Trustee Corporations Association of Australia

Green Paper on Financial Services and Credit Reform

Submission to the Treasury

July 2008

Executive Summary

The TCA supports the move to Commonwealth regulation of trustee corporations as this will eliminate the inconsistencies between the current regional legislation, thereby allowing greater efficiency and cost savings in the provision of personal trust services to the community.

We regard the 'ASIC option' as the most appropriate approach, on the basis that prudential supervision by APRA would be unnecessarily intrusive and costly, and would raise significant competitive neutrality issues.

We believe that the key elements of an effective, fair and efficient ASIC model for regulating trustee corporations would include:

- robust licensing and ongoing supervision standards to ensure participants have the necessary resources and expertise to properly conduct trust and estate activities.
- disclosure obligations that recognise the particular nature of trustee corporation clients.
- deregulated fees that acknowledge the competitive forces present in the areas of deceased estate administration and personal trust management.
- retention of Common Funds, which represent an efficient means of pooling client funds for investment.
- director and employee liability consistent with other corporations.
- dispute resolution arrangements that recognise existing statutory and common law protections and the inherent jurisdiction of the Supreme Courts in estate and trust matters.

The TCA also supports measures to enhance the protection of retail investors in debentures, including:

- treating promissory notes issued to retail investors as debentures for regulatory purposes.
- extending the licensing requirements for debenture issuers.
- licensing all debenture trustees, as well as clarifying their role and providing them with appropriate legislative protection when acting in good faith.

Introduction

The Trustee Corporations Association (TCA) is the peak representative body for the trustee corporations industry in Australia. Its 17 member organisations include all 8 regional Public Trustees and the great majority of the 10 private statutory trustee corporations (see Attachment).

We are pleased to provide comments in relation to two issues covered by the Green Paper on Financial Services and Credit Reform:

- Trustee corporations
- Debentures

A number of our members are making separate submissions, commenting in more detail on some of the matters addressed below and raising other issues.

Trustee Corporations

Trustee corporations have been providing personal trust and deceased estate administration services for well over a hundred years. Their establishment reflected the community's need for trustworthy, independent entities which could provide greater expertise and resources than a natural person could offer, as well as the benefit of perpetuity.

Today, trustee corporations offer a broader range of wealth creation, management and transfer products.

While their 'traditional' activities now represent only about 4% of members' aggregate funds under management, it is important to note that those activities generally account for a significantly greater share of revenue.

Each year our members:

- write or revise about 60,000 wills
- administer about 10,000 deceased estates

TCA members currently manage assets for:

- 10,000 clients under power of attorney or other agency arrangements
- 35,000 clients under court and tribunal orders

They also manage about 20,000 various other trusts, including about 2,000 charitable trusts.

For many years, the industry has been seeking the introduction of a nationally uniform regulatory system, encompassing licensing and ongoing supervision, which would allow greater efficiency and cost savings in the provision of personal trust services to the community.

The TCA welcomes the Commonwealth taking over regulatory responsibility for the industry's traditional business, especially as the great bulk of trustee corporations' activities (ie: superannuation, managed investments, debentures, securitisation and custody) is already subject to Commonwealth legislation.

This action will eliminate the numerous inconsistencies between the current regional legislation, in terms of different requirements regarding such matters as licensing, shareholdings, reporting, insurance, borrowing and affidavits.

We regard the 'ASIC option', as outlined in the Green Paper, as the most appropriate future regulatory regime for trustee corporations.

We believe that prudential supervision of the industry by APRA is not warranted, on the basis that such an approach:

- would be unnecessarily intrusive and costly given the industry's low level of systemic risk, and
- raise significant competitive neutrality issues, given that trustee corporations' main competitors are not subject to prudential regulation.

There are, of course, a number of 'grey areas' in respect of the ASIC 'consumer protection' model proposed in the Green Paper. In the following sections, we offer our views on how these matters might best be addressed.

As a general point, it would seem preferable, from a flexibility perspective, for the detail of the new regulatory regime to be covered by regulations or licence conditions rather than be included in the Act itself.

<u>Licensing and operating standards</u>

We believe that robust, but not prohibitive, entry level and ongoing requirements should apply, in order to ensure that participants have the necessary resources and expertise to properly conduct trust and estate activities, and to guard against 'rogue' operators.

Key elements would be:

- a reasonable level of minimum capital for new entrants, say $5m.

- adequate PI insurance - a minimum of say $10m.
- appropriate specialist skills in a range of areas (eg: trust law, estate administration, investment management, custody, taxation, accounting, and superannuation) that can be relevant to efficiently managing estates and trusts.

However, we would not see it as necessary for a reserve requirement to also apply (Victoria is unique under present regional legislation in imposing such a reserve).

Disclosure

The provision of relevant information to interested parties has always been a core duty of trustee corporations under common law.

When looking at disclosure arrangements, it needs to be recognised that a trustee corporation's 'primary' clients are usually the settlors and testators who choose to employ the services of an independent, professional trustee corporation.

Those clients do this for good reasons, eg:

- beneficiaries of the same trust (eg: income v capital beneficiaries) often have different rights over the assets of the trust, which creates tensions.
- a settlor may believe that the beneficiaries lack the competency or rationality to properly handle their own financial affairs.

However, trustee corporations also clearly recognise that, subject to following the terms of the will or trust deed, they have responsibilities in terms of acting in the best interests of beneficiaries, who can be regarded as 'consequential clients'.

Trustee corporations provide statements tailored to meet the nature of their obligations, eg: executor accounts in relation to deceased estate administrations, and trustee investment review and performance reporting to beneficiaries of trusts.

However, in order to guard against frivolous or mischievous requests for information, which can be costly and raise privacy issues, the new regulatory regime should adopt a reasonably tight definition of 'interested parties' as

regards who is entitled to obtain information on individual estates and trusts under administration / management.

Further, while the Public Trustees will not come under the new regulatory regime (the position in respect of State Trustees remains unclear), for competitive neutrality reasons they should be subject to similar disclosure requirements as the private trustee corporations.

Similarly, the current regional laws governing general trustee responsibilities, and which also apply to competitors (such as solicitors and accountants) in the areas of will preparation, estate administration etc, should not be changed.

Removal of trustees

We believe that the ability of beneficiaries to remove a trustee should remain restricted to circumstances of breach of trust or gross negligence, and continue to be a matter for the relevant Supreme Court.

Reporting

One important benefit of the move to a single Commonwealth regulator will be the rationalisation of the varied reports that trustee corporations are currently required to submit to the regional governments.

We believe that the regular reports to be submitted in future should be similar to those required of AFS licensees, eg:

- NTA position
- cash position
- breach reports

External Dispute Resolution Scheme

In considering an appropriate EDRS for the industry, it should be noted that trustee corporations are subject to a relatively low number of legitimate customer complaints about their performance.

Many complaints prove to be simply disputes between beneficiaries (eg: between life tenants and capital beneficiaries, who generally have conflicting interests over an estate's assets).

An appropriate EDRS for the industry might involve:

- use of a low cost tribunal of industry experts or the new Financial Ombudsman Service (if it has the necessary expertise) to arbitrate on complaints about a trustee corporation's 'performance' involving amounts up to say $50,000.
- the system to address matters such as non-disclosure of fees rather than the level of fees, and complaints about 'asset allocation' rather than 'investment performance' of a particular asset.
- publishing the outcomes of complaint arbitrations (even if the names of the client and the corporation concerned are not revealed).
- the trustee corporation and the client would reserve the right to take a matter to the relevant Supreme Court, which has inherent jurisdiction in relation to estate and trust matters (trustee corporations see this option as important where 'reputational' issues are involved).

Common Funds

Common Funds should be retained as they are an efficient mechanism by which trustee corporations can pool clients' funds and thereby generate better investment returns for those clients.

Further, a beneficiary who receives an interest in the assets held in a Common Fund (eg: a capital beneficiary on the death of a life tenant), should be entitled to retain that investment rather than be required to redeem the funds.

Fees

We believe there is a strong case, on competitive neutrality grounds, for the deregulation of fees under the new regulatory regime.

As is currently the case in Western Australia, trustee corporations should be able to charge for their services on the basis of their latest scale of published fees.

However, the ability to negotiate fees with individual clients, as is presently provided for in the regional legislation, should be preserved.

For equity reasons, there should also be the flexibility to charge the fee against income or capital.

Further, trustee corporations should have the ability to review from time to time the historical fees that apply to longstanding trusts and adjust these in line with their latest scale of published fees.

We believe that competitive market forces, as in other industries, should be allowed to determine a reasonable level of fees commensurate with the work and responsibilities involved in providing estate and trust services.

Director and employee liability

At the time trustee corporations were first established, legislation was still grappling with the concept of limited liability companies and the responsibilities of directors. Trustee company capital was relatively small and professional indemnity insurance was not available.

In this context, it made sense to make directors and employees of trustee corporations liable in the same way as personal trustees.

This approach is now out of date and anti-competitive.

We strongly believe that director and employee liability arrangements for trustee corporations should be the same as for other corporations.

Debentures

We were very supportive of ASIC's review of the regulatory requirements for debentures last year, on the basis that there needed to be greater certainty as to the roles and responsibilities of the key parties involved, and enhanced disclosure for retail investors.

Prior to that review, and following some problems with several debenture issuers, there had been much ill-informed commentary on the role of the trustee, based on the incorrect premise that such issues are similar to managed investment schemes and that the trustee ought to have the same knowledge and powers as the responsible entity of a managed investment scheme.

We generally support the changes proposed in the Green Paper and offer the following comments:

Promissory notes

We agree that the present treatment of promissory notes, based on their value, is unsatisfactory in terms of investor protection.

It would make sense for all promissory notes issued to retail investors to be brought under the definition of 'debenture' and therefore become subject to the regulatory regime applicable to debentures.

Licensing debenture issuers

We agree that the licensing requirements for debenture issuers should be extended.

The Green Paper suggests that all issuers carrying on an investment business which regularly offer securities to retail investors, and for whom such issues constitute their main source of funding, should be licensed by ASIC.

However, this may be 'casting the net' too wide, in terms of the compliance costs imposed versus likely consumer benefits. We feel that consideration could be given to whether some exemptions are warranted, such as for issuers which do not on-lend the moneys raised through debentures

Licensing debenture trustees

We agree that all entities wishing to act as a debenture trustee should be licensed by ASIC.

In order to obtain a licence, an entity would need to be able to demonstrate that it had the necessary resources and expertise to carry out this role.

Review of trustee duties

We agree that the list of trustee duties set out in s283DA of the *Corporations Act* should be updated to better reflect the obligations required of trustees under ASIC's Regulatory Guide 69.

At the same time, we firmly believe that there should be a clear legislative basis for the trustee's expanded role in relation to monitoring the new issuer benchmarks and taking enforcement action.

As noted in our submission in response to ASIC's consultation paper last year, it is desirable that those benchmarks be set out as covenants in the *Corporations Act*.

Further, the trustee should be given legislative protection when carrying out its function in good faith, especially given that it must rely to a large extent on information provided by other parties (eg: the issuer and the issuers auditor).

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Attachment

TCA Members

- ANZ Trustees Ltd
- Australian Executor Trustees Ltd
- Elders Trustees Ltd
- Equity Trustees Ltd
- National Australia Trustees Ltd
- Perpetual Ltd
- Public Trustee for the ACT
- Public Trustee New South Wales
- Public Trustee for the Northern Territory
- The Public Trustee of Queensland
- Public Trustee South Australia
- The Public Trustee Tasmania
- Public Trustee Western Australia
- Sandhurst Trustees Ltd
- State Trustees Ltd
- Tasmanian Perpetual Trustees Ltd
- Trust Company Ltd

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