changes on the Horizon

by Ivana bosio
STEP Journal November / December, page 60

This important article by Ivana Bosio discusses forthcoming changes to legislation that will affect trustee companies in Australia. A copy of this article is attached on pages 8 and 9 for your information.

Have you read a relevant article of interest lately? Let us know by emailing Kylie Wilkie at kwilkie@jacmac.com.au and we will feature it in the next newsletter.

A message from our sponsors...

nabprivatewealth

Nab Private Wealth has been proud to sponsor STEP in its inaugural year of operation.

To all supporting and future practitioners we wish you all a safe and merry Xmas.

We look forward to continuing our support and working with you all throughout 2010.



STEP's CPD Requirements

A requirement of STEP membership is that each member completes a minimum of 35 hours of CPD each year. The CPD year commences on 1 April annually and ends on 31 March in the following calendar year. For Members joining part way through the CPD year, CPD will apply on a pro-rata basis.

STEP International issues CPD guidelines for your assistance. The guidelines state that of the 35 hours, 15 hours must be Structured Training. Structured Training is defined at paragraph 4 of the Guidelines, and includes all learning events, relevant to trust and estate practitioners, involving interaction with other individuals (as contributors or as an audience member), completion of interactive printed material by an authorised provider, or some form of assessment. The remaining 20 hours may be Unstructured Training. Unstructured Training is defined at paragraph 5 of the Guidelines, and includes any form of learning where there is

no interaction with other individuals including informal personal research and reading. Paragraph 6 of the Guidelines states that while the structured and unstructured training 'must of course relate to the field of trust and estate work...it is nevertheless appreciated that members must often keep up to date on the related topics of law, accounting, banking and financial services. Such study can account for up to 50% of the CPD requirements'.

Start your Unstructured Training by reading the article on pages 8 and 9!

Visit the STEP website at www.step.org and follow the "Education" link to download the CPD Guidelines, a CPD Record Sheet and CPD Self-certification Form.

Member Profile

Patrick Hughes

Employer: Jackson McDonald

Position: Special Counsel

STEP member since: March 2009



Contact details

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Patrick's main area of expertise is in succession law and trusts. Patrick provides comprehensive estate planning advice including advising on wills, testamentary trusts, discretionary trusts, and enduring powers of attorney. Many of Patrick's clients are professionals and executives requiring strategic estate planning advice.

Patrick's expertise also includes all aspects of the administration of deceased estates including probate applications and estate administration.

As well as an extensive knowledge of estate planning and estate administration law, Patrick has considerable experience in litigious succession matters including solemn form contested probate applications and claims under the family provision legislation.

If you would like to be featured in "Member Profile" please send a brief professional profile and a photo to Kylie Wilkie at kwilkie@jacmac.com.au.

STEP Website

Visit the STEP website at www.step.org and search "Perth" for more information on STEP Perth, including:

- further information on upcoming events
- more detailed recaps of past events
- minutes from STEP Perth Committee meetings
- links to trusts and estate planning resources websites of interest
- a discussion forum in which members can discuss issues of interest

The website is a work in progress so please check for updates from time to time.





Changes on the horizon

Ivana Bosio discusses forthcoming changes to legislation that will affect trustee companies in Australia

ABOUT THE AUTHOR

Ivana Bosio TEP is a Technical Manager for Wills at Australian Executor Trustees Limited

On 6 May 2009, the Exposure Draft of the *Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009* (the Bill) was released, which is intended to amend the *Corporations Act 2001* (Commonwealth) by inserting a new Chapter 5D therein.

The main objectives of the Bill are to amend the ways in which trustee companies are regulated in Australia. This will be done by ensuring that such companies come under the control of the Commonwealth, as opposed to the individual states and territories (as is the current situation). It will also launch a new system whereby consumers will be better protected via the creation of a national market for trustee services.

Why are the legislative amendments needed in Australia?

The regulation of trustee companies in Australia is not uniform between each state and territory. Each jurisdiction has its own licensing, reporting and supervisory regime, which ultimately has a negative impact on the competition for trustee services within the Australian marketplace.

Furthermore, the current regime offers limited options to beneficiaries who may require dispute resolution services outside of those available by the trustee companies themselves. At present, beneficiaries who may have concerns about the way in which a trustee company is handling the management or administration of a trust or estate in which they have an interest, (after exhausting all internal dispute resolution options with the trustee company) must suffer the financial burden and time delays of applying to the

Supreme Court in the appropriate state or territory to have their complaint dealt with.

Another reason for the introduction of this new legislation is to deal with the inadequacy in ongoing government supervision and regulation currently faced by trustee companies in Australia.

Important features of the new legislation

The Commentary to the Exposure Draft (at page 29) of the Bill summarises the important features of the new legislation as follows:

'The new legislation will:

- empower trustee companies to provide 'traditional trustee company services' that may otherwise be provided only by individuals
- deem 'traditional trustee company services' to be financial services for the purposes of the *Corporations Act 2001* (Cth)
- provide that the Australian Securities and Investments Commission (ASIC - the Commonwealth regulator) will regulate trustee companies in the provision of these traditional services
- apply the consumer protection (licensing, conduct, disclosure, advice and dispute resolution) provisions of the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth), as modified
- regulate the fees that trustee companies may charge, and how those fees are disclosed
- prohibit a company that is not a trustee company from providing traditional trustee company services.'

What is a 'traditional trustee company service?'

The Bill only proposes to regulate the provision of 'traditional trustee company services.' They are listed in the Bill to include:

- preparing a will, a trust instrument, a power of attorney or an agency arrangement

- performing estate management functions, which include acting as:
 - a trustee of any kind or otherwise administering or managing a trust
 - an executor or administrator of a deceased estate
 - an agent, attorney or nominee
 - a manager or administrator of the estate of an individual who lacks the capacity to manage his or her affairs
 - a financial guardian of the estate of a minor, or
 - a receiver or custodian of property of a person
- applying for probate of a will, applying for grant of letters of administration, or electing to administer a deceased estate, and
- establishing and operating common funds' (section 601RAC of the Bill).

The types of services which are not covered by the Bill include:

- acting as a superannuation trustee or a responsible entity for managed funds
- acting as a debenture trustee, and
- providing a custodial or depository service.

These services will continue to be regulated under the *Superannuation Industry (Supervision) Act 1993* (Cth), the *Managed Investments Act 1998* (Cth) and the current sections of the *Corporations Act 2001* (Cth) – see page 28 of the Commentary to the Bill.

Regulation of fees charged by licensed trustee companies

As previously explained, the Bill only regulates traditional trustee company services. As a consequence, the Bill is limited to regulating those fees that trustee companies are able to charge their clients for such services.

The Commentary to the Exposure Draft at page 42 states that:

'The general approach to the regulation of fees includes:

- disclosure of fees for all work which may be performed (fees include remuneration/commissions)



- deregulation of the fees charged to new trusts and estates (other than charitable trusts), subject to a requirement that the company's fee schedule be disclosed on the Internet and a requirement that trustee companies charge no more than the fees specified in their published fee schedule at the time they begin administration
- in relation to charitable trusts:
 - 'grandfathering' of fees charged to existing clients
 - capping of fees charged to new clients
- The government is committed to a review of the fee arrangements in relation to charitable trusts after two years of operation.'

It is important to note that a trustee company must ensure that an up-to-date schedule of its fees for traditional trustee services is only disclosed on a website maintained by, or on behalf of, the trustee company. Any changes in fees must be disclosed to its clients within 21 days of the change taking effect.

For fees relating to estates and trusts (excluding charitable trusts), the trustee company must not charge fees in excess of its recently published schedule. However, the parties are able to negotiate a different fee (either higher or lower) to that contained in the trustee company's most recently published schedule.

With respect to estate management services, the Bill allows a licensed trustee company the flexibility to draw its fees from both the income and capital of the relevant estate (however, this does not apply to the annual management fee or to the common fund administration fee for new charitable trusts, which can only come from income).

For services provided to new charitable trusts (i.e. for services provided after this section commences), a licensed trustee company can charge its fees in two ways:

1. it can charge a capital commission and an income commission; or
2. it can charge a management fee.

Under the first option, the capital commission cannot exceed 5.5 per cent (Goods and Services Tax (GST) inclusive) of the gross value of the trust assets ('gross value of the trust assets' is not defined). The annual income commission charged by the licensed trustee company cannot exceed 6.6 per cent (GST inclusive) of the income received on trust assets.

Under the second option, the annual management fee must not exceed 1.056 per cent (GST inclusive) of the gross value of the trust assets.

For services provided to existing charitable trusts, the Bill 'grandfathers' these fees and those clients will be unaffected by the new rules. However, if the charitable trust invests in common fund assets, the licensed trustee company may charge an annual administration fee not exceeding 1.1 per cent of the gross value of the trust assets (for a full summary of fees, see Part 5D.3 of the Bill).

What other regulatory requirements under the Bill will affect trustee companies?

The Bill proposes to align the provision of traditional trustee company services with the provision of 'financial services', as currently defined in Chapter 7 of the *Corporations Act 2001* (Cth).

This means that trustee companies must be licensed by ASIC and will be required to hold an Australian financial services licence (AFSL), which specifically covers the provision of traditional trustee company services. Furthermore, under the new legislation, ASIC can only give a licence to a trustee company if it provides all, and not only some, traditional trustee company services. Trustee companies that do not presently hold an AFSL will need to apply for one. Trustee companies that already hold an AFSL for other purposes will need to review their circumstances to ensure that they meet their obligations as AFSL holders with

regard to the provision of traditional trustee company services (refer to Part 5D.1 of the Bill).

Duties of officers and employees of licensed trustee companies

Once licensed, the officers of trustee companies will be expected to carry out the duties of 'loyalty and good faith' and the duties of 'care, skill and diligence.' The Bill also imposes a negative duty on employees of trustee companies to avoid conflicts of interest (see Part 5D.4 of the Bill).

Contravention of these duties may result in both civil and criminal penalties.

Limit on control of licensed trustee companies

Consistent with the current system across many Australian states and territories, the Bill also places ownership restrictions on trustee companies. The voting power of any one person in a trustee company will be limited to 15 per cent (section 601VAA of the Bill). Only the minister is able to approve a higher shareholding where necessary (section 601VBB of the Bill).

Cancellation of Australian Financial Services Licence (AFSL)

ASIC is able to cancel the AFSL held by a trustee company. This may be problematic for clients as they may be left without an entity to manage the estate or trust in which they have an interest. The Bill proposes to address this issue by stipulating the procedures for the 'transfer of estate assets and liabilities from the former licensed trustee company to another licensed trustee company' (section 601WBA of the Bill).

Commencement and transitional provisions

The proposed Bill commences on a date to be fixed by proclamation. The *Corporations Act 2001* (Cth) will apply to trustee companies within six months from the day the new Act receives Royal Assent. ■