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cc
bcc

Subject Property Law Act 1958 Review - Consultation Paper

28 JUN 2010

Dear Sir/Madam,

I refer to the Law Reform Committee's Consultation Paper regarding a review of the Property Law Act 1958 (the Act). In accordance with the Commission's invitation to comment on the Paper, I make the following submission.

Section 74 of the Act contains provisions dealing with the execution of instruments by or on behalf of corporations. Section 74 (1) sets out how deeds under seal may be validly executed and section 74 (2) sets out how a corporation may appoint an agent to execute, on the corporation's behalf, "any agreement or other instrument **not** under seal".

Victorian Rail Track is a public statutory body established under section 8 of the Rail Corporations Act 1996 (RCA). Section 8 provides as follows.

8. Establishment

(1) Victorian Rail Track is established.

(2) Rail Track-

- (a) is a body corporate with perpetual succession;*
- (b) has an official seal;*
- (c) may sue and be sued;*
- (d) may acquire, hold and dispose of real and personal property;*
- (e) may do and suffer all acts and things that a body corporate may by law do and suffer,*

(3) All courts must take judicial notice of the seal of Rail Track affixed to a document and, until the contrary is proved, must presume that it was duly affixed.

(4) The official seal of Rail Track must be kept in such custody as Rail Track directs and must not be used except as authorised by Rail Track.

Under section 21 of the RCA:

21. Delegation

1) A rail corporation, by instrument under its official seal, may delegate to 2 or more directors of the corporation, to an officer or employee of the corporation or, with the consent of the Minister, to another person any function or power of the corporation, other than-

- (a) this power of delegation; and*
- (b) any other power that is prescribed for the purposes of this section.*

(2) The Governor in Council may make regulations prescribing powers for the purpose of subsection (1)(b).

Acting under its powers of delegation and through a formal instrument of delegation, VicTrack has delegated various functions and powers to officers and employees identified in that instrument of delegation. One of those powers is the power to execute legally binding documents on VicTrack's behalf subject, inter alia, to financial limits. Accordingly, VicTrack executes legally binding documents by:

- the affixing of VicTrack's corporate seal to a legally binding document in the presence of two authorised signatories; or
- the signing of a legally binding document by a duly authorised signatory.

It is clear that an authorised VicTrack officer or employee, in conformity with that person's delegated power, can execute agreements "not under seal". What is not clear to me (and has been the subject of conjecture on several occasions with lawyers for other parties), is whether an authorised delegate of VicTrack can execute a "deed under seal" for and on behalf of VicTrack or whether that deed must be executed under seal by VicTrack itself. This uncertainty appears to stem from the legal distinction drawn between agreements for consideration and deeds under seal.

On VicTrack's behalf and in order to overcome this perceived uncertainty, I would like to submit that section 74 of the Act should be amended to provide that:

(2) The board of directors, council or other governing body of a corporation aggregate may, by resolution or otherwise, appoint an agent either generally or in any particular case, to execute on behalf of the corporation any agreement or other instrument whether or not under seal in relation to any matter within the powers of the corporation.

I appreciate that this amendment may (for technical legal reasons that I am unaware of) be incapable of being made, particularly if the legal distinction between agreements and deeds under seal is to be maintained. Whether that distinction ought to be maintained appears to be outside the scope of the Paper. This proposed amendment, if made, would facilitate and improve the documentation of business transactions carried out by corporations such as VicTrack and also eliminate a potential source of uncertainty and debate surrounding the proper execution of agreements and deeds under seal, notwithstanding the relative insignificance of the issue.

Regards,

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