



for

Tabled, by leave,

SWent

Clerk of the Parliaments

12 / 9 / 2022

## CRIMES AMENDMENT (CORRUPT BENEFITS FOR TRUSTEES) BILL 2023

### STATEMENT OF PUBLIC INTEREST

#### **Need: Why is the policy needed based on factual evidence and stakeholder input?**

The Crimes Amendment (Corrupt Benefits for Trustees) Bill 2023 (the Bill) amends the *Crimes Act 1900* (Crimes Act) to expressly impose a requirement for 'corrupt' conduct to establish the offence of providing corrupt benefits in return for the appointment of a person as trustee under s249E.

Currently, s249E of the Crimes Act creates a criminal offence if a person entrusted with property receives or solicits, or if another person offers or gives that person, a benefit as an inducement or reward for the appointment of any person to be entrusted with the property without the consent of the beneficiaries or the Supreme Court of NSW.

The amendments are in response to concerns expressed by stakeholders following recent decisions by the NSW Supreme Court which found that an offence under s249E can be made out without proof of a corrupt purpose.<sup>1</sup> In 2022, the NSW Supreme Court found in *Application of MLC Investments Limited* [2022] NSWSC 1541 that s249E does not require a dishonest or corrupt purpose for the offence to be made out and that the only relevant mental element to the offence is an intent to give or receive a benefit, without consent, as an inducement or reward for a person to be entrusted with property.

As a result of this decision, a large number of routine, good faith transactions, may potentially be illegal under the Crimes Act and subject to penalties of up to seven years imprisonment. The amendments contained in the Bill are a response to these concerns, and were developed in consultation with legal stakeholders.

The objects of this bill are to amend the Crimes Act to:

- Expressly require 'corrupt' conduct to establish the offence under s249E of the Crimes Act of receiving or soliciting a benefit from a person as an inducement or reward for the appointment of any other person to be a person entrusted with property;
- Remove the requirement to obtain the consent of beneficiaries or the Supreme Court of NSW where a 'benefit' is provided to a person entrusted with property as an inducement or reward or the appointment of another person to be entrusted with property;
- Remove the requirement for the Attorney General's consent to commence proceedings for an offence under s249E; and
- Make these changes apply retrospectively to conduct that would otherwise have breached the current s249E as well as the aiding and abetting offence in s249F and the offence of concealing a serious indictable offence in s316.

#### **Objectives: What is the policy's objective couched in terms of the public interest?**

The policy objective of the amendment is to ensure that the mental element of the offence in s249E can only be satisfied if there is a corrupt intent so that only dishonest or corrupt conduct will be criminalised. The change would also bring s249E in line with other similar offences in Part 4A (corruptly receiving commissions and other corrupt practices) of the

<sup>1</sup> *Application of MLC Investments Ltd* [2022] NSWSC 1541

Crimes Act, including s249B (corrupt commissions or rewards) and s249D (corrupt inducements for advice), which contain express qualifications for the relevant conduct to be undertaken 'corruptly' for those offences to be made out.

It is appropriate to remove the need for the court or beneficiaries to 'consent' to transactions under s294E, as beneficiaries or the Court would not knowingly approve corrupt conduct, making the provision redundant once the provision only applies to relevant conduct engaged in 'corruptly'.

Under s249E(4), the Attorney General must consent to any prosecution under s249E. It is likely that the Attorney General's consent is required as a safeguard to ensure prosecutions are not brought in inappropriate circumstances. Once s249E is updated to clarify that a corrupt intent is required for an offence to be committed, the safeguard is no longer necessary.

There is a strong public interest to ensure that only corrupt conduct is criminalised. Without the amendment, trustees and their advisors conducting routine, good faith business transactions are exposed to criminal penalties. It is common practice for outgoing trustees to receive benefits upon the appointment of new trustees. Examples of benefits that are commonly provided that may fall under the offence in s249E include:

- Contractual indemnities in favour of outgoing trustee that restate indemnities available at general law, including a right to be indemnified out of trust assets for any expenses of liability properly incurred while acting as trustee; and
- An arrangement under which a third party will pay the transaction costs of the outgoing trustee to avoid these costs being paid out of trust assets.

Further to trustees potentially facing serious criminal penalties for good faith transactions under the existing provision, commercial advisers are also at risk of committing an offence under the accessorial criminal liability provision in s249F of the Crimes Act if they were involved in decisions made without court or beneficiary consent.

The changes in the Bill will also apply retrospectively. Prior to the recent Supreme Court decisions, many people had assumed that s249E required 'corrupt' conduct to be demonstrated (or were unaware of the provision entirely). As a result, many changes of trustee have occurred that arguably breach current s249E, notwithstanding that the relevant benefits were provided in good faith and without corrupt intent. The parties involved in such transactions remain technically at risk of criminal liability if the proposed amendments do not apply retrospectively.

The proposed amendments will not affect existing state and Commonwealth laws and principles at general law that protect the interests of beneficiaries where a change of trustee is proposed and a 'benefit' is provided to the outgoing trustee. Existing statutory obligations and the general law of trusts will continue to operate in the context of a change of trustee to offer protections to beneficiaries, in the absence of the scrutiny of the Court.

**Options: What alternative policies and mechanisms were considered in advance of the bill?**

The Government considered whether the existing legislative framework provided an adequate response to the issue. However, if the proposed amendments in the Bill are not made, parties conducting routine transactions properly and in good faith could face criminal penalties if the unanimous consent of beneficiaries or the Supreme Court of NSW is not obtained.

The need to seek consent for standard market practices that are not unlawful or improper, such as the provision of indemnities to outgoing trustees, would impose a significant burden on trustees, beneficiaries, commercial and legal advisers, and the Supreme Court.

In many cases it may be impossible or impractical to obtain the consent of all beneficiaries. For example, the beneficiaries may lack capacity or their consent may not be easy to obtain due to the significant number of beneficiaries. In these cases, it will be necessary to apply to the Supreme Court for consent to the transaction. For small trusts, the costs of this application may substantially exceed the value of the trust. Even for larger trusts, the application may cause delay and increase the costs of good faith commercial transactions.

If the proposed amendments are not made, the requirement for the Attorney General's consent for prosecution of conduct under s249E could be relied upon to prevent prosecution of good faith transactions. However, reliance on this mechanism is not the preferable solution as it would risk undermining regard for the criminal law, and create uncertainty for lawyers and other professionals providing advice about the relevance the section for previous transactions.

Non-legislative options were not considered because the policy objectives can only be achieved through legislative amendment.

**Analysis: What were the pros/cons and benefits/costs of each option considered?**

As stated above, legislative amendment is the only option to achieve the policy objective.

**Pathway: What are the timetable and steps for the policy's rollout and who will administer it?**

The Bill will commence on the date of assent.

The Department of Communities and Justice will be responsible for the general oversight of the implementation of these changes and monitoring the impacts of the reforms.

**Consultation: Were the views of affected stakeholders sought and considered in making the policy?**

The amendments in the Bill were requested by stakeholders following the Supreme Court decision. Stakeholders all support the object and purpose of the Bill. The policy development and drafting of the Bill was further informed by targeted consultation with the following stakeholders:

- NSW Bar Association
- Supreme Court of NSW
- NSW Trustee and Guardian
- NSW Department of Communities and Justice
- Office of the Director of Public Prosecutions
- Law Firms Australia
- Minter Ellison
- Asia Pacific Loan Market Association
- Dr Alison Silink
- The Society of Trust and Estate Practitioners (STEP)
- The Association of Superfunds Australia

In particular, the retrospective application of the changes to s249E was included in the Bill based on strong support from stakeholders.

We thank these stakeholders for contributing to this important work.