
Trustee Corporations Association of Australia

**Corporations Amendment
Regulations 2009**

Submission to Treasury

September 2009

Executive summary

The TCA has a number of suggested changes to the draft *Corporations Amendment Regulations 2009* which we feel will allow for better regulation of trustee companies' traditional services without compromising the consumer protection measures contained in the *Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009*.

The more substantial amendments that are recommended relate to two matters where important outcomes expected by the TCA from the new regulatory scheme do not appear to be achieved, ie:

- we firmly believe that, in order for a corporate entity to warrant being granted 'licensed trustee company' status, it must provide the core traditional services of applying for probate / letters of administration and acting as executor / administrator of a deceased estate, as this is the distinguishing feature of trustee companies.
 - merely providing "one or more traditional trustee company services" (such as acting as trustee of a charitable trust and / or acting as an attorney under a power of attorney) should not be sufficient grounds for being authorised as a licensed trustee company.
 - similarly, any corporate entity wishing to provide the core services of applying for probate / letters of administration and acting as executor / administrator of a deceased estate should be required to become a licensed trustee company (ie: meet all the relevant legislative and regulatory obligations associated with such a licence).
- we have a strong preference for an administrative procedure over a Court application process to allow existing trustee companies to expeditiously, and at minimum cost, rationalise their operations by transferring all estate management functions to one licensed trustee company within the same group – we do not see that the issues involved would create complexity for ASIC as the transfers would be to an already licensed entity within the same corporate group, and would not be done in an urgency situation.

We also suggest that a more prescriptive regulation covering common funds operated by trustee companies would be desirable.

In addition, several minor amendments are recommended where the draft regulations appear to be based on a misunderstanding of the nature of traditional trustee company services.

The TCA appreciates the opportunity to comment on the draft *Corporations Amendment Regulations 2009*.

Regulation 5D.1.01 - Licensing

Paragraph 601RAA of the Bill defines a licensed trustee company to mean a trustee company that holds an Australian financial services licence covering the provision of one or more traditional trustee company services.

We firmly believe that, in order for an entity to warrant ‘licensed trustee company’ status, it is essential that it provide the core traditional services of applying for probate / letters of administration and acting as executor / administrator of a deceased estate, as this is the distinguishing feature of trustee companies.

Merely providing “one or more traditional trustee company services” should not be sufficient grounds for being authorised as a licensed trustee company.

Similarly, any corporate entity wishing to provide the core services of applying for probate / letters of administration and acting as executor / administrator of a deceased estate should be required to become a licensed trustee company (ie: meet all the relevant legislative and regulatory obligations associated with such a licence).

Some other entities currently provide certain traditional trustee company services, such as acting as a trustee or attorney, without the need to be licensed under the existing State and Territory regime because they do not apply for probate / letters of administration or act as executor / administrator of a deceased estate.

Recommendation 1:

An entity wishing to be granted ‘licensed trustee company’ status should be required to provide the traditional services of applying for probate / letters of administration and acting as executor / administrator of a deceased estate, rather than merely one or more traditional trustee company services.

Similarly, any corporate entity wishing to provide the core services of applying for probate / letters of administration and acting as executor / administrator of a deceased estate should be required to become a licensed trustee company

2. Regulation 5D.1.02 - Guardianship

The draft Explanatory Statement notes that:

“The purpose of this regulation (in conjunction with sub regulation 7.6.02(6)) is to ensure that matters relating to the role of trustee companies as guardians remain subject to State and Territory laws and tribunals. However, under Commonwealth law the trustee company would still:

- *have to fulfil its general AFSL obligations (except in relation to dispute resolution);*
- *be prohibited from engaging in unconscionable conduct;*
- *be regulated in relation to common funds that contain guardianship moneys;*
- *be regulated in relation to fees charged to clients who are subject to a guardianship order; and*
- *be subject to the general duties of officers and employees.”*

The issues arising out of the regulation as drafted are:

- (a) The use of the term “guardian” needs to be clarified as it is used in different contexts in the various State and Territory legislation. We believe that the term “financial manager” is the appropriate term for the purpose of the Commonwealth legislation, covering financial matters rather than personal guardianship matters. Trustee companies cannot be appointed as personal guardians.
- (b) The partial exclusion of the role of financial manager was promoted by the States and Territories. State Trustees Ltd also provided detailed comments in a submission.

Some private TCA members do not see the benefit of excluding financial management matters from the disclosure and reporting requirements of the Chapter, and may make separate submissions on this point as they believe they can meet their obligations by providing any required information to an agent of the person with the disability, usually a guardian (not financial) in accordance with 601RAD.

Recommendation 2:

If the partial exclusion of financial guardians is to be maintained, the Regulation must make it clear that it is only the financial management function in the legislation in Schedule 8AB which is impacted by the Regulation.

Recommendation 3:

The States should confirm that Schedule 8AB includes all the relevant legislation, noting that in NSW the NSW Trustee and Guardian Act 2009 allows for the appointment of financial managers and is not currently included in the schedule.

3. Regulation 5D.2.01 - Annual information return recipients

The issues arising out of the draft are:

- (a) In respect of charitable trusts, paragraph 3(b)(iii) of the regulations and paragraph 601RAD(1)(b)(iv) of the Bill use the wording “a person who may receive payments *on behalf of a trust*”.

The phrase in italics has no clear meaning at law and should be replaced with “as a beneficiary of a trust” if that is the intention.

Also, the word “may” is inappropriate as it will automatically include all possible classes of beneficiaries, whether they are contingent or substitute.

Recommendation 4:

In relation to charitable trusts, pursuant to 601YAA and 601YAB, the regulations should exempt the requirement to provide an annual information return to any person other than “a person who is entitled to receive payments as a beneficiary of a trust”: ie, only those named beneficiaries currently in the class of beneficiary entitled to receive benefit will receive the annual information return, and not those beneficiaries in a class being contingent, subsequent or substitute beneficiaries to some future/possible benefit.

- (b) In respect of non-charitable trusts, there is no mention of beneficiaries of inter-vivos and Court order trusts, who therefore appear not to be persons entitled to request an annual information return. We assume that this is an oversight.

Additionally, paragraph 3(c)(iii) makes reference to testamentary trusts, the beneficiaries of which would already be covered in (3)(a)(i).

Recommendation 5:

The wording of 5D.2.01(3)(c)(iii) should extend to inter-vivos and Court trusts, and need not refer specifically to testamentary trusts, ie:

“(c) in the case of any other trust, including trusts created by deed or Court order,

(i) (as currently drafted)

(ii) (as currently drafted)

(iii) a beneficiary of the trust.”

- (c) In paragraphs (5), (7) and (8) of 5D.2.01, reference is made to the publication of the annual information return on the trustee company’s website. The obligation is mandatory when the company knows the identity of the beneficiary to a testate, intestate estate and testamentary trust.

This is not a normal practice and would require all trustee companies to establish a login for persons entitled to request an annual information return.

Recommendation 6:

Delete sub-paragraph (c) from 5D.2.01(5), sub-paragraph (b) from 5D.2.01(7)

and paragraph (8).

Regulation 5D.2.02 - Annual information return contents

In 5D.2.02(1), it is specified that the annual information return can be provided in relation to the person’s trust, or the common fund on account of the person’s estate.

The words “trust” and “common fund on account of the person’s estate” are used in the alternative. This is confusing as estates and trusts will have assets both within and outside a common fund. An estate also can contain a trust.

The information required to be provided should be limited to the person’s interest in the trust or estate, noting that for a settlor or person able to replace the trustee or vary the trust, this will allow access to information about the whole of the trust or estate.

Recommendation 7:

The wording of regulation 5D.2.02 should be amended to read:

- (1) The licensed trustee company must provide the annual information return to a person in relation to their interest in the trust or estate that is being administered or managed by the licensed trustee company.***
- (2) The annual information return must include the following:***
 - (a) details of income earned on the person's interest in the trust's or estate's assets; and***
 - (b) details of expenses in relation to operating the person's interest in the estate or trust; and***
 - (c) the net value of the person's interest in the estate or trust.***
 - (d) if required under the terms of the trust - a copy of the trust's audit report and financial statements for the year; and***
 - (e) where the person is the person referred to in Regulation 5D.2.01(3)(c)(i) and (ii) the details of income, expenses and value will be provided for the whole of the trust .***

5. Regulation 5D.2.03 – Voluntary transfer of assets

One of the key outcomes for trustee companies from national regulation is to enable companies to consolidate the supply of traditional trustee services into a single licensed entity. To achieve this, the framework must allow for transfer of existing client estates, trusts, attorneys, administrations, financial managements and agencies to a receiving entity.

Additionally, it will be important to allow any existing appointments of the transferring entity in wills and other documents, to be deemed to be valid appointments of the receiving entity.

There will be operational efficiencies and simplified governance if both these requirements are met.

The draft Explanatory Statement notes:

“This regulation is intended to allow corporate groups that have numerous corporate trustee subsidiaries to rationalise their operations by seeking a Court order transferring estates (including appointments and estate assets and liabilities) from entities that are to be wound up to another group entity. The role of the Court is (amongst other things)

to consider the interests of the clients of both the transferring and the receiving entity.”

We believe the regulations as currently drafted are not appropriate to assist the aim for effective rationalisation of service delivery and efficient governance.

The issues arising out of the draft regulation are:

- (a) The regulation proposes a Court-based system for obtaining the approval for the voluntary rationalisation of trustee company entities.

We do not believe that the Court is the appropriate forum for dealing with what is an administrative process. The regulation as drafted would require continuous approaches to the Court to apply for the transfer of estate assets and liabilities as, under paragraph 7, a company can only apply to transfer estates administered by the company before the transfer and were vested in the trustee company. This continuous approach would be time consuming, inefficient and costly.

The Court process would require an initial approval for the transfer of all of the current estates managed by the company. By the time the matter is listed and orders made, additional estates would have come under management. This will require constant referral to the Court.

Additionally, it is not currently a requirement under State and Territory law to require Court approval to transfer a trustee company's role as trustee to a new trustee - this can be done by deed.

The regulation also does not allow for the transfer of prospective appointments under wills, powers of attorney or other documents as the company will not be performing estate management functions until death, loss of capacity or other defined events.

- (b) Many of the aspects of Part 5D.6 are more appropriate to the voluntary transfer of obligations, assets and liabilities.

Part 5D.6 contains many machinery provisions to effectively deal with this issue. These provisions also meet the consumer protection obligations underpinning the reform.

It is important to note that the risk to the consumer is insignificant as the receiving company will be licensed.

The more pertinent provisions in Part 5D.6 are:

- The definitions in 601WAA are comprehensive in respect of:
 - “*asset*”, “*estate assets and liabilities*” and “*liability*” (which includes actual, contingent, or prospective duties or obligations whether arising under an instrument or otherwise).

Note, however, to ensure that prospective appointments are caught clarification is required as to the interplay between the 2 definitions of “*liability*” and “*estate assets and liabilities*”.

Clearly the Bill and the regulations should allow for the transfer of prospective appointments as an administrative process.

- “*cancel*” allows for varying the conditions of a licence so that it ceases to cover the traditional trustee company service - this would allow the transferring entity to remain licensed for other services.
- Under 601WBA, ASIC may make the compulsory transfer determination with the safeguards of :
 - Minister’s consent,
 - ASIC’s consideration of the interests of the clients of transferring and receiving companies,
 - Board approval of the receiving company, and
 - State based legislative requirements.
- Under 601WBJ, on a certificate of transfer coming into force, any appointment or nomination of the transferring company as trustee, executor or administrator in relation to transferred assets is taken to be an appointment or nomination of the receiving company.
- Under 601WDA, there is an obligation for the transferring trustee company to contact people who have lodged instruments such as wills that have not come into effect, “*but will potentially lead to estate assets and liabilities being held by the trustee company.*”

It is important to note, however, that the requirements are that the company take all reasonable steps to contact, for example, will and power of attorney clients and publish a notice. The TCA believes the contact options could be in the alternative for these clients.

- Most of the other machinery provisions in relation to notices, certificates, construction of references to transferring company, breach of trust, and income / distributions received are equally

relevant to the voluntary consolidation envisaged in the proposed regulation 5D.2.03.

- Under 601WBC, it is proposed that State and Territory legislation be introduced to ensure that the receiving company is deemed to be the successor in law for all of the traditional trustee functions of the transferring company.

This legislation should provide the authority within each State and Territory for recognition, without further action, of the receiving company's right to apply for probate, commence operating as attorney, trustee, executor, agent or any other capacity.

We would stress that the TCA members who intend to make use of this provision wish to rationalise the licensed entities within their respective groups as expeditiously as possible, and at minimum cost.

We do not see that the issues involved would create complexity for ASIC as the transfer would be to an already licensed entity within the company's corporate structure.

Also, the process would be orderly and quite different to the urgency required should ASIC need to respond to corporate failure envisaged by the operation of Part 5D.6.

We note that a precedent exists in Commonwealth law in the form of a voluntary transfer mechanism under the *Financial Sector (Business Transfer and Restructure) Act 1999*.

While we understand that Treasury may prefer the mechanism to be in the Act rather than in the regulations, the fact that the Court-based approach was included in the regulations indicates that its presence there was considered appropriate in the first instance.

Recommendation 8:

The Regulation should be amended to allow for:

- ***an administrative, rather than judicial, procedure governing the transfer of a company's obligations and liabilities in respect of current and prospective traditional trustee company activities to another licensed trustee company within the same consolidated entity.***
- ***the provisions of Part 5D.6, where applicable, be applied to the transfer.***

6. Regulation 7.6.02AI - External Dispute Resolution

The draft Explanatory Statement notes that:

“This regulation ensures that a beneficiary of a trust or estate has the right to access internal and dispute resolution mechanisms. As a result of the trustee company provisions being inserted into the Act, paragraph 912A(1)(g) of the Act, which requires financial services licensees to have a dispute resolution system that complies with subsection 912A(2), will ensure that clients of trustee company services will have access to dispute resolution. However, there is a need to make special provision for beneficiaries. The regulation provides that a licensed trustee company must have a dispute resolution system that complies with the normal requirements for such systems and that provides for complaints by beneficiaries.

Specifically, beneficiaries may make a complaint against a financial services licensee if the complaint relates to an alleged breach of the financial services law as defined in section 761A of the Act.”

The issues arising out of this regulation are:

- (a) It is possible that an appropriate external dispute resolution provider will not be established by the commencement of the Act, with the effect that the requirements of obtaining a licence cannot be met.

However, the TCA has commenced discussions with the Financial Ombudsman Service and progress will be reported to Treasury and ASIC on meeting the requirements.

Recommendation 9:

It may be necessary to allow a transition period to establish an appropriate external dispute resolution scheme to ensure that the relevant licence condition is not breached on commencement of the Act.

- (b) The definition of ‘beneficiary’ in the proposed 912A(2B) does not include a beneficiary of a trust other than a testamentary trust.

Recommendation 10:

The regulation should define beneficiary in (2B) (b) as a beneficiary of a trust.

7. 601SCC - Common funds

The Bill allows for the regulation of common funds in S 601SCC.

Division 3 of Part 5D.2 contains only basic provision for the creation of a common fund and the obligations relating to them.

Common funds, whether or not they are managed investment schemes, are an integral way trustee companies manage the holding and investing of clients' funds.

Accordingly, it is important to make sure that any licensing scheme for trustee companies provides appropriate standards for the creation and management of common funds.

Recent legislation dealing with common funds of NSW Trustee and Guardian and Public Trustee Western Australia provide a guide to what could be in regulations to strengthen the management of common funds. The legislation is the *NSW Trustee and Guardian Act 2009* and the *Public Trustee Act WA*.

The key factors in the NSW and WA legislation are:

- Unitisation/other appropriate basis
- Applying income to payment of costs
- Determining policies for a number of matters:
 - Classes of investment
 - Crediting of interest
 - Apportioning of capital gain/loss
 - Entry/exit
 - Frequency of determination of value of investments
 - Entry/exit valuation
 - Advances from the fund to matters

Recommendation 11:

A more prescriptive regulation covering common funds operated by trustee companies would be desirable.
