
The Committee Secretary
Senate Standing Committee on Economics
P O Box 1600
Parliament House
CANBERRA ACT 2600

**By e-mail:** economics.sen@aph.gov.au (Original follows by mail)

14 August 2009

Dear Sir,

**Inquiry into the National Credit Consumer Protection Bill and related legislation**
**Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009**

We welcome the opportunity to make a submission on behalf of State Trustees Limited (**State Trustees**) in regard to the trustee companies component (Schedule 2) of the Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009.

A nationally uniform system for the licensing of statutory trustee companies is a worthy goal. We are aware of the position of the Trustee Corporations Association of Australia (**TCA**), of which State Trustees is a member, in respect of the proposed new Chapter-5D regime. We share the concerns expressed by the TCA about unintended consequences that are likely to flow from the legislation in its present form. Due to its particular circumstances, however, State Trustees' concerns are of such a magnitude that, unless they can be addressed, we cannot support State Trustees' inclusion under the proposed new Chapter-5D regime.

**Background to State Trustees' position in regard to the Chapter-5D regime**

State Trustees is a public company wholly owned by the the State of Victoria, and is the successor in law to the Public Trustee for Victorian and the State Trust Corporation of Victoria. It is also a trustee company under the *Trustee Companies Act* 1984 (Vic.). It has a number of statutory functions under Victorian law, and has a central role in providing trustee services to members of the Victorian public who do not have the resources to obtain those services for themselves. Crucially, State Trustees acts under appointment by the Victorian Civil and Administrative Tribunal (**VCAT**) as administrator of the financial and legal affairs of approximately 10,000 'represented persons' (persons who, due to disability, are unable fully to manage their affairs themselves).

We understand that State Trustees is, at present, the only public trustee that will potentially be made subject to the proposed new regime.[1] (State Trustees is also now the only public trustee that holds an Australian financial services licence (**AFSL**).)[2] Treasury has indicated that, under the Regulations it will be proposing, a public trustee such as State Trustees will

[1] To be a "trustee company" within the meaning of Chapter 5D, an entity must, *inter alia*, be a corporation to which paragraph 51(xx) of the Constitution applies: cl. 601RAB(1)(a).
[2] The AFSL held by the Public Trustee NSW has not been carried over to its successor entity, the NSW Trustee & Guardian, which commenced operation on 1 July 2009.

*not* be prescribed as a "trustee company" for the purposes of Chapter 5D unless such coverage is requested by the responsible State or Territory government. We support this approach. Given, however, that there is the possibility that State Trustees will become subject to Chapter 5D at some future date, we regard it as highly desirable that those aspects of the new legislation that we consider to be problematic are dealt with at the outset.

**Outline of concerns regarding Chapter-5D regime**

In our view, the proposed Chapter-5D regime in its current form is unworkable.

A fundamental problem, in our view, is the incompatibility of the proposed regulatory approach with some of the traditional functions that a trustee company fulfils. For example, a key problem relates to the ability of a State/Territory Tribunal, such as VCAT, to maintain its supervisory jurisdiction in respect of the estates of represented persons, and donors of enduring powers of attorney. As currently expressed in the Bill, such a Tribunal would not appear to have the power to override provisions of Chapter 5D in respect of, say, fees or the provision of accounts. In this context, it may well be that such a Tribunal would choose not to appoint a licensed trustee company, rather than have its supervisory role undermined by the Chapter-5D regime.

A further problem relates to the lack of regulatory certainty. The community, the courts and the markets look to the trustee company industry for stability and reliability. Many of the services they undertake involve balancing the interests of a variety of parties (e.g., in a life-interest trust, the interests of the life tenant and those of the remaindermen), often in circumstances where there is conflict between those parties and/or where the role the trustee company is obliged to perform is not one that the affected parties are happy with. The new regime will inject significant uncertainty into the provision of some services by trustee companies, and will potentially add to the costs of providing those services because of the additional resources that will be required to manage the new regulatory requirements, especially in those conflict-laden situations. The Chapter-5D processes will not necessarily lead to better dispute resolution, because neither ASIC nor the external dispute resolution regime (**EDRS**) will be in a position to absolve the licensed trustee company from its fiduciary obligations, e.g. the duty not to act under dictation, with the consequence that licensed trustee companies may nevertheless find themselves obliged to seek Supreme Court sanction for their actions, generally at the expense of the relevant estate.

The scope of the services to be regulated ("traditional trustee company services") is far from clear: whilst the services are listed, they are not defined. By contrast, under the Corporations Act 2001 (Cth) as it stands, the current five "financial services" are all referable to an underlying "financial product", and these terms are extensively defined and delineated, both in the Act and via the underlying regulations.[3] Chapter 5D, however, would introduce at least **nine** (and, on one reading, more than ***20***) new financial services, none of which are necessarily referable to either an underlying financial product, or to any other defined type of property, and none of which are given any definitions in the legislation.[4] As a consequence, it is not clear what specific acts of a trustee company, or its

[3] See Part 7.1, Divs 3 and 4, and the related regulations.
[4] cl 601RAC.

employees or other representatives, will amount to provision of a particular service, such as "managing a trust", or "managing the estate[5] of an individual".

Aside from this lack of clarity, it is a characteristic of the content of the traditional trustee company services that it is governed, in the main, not by Federal legislation but by the laws (both general law and legislation) of the various States and Territories. Those laws, to the extent that they cover conduct relating to the provision of traditional trustee company service, will under the new regime be "financial services laws" with which the licensed trustee company will bound to comply;[6] of necessity, therefore, the regulator (ASIC) and the proposed EDRS will need to develop and maintain expertise in the requirements of all these laws in the various forms they take in the eight State/Territory jurisdictions (which may amount to several hundred pieces of legislation, leaving aside the general law requirements). We query whether there will be sufficient resources within ASIC or the EDRS to achieve this; if there is not, the cost of a licensed trustee companies' dealings with the regulator or the EDRS in relation to these laws would be significantly increased, and such costs will invariably flow through to the consumer.

**Conclusion**

For the above reasons we consider the proposed new regime in its current form is unworkable. Pending greater uniformity amongst the States and Territories in the areas of estate administration, our preference would be for a Commonwealth regime limited to licensing trustee companies on the basis of base-level financial requirements, and providing the necessary uniform authority for the pooling of client investments (common funds) and remuneration for estate administration and tax return preparation.

At this juncture, however, rather than opposing the passage of the new regime, we would encourage amendment of the legislation in such a manner that its current deficiencies can be remedied via appropriate regulations and/or via ASIC-granted exemptions. In particular, we suggest the Bill be amended so that there is the ability, where not already present, for regulations (or ASIC-granted exemptions) to be made to better and more sensibly delineate and *delimit* the concepts that are currently the source of uncertainty or regulatory overreach.[7] This would then open the way for a more considered and balanced outcome.

We remain willing to provide such assistance to Treasury and others as is required to find ways to address these issues. Feel free to contact Alistair Craig on (03) 9667 6441 should you have any queries in relation to this submission.

Yours faithfully,

A G Fitzgerald
**Managing Director**
**State Trustees Limited**

[5] The word "estate" is not defined.
[6] Under s 912A(1)(c).
[7] Such concepts include "traditional trustee company services" (and each of the constituent services), "estate", "client", "person with a proper interest", "account of the trustee company's administration or management of the estate", "rule of common law or equity" and "financial services laws".