

South Australia

Trustee Companies (Commonwealth Regulation) Amendment Act 2010

An Act to amend the *Trustee Companies Act 1988*; and to make consequential amendments to the *Administration and Probate Act 1919*, the *Guardianship and Administration Act 1993*, the *Legal Practitioners Act 1981* and the *Trustee Act 1936*.

Contents

Part 1—Preliminary

- 1 Short title
- 2 Commencement
- 3 Amendment provisions

Part 2—Amendment of *Trustee Companies Act 1988*

- 4 Amendment to long title
- 5 Amendment of section 3—Interpretation
- 6 Repeal of sections 9 to 12
- 7 Amendment of section 13—Investment of trust funds
- 8 Repeal of sections 15 to 15B
- 9 Amendment of section 16—Power of trustee company acting in representative capacity to hold its own shares etc
- 10 Repeal of section 16A
- 11 Repeal of sections 17 to 22
- 12 Insertion of Part 3A

Part 3A—Transfer of estate assets and liabilities

Division 1—Preliminary

- 25A Interpretation

Division 2—Compulsory transfers

- 25B Purpose and application of Division
- 25C Compulsory transfer of transferring company's estate assets and liabilities
- 25D Certificates evidencing operation of Division
- 25E Registration or record of transfer
- 25F Exemption from State taxes

Division 3—Voluntary transfers

- 25G Voluntary transfer of transferring company's estate assets and liabilities

Division 4—Relationship of Part with other laws

- 25H Relationship of Part with other laws
- 13 Repeal of section 27
- 14 Repeal of section 30
- 15 Amendment of section 31—Regulations

- 16 Repeal of Schedule 1
- 17 Repeal of Schedule 2

Schedule 1—Consequential amendments and transitional provision

Part 1—Amendment of *Administration and Probate Act 1919*

- 1 Amendment of section 4—Interpretation
- 2 Amendment of section 18—Administration guarantees may be required before administration sealed
- 3 Amendment of section 31—Administration guarantees

Part 2—Amendment of *Guardianship and Administration Act 1993*

- 4 Amendment of section 3—Interpretation
- 5 Amendment of section 35—Administration orders

Part 3—Amendment of *Legal Practitioners Act 1981*

- 6 Amendment of section 5—Interpretation

Part 4—Amendment of *Trustee Act 1936*

- 7 Amendment of section 4—Interpretation

Part 5—Transitional provision

- 8 Interpretation
 - 9 Transitional provision
-

The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Trustee Companies (Commonwealth Regulation) Amendment Act 2010*.

2—Commencement

- (1) This Act will come into operation on a day to be fixed by proclamation.
- (2) Section 7(5) of the *Acts Interpretation Act 1915* does not apply to the commencement of this Act or any provision of this Act.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Trustee Companies Act 1988*

4—Amendment to long title

- (1) Long title—delete "consolidate and amend the law relating" and substitute:
make provision in relation
-

- (2) Long title—delete "and to repeal the *ANZ Executors & Trustees Company (South Australia) Limited Act 1985*, the *Bagot's Executor Company Act 1910*, the *Elder's Executor Company's Act 1910*, the *Executors Company's Act 1885* and the *Farmers' Co-operative Executors Act 1919*"

5—Amendment of section 3—Interpretation

- (1) Section 3(1), definitions of *business day* and *common fund*—delete the definitions and substitute:

appointment includes nomination;

Commonwealth Act means the *Corporations Act 2001* of the Commonwealth;

- (2) Section 3(1), definition of *investor*—delete the definition
- (3) Section 3(1), definition of *person who has a proper interest* or *person with a proper interest*—delete the definition
- (4) Section 3(1), definition of *trustee company*—delete the definition and substitute:

trustee company means a licensed trustee company within the meaning of Chapter 5D of the Commonwealth Act;

6—Repeal of sections 9 to 12

Sections 9 to 12 (inclusive)—delete the sections

7—Amendment of section 13—Investment of trust funds

Section 13(c)—after "common fund" insert:

(within the meaning of the Commonwealth Act)

8—Repeal of sections 15 to 15B

Sections 15 to 15B (inclusive)—delete the sections

9—Amendment of section 16—Power of trustee company acting in representative capacity to hold its own shares etc

Section 16—delete "*Corporations Act 2001* of the Commonwealth" and substitute:

Commonwealth Act

10—Repeal of section 16A

Section 16A—delete the section

11—Repeal of sections 17 to 22

Sections 17 to 22 (inclusive)—delete the sections

12—Insertion of Part 3A

After Part 3 insert:

Part 3A—Transfer of estate assets and liabilities

Division 1—Preliminary

25A—Interpretation

- (1) In this Part—

ASIC means the Australian Securities and Investments Commission;

authorised ASIC officer means a person authorised under section 25D to issue certificates under that section;

certificate of transfer—see section 25B(2)(b);

receiving company—see Divisions 2 and 3;

State tax means—

- (a) stamp duty; or
- (b) any other tax, duty or impost that would, apart from an exemption under this Part, be payable in respect of the transaction under the law of the State;

transferring company—see Divisions 2 and 3.

- (2) If an expression is defined in the Commonwealth Act and is also used in this Part, the expression as used in this Part has, unless the contrary intention appears, the same meaning as in that Act.

Division 2—Compulsory transfers

25B—Purpose and application of Division

- (1) The purpose of this Division is to facilitate compulsory transfers of estate assets and liabilities under Part 5D.6 of the Commonwealth Act.
- (2) This Division applies if ASIC—
 - (a) cancels the licence of a trustee company (the *transferring company*) and makes a compulsory transfer determination under section 601WBA of the Commonwealth Act that there is to be a transfer of estate assets and liabilities from the transferring company to another licensed trustee company (the *receiving company*); and
 - (b) issues a certificate of transfer under section 601WBG of the Commonwealth Act stating that the transfer is to take effect.

25C—Compulsory transfer of transferring company's estate assets and liabilities

- (1) From the time a certificate of transfer comes into force in respect of the transfer of estate assets and liabilities from a transferring company to a receiving company, the receiving company is to be taken to be the successor in law of the transferring company, to the extent of the transfer.
- (2) If the transfer of estate assets and liabilities is a total transfer, all the assets and liabilities of the transferring company become respectively the assets and liabilities of the receiving company without any transfer, conveyance or assignment.
- (3) If the transfer of estate assets and liabilities is a partial transfer, all the assets and liabilities of the transferring company that are included in the list (referred to in section 601WBG(2)(c) of the Commonwealth Act) included in, or attached to, the certificate of transfer become respectively assets and liabilities of the receiving company without any transfer, conveyance or assignment.
- (4) To the extent of the transfer of estate assets and liabilities, the duties, obligations, immunities, rights and privileges applying to the transferring company apply to the receiving company and, in particular—
 - (a) an appointment of the transferring company in a will, order of a court or instrument of any kind is to be taken to be an appointment of the receiving company (whether the appointment was made before, on or after the commencement of this Division and whether the appointment is in effect on that date, takes effect after that date or has taken effect previously but some further act or thing is necessary to perfect the appointment or undertaking of the office); and
 - (b) in each case where the transferring company is acting as a trustee, the receiving company is appointed as the trustee in place of the transferring company and the receiving company—
 - (i) is entitled to exercise any rights, powers, capacities or authorities in respect of or arising from each such appointment; and
 - (ii) to the extent provided in this Act, is obliged to discharge the liabilities and obligations of the transferring company in respect of and arising from each such appointment.
- (5) If the certificate of transfer includes provisions of a kind referred to in section 601WBG(3) of the Commonwealth Act—
 - (a) specifying that particular things are to happen or are taken to be the case, those things are taken to happen, or to be the case, in accordance with those provisions; or

- (b) specifying a mechanism for determining things that are to happen or are taken to be the case, things determined in accordance with that mechanism are taken to happen, or to be the case, as determined in accordance with that mechanism.

25D—Certificates evidencing operation of Division

- (1) An authorised ASIC officer may, by a certificate in writing signed by the officer, certify that a specified asset or liability of the transferring company has become an asset or liability of the receiving company under this Division.
- (2) For all purposes and in all proceedings, a certificate purporting to be issued under subsection (1) is evidence of the matters certified.
- (3) ASIC is empowered to authorise, in writing, a person who is a member of ASIC, or of its staff, to issue certificates under this section.

25E—Registration or record of transfer

The Registrar-General or any other person or authority required or authorised under a law of the State to register or record transactions affecting assets or liabilities, or documents relating to such transactions, must, on application under this section accompanied by a certificate issued under section 25D, register or record in an appropriate manner the transfer or transfers to which the certificate relates.

25F—Exemption from State taxes

No State taxes are chargeable under any Act in respect of a compulsory transfer of estate assets or liabilities facilitated under this Division.

Division 3—Voluntary transfers

25G—Voluntary transfer of transferring company's estate assets and liabilities

- (1) The Governor may make regulations to facilitate the voluntary transfer of estate assets and liabilities from 1 trustee company (the *transferring company*) to another trustee company (the *receiving company*) if ASIC has made a determination under the Commonwealth Act allowing the transfer.
- (2) Without limiting the generality of subsection (1), the regulations may—
 - (a) provide that the receiving company is to be taken to be the successor in law of the transferring company, to the extent of the transfer; and
 - (b) provide for the identification of estate assets or liabilities of the transferring company; and

- (c) provide for and give effect to the transfer of estate assets and liabilities of the transferring company from the transferring company to the receiving company; and
 - (d) provide for and give effect to the transfer of duties, obligations, immunities, rights and privileges of the transferring company from the transferring company to the receiving company, including by providing (for example) that—
 - (i) an appointment of the transferring company in a will, order of a court or instrument of any kind is to be taken to be an appointment of the receiving company (whether the appointment was made before, on or after the commencement of the regulation and whether the appointment is in effect on that date, takes effect after that date or has taken effect previously but some further act or thing is necessary to perfect the appointment or undertaking of the office); and
 - (ii) in each case where the transferring company is acting as a trustee, the receiving company is appointed as the trustee in place of the transferring company; and
 - (e) provide for the registration or recording of the transfer (with or without formal application) by the Registrar-General or any other person or authority; and
 - (f) provide for evidence of matters relating to the transfer; and
 - (g) provide for relief from the consequences of anything done or allowed under regulations made under this section; and
 - (h) provide for payment, or exemption from payment, of State taxes in respect of the transfer; and
 - (i) provide for the liquidation or dissolution of the transferring company; and
 - (j) provide for any other matter of a savings or transitional nature consequent on the transfer.
- (3) A regulation made under this section may, if the regulation so provides, take effect from the commencement of this section or from a later day.
- (4) A regulation made under this section has effect despite anything in a contract, deed, undertaking, agreement, will or other instrument.

Division 4—Relationship of Part with other laws

25H—Relationship of Part with other laws

- (1) This Part has effect despite anything in a contract, deed, undertaking, agreement, will or other instrument.

- (2) Nothing done by or under this Part—
 - (a) places a receiving company, a transferring company or another person in breach of contract or confidence or otherwise makes any of them guilty of a civil wrong; or
 - (b) places a receiving company, a transferring company or another person in breach of—
 - (i) a law of the State; or
 - (ii) a contractual provision prohibiting, restricting or regulating the assignment or transfer of an asset or liability or the disclosure of information; or
 - (c) releases a surety, wholly or partly, from all or any of the surety's obligations.
- (3) Without limiting subsection (1), if, apart from this section, the advice or consent of a person would be necessary in a particular respect, the advice is taken to have been obtained or the consent is taken to have been given.

13—Repeal of section 27

Section 27—delete the section

14—Repeal of section 30

Section 30—delete the section

15—Amendment of section 31—Regulations

Section 31(2)—delete subsection (2) and substitute:

- (2) Without limiting the generality of subregulation (1), the regulations may—
 - (a) make provisions of a saving or transitional nature—
 - (i) consequent on the amendment of this Act by a relevant Act; or
 - (ii) relevant to the interaction between this Act and a relevant Commonwealth Act; and
 - (b) prescribe a fine, not exceeding \$1 250, for breach of or non-compliance with a provision of the regulations.
- (3) A provision of a regulation made under subsection (2)(a) may, if the regulation so provides, take effect from the commencement of a relevant Act or relevant Commonwealth Act or from a later day.
- (4) In this section—

relevant Act means the *Trustee Companies (Commonwealth Regulation) Amendment Act 2010*;

relevant Commonwealth Act means—

- (a) the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* of the Commonwealth; or
- (b) any other Act of the Commonwealth relevant to the interaction between this Act and the *Corporations Act 2001* of the Commonwealth.

16—Repeal of Schedule 1

Schedule 1—delete the Schedule

17—Repeal of Schedule 2

Schedule 2—delete the Schedule

Schedule 1—Consequential amendments and transitional provision

Part 1—Amendment of *Administration and Probate Act 1919*

1—Amendment of section 4—Interpretation

Section 4—after the definition of *spouse* insert:

trustee company means a trustee company within the meaning of the *Trustee Companies Act 1988*;

2—Amendment of section 18—Administration guarantees may be required before administration sealed

Section 18(9)(c)—delete paragraph (c) and substitute:

- (c) a trustee company.

3—Amendment of section 31—Administration guarantees

Section 31(9)(c)—delete paragraph (c) and substitute:

- (c) a trustee company.

Part 2—Amendment of *Guardianship and Administration Act 1993*

4—Amendment of section 3—Interpretation

Section 3(1)—after the definition of *sterilisation* insert:

trustee company means a trustee company within the meaning of the *Trustee Companies Act 1988*.

5—Amendment of section 35—Administration orders

Section 35(2)(b)—delete "under the *Trustee Companies Act 1988*"

Part 3—Amendment of *Legal Practitioners Act 1981*

6—Amendment of section 5—Interpretation

Section 5(1)—after the definition of *trust account* insert:

trustee company means a trustee company within the meaning of the *Trustee Companies Act 1988*;

Part 4—Amendment of *Trustee Act 1936*

7—Amendment of section 4—Interpretation

Section 4(1), definition of *trustee company*—delete the definition and substitute:

trustee company means a trustee company within the meaning of the *Trustee Companies Act 1988*.

Part 5—Transitional provision

8—Interpretation

In this Part—

appointment includes nomination;

Commonwealth Act means the *Corporations Act 2001* of the Commonwealth;

principal Act means the *Trustee Companies Act 1988*;

Schedule 1 trustee company means a company listed in Schedule 1 of the principal Act immediately before the repeal of that Schedule by Part 2 of this Act.

9—Transitional provision

- (1) The repeal of Schedule 1 of the principal Act by Part 2 of this Act does not affect the appointment of a Schedule 1 trustee company made before the repeal as—
 - (a) the executor of a will, or the administrator of an estate of a deceased person; or
 - (b) a trustee, agent, attorney, manager or receiver; or
 - (c) the guardian of a child; or
 - (d) the administrator, committee, guardian or manager of the estate of a person who is unable to manage his or her own affairs.
- (2) Except to the extent of any inconsistency with the Commonwealth Act—
 - (a) any duties, obligations, immunities, rights and privileges of a Schedule 1 trustee company arising before the repeal of that Schedule are not affected by the repeal; and
 - (b) the assets and liabilities of a Schedule 1 trustee company are not affected by the repeal; and
 - (c) any action taken or notice given by a Schedule 1 trustee company before the repeal of that Schedule or the amendment of the principal Act by this Act is not affected by the repeal or amendment; and

- (d) the principal Act (as amended by this Act) continues to apply to a Schedule 1 trustee company.
- (3) Proceedings relating to a Schedule 1 trustee company that have been commenced but not determined before the repeal of that Schedule are not affected by the repeal.