**TRUSTEE COMPANIES BILL 1988**

**Legislative Council, 9 November 1988, pages 1378-80**

Second reading

The Hon. BARBARA WIESE (Minister of Tourism): I move:

That this Bill be now read a second time.

I seek leave to have the second reading explanation inserted in Hansard without my reading it.

Leave granted.

Explanation of Bill

The purpose of this Bill is to replace the five Acts currently regulating the activities of corporate trustees and executors in South Australia with a modern enactment of general application.

Special legislation is necessary to enable corporate trustee companies to act as executors and trustees on a substantial commercial scale In South Australia there are presently five such companies operating: Executor Trustee and Agency Company of South Australia Limited; Elders Trustee and Executor Company Limited; Farmers’ Co-operative Executors and Trustees Limited; Bagot's Executor and Trustee Company Limited; and ANZ Executors & Trustee Company (South Australia) Limited.

Each of these companies is authorised to operate as a corporate trustee and executor by its own separate Act of Parliament. When Perpetual Trustees Australia Limited and National Mutual Trustees Limited applied to be authorised to act as corporate trustees and executors in South Australia consideration was given to enacting special enabling Acts for each company. However, the Government decided that the preferable course was to enact one Act of general application to regulate the operation of all companies authorised to act as corporate trustees and executors.

The companies authorised to operate as corporate trustees and executors are listed in Schedule 1 of the Bill. Those so authorised are the five existing companies together with ANZ Executors & Trustee Company Limited, National Mutual Trustees Limited and Perpetual Trustees Australia Limited. Following the deregulation of the financial market, with banks and other bodies seeking to provide a wide range of financial services, it is reasonable to assume that there will be an increasing number of companies wishing to offer corporate trustee and executor services to their clients and to the public of South Australia. Accordingly, provision is made in the Bill for companies to be authorised to act as corporate trustees and executors by regulation. Companies which apply to be authorised to act by regulation will be subject to exactly the same rigorous vetting as have companies who applied to be authorised by separate Act of Parliament.

Clauses 4 and 5 provide that trustee companies have the same powers as a natural person to act as executor, administrator, trustee, agent, attorney, manager or receiver. Clause 6 provides that trustee companies may act for children or persons who are unable to manage their affairs. Clause 15 allows trustee companies to establish common funds. Clause 20 requires trustee companies to provide prospective investors in common funds with, inter alia, information about the fees charged by the company, the rights of investors and financial details of the fund. Trustee companies are not presently required to provide this information as regulations under section 16 (1) of the Companies (Application of Laws) Act 1982 exempt trustee companies from complying with the provisions of Division 6 of Part IV of the Companies (South Australia) Code in relation to any right to participate or invest in any common fund. However, if investors are to make informed investment decisions they need a certain amount of information to enable them to compare investment in a common fund with other forms of investment. It is considered that the amount of disclosure investors require varies with the type of investment and it is proposed to amend the regulations under the Companies (Application of Laws) Act to restrict the exemption only to common funds which invest in authorised trustee investments. Companies offering interests in common funds which are invested only in authorised trustee investments will have to comply only with the disclosure requirements in the Bill.

The Corporate Affairs Commission will be able to require appropriate disclosure requirements for other common funds according to the type of investment offered. This approach recognises the special nature of trustee companies, which under clause 15 hold money invested in a common fund on trust for the investor, while at the same time ensuring that investors are properly informed about investments they make. I commend this Bill to all members.

Clause 1 is formal. Clause 2 provides that the measure is to come into force on a day to be fixed by proclamation. Clause 3 provides definitions of terms used in the measure. A trustee company is a company listed in schedule 1. Under the provisions of schedule 1, the list of trustee companies may be varied by regulation. Part II (comprising clauses 4 to 16) sets out the special powers of trustee companies, in addition to their powers as companies under the Companies Code.

Clause 4 sets out the powers of a trustee company to act as executor or administrator of a deceased estate. Under the clause, a trustee company is given the same powers as a natural person to act as executor or administrator and to obtain probate or letters of administration. A trustee company is, with the approval of the Supreme Court or the Registrar of Probates and the consent of the person entitled to probate or a grant of administration, authorised to apply for and obtain the probate or grant. A trustee company is, with the approval of the court, authorised to act on behalf or in the place of an executor or administrator on a permanent or temporary basis.

Clause 5 provides that a trustee company has the same powers as a natural person to act as trustee, agent, attorney, manager or receiver. Clause 6 provides that a trustee company may act as guardian of a child or administrator, committee, guardian or manager of the estate of a person unable to manage his or her own affairs. Clause 7 provides that a trustee company may be represented by an officer of the company when making an application or acting in any capacity authorised by the measure. An affidavit, declaration or statement may, under the clause, be made on behalf of a trustee company by an officer of the company.

Clause 8 provides that a trustee company may be appointed to act in any capacity jointly with another person or, with the consent in writing of such other person, to act alone. Under the clause, the person consenting to the company acting alone is exonerated from liability for any subsequent dealing with the property held or controlled jointly. Clause 9 regulates the commission that may be charged by a trustee company against an estate committed to its administration or management. The commission is not to exceed 7.5 per cent of income received on account of the estate and 6 per cent of the capital value of the estate.

Clause 10 authorises a trustee company to charge a com mission not exceeding one-twelfth of one per cent of the value of any perpetual trust administered by the company for each month of the company's administration of the trust. Clause 11 regulates the additional remuneration of a trustee company in respect of its administration of an estate. This may include charges for disbursements, fees for preparation and lodging of tax returns and any alternative or additional fee or commission specially authorised by the original instrument of appointment or the beneficiaries of the estate, or, where the company is authorised or required to carry on a business or undertaking, by the Supreme Court. A trustee company's remuneration for administering an estate is restricted by the clause to the commission, fees and other remuneration allowed under the measure.

Clause 12 provides that the Supreme Court may, on the application of a person with a proper interest in the matter, reduce a trustee company's charges if it is of the opinion that they are excessive. Clause 13 provides that, subject to the terms of any relevant instrument of trust, a trustee company may invest money held by it in trust in a manner authorised by the trust, in an authorised trustee investment or in a common fund established by the company.

Clause 14 allows a trustee company to pool money from a number of estates and invest it together as one fund in one or more investments. This power is in addition to the powers of a company with respect to common funds. Clause 15 provides for the establishment and operation of common funds by trustee companies. The class of investments in which a common fund may be invested is limited to that determined by the company prior to its establishment. The clause makes it clear that money not otherwise held in trust is while invested in a common fund held by the company in trust for the investor. Separate accounts must be kept showing the amount for the time being at credit in the fund on account of each investor. Income and capital profits and losses from operation of the fund are to be distributed proportionately between investors. Common funds must be valued at least monthly. The clause authorises a company to charge a management fee for each month of its management of a fund. In the case of estate money invested in a fund, the fee is limited to a maximum of one-twelfth of one per cent of the value of the fund attributable to investment of the estate as at the first business day of each month. Investors other than estates must be given not less than one month's notice in writing of any increase in management fees.

Clause 16 authorises a trustee company to hold or acquire its own shares or those of a related corporation as part of its administration of an estate. Such a practice might otherwise constitute a breach of the Companies Code. Part III (comprising clauses 17 to 25) deals with the duties and liabilities of trustee companies. Clause 17 requires a trustee company to lodge periodic returns with the Corporate Affairs Commission containing information required under the regulations. Such returns may not be required more frequently than once every three months. They are to be available for public inspection.

Clause 18 provides that the Minister may require a trustee company to furnish information about its operations. Under the clause, the Minister may, if it appears necessary or desirable, order an audit of the company's account or a review of its operations or both. The clause confers powers necessary for the conduct of such a review or audit. The clause provides that, unless the Minister otherwise deter mines, the cost of such a review or audit may be recovered from the company. Clause 19 requires a trustee company to keep proper accounts in relation to each common fund that it establishes, to cause the accounts to be audited at the end of each financial year by a registered company auditor and to send a statement of the accounts and the auditor's report to each investor other than an estate. The clause requires a trustee company to supply copies of the accounts, auditor's report and other documents laid before the company at its last annual general meeting to an investor in a common fund established by the company when requested to do so in writing by the investor.

Clause 20 requires disclosure of certain information relating to a common fund to each prospective investor in the fund. This requirement does not apply in relation to investment of estate money or in circumstances prescribed by regulation. The following information must be disclosed:

the nature and the amount or rate of any fee that the trustee company charges in respect of investment in the common fund;

the extent (if any) to which a capital sum invested may be reduced to defray losses from investment of the common fund;

the class of investments in which the common fund may be invested;

the rights of an investor in the common fund to withdraw all or part of the person's investment in the fund and the period of notice (if any) that the investor is required to give the company in respect of such withdrawal;

the terms governing distribution of income and profit or loss of a capital nature attributable to each investment in the common fund;

copies of the statement of accounts and auditor's report last prepared in relation to the common fund; and

(g) copies of the accounts and auditor's report laid before the last annual general meeting of the company pursuant to the Companies (South Australia) Code.

Clause 21 makes it an offence punishable by a division 4 fine (a maximum of $15 000) if a trustee company makes a statement that is false or misleading in a material particular in any advertisement or notice that it publishes or issues in relation to a common fund. The clause would allow recovery of compensation for any resulting loss. Clause 22 provides that a person with a proper interest in the matter may require a trustee company to provide an account in relation to an estate managed by the company. The company may charge a reasonable fee for providing such an account. If a company fails to provide a proper account, the Supreme Court may, on application, order the preparation and delivery of proper accounts or an investigation of the administration of the estate or both.

Clause 23 provides that where a trustee company is appointed or acts as executor, administrator or in any other capacity under the measure, the manager and directors of the company are individually and collectively responsible to the Supreme Court in the same way and to the same extent as if they had been personally appointed to act in that capacity.

Clause 24 provides that a trustee company appointed or acting as executor, administrator or in any other capacity under the measure is to be subject to the same control by the Supreme Court as a natural person acting in that capacity and is to be similarly liable to removal by the Court.

Clause 25 empowers the Supreme Court to appoint an administrator to administer the affairs of a trustee company in so far as they involve the performance of fiduciary duties.

Such an appointment may be made on the application of the Minister where it appears to the Court that proceedings have commenced to wind up the company, that the company is not in a position to discharge its fiduciary duties or that the company has committed serious breaches of its fiduciary duties such that the power to appoint an administrator should be exercised. Part IV (comprising clauses 26 to 31) deals with miscellaneous matters. Clause 26 makes it an offence punishable by a division 4 fine (a maximum of $ 15 000) if a trustee makes or includes in any document required by or for the purposes of the measure any statement that is false or misleading in a material particular.

Clause 27 is the usual provision for personal liability on the part of the manager and directors where a corporation commits an offence. Clause 28 provides certain evidentiary assistance to establish the capacity of trustee companies and their officers. Clause 29 makes it clear that the provisions of the measure are in addition to, and do not derogate from, the provisions of any other Act and that nothing in the measure affects the rights or remedies that a person has apart from the measure.

Clause 30 provides that offences against the measure are summary offences. Clause 31 provides power to make regulations.

Schedule 1, at clause 1, lists the companies that are trustee companies for the purposes of the measure. Clause 2 of the schedule provides that the Governor may, by regulation, vary the list contained in clause 1. Schedule 2 provides for the repeal of the current executor company Acts. The schedule provides for the return within six months of the money or securities required under those Acts to have been deposited by the trustee companies with the Public Trustee in trust as security for the proper discharge of their duties.

The Hon. K.T. GRIFFIN secured the adjournment of the debate.