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STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES

LEGISLATION COMMITTEE

Inquiry into the Wills Amendment (International Wills) Bill 2011

Melbourne — 30 May 2012

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Mr D. Esposito, Autralian Italian Lawyers Association.

Necessary corrections to be notified to secretary of committee

The CHAIR — I declare open again the public hearing of the Legislative Council Legal and Social Issues Legislation Committee with regard to the Wills Amendment (International Wills) Bill 2011. I welcome Mr Dominic Esposito from the Australian Italian Lawyers Association. I caution that all evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and is further subject to the provisions of the Legislative Council's 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 protected by this privilege. All evidence is being recorded. You will be provided with a proof version of the transcript in the next week. Transcripts will ultimately be made public and posted on the committee's website. I invite you to make some opening remarks, and thereafter members of the committee will ask questions.

Mr ESPOSITO — That is lovely. Thank you very much, Chair. The first thing is that I table Mr Morfuni's letter to you of 9 May 2012, which encompasses the association's comments in relation to the inquiry on wills. In effect, the association is very supportive of the convention and the recognising of wills globally. There is a great interest in facilitating estate planning and there is an interest — in a diverse community such as Melbourne has and indeed as Australia has — in having comfort and certainty about very important instruments which deal with succession.

Anecdotally if I may, in my practice there is always an anxiety about extraterrestrial assets or assets that are held overseas and about who has control, how they are recognised and also whether or not wills in this jurisdiction have the same legal power or effect as wills anywhere else and what then happens in terms of the mechanics of proving any such will and dealing with such assets. It will be an assurance, I think, to testators and families to know and appreciate that this will is a globally recognised instrument, and they can be comforted that that instrument will have the facility of delivering what was intended. I think that is very important.

Of particular interest in this convention is the third person — the authorised person — who participates in the validation of the will. That is a new thing for Victorians. A Victorian will, of course, only needs two witnesses. In my experience by having a lawyer involved, or a notary involved, that might give a dimension of formality and also a control in terms of how wills are generated and how wills are kept. I have had a number of terrible litigation cases, like many practitioners in Melbourne, about the last will, especially with aged people who change their allegiances or change their family status in their later years, and there is a will made 17 years ago and there is a will made 10 years ago and a will made 4 years ago in different circumstances. We have had cases where we have had to prove a mutual will that was 35 years old where there had been four subsequent wills.

It is very awkward to explain to people that you can get a will kit from a shopping centre or a stationery place and do your own document and think it has some legal effect without really understanding what other instruments you have created or what other rights and duties you are creating. Are you creating trusts? What are you doing with these assets? That sort of thing.

So if there is a lawyer involved, a notary involved, there will be some formality given at least to the execution, and it may give an opportunity also to consider the legal nature of the document — whether or not assets are inside the estate or outside. That is often a very common misunderstanding. So if a house is jointly owned, is it something that is subject to your will or not? Are superannuation assets subject to your will or not? That is an opportunity to deal with that.

A related issue which comes from people from a European background in particular is the registration of a will. People are very anxious about: where is the will? That is not contemplated by this convention and this proposed legislation. People have comfort in the registration of a will so there is some manifestation or public trust in the last being identified. When people moved interstate and they moved countries and they moved jurisdictions, did they make a will? Has a will been made or not made? We live in a very socially and spatially fluid world, and a registration system would be very important. I understand there is a notary or authorised person who can have a direction about keeping a will; that is a starting point, but I commend to the committee that they think a little bit about the registration issue as well. They are my comments.

Ms MIKAKOS — I just want to ask you a little bit more about that issue of registration.

Mr ESPOSITO — Yes.

Ms MIKAKOS — You are talking about registering with the probate office — leaving a copy there to avoid a situation of accusations of fraud, for example?

Mr ESPOSITO — Madam, that is quite the case. It can be any arm of the government that is appropriate for that sort of role, but in Europe there is a notary system of registration. That is a very powerful thing. I have had nasty litigation where the son-in-law is on the phone to the lawyer dictating a will. That will is then executed and the question is whether or not that will is valid or not valid. If the will is registered, there is a formal process. Is that the last will? I had an octogenarian who had five wills within 18 months under the influence of one sibling or another or one child or another or other people. Wills are made out to charities and then they are made out to one party or another depending on how the power in the family or other interests might affect the testator's capacity.

Ms MIKAKOS — Are you suggesting that across the board and not just for international wills? I am just saying that that is not very common.

Mr ESPOSITO — This is an opportunity to think about the security of that very important instrument and succession. It could start with an international will, so if people were very concerned about assets overseas and succession, one step to enhance that might be to say that there is a registration system so everybody knows that is the last will, and if that will needs to be changed there is a new will change and a new registration system. Is that helpful, madam?

Ms MIKAKOS — Yes, thank you. I just have some follow-up questions. Your organisation is obviously supportive of the bill.

Mr ESPOSITO — Yes.

Ms MIKAKOS — You can only obviously comment on this in an anecdotal way, but given Australia and Italy have, as I understand it, a social security agreement —

Mr ESPOSITO — Yes.

Ms MIKAKOS — and presumably Italian-based assets would impact on someone's ability to receive the pension in Australia, is it common for Italians to have retained assets in Italy? I am just trying to think about how useful this bill will be for, say, the Italian community in Victoria.

Mr ESPOSITO — I see. Firstly, madam, I have limited practical experience with the Italian community in Italy; I am the next generation down.

Ms MIKAKOS — Yes.

Mr ESPOSITO — But certainly I have had experience that clients are anxious about what happens with assets overseas. That is very common. People also in their migration experience actually remigrate a lot and transfer a lot. We are really involved in a global world now. People have assets all over Australia and they have assets all over the world. I had a family law case where we had injunctive orders given with assets in about six different countries — Panama, Nicaragua, Italy and Switzerland. People have assets everywhere. What is important about this is the convention codification recognising a valid will so there is no doubt about your instrument taking effect in another jurisdiction. That is the comforting point.

Certainly the more wealth there is in a particular family in terms of acquired assets and trusts and things, and the complexity, the more confident they would be and the more interest there would be in a will. It really depends on what sort of fabric you are dealing with. If you are dealing with the mums and dads-type thing, there may not be any really practical difficulty, but if you have got transnational assets or if you have got assets that are of significant value and other stakeholders who might consider that they have a right or an entitlement to them, then I think international law would help a great deal.

Ms MIKAKOS — But in terms of those mums and dads, I guess the average family, do you have any sense anecdotally from your colleagues as to whether this is a common occurrence to have assets based in Italy, for example?

Mr ESPOSITO — It is common; it is common. What families do not want, if they are mums and dads on, as I say, a working income sort of thing, is to have a second or third legal process to prove a will elsewhere. It is just another process, another complexity, another cost. For mums and dads that is a very important consideration.

Mr O'BRIEN — Thank you, Mr Esposito.

Mr ESPOSITO — Yes; nice to see you, David.

Mr O'BRIEN — Yes. I should put on record that Mr Esposito and I had a previous relationship. He used to brief me for many years.

Mr ESPOSITO — Yes.

Mr O'BRIEN — I thank you very much for making your submission; it is helpful. I know the time it takes to make these submissions, and it is a very helpful submission. One of the reasons it is particularly helpful is that Italy is one of the 12 countries that has signed up to the convention. The idea you have related to this committee about registration does sound novel and does have some practical benefit. It is obviously something beyond the terms of reference, but I imagine you are thinking something similar to what was done with the land title or conveyance system. Previously there would be lots of conveyances floating around in solicitors' offices and turning up under the general law system, and then — I think it was an Australian — Torrens developed the Torrens system and we have title by registration. Maybe you are looking at heading that way or suggesting that. I can imagine there may be some issues in that you have to give effect to the intention if you find it.

Mr ESPOSITO — Yes.

Mr O'BRIEN — But there are also exceptions in the Torrens system as well. You are looking at a practical step, and thank you for that suggestion.

Referring to the bill, you have drawn attention to the convention and point 11 of the form of the certificate, which states:

> … the testator has requested me to include the following statement concerning the safekeeping of his will …

I suppose you are saying that in an international wills context if there were assets in Italy, for example, someone could draw attention to the fact that the will is lodged with the Italian registrar or lodged with a solicitor or the State Trustees or someone else at that point and that that was the last intended will, and in the absence of evidence to the contrary that would act as conclusive evidence of the making of the will at least, if nothing else, and give some direction to the estate and those dealing with it.

Mr ESPOSITO — Yes.

Mr O'BRIEN — I asked a question of the previous witness, which you were not here for. It was about the extent to which there may be operations of international wills in Victoria at present by for example an authorised person for the purposes of the Italian jurisdiction being able to make those wills in Victoria, and they would, in a sense, be valid in the present situation. Are you aware of any practitioners who have obtained registration or are authorised for the purposes of the Italian convention law?

Mr ESPOSITO — Unfortunately I am not. As I say, I am the next generation down. To the first part of your question or comments about the registration, if you think about how many, let us say, sole practitioners there are in Victoria, it is something like 80 per cent of the law firms — there are several thousand of them — and it is an absolute administrative nightmare to think through when the last will was created by any particular testator. You know, the children might be living elsewhere for vocational reasons or for social reasons, and trying to work out where mum and dad last lived — whether they were in Queensland, where they lived for two years, and then they lived in Perth and they had an old lawyer in Melbourne — and what is the last will is an absolute nightmare.

In that trans-decade-type time frame people can have three different spouses, they can have three estates coming and going, they can have two bankruptcies, they can have unbelievable wealth and they can have assets created outside their will, which are things like trusts and things. There is a real problem about administration. In a way there is a trust issue and dealing with fraud, but it is also an administrative issue in itself.

I think the notary system works in Europe; you register your will and it is kept with a notary, so people know that is where it is. There is no risk of a person, who is in a global context living in four different cities and three different countries, having wills all over the place.

My comments about that registration are that the lawyer or the notary who is the authorised person can think carefully about where that will is kept, and there can be a demonstrable record about that. But it is a big problem. In the Italian community, for example, as in other migrant communities, there are lots of practitioners who have been working for 30 years and 50 years, and they have collected literally thousands and thousands of wills. I would say 70 to 80 per cent of them would be redundant because the person has died or there have been subsequent wills made or there have been changes that involve intention. It is a real, real problem. I mean, if you ask some of those old-standing lawyers, they literally have wall-to-wall filing cabinets full of wills made from the '50s. So which will?

Mr O'BRIEN — I remember going through one of them for two weeks when doing my articles. It was a dusty experience; I know it. Thank you.

Mr ESPOSITO — Yes; I hope that is clear enough.

Mr O'BRIEN — Just to summarise: your view is that the bill will improve the situation; it is a step in the right direction?

Mr ESPOSITO — Yes, undoubtedly.

Mr O'BRIEN — Could you briefly summarise the reasons why you say that?

Mr ESPOSITO — The first reason is that it would facilitate the estate planning so people would have certainty about that instrument applying elsewhere. People may have confidence in the jurisdictional laws of their own domicile, but they may not know what the laws are in Senegal or any other place in the world; but if there is a convention about that, they are going to have some confidence. The second thing is it is done more formally, I think, with a third witness, which is the authorised person; that is an act of solemness, which I think is an advantage. Thirdly, it might transcend the possibility of people trying to write their own rules, getting stationery from shopping centres and stationery providers, trying to do their own thing and thinking they understand what is involved. Fourthly, I think the comfort that there is a convention means that there is no doubt that they have the application of their intentions wherever they go. I think that is really good.

Ms MIKAKOS — Mr Esposito, in the earlier part of this morning we heard evidence from the States Trustees. In their written submission they said that in many cases it may still be appropriate to execute a will overseas where there are foreign-based assets, and they particularly referred to the issues of unique succession laws, particularly in European countries, that restrict the ability for people to inherit assets outside of the immediate family, and also the uniqueness of taxation laws in every country and the limitations perhaps of practitioners in Victoria having appropriate expertise in these types of issues. Do you envisage that these are potential problems for Victorian practitioners — to be across succession laws in the convention countries and taxation laws in those convention countries?

Mr ESPOSITO — That is a very interesting question. I do not have the expertise to answer that fully, but I am aware that there are issues about the inherent flexibility in the common law succession culture, if I can use that phraseology. In English law a testator can virtually provide how he or she wishes, but in Europe — —

Ms MIKAKOS — Down to your cat!

Mr ESPOSITO — Down to your cat, or even be reckless and list 17 different charities and avoid blood relatives. But in Europe it is a far more constrained and culturally driven legal system where you must recognise blood lineage.

The Wills Amendment Act that introduced the part 4 activity in Victoria is all about recognising that there are blended families nowadays. Our grandparents lived very conventionally and very traditionally, and that is true for most parts of the globe, whether Europe or Australia. What is happening with the urbanisation and modernisation of our society is a fragmentation of communities and there is a different dynamic within families. When you expect the elder son to have the farm, for example, out in the Wimmera, that will not happen any more — the concentration of that wealth. You do not expect the nurse or your neighbour to have a greater status than your blood sister, but nowadays there are surrogate parents, there are step-parents and there are stepchildren. The English system recognises that inherent dynamic, which is really the nature of the common law for many activities or areas of interest, even commercial law.

The concept of trust, for example, is a very difficult concept in Europe. I think they are getting onto it now, but the whole idea that some person can hold something but not beneficially and hold it for someone else — there are controls about that. It is a very difficult concept in European law. I think an international convention has a power and has a capacity to help codify those things and help reconcile those things. It is always good to have a global consensus.

Ms MIKAKOS — Do you think that will get to a situation, though, where Victorian practitioners are putting big disclaimers on written advice they are giving to their clients, saying perhaps that they need to seek relevant expert advice on the implications of their will being able to have practical effect overseas? For example, where they try to disinherit a child, that may not be recognised under, for example, Italian law.

Mr ESPOSITO — That is another intriguing question. I think that is true. The first job of any practitioner is to try to identify the assets and the nature of those assets, then to think about the correlative liability. People often do not think about their liabilities at all — 'I give this, I give that'. They do not think that it might trigger liabilities that might affect the intended regime for succession. This asset might have the collateral guarantee attached to it or a mortgage; this one may not. Then there are the beneficiaries and how that works. Certainly that advice is given quite frequently for those who are concerned and interested in that.

I can give you a brief example in matrimonial law. We had this case that I mentioned, with the injunction and assets all over the world. One party went to court and tried to argue that this case should be heard in Italy because the assets were mostly in Italy, although they were all around the world, and the marriage was consummated in Italy. But there was an issue of maintenance. The judge said, 'Are you expecting the spouse to go to Italy to get her maintenance?'. There were very complex issues about domicile and very complex issues about assets around the globe, but they were dealt with. The court here was not going to be shut out because there was one immediate need for the person of domicile within the jurisdiction. Certainly people who have the confidence to draw such a will need to turn their minds to conflict-of-law issues and how those issues would have significance.

Ms MIKAKOS — I guess what I am getting at here is that we would like to think that this bill is going to make things easier and simplify things, but from what you are saying and from the evidence we have heard earlier it possibly could be just as confusing if not more complicated. We will draw our conclusions based on the evidence, obviously.

Mr ESPOSITO — Look, I think any codification and any uniform instrument that has global recognition is a positive thing. Certainly the common law experience will be to see how this convention works, and if it has to be refined, it can be refined.

We have this interesting issue at the moment with these Italian minors who are running around Australia trying to hide from jurisdictional requirements that they be sent back to Italy. Those things are very complex, and the law has to deal with those things. A starting point is: what consensus do we have?

Ms CROZIER — Thank you. You raise some very interesting points. My question really was prior to Ms Mikakos's question in relation to the benefits of estate planning. Do you see this bill supporting the efficacy benefits to those people who are having these issues with their international wills?

Mr ESPOSITO — Madam, thank you for that question. I think the first point about this will is that it will be recognised internationally. That is the first point. If you do acquire assets in an interesting place — people do that by inheritance, they do that by other dynamics; say a mining company in Australia relocates to Senegal and the assets are in Senegal, a man with shares finds they are registered there. Things are not always within your control. Jurisdictions are fluid.

Ms CROZIER — And the complexities when disposing of those assets and dealing with that situation. What I am really asking is: do you think that this bill will assist with efficacy in relation to time and the complexities that it sometimes throws up in disposing of the assets? Do you see it as a benefit?

Mr ESPOSITO — I think, madam, it will not solve all issues, but it will certainly solve the recognition issue — that the will is valid to the extent that it can be valid in another jurisdiction. That is the first step. I think the second aspect to it, madam, is the fact that it is executed more formally with an authorised person. In Europe people complete their wills with notaries and with much more significant degree of formality, as I understand it.

I have had wills that have been done in shopping centres where people turn up to a booth, they fill out parts of the document, they sign it and they think they have a will. That is a shock to the probate office here, and it would be a shock to the relevant officers in any other part of the world, I am sure. Where is the formality in it, especially when parts of the pro forma have not been completed — whole sections of it are blank — because they do not apply?

Ms MIKAKOS — It is surprising that some people have undue casualness towards the disposal of the assets that they have acquired over a lifetime.

Mr ESPOSITO — Yes. The other thing is the ambulatory nature of the will, which is a bit interesting too. A lot of Europeans do not readily understand that if they have made a will, it does not have any legal effect until they die. They have the European idea at the back of their minds that that is how things will be. By having an authorised person, an authorised person might guide them and might let them understand that they can change this will tomorrow if their circumstances change.

Mr O'BRIEN — I want to clarify and follow up something that Ms Mikakos put to you. You have outlined very helpfully a number of the problems that I would say exist within the present will scenario, both in Australia and overseas. To sum up to assist the committee in formulating its opinion as to the merits or otherwise of this legislation, is it your evidence or opinion to this committee that this bill will help fix up some of the problems, not all of them, but some of the problems, particularly in the areas you have identified, or will it cause further confusion? If it were to cause further confusion, we obviously need to be aware of that. That would be a downside of the bill. What is your evidence in relation to the net effect of the bill?

Mr ESPOSITO — The net effect will be positive, David, for the reasons I have outlined — consistency and formality, and the involvement of authorised persons.

Mr O'BRIEN — It is a step in the right direction?

Mr ESPOSITO — Yes.

The CHAIR — Thank you very much for your presentation and willingness to answer questions this morning. It is very much appreciated. Could you also pass on our thanks to Mr Morfuni for his submission.

Mr ESPOSITO — Thank you all. It has been a pleasure to help.

Committee adjourned.