# PROOF VERSION ONLY

**STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES**

**LEGISLATION COMMITTEE**

**Inquiry into the Wills Amendment (International Wills) Bill 2011**

Melbourne — 30 May 2012

Members

| | |
|---|---|
| Ms G. Crozier | Mr D. O'Brien |
| Mr N. Elasmar | Mr E. O'Donohue |
| Ms C. Hartland | Mrs D. Petrovich |
| Ms J. Mikakos | Mr M. Viney |

Chair: Mr E. O'Donohue

Deputy Chair: Mr M. Viney

Staff

Secretary: Mr R. Willis
Research officer: Ms L. Kazalac

Witness

Mr A. Craig, senior corporate lawyer, State Trustees.

**Necessary corrections to be notified to secretary of committee**

**The CHAIR** — Mr Craig, from State Trustees, thank you very much for being here this morning. I caution you that all evidence taken at this hearing is protected by parliamentary privilege, as provided by the Constitution Act 1975, and further subject to the provisions of the Legislative Council standing orders. Therefore you are protected against any action for what you say here today, but if you go outside and repeat the same comments, they may not be so protected. All evidence is being recorded. You will be provided with a proof version of the transcript within the next week. Transcripts will ultimately be made public and posted on the committee's website. We would be interested in opening remarks or an opening comment from you if you have one. We have a copy of your submission; thank you for that. The committee members will thereafter have questions.

**Mr CRAIG** — Certainly. Thank you, Mr Chairman. The short submission by the State Trustees you have received. State Trustees supports the bill. We are cautious as to the risk around people misconstruing what the bill will actually mean in practice for their estate planning arrangements and needs. We have pointed out all along that each individual's circumstances need to be considered when making estate planning arrangements through wills. Currently it is often the best recommendation that a person at least seek specialist advice about assets that they hold outside of Victoria when it comes to planning for succession in relation to those assets, and there are a variety of reasons why that is important.

A lot of other jurisdictions will have quite different legal arrangements in relation to the efficacy of wills. In a number of jurisdictions you cannot even give your entire estate by will, depending on your circumstances. The law in those states will prescribe a formula, effectively, as to where your assets will go, and there may be a portion of your estate that you can distribute by will. Other considerations are that trust law may not be applied in the same manner, or the jurisdiction may not even recognise trusts in the way we understand them. The role of executor may be different or may involve a different identity, and of course there is the question of taxation law, which is very specialised in each jurisdiction. That said, what we see as the positive of the bill is that it adds a degree of additional flexibility in that an individual can ask themselves, 'Well, is this an appropriate means for me to encapsulate my testamentary wishes?'. The answer may be 'no', or the answer may be 'yes'. So it does add flexibility.

Obviously over time if the number of states or jurisdictions that accede to the convention grows — which one would assume it would over time — then it will become a more useful tool. Possibly at present it is not something that would be of immediate use in many circumstances, but if countries and jurisdictions like Victoria are not assisting in accession to the convention, then you cannot really expect the number of accession states to continue to grow. So it is positive in that respect.

Obviously in terms of any risks around misinformation about the scope of what an international will is, what it can do, what it means in terms of assets in jurisdictions overseas and whether those jurisdictions may or may not be under the convention, that is something that will put a fair amount of onus on people assisting people to make wills: obviously solicitors, trustee companies and so forth. It would help if whatever communication there is of a formal nature from government is consistent with an accurate portrayal of what the scope of the international will would be once implemented.

There is only one other point of clarification perhaps in relation to our submission. Just on the top of page 2 we have talked about the appropriateness of preparing a separate will for each relevant jurisdiction rather than an international will. Of course in appropriate circumstances one or both or as many as required of the separate wills could also be international wills if that were appropriate. It is a little bit like any form of financial planning or estate planning advice: you have to tailor it to the individual and their circumstances, which will evolve over time.

We touched on the question of the extension of the international will provisions to the statutory will provisions under the Wills Act. On my reading, were the bill in its current form to be enacted, it would appear on the face of it that it is possible to make an international will via the statutory will mechanisms. That is not to say that it would in practice ever be found appropriate. There may be a lot of considerations the court would have to let through before it actually formed a view that that was something that would make sense in a given case, but in terms of allowing that option to the court, on its face it would appear that there would be means that could be brought to bear to bring that about. That seems like a sensible outcome and one that seems consistent with, for example, the charter of human rights. Those were the only high-level comments I had.

**Ms MIKAKOS** — I was interested in those comments that you referred to just now, on page 1 and going on to page 2 of the cover letter of your submission, where the managing director says:

> … in many cases where there are overseas assets, it may still be appropriate to prepare a separate will for each relevant jurisdiction (rather than an international will) …

It would seem, then, that in the view of the State Trustees you see a fairly limited benefit in this new bill coming into effect. Would that be correct?

**Mr CRAIG** — Certainly it is a benefit, but we do not want to overstate the rate of take-up of these wills. We would not envisage it becoming the most common form of will that we prepare, for example, by any stretch.

Obviously when you take instructions for the preparation of a will you ascertain what the person's assets are both within the jurisdiction and outside the jurisdiction. To the extent that there are assets outside of the jurisdiction, that leads to a discussion around the mechanisms for dealing with those, and a whole spectrum of options may arise. The person may say, 'I have already dealt with those separately. I do not need to discuss those with you, and I have separate solicitors in that jurisdiction who have helped me out in that regard', and that usually is the end of that. To the extent that they say, 'I had not thought of that', that becomes a new conversation around what mechanisms can be adopted, and it may well be that if they are complex assets, one would have to locate a specialist who would understand the best way of dealing with those in that other jurisdiction.

It is very difficult for a practitioner in Victoria to have a grasp of all the implications of a particular means of providing for assets in another jurisdiction, because the law is changing in those jurisdictions. They will often have completely different laws relating to succession. What the bill will enable, though, is for a person to at least have comfort that to the extent that they know what they are doing when they put provisions in a will, the execution of the will will not raise issues in a convention jurisdiction, because it will conform to the convention form, and the convention is solely really around form and recognition of form. That is a good thing.

**Ms MIKAKOS** — Just a follow-up question, if I may. Given that State Trustees is the biggest provider of estate planning, as I understand it, in Victoria, and you are suggesting that you would be relying on external specialists in cases of international wills, would you currently have that expertise in house or would you need to refer people to external solicitors in those types of situations? I am just trying to think about the consequences for the profession if this change were to come into effect and how your organisation, for example, might be able to deal with, or will be unable to deal with, these types of changes.

**Mr CRAIG** — I do not see the enactment of the bill as changing the responsibility of the people advising. It adds another string to the bow, in a sense, because it can be used to have a will drafted that will, as I say, be able to be recognised in convention jurisdictions and is to that extent possibly a mechanism for a safety valve. But you would still be strongly advising people by saying, 'At this point in time you are telling us that you have no assets outside Victoria, but you are requesting an international will in case you acquire assets outside Victoria. If that were to occur, we would strongly recommend you obtain advice again as to how to deal with those assets'.

As to how we get the expertise around that, sometimes there will not be, even within Victoria itself, the knowledge of a particular jurisdiction and its legal system. That sort of expertise may, in some cases, only be able to be found in that external jurisdiction. So that is a situation that not only State Trustees finds itself in but also any legal practitioners offering estate planning and will preparation services.

**Ms MIKAKOS** — That is the point that I made, Chair. I guess the point that I am coming to is that is currently the situation. If you have assets overseas, presumably you have to go through a solicitor overseas to execute a will overseas in relation to those assets. It does not sound as if there is a great deal of difference between that scenario and what you have just described, which is that State Trustees or some other legal practitioner in Victoria still has to secure the expertise of an overseas-based lawyer in order to be able to find out what the consequences of these foreign-located assets are going to be. I am trying to make an evaluation as to whether there will be any practical benefit for Victorians with this change.

**Mr CRAIG** — I think it will be a small benefit, an accretion to the benefits that they already have under the Wills Act, which I think is a good piece of Victorian legislation and will presumably be improved through the review by the Law Reform Commission. It is a good string to have to the bow of our law, but as I say we cannot

overstate what it will permit to happen. To the extent it is known that there are means by which the consequences of making a particular will within Victoria will affect overseas assets, then practitioners will in many cases actually prepare those types of wills. They do not need the international will convention to do that. The convention adds certainty to the form; it is almost like a means of getting more watertight assurance that there will not be a problem in terms of recognition of the means by which it has been executed and so forth. It gives that extra comfort, but it can already happen under the present law, and you would be aware of section 17 of the Wills Act.

**The CHAIR** — Mr Craig, is the issue of people having assets in different jurisdictions a growing issue that you are seeing in your work with, I suppose, immigration, with people working overseas and all the rest of it? Is this a growing issue?

**Mr CRAIG** — I think complexity generally is a growing issue. Certainly Victoria has a long history of immigration. The flexibility of the workforce in terms of location I would imagine would increasingly throw up issues around the location of assets. As a general rule people are not automatically keen to be putting their affairs in order until it comes to a time in their life when they think it may occur. It would be preferable if that were not the case and that everyone, as soon as they became an adult, thought, 'I had better put a will in place'. But it is human nature to put that off until they think they need to have something in place. Often then they adopt a set-and-forget approach as well. Their circumstances may well change and they end up with a 10 or 20-year-old will that does not actually fit their circumstances and so forth. That is always a challenge. To the extent that people are lucky enough to have substantial assets in multiple jurisdictions, they can probably access relevant advice to make appropriate plans for those assets.

**Ms CROZIER** — I have just a very quick question. You mentioned in your first answer to Ms Mikakos the challenges and the whole complexity of dealing with this issue. It is my understanding that it can be extremely complex and have a number of issues that arise from it and subsequently long time frames associated with it. You say there are benefits to this particular legislation. Do you see those time frames being one of those major benefits in shortening the process for people to deal with the assets that they have overseas or that have been dealt with in relation to an international will?

**Mr CRAIG** — If applied appropriately, then there will be time frame benefits. I suppose in the back of my mind I have an understanding that some people may see what is in the heading of the bill and think, 'Hooray! I want to make an international will. I don't care what my solicitor or what the trustee company says, I know I can do it, so I'm going to tell them to make one for me'. That may actually add to the complexity of explaining why it may or may not be appropriate in their particular case or maybe that making two wills would be more appropriate, or having to explain, 'Well, the jurisdiction you are worried about has not acceded to the convention yet, so it is actually not relevant yet to that jurisdiction', and so forth. There may be an educational aspect that is added in to the discussion around estate planning. As to whether over time that means that these things take a longer or a shorter time, certainly if people have a full understanding, then the bill when enacted would permit in a number of circumstances things to be done more efficaciously and more efficiently. I do not see that being in a large number of cases as yet.

**Mr O'BRIEN** — Thank you for your submission. I just wanted to pick up something about this. One of the key differences, as I understand it, between the existing Victorian wills regime and what is set out under the international convention is the role of the authorised person and the certificate that they provide to the will. I understand what in a sense that does, which is not much, but to pick up Ms Crozier's point, it may be of great practical significance, which is that in the absence of contrary evidence the certificate of the authorised person would be conclusive proof of the formal validity of the will. The other requirements in a sense seem to mirror in large part the existing formality requirements in the Victorian law anyway. There are some issues about signatures on each page and slightly further dates and numbers, and there is also a variation requirement in the sense that I think article 2 says that the invalidity of the will shall not affect its formal validity as a will of another kind. So there are those provisions as well.

One of the things, picking up your submission, that I wanted to explore with you is in relation to these countries where it is already in existence. For example, with a will under one of the Canadian provinces it would seem to me that presently in Victoria someone who was an authorised person under the convention — and it may be, because Victoria does not have it in force as yet, they would have to be authorised presumably under Canadian law but somehow entitled to practise here, but I will leave that question alone — would be able to enter into a

law as an international will now for the purposes of the Canadian convention, given that that country has signed. As I understand the formality, it is designed to operate irrespective of where the will is signed. If you cannot answer this now, I understand that.

In a sense what this bill will be doing once it comes into force will be to enable in a sense more people to be authorised under Victorian law and effectively enable Victoria to be one of these states that then picks up this international convention, which in a sense has been existing since 1973. I am not sure if you have done this work, but there may be practitioners already in Victoria who are suitably authorised under the foreign regimes. I do not know if you are aware of any that purport to operate in this area already. If you are not, what is your understanding of that as the practical impost? So effectively once Victoria comes on board they will be able in a sense to do it more; and for the purposes of Victorian practitioners and Victorian wills they will be accepted as international wills, but ultimately it is in a sense adding to the body but not changing the fundamental issues that exist in Victoria at the moment.

**Mr CRAIG** — I understand your question. My reading of what the bill would effect is that Australian legal practitioners would become authorised persons for the purposes of convention wills. As you say, the whole point of the convention is that a will that complies with the form ought to be capable of being recognised in all the convention jurisdictions. I do not take it to mean that there can be no challenge brought to an international will for other reasons. It is not a way of, in a sense, giving an ironclad validation of the circumstances in which the will was made and so forth. I am not aware of any practitioners in Victoria who are holding themselves out as already authorised under another convention jurisdiction. They may well exist. It certainly would be a useful string to the bow for someone who was assisting people across jurisdictions, but I am not aware of any.

As you are aware, the list of jurisdictions that have enacted and ratified the convention obligations at the moment is not particularly long and would probably not consist of those countries where we would expect people resident in Victoria to have a lot of assets. Not to say that it would not occur, but New Zealand, for example, has not ratified, just to state an obvious neighbour. The United Kingdom has not ratified.

**Mr O'BRIEN** — Thank you for that. If I could just follow up, I agree with your analysis about the ironclad guarantee. That is not dissimilar to what I was putting to you, and I just want to be clear that the operation is that the international will will act in the absence of contrary evidence or conclusive proof of the formal validity of the will, but it does not affect underlying will issues. Is that your understanding?

**Mr CRAIG** — Which is not far removed, in a sense, from what applies under the Wills Act at present in the case of a will that has been executed in accordance with section 7 of the Wills Act. There is a strong presumption, if it has been executed in that way, that on the face of it, it will be held to be valid. Of course there is a lot of litigation around whether even validly executed wills should be overturned because of undue influence or because the person, notwithstanding the witnesses, actually did not have capacity and so forth.

**Mr O'BRIEN** — So it is effectively Ms Crozier's point about the efficacy of having this conclusive proof of presumption, which in most cases may not be overturned. That will in a sense speed it up, I imagine, or deal with it in a lot of cases.

I then take you back to that present situation, and I might be asking you on the spot. I would be happy, perhaps, if you respond if you need to as to some information as to current people signed off. Is it your understanding as to the operation of the bill and the international wills convention that in a sense clause 19C(1), which authorises the Australian practitioners to be authorised persons, will be brought in by this will, which will make all lawyers and public notaries in Victoria authorised persons? But assuming someone was authorised under a foreign act, if that is possible — and I know those conventions; you can become a practitioner in several countries — the operation of the international wills convention effectively means that wills by a presently authorised person in Victoria signed now or signed 10 years ago will be valid and effectively, from the date of this act, any of the other of those wills will come on, and as soon as the act comes into force then you will have the opportunity for all Victorian lawyers to effectively become authorised persons.

If you could just confirm that that is your understanding of the commencement procedures, because it is a bit unusual with the convention and the need for it to be adopted in other states and the fact that in a sense the form of the will is available now under the international convention.

You can take that on notice.

**Mr CRAIG** — I might take that one on notice. If I can just clarify — are you in a sense asking about the effective retrospectivity of the bill?

**Mr O'BRIEN** — Perhaps a clearer statement of the present position in relation to international wills in Victoria under the convention in that, as I see the convention, an international will signed in Victoria by an authorised person would be valid under the other laws — so a Canadian will, for the example — but there probably would not be practically many authorised because it is not an automatic entitlement of present Victorian lawyers without the bill. So therefore we can then look at the situation once the bill is brought into force, which is then that all Victorian practitioners will be able to sign or be authorised persons, which is the critical complicit proof step, which will obviously allow the form of the will to be much more broadly adopted in Victoria.

**Mr CRAIG** — Certainly what is exercising my mind arising from what you are saying is that a hypothetical person authorised in another convention jurisdiction to be an authorised person for the purposes of that jurisdiction and therefore of all other convention jurisdictions has, whilst in Victoria, made the certifications required for an international will prior to the enactment of this bill for a person, say a resident in Victoria but having assets in Canada or another convention jurisdiction. Say, when that person ultimately dies, they actually not only have assets in the Canadian jurisdiction but also have assets Victoria, what is the consequence of that? Will that international will be deemed to be an international will for Victorian purposes, or will it have to be looked at only as a will simple, in effect, for Victorian purposes, and will there be any consequences either way?

Obviously as a general rule were a will to be executed in the form of an international will in Victoria now it would, I would suggest, have little problem being accepted as a will for Victorian purposes just based on the will provisions. I have not done a line-by-line comparison, but my take on it was that that would be satisfactory for the purposes of having a grant of probate in Victoria for that bill. Whether there would be any additional consequences if the court in Victoria could not find that it actually was an international will because of the timing question for Victorian purposes, I would have to take that one on notice I am afraid.

**Mr O'BRIEN** — Yes. You have defined it well, and with respect I appreciate how you have defined it. My suspicion is it is valid now under the international convention — as it can be if the person is authorised, as I understand it — because as I understand the operations of the international convention it is irrespective of where the assets or the individuals are located. I think there is a theoretical, maybe an actual, existence of people presently signing these wills — there may or may not be. That is why if you could answer that question that you have defined yourself, and I will not risk defining it again, for the purposes of being able to demonstrate the true opportunities that this legislation then prevails upon or offers to the existing situation.

**Mr CRAIG** — Certainly.

**The CHAIR** — Mr Craig, we do appreciate your presence and the submission and State Trustees' involvement in this inquiry and process. As I said at the outset, a transcript will be provided to you shortly for your review and any minor alterations. We look forward to your response to that question that you very precisely framed.

**Mr CRAIG** — Thank you, Chair. Thank you, committee.

**Witness withdrew.**