Trust Company Limited

Response to Green Paper *Financial Services and Credit Reform: Improving, Simplifying and Standardising Financial Services and Credit Regulation* (June 2008)

27 June 2008

EXECUTIVE SUMMARY

Trust Company Limited (**Trust**) has prepared the following response to the Green Paper *Financial Services and Credit Reform: Improving, Simplifying and Standardising Financial Services and Credit Regulation* (June 2008) (**Green Paper**) issued by the Treasury Department (**Treasury**).

Trust welcomes the review of the legislation addressing the licensing and regulation of trustee corporations and supports the move toward Commonwealth legislation. Trust's submission addresses Section 2 (Trustee Corporations) and Section 4 (Debentures) of the Green Paper. As per Treasury's request in the Green Paper, Trust has given particular consideration to likely compliance costs and impacts on competition. Trust has also given attention to the effective management and safeguarding of trust assets, consumer protection and costs and benefits generally.

TRUSTEE CORPORATIONS

Trust's submissions in respect of Section 2 (Trustee Corporations) of the Green Paper address the following key points:

(**Disclosure obligations**) Disclosure has always been a core duty of trustees and the duty to account to beneficiaries and co trustees is enshrined in common law. Any changes to the disclosure obligations of trustee corporations should be considered carefully as any reforms could have the consequence of changing trustee law and result in the interests of beneficiaries being favoured over the instructions of the testator. FSR disclosure is targeted at the appointers of financial services providers and therefore is not appropriate for beneficiaries, who are generally not the appointers of trustee corporations.

(**Dispute resolution**) Trust is firmly of the view that there is no better system for dispute resolution in regard to estate/trust issues than that offered by the Supreme Courts of the various States and Territories, and that the inherent jurisdiction of the Supreme Courts with regard to estates/trusts should not be affected by any legislative amendments at the Commonwealth level. There is ample statutory and common law protection for most aspects of estate/trust dispute resolution and the duties and obligations of trustees in the administration and management of trust assets have been built up over centuries and should not be lightly disturbed. If Treasury does proceed with a dispute resolution process then Trust submits that such a process should be limited in terms of the type of complaint and the class of complainant and that the Supreme Courts should be the final arbiters in any dispute.

(**Licensing and ongoing oversight of trustee corporations**) In Trust's view, the consumer protection supervision approach, as opposed to prudential regulation, should be the option adopted by Treasury, and the existing custodial regime under the *Corporations Act* would appear to be an appropriate model for such regulation. In order to develop consistency between the trustee corporation industry and the financial services industry generally the restrictions on borrowing, capital reduction and shareholding which apply to trustee corporations should not be adopted in the Commonwealth legislation.

(**Fees**) Trust endorses the deregulated fee system currently operating in Western Australia as a generally appropriate model for fees for trustee corporations. Trust also proposes that a trustee corporation should have the ability to apply a revised fee structure to existing estates/trusts by advertising these revised fees to interested parties. There should also be flexibility to charge the fee against income or capital.

(**Director and employee liabilities**) The level of liability of directors and employees of trustee corporations is very onerous in comparison to the liability of directors and employees of ordinary corporations and Trust is of the view that provisions for liability of trustee corporation directors and employees should be the same as those for all other corporations.

(**Common funds**) Trust is firmly of the view that the status quo should be maintained with respect to common funds generally, with the exception of fees, which should be deregulated. Treasury will need to pay close regard to the existing provisions in the State and Territory *Trustee Companies Acts'* to ensure that there is a seamless transition from these Acts to the Commonwealth regime.

(**Superannuation**) Although this issue is not addressed in the Green Paper, Trust recommends that amendments be made to the *Superannuation Industry (Supervision) Act* to permit a trustee corporation to receive remuneration where the trustee corporation is the executor of a deceased member or the attorney of an incapacitated member of a self managed superannuation fund and is required to act as trustee of that fund.

Harmonisation issues

Trust also makes the following points generally in relation to Section 2 (Trustee Corporations) of the Green Paper:

- Trust is of the view that any administrative burdens imposed on trustee corporations should be considered in light of the fact that trustee corporations are also subject to administrative requirements under the *Corporations Act*, the inherent jurisdiction of Supreme Courts, trustee laws, guardianship laws, administration and probate laws;
- Trust strongly endorses the scoping statement on page 20 of the Green Paper which states that *"the scope of reform for the regulation of trustee corporations will not result in changes to the general responsibilities of the States and Territories with regard to trust law and the basic equity law and statutory framework governing trustee responsibilities"*;
- Trust is of the view that where public statutory trustees and trustee corporations undertake the same activities, trustee corporations should not be at a regulatory disadvantage. Therefore, while Trust does not want to interfere with the licensing regime applying to public statutory trustees, Trust believes that in order to ensure a level playing field, trustee corporations and public statutory trustees should be regulated in the same way in respect of fees and disclosure requirements to clients;
- As the Green Paper notes, the main competitors to trustee corporations are public trustees, lawyers and accountants however the Green Paper indicates that these proposals will not extend to them. This has the potential to place greater regulatory burden on trustee corporations for the provision of the same services.
- With regard to the statement on page 18 of the Green Paper that "*personal trust business*" represents "*approximately 4% of TCA member trustee corporations' business*", Trust wishes to confirm that its personal trust business represents between 25% and 30% of its total revenue, being far more significant than Treasury may have thought.

DEBENTURES

Trust generally supports the proposals of Treasury set out in Section 4 (Debentures) of the Green Paper. It is also imperative that any amendment to the legislative and policy regime governing the role of debentures trustees clearly defines the precise role of the trustee.

TRUSTEE CORPORATIONS

1. DISCLOSURE OBLIGATIONS

Introduction

Disclosure of information to consumers in respect of the "traditional activities" of trustee corporations would appear to be a key facet of Treasury's plan to achieve greater consumer protection with respect to trustee corporations. We note that at page 23 of the Green Paper it is stated that a consumer protection focused regulatory regime could provide for *"disclosure obligations for trustee corporations that would enhance the ability of their clients to assess the performance of trustee corporations".*

Trust believes that this policy area should be considered carefully by Treasury as any reforms to disclosure obligations could have the consequence of changing the nature of trustee law and could favour the interests of beneficiaries over the instructions of the testator, which goes to the very heart of the purpose of trusteeship. Over centuries trust law has developed because of the need to protect the aims of the testator whilst balancing the rights of beneficiaries to an accounting and ultimately a distribution of trust assets.

Changes to disclosure obligations for trustee corporations that would have the effect of changing the existing common law and statutory framework in respect of the "traditional activities" undertaken by trustee corporations would appear to be outside the scope of the Green Paper and the reform process initiated by Treasury. Any changes to the disclosure obligations of trustee corporations with respect to beneficiaries under estates and trusts may also have the effect of altering the rights of all beneficiaries, not just those under trusts with corporate trustees. These rights are well established by the common law.

The client of a trustee corporation

Determining who exactly is the client of a trustee corporation in respect of the "traditional activities" provided by a trustee corporation is a complex matter.

A trustee corporation will have stakeholders other than just the person who appoints the trustee corporation, because a person who establishes a trust to be administered by a trustee corporation generally does so to benefit a third party. A trust may come into effect at an unpredictable later time, and may continue to operate for many years, or in perpetuity, as in the case of a charitable trust. Further, the choice of trustee corporation can be made by courts or tribunals, such as, for example, in the case of an adult with a disability who lacks the capacity to manage his or her affairs.

An executor or settlor of a trust can select a trustee corporation and change his or her choice before the instrument comes into effect. It is worth noting that when appointing a trustee corporation, the appointer has a wide choice of possible alternatives including for example personal trustees, public trustees, solicitors and other trustee corporations.

On page 17 of the Green Paper it is stated that the clients of a trustee corporation in relation to its "traditional activities" include testators and grantors as well as beneficiaries of the funds held on trust. However Trust considers that there are two classes of clients based on the time at which those relationships arise:

(a) (**primary clients**) those at time of appointment, including for example:
- will makers;
- donors providing Trust with an enduring power of attorney;
- settlors, appointers or retiring trustees appointing Trust.

(b) (**consequential clients**) those at the time Trust's role as trustee commences including for example:
- beneficiaries: legatees, life tenants, residuary beneficiaries of either distributable estates/long term trusts, charities, or minors;
- power of attorney principals, personal injury style appointments, or other persons under legal incapacity.

When considering an appropriate level of disclosure to clients of a trustee corporation, it is important to distinguish between primary and consequential clients. Consequential clients have not made the choice of appointing a trustee corporation and are therefore unlike primary clients of trustee corporations and financial services clients generally who are entitled to have information regarding fees for example when making an appointment.

Trust is of the view that the disclosure regime required in the financial services sector as a result of Financial Services Reform (**FSR**) cannot be generally applied to trustee corporations in respect of the "traditional activities" because of the following issues:

- the "traditional activities" provided by trustee corporations are not 'financial services' and may also be provided by other service providers such as firms of solicitors who are not captured by the *Corporations Act*; and
- FSR disclosure is targeted at the appointers of financial services providers and so it is not appropriate to provide for disclosure to beneficiaries who are generally not the same as the appointer of trustee corporations.

Existing disclosure duties for trustee corporations

Disclosure has always been a core duty of trustees and this duty is enshrined in common law. The duty is one to account to beneficiaries and co trustees, and to keep them fully informed of their entitlement under a trust.

This duty is also expressed in the various Trustee Companies Acts' of the States and Territories (**TCA Acts**), which all require accounting to be provided to beneficiaries or other interested parties at least on request, and is intended to enable those beneficiaries or other parties to determine whether or not the trustee corporation is carrying out its duties and responsibilities as trustee appropriately. The TCA Acts do not however expressly address disclosure to the person who has appointed the trustee corporation to act under a will or trust deed.

An appropriate level of disclosure

The level of disclosure to clients of a trustee corporation that is appropriate can be best determined by examining the unique client relationships of a trustee corporation. This can be shown by addressing the different life stages of a 'trust'.

Disclosure at time of appointment: Creation of trust

A trust is created generally by way of a will or trust deed. In the case of a will, the testator provides instructions for their will to be drafted. Where a trustee corporation

takes such instructions, they are generally providing a legal service as distinct from a financial service. Consistent with the provisions relating to solicitors in some jurisdictions such as New South Wales there should be full disclosure of fees involved for provision of this drafting service and we suggest that this can be most simply achieved by requiring that fees (or their method of calculation) be disclosed to the testator prior to the trustee corporation performing the work.

In addition to disclosure of fees, Trust believes that at this time the client should also have information regarding the expertise of the trustee corporation when considering the question of appointing a trustee corporation as executor, however Trust is of the view that it is not appropriate to transcribe existing regulatory disclosure requirements under FSR because:

(a) when a trust is created by way of a will or power of attorney the trustee corporation is providing a legal service as distinct from a financial service; and

(b) when a will or power of attorney is made, these documents are generally not intended to be immediately operable. A will/power of attorney can be, and often is, changed many times in the appointor's lifetime. Whilst the appointer may be considered to have made the ultimate contract by appointing their executor/trustee/ attorney, they are not held to that contract and can change their mind at a whim with or without notice to the trustee. The appointer is therefore free at any time to appoint for example a personal trustee, public trustee, solicitor or another trustee corporation in place of the trustee corporation stated in the original will/power of attorney.

Disclosure at time Trust's role commences: At death of testator and commencement of estate

Under existing trust law beneficiaries are entitled to be advised of their benefit pursuant to the will together with details of the assets of the estate. A trustee is under a duty to inform the beneficiaries and this duty is not limited to the information requested by a beneficiary. The trustee must inform all beneficiaries of full age and capacity or their guardians of their entitlements under the instrument. The beneficiary entitlements referred to however relate only to their distributive share, i.e. what they are entitled to receive and so for example a beneficiary entitled to a specific asset is not interested in or affected by administrative costs borne by the residuary estate.

In Trust's view it is not appropriate to treat beneficiaries in the same manner as consumers under the FSR regime. Trust submits that a beneficiary is entitled to disclosure concerning protection and management of trust assets based on a prudential investment strategy. It is to be remembered that it is at this stage that the trustee will commence the process for controlling the trust assets and at no stage has the beneficiary invested any of their own funds (nor will they). Despite this, trust law requires certain disclosure from a trustee for the protection of those assets on behalf of the beneficiaries:

*Distributable estates***:** Beneficiaries may be provided with a copy of the trust instrument and the details of estate administration procedures, timelines of those procedures, fees to be charged by the trustee and anticipated external costs. Beneficiaries may also be provided with a complete statement of assets and liabilities upon verification of assets and capital gains tax cost bases of the assets. They will be requested to provide instructions as to

transfer or sale of assets by way of a distribution schedule (where there is more than one beneficiary).

During administration of estate: During the administration period of a deceased estate, beneficiaries have the right to challenge the terms of the will and to claim a greater share of the estate. A trustee will be bound by the final decision of the court on such a claim. A residuary beneficiary during administration is also entitled to receive information on all transactions as the estate proceeds and can call for a statement of account at any time.

Long term trusts: Apart from the information referred to above, beneficiaries of such trusts are entitled to know their contingent entitlement and the assets of the trust and the manner in which they are invested. Because they are only contingently/discretionally entitled they have no right to impose investment control on the assets unless they are a co-trustee**.**

Finalisation of the trust: In certain circumstances beneficiaries may be entitled to a full accounting of the estate and a breakdown of the calculation of their entitlement where they are entitled to a share of residue rather than say a specific cash legacy.

As addressed in the fees section of this submission, Trust submits that a trustee corporation should be able to apply a revised fee structure to existing estates/trusts by advertising the revised fee structure to interested parties (i.e. co-trustees, beneficiaries and attorney clients).

Costs and consequences of further disclosure obligations

Further disclosure obligations on trustee corporations would be a compliance cost. Possible downsides of prescriptive disclosure would be that:

- more people may turn to public trustees or solicitors not caught by the increased disclosure obligations which would mean that those individuals would not receive the additional disclosure anyway; and
- as the Green Paper notes, the main competitors to trustee corporations are public trustees, lawyers and accountants and given that any changes to disclosure requirements would not extend to them, the changes would place greater regulatory burden on trustee corporations for the provision of the same services with the disclosure being of little benefit to the parties involved.

2. DISPUTE RESOLUTION

Introduction

Trust notes that it appears to be an objective of Treasury to enable beneficiaries to address issues of non performance by a trustee including replacement of an underperforming trustee. This is indicated at page 23 of the Green Paper where it is stated that one outcome of a consumer protection focused regulatory regime would be *"a mechanism for beneficiaries to address issues of trustee underperformance in a cost effective way".* It is also stated on page 21 of the Green Paper that *"there are also concerns about the need for a more cost effective and timely alternative dispute resolution mechanism for beneficiaries to enhance the protections available for personal trust assets".*

We also note Treasury's general statement at page 20 of the Green Paper that: *"the scope of reform for the regulation of trustee corporations will not result in changes to the general responsibilities of the States and Territories with regard to trust law and the basic equity law and statutory framework governing trustee responsibilities".*

Trust recognises that consumer protection is particularly important in the market for trustee services. Many of the clients of trustee corporations are adults with disabilities, children, people who are absent from the jurisdiction, or who are inexperienced in the management of assets. In fact, one of the primary reasons that trustee corporations are retained is to ensure that the interests of such persons are protected.

Trust is firmly of the view however that there is no better system for dispute resolution in regard to trust issues than that offered by the Supreme Courts of the various States and Territories. Should a limited form of consumer protection be proposed by Treasury it should be very carefully considered within the framework of the protections that are already in place. Trust believes that the inherent jurisdiction of the Supreme Courts to supervise trusts and trustees should not be affected by any legislative amendments at the Commonwealth level.

Matters which come into dispute

In Trust's experience, common areas of dispute that arise for a trustee corporation can include, for example, the following:

- a beneficiary may wish to have the trust administered in a different way to that intended by the trust's establisher and may seek to have the trustee removed;
- a beneficiary may object to the terms of the trust;
- disputes between beneficiaries or the need to balance the competing interests of beneficiaries such as income and capital beneficiaries;
- a beneficiary may object to the interpretation of an administrative issue by the trustee; and
- some beneficiaries may not appreciate that the obligations of a trustee require a high degree of diligence, the cost of which must be recovered by the trustee and accordingly may dispute fees charged by the trustee.

Consumer protection

Trust is of the view that there is ample statutory and common law protection for most aspects of trust and estate dispute resolution and that the duties and obligations of trustees in the administration and management of trust assets which have been built up over centuries should not lightly be disturbed.

One of the public benefits of the regulation of trustee corporations is the protection of consumers, and in particular, vulnerable consumers. Once a trustee corporation has been selected and a trust has come into effect, the trustee corporation can only be removed by an order made by the Supreme Court, or the trustee can retire and appoint another trustee. This distinguishes personal trust services from other products offered by the financial services sector, and is a further reason for ensuring the stability of trustee corporations.

Consumer protection is already addressed through the legal system in the various States and Territories which provide beneficiaries with recourse to the courts to remove a trustee. At present, if beneficiaries are concerned about the administration of a trust, their main recourse is to apply to the Supreme Court for the removal of a trustee, or, in the case of excessive fees, for a review of those fees. Any person having an interest in an estate or trust can approach the court for a ruling or interpretation of any aspect of the estate or trust administration. It is certainly more difficult to change a trustee than to change other service providers, however this is usually what the testator desires as a common purpose for appointing a trustee corporation is to protect the interest and intent of the testator beyond their lifetime. Trustee corporations are appointed by courts, testators and clients because they believe they will better perform the task of managing the assets of the client either immediately or over an extended period of time than perhaps a private individual or institution.

The administration of trusts and the interpretative issues in respect thereof are well established through the development of the common law. Furthermore, there does not seem to be any compelling argument for suggesting that trustee corporations differ from other businesses in terms of available information for consumers and given the fiduciary nature of the trustee relationship it is reasonable to expect that trustee corporations should be more conscious of client rights than other service providers.

External dispute resolution process

Any development of an external dispute resolution process would increase the costs of administration.

If Treasury does proceed with a dispute resolution process then Trust submits that such a process should be limited in terms of the type of complaint and the class of complainant. Trust is of the view that any dispute resolution process should not be binding on the parties involved and that the Supreme Court of each State and Territory should be the final arbiter in any dispute.

A trustee corporation should not be able to be removed as trustee of a trust other than for fraud, negligence or breach of trust and the existing Supreme Court process is best placed to make this decision. The common law and individual State and Territory courts and legislature have already established standards and conditions by which trustees are to be judged and this should not be interfered with.

The only matters which should be the subject of an external dispute resolution process are where fees of the trustee corporation are contrary to what was disclosed to the appointer, the suitability of the asset allocation selected by the trustee corporation in its role as trustee and the accuracy of the accounting provided to beneficiaries by the trustee corporation. Trust also submits that any matters subject to an external dispute resolution process should be limited to complaints where the amount of money in dispute is less than $50,000 and that any complaints greater than this amount should be dealt with by the Supreme Courts of the States and Territories. Furthermore, any remedies decided by the external dispute resolution body should be restitutional as opposed to punitive.

Trusts are often in a unique situation where the trustee and beneficiaries are bound in a legal relationship for sometimes lengthy periods of times – often for a lifetime. This is a point of difference to other professional relationships where the client can usually finalise the relationship on terms. If an avenue of 'no charge' complaint was given to all beneficiaries then it could be open to consistent and prolonged abuse over many years to the detriment of other beneficiaries of the trust and would potentially increase the costs of administration for the trustee corporation. The Financial Industry Complaints Service (**FICS**) (soon to be part of the Financial Ombudsman Service) would appear to be an unsatisfactory option for dispute resolution as it would be binding on the trustee corporation but not on the complaining beneficiary unlike the existing court based process.

Therefore any dispute resolution process proposed by Treasury should be confined to a narrow user group and should exclude beneficiaries under charitable trusts where the number of potential disaffected beneficiaries could be enormous for example when a person who falls within an eligible class is not chosen for a distribution from a trust.

In most court cases, where there are disputes regarding estates, estate assets or the management of the trust the parties have their costs paid out of the trust assets. Trust assets could be severely depleted if the trust was to bear the costs of dispute resolution. If costs of dispute resolution were to be borne by trustee corporations solely then this cost will increase the costs of administration.

Trustee corporations would be adversely affected by a far reaching dispute resolution scheme as it would put them at a disadvantage to private trustees and public trustees who would not be subject to the same regimes, costs and delays. In addition, the process could be open to abuse by disaffected beneficiaries in an endeavour to remove a trustee not because of the trustees actions but simply because the beneficiary wishes to control the trust.

3. LICENSING AND ONGOING OVERSIGHT

Introduction

As a trustee corporation operating in more than one jurisdiction Trust welcomes the proposals to institute national licensing through Commonwealth legislation.

However we are of the view that Commonwealth regulation of trustee corporations at an entity level should not fundamentally affect the performance of "traditional activities" by trustee corporations, due to Treasury's stated intention at page 20 of the Green Paper that "*the scope of reform for the regulation of trustee corporations will not result in changes to the general responsibilities of the States and Territories with regard to trust law and the basic equity law and statutory framework governing trustee responsibilities".* Furthermore, as the Green Paper notes, the main competitors to trustee corporations are public trustees, lawyers and accountants and these parties will not be subject to any licensing regime developed by Treasury.

Unique nature of a trustee appointment

The acceptance of a trustee appointment in personal trusts is a very different matter from more commercial enterprises such as the custodianship of registered managed investment scheme assets for instance. The relationship between the will maker/settlor and beneficiaries is unique in that it encompasses legal, financial and personal responsibilities that require a higher degree of exercise of trustee discretion. The trustee must stand in the shoes of the person appointing them.

Level of regulatory supervision

The question of the level of regulatory supervision which should apply to trustee corporations should be examined in the context of the duties of trustee corporations and the attributes of their clients. A trustee of a trust has a fiduciary responsibility to the trust. The trustee corporation stands in the shoes of the owner of the assets and must deal with them as if they were its own.

The key issue would appear to be developing a licensing and regulatory framework that has sufficient regulatory oversight to adequately protect the public interest, at minimum cost. To minimise the cost, each component of the regulatory framework needs to be targeted, to ensure that the cost is not imposed unless it meets a specific goal that is not already met by a pre-existing, or less-expensive alternative. It would seem from Treasury's comments in the Green Paper regarding a consumer protection supervision regime that any corporation which could comply with the yet to be determined licensing requirements could apply to be a trustee corporation.

Licensing

Trust believes that it would be appropriate to automatically provide a licence to existing trustee corporations and that the licence would not need to be reviewed unless there were grounds for potential cancellation because of failure to rectify regulatory breaches.

Trust is of the view that all existing trustee corporations should have the right to nominate which of their existing licensed entities should hold the national license within their respective corporate structures and should be entitled to transfer business from other entities within the corporate group structure, with no adverse tax consequences.

The transfer of business from one entity to another within a corporate group could be achieved by legislation which provides that one entity within the corporate group of a licensed trustee corporation may stand in the place of another entity within the corporate group. Such legislation would allow for the transition of existing appointments for trustee corporations who currently hold multiple trustee corporation licences among various entities within their corporate structure.

Barriers to entry

If barriers to entry to the trustee corporation industry are lowered, the cohesion of the industry would be affected by new entrants to the market. On one hand, the presence of a greater number and range of entities in the market for trust services could enhance competition and choice for consumers. However, in such a market, there could be a greater risk that some corporations offering trustee services would fail, placing trust assets at risk. Lower barriers to entry might therefore warrant more stringent ongoing supervision. The fraud committed by a director of Burns Philp Trustee Company (Canberra) Limited, which led to the liquidation of that company, demonstrated that standards in relation to the licensing of trustee corporations are important to protect the reputation of trustee corporations generally.

New players to the trustee corporation industry may only wish to take on certain services such as estate administration, but not other types of work such as power of attorney, guardianship and personal injuries management.

APRA prudential regulation as opposed to ASIC consumer protection supervision

Trust submits that the consumer protection supervision option for regulation of trustee corporations at an entity level outlined on page 23 of the Green Paper be the preferred option for regulation of trustee corporations.

In Trust's view, the reasons favouring prudential regulation of banks and insurers by APRA do not apply to trustee corporations for the following reasons:

- banks have high levels of gearing and this is not the case for trustee corporations;
- the payments system relies on banks having confidence in each other and this is not relevant for trustee corporations;
- banks hold the assets of depositors on their own balance sheets whereas trustee corporations do not hold trust assets on their own balance sheets and therefore the prudential health of a bank is a concern for depositors of banks as opposed to trustee corporations where the assets of its clients are held separately from the assets of the trustee corporation; and
- insurers receive premiums on their own account and must fund payouts from their balance sheet as opposed to trustee corporations where the assets of its clients are held separately from the assets of the trustee corporation.

In this context it is also worth comparing managed investment schemes with trustee corporations. Managed investment schemes are under a consumer protection regime as opposed to a prudential regime and where a responsible entity of a scheme collapses, the assets of the scheme are protected by virtue of their segregation from the assets of the responsible entity. The failure of Trustees and Executors Agency Australia Company Limited demonstrated this point in relation to trustee corporations.

Despite the collapse of the licensed entity, no assets held in trust were lost as those assets were held separately from the assets of the licensed entity in accordance with the requirements of trust law.

Existing restrictions and inconsistencies in TCA Acts

There are jurisdictional inconsistencies in the TCA Acts including for example:

- (**capital requirements**) varying capital requirements with respect to net tangible assets and reserve funds which must be held, including trustee corporations in Queensland being required to invest part of their capital with the Treasurer of Queensland and a unique reserve funds requirement in Victoria;
- (**reduction of capital**) restrictions on certain trustee corporations in some jurisdictions from reducing their capital;
- (**restrictions on borrowing**) varying restrictions in relation to a trustee corporation's ability to borrow;
- (**financial reporting**) varying requirements with respect to submission of regular financial returns to government authorities;
- (**shareholding restriction mechanism**) restrictions on the acquisition of shares in trustee corporations in some jurisdictions with Ministerial consent being required for share acquisitions in trustee corporations above 20% in most jurisdictions.

Page 22 of the Green Paper states that one of the main policy objectives for a Commonwealth regulatory framework is reducing the *"regulatory burden on business for rationalising the reporting and accountability requirements for trustee corporations in a way that is consistent with Australian's framework for financial sector regulation"*. Page 19 of the Green Paper speculates that *"Commonwealth entity based regulation of trustee corporations would likely streamline supervision and reduce business compliance costs".* We note that trustee corporations do not occupy a pivotal role in the financial services sector or the broad community in the same way as deposit taking institutions, but rather are participants in a small industry, competing with other service providers who are not subject to similar restrictions as those listed above.

In accordance with Treasury's commitment to developing consistency between the trustee corporation industry and the financial services industry generally Trust submits that the current requirements in the TCA Acts with regard to capital requirements, reduction of capital and restrictions on borrowing, are inconsistent with those of other corporations generally and therefore should not be part of any Commonwealth legislative framework.

Trust also submits that the existing financial reporting requirements in the TCA Acts should not be part of any Commonwealth legislative framework or should at least be consistent with those required of other financial services organisations generally.

Furthermore, in view of the unique nature of a trustee corporation's business and its off balance sheet activities, a shareholding restriction mechanism is not appropriate for trustee corporations, because the ownership of the service provider is less relevant than its ability to provide services which conform with its fiduciary obligations to trusts.

Custodial regulatory regime

Trust understands that should Treasury choose the path of regulation of the trustee corporation industry through the consumer protection supervision option, that Treasury has envisaged that the custodial or depository regime could be an appropriate model. We note that at page 23 of Green Paper it is stated that "*while the specific standards and requirements for a consumer and disclosure regime would need to be developed, some of the standards and requirements could be adapted from the regime applying to custodial or depository services under the Australian Financial Services Licence".* We also note that at page 23 of the Green Paper Treasury has envisaged another potential outcome of choosing the consumer protection supervision option would include *"objective and transparent standards setting out minimum levels of organisational capacity, financial resources and funds management expertise for trustee corporations".*

The acceptance of a trustee appointment in personal trusts is a very different matter from more commercial enterprises such as the custodianship of registered managed investment scheme assets for instance. The relationship between the will maker/settlor and beneficiaries is unique in that it encompasses legal, financial and personal responsibilities that require a higher degree of exercise of trustee discretion. We have however given consideration to the requirements of the custodial regulatory regime and we understand that regime is concerned with ensuring that there are arrangements in place to ensure proper standards for the safe keeping of property and efficient operational arrangements for holding and dealing with scheme property. Despite the unique nature of the trustee corporation industry as outlined in this section, Trust agrees that the general principles underlying the custodial regime provide an appropriate model for a consumer protection supervision scheme for trustee corporations. We note however that the consumer protection supervision principles which apply to a licensed trustee corporation must be distinguished from the provision of services by the trustee corporation which must comply with the licensed entity's fiduciary obligations to trusts, and which are governed by the Supreme Courts of the various States and Territories.

We understand that a custodian of scheme property, whether it is the responsible entity or its agent, must meet standards on the issues addressed below, based on ASIC Regulatory Guide 133. We have also set out below the appropriate standards that could be put in place for trustee corporations.

(a) Organisational structure

(**Existing custodian standard**) The custodian must have an organisational structure that supports the segregation of scheme property from its own assets. There may be a conflict of interest between the custody operations and other operational areas of the custodian. If there could possibly be a conflict, the custodian must make sure that custody staff is segregated in a way that minimises the potential for conflict. The organisation should also be structured to ensure that the duties of custody staff are appropriately segregated from the duties of other employees. This would mean, for example, that custody staff must not also be responsible for investment decisions, trading decisions or other decisions resulting in the movement of scheme property.

(**Possible trustee corporation standard**) It is a critical part of a trustee's role that it establishes title of, protects and holds in the name of the trustee the assets of the trust. Therefore the following functions would assist in this:

- an accounting system clearly delineating between capital and income funds, which is a core duty of a personal trustee;
- an accounting and reporting system that tracks all movements within a trust account as a core duty for personal trustees is to fully account to beneficiaries from commencement of the trust;
- the trustee corporation structure must support the division of tasks between trust administration staff and investment, marketing and operational staff so as to avoid conflict of interest situations arising.

(b) Staffing capabilities

(**Existing custodian standard**) Custody staff must have the experience, qualifications, knowledge and skills necessary to perform their functions properly. The entity must undertake adequate ongoing training and educational programs so that the officers' knowledge remains at a level necessary for performing assigned responsibilities.

(**Possible trustee corporation standard**) We recommend that it should be a pre requisite that staff of the trustee corporation have the experience, qualifications, knowledge and skills to perform the functions of the trustee corporation as trustee.

(c) Ability and resources to perform core administrative activities

(**Existing custodian standard**) Likely to include:

(i) computer systems which are secure and capable of handling the record keeping and transaction processing for the scheme (having regard to the volume of transactions) and the capacity to separately identify scheme property; and

(ii) procedures in place for accurately recording all scheme property, all movements of scheme property, and all income, pricing and other related core administrative activities.

(**Possible trustee corporation standard**) Likely to include:

(i) an appropriate trades and transactions staffing component that uses a computer system recording and tracking transaction processing.

(ii) procedures and segregation of duties for transaction processing and approval of transactions for all trust asset management.

(iii) systems for researching and handling of corporate actions and access to settlement and clearance systems.

(iv) appropriate processes for handling the collection, protection and valuation of physical assets such as real property, vehicles, jewellery and cash including receipting for same.

(d) Arrangements on how various assets are held

(**Existing custodian standard**) A responsible entity and any of its agents must hold scheme property in a way which ensures that those assets are clearly identified as scheme property and held separate from the property of the responsible entity and property of any other scheme.

(**Possible trustee corporation standard**) Consistent with the general requirements of trust law a trustee corporation would have to ensure that trust assets are held so that they are clearly identified as trust property as it is essential under trust law that trust assets are held separately from the assets of the trustee corporation. The exception to this general rule is where funds are held in a common fund, although the trustee corporation must still distinguish the amounts invested as belonging to particular trusts.

(e) Custody-related financial resources

(**Custodian standard**) A custodian must continue to meet ASIC's financial requirements relating to custodians.

(**Trustee corporation**) As a matter of public interest, we believe that trustee corporations should establish sufficient financial substance to provide the operational framework to carry out their fiduciary obligations and that the proposed regulatory framework sets minimum standards including:

(i) **Minimum Capital:** Trust supports a minimum amount of paid up capital/net tangible assets as defined under FSR of circa $10 million for the licensed entity. This is necessary to establish the commitment of a trustee corporation and to ensure that they have the resources to build the operational infrastructure required.

(ii) **Insurance:** Trust recommends that trustee corporations hold the following insurance (1) insurance against fraud by officers and agents, (2) directors and officers insurance and (3) a minimum of $20 million of professional indemnity insurance.

(iii) **Reserve requirements:** We believe that with minimum capital and insurance levels in place, it would be unnecessary to also require specific reserve levels on trustee corporations.

(iv) **Borrowing Requirements:** We believe that with minimum capital adequacy and insurance levels in place there should be no restrictions on trustee corporations from borrowing in the usual course of business as with any corporation. Naturally there should be no borrowing from trust funds.

A trustee corporation could also be required to provide each year a report from external auditors in accordance with Auditing Standard AUS 810: "Special Purpose Reports on the Effectiveness of Control Procedures", and in reliance on a report from directors of the trustee corporation, as to whether internal controls and structures and compliance systems have been properly conducted that year.

Existing trustee corporations should be required to affirm that they have the above functions in place, whereas prospective entrants to the market should be required to demonstrate that they have the appropriate systems to fulfil the above listed functions.

4. FEES

Introduction

Historical inconsistencies currently exist in the TCA Acts where fees and charges for traditional trustee services are concerned and a uniform national fees regime would eliminate cross border variances. Trust strongly supports a consistent approach regarding fees and charges.

Existing inconsistencies in the TCA Acts

Currently each State and Territory charges under a different regime. For example, in respect of the administration of continuing estates and trusts, Queensland and Victoria licensed trustee corporations are required to charge commission based on income received, whereas New South Wales licensed trustee corporations generally receive management fees based on the capital value of an estate or trust from time to time. In Victoria and Queensland the income commission is charged against the income and in New South Wales the management fees can be levied wholly against capital and/or up to 50% against income and the balance against capital. These inconsistencies require duplication of administrative systems, additional staff training and add to the costs of administration.

As well as in relation to the administration of trusts, the TCA Acts vary in relation to the fees which may be charged by a trustee corporation for acting as an attorney (e.g. for an incapacitated person).

Trust also supports a deregulated fee model for common funds as well and has addressed this issue in the “common funds” section of this submission.

The deregulated model in WA

The deregulated fee system currently operating in Western Australia seems to be a generally appropriate model for fees going forward. The deregulated WA fee system gives directors of a trustee corporation the ability to set and publish fees deemed appropriate which may not be exceeded unless negotiated with the consumer. We understand that an annual fee is commonly charged by WA trustee corporations over the life of the trust, rather than an up front capital commission followed by income commission. The annual fee structure is advantageous to the consumer because more of the estate is invested for longer on the beneficiary’s behalf. The minor or incapacitated beneficiary is protected by this system as fees greater than that published by the trustee corporation board cannot be charged.

Fees to be changed in relation to existing trusts upon notification to interested parties

The WA legislation provides that the fees to be charged shall be those set out in the latest scale of charges of the trustee corporation published before the administration of the estate commences. For trustee corporations with a number of continuing trusts, this would result in multiple fee regimes applying, depending on the dates of commencement of the estates and is therefore a weakness of the WA model.

Trust therefore submits that a trustee corporation should be able to apply a revised fee structure to existing estates/trusts by advertising the revised fee structure to interested parties (i.e. co-trustees, beneficiaries and attorney clients). This would

have the benefit of avoiding duplication of administrative systems, would reduce staff training and would be more cost effective generally.

Charging the fee against income or capital

Trust is of the view that there should also be flexibility to charge the fee against income or capital. This approach would ensure consistency in the fee where there are changes in the economic cycle which result in variances between the growth in income and capital at any given time.

Capacity to charge fees to not be prescriptive

We would recommend that any legislation developed by Treasury with regard to fees not be prescriptive in the types of administration and attorney work that can be charged for. The legislation should also provide for subsidiaries of the licensed trustee corporation to be able to charge for these services as well.

5. DIRECTORS LIABILITY

Introduction

The TCA Acts generally provide that directors and employees of trustee corporations are personally liable with respect to certain activities undertaken by the trustee corporation.

Director and employee liability

The historical reason for the existing director and employee liability provisions in the TCA Acts was that when trustee corporations were established, the directors of trustee corporations were made personally liable to ensure that trustee corporations operated on the same footing as personal trustees who have a fiduciary duty to the trust and must account for any losses.

Some jurisdictions also provide that in the event of being wound up, every person who has been a director of that trustee corporation at any time within the period of 2 years preceding the commencement of the winding-up shall be liable for the balance unpaid on every share which the person may have transferred during such 2 years.

The *Corporations Act* provides due diligence defences to company directors, together with the 'business judgment' rule where directors have acted honestly. The TCA Acts do not allow for this. The extension of strict personal liability to directors and employees of trustee corporations is now an anomaly in corporation law as the assets of a trustee corporation are available to cover any losses caused by fraud, negligence or breach of trust by the trustee corporation and there is also nothing to prevent a trustee corporation from providing insurance for its directors, subject to some restrictions in section 199B of the *Corporations Act*. The development of professional indemnity insurance has also contributed to making the provisions of the TCA Acts dealing with director and employee liability unnecessary.

This level of liability of directors and employees of trustee corporations is very onerous in comparison to the liability of directors and employees of ordinary corporations generally. Trust is of the view that the provisions in the TCA Acts dealing with the liability of directors and employees of trustee corporations should not be adopted in the Commonwealth legislation. Accordingly, Trust is of the view that the liability of trustee corporation directors and employees should be the same as that for all other corporations.

6. COMMON FUNDS

Introduction

Trustee corporations are permitted to operate common funds to enable the efficient pooling and investment of moneys from estates and trusts. Common funds represent a vehicle through which trustee corporations can conduct the business of investing the funds with them on trust. At general law, trustees cannot mix the funds from two or more trusts. The TCA Acts modify the general law position by permitting trustee corporations to invest funds from more than one trust in a "common fund", and that the moneys forming part of a common fund do not belong to any particular trust. However trustees are still obligated to maintain accounts of investments made on behalf of each individual fund. The other reason for the creation of common funds was that at law a trustee cannot profit from its position. The provisions in the TCA Acts which brought common funds into existence provide a legislative mechanism for a trustee corporation to take a fee for this important and costly function.

Trust is firmly of the view that the status quo should be maintained with respect to common funds generally, with the exception of the method of fee calculation.

Specific benefits offered by common funds

Some of the specific benefits that common funds offer over registered managed investment schemes include:

- generally the unit price for common funds does not include the accrued income from the investments. The unit price is simply the value of the underlying assets divided by the number of units on issue;
- income is held in a separate account so that it can be paid to the "income" beneficiaries who often differ from the "capital" beneficiaries, at the end of the distribution period; and
- the income accrued is apportioned to an investor if the holding is redeemed during the distribution period so beneficiaries do not miss out on income when changes are made to the estate's investments or when the trust is wound up.

Existing legislative framework and issues for new regulatory regime

With respect to common funds the TCA Acts are reasonably consistent with the exception of three matters:

(I) Source of funds for investment
(II) Frequency of distributions
(III) Calculations of fees for the management of the common fund

It is essential that these three matters be dealt with thoughtfully to enable the seamless transition from the TCA Acts framework to the Commonwealth regime.

Source of funds for investment

The *Trustee Companies Act 1987* (WA) seems to be the most restrictive of all the TCA Acts and through section 19 prevents external moneys from being invested into common funds. If such a restriction were to be repeated in the Commonwealth legislation it would be detrimental to most trustee corporations and their clients holding investments in common funds. In order to exit external investors from the common funds the funds would require cash and therefore investments would have

to be realised. Because of the nature of common funds all investments are held collectively and therefore all those invested at the time the assets are realised would share in the capital gains. Hence continuing investors as well as those external investors exiting the fund may be burdened with a potential capital gains tax liability.

Since the enactment of the legislation regarding common funds trustee corporations have extended access to many common funds to public investors, and many common funds now contain a mix of estate and public money. Money in common funds must be invested prudently. Common funds offered to the public must now be registered management investment schemes and must comply with the obligations set out under the *Corporations Act* with regard to licensing and disclosure to retail investors in registered managed investment schemes, in addition to the requirements under the various TCA Acts, therefore providing a dual layer of regulation.

If investments in common funds are offered to the public, trustee corporations must comply with the managed investment scheme provisions in Chapter 5C of the *Corporations Act*. These provisions require managed investment schemes to be managed by a responsible entity, which must be a public corporation and hold a dealer's licence. Each scheme must have a constitution, a compliance plan and a product disclosure statement where offering units to retail investors.

However, trustee corporations should not have to comply with these provisions if a common fund is restricted to estate or trust funds as the trustee corporation already has the obligations of a trustee with respect to those moneys. In addition, the maintaining of estate funds separate from public funds may involve a reduction in investment returns and less diversification if the size of estate common funds are too small to obtain the greatest benefit from investment opportunities.

To exclude external investors from common funds would be particularly onerous on those common funds that are also registered managed investment schemes. As well as the capital gains tax liability incurred on exiting external investors, continuing investors would also be faced with increased costs due to losses of economies of scale and the costs expended on facilitating the transition of the fund. From a competition perspective this would also place common funds at a disadvantage to other managed funds as their scope for expansion would be severely restricted.

In short no advantage can be seen in limiting the pool of potential investors to common funds; especially as those funds seeking money from the public must be registered as a managed investment scheme under the *Corporations Act*.

Trust is also of the view that a positive addition to the any Commonwealth legislation in respect of common funds would be to allow beneficiaries, where there is a nexus to the estate, to remain invested in common funds after the trust vests in them, albeit that they no longer have a fiduciary relationship with the trustee. In some circumstances this may allow the beneficiary to defer triggering a CGT event. It would also be to the advantage of all parties invested in the funds due to increased economies of scale with respect to investments and costs.

Frequency of Distributions

Most of the TCA Acts do not designate a frequency for distributions from common funds. The New South Wales and Western Australia Acts are the exceptions and require distributions every 6 months and every 3 months respectively.

Common funds hold investments for trusts with different income and capital beneficiaries. A typical example of this would be a life tenancy situation where the life tenant receives the income and the remainder beneficiaries become entitled to the capital on the death of the life tenant. The life tenant relies on the regular distribution of income from the trust to maintain themselves. In turn the trust receives income from investments including common funds. The trustee therefore has the duty of distributing the income of the trust to the income beneficiary in a manner that is suitable, without disadvantaging the interests of the capital beneficiary. For many decades trustee corporations outside of New South Wales and Western Australia have been able to discharge this duty without legislation imposing the frequency of distributions from their common funds.

Commercially managed funds distribute income at intervals determined by their trust instrument. For reasons of competition neutrality it would be detrimental to common funds if they were to be bound to make distributions more or less regularly than their competitors.

Each distribution from a common fund incurs costs. These costs include postage, stationery, registry expenses and correspondence. These costs eventually will reduce the quantum of the distribution available to investors.

For these reasons it would be prudent not to include a distribution frequency in any draft Commonwealth legislation to be developed by Treasury.

Calculations of fees for the management of common funds

The establishment, conduct and administration of a common fund are not without cost. The trustee of the common fund is therefore entitled to charge a fee for these expenses.

The current situation is that common funds in New South Wales, Victoria, South Australia and Tasmania generally charge a management fee of 1% per annum on the value of the assets invested. In Western Australia the trustee is bound by the limit of the fee set out in the scale of charges published at the time the investment was made. In Queensland the board of directors of the trustee corporation must pass a minute establishing the fees that are to be paid out of the common fund.

In the broader financial services market registered managed investment schemes disclose their fees in a Product Disclosure Statement (**PDS**). Accordingly where common funds are also managed investment schemes the PDS will disclose the fees charged by the trustee corporation. Common funds compete with other managed funds in the marketplace. Therefore for reasons of competition neutrality and transparency it could be argued that common funds should not have a legislated management fee but should be free to compete commercially with managed investment schemes in the market.

7. SUPERANNUATION

Introduction

Trust has identified an issue where, as executor or attorney of a member of a self managed superannuation fund (**SMSF**) who is a corporate trustee, Trust becomes the trustee of the SMSF. A trustee corporation can become the trustee of a SMSF in a number of circumstances including for example:

(a) by provision in the deed of the SMSF which appoints the trustee corporation as executor upon the death of the member or attorney upon the incapacitation of the member;
(b) through appointment by a person having the power of appointment under the deed of the SMSF; or
(c) through appointment by a person having the power of appointment under section 6 of the *Trustees Act 1925* (NSW) or its equivalent in other jurisdictions.

There is considerable work to be done by a trustee corporation acting as trustee of a SMSF and this work may include reviewing the SMSF deed, liaising with any other members/trustees, and preparing a deed of appointment if appropriate.

In the case of a deceased member, the work to be done by the trustee corporation will be in relation to the payment of death benefits and may include making life insurance claims, making determinations and arrangements as to the payment of death benefits by lump sum or pension, realising assets, and complying with taxation obligations. In the case of an incapacitated member, the work to be done by the trustee corporation would relate to the administration of the fund and may include ensuring compliance with superannuation legislation, reviewing investments and making determinations in relation to the payment of pensions and lump sums.

There is also a need to develop particular expertise within the trustee corporation in relation to superannuation as the legislative framework differs significantly from the general law in relation to trusts and estates and powers of attorney.

Legislative position

Section 17A of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) prescribes the conditions for SMSFs.

If a trustee or director of a corporate trustee of the SMSF receives any remuneration from the SMSF or from any person for any duties or services performed in relation to the SMSF, the SMSF will be non-complying (see sections 17A(1)(f)-(g) and 17A(2)(c)-(d) of the SIS Act).

Section 17A(3) of the SIS Act expressly provides that an executor of a deceased member or an attorney of an incapacitated member can act as trustee or director of a corporate trustee without the SMSF losing its status as a self managed superannuation fund however under sections 17A(1)(f) -g) and 17A(2)(c)-(d) of the SIS Act that person is not entitled to receive any remuneration for acting in this role.

Given the substantial size of the SMSF sector, it is a matter of significant public interest that SMSFs be properly administered when a member has died or lost capacity. There are serious risks associated with failure to properly administer a SMSF. Where a member of a SMSF has appointed a trustee corporation to act as his

or her executor and/or attorney there should not be a barrier to the trustee corporation assuming the administration of the SMSF because of the inability to charge a reasonable fee for taking on that responsibility.

Accordingly Trust recommends that sections 17A(1)(f)-(g) and 17A(2)(c)-(d) of the SIS Act be amended to provide for an exception in circumstances where a trustee corporation is the executor of a deceased member or the attorney of an incapacitated member.

DEBENTURES

Introduction

Trust has given consideration to the proposed changes set out in Section 4 (Debentures) of the Green Paper and using the terminology set out on page 39 of the Green Paper, Trust responds as follows.

Harmonisation of the regulation of promissory notes, regardless of their value

Trust welcomes this proposal in principle and in Trust's view:

- promissory notes should be included in the definition of "securities" under the *Corporations Act* and accordingly section 92 of the *Corporations Act* should be amended to expressly include a reference to promissory notes;
- Chapter 2L of the *Corporations Act* should also be amended to expressly include promissory notes with a face value of less than $50,000 as a type of debenture, subject to the provisions of Chapter 2L.

Extending the licensing requirement for debenture issuers

Trust supports this proposal but is of the view that not all types of issuers need to be licensed.

Historical as well as more recent failures on the part of debenture issuers indicate that the riskiest types of issuers are those who raise debt finance from the public for on-lending for often very high risk or ill-conceived projects which are not necessarily transparent to the public, the trustee and regulators, until a collapse occurs. These are continuous debenture issuers who are typically very thinly capitalised and entirely dependent for their capital needs on debenture funding. Often there is a significant mismatch between the maturity of the debt securities they issue and the loans they make. Although ASIC's Regulatory Guide 69 (**RG 69**) seems certain to improve the disclosure to be made by each such debenture issuer, this type of investment will always be risky.

At the other end of the spectrum there are other types of debenture issuers, for example, industrial corporations, which opt to raise debt finance for a defined in-house project, such as the construction of a new factory. These types of debenture issues tend to be of a fixed amount, for a fixed duration which matches the completion of the project. Information in the relevant prospectus would usually be underpinned by various expert reports and a proper costing of the project. Such issuers also tend to be listed entities (even if the debt securities themselves are not necessarily listed) and so their operations and performance are subject to market scrutiny. These debenture issuers normally merely supplement their capital requirements by the issue of debt securities, rather than wholly depending on such funding for their capital.

Taking into account the very different profiles of debenture issuers, it would seem:

- logical and desirable that debenture issuers who on-lend the funds raised (either directly to third parties or to associates for on-lending to third parties) be subject to a licensing requirement;
- unnecessary to require issuers who (1) do not so on-lend funds or (2) raise a fixed amount with a defined maturity and for a specific project which they will

themselves substantially control, to be subject to a licensing requirement. This recommendation is based on the premise that the core business of these issuers is not the issue of debentures and lending of funds but rather merely a means of supplementing their capital needs. It is not thought that licensing would improve the risk profile of such issuers.

Licensing of debenture trustees

Trust supports the simplification of the current requirement for a debenture trustee to be a trustee of a type contemplated by the list in section 283AC of the *Corporations Act*.

It may be useful at this point to restate the current key functions of the debenture trustee, which can be summarised as follows:

- to act as a focal point for hundreds or thousands of individual investors in monitoring (and, if applicable) enforcing the provisions of the relevant trust deed and prospectus;
- to ensure that that directors' quarterly and auditor half-yearly reports and applicable financial statements are received on time*;
- to read the above reports and take appropriate action, including seeking directions from a court if the reports indicate a breach of the trust deed or other default situation; and
- to place the issuer under external administration if the reports received by the trustee indicate the need to do so.

**ASIC, by virtue of RG 69, has sought to extend the involvement of debenture trustee into areas which have traditionally and – in Trust's view – quite properly belonged in the ambit of the debenture issuer. One example of such extension of the debenture trustee's role is the requirement for it to consent to the appointment of valuers by the debenture issuer.*

Trust is of the view that:

- the independence of a trustee from the operational and other decisions of the debenture issuer must be preserved; and
- it is not the role of trustees, nor should it be, to underwrite or guarantee the success of any investment in debentures.

Because the trustee does not guarantee or underwrite the debenture issuer, any specific licensing of trustee corporations to act as debenture trustees should be based on each such entity's ability and experience to perform this role rather than, for example, some financial criterion. In addition, consideration should be given to providing a clear legislative basis for the debenture trustee's role as expanded by RG 69. The Trustee Corporations Association of Australia included this request in its submission in response to the draft RG 69 however that request was not reflected in RG 69.

Reviewing the duties of trustees

As set out above, Trust is firmly of the view that:

- it is not the role of trustees to underwrite or guarantee the success of any investment in debentures;

- the independence of trustees from the operational and other decisions of the debenture issuer must be preserved; and
- the debenture trustee's duties and powers set out in Chapter 2L should be revised in order to take account of ASIC's RG 69.

In addition, debenture trustees need to be accorded legislative protection in situations where they have acted in good faith to protect investors in matters which may have adversely affected the issuer. An example of such a situation is the RG 69 requirement for the trustee to inform ASIC and the investors if in the trustee's opinion the issuer is failing to observe the promises it had made in its prospectus. Informing the investors will inevitably bring the matter into the public domain and may precipitate a run on the issuer. If it is later shown that the information was incorrect (even though the trustee acted in a proper and soundly based manner), the trustee may be exposed to a claim for compensation and damages from the issuer. In order that trustees may undertake their role without fear or favour, they need to be given appropriate legislative protection.