



Trustee Companies Benefit from National Uniformity

By Tony Crilly

Interesting changes ahead

One of the critical issues for trusts and estates is the role of the *Executor* and *Trustee*. There are a number of Trustee Companies that provide services to private clients and organisations to administer trusts and estates. These are subject to complicated laws. Currently, there is draft legislation to amend the *Corporations Act 2001* to change the regulation of Trustee Companies in Australia.

By agreement between the States, this will come under control of the Commonwealth rather than individual States and Territories and create consumer protection in a national framework of trustee services.

The current position

Presently, in each State or Territory there is a different Act which governs the licences, supervision and reporting regimes. This complicates the process and provides limited recourse for beneficiaries for dispute resolution, apart from those available to the trustee. The Supreme Court in each State determines those disputes under separate legislation. The concern of Trustee Companies is the possible inadequacy of government supervision and regulation.

The main points

The *Corporations Legislation Amendment (Financial Services and Modernisation) Bill 2009* (the Bill) has several main points.

- ▼ Trustee Companies will be empowered to provide trustee services otherwise only provided by individuals.
- ▼ These will be 'financial services' for the *Corporations Act 2001*.
- ▼ ASIC will regulate Trustee Companies for financial services.
- ▼ Consumer protection including licensing, disclosure, advice and dispute resolution will be applied.
- ▼ Trustee Company fees will be regulated, as well as disclosure.
- ▼ Other companies will be prohibited from providing traditional Trustee Company services.

Traditional Trustee Company Services

What does this mean?

The Bill attempts to limit operation to *Traditional Trustee Company Services*. These are listed in the Bill and include:

- ▼ preparation of a will, a trust document, Powers of Attorney and agency arrangements;
- ▼ estate administration including acting as a trustee and managing a trust; and
- ▼ acting as:
 - an executor or administrator of a deceased estate;
 - an agent, attorney or nominee;
 - a manager or administrator of an estate of a person who has lost capacity;
 - a financial guardian for children or injury affected person;
 - a receiver or custodian of property for a person.

This will include Application for Probate, Letters of Administration and establishing and operating common funds where a number of estates are pooled and invested collectively.

The Bill does not include acting as a Superannuation Trustee or as a responsible entity for managed funds. It does not include acting as a Debenture Trustee or providing a custodial depository service.

These services will continue to be regulated under the *Superannuation Industry Supervision Act 1993*, the *Managed Investments Act 1998* and currently sections of the *Corporations Act 2001*.

Fee disclosure

The Bill intends to regulate fee disclosure including trustee charges and commissions.

There is a requirement that the Trustees charge no more than fees specified in the Published Fee Schedule which can be disclosed on the internet.

For Charitable Trusts there will be capping of fees to new clients.

Ranges of fees must be disclosed to clients within 21 days. This is far less onerous than the requirements on legal practitioners for disclosure of fees and signing of client agreements.

The Bill allows a licensed Trustee Company to be paid from both income and capital of an estate. For charities, the Trustee Company can charge the capital commission and an income commission, or it can charge a management fee. The capital commission must not exceed 5.5% of the gross value of the trust assets. The annual income commission cannot exceed 6.6% of the income percentage. The management fee must not exceed 1.056% of the gross value of the trust assets. These rates will be reviewed every two years by consultation with the Government.

Financial services

The Bill also anticipates provision of financial services, which means they must be licensed by ASIC. A licence will be granted if they provide all, not only some, of the traditional Trustee Company services. The general motherhood statement in the Bill is that the Trustee Companies must carry out their duties with “loyalty and good faith” and care, skill and diligence. Employees of the Trustee Company must avoid conflicts of interest.

Voting power by only one person in the Trustee Company will be limited to 15% unless the Minister consents.

If there is a breach and a cancellation of a licence, then there are provisions about a transfer to a licensed trustee.

I expect the Bill to be enacted early this year.

It will be very interesting to see how these changes impact on the rights of beneficiaries and if the consumer protection elements of the Bill are adequate given the removal of the right of action to the Supreme Court in each State.