



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: ELSC:AJ1382319

11 July 2017

Ms Jenifer Walton
Director, Chief Operating Officer
KPMG
International Towers Sydney 3
300 Barangaroo Avenue
Sydney NSW 2000 Australia

By email: AU-FMNSWTGFocusGroup@kpmg.com.au

Dear Ms Walton,

Independent review of the surety bond scheme

I am writing in relation to the independent review being undertaken by KPMG of the NSW Trustee & Guardian's (NSWTG) surety bond scheme.

Manner of introduction of the Surety Bond by NSWTG

The Law Society is not aware of the evidentiary basis for the introduction of the surety bond scheme. A number of safeguards against potential maladministration or fraud are already available under the existing legal framework¹. The Law Society is not aware of evidence that shows that the current safeguards are inadequate and that additional safeguards are required. Given the scheme has been in operation for over two years, the Law Society welcomes any evaluative material on its effectiveness.

Reform recommendations

NSWTG's lack of power

The question as to the proper exercise of the NSWTG's powers regarding the mandatory application of the surety bond appears now in doubt following the decision of *CTS v NSW Trustee and Guardian* [2017] NSWCATAD 217. In that decision, the Administrative and Equal Opportunity Division of the Civil and Administrative Tribunal held that the security decision by NSWTG was "without power" and the NSWTG's decision that a surety bond should apply to the applicant's wife's estate be set aside.²

Until this issue is resolved, the Law Society supports the suspension of the surety bond scheme. The Law Society also welcomes the announcement by NSWTG that during the review period surety bond fee invoices will not be issued, no action will be taken to collect any outstanding surety bond fees, and surety bond applications will be on hold.

¹ *NSW Trustee and Guardianship Act 2009* (NSW) Part 4.5.

² *CTS v NSW Trustee and Guardian* [2017] NSWCATAD 217, [3].

Concerns regarding application of the Surety Bond

The surety bond scheme was initially introduced as a mandatory requirement for all privately managed estates, with some exceptions.³ The Law Society understands that the scheme is no longer mandatory however it is still unclear to the Law Society whether NSWTCG has a formal process for examining the personal attributes of private managers prior to imposing the surety bond on privately managed estates. The Law Society has ongoing concerns that NSWTCG's primary focus remains on the liquidity of the asset class in privately managed estates rather than the suitability of private managers.

The Law Society suggests that there should be a coherent and reasoned case for the imposition of surety bonds on private managers, particularly retrospectively, and the necessity determined by the circumstances in individual cases. If the surety bond scheme is to continue, the Law Society would like to see the assessment process formalised in a publically available document on NSWTCG's website.

The Law Society considers that the mandatory imposition of a surety bond and/or the inadequate assessment process for requiring the surety bond for privately managed estates has led to unfair and unnecessary expense in a number of cases.

Cost

The Law Society notes that, in cases where the imposition of a surety bond is unnecessary, the cost reduces the amount of funds available to care and provide for the living expenses of managed persons. Where there is no immediate or long-term benefit to the managed person, it cannot be argued that the imposition of this cost is in the best interests of the managed person. There will inevitably be cases where the surety bond will be found not to be in the best interests of a managed person.⁴

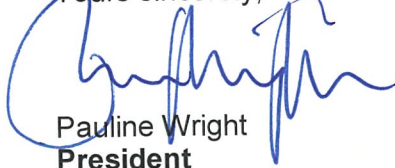
Unintended consequences

Law Society members have reported an increase in the number of private managers seeking to revoke financial management orders to avoid the requirement to pay a surety bond, resulting in informal financial arrangements. This revocation of a financial management order means that a managed person no longer has the protections afforded by the order, and can be vulnerable to financial abuse.

Our members report that conscientious and diligent private managers are being put to considerable expense and inconvenience when seeking alternative formal and informal financial management arrangements in order to avoid significant annual premiums in order to comply with NSWTCG surety bond requirements. In some cases, an annual premium of \$12,000 is payable from the managed person's estate. This consequence could be avoided if the surety bond scheme was genuinely applied on a case by case basis after careful consideration of the financial management of a managed person's estate, including the personal attributes of private managers.

Thank you for considering this letter. Any questions may be directed to Amelia Jenner, Policy Lawyer, on 9926 0275 or Amelia.Jenner@lawsociety.com.au.

Yours sincerely,



Pauline Wright
President

³ KDP [2016] NSWCATGD 24, [17] - [19].

⁴ KDP [2016] NSWCATGD 24; TNL [2016] NSWCATGD 25; DVX [2016] NSWCATGD 26.