Trustee Corporations Association of Australia

Submission to the
Senate Community Affairs Committee

Inquiry into Planning Options and Services for People Ageing with a Disability

May 2010

Introduction

The Trustee Corporations Association is the peak representative body for the trustee corporations industry in Australia. It represents 16 organisations, comprising all 8 regional Public Trustees and the great majority of the 10 private trustee companies (see Attachment).

Traditional services provided by trustee corporations include:

- estate planning.
- preparing wills, trust instruments, powers of attorney etc.
- acting as executor or administrator of deceased estates.
- acting as trustee for various types of trusts.
- acting as attorney under powers of attorney.
- managing the estates of individuals who lack capacity to manage their affairs.

Each year our members:

- administer about 9,000 deceased estates.
- write about 60,000 wills and powers of attorney.
- manage assets under agency arrangements or Court / Tribunal orders for about 45,000 people.
- manage about 2,000 charitable trusts and 15,000 other personal trusts.
- prepare over 40,000 tax returns.

From 6 May this year, the licensing and supervision of traditional trustee company services was transferred from the States and Territories to the Commonwealth, with the Australian Securities and Investments Commission being appointed the new national regulator for the industry.

The TCA appreciates the opportunity to make a submission to the Committee's *Inquiry into Planning Options and Services for People Ageing with a Disability.*

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Comments

For many elderly people, managing their financial affairs can become a challenging and potentially stressful task.

This is especially so for people ageing with a disability and for their carers.

Coping with these challenges is made more difficult by the complexity of the legal, taxation and superannuation systems.

Also, people's assets are increasingly likely to comprise a greater range of financial products than in the past – eg: shares, managed funds and property (possibly including an interstate holiday house or investment property).

The fact that people are living longer means that they may need assistance with managing their assets for many years.

In order to prepare for an uncertain future, it is generally wise for people to give early attention to ways in which their financial assets can be managed and protected.

Various tools are available to assist in planning for the future.

Wills

One very important way of minimising some of the potential trauma associated with personal finances is for people to ensure that they prepare a valid will that clearly sets out how they want their assets to be distributed after their death.

If a person dies without a will (ie "intestate"), their estate will be distributed according to the relevant State/Territory legislation, which may not be consistent with their intentions and may result in delays and additional costs in settling the estate.

It is essential that people attend to their wills before a lack of mental capacity prevents them from legally doing so.

An ageing carer, for example, should ensure their will clearly provides that some or all of their assets go to the disabled person they have been caring for if that is their wish.

The disabled person, if they have testamentary capacity, should also express their wishes in their own will.

If they do not have capacity, the carer (or another person) can make an application to the Supreme Court to authorise the making of a will based on any available evidence as to the likely wishes of the disabled person in respect of the distribution of their estate

A will is just one component of a proper estate plan.

Powers of Attorney

In terms of facilitating proper management of a person's financial affairs, a Power of Attorney is also very important.

A general Power of Attorney permits a person (the donor) to confer legal authority on another person (the attorney) to make various financial (and sometimes other) decisions on behalf of the donor. This power ceases to have effect when the donor revokes it or loses mental capacity.

An Enduring Power of Attorney (EPA), on the other hand, remains operative after the donor loses mental capacity, and can be revoked or altered whilst ever the donor has legal capacity.

An EPA is a flexible and relatively cheap planning tool in terms of ensuring that people's wishes in relation to their financial affairs are carried out once they suffer decision-making impairment.

The donor should ensure that they appoint a trusted person, with appropriate skills, in that role.

Donors of EPAs are afforded various protections:

- they can specify conditions and limitations that attach to the attorney's powers.
- the attorney has a responsibility to always act in the best interest of the donor, to keep the attorney's own money and property separate from that of the donor, and to keep appropriate accounts and records.
- the donor can specify whether or not the attorney can take a benefit (or confer a benefit on a third party) and if so, what is to be the extent of that benefit; this avoids unlimited access of an attorney to the donor's assets without express prior approval.

- witness requirements aim to ensure that an appropriate person attests that the nature and importance of the document was explained to, and appeared to be understood by, the donor.
- the attorney must formally accept the appointment - having the attorney's signature on the document also assists financial institutions etc in verifying the attorney's identity when the power is being used.

The suggestion that all EPAs (and revocations) should be registered remains subject to debate.

Registration in a national (electronic) location would seem to offer potential benefits in terms of enhanced accountability for attorneys and easier monitoring of dealings under EPAs by the authorities.

However, a registration system potentially would be very costly. It also raises privacy concerns, with that many people possibly electing to forego an EPA if they felt that their privacy would be compromised by registration.

Enduring Guardianship

Older people, especially if they have a disability, should also consider appointing an enduring guardian to make decisions on their behalf on matters such as accommodation, health and other lifestyle issues should they lose the capacity to make their own decisions, and their present carer has died or no longer has the capacity to act in that role.

Advance Care Directive

An advance care directive (ACD), often called a living will, is another useful planning tool.

An ACD allows a person to provide specific directives about future medical treatment should that person become incapable of participating in those treatment decisions.

For example, an ACD might express the person's wish not to be subjected to various kinds of intrusive treatment, such as tube feeding, blood transfusion or cardio pulmonary resuscitation.

ACDs are legally binding in some jurisdictions, whereas in others they may still be valid under common law.

More information on ACDs can be obtained from government health departments and welfare organisations such as the Benevolent Society.

Testamentary trusts

Another useful planning tool for older people, including carers of people with a disability, is a testamentary trust.

This is a trust, created by a will, which is designed to facilitate ongoing management of (some or all of) a person's assets after they die, rather than the assets simply being distributed to beneficiaries as soon as the probate process is completed.

A testamentary trust is normally discretionary in that it gives the trustee discretion about who receives distributions from the trust, how much they receive and when.
A testamentary trust can protect bequeathed assets from any financial or other difficulties that the beneficiaries may experience.

Special Disability Trusts

As you are aware, SDTs were introduced in 2006 with the aim of assisting parents and immediate family members wanting to make a financial contribution towards the care and accommodation of a family member with severe disability, without affecting their own entitlement to various Government benefits.

An SDT can be set up as an *inter vivos* trust, ie: to commence while the parents etc are still alive, or as a testamentary trust under a will, ie: to commence after the parents etc have died.

SDTs have not been as successful as the Government had hoped.

The TCA was very supportive of the SDT initiative, but from the outset we expressed some reservations about the potential attractiveness of the new facility given the restrictive conditions attached, ie:

- the complexity of the SDT arrangements discouraged many people from pursuing this matter on behalf of a severely disabled dependent.
- as parents / carers often do not have sufficient assets to offend against Centrelink / disability support pension or Veterans Affairs thresholds, the SDT option was not seen as relevant.

- the definition of 'severe disability' was overly-restrictive, thereby limiting the number of people who might potentially benefit from the concessions.
- the Social Security guidelines seemed to be slanted more towards physical disability rather than mental impairment.
- the often episodic nature of mental illness and the fact that sufferers may do part time or casual work, meant that they find it difficult to qualify for an SDT.
- the overly-narrow application of the 'reasonable care and accommodation needs', eg: the inability to apply SDT funds towards living expenses, rent etc where the beneficiary resides with or rents from family members or carers.[1]
- establishing two trusts - one that meets the narrow SDT parameters and another that can be used for more general expenses – would generally be an inefficient and costly approach; if families with a severely disabled dependent decided to set up only one trust, most people seemed to feel that a simple discretionary trust, rather than an SDT, was the most appropriate option.
- it was very difficult, if not impossible, for a trustee to match the income earned by an SDT in a given year with the amount expended on eligible care and accommodation during that same period – however, the undistributed income of an SDT would be taxed at 45%, even though it could only be used in the future for care and accommodation, ie: beneficiaries who ordinarily would not pay any income tax (due to the tax free status of their disability support pension, rebates etc) would find themselves effectively subject to the highest marginal rate on unexpended trust income.

[1] *Centrelink initially would not allow SDT funds to be used to pay nursing home fees, on the basis that these are usually 'composite' – covering accommodation, care, food, building maintenance, garden care, cleaning of buildings and individual rooms etc – rather than itemised, and it is impossible to differentiate what would be directly associated with the disability; however, in 2007 the Government agreed that the daily care fee charged by all 'accredited' facilities could be paid from an SDT.*

- the limitation of having only one SDT per beneficiary could be a barrier, ie: if more than one testator / donor wanted to set up an SDT for the same beneficiary.

In summary, the inflexibility of the initial SDT framework was seen as a major issue by our members on the basis that it may be imprudent for a trustee to so severely restrict how trust funds can be applied, given the trustee's duty to act in the best interests of the beneficiary at all times.

Your 2008 report on SDTs, *Building trust: Supporting families through Disability Trusts*, shared our concerns and it was pleasing that some of those concerns were addressed by the Government last year, ie:

- unexpended SDT income will be taxed at the beneficiary's personal tax rate, rather than the top marginal tax rate, with effect from the 2008-09 income year (however, we still have concerns as to whether this policy intent will be achieved by the proposed legislative amendments).
- the sale of a residence owned by an SDT and used by the beneficiary as their main residence has been exempt from capital gains tax, with effect from 1 July 2009.

We also welcome the proposed changes to the SDT guidelines announced in the last Budget, which will apply from 1 January next year, ie:

- a disabled person who is assessed as being able to work up to 7 hours a week will still qualify as a beneficiary of an SDT.
- an SDT will be able to pay for the beneficiary's medical expenses, including membership costs for private health funds, and the maintenance expenses of assets and properties.
- an SDT will be able to spend up to $10,000 in a financial year on discretionary items not related to the care and accommodation needs of the beneficiary.

These positive developments should result in SDTs being more useful planning instruments for people ageing with a disability and their carers.

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Attachment

TCA Members

- ANZ Trustees Ltd
- Australian Executor 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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