The Law Society of Western Australia
The voice of the legal profession in Western Australia

5 December 2024

Mr Domonic Fernandes
Executive Director Legislative Services
Department of Justice
David Malcolm Justice Centre
28 Barrack Street
PERTH WA 6000

By email: Cassandra.Pollock@justice.wa.gov.au

Dear Mr Fernandes

CHANGES OF TRUSTEE AND SECTION 535 OF THE CRIMINAL CODE 1913 (WA)

The Law Society has reviewed the submission made by Law Firms Australia regarding the changes of trustees and section 535 of the *Criminal Code 1913* (WA), and the Law Society supports that submission.

The submission is attached to this letter for your reference.

If you have any questions or wish to discuss the above, please contact Susie Moir, General Manager Advocacy and Professional Development on smoir@lawsocietywa.asn.au or telephone 9324 868.

Yours sincerely

Paula Wilkinson
President

Encl.

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LAW FIRMS AUSTRALIA

Email

19 June 2024

The Hon. John Quigley MLA
Attorney-General
Minister for Electoral Affairs
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2 Havelock Street
West Perth WA 6005

Minister.Quigley@dpc.wa.gov.au

Dear Attorney

Changes of trustees and section 535 of the *Criminal Code 1913* (WA)

I write on behalf of Law Firms Australia (**LFA**) in relation to the potential impact of s 535 of the *Criminal Code 1913* (WA) (***the Criminal Code***) on changes of trustees in Western Australia. LFA represents Australia's leading multi-jurisdictional law firms, Allens, Ashurst, Clayton Utz, Corrs Chambers Westgarth, DLA Piper Australia, Herbert Smith Freehills, King & Wood Mallesons, MinterEllison, and Norton Rose Fulbright Australia. LFA is also a constituent body of the Law Council of Australia, the peak representative organisation of the Australian legal profession.

Section 535 of the Criminal Code, titled 'Secret commission to trustee for substituted appointment', provides:

> If any person offers or gives any valuable consideration to a trustee, or if any trustee receives or solicits any valuable consideration for himself or for any other person, without the assent of the persons beneficially entitled to the estate, or of a Judge of the Supreme Court, as an inducement or reward for appointing or having appointed or for joining or having joined with another in appointing, or for authorising or having authorised or for joining or having joined with another in authorising any person to be appointed in his stead or instead of him and any other person as trustee he shall be guilty of a crime.

Secret commissions provisions of similar effect exist, or existed, in New South Wales,[1] Victoria,[2] and Queensland.[3] I am advised that it was the commonly understood position in the market in respect of such provisions that the giving of indemnities and costs coverage to an outgoing trustee (a quite usual practice) did not require the unanimous consent of beneficiaries to the relevant trust (or failing that, the relevant Supreme Court), provided that the indemnities and costs coverage were given without dishonest intent. A series of recent decisions in the Supreme Court of New South Wales[4] and the Supreme Court of Victoria[5] (together, **the New South Wales and Victorian decisions**), however, have found otherwise. The specific intent to provide or solicit indemnities and costs coverage was sufficient to establish the pre-September

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[1] *Crimes Act 1900* (NSW), s 249E prior to its amendment in September 2023.

[2] *Crimes Act 1958* (Vic), s 180.

[3] *Criminal Code 1899* (Qld), s 442F.

[4] *MLC Investments Ltd* [2022] NSWSC 1541 and *BT Funds Management Limited (ACN 002 916 458) as trustee for the Retirement Wrap Superannuation Fund* [2022] NSWSC 401.

[5] *Diversa Trustees Ltd in its capacity as Trustee for the Future Super Fund* [2023] VSC 279 and *Re Guild Trustee Services (in its capacity as trustee for the Guild Retirement Fund* [2023] VSC 629.

2023 secret commissions offence in New South Wales, and is sufficient to establish the current relevant secret commissions offence in Victoria; that is, the intent need not be dishonest or otherwise wrongful.

The wording of s 535 of the Criminal Code is such that it may also be reasonably expected to require that the unanimous consent of beneficiaries to a trust, or the assent of the Court, be obtained where indemnities or costs coverage are to be provided to an outgoing trustee to a trust constituted in Western Australia, regardless of intent. Indeed, this was determined to be the case in each of the New South Wales and Victorian decisions, which considered the effect of the Western Australian legislation for the purposes of providing consent under cross-vesting jurisdiction to transactions that would have amounted to an offence in Western Australia.

The effect of this position is such:

- that s 535 can apply to any change of any trustee of any trust of any size, from (at the domestic and retail level) small family trusts, small and medium sized enterprise trading trusts and self-managed superannuation funds, through to (at the commercial level) substantial superannuation funds, investment funds and managed investment schemes, as well as trusts involved in financing arrangements like securitisation and syndicated lending,

- that a party (or its officers or employees) may unknowingly commit an offence under s 535 in concluding an otherwise common transaction in the ordinary course and in good faith, with no suggestion of criminal or civil impropriety, and even if the transaction is in the best interests of the trust beneficiaries,

- that it is unclear whether the commission of an offence by either the outgoing or incoming trustee (or both) would, as a matter of public policy, invalidate or otherwise taint the transaction by which the trustee is replaced, or would constitute a breach of trust by either or both,[6] and

- that advisers will need to consider the impacts of the decisions on past transactions.

Unless these issues are addressed by Parliament, where a change of trustee occurs and the outgoing trustee is provided with indemnities and costs coverage (sparing the trust assets from bearing these costs as properly incurred costs by the trustee), either the unanimous consent of beneficiaries to the trust or the consent of the Supreme Court will need to be sought to avoid the commission of an indictable offence.

Where informed unanimous consent is not possible or feasible (which will be the case for discretionary trusts, most superannuation funds and widely-held commercial trusts and managed investment schemes), the consent of the Supreme Court will need to be sought. This will impose significant time and cost burdens for clients, lawyers and the Court. These reasons appear to be a significant part of the basis on which the New South Wales Government introduced in August 2023, and New South Wales Parliament passed in September 2023, legislation to amend s 249E of the *Crimes Act 1900* (NSW) to address directly the impacts of the relevant New South Wales decisions (including retrospectively), so that the provision is only contravened if relevant conduct is 'corrupt', in the sense of being dishonest.

LFA submits that amendments of a similar effect should be made to s 535 of the Criminal Code, and kindly requests a meeting with you to discuss the matter. Without reform, these concerns may cause trustees to consider settling trusts in New South Wales on the basis of costs and risk. Additional information on the background to secret commissions offices, issues relating to the aiding and abetting of offences, retrospectivity and extraterritoriality, and a proposed way forward, are set out in a submission to you from Dr Allison Silink (a copy of which accompanies this letter).

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[6] It may depend on the terms of the relevant trust.

For your information, LFA has had preliminary discussions on this matter with the Law Society of Western Australia. This letter will be provided to relevant professional organisations so that they may consider the position of s 535 of the Criminal Code with respect to their members.

Finally, I note that LFA and Dr Silink are making similar submissions to your counterparts in both Victoria and Queensland.

Please let me know if any further information would be of assistance to you, your office or the Department of Justice.

Yours faithfully

Mitch Hillier
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20 May 2024

Hon. John Quigley MLA
Attorney General; Minister for Electoral Affairs
11th Floor, Dumas House,
2 Havelock Street,
WEST PERTH WA 6005

By email: Minister.Quigley@dpc.wa.gov.au

Dear Attorney General,

Section 535 *Criminal Code 1913* (WA): Corrupt Benefits for Trustees

Introduction

I am a barrister in New South Wales and an Associate Professor in the Faculty of Law of the University of Technology Sydney. I have published[1] and presented[2] on the scope of the criminal offences under Australian law dealing with corrupt benefits for trustees (**corrupt trustee offences)**. These offences proscribe offering, giving, soliciting or receiving a benefit by way of inducement or reward for the appointment of a trustee, if done without the unanimous consent of beneficiaries or assent of the Supreme Court. The four current trustee offences are s 249E of the *Crimes Act 1900* (NSW), s 180 of the *Crimes Act 1958* (Vic), s 442F of the *Criminal Code 1899* (Qld) and s 535 of the *Criminal Code Act Compilation Act* 1913 (WA), all of which are in substantially similar form.[3] A copy of these offences is set out in **Annexure A** to this submission.

I write to draw attention to the need for reform to s 535 of the *Criminal Code* (WA) ('**the Criminal Code**") for the following reasons.

Background

Prior to 2022, there had been no reported judicial consideration of any of the corrupt trustee offences. However, since 2022 there have been six cases that have considered different aspects of their scope. None has been a criminal prosecution. Rather, all cases have been applications for consent of the Supreme Court to particular transactions.

[1] Allison Silink, "Corrupt Benefits for Trustees and Others – The Scope of the Offence under s 249E of the Crimes Act 1900 (NSW)" (2023) 33 *Journal of Banking and Finance Law and Practice* 83-106; A. Silink, "Corrupt Benefits for Trustees – Is the Presumption of Mens Rea Rebutted in s 249E of the Crimes Act 1900 (NSW), and if Not, What Is the Mens Rea to Be Implied?" (July 1, 2022). UNSW Law Research Paper No. 22-20, available at http://ssrn.com/abstract=4166638.

[2] These include to a seminar on the scope of s 249E held by the UNSW School of Private and Commercial Law on 27 May 2022, at the colloquium of the Banking and Financial Services Law Association Academic Committee on 1 December 2022, at the invitation of several law firms in 2022, and to the 39th BFSLA Annual Conference in Queenstown, New Zealand, on 4 September 2023.

[3] They are all derived from s 6 of the *Secret Commissions Prohibition Act 1905* (Vic) although following the September 2023 amendments described below, the NSW provision now differs in several material respects.

In *BT Funds Management Limited (ACN 002 916 458) as trustee for the Retirement Wrap Superannuation Fund*[4] ('***BTFM***') the application was brought in light of concern as to the scope of s 249E to apply to certain payments and indemnities proposed in the context of a merger of superannuation funds by a process known as a 'successor fund transfer.' In a superannuation fund merger of this nature, assets of the outgoing fund are transferred to a trustee of an existing trust. In this case, it was proposed that the applicant, as outgoing trustee, would receive certain indemnities as to costs and expenses in connection with the transfer in circumstances where unanimous consent of all beneficiaries could not be obtained. In light of the applicant's concerns about the scope of s 249E, the applicant took precautionary steps to seek court consent to the proposal. Ball J accepted that s 249E was 'broad enough to catch the payments or benefits which are in contemplation.'[5] His Honour accepted that the provision of those benefits acted as an 'inducement or reward' in the sense that the applicant would 'take into account'[6] the benefits in agreeing to the terms of the transfer, and held that the offence under s 249E was not dependent on proof of 'corrupt' conduct.[7] The Court accepted that the proposed transaction was undertaken in the best interest of the beneficiaries and consent was granted.

HEST Australia Ltd v Attorney-General (Qld)[8] was another application in the context of a proposed successor fund transfer which was brought in the Supreme Court of Queensland in light of *BTFM*. In these proceedings the Attorneys-General of Queensland and Victoria appeared as contradictors and APRA also appeared with leave. The applicant's primary argument was that by reason of its form, the nature of a successor fund transfer by which assets are transferred from one trust to another did not constitute a relevant *appointment* of the successor trustee.[9] This argument was accepted by Kelly J.[10] In *The Trustee for Host Plus Superannuation Fund trading as Host-Plus Pty Limited v Maritime Super Pty Limited trading as Maritime Super Pty Limited*,[11] Stevenson J agreed with this construction.[12] These cases are mentioned for completeness as they involved some consideration of these offences. However, by reason of their narrow focus upon whether a superannuation succession fund transfer can be regarded as involving a relevant 'appointment,' these cases did not consider the mental element of the offences the subject of the proposed reform.

The *Application of MLC Investments Limited ('**MLC Investments')*[13] concerned a retiring trustee of several managed investment schemes and similarly, it was proposed that, as outgoing trustee, it would receive certain expenses and an indemnity for costs and antecedent liabilities. In light of the finding in *BTFM*, the applicant sought consent of the court. Stevenson J held that the content of s 249E(2) defines the conduct that is for this purpose 'corrupt,'[14] and that the only mental element required was the specific intention to engage in that conduct.[15] Like Ball J in *BTFM*, Stevenson J also found that the proposed indemnities would fall within the scope of the s 249E(2),[16] even though it was accepted that the conduct was in the best interests of beneficiaries, and consent was granted.

In *Diversa Trustees Ltd in its capacity as Trustee for the Future Super Fund ('**Diversa Trustees')*[17] Delany J followed *BTFM* and *MLC Investments* in construing s 180 and the other corrupt trustee offences. Like *MLC Investments*, this application was for assent of the court to certain contractual arrangements proposed to be entered into by the applicant in connection with its proposed retirement as trustee of the Fund and the appointment of a new trustee of the Fund. Delany J noted that the *actus reus* of s 180 is very similar to the New South Wales offence as it then was, namely, that a person 'offers or gives any valuable consideration to a trustee' or that such a person 'receives or solicits any valuable consideration for himself or for any other person' without the requisite assent.[18] His Honour

[4] [2022] NSWSC 401.
[5] Ibid, at [13].
[6] Ibid.
[7] Ibid, at [12].
[8] *HEST Australia Ltd v Attorney-General (Qld)* [2022] QSC 221.
[9] Each of the offences under sections 180, 442F and 535 (but not under s 249E in New South Wales) provide that the offence arises in relation to the provision of valuable consideration in respect of the trustee 'authorising any person to be appointed in the person's stead or instead of the person and any other person as trustee'.
[10] Ibid, [29].
[11] [2023] NSWSC 725.
[12] Ibid, [39].
[13] [2022] NSWSC 1541
[14] *MLC* at [35].
[15] Ibid, at [34]
[16] Ibid, at [13].
[17] *Diversa Trustees Ltd in its capacity as Trustee for the Future Super Fund* [2023] VSC 279.
[18] Ibid, at [31].

also found that s 180 does not specify a state of mind or *mens rea* that must be proved to make out a contravention, as was the case with s 249E of the NSW Crimes Act at that time, adopting the same construction as was applied by Stevenson J in *MLC Investments*. Delany J was satisfied that the entry into the contractual arrangements providing for the retirement of Diversa and the appointment of the new trustee, and the performance of those arrangements, was in the best interests of the beneficiaries of the Fund and did not provide any inducement to Diversa to act other than in the best interests of the beneficiaries of the Fund.[19] In the circumstances, assent was granted.[20]

Most recently, in *Re Guild Trustee Services (in its capacity as trustee for the Guild Retirement Fund ('**Re Guild Trustee Services'**)*[21] Waller J considered another application by the trustee of a superannuation fund for the assent of the court to arrangements that could otherwise have constituted an offence under s 180 and other corrupt trustee offences, again in the context of the retirement and appointment of a trustee to the trust. Waller J noted the cases discussed above, and the fact that as at the date of those reasons, on 10 October 2023, s 249E of the *Crimes Act 1900* (NSW) had been recently amended to require that the offering, giving, receipt or solicitation of the relevant benefit must be done 'corruptly'.[22]

Relevance to WA

The offence under s 535 of the Criminal Code was considered in each of the cases discussed above for the purposes of providing consent under cross-vesting jurisdiction to transactions that would have amounted to an offence under s 535. These offences were construed as having the same effect as s 249E of the Crimes Act 1900 (NSW) (in its form prior to the September 2023 amendments) and s 180 Crimes Act 1958 (Vic): see *BTFM* at [1]; *MLC* at [1]; *Diversa Trustee* at [2], [46], *Guild Trustee Services* at [1]. In other words, these cases accepted that the offence under s 535 of the Criminal Code also criminalises the offering, giving, soliciting or receiving of routine indemnities or payment of costs to facilitate transactions even where entered into for the best interests of beneficiaries and without any dishonest or corrupt intention.

On this construction, s 535 of the Criminal Code is capable of applying to conduct that is otherwise entirely lawful and engaged in without improper purpose or breach of duty (and even if in the best interests of the beneficiaries). Any conduct that falls within its scope amounts to an offence unless saved by the unanimous consent of the beneficiaries or assent of the court.

In my submission there is now a need for comparable reform in Western Australia to s 535 for the same reasons as founded both the law reform passed in New South Wales and the recent submissions for reform in Victoria: to ensure an the offence is not committed in Western Australia where there is no dishonest intention and where the conduct itself is not in any way dishonest.

The nature and construction of s 535 of the *Criminal Code*

Section 535 of the Criminal Code is located in Part 6 of the Code headed *Offences relating to property and contracts*, in Division IV entitled '*Offences connected with trade and breach of contract, and corruption of agents, trustees, and others*', and is found under Chapter LV dealing with '*Corruption of agents, trustees, and others in whom confidence is reposed*.'

The legislative history of the offence is similar to that of New South Wales and Victoria. In each state there was a standalone secret commissions act modelled on the *Secret Commissions Prohibition Act 1905* (Vic), provisions of which were in due course re-enacted in the states' criminal laws.

In Western Australia, s 535 derives from s 8 of the *Secret Commissions Act 1905* (WA) which was repealed upon the enactment of the Criminal Code.

The Preamble to the Criminal Code states that:

> "… in order to carry out the purposes of the *Criminal Code Amendment Act 1913*, it is desirable to include in the compilation the further amendments authorised to be so included

[19] Ibid, at [8].
[20] Ibid, at [40].
[21] *Re Guild Trustee Services (in its capacity as trustee for the Guild Retirement Fund* [2023] VSC 629.
[22] Ibid, at [39].

by that Act, and also the provisions of the *Secret Commissions Act 1905* (except section 19 thereof) and to repeal the last-mentioned Act …"

Section 535 provides:

> **Secret commission to trustee for substituted appointment**
>
> If any person offers or gives any valuable consideration to a trustee, or if any trustee receives or solicits any valuable consideration for himself or for any other person, without the assent of the persons beneficially entitled to the estate, or of a Judge of the Supreme Court, as an inducement or reward for appointing or having appointed or for joining or having joined with another in appointing, or for authorising or having authorised or for joining or having joined with another in authorising any person to be appointed in his stead or instead of him and any other person as trustee he shall be guilty of a crime.

This is in identical form to s 8 of the *Secret Commissions Act 1905* (WA) but for the recognition that this offence is a crime rather than a misdemeanour. That section provided:

> **8. Secret commission to trustee in return for substituted appointment.**
>
> If any person offers or gives any valuable consideration to a trustee, or if any trustee receives or solicits any valuable consideration for himself or for any other person, without the assent of the persons beneficially entitled to the estate, or of a Judge of the Supreme Court, as an inducement or reward for appointing or having appointed or for joining or having joined with another in appointing, or for authorising or having authorised or for joining or having joined with another in authorising any person to be appointed in his stead or instead of him and any other person as trustee he shall be guilty of a misdemeanour.

Under the criminal laws of New South Wales and Victoria there is a rebuttable presumption that the element of *mens rea* representing a form of "evil intention, or knowledge of the wrongfulness of the act"[23] or other relevant culpable mental state is an essential ingredient of any criminal offence even if the legislation is silent on it.[24] However, the mental element of an offence under the Criminal Code is not determined by reference to this common law principle.[25] In *R v Hutchison*,[26] McKechnie J stated:

> The constituent elements of an offence are not determined by reference to common law concepts of actus reus or mens rea, but solely by reference to the provisions of the Criminal Code or other statute: *Widgee Shire Council v Bonney* (1907) 4 CLR 977 per Griffith CJ at 981 Unless knowledge or intention are elements of the offence created by statute, either expressly or by necessary implication, then the prosecution does not have to prove knowledge or intention.

The mental element of offences under the Criminal Code is dealt with under s 23 which provides that:

> **23. Intention and motive**
>
> (1) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.
>
> (2) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

Accordingly, at present, given that s 535 has no express mental element and there is no specific other provision that deals with the mental element of this offence, it operates effectively as strict liability offence.

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[23] *Sherras v De Rutzen* (1895) 1 QB 918, 921 (Wright J), approved in *He Kaw Teh v The Queen* (1985) 157 CLR 523, at 566 (Brennan J).
[24] *He Kaw Teh* 528 (Gibbs CJ).
[25] See *BRK v The Queen* [2001] WASCA 161 [21] - [22] where Murray J, with whom Parker J agreed, citing Brennan v The King (1936) 55 CLR 253, 263; *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, 309; *Ward v The Queen* [1972] WAR 36, 41-42.
[26] [2003] WASCA 323, [31] (McKechnie J)

Aiding and abetting the commission of the corrupt trustee offence

Pursuant to s 536 of the *Criminal Code*:

536. Aiding etc. Chapter LV offences within or outside WA

> Any person who, being within Western Australia, knowingly aids, abets, counsels, or procures, or who attempts or takes part in or is in any way privy to —
> (a) doing any act or thing in contravention of this Chapter;
> (b) doing any act or thing outside Western Australia, or partly within and partly outside Western Australia, which if done within Western Australia, would be in contravention of this Chapter;
>
> shall be guilty of a crime.

This has significant implications for lawyers and advisers to trustees engaged in the replacement of a trustee. There are also reporting obligations and insurance consequences for many professionals in relation to commission of a serious criminal offence, and further consequential issues in relation to having knowledge of the commission of the offence by another.

Furthermore, s 536 has extraterritorial effect. It also applies where "doing any act or thing outside Western Australia, or partly within and partly outside Western Australia, which if done within Western Australia would be in contravention of this Chapter." Accordingly, lawyers and advisers outside Western Australia are also impacted by the scope of the offence.

Impact and community concern

The fact that the trustee offences (other than that of New South Wales), including s 535, can now apply to routine commercial practices such as those considered in the cases referred to above is causing widespread concern, particularly across the banking and financial services sector, the trusts/trustee market and the superannuation industry. In the context of superannuation fund mergers and appointments of custodians of trust assets, managed investment schemes, and in funds management in financial services generally, the appointment (and replacement) of trustees, including as custodians and nominees, are everyday transactions. Provision to the outgoing trustee of indemnity as to its costs and certain expenses is so common as to be standard market practice. It is uncontroversial that these are expenses in respect of which the trustee has an indemnity from the trust assets at general law in any case. However, through the means of these types of indemnities, the trust assets are not burdened by the costs of change or replacement of the trustee.

Additionally, as every such transaction is entered into with the "specific intent"[27] of transacting on those terms (it goes without saying that no such complex commercial transaction is entered into otherwise than intentionally), the effect of the reasons the cases discussed above will be to compel all parties to current and future transactions under which such an indemnity is offered to obtain either consent of all beneficiaries or assent of the court or risk committing an offence. Significant time, costs and resources will be spent in arranging either beneficiary consent (if indeed that is even possible or feasible) or preparing for court applications for consent. These costs will inevitable be drawn from the trust assets – a particular burden for small estates. There will be a further burden upon judicial time and court resources that will flow from the requirement.

Past transactions present a particular problem. There is no apparent way to obtain retrospective consent in respect of past transactions that were entered into for the best interests of beneficiaries and without any dishonest or corrupt intention but without unanimous beneficiary consent, or assent of the court. There may also be reporting obligations for some trustees about the likelihood of having committed an offence, action required to notify insurers about these risks, potential consequences for holding office as a trustee, and questions about whether costs can be recovered under the trustee's indemnity.

This issue affects a wide number of trusts, both large and small. According to estimates by the Australian Taxation Office, it was expected that by 2022, over 1 million trusts would lodge tax returns

[27] *MLC* at [35].

in Australia.[28] Accordingly, the scale of commercial disruption that flows from the consequential implications of the construction of s 535 and counterpart offences is of great concern to many.

Furthermore, there is now an undesirable jurisdictional difference between the states given that the mental element of the offence has been amended in New South Wales (discussed next) but has not yet been amended in Victoria, Queensland or Western Australia.

Law Reform in New South Wales

The desirability of legislative reform in New South Wales to deal with these issues was brought to the attention of the then Attorney General, the Hon Mark Speakman SC, soon after the *MLC Investments* decision through a number of submissions calling for reform of s 249E.[29] In September 2023, the present Attorney General, the Hon Michael Daley, introduced into the NSW Parliament the *Crimes Amendment (Corrupt Benefits for Trustees) Bill 2023* (NSW). This bill amended the Crimes Act 1900 (NSW) to insert a new s 249E which gives effect to these reforms so that the trustee offence in New South Wales now requires that the person acted "corruptly."

Section 249E now provides (emphasis added):

> **249E Corrupt benefits for trustees and others**
>
> (1) A person is guilty of an offence if—
>
> (a) the person corruptly offers or gives a benefit to a person entrusted with property as an inducement or reward for the appointment of a person to be a person entrusted with the property, or
> (b) the person is entrusted with property and corruptly receives or solicits a benefit for any person as an inducement or reward for the appointment of a person to be a person entrusted with the property.
>
> Maximum penalty—imprisonment for 7 years.
>
> (2) In this section, a person entrusted with property means the following—
>
> (a) a trustee of the property,
> (b) an executor or administrator appointed for the purpose of dealing with the property,
> (c) a person who, because of a power of attorney or a power of appointment, has authority over the property,
> (d) a person managing or administering the property, or appointed or employed to manage or administer the property, under the NSW Trustee and Guardian Act 2009.
>
> (3) A reference to the appointment of a person includes—
>
> (a) joining in the appointment of the person, and
> (b) assisting in the appointment of the person.

Upon its second reading, the Hon Michael Daley said:

> Imposing an express requirement that the conduct be done "corruptly" will ensure that the criminal offence only targets dishonest and improper conduct, while allowing parties to engage in good faith transactions without exposure to potential criminal sanctions. The change will also bring section 249E into line with other similar offences contained in part 4A of the Crimes Act. These are categorised collectively as corruptly receiving commissions and other corrupt practices, which generally contain express requirements for the relevant conduct to be undertaken "corruptly" for those offences to be made out. *It is intended that the term "corruptly" in the context of the substituted section 249E offence will encompass*

[28] https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/General-research/Current-issues-with-trusts-and-the-tax-system/#:~:text=paper%20is%20below.-,Executive%20Summary,common%20type%20being%20discretionary%20trusts.
[29] These were from a number of parties including this author, the NSW Bar Association, Law Society of New South Wales, the Asia Pacific Loan Market Association (Australia Branch), MinterEllison, and Law Firms Australia ('**LFA'**). LFA represents Australia's leading multi-jurisdictional law firms, Allens, Ashurst, Clayton Utz, Corrs Chambers Westgarth, DLA Piper Australia, Herbert Smith Freehills, King & Wood Mallesons, MinterEllison, and Norton Rose Fulbright Australia. LFA is also a constituent body of the Law Council of Australia.

dishonesty and acting with a wrongful intention. This will be consistent with other offences in part 4A of the Act.[30]

Its retrospective effect means that conduct that was engaged in prior to the enactment of the amended offence will only constitute an offence if it was done corruptly on the terms of the new language. The bill received assent on Wednesday 20 September 2023.

This is likely to mean that settling and administering trusts in New South Wales (particularly where beneficiaries are all located in New South Wales) will be more attractive than in other states where the risk of committing this offence will compel applications for court assent to the provision of routine benefits upon the replacement of a trustee. However for trusts operating across jurisdictions there are now complex questions as to when applications for consent will still need to be brought and in which jurisdictions.

Need for Reform to s 535 of the *Criminal Code*

It is submitted that there is now a need for comparable reform to amend the Criminal Code to clarify that the mental element of the offence under s 535 requires that the person act 'corruptly' in the sense of acting dishonestly. This will ensure that corrupt conduct in appointing a person to be entrusted with property remains punishable by law, but that s 535 does not function as it does now, as, in effect, a strict liability offence capable of applying to conduct that is not inherently unlawful or otherwise improper.

The mental element of acting 'corruptly,' in the sense of acting dishonestly, in connection with a secret commission offence is already present under other secret commission offences, such as the offence under s 530 of the Criminal Code which addresses corrupt conduct of *agents* (**the corrupt agent offence**).[31] That offence provides:

> **530. Corruptly giving or offering agent reward etc.**
>
> If any person corruptly gives or offers to any agent any valuable consideration —
>
> (a) as an inducement or reward for, or otherwise on account of, doing or forbearing to do or having done or forborne to do any act in relation to his principal's affairs or business; or
>
> (b) the receipt or any expectation of which would in any way tend to influence him to show or forbear to show favour or disfavour to any person in relation to his principal's affairs or business,
>
> he shall be guilty of a crime.

In very similar terms to the corrupt trustee offences, these offences arise where valuable consideration is *corruptly* offered or given to an *agent*, or where an agent *corruptly* solicits or receives the same for himself or for any other person, as either an inducement or reward for or otherwise on account of doing or forbearing to do any act in relation to his principal's affairs or business, or where the receipt or any expectation of which would in any way tend to influence him to show or to forbear to show favour or disfavour to any person in relation to his principal's affairs or business. The corrupt agent offence has counterparts in all states in which there is a corrupt trustee offence, as well as in other states that lack a corrupt trustee offence.

Unlike the trustee offence, the corrupt agent offences expressly provide that the conduct must be engaged in 'corruptly'. For the purpose of the corrupt agent offence, the word 'corruptly' has been construed as implying acting *mala fide,* or with an improper intention, by the Supreme Court of Western

[30] Legislative Assembly, New South Wales, Hansard 22 August 2023. https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-133760.

[31] It provides: 530. Corruptly giving or offering agent reward etc. If any person corruptly gives or offers to any agent any valuable consideration — (a) as an inducement or reward for, or otherwise on account of, doing or forbearing to do or having done or forborne to do any act in relation to his principal's affairs or business; or (b) the receipt or any expectation of which would in any way tend to influence him to show or forbear to show favour or disfavour to any person in relation to his principal's affairs or business, he shall be guilty of a crime.

Australia in *R v Turner* (2001) 25 WAR 258; 126 A Crim R 247.[32] There, Wheeler J summarised the authorities which accepted this proposition at [12]:

> [12] ….The joint judgment of the Full Court of the Supreme Court of Victoria (Young CJ, Kaye and Gray JJ) in *R v Gallagher* (at 230) emphasizes the nature of the intention which stamps on a relevant action the mark of corruption:
>
> "It therefore clearly emerges from the decisions and opinions of the Court of Appeal, and from what was said by Cussen J in *R v Scott* [1907] VLR 471 and Hood J in *R v Stevenson* [1907] VLR 475, that it is the intention of the person either giving or receiving, as the case may be, at the time of the passing of the consideration which is relevant to whether the behaviour charged was corrupt within the meaning of the section. This emerges in the passage cited by Bray CJ in *C v Johnson* [1967] SASR 279, at p290, from the judgment of the Court of Appeal of Ontario in *R v Gross* [1946] OR 1: 'The word "corruptly" in the section sounds the key note to the conduct at which the section is aimed. *The evil is the giving of a gift or consideration, not bona fide but mala fide, and designedly, wholly or partially, for the purpose of bringing about the effect forbidden by the section.*' "
>
> Their Honours added (at 231):
>
> "What is struck at by the statutory provision is the intention on the part of the giver or receiver of a gift or consideration to show favour or to forbear from showing disfavour to another in relation to his principal's affairs or business."
>
> In my opinion, these authorities confirm that the sections are directed at the specified conduct done with the intention (properly described as corrupt) of seducing an agent from the duty owed to his principal or of rewarding the forsaking of that duty in favour of another. Consistently with this view of the sections, they will not apply where the principal is known or believed to have assented.

R v Turner was cited with approval by Bathurst CJ in the Supreme Court of New South Wales in *Mehajer v The Queen* (2014) 244 A Crim R 15[33] in construing the NSW corrupt agent offence under s 249B of the *Crimes Act 1900* (NSW). His Honour treated the decision as consistent with South Australian authority[34] to the same effect, that acting corruptly means acting *mala fide* or with wrongful intention.

Notwithstanding the fact that the corrupt trustee offences in all four states did not use the word "corruptly" in their original enactment or subsequent re-enactments, as discussed in more detail in Annexure "B" to this submission, the legislative purpose of all of the secret commission prohibition offences at the time of their original enactment in Victoria in 1905 was to criminalise dishonest conduct, not honest trade.

When the *Secret Commission Prohibition Bill* 1905 (Vic) (which contained the trustee offence in almost identical form to the present s 535) was debated in the lower house, the member who had introduced

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[32] *R v Turner* (2001) 25 WAR 258; 126 A Crim R 247 (Burchett AUJ, Malcolm CJ and Wheeler J agreeing). There the court discussed the mental element in terms of the betrayal of trust or debasement of the disinterestedness a principal is entitled to expect of an agent. In *Mehajer*, at Bathurst CJ construed the views of Bray CJ and Chamberlain J in *C v Johnson* as consistent with the views of the court in *R v Turner*.

[33] *Mehajer v The Queen* (2014) 244 A Crim R 15 ('*Mehajer*') (Bathurst CJ, Johnson and RA Hulme JJ agreeing). Bathurst CJ distinguished the English and Victorian authorities which found that dishonesty was not required (citing *Cooper v Slade* (1958) 6 HL Cas 746; 10 ER 1488 in relation to the provisions of the Corrupt Practices Prevention Act 1854 (UK) where Willes J who delivered the opinion of the majority of their Lordships stated that "corruptly" in that statute "means not 'dishonestly' but in purposely doing an act which the law forbids". The other line of authority arose from cases construing cognates of section 249B in various jurisdictions including South Australia, Western Australia and Canada, where "corruptly" was construed as importing an element of dishonesty or "acting mala fide, or with wrongful intention," requiring "dishonesty according to normally received standards of conduct." Bathurst CJ preferred this latter meaning of "corruptly" for the purposes of section 249B.

[34] *C v Johnson* [1967] SASR 279, 289 per Bray CJ, construing s 5(a) of the *Secret Commissions Prohibition Act 1920* (SA) (the equivalent offence to s 176 of the Crimes Act 1958 (Vic) and s 249B of the Crimes Act 1900 (NSW)), finding, "I think in this statute it does import that the defendant was acting mala fide… [m]y view is that the commission of an offence against s5(a) of the *Secret Commissions Prohibition Act 1920* necessarily involves dishonestly and that a man who acts corruptly within the meaning of that section necessarily acts dishonestly. Of course, I use the word "dishonesty: to mean dishonesty according to normally received standards of honest conduct." Chamberlain J also found that the offence involved dishonesty in the sense of the intention of an agent to take advantage of his relationship with his principal to secure some benefit to himself or to some other person without the knowledge of his principle which his Honour observed "most people would think involves dishonesty". (at 301).

the bill, Mr Mackey, noted that "[a]s he had told the House right through, the intention of the Government was only to prohibit dishonest commissions…" and confirmed:

> There are two factors that must be borne in mind. The mere giving of the commission, or the receipt of it, is not an offence. *The jury must be satisfied of two things. The first is that the gift was given or received, as the case may be, without the consent of the principal, and secondly, that the commission was paid or received, as the case may be, for an improper purpose, or was likely to have an improper effect.*[35] *(emphasis added)*

When it had its second reading in the upper house, the Attorney-General, the Hon J M Davies, said that:

> the Bill was not intended to in any way prevent honest commissions being given or taken, but it was for the purpose of preventing a commission being given or obtained for the purpose of *inducing a person to do something dishonest which otherwise he would not do.*"[36] (emphasis added)

Consistent with this original legislative purpose, the purpose of the recent legislative reform in New South Wales to insert the word "corruptly" into the NSW corrupt trustee offence was stated by the Attorney General to '*ensure that the criminal offence only targets dishonest and improper conduct*, while allowing parties to engage in good faith transactions without exposure to potential criminal sanctions.'[37]

It is submitted that reform to s 535 is now also required to ensure that the scope of the trustee offence is also limited to inducing a trustee to act "corruptly" in the sense of doing 'something dishonest which otherwise he would not do.'

Element of offence that conduct engaged in without consent of beneficiaries or assent of the court redundant if conduct required to be corrupt.

It is an element of all trustee offences including s 535 (other than the amended offence in New South Wales) that the relevant valuable consideration is offered, given, solicited or received without the unanimous consent of the beneficiaries or assent of the court.

It is submitted here that if the offence is amended to require that the conduct is engaged in corruptly, this element is rendered redundant and should be removed, as it has been in New South Wales.

Of course, in many cases corrupt conduct is carried out in secret – indeed secrecy is a prime indicator of a fiduciary acting dishonestly. However, as Bathurst CJ noted in *Mehajer,* it does not necessarily follow that acting without consent is corrupt in the relevant sense of acting dishonestly and with an improper intention: in all cases it will be a matter for the jury as to whether acting without consent is corrupt.[38] As the circumstances of replacement of a trustee of a large commercial trust considered in *MLC Investments*, *Diversa Trustees* and *Re Guild Trustee Services* demonstrate, there are circumstances where a trustee may act without the consent of the beneficiaries or court and yet act without any improper motive and in their best interest. Just as acting without consent is not always corrupt, nor can corrupt conduct be 'cured' by having obtained consent.

Accordingly, as acting without consent is not always corrupt, it should be removed as an element of the offence. If there is evidence of corruption, it is unnecessary, and should be no defence to a prosecution that consent was obtained.

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[35] Ibid 514. As a result of that debate, the offence dealing with agents was amended to make the requirement for corrupt conduct express. The amendment introduced the word "corruptly" to appear before "receives or solicits" and "gives or offers".
[36] Victorian Hansard, Parliamentary Debates, Legislative Council, 26 September 1905, 1686.
[37] Legislative Assembly, New South Wales, Hansard 22 August 2023.
[38] *Mehajer* at 34 [63]. Bathurst CJ accepted that a payment to or received by an agent without knowledge or consent of the principal for one of the purposes described in s 249B "would generally be regarded as corrupt according to such standards," but observed that it would be a matter for the jury in any particular case.

Retrospectivity

This reform should also be given retrospective effect as it has been in New South Wales, given the number of transactions that will have been conducted to date in relation to which the unanimous consent of the beneficiaries or assent of the court was not sought because it was not believed to be required. The retrospective operation of the reform should have the effect that the offence prior to amendment will not apply to conduct before the commencement date, and the amended offence will only apply to conduct engaged in prior to the amendment if it was engaged in corruptly, as defined. The reason for this is that the many transactions that have already been entered into in providing routine indemnities to outgoing trustees which would not breach the amended offence because they have not involved corruption, might constitute an irremediable offence under the presently worded offence and in respect of some of which there are more applications for consent pending.

Schedule 11 to the *Crimes Act 1900* (NSW) provides that section 249E, as in force before the commencement of the amendment to s 249E, no longer applies in relation to conduct engaged in before the commencement. (The retrospectivity provisions also apply to the offence under s 249F in relation to aiding and abetting an offence under s 249E, and to s 316 which provides that it is an offence for a person who knows or believes that a serious indictable offence has been committed by another person, and has information that might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for that offence, and fails without reasonable excuse to bring that information to the attention of a member of the NSW Police Force or other appropriate authority).

The need for reform in other states

I note that I am also making a similar submission to the Attorneys General of Victoria and Queensland in relation to the desirability of uniform reforms to the counterpart offences under s 180 of the *Crimes Act 1958* (Vic) and s 442F of the *Criminal Code 1899* (Qld) respectively. None of the trustee offences should apply to conduct that is not corrupt and it is appropriate that the mental element of each offence is consistent, requiring a dishonest intent to engage in the relevant conduct.

Extraterritoriality

Another reason to seek consistent reform across all four states with a corrupt trustee offence is that the extraterritorial reach of the offences in Western Australia (and in Queensland). The effect of these provisions is that risks remain for trustees in other states who engage in any conduct which might fall within the scope of s 535, despite the reform that has been enacted in New South Wales to limit the scope of the offence under s 249E to corrupt conduct.

Section 12 of the *Criminal Code* provides:

> **12. Territorial application of criminal law**
>
> (1) An offence under this Code or any other law of Western Australia is committed if —
>
> (a) all elements necessary to constitute the offence exist; and
>
> (b) at least one of the acts, omissions, events, circumstances or states of affairs that make up those elements occurs in Western Australia.

In other words, where a trustee resident in one state under a trust whose proper law is that of another state, engages in conduct in relation to the appointment of a replacement trustee, and one of the elements of the trustee offences occurs in Western Australia or in Queensland, this may be enough to give rise to an offence in one of those states. For example, presently, one of the elements of the offences in those states is the omission to obtain consent of the beneficiaries or of the court. If the relevant trust has any beneficiaries resident in Queensland or in Western Australia, the failure to obtain consent from one of those beneficiaries in the absence of consent of the court, would arguably attract s 12(1)(b) of the Criminal Code and amount to the commission of a trustee offence in that state because of the *omission* that occurs that state.

Furthermore, the legal and other advisers acting in relation to the transaction are potentially liable pursuant to the aiding and abetting offence under sections 13 of the two criminal codes which both provide:

> **13 Offence aided, counselled or procured by person out of WA**
>
> When an offence under this Code or any other law of Western Australia is committed, section 7 of this Code applies to a person even if all the acts or omissions of the person in —
>
> (a) enabling or aiding another person to commit the offence; or
>
> (b) aiding another person in committing the offence; or
>
> (c) counselling or procuring another person to commit the offence,
>
> occurred outside Western Australia.

Many, if not most, forms of large commercial trust and superannuation trusts operate in multiple states if not nationally. Indeed, in both *BTFM* and *Diversa Trustees*, one of the issues was whether the conduct would also breach the counterpart offences in other states by reason of the operation of the superannuation fund in those states.

Accordingly, consistency between the states in the elements of these trustee offences would be highly desirable.

Conclusion

For these reasons, it is submitted that this reform is of widespread community and commercial importance, and urgent, given the impact that the current state of the law is having in relation to routine transactions that are not improper and conducted in good faith in the best interests of beneficiaries.

If you have any questions about this submission, please do not hesitate to contact me for further information or to discuss any aspect of it.

Yours faithfully,

Allison Silink

Dr Allison Silink

Annexure "A"

Historical Provisions

Secret Commissions Prohibition Act 1905 (Vic)

Secret commission to trustee in return for substituted appointment

> 6. If any person offers or gives any valuable consideration to a trustee or if any trustee receives or solicits any valuable consideration for himself or for any other person without the assent of the persons beneficially entitled to the estate or of a Judge of the Supreme Court as an inducement or reward for appointing or having appointed or for joining or having joined with another in appointing or for authorizing or having authorized or for joining or having joined with another in authorizing any person to be appointed in his stead or instead of him and any other person as trustee he shall be guilty of a misdemeanour.

Section 6 was then copied into cognate secret commission prohibition acts in New South Wales, South Australia and Western Australia.[39] In each state, those provisions were then subsequently reenacted into the relevant state crimes legislation.[40]

Contemporary corrupt trustee benefit offences

Victoria

Section 180 of the *Crimes Act 1958* (Vic) provides:

> **Secret commission to trustee in return for substituted appointment**
>
> Every person who offers or gives any valuable consideration to a trustee and every trustee who receives or solicits any valuable consideration for himself or for any other person without the assent of the persons beneficially entitled to the estate or of the Supreme Court as an inducement or reward for appointing or having appointed or for joining or having joined with another in appointing or for authorizing or having authorized or for joining or having joined with another in authorizing any person to be appointed in his stead or instead of him and any other person as trustee shall be guilty of an indictable offence, and shall —
>
> (a) be liable if a corporation to a level 5 fine and if any other person to level 5 imprisonment (10 years maximum) or a level 5 fine or both.

Queensland

Section 442F of the *Criminal Code 1899* (Qld) provides:

> **S 442F**
>
> **Secret commission to trustee in return for substituted appointment**
>
> Any person who offers or gives any valuable consideration to a trustee, or any trustee who receives or solicits any valuable consideration for himself or herself or for any other person, without the assent of the persons beneficially entitled to the estate or of a judge of the Supreme Court, as an inducement or reward for appointing or having appointed, or for joining or having joined with another in appointing, or for authorising or having authorised, or for joining or having joined with another in authorising, any person to be appointed in the person's stead or instead of the person and any other person as trustee, commits a crime.

Western Australia

[39] *Secret Commission Act 1905* (WA); *Secret Commissions Prohibition Act 1910* (SA); *Secret Commission Prohibition Act 1919* (NSW)

[40] Pursuant to the *Prohibition of Secret Commissions and Further Amendment Act 1931* (Qld), chapter 42A was inserted directly into the Criminal Code 1899 (Qld) where it remains.

Section 535 of the *Criminal Code 1913* (WA) provides:

> **S 535**
>
> **Secret commission to trustee for substituted appointment**
>
> If any person offers or gives any valuable consideration to a trustee, or if any trustee receives or solicits any valuable consideration for himself or for any other person, without the assent of the persons beneficially entitled to the estate, or of a Judge of the Supreme Court, as an inducement or reward for appointing or having appointed or for joining or having joined with another in appointing, or for authorising or having authorised or for joining or having joined with another in authorising any person to be appointed in his stead or instead of him and any other person as trustee he shall be guilty of a crime.

New South Wales

Section 249E(2) of the *Crimes Act 1900* (NSW) before its replacement provided:

> **Corrupt benefits for trustees and others**
>
> (2) Any person who offers or gives a benefit to a person entrusted with property, and any person entrusted with property who receives or solicits a benefit for anyone, without the consent—
>
> (a) of each person beneficially entitled to the property, or
> (b) of the Supreme Court,
>
> as an inducement or reward for the appointment of any person to be a person entrusted with the property, are each liable to imprisonment for 7 years.

Section 249E(2) as amended now provides:

> **249E Corrupt benefits for trustees and others**
>
> (1) A person is guilty of an offence if—
>
> (a) the person corruptly offers or gives a benefit to a person entrusted with property as an inducement or reward for the appointment of a person to be a person entrusted with the property, or
>
> (b) the person is entrusted with property and corruptly receives or solicits a benefit for any person as an inducement or reward for the appointment of a person to be a person entrusted with the property.
>
> Maximum penalty—imprisonment for 7 years.

Annexure "B"

History of the Secret Commissions Prohibition Offences

Each of the trustee offences derives from section 6 of the *Secret Commission Prohibition Act 1905* (Vic), which was the legislative response to the recommendation of two Royal Commission reports; the Report of the Royal Commission dealing with *Secret Rebates on Ocean Freights 1904*, and the recommendations of the *Royal Commission On the Butter Industry 1905 (the "Butter Royal Commission")*. The scope of the two reports overlapped in the context of the shipping of butter by way of trade with England and other countries in the European market. So endemic was it that the Royal Commission reported that the business of traders and agents who withstood the solicitations for commissions consequently suffered from such refusal to make secret payments."[41] Importantly, the Royal Commission observed:

> We have not discerned during the investigation an instance where gifts were bestowed or bribes given with a philanthropic motive. It has been clearly demonstrated that the object of these payments was to gain the favour of the director or official as against the interests of their principals, or to perpetuate a practice followed by competitors and insisted upon by the employees.[42]

The Royal Commission concluded that:

> Following upon the Report by this Commission dealing with Secret Rebates on Ocean Freights, the Premiers in Conference at Hobart with the representatives of the Federal Parlament (sic) have intrusted to the Premier of Victoria, the Hon. Thomas Bent, the introduction of *legislation to check the corruption arising out of secret commissions and bribes*. We have no hesitation in stating that much benefit will be derived by the dairy industry and the trade generally from the introduction of such legislation.[43] (emphasis added)

The *Secret Commission Prohibition Act 1905* (Vic) comprised a suite of different misdemeanours addressing different forms of bribery and corruption. The Second Reading speech and debate[44] gives a detailed insight into its purpose. The member introducing the bill into the lower house, Mr Mackey, observed that the bill was "almost exclusively" one of the consequences of the Butter Royal Commission.[45] He referred to the evidence in relation to corrupt practices in the form of secret commissions, and observed that "the introduction of a Bill embodying the principles contained in this Bill is justified by those findings"[46] and addressed its object. He said:

> The object of the Bill will be gathered from the report of the Royal Commission I have referred to, and cannot be better put than it was put when a Bill introduced in 1899 by Lord Russell of Killowen was before the House of Lords. He stated-
>
> > The object of the Bill may be shortly stated as an effort to check by making them criminal, a large number of inequitable and illegal secret payments, all of which are dishonest, and tend to shake confidence between man and man, and to discourage honest trade and enterprise.

One of offences dealt with the conduct of agents. The original form of clause 2 of the 1905 bill as it was introduced to the Victorian legislative assembly, dealing with offering or giving an agent, or an agent soliciting or receiving a benefit by way of inducement or reward to act in particular ways, did not use the word "corruptly". This was inserted by way of amendment to clause 2 the bill introduced in response

[41] Ibid.
[42] Ibid.
[43] Ibid 33.
[44] Victorian Hansard, 25 July 1905, Parliamentary Debates, Legislative Assembly, 507-521, 9 August 1905, 869-905 (Mackey).
[45] Victoria, *Hansard*, Legislative Assembly, 25 July 1905, 507 (Mr Mackey).
[46] Ibid 509.

to heated debate and alarm amongst members as to its scope to apply to honest behaviour if it was not limited.

Mr Mackey was asked repeated questions about the effect of the bill upon honest practices of giving commissions and whether they would become illegal. Mr Mackey noted that "[a]s he had told the House right through, the intention of the Government was only to prohibit dishonest commissions…" and confirmed (emphasis added):

> There are two factors that must be borne in mind. The mere giving of the commission, or the receipt of it, is not an offence. *The jury must be satisfied of two things. The first is that the gift was given or received, as the case may be, without the consent of the principal, and secondly, that the commission was paid or received, as the case may be, for an improper purpose, or was likely to have an improper effect.*[47])

As a result of that debate, the offence dealing with agents was amended to make the requirement for corrupt conduct express. The amendment introduced the word "corruptly" to appear before "receives or solicits" and "gives or offers".

When the bill had its second reading in the upper house, the Attorney-General, the Hon J M Davies, also said that:

> the Bill was not intended to in any way prevent honest commissions being given or taken, but it was for the purpose of preventing a commission being given or obtained for the purpose of *inducing a person to do something dishonest which otherwise he would not do.*"[48] (emphasis added)

These second reading speeches support a construction of the purpose of the secret commissions prohibition legislation as targeting corrupt and dishonest practices, and not honest payments, consideration or commissions.

Another of those offences contained in the bill – the forerunner to the contemporary trustee offences - made it an offence to offer or give valuable consideration to a trustee, or for a trustee to solicit or receive such valuable consideration, by way of inducement or reward for the appointment of another trustee in his stead, if done without unanimous beneficiary consent or consent of the court.[49] According to the second reading speech it was introduced to address a corrupt practice identified at the time whereby some trustee companies engaged in bribing executors of estates with a secret commission as an inducement or reward for being appointed in their place as trustee of the estate.[50] Mr Mackey said of clause 6 of the Bill (the forerunner of s 249E):

> Where a person is an executor, or administrator, or entitled to take out probate or administration, a practice has arisen in one or two cases of trustee companies giving consideration to allow them to be appointed in his place. This is most improper competition, and it prevents the persons to whom the commission is given from exercising a disinterested discretion in the selection of trustees in the interests of the beneficiaries.[51]

However, it does not appear that there was any further debate at the time about whether this trustee offence also required amending in the same vein as the agents offence. Whether this was because it had only arisen in "one or two" cases and did not excite the attention that the agency offence attracted due to its wider application and impact upon commission based occupations, or whether it was simply assumed at the time that the *mens rea* for all offences in the bill was understood as a corrupt purpose, as the member introducing the bill had confirmed in debate, is only speculation now. But despite the clear legislative purpose for the bill as a whole, the form of the trustee offence that was enacted in the first 1905 legislation in Victoria did not expressly require corrupt conduct or refer to any *mens rea* component.

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[47] Ibid 514.
[48] Victorian Hansard, Parliamentary Debates, Legislative Council, 26 September 1905, 1686.
[49] *Secret Commissions Prohibition Act 1905* (Vic), s 6.
[50] Victorian Hansard, 25 July 1905, 515 (Mackey M).
[51] Ibid, 515.

The secret commissions prohibition statute enacted in 1905 in Victoria was then enacted into counterpart secret commission prohibition acts in the early twentieth century in most states of Australia and federally.[52]

Subsequently, in most states, those stand alone statutes were re-enacted into the relevant state crimes legislation.[53] (In Queensland the secret commissions prohibition offences were enacted initially directly into the Criminal Code 1899 (Qld)).

Confirmation in New South Wales that the secret commissions prohibition offences target dishonesty

Upon the re-enactment of the secret commission prohibition offences into Part IVA of the *Crimes Act 1900 (NSW)* it is clear that the legislative purpose of these offence to target dishonest conduct did not change. In the second reading of the *Crimes (Secret Commissions) Amendment Act 1987* (NSW), the Attorney-General explained the purpose of the bill, observing that the main purpose of this bill was to up-date the existing laws to enable effective prosecution of these offences and to ensure adequate penalties exist for the punishment of the worst examples of these crimes.[54] It is noteworthy that at no point did the Attorney-General identify the trustee offence as bearing a different purpose or *mens rea*. The provisions were rolled up collectively as "the bill":

> "The main purpose of this bill is, therefore, to up-date the existing laws to enable effective prosecution of these offences and to ensure adequate penalties exist for the punishment of the worst examples of these crimes. To this end, the *Secret Commissions Prohibition Act* will be repealed, and most of its provisions brought into the Crimes Act, with appropriate amendments. ….
>
> *The offences currently existing are all to be re-enacted in a form similar to that which they presently have, although some effort has been taken to simplify and clarify them*. However, they are dealing with fairly complex areas. …
>
> The penalty of seven years is appropriate because these offences can represent substantial breaches of the fiduciary relationship that exists between principal and agent. The penalty is consistent with those prescribed for the general offences relating to theft and misleading statements, but takes into account the aggravating circumstances of a breach of trust…
>
> *This bill brings the offences covered by this legislation into line with other comparable offences of dishonesty*".[55] (emphasis added)

[52] *Secret Commission Act 1905* (WA); *Secret Commissions Prohibition Act 1910* (SA); *Secret Commission Prohibition Act 1919* (NSW)
[53] Pursuant to the *Prohibition of Secret Commissions and Further Amendment Act 1931* (Qld), chapter 42A was inserted directly into the Criminal Code 1899 (Qld) where it remains.
[54] New South Wales, *Hansard*, Legislative Assembly, 26 May 1987, 12407-9 (Terence Sheahan).
[55] New South Wales, *Hansard*, Legislative Assembly, 26 May 1987, 12407-9 (Terence Sheahan).