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DEALING WITH LICENSED TRUSTEE COMPANIES AND CHAPTER 5D OF THE *CORPORATIONS ACT* (2001)

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1. Background to the Industry:

Most, but not all, trustee companies currently in existence owe their origins to the sudden blossoming of wealth following the gold rush mid-19th century. In the 1880s a significant number of trustee companies were established under their own Acts of the various state parliaments. Over time legislation was passed in each of the states regulating the various companies operating in that state as a group. In Victoria this process commenced with the Trustee Companies Act 1928, although following that enactment there were still numerous Acts passed concerning individual trustee companies- dealing with matters like shareholder capital and mergers and acquisitions. This process culminated in the Trustee Companies Act 1984.

Throughout the 20th century there was considerable consolidation in the industry. Some trustee companies merged, others were taken over, and at least one failed. In each case the existing appointments and administrations being undertaken by the company, and the company's "will bank", was passed onto a new controlling trustee company, ensuring continuity of administration, and that no will was left without a valid appointment of an executor.

Perhaps more importantly the assets of the estates and trusts under a company's administration are not the assets of the company, and the failure of a trustee company does not therefore directly place the assets of any individual trust or estate at risk.

This fact, coupled with the consumer protections referred to below, together with their objectivity, experience and expertise make trustee companies a safe but at times comparatively expensive, option for fiduciary appointments.

Annexure A may be the most useful thing I impart with this paper. It is a table available from the Financial Services Council website[1] and enables tracing of trustee companies' succession.

For example, if you came across a will referring to an organisation called Union Trustees, you would discover that it merged with Fidelity Trustees to form Union Fidelity Trustees which in turn changed its name to Trust Company of Australia, and then to Trust Company, an entity which is currently the subject of rival takeover bids from Perpetual Trustees and Equity Trustees. So in the near future any wills or unadministered estates naming Union Trustees as executor will be construed as appointing Trust Co, Perpetual or Equity as the case may be.

Since their inception the scope of services provided by licensed trustee companies have steadily increased. Most licensed trustee companies now actively provide a suite of personal investment services, fund management services, corporate trustee services and superannuation, as well as the traditional functions in estate planning and administration.

The provision of professional fiduciary services is a highly competitive business. Trustee companies compete not only with each other and with their state government counterparts, such as State Trustees, but also with individuals, including of course legal

[1] http://www.fsc.org.au/policy/trustees/former-trustee-organisations.aspx

practitioners, accountants and financial planners, and with family members and friends who will perform the role of fiduciary sometimes gratuitously (but sometimes followed by an application to the court for executors commission).

The purpose of this paper is to consider only those aspects of the operations of licensed trustee companies that are relevant for practitioners operating in the areas of elder law and succession law, the “traditional trustee company services".

In May 2010 the Corporations Act was amended to insert Chapter 5D. This chapter created a national regulatory regime for the trustee company industry. State and Territory public trustees may opt into the licensing regime, but to date, none have done so.

Although the Corporations Act now provides a national regulatory framework for companies licensed under the Act, there are still important state provisions that empower licensed trustee companies to ply their trade.

2. Trustee Companies Act 1984: Key Remaining Provisions

(See annexure A for the text of the provisions.)

Under the Trustee Companies Act 1984 a trustee company is defied as a licensed trustee company under the Corporations Act or State Trustees.

Section 9 of the Trustee Companies Act 1984 empowers licensed trustee companies to act as executor "as fully and effectively as an executor who is a private individual". This is the key distinguishing element of a LTC- they are the only companies (other than their Public Trustee equivalents) that obtain grants of probate in their own name.

Section 10 provides that a person entitled to a grant of probate may authorise a trustee company to obtain the grant in their stead, or to appoint a trustee company to act jointly with them in the administration of an estate. (Section 11 makes similar provision with respect to persons entitled to a grant of letters of administration).

Section 14 empowers individuals and a court empowered to appoint a person to the role of trustee, or guardian of a minor, to appoint a (licensed) trustee company.

Section 15 authorises trustee companies to act under a power of attorney. Building on this power section 16 specifically authorises executors, administrators, or trustees to appoint a trustee company under power of attorney to exercise authority conferred on them, including discretionary powers.

Section 17 provides that where a trustee company is appointed to perform the functions of executor, administrator, trustee or guardian, the person appointing them is released from liability in respect of any of the acts done, or omitted to be done, by the trustee company acting under that appointment.

Section 20A Permits trustee companies to prepare wills and to receive fees for doing so.

Taken as a whole, these provisions authorise the backbone of the traditional work undertaken by trustee companies. Trustee companies act for individuals under enduring powers of attorney and under VCAT appointments when an individual loses capacity. They are appointed as executors of estates, both by testators and individuals not wishing to take up such an appointment, they provide administrative services for executors and administrators who do take up appointments, and they act as trustees of various trusts (including testamentary trusts, family trust, special disability trusts, and charitable trusts).

In addition, licensed trustee companies are referred to in other Victorian legislation [2]

3. Traditional trustee company services and the Corporations Act:

The Corporations Act regime now regulates fees, governance, licensing, and alternative dispute resolution procedures. Naturally, of course, trustee companies remain accountable to the state courts, and Guardianship Tribunals, in respect of the performance of their fiduciary functions in the same way that individuals are[3].

"Traditional trustee Company services", when performed by a trustee company, are now deemed to be "financial services" for the purposes of Chapter 5D of the Corporations Act[4]. This has the effect of making the operations of LTCs in this area subject to ASIC oversight, and the regulatory and compliance regime applicable to holders of Australian Financial Services Licenses under the Act (usually referred to as "AFSL")

Due to the number and length of the relevant Corporations Act provisions I have not included the text of most provisions referred to in the paper. However I do include s.601RAC, which defines traditional trustee company services:

> (1) The following are ***traditional trustee company services***:
>
> (a) Performing estate management functions (see subsection (2));
>
> (b) Preparing a will, a trust instrument, a power of attorney or an agency arrangement;
>
> (c) Applying for probate of a will, applying for grant of letters of administration, or electing to administer a deceased estate;
>
> (d) Establishing and operating common funds;
>
> (e) Any other services prescribed by the regulations for the purpose of this paragraph.

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[2] See *Trustee Act (1958)*, s.10(b), s.18(2), s.19(1), s.22(3), s.30(1), s.42(1)(c), and s.47 *Administration & Probate Act (1958)*, s.24A, s.34(1), s.34A, s.35 & s.47 s.5 defines a "trustee company", as a licensed trustee company under the Corporations Act or State Trustee (State Owned Companies) Act (1984), . *Guardianship and Administration Act (1986)* s.47A

[3] s.601SAA

[4] s.766A (1A)

(2) The following are ***estate management functions*** (whether provided alone or jointly with another person or persons):

(a) Acting as a trustee of any kind, or otherwise administering or managing a trust;

(b) Acting as executor or administrator of a deceased estate;

(c) Acting as agent, attorney or nominee;

(d) Acting as receiver, controller or custodian of property;

(e) Otherwise acting as manager or administrator (including in the capacity as guardian) of the estate of an individual;

(f) Acting in any other capacity prescribed by the regulations for the purpose of this paragraph.

(3) Subsections (1) and (2) do not apply to:

(a) Operating a registered scheme; or

(b) Providing a custodial or depository service (within the meaning of section 766E); or

(c) Acting as trustee for debenture holders under Chapter 2L; or

(d) Acting as a receiver or other controller of property of a corporation under Part 5.2; or

(e) Acting as trustee of a superannuation fund, an approved deposit fund or a pooled superannuation trust (within the meaning of the *Superannuation Industry (Supervision) Act 1993*); or

(f) Acting in any other capacity prescribed by the regulations for the purpose of this paragraph.

That provision sets out the meets and bounds of the services traditionally supplied by the industry, and to which the Corporations Act regime applies. Under the Act, when a LTC performs those functions, it is providing a financial service under its AFSL, and is subject to the laws and regulations that follow that. However it is the State provisions referred to in the preceding section which empower the companies to perform their fiduciary functions under state law, for example being granted probate.

4. Consumer Protection Under the Corporations Act

The Corporations Act licensing regime for providers of Traditional Trustee Company Services contains a number of consumer protections:

- **Corporate integrity:** Companies must satisfy a "fit & proper" test and a test of "no unacceptable control". Mergers and takeovers require Ministerial approval, as does the acquisition of more than 15% of the shareholding of a LTC[5]
- **Adequate Resources:** LTCs are required to have net tangible assets of at least $5m at all times, ensuring they are entities of substance.[6]
- **Insurance:** Trustee companies are required to have a compensation scheme in place.[7]

[5] S.601RAB(2A)(d) & (e), and Part 5D.5 and 5D.6 (s.601VAA – s.601WDA)
[6] See ASIC Regulatory Guide 166 at 166.90, and s.912A(1)(d)
[7] S.912B, Reg 7.6.02AA

- **Responsible officers:** LTCs are required to have key office holders who are of good fame and character.[8]
- **Financial Services Guides:** Clients of a trustee companies are required to be provided with FSGs complying with ASIC disclosure requirements.[9]
- **Fee publication & capping:** The fees that LTCs can charge must be in accordance with the statutory requirements for disclosure and publication, and are capped for charitable trusts. There are onerous cost consequences for LTCs if the reasonableness of its fees are successfully disputed (see below).
- **Audit requirements:** AFS Licensees are required to have an annual audit undertaken of their compliance with the financial requirements of their AFSL.
- **Breach reporting:** Companies are required to have internal processes for monitoring and recording breaches of internal process or the law, and have obligations to report significant breaches to ASIC.[10]
- **Dispute resolution system:** All LTCs are required to have an internal dispute resolution system compliant with ASIC standards, and to be a member of an approved External Dispute Resolution service (currently FOS). The External Dispute Resolution service provides clients with an accessible and binding (upon the LTC) dispute resolution process for matters concerning the provision of traditional trustee company services.[11]
- **Risk management framework:** LTCs are required to demonstrate to ASIC that they employ a sufficient risk management framework.[12]
- **Statutory duties of fidelity imposed on staff and officers:** It is an offence, with financial penalties applicable for breach, for staff and officers of LTCs to misuse their position or to act in bad faith.[13]
- **Compulsory reporting:** Clients of LTCs have a right to require the provision of information concerning the administration of a trust or estate in which they have an interest.[14]

5. LTC Fees: Introduction

The issue that seems to loom largest in many of my discussions with professionals, potential clients of trustee companies, or beneficiaries of estates administered by trustee companies, is that of fees.

Trustee companies are sometimes seen as being unnecessarily expensive. Moreover a common (but often mistaken) understanding is that trustee companies standardly

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[8] S.913B , s.915C(1)(b)
[9] Corporations Act s.942A and following
[10] S.912D(1)(b)
[11] S.912A
[12] S.912A(1)(h)
[13] S.601UAA, s.601UAB
[14] 2.601SBB Reg 5D.2.01

charge a flat capital commission of 5.5%. This understanding supports the view that there is little correlation between the services provided and fees charged by trustee companies, and therefore that they represent poor value for money.

Whilst there may be sound reasons for a number of complaints about trustee company fees in particular instances, critics often overlook that:

- Trustee companies typically and appropriately adopt corporate administrative and governance practices. This means that different functions in an estate administration will be performed by different individuals, or pooled into streamlined administrative processes. Administration of this nature does not lend itself to time based charging.

- Licensed trustee companies, particularly those that are publicly listed, must support significant corporate overheads. There are substantial regulatory and compliance costs associated with the provision of professional fiduciary services, which have been made more onerous now by the overlay of AFLS compliance requirements (see “consumer protections” above).

- Even under the old regime, many (but not all) licensed trustee companies adopted scaled fees that allowed for the charging of commissions at below the maximum statutory caps. In addition trustee companies would negotiate fees on a case-by-case basis for prospective appointments, and would consider applications for reductions in fees at the conclusion of the estate administrations.

- There is an element of "swings and roundabouts" for trustee companies. Some appointments may be extremely time-consuming and complex, while others may be straightforward. The now repealed Trustee Companies Act fee regime contemplated this fact. In Vance’s: "Executors Commission Law and Practice in Victoria" the author contrasts the position of trustee companies with individual executors applying to the court for executors commission at page 147:

  > "What the company may lose in administering one estate it is, in fact, permitted to make up in other estates. The scale ignores all individual features of an administration and is an average scale; the company has to take the good with the bad. The court in the case of an individual executor is under no such restriction. Each case is dealt with on its merits"[15].

- There is no evidence of excessive profits being made in the industry:
  - Very few new entrants have been attracted to join the industry
  - Existing companies have not invested significant funds in pursuing organic growth
  - Even though State Trustees received around $15m per annum from the state government to subsidise its provision of services with respect to small estates it managed a net profit of only $120,000 from a total revenue of over $63m in the financial year ending 30 June 2012[16],

[15] @ p.147

[16] See State Trustees Annual Report 2012 page 47, “Community Service Obligation Revenue”5.3

Whilst trustee companies' fees may be justifiable, the critical issue still remains for those considering appointing them: is it worth it?

When considering that question it is important to have regard to the fact that trustee company fees have now been substantially deregulated and trustee companies in most instances are prepared to be far more competitive in their pricing than in years gone by.

6. LTC Fees: Historical

A working knowledge of the former statutory regime that regulated the fees that could be charged by LTC's provides important context within which to consider the new Corporations Act provisions, and is also relevant for existing trusts and estates which were commenced prior to the new regime coming into effect from 6 May 2010 (noting that many trusts in particular commenced under the old regime will continue to run for many years, even decades, to come).

Under s.21 of Trustee Companies Act trustee companies were permitted to charge:

- Capital commission not exceeding 5.5%
- Income commission not exceeding 6.6%
- The companies were required to lodge a scale of fees with the Commissioner for Corporate Affairs under the Act[17]
- Alternatively trustee companies could charge such other fees as were agreed with the testator or settlor[18].

In addition they were permitted to charge fees for the preparation of tax returns[19], and a fee not exceeding 1.1% of the value of the assets invested in a common fund for the administration of the fund. [20]

Capital commission was paid on the initial value of the estate, and then adjusted on a distributable value of the estate[21].

For example, if an estate had assets of $1 million the company could take commission on that sum at the commencement of an administration in accordance with the company's scale of fees. If 20 years later, following the death of a life tenant, the trust had a distributable value of $7 million the company could take commission on the $6 million increase in estate value. The catch, from the company's point of view, was that the rate at which they could take this commission was per its published scale applicable at the date of the commencement of the administration. Due to the adoption of scale

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[17] s.21(5)
[18] s.21(8)
[19] s.24
[20] Licensed trustee companies were authorised by the Act to maintain "Common funds" which were, in essence, unit trusts into which trust monies could be invested. The regulation and operational common funds was controlled by Part VII of the Act and per s.41(13) trustee companies were entitled to receive a fee of not more than 1.1% per annum from the administration of the common fund.
[21] S.21(7)

tearing, and the relentless march of inflation, in practical terms for long-running trusts of any size, the majority of any adjusting capital commission was calculated on the smallest marginal capital commission rate.

The only other charges trustee companies were entitled to were fees for the preparation of wills[22], and disbursements (or more accurately "all money is properly expended by the trustee company and chargeable against the estate"[23].)

- Some trustee companies inserted standard clauses into wills and deeds appointing them which authorised them to charge the estate for legal work undertaken by the company in-house, and also authorising payment of real estate agents' commissions to real estate companies that are wholly owned by the trustee company.

- As with any other fiduciary, trustee companies could also be paid in accordance with the provisions of a court or tribunal (e.g. VCAT) order, or as agreed with the beneficiaries where "the class is closed" and all beneficiaries have legal capacity.

The Supreme Court had the power to review and reduce the rate of commission payable if the court was of the view that such commission was excessive[24].

There was a scope for trustee companies to apply to the court for additional commission in the very limited circumstances where, in connection with an estate, it managed or carried on a business or undertaking, or took an active part in managing a corporation[25].

The most obvious thing about capital commission is that it is an extremely blunt instrument for determining remuneration. Even where trustee companies applied a tiered scale reducing the marginal rate of which commissioned was payable in larger estates, there was no necessary correlation for any given estate between the difficulty of the estate administration and the fee charged.

In long-running trusts the ongoing revenue received by the company (being income commission) was inadequate and not commercial. For example, if one allows that a portfolio will generate an income yield of 5% on the invested capital, income commission of 6.6% (which is calculated on the income received and not the capital) entitles the company to remuneration for managing the trust of around 0.3% of the value of the capital. In contrast, for example, administration fees chargeable for the vanilla (My Super) option are around the 1% mark. Super fund accounts are not bespoke trusts, do not require consideration of individual deeds, and do not involve discretionary decision making with respect to allocation of income and capital on an ongoing basis. Further, when one considers that many long-running trusts have, as a substantial asset, a non-income producing residential property occupied by a life tenant (not generating any income, but requiring inspections, monitoring of maintenance and, for example oversight of the payment of insurance) one can see that this arrangement did not work particularly well for the trustee companies.

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[22] S.20A
[23] s.21(1)
[24] s.21(3)
[25] s.22

The problem of being limited to income commission was felt by trustee companies most acutely in relation to perpetual charitable trusts. Inherent in their nature is the fact that they never vest. Trustee companies which are for all intents and purposes immortal, were therefore in a particularly difficult position. In Victoria this was addressed by the introduction of section s.21A of the Trustee Companies Act, which permitted trustee companies to charge an annual management fee of up to 1.056% of the value of the trust. As with capital and income commission, some trustee companies adopted tiered scales whereby large value trusts were levied fees lower than the statutory maximum.

It must be remembered that for many trusts some or all capital may be invested in the company's common funds, and the company would therefore be entitled to the fee relating to the management of the common fund in addition to its commission.

7. LTC Fees Under The Corporations Act:

The current fee provisions under the Corporations Act represent a significant departure from the prescribed statutory caps of capital and income commissions under the Trustee Companies Act.

Save in respect of charitable trusts, the Corporations Act regime has rejected the concept of statutory fees, and has instead left the setting fees to market forces.

The driving philosophy is now based on disclosure and informed consent, leaving it to consumers to determine what fees are reasonable.

Each LTC is now required to publish on its website, and make available at its place of business, a schedule of fees that it generally charges for the provision of traditional trustee company services[26].

Save again for charitable trusts, licensed trustee companies may take the fees from either the capital or income of a trust[27].

As was the case with the Trustees Companies Act trustee companies and individuals are free to negotiate fees other than in accordance with published scales.[28]

The Corporations Act has also preserved an entitlement of trustee company to recover disbursements properly incurred in the provision of the services.[29]

8. LTC fees for charitable trusts

The Corporations Act prescribes a capped fee model for charitable trusts, as was the case under the former Victorian legislation. Trustee Companies can either adopt a

[26] see s.601TAA
[27] s.601TBE
[28] s.601TBB
[29] s.601TBD

capital and income commission model (capped at 5.5% and 6.6% respectively) under s.601TDC, or an annual management fee (not exceeding 1.056% of the value of the assets of the trust) under s.601TDD.

In addition LTCs are permitted to charge fees the preparation of tax returns[30], and to invest money in, and charge fees for, the management of, common funds[31].

As far as charitable trusts go, therefore, the Commonwealth provisions closely mirror those that previously applied in Victoria.

CAMAC Review:

The provisions regarding charitable trust fees were slated to be reviewed after two years of operation. As a result the Federal Government recently requested the Corporations and Markets Advisory Committee ("CAMAC") to review the operation of the provisions and prepare a report for Government. The review was undertaken in late 2012 and early 2013. By way of declaration of the potential for perceived bias I was involved in assisting Equity Trustees in preparing its submission to the review.

The report was released in May 2013[32] and made what may fairly be described as bold recommendations for change in some areas. It suggests, for example, the introduction of something termed "stewardship audits" which appears to be a form of general enquiry into the LTC industry and its administration of charitable trusts. The report suggests the Stewardship Audit be undertaken by the newly formed federal regulator, the Australian Charities and Not-for-profit Commission ("ACNC"). The report does not identify any basis justifying such an enquiry, other than a perceived "deficit of readily available information" in relation to the service provided and fees charged by LTCs[33].

The report also recommends the introduction of a "fair and reasonable" test to operate along side the statutory fee caps. It is unclear what the criteria for determining fair and reasonable would be in light of the existing caps. In fact the report calls for "regulatory or industry guidance"[34] (on what one would have thought would be a threshold question) regarding the appropriate manner for assessing whether fees are fair and reasonable. It seems that there are inconsistencies in philosophical approach between a market based pricing mechanism and an administrative assessment of "reasonableness". One may have expected that prior to recommending the adoption of such an approach the report authors would have considered and weighed the practicalities and potential cost of implementing and administering such system if it is to operate appropriately and effectively. It is not clear whether CAMAC's preference for administrative intervention and regulation (as far as I am aware unprecedented in any other industry) is shared by either of the main political parties.

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[30] s.601 TDF and s.601TDJ
[31] s.601TDE an s.601TDI
[32] see:
http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2013/$file/Charitable_Trusts_Report_May2013.pdf
[33] See the Report [2.3.1]
[34] See bottom of page 37

Perhaps more surprisingly the report recommends that licensed trustee companies should be able to be removed from their position as trustee of a charitable trust in circumstances other than those currently available at law. The proposed basis for doing so is to impute a "primary intent" to the trust founder, and to relegate their selection of trustee to the status of "administrative arrangements" which can be altered when a court forms the view that doing so is called for in order to achieve the "primary intent" of the donor.

The report does not indicate why it is felt necessary or appropriate to depart from the normal rules of construction applying to wills and trust deeds, or why existing law in relation to removal of trustees is not performing adequately in this context. [35] Nor is it apparent why LTCs should be liable to removal on the basis suggested but not other trustees of perpetual charitable trusts.

As an alteration to the law relating to the appointment and removal of trustees is an alteration to the law of trusts, which currently sits with the states, there may well be constitutional obstacles to some of the reforms proposed.

It remains to be seen whether the Government will take any of the CAMAC recommendations up. One might expect that the Government may wait to see whether the ACNC identifies any real issues in the management of charitable trusts by licensed trustee companies before radical change to the existing law is further considered

9. LTCs- Fee Disputes

Which Fee Provisions Apply?

With the commencement of the Corporations Act the fee arrangements for existing clients were grandfathered for both charitable trusts[36] and other matters[37] so if the administration of an estate or trust commenced prior to 6 May 2010 it will be the now repealed provisions of the Trustee Companies Act which apply (see section 6 above).

Fee Dispute and the Corporations Act- Court Application:

Section s.601TEA provides a new regime for challenging trustee company fees in court. There are certain exclusions to the operation of the provision to disputes that involve negotiated fees, and certain (capped) fees applicable to charitable trusts.

Under s.601TEA a court may review the fees charged by a LTC. In reviewing the fees to determine whether they are excessive the court may consider ten matters specified in the section and "any other relevant matters".

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[35] se [4.2.3] and [5.5.4]
[36] s.601TDH

[37] CORPORATIONS AMENDMENT REGULATIONS 2010 (NO. 3) (SLI NO 88 OF 2010) - REG 4

The matters specified relate to thing like:

- whether the work performed was necessary;
- the period during which the work was performed;
- the quality of the work;
- the complexity of the work;
- whether the company was required to deal with extraordinary issues;
- the risk or responsibility associated with the appointment;
- the value and nature of the property dealt with, and;
- if the fees are calculated on a time basis that the time taken was proper.

As far as I am aware there is yet to be judicial application of these provisions, and it remains to be seen how they will be applied in the context of the corporatised nature of services provided, and the swings and roundabouts element to trustee company fees acknowledged in the quote from Vance referred to above.

In many respects this form of curial review of fees appears inconsistent with the policy of deregulating fees and leaving it to the individual companies to determine the correct balance between fee levels and the cost of provision of services in a competitive market.

The pricing of services by any company involves a strategic balancing of revenue and expense projections having regard to matters like corporate overheads, compliance costs, the fixed and marginal operational costs of service delivery, and overall business strategy, (including comparative market positioning and pricing).

The section 601TEA factors focus almost exclusively on matters relevant only to the marginal cost of the service delivery for the estate in question. The marginal cost of service delivery is only one matter a company must consider when determining its overall pricing policy for its suite of services in a market based pricing system. In a commercial context the question of the reasonableness of fees is determined by each company having regard to its own balancing of the various relevant factors. The determinant of whether fees are excessive from a corporate perspective would involve a consideration of a company's success in attracting and retaining clients, and its overall profitability and growth potential. What yardstick will the court adopt in order to determine what is excessive profit for a publically listed company operating in a competitive market? Will inefficient companies be able to justify higher fees (in the manner of gold plating of infrastructure spending in the energy industry)? Will, for example, staffing levels and staff remuneration be a factor to be balance when considering cost?

It is difficult to see how consideration of matters relevant to the marginal costs of service delivery in one estate, taken in isolation, can inform any meaningful conclusions about whether any given fee was "excessive".

It will be interesting to see how early cases deal with these critical issues.

Having regard to the scope of the s.601TEA factors it may be that the evidence that a trustee company would be required to submit in any such application would be quite extensive, and may potentially require disclosure of commercially sensitive information.

In the event that such evidence is to be tested by cross-examination, hearings could potentially be quite lengthy.

Importantly, the section provides that if trustee company fees are reduced by more than 10% the trustee company must, unless the court in "special circumstances" otherwise orders, pay the costs of the review. When one considers that most estates administered by trustee companies would be levied fees of between $25,000 and $50,000, a reduction in the company's commission entitlements of just a few thousand dollars could give rise to a liability for costs to the company many times greater than the total remuneration they received for the administration of the estate.

10. Fee Disputes in FOS

An alternative mechanism of addressing certain issues regarding fees is available through FOS, although according to paragraph: 5.1 of the FOS Operational Guidelines, the service may not consider disputes concerning the reasonableness of fees:

> 5.1 Exclusions from FOS's jurisdiction
>
> The Service may not consider a Dispute:
>
> b) about the level of a fee, premium, charge or interest rate – unless:
>
> (i) the Dispute concerns non-disclosure, misrepresentation or incorrect application of the fee, premium, charge or interest rate by the Financial Services Provider having regard to any scale or practices generally applied by that Financial Services Provider or agreed with that Applicant; or
>
> (ii) the Dispute concerns a breach of any legal obligation or duty on the part of the Financial Services Provider;

So where the dispute concerns the misapplication of a fee scale, charging fees other than as permitted by law, or, for example, a failure in relation to disclosure requirements regarding fees, an application to FOS should be considered. Where the complaint is that the fees were too high having regard to the nature of the estate and the work done it seems that a court application is the appropriate mechanism.

11A. Disputes other than fee disputes

It is important to note that the general principles applicable to all executors and trustees, including legislative obligations, and immunities, apply to LTCs.

For example, there is no greater obligation on a licensed trustee company to provide reasons for a discretionary determination than there is for any other fiduciary, and the law limiting the circumstances in which trustees can be required to give reasons for discretionary decision-making continues to apply. It would therefore be no more

possible to complain about an exercise of discretion by a LTC to FOS, than it would be to impugn any other trustee or executor's discretionary decision making in a court.

In relation to investment management LTCs are professional trustees, and therefore have a heightened standard of care applicable to them[38]

LTCs may be required to provide an account to people with an interest in an estate.[39] The trustee company will be entitled to charge a reasonable fee to comply with this request. A person with a proper interest in the estate includes a settlor, appointor, beneficiary, and "in relation to an application to a court relating to the estate- a person that court considers, in the circumstances of the case, has a proper interest in the estate" [40] which would presumably include a plaintiff in a Part IV application.

In addition LTCs may be required to provide on request certain individuals with an "Annual Information Return" [41] which includes details of income earned on the person's interest in the trust or estate, expenses in operating the trust or estate, the net value of the person's interest in the trust or estate.

Under ASIC Regulatory Guide 165 licensed trustee companies must have internal dispute resolution procedures for dealing with complaints from individuals who directly engage the company, individuals entitled to request an "information return," beneficiaries (or people who have commenced legal proceedings to be included as a beneficiary), or the settlor or appointor of a trust[42].

The Regulatory Guide expresses a preference for complaints to be investigated by staff not involved in the subject matter of the complaint or dispute. It suggests that the company should provide reasons for their response to the complaint in writing, where practicable, and should refer in the response to applicable provisions in legislation, codes, standards or procedures.[43]

When the complaint is received the LTC may be required to notify beneficiaries, or other persons potentially interested in the subject matter of the complaint, and keep them advised as to the progress of the complaint.[44]

LTCs are required to give a final response to a complaint within 90 days[45]. The final response must be in writing and advise the complainant of their right to take the matter to external dispute resolution, and the details of the EDR provider.[46]

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[38] Trustee Act s.6
[39] s.601SBB
[40] s.601RAD
[41] See Corporations Regulations 2001 r.5D.2.01(3) and 5D.2.2.2
[42] RG 165.74
[43] See guide principles 4.5
[44] RG 165.100
[45] RG 165.96
[46] RG 165.97

Companies are expected to maintain data relating to complaints, and for there to be regular reports to senior management concerning complaints, which means that formally engaging the IDR process should get the attention of the organisation.

For practical purposes then, whenever a client has a legitimate issue with a LTC:

1) Address the matter directly with the file manager, or if appropriate the file manager's line manager or supervisor.
2) From the outset ask for particulars of the company's IDR policy and procedure.
3) If the matter is not immediately clarified or resolved following the initial enquiry engage in the IDR process.
4) At the conclusion of 90 days from the initial making of a complaint, consider referring the matter to External Dispute Resolution (FOS)

The Financial Ombudsman's Service provides EDR for, I believe, all licensed trustee companies. This service provides dispute resolution and arbitration at no costs to the consumers. There are, however, significant limitations the jurisdiction of FOS to deal with complaints.

Paragraph 5.1 of FOS's Operational Guidelines sets out matters FOS cannot deal with; some of the relevant matters include complaints:

> "g) about the investment performance of a financial investment, except a Dispute concerning non-disclosure or misrepresentation;
>
> j) that relates to a decision by a Financial Services Provider as to how to allocate the benefit of a financial product (such as but not limited to a Life Insurance Policy) between the competing claims of potential beneficiaries (unless the other parties all consent, see. 14.1);
>
> o) where the value of the Applicant's claim in the Dispute exceeds $500,000;
>
> q) requiring a review of a trustee's exercise of discretion except to the extent that there is an allegation of bad faith, failure to give and proper consideration to the exercise of the discretion, or failure to exercise the discretion in accordance with the purpose for which it was conferred. "

Paragraph 5. 2 sets out circumstances where FOS may exercise a discretion not to determine a dispute:

"FOS may refuse to consider, or continue to consider, a Dispute, if FOS considers this course of action appropriate, for example, because:

> a) there is a more appropriate place to deal with the Dispute, such as a court, tribunal or another dispute resolution scheme or the Privacy Commissioner;
>
> b) the Applicant is not a retail client as defined in the Corporations Act 2001;
>
> c) the Dispute relates to a Financial Services Provider's practice or policy and does not involve any allegation of either Maladministration or inappropriate

application of the practice or policy;

d) the Dispute being made is frivolous or vexatious or lacking in substance; or

e) after the Dispute is lodged with FOS, the Applicant commences legal proceedings against the Financial Services Provider that are related to the Dispute."

FOS will not determine matters that will affect the interests the parties other than licensed trustee company, unless that party consents. This effectively limits the ability to review discretionary determinations that favour one beneficiary, or class a beneficiary, over another. It also limits complaints in matters where licensed trustee companies have individuals as co-trustees, unless the co-trustees consent to FOS determining the matter[47].

In practice it would be anticipated that most matters which proceed before FOS will relate to complaints regarding delay in estate administration, negligent acts or omissions in administering the estate assets, charging of fees in excess of published scales or fees as agreed (noting that FOS does not have power under 601TEA to make determinations of whether fees are "excessive").

11B. Dispute Resolution: Summary

Like any large organisations trustee companies have their problems with client service. From time to time particular issues may not be handled in a way that your clients, or even you, consider ideal or appropriate.

When such issues arise the first port of call should always be the file manager. If that does not yield results then, if possible, ask your colleagues for a contact name within the organisation with whom you can take the issue up. It will often be the case that festering issues can be "nipped in the bud" at an early stage in this manner.

If that does not succeed then the next step is to formally engage the company in its internal dispute resolution procedure. If that fails, then consideration needs to be given the alternatives available.

It should be noted that a complaint to FOS involves little or no cost to the client but potentially considerable cost and inconvenience to the LTC, and therefore this option should be explored in preference to a court application where available.

12. Removing a Trustee Company

In the absence of a clear and significant breach of duty, it is not an easy thing remove an executor or trustee. Trustee companies are no exception. The fact that beneficiaries may not like the trustee, or the fact that they charge fees, is unlikely to persuade the company, or a court, that that they should cease to continue in the role.

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[47] Operational Guidelines p.26

Unsurprisingly, trustee companies see themselves as being appointed by the testator or settlor, and not at the whim of the beneficiaries. They are often appointed in circumstances where it is anticipated that beneficiaries may be "difficult", and it is often these very individuals who are most inclined to take issue with the company's role. In such circumstances the company will likely be of the view that it ought to continue. If beneficiaries are adamant that they want an existing trustee company "out" it would be useful to ascertain if some other licensed trustee company is prepared to take over the appointment. Trustee companies may be more likely to agree to a retirement if it is in favour of another licensed trustee company. However, it should be noted, the changing from one company to another will usually involve the estate in considerable expense particularly if adjusting capital commission is payable upon the retirement, a new capital commission is payable upon the new appointment.

Court's have noted that in appointing LTCs testators or settlors must have intended that commissions would be payable, and the simple fact that the LTC is taking commission in accordance with its entitlement is not a sufficient basis for removal.[48]

More often than not where a client has an issue with a LTC it will be appropriate to work through the matter by direct dialogue with the company, or a reference to FOS for determination of the dispute if that is available, rather than calling for the company to step down.

13. State Trustees Ltd

State Trustees is not a licensed trustee company. It is established under its own legislation[49], with its own unique provisions relating to remuneration and fees[50]. It has its own complaints handling and dispute resolution processes.

Importantly, in addition to its commission, State Trustees is permitted by its statute to charge reasonable fees for genealogical and financial planning services provided to the [trusts and] estates it administers , and for the provision of legal services to those estates, (but if there is only one beneficiary, with that beneficiary's consent if they have legal capacity).

There is no equivalent provision in the Corporations Act, nor was there under the state legislation, other than section 20A of the Trustee Companies Act which allows trustee companies to charge for will preparation and incidental services, (if the will is prepared under the direction and control of a current legal practitioner).

It is therefore the case that the services for which STL is entitled to receive remuneration are considerably broader than LTCs.

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[48] Sir Moses Montefiore Jewish Home & Ors v Perpetual Company Limited & Anor [2012] NSWSC 210 @ 30-33

[49] State Trustee (State Owned Company) Act 1994
[50] s.13 and s.14

In terms of IDR and EDR- information concerning STL's alternative dispute resolution process can be found on the web[51]. In essence, complaints will be dealt with by a "Client Consultant" at first instance, then escalated to "The Client Concerns Manger". The ultimate point of escalation is to complain to VCAT if it is a VCAT matter or the State Government Ombudsman.

[51] http://www.statetrustees.com.au/uploads/static/36-STS20023-Resolving-Concerns-LR.pdf

14. Appointing a LTC

It is my view that trustee companies are significantly underutilized. They provide objective and professional fiduciary services, with significant expertise in both estate administration and asset management. They offer security of tenure. Even though an individual trustee company may cease to operate, whether through merger, takeover or insolvency, the assets of the estate are guaranteed to be kept separate, and the administration will pass to another licensed trustee company.

Estate planning and administration increasingly deals with:

- complexity in the financial affairs of a growing number of individuals,
- testamentary trusts as an intergenerational wealth a management tool,
- blended families, calling for objectivity in balancing competing and often opposed interests,
- family provision claims, and
- individuals living with dementia,

As such there is an ever-increasing potential role for trustee companies.

Simultaneously a growing number of legal practitioners are wary about taking appointments as executors or administrators of their client's affairs.

In that context it may be expected that if trustee companies can "meet the market" in relation to pricing and service, they will have a significantly increasing role to play in the administration the affairs of individuals in the years and decades to come.

<u>Appointing a LTC, Tips For Lawyers:</u>
Recommending to a client that they appoint licensed trustee company to assist in administering their affairs is a significant matter for any legal practitioner. If the client, or their family, is not satisfied with the services they receive it may reflect adversely on the lawyer, and potentially impact upon their relationship with the client.

For that reason I suggest legal practitioners should familiarise themselves with the key players in the industry in the state in which they operate, both in relation to fee charging practices and client service. The industry is not large, and there are only a handful of active participants in each state.

Unless you have an informed and a clear view on the subject, it would be prudent to consider providing clients with information concerning a number of companies, and leave it to the clients themselves to make a selection.

I would always recommend that clients be encouraged to meet with a representative of a trustee company prior to making an appointment, not only to discuss fee scales and how they are applied, (or to negotiate potential alternative fee arrangements), but also to provide the client with the comfort of having an understanding of who will administer their affairs, and to allow them the opportunity to discuss the processes the company will employ in discharging its duties.

<u>Discuss the Options</u>
When considering the appointment of a trustee company, particularly for a long-term role (for example the trustee of the testamentary trust, attorney under an enduring

power, or trustee of a perpetual charitable trust), it is important to consider and to discuss with the client their views in relation to matters like:

- *A power of appointment:*
  Is the client happy for the trustee company to remain in the proposed role with little prospect of being removed, or would they prefer there to be someone with the power remove the trustee company, and if so who and in what circumstances?

- *Investment Management:*
  Is the client happy for the trustee company to be responsible for the investment management of the estate, allowing for the use of the company's own common funds?

  Interestingly, in my experience, settlors and testators are almost never concerned by the fact that trustee companies will be administering the assets, and making investment decisions, including investing in common funds. That is, after all, the service that trustee companies provide, and their track record of fund management over the medium to long term (including through the GFC) stands up well in comparison to their peers in the wealth management industry.

  Beneficiaries, in contrast to testator/settlors, occasionally consider trustee companies having control of investment decisions and investing in common funds to be a most concerning conflict-of-interest. Often these views are coupled with quiet extreme views of what prudent trustee investment is (for example, believing that having any portion of a portfolio in growth assets is tantamount to gambling, or at the other end of the spectrum, believing that a trust portfolio should be heavily traded, and respond to whatever they read in that morning's newspaper).

  It would be prudent to canvass matters of investment management with your client at the time of considering appointing a trustee company, particularly if there are to be large sums to be managed over an extended period.

- *Does the client want a co-trustee or a co-executor involved?:*
  Some people are attracted to combining the expertise, objectivity and security of a LTC with someone who knows and understands the family issues.

  If desired this is an important matter to raise with the trustee company in advance as not all trustee companies are prepared to take joint appointments.

  Interestingly, both testators and beneficiaries are inclined to view the existence of a co-trustee or co-executor as lessening the work and responsibility of the company, and therefore supporting a claim for lower commission.

I can assure you that industry experience is quite the opposite, and although a company may not seek additional fees for having to liaise with a co- trustee or co-executor (and they may), they will almost certainly not offer a discount because one is appointed.

- *Fees:*
  There are significant differences in corporate cultures and approaches to service delivery between companies and fees, whilst certainly a relevant consideration, should not be the sole criteria upon which a choice is based.

Annexure A

Former Trustee Organisations

(Source: http://www.fsc.org.au/policy/trustees/former-trustee-organisations.aspx)

Used to be...	**Now...**
ANZ Executors & Trustee Company	Name changed to ANZ Trustees
Austrust	Taken over by Tower Financial Services in Mar 1996. Changed name to Tower Trust in Mar 1999
AXA Trustees	Acquired by Perpetual Trustees Australia in Dec 2000
Bagot's Executor and Trustee Company	Acquired by Farmers' Co-operative Executors and Trustees in Mar 1975
Ballarat Trustee Executors & Agencies Company	Became Fidelity Trustees
Burns Philp Trustee Company (except Canberra)	Taken over by Permanent Trustee Company
Burns Philip Trustee Company (Canberra)	Taken over by America Pacific group of companies in 1991. Subsequently liquidated by Ferrier Hodgson in 1994
Eagle Star Trustees	Taken over by Permanent Trustee Company
Elders Trustee & Executor Company	Changed name to Austrust in 1990
Equity Trustees Company of Tasmania	Merged with Tasmanian Permanent Executors and Trustees Association in 1979 to form Tasmanian Permanent Executors and Equity Trustees
Equity Trustees Executors & Agency Company	Name changed to Equity Trustees

Used to be...	Now...
Executor Trustee and Agency Company of South Australia	Name changed to Executor Trustee Australia in 1989
Executor Trustee Australia	Taken over by Austrust in Aug 1991
Farmers' Co-operative Executors & Trustees	Bought by IOOF and name changed to IOOF Australia Trustees in Feb 1992
Fidelity Trustees	Merged with Union Trustees in 1962 to become Union Fidelity Trustees
Guardian Trust Australia	Taken over by JP Morgan in 2003. Subsequently sold to Trust Company
IOOF Australia Trustees and IOOF Australia Trustees (NSW)	Bought by Tower Trust in Sep 2000
National Executors and Trustees Company of Tasmania	Merged with Perpetual Trustees Executors and Agency Company in Dec1967 to form Perpetual Trustees and National Executors of Tasmania
National Mutual Trustees	Changed name to AXA Trustees in Aug 1999
National Trustees Executors & Agency Company of Australasia	Renamed National Mutual Trustees
Permanent Trustee Company	Merged with Trust Company of Australia in Dec 2002, now trading as Trust
Perpetual Executors & Trustees Association of Australia	Became Perpetual Trustees Victoria
Perpetual Trustees and National Executors of Tasmania	Became Perpetual Trustees Tasmania

Used to be...	Now...
Perpetual Trustees Tasmania	Merged with Tasmanian Trustees in Dec 2001 to form Tasmanian Perpetual Trustees
Queensland Trustees	Now Perpetual Trustees Queensland
R & I Trustees	Became Trustees of Western Australia in 1994, trading as TrustWest.
Tasmanian Permanent Executors and Equity Trustees	Changed name to Tasmanian Trustees
Tasmanian Trustees	Merged with Perpetual Trustees Tasmania in Dec 2001 to form Tasmanian Perpetual Trustees
Tower Trust	Changed name to Australian Executor Trustees in Feb 2005
Trustee & Executors Agency Company	Taken over by ANZ Executors & Trustee Company
Trustees of Western Australia (trading as TrustWest)	Became subsidiary of Precedent Financial Services in 1999, 50% owned by Bank of Western Australia (trading as BankWest). Precedent changed its name to Plan B Financial Services in Mar 2000
Union Trustees	Merged with Fidelity Trustees to become Union Fidelity Trustees
Union Fidelity Trustees	Name changed to Trust Company of Australia in 1988; later changed to Trust Company
West Australia Trustee Executor and Agency Company	Now Perpetual Trustees WA
Winchcombe Carson Trustee Company	Bought by IOOF and name changed to IOOF Australia Trustees (NSW) in Feb 1992

Annexure B

Trustee Companies Act 1984: Key Remaining Provisions

9 Trustee Company may act as executor or administrator

Where a trustee company is named either alone or jointly as executor in the will of a testator (whether the will was made before or after the commencement of this section) the trustee company may act as executor, and may apply for and obtain probate of the will of the testator and may perform and discharge all the acts and duties of an executor as fully and effectually as an executor who is a private individual.

10 Authority for Trustee Company to obtain probate

(1) Where a person is named expressly or by implication as executor and is entitled to obtain probate of the will of a testator, that person may—

(a) instead of applying personally, authorize a trustee company to apply for and obtain probate of the will; or

(b) join with a trustee company in an application for a grant of probate of the will to the person and the trustee company jointly.

(2) An application under subsection (1) may be granted unless the testator has by will expressed the desire that the office of executor is not to be delegated or that the trustee company so applying is not to act in the trusts of the will.

11 Authority for Trustee Company to obtain letters of administration

(1) In any case in which a person may apply for and obtain a grant of letters of administration of the estate of a deceased person (whether with or without the will annexed), that person may—

(a) join with a trustee company in an application for a grant of letters of administration to the person and the trustee company jointly; or

(b) instead of applying personally, authorize a trustee company to apply for and obtain a grant of letters of administration to the estate.

(2) Where—

(a) a person joins with a trustee company in an application under subsection (1); or

(b) a trustee company makes an application that it has, pursuant to subsection (1)(b), been authorized to make—

the Supreme Court may grant letters of administration of the estate in accordance with the application.

(3) Where administration of any estate with or without the will annexed is granted to a trustee company either alone or jointly with any other person, that trustee company may do and perform all acts and duties which belong to the office of administrator or administrator with the will annexed, as the case may be, as fully and effectually as an administrator who is a private individual.

14 Trustee Company may be appointed trustee, receiver or guardian of estate

(1) Where a court, judge or other person has power to appoint a person as—

(a) trustee;

(b) guardian of a minor; or

(c) sole guarantor or surety for a person appointed as trustee or guardian—

a trustee company may be so appointed and may continue to act until removed from office.

(2) Where a trustee company is appointed to an office referred to in subsection (1) or as an administrator under the **Guardianship and Administration Act 1986**, the capital of the trustee company and all other assets of the trustee company shall be liable for the proper discharge of the duties committed to the trustee company and that liability shall be deemed sufficient security for the discharge of those duties in place of the bond required from private persons when appointed as trustee, guardian, administrator, guarantor or surety.

15 Trustee Company may act under power of attorney

(1) It shall be lawful for a trustee company to act under any power of attorney by which the trustee company is appointed attorney by any person, and all the powers conferred upon the trustee company by any such power of attorney may be exercised and carried into execution by such officers of the trustee company as it determines.

(2) The capital and all other assets of a trustee company shall be liable for the due execution of the powers conferred by subsection (1) upon the trustee company.

(3) This section does not authorize any person to confer any power upon a trustee company, which cannot be legally conferred upon a private individual.

16 Trustee Company may be appointed to act as temporary executor, administrator or trustee

An executor, administrator or trustee may appoint a trustee company to act as executor, administrator or trustee, and a trustee company, if so appointed by power of attorney, may act within the scope of the authority conferred upon it as effectually as the executor, administrator or trustee could have acted and may exercise all discretionary and other powers delegated by the principal as fully as the principal could have exercised them.

17 Executor or administrator may appoint Trustee Company

(1) It shall be lawful—

(a) for an executor or administrator acting under any probate or letters of administration, whether granted before or after the commencement of this section;

(b) for a trustee;

(c) with the consent of the Victorian Civil and Administrative Tribunal, for an administrator appointed under the **Guardianship and Administration Act 1986**; or

(d) with the consent of the Supreme Court, for the guardian of a minor—

to appoint a trustee company to perform and discharge all the acts and duties of the executor, administrator, trustee or guardian and the trustee company shall have power to perform and discharge those acts and duties.

(2) Where a trustee company is appointed under subsection (1)—

(a) the capital and all other assets of the trustee company shall be liable for the proper discharge of the duties referred to in subsection (1);

(b) the executor, administrator, trustee or guardian that appointed the trustee company shall be released from liability in respect of all acts done, or omitted to be done, by the trustee company acting under that appointment.

20A Preparation of wills

Despite anything to the contrary in the Legal Profession Act 2004, a trustee company may prepare wills and charge a fee and recover disbursements for will preparation and other related services, if the wills are prepared under the direction and control of an Australian legal practitioner within the meaning of that Act.

Annexure C

Trustee Companies Act 1984 (Now repealed) Provisions Relating to fees:

21 Commission chargeable by Trustee Company

(1) In respect of an estate committed (whether before or after the commencement of this section) to the administration or management of a trustee company as executor, administrator, trustee or as sole guarantor or surety or as guardian of any minor or in any other capacity, the trustee company shall be entitled to receive out of the estate, in addition to all moneys properly expended by the trustee company and chargeable against the estate, a commission to be fixed from time to time by the directors of the trustee company but not in any case exceeding—

(a) $5.50 for every $100 of the gross value of the estate; and

(b) $6.60 for every $100 of income received by the trustee company on account of the estate.

(2) Subject to this Act and to the **State Trustees (State Owned Company) Act 1994**—

(a) the commission determined under subsection (1) shall be received and accepted by the trustee company as full recompense and remuneration to it for acting in the administration or management of the estate; and

(b) no other charges beyond the commission and the moneys so expended by the trustee company shall be made by the trustee company.

(3) Notwithstanding subsections (1) and (2), if, in any case, on application by or on behalf of any person interested in the estate made upon summons served on the trustee company, the Supreme Court is of opinion that the commission is excessive, the Supreme Court may review and reduce the rate of the commission.

(4) The commission charged by a trustee company on the gross value of an estate or on the income of an estate (whether the estate was committed to the administration or management of the trustee company before or after the commencement of this section) shall not exceed—

(a) in relation to estates committed to the trustee company—

(i) before 1 July 2000—the amount of the published scale of charges of the company current at the time when the estate was committed to it plus 10%;

(ii) on or after 1 July 2000—the amount of the published scale of charges of the company current at the time when the estate was committed to it;

(b) in the case of income received in respect of any perpetual trust committed to the trustee company (whether before or after the commencement of this Act) the amount of the published scale of charges of the company applicable to income of trust estates as current from time to time.

(5) A trustee company shall lodge with the Commissioner a copy of a scale of charges of the trustee company.

(6) Any commission that a trustee company is entitled to receive in respect of an estate may be paid or deducted out of the estate at any time after the estate has been committed to the administration or management of the company.

(7) A trustee company is not entitled to draw any commission in respect of any portion of an estate that has not been distributed over and above an amount of commission that is calculated—

(a) on the value of that portion at the time it was so committed to the administration or management of the company; and

(b) at the rate charged at the time when the estate was committed to the administration or management of the company - the amount of commission so drawn being adjusted when that portion of the estate has been distributed.

(8) Nothing in this section prevents the receipt by a trustee company from an estate, in lieu of commission referred to in the preceding subsections, of any commission directed to be allowed or paid by the testator, settlor or other person by whom the estate is committed to the administration or management of the trustee company notwithstanding that the commission so directed to be allowed or paid is in excess of the commission referred to in the preceding subsections.

(9) In this section, a reference to a published scale of charges of a trustee company—

(a) includes a reference to a scale a copy of which is lodged with the Commissioner under this section; and

(b) does not include a reference to a scale of charges published after the commencement of this section unless a copy of that scale has been lodged with the Commissioner.

(10) This section does not apply where a trustee company is appointed as an administrator under the **Guardianship and Administration Act 1986**.

21A Fee for administering perpetual trust

(1) A trustee company is entitled to receive out of an estate in relation to which there is a perpetual trust (whether that estate was committed to the

company before or after the commencement of section 7 of the **Trustee and Trustee Companies (Amendment) Act 1995**) an administration fee in respect of each calendar year, or part of a calendar year, of the company's administration of the perpetual trust.

(2) The administration fee in respect of a calendar year, or part of a calendar year, that a trustee company is entitled to receive under subsection (1)—

(a) must not exceed 1.056% per annum of the value of the perpetual trust, calculated in the prescribed manner, for that year; and

(b) may be charged only against income received by the company on account of the perpetual trust for that year, or part of that year.

(3) If a trustee company charges an administration fee under this section against a perpetual trust, it may not charge a commission under section 21(1) or (7) in respect of the part of the estate constituted by the perpetual trust.

22 Supreme Court may allow additional commission

(1) When a trustee company at or after the commencement of this section in connexion with any estate under its administration or management lawfully carries on or manages (whether alone or in partnership or through an agent) any business or undertaking or, through a representative or otherwise, takes any active part in the management or direction of any corporation, the trustee company may apply to the Supreme Court to fix, in addition to the commission mentioned in section 21(1), a commission either by way of fee or percentage on the amount of the interest of the estate in such business, undertaking or corporation.

(2) The Supreme Court shall have jurisdiction to allow to the trustee company such additional fee or percentage as the Supreme Court thinks fit having regard to the work, care, skill and responsibility involved in carrying on, managing or directing the business, undertaking or company.

(3) If, before 1 July 2000, the Supreme Court fixed an additional commission under subsection (1) for a trustee company, the trustee company on and after that day is entitled to receive an additional amount of 10% of the amount of that commission.

23 Certain commissions prohibited

(1) Except as otherwise provided by this Act or the regulations, a person associated with a trustee company or with an executive officer of a trustee company is not entitled to receive any commission in respect of the performance of any function in relation to any property that forms the whole or any part of an estate.

(2) Subsection (1) does not apply in relation to a commission in respect of the performance of any function in relation to any property that forms the whole or any part of an estate where-

(a) if the estate is subject to a trust—the instrument creating the trust expressly provides for the payment of the commission; or

(b)if the estate is not subject to a trust—the person committing the property to the administration or management of the trustee company expressly authorizes the payment of the commission.

(3)In this section—

(a) ***commission*** means an amount paid or payable (whether directly or indirectly and whether or not pursuant to an agreement or undertaking) by way of fee, reward or commission or as payment in the nature of a commission (however described);

(b) ***executive officer*** in relation to a trustee company, means any person, by whatever name called and whether or not a director of the trustee company, who is concerned, or takes part, in the management of the trustee company;

(c) a reference to a person associated with a trustee company shall be construed as a reference to—

(i) a director or secretary of the trustee company;

(ii) a corporation that is related to the trustee company; or

(iii) a director or secretary of such a related corporation; and

(d) a reference to a person associated with an executive officer of a trustee company shall be construed as a reference to—

(i) a corporation controlled, whether directly or indirectly, by the executive officer; or

(ii) a trustee of a trust under which the executive officer has a beneficial interest, whether direct or indirect.

24 Fees for services etc.

In addition to the commission chargeable apart from this section under this Act, a trustee company shall, in respect of any estate, be entitled to charge and to receive a reasonable fee or remuneration for work involved in the preparation and lodging of returns for the purpose of or in connexion with assessments of any duties or taxes (other than probate, death, succession or estate duties).

40 Common funds

[subsections (1) – (12) omitted)]

(13) In addition to the commission, fees and remuneration which it is entitled to receive under sections 21, 21A, 22 and 24, a trustee company shall be entitled to charge and receive from or out of any income received by a common fund, a fee (according to the value of the work done and the services rendered) calculated at a rate not exceeding 1·1% per annum upon the capital sums invested in the common fund during the period in respect of which the income is received or allocated, for the establishment, keeping (including the keeping of books of account) and conduct of the common fund.