Trustee Corporations Association of Australia

National Consumer Credit Protection Bill 2009 and Related Bills

Submission to the Senate Economics Committee

August 2009

Executive summary

The TCA welcomed the announcement last year that the Commonwealth would take over responsibility for the regulation of trustee companies.

Such a move, by eliminating duplication of licensing and reporting arrangements and a number of restrictive operational requirements in the various State and Territory legislation, was expected to reduce the regulatory burden on trustee companies, while creating a national market for trustee services.

It would also be expected to improve the effectiveness and efficiency of the industry's supervision.

However, we have concerns with several aspects of the approach proposed in the *Corporations Amendment (Financial Services Modernisation) Bill 2009:*

- whereas the Exposure Draft envisaged that the States and Territories would each repeal their *Trustee Companies Act*, the Bill provides for the Commonwealth to assume exclusive responsibility for 'entity level' regulation of traditional trustee company services, with existing State and Territory legislation, and the rules of common law and equity, continuing to govern the functions and powers of trustee companies.
- it is unclear how that amended model would work in practice - for example, how the obligations imposed on trustee companies by the Commonwealth legislation interact with the responsibilities of State and Territory tribunals in respect 'represented persons'.
- it would be unfortunate, and contrary to the underlying purpose of the move to Commonwealth regulation of the industry, if the new arrangements failed to deliver a more efficient system and reduced compliance costs.
- we have reservations about all traditional trustee company services being designated as financial services under Chapter 7 of the *Corporations Act*, and requiring an Australian Financial Services Licence – that approach could have unwarranted implications in terms of the disclosure, conduct, advice and dispute resolution obligations that would be imposed on trustee companies.
- however, until the regulations are released, which will clarify the persons to be regarded as 'clients' of trustee companies, it is difficult to assess the likely appropriateness and cost of the AFSL obligations.
- the proposed mechanism for licensing trustee companies seems cumbersome; moreover, it is unclear if it will meet what we understood to be a key policy objective, ie: prohibiting a company that is not a licensed trustee company from providing the core distinguishing services of applying for probate and acting as executor / administrator of a deceased estate in a corporate capacity.
- the definition of 'person with a proper interest' in relation to an estate is unreasonably wide, as is the nature and frequency of the information that must be supplied to them, on request, by the trustee company.
- the fees applicable to traditional trustee company services should be fully deregulated for all clients, on the basis that strong competition from other trustee companies, public trustees and other market participants such as lawyers, and full disclosure of fees, provide an effective check on charges.

- we are very concerned with the proposal, which would seem to be without parallel in any other industry or profession, that where a court determines a trustee company's fees to be 'excessive' and should be reduced by more than 10 per cent, the company must pay the costs of the review.
- such a provision would require considerable subjective assessments by the court, which might not adequately take into account the quality, complexity and attendant risk of the trustee company's work compared with unregulated providers of estate management services, and could be used by disgruntled beneficiaries as an unfair bargaining tool to encourage a trustee company to settle.
- if such a penalty provision is to be introduced, a threshold of 'by more than 25 per cent' would be more reasonable – also, it would be equitable for the other party to bear the cost of the review where the court finds that the fees were not excessive.
- the transitional arrangements should facilitate the rolling of present multiple licences held within the one trustee company group into one new licence, and the rolling of multiple Common Funds into one Common Fund by excluding any potential CGT on those transactions.

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1. Introduction

1.1. The TCA is the peak representative body for the trustee corporations industry in Australia. It represents 17 organisations, comprising all 8 regional Public Trustees and the great majority of the 10 private statutory trustee corporations (see Attachment).

1.2. We appreciate the opportunity to make a submission to the Committee's Inquiry into the National Consumer Credit Protection Bill 2009 and Related Bills.

1.3. Our comments are limited to Schedule 2 of the *Corporations Amendment (Financial Services Modernisation) Bill 2009* and the related Explanatory Memorandum dealing with the regulation of trustee companies.

2. General approach taken in the Bill

For many years, the TCA had been seeking uniformity in the various State and Territory legislative requirements applicable to the industry, with a view to eliminating inefficient duplication of licensing and reporting arrangements, as well as a number of restrictive operational requirements.

We therefore welcomed the announcement last year that the Commonwealth would take over responsibility for the regulation of trustee companies, as such a move was expected to reduce the regulatory burden on trustee companies, while creating a national market for trustee services.

Also, a move to a single national regulator (the Australian Securities and Investments Commission) was expected to improve the effectiveness and efficiency of the industry's supervision.

The Exposure Draft of the new legislation, released in May this year, envisaged that the States and Territories would repeal their *Trustee Companies Acts* and re-enact any necessary remaining provisions in other Acts.

We agreed that current rules which apply generally to persons such as trustees, executors, administrators and guardians that are located in State and Territory legislation and common law and equity should be preserved (and modified as necessary), with the aim of promoting as much uniformity as possible in those processes across all jurisdictions.

We also agreed that a licensed trustee company that is performing a particular traditional trustee company service should be subject in all respects to the same control and inherent jurisdiction of the courts as any other person who performs traditional trustee company services of that kind.

However, during the subsequent short consultation phase, the Commonwealth agreed to an amendment proposed by the States and Territories whereby the Commonwealth would assume exclusive responsibility for 'entity level' regulation of traditional trustee company services, but existing State and Territory legislation, and the rules of common law and equity, would continue to govern the functions and powers of trustee companies.

The amended approach apparently reflected the view that including provisions dealing with the functions and powers of trustee companies in the Bill could impact adversely on the Uniform Succession Laws project, which is seeking uniformity across all jurisdictions in the areas of wills, intestacy, family provision and administration of deceased estates - we do not believe that the model proposed in the Exposure Draft would have compromised those objectives.

It is unclear how the amended approach will work in practice - for example, how the obligations imposed on trustee companies by the Commonwealth legislation interact with the responsibilities of State and Territory tribunals in respect of 'represented persons'.

It would be very disappointing if the licensing and oversight arrangements proposed in the Bill do not avoid duplication and hamper the objective of enabling trustee companies to carry out their activities as efficiently as possible and reduce compliance costs.

3. Licensing

3.1 The Bill provides that all 'traditional trustee company services' are deemed to be 'financial services' under Chapter 7 of the *Corporations Act*, and requires an entity to hold a specific Australian Financial Services Licence (AFSL) in order to offer one or more of those services.

3.2 Traditional trustee company services are defined as:

(a) performing estate management functions (see below);

(b) preparing a will, a trust instrument, a power of attorney or an agency arrangement;

(c) applying for probate of a will / grant of letters of administration, or electing to administer a deceased estate;

(d) establishing and operating Common Funds;

(e) any other services prescribed by the regulations for the purpose of this paragraph.

3.3 Estate management functions are defined as:

(a) acting as a trustee of any kind, or otherwise administering or managing a trust;

(b) acting as executor or administrator of a deceased estate;

(c) acting as agent, attorney or nominee;

(d) acting as manager or administrator of the estate of an individual who lacks capacity to manage his or her affairs;

(e) acting as financial guardian of the estate of a minor;

(f) acting as receiver or custodian of property of a person;

(g) acting in any other capacity prescribed by the regulations for the purpose of this paragraph.

3.4 The purpose of Chapter 7 is to regulate conduct in relation to 'functionally equivalent' financial products. However, traditional trustee company services are not, of necessity, referable to any underlying 'financial product'. It is therefore inherently problematic, from a regulatory

perspective, to equate traditional trustee company services with financial services.

3.5 We believe that certain services are legal services rather than financial services and should not be regulated under Chapter 7, ie:

- preparing a will, a trust instrument, a power of attorney or an agency arrangement.
- applying for probate of a will / grant of letters of administration, or electing to administer a deceased estate.

3.6 We also have difficulty with the proposed mechanism for licensing trustee companies.

3.7 The Bill provides that a licensed trustee company is a trustee company that holds an AFSL covering the provision of traditional trustee company services.

3.8 A trustee company, in turn, is a company that is:

- a constitutional corporation; and
- prescribed by the regulations as a trustee company for the purposes of the Act.

3.9 The Bill then notes that companies may (for example) be prescribed:

- by setting out a list of companies in the regulations; or
- by providing a mechanism in the regulations for the determination of a list of companies.

3.10 By way of example, the Bill suggests that the regulations could specify that a corporation that is authorised to apply for a grant of probate or letters of administration, of the estate of a deceased person, must be listed.

3.11 We find this approach very cumbersome.

3.12 Moreover, it is unclear that it meets what we understood was a key policy objective of prohibiting a company that is not a licensed trustee company from providing the core distinguishing services of applying for probate and acting as executor / administrator of a deceased estate in a corporate capacity.

3.13 This confusion is heightened by the comment in the Explanatory Memorandum that *"Trustee companies that are listed in the regulations and that offer one or more traditional trustee company services must hold an AFSL covering the provision of those services."*

3.14 As put to Treasury in our submission on the Exposure Draft, the licensing regime should require an entity wishing to become a 'licensed trustee company' to provide the core distinguishing services of applying for probate and acting as executor / administrator of a deceased estate in a corporate capacity.

3.15 Further, there are some other aspects of the licensing process where more details are required in order to assess likely administrative costs, ie:

- what ASIC regards as adequate 'organisational capacity'.
- minimum capital requirements.

- what other conditions will attach to a licence (we assume that borrowing restrictions, such as apply under the Queensland Trustee Companies Act, or a reserve requirement as applies in Victoria, will not be part of the new regime).

4. Fees

4.1 We welcome the decision to deregulate the fees that may be charged to new non-charitable trusts and estates, subject to trustee companies disclosing their current fee schedule on the internet.

4.2 However, we firmly believe that fees should be fully deregulated for all clients, as is the case in most other industries.

4.3 The existence of strong competition, from other trustee companies, public trustees and other market participants such as lawyers etc, provides a check on excessive fees.

4.4 This is the case even in Tasmania where only one private trustee company presently operates.

4.5 Indeed, competitive neutrality remains an issue, to the extent that those competitors of trustee companies will not be subject to the same regulatory burden.

4.6 The Bill provides that a trustee company must not charge fees in excess of its most recently published schedule of fees, ie: once a service commences, a client cannot be charged more than the relevant fee set out in that schedule for the duration of the service.

4.7 However, if fees are to be 'locked in' for existing clients, we are puzzled by section 601TAB (1) of the Bill which provides: *'if, while a licensed trustee company continues to provide a particular service to a client, it changes the fees that it will charge for the provision of the service, it must notify the client within 21 days of the change.'*

4.8 We believe that the legislation should permit a trustee company, from time to time, to apply a revised fee schedule to existing clients, after an appropriate period of advertising the new fees, to bring them into line with current costs.

4.9 This would avoid the administrative burden of maintaining multiple fee regimes for different clients – for example, life tenancies (that can run for up to 80 years) and perpetual charitable trusts.

4.10 The inability to cover the growing costs of managing existing charitable trusts is a disincentive for professional trustees to devote resources to this important area.

4.11 Philanthropy Australia, in its comments on the Exposure Draft, acknowledged that it is in the interests of charitable trusts that trustee companies are able to charge fair and reasonable fees that enable them to provide a sustainable level of service.

4.12 We are also very concerned with the provisions in the Bill dealing with situations where a court determines that the fees charged by a trustee company in respect of an estate are 'excessive'; ie: if a court reviews the fees, on its own motion or on application by a 'person with a proper interest' in the estate, and finds that they should be reduced by more than 10 per cent, the trustee company must pay the costs of the review.

4.13 Such a penalty provision would seem to be without parallel in any other industry or profession.

4.14 Its operation would require considerable subjective assessments by the court, which might not adequately take into account the quality, complexity and attendant risk of the trustee company's work compared with unregulated providers of estate management services.

4.15 Also, disgruntled beneficiaries could use the provision as an unfair bargaining tool to encourage a trustee company to settle a matter in order to avoid the potentially large legal costs associated with a court review.

4.16 If such a penalty provision is to be introduced, which would seem to be without parallel in any other industry or profession, we suggest that a threshold of 'by more than 25 per cent' would be more reasonable.

4.17 Further, it would be equitable for the other party to bear the cost of the review where the court finds that the fees were not excessive, and for the provision to allow fee increases in appropriate situations.

5. Clients

5.1 The regulatory burden on trustee companies under the new regime will depend greatly on how 'clients' of trustee companies are defined as this will have a significant bearing on disclosure obligations (and hence costs).

5.2 The Bill defines a 'client' of a trustee company as *"a person to whom, within the meaning of Chapter 7 of the Corporations Act, a financial service (being a traditional trustee company service) is provided by the trustee company."*

5.3 Further, regulations may prescribe "*the person or persons to whom a class of traditional trustee company services is taken to be provided*."

5.4 We see it as vital that the legislation / regulations, in order to achieve a workable regime, have close regard to the unique nature of trustee company 'clients', which is recognised in longstanding trustee and common law.

5.5 Trustee company clients fall into 2 distinct groups:

- 'primary' clients (such as testators, donors of powers of attorney and settlors of trusts), who have appointed the trustee company to provide certain services, and
- 'consequential' clients (ie: beneficiaries, including life tenants, charities and persons lacking legal capacity), who have not appointed the trustee company but benefit from the services provided.

5.6 For practical reasons, in terms of implications for disclosure and dispute resolution requirements, certain types of consequential clients should be excluded from Chapter 7 regulation, or modified requirements should be agreed.

5.7 For example, in the case of Enduring Powers of Attorney, the donor (ie: the primary client) should receive all the disclosure and dispute resolution protections in the EPA advice and execution process.

However, when the EPA comes into effect after the donor has lost capacity, secondary clients (eg: family members or a guardian) should be entitled to modified disclosure (subject to any instructions about such matters given to the attorney by the donor while they had capacity).

6. Disclosure

6.1 Disclosure is a core duty of trustees, enshrined in general law and statute.

6.2 The present *Trustee Companies Acts* do not expressly address disclosure to 'primary' clients. However, in practice, when trustee companies take instructions from those clients to prepare a will / trust deed or agree to undertake the role of executor / attorney, they provide those clients with full details of the fees that will be charged and the processes involved.

6.3 As regards 'consequential' clients, the general law requires accounting to be provided to beneficiaries or other interested parties upon request, so that they can determine whether a trustee company is properly carrying out its duties. A trustee must inform all beneficiaries of full age and capacity, or their guardians, of their distributive share under the will.

6.4 The Bill provides that on application by a 'person with a proper interest' in an estate that is being administered by a trustee company, the company must provide that person with an account of:

- the assets and liabilities of the estate;
- the trustee company's administration or management of the estate;
- any investment made from the estate;
- any distribution made from the estate; and
- any other expenditure (including fees) from the estate.

6.5 That information can be requested every 3 months, although the trustee company may charge a reasonable fee for providing accounts.

6.6 A 'person with a proper interest' is defined very widely and, apart from 'primary' clients such as settlors of trusts, includes beneficiaries of trusts and deceased estates.

6.7 In the case of charitable trusts, that group includes a *"person of a class that the trust is intended to benefit",* which could run into the thousands, if not hundreds of thousands for some trusts.

6.8 The new regime's disclosure requirements should aim to avoid the situation of trustee companies being subject to numerous frivolous or mischievous requests for information.

6.9 Access should be restricted to aspects of the estate in which that person has a legitimate interest – eg: a beneficiary only entitled to a specific asset is not affected by administrative costs borne by the residuary estate and should not have access to other information about the estate.

6.10 We suggest that for many consequential clients and 'persons with a proper interest', an appropriate form of disclosure would entail a full accounting at the completion of the service.

6.11 The disclosure requirements also need to take into account current privacy provisions in other legislation, for example, in relation to the affairs of represented persons.

7. Transitional arrangements

7.1 The transitional arrangements should facilitate the rolling of present multiple licences held within the one trustee company group into one new licence, and the rolling of multiple Common Funds into one Common Fund by excluding any potential CGT on those transactions (as we understand the Government has allowed for merging superannuation funds).

7.2 Such consolidation is seen as an important element in achieving the goal of an efficient national market for trustee company services.

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Attachment

TCA Members

- ANZ Trustees Ltd
- Australian Executor Trustees Ltd
- Elders Trustees Ltd
- Equity Trustees Ltd
- National Australia Trustees Ltd
- New South Wales Trustee and Guardian
- Perpetual Ltd
- Public Trustee for the ACT
- Public Trustee for the Northern Territory
- The Public Trustee of Queensland
- Public Trustee South Australia
- The Public Trustee Tasmania
- Public Trustee Western Australia
- Sandhurst Trustees Ltd
- State Trustees Ltd
- Tasmanian Perpetual Trustees Ltd
- Trust Company Ltd

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