



Independent Pricing and Regulatory Tribunal

# **A fair and transparent fee structure for the NSW Trustee & Guardian**

**Other Industries — Issues Paper**  
May 2014





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## Invitation for submissions

IPART invites written comment on this document and encourages all interested parties to provide submissions addressing the matters discussed.

**Submissions are due by 16 June 2014.**

We would prefer to receive them electronically via our online submission form <[www.ipart.nsw.gov.au/Home/Consumer\\_Information/Lodge\\_a\\_submission](http://www.ipart.nsw.gov.au/Home/Consumer_Information/Lodge_a_submission)>.

You can also send comments by fax to (02) 9290 2061, or by mail to:

**NSWTG Review 2014**  
Independent Pricing and Regulatory Tribunal  
PO Box Q290  
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Submissions will be posted as soon as possible after the closing date on our website <[www.ipart.nsw.gov.au](http://www.ipart.nsw.gov.au)>. Late submissions might not be accepted and in that event will be returned to the submitter.

If you wish to view copies of submissions but do not have access to the website, you can make alternative arrangements by telephoning one of the staff members listed on the previous page.

We may choose not to publish a submission—for example, if it contains confidential or commercially sensitive information. If your submission contains information that you do not wish to be publicly disclosed, please indicate this clearly at the time of making the submission. IPART will then make every effort to protect that information, but it could be disclosed under the *Government Information (Public Access) Act 2009* (NSW) or the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW), or where otherwise required by law.

If you would like further information on making a submission, IPART's submission policy is available on our website.



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# 1 Introduction

The NSW Government has asked the Independent Pricing and Regulatory Tribunal of NSW (IPART) to review the fee structure of the NSW Trustee and Guardian (NSWTG). The NSWTG was established in 2009, through the merger of the Office of the Protective Commissioner (OPC) and the Public Trustee (PT) of NSW. It charges fees for 2 main types of services:

- ▼ **Financial management services.** These include managing the affairs and property of individuals with diminished capacity to make their own financial decisions (protected persons<sup>1</sup>) who have been assigned to the NSWTG by a court or tribunal order. They also include overseeing the performance of private financial managers for protected persons who have been assigned to these managers by a court or tribunal order.
- ▼ **Trustee services.** These include making wills and powers of attorney, administering estates, and establishing and managing trusts.<sup>2</sup> It provides these services to individuals who cannot afford or who choose not to obtain them from a private lawyer, accountant or trustee company.<sup>3</sup>

The NSWTG's clients differ widely in terms of their capacity to pay for its services. For example, some protected persons are relatively wealthy, with significant financial assets and income streams. Others have little in the way of assets, and rely on Centrelink benefits.

This paper sets out our proposed approach to the review and outlines our preliminary views (where we have them). It also explains how stakeholders can provide input to the review, and identifies the issues on which we particularly seek stakeholder comment.

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<sup>1</sup> Throughout this Issues Paper we use the term "protected persons" to include protected persons and the small number of other managed persons such as declared missing persons and voluntary mental patients.

<sup>2</sup> NSW Trustee and Guardian, *About us*, [www.tag.nsw.gov.au/about-us-2.html](http://www.tag.nsw.gov.au/about-us-2.html), accessed 6 May 2014.

<sup>3</sup> The NSWTG also administers the Public Guardian, which may be legally appointed to make major health and lifestyle decisions for those lacking the capacity to make such decisions themselves. However, the costs associated with this role, and the fees charged by the Public Guardian are outside the scope of our review.

## 1.1 What have we been asked to do?

The objective of this review is to recommend a fee structure for the NSWTG that is clear, fair and transparent and where possible, harmonises the fees for services provided by the former OPC and the former PT. In conducting the review, we have been asked to:

- ▼ review the costs of delivering the services the NSWTG provides to clients
- ▼ review the extent to which there are differences in cost recovery between client groups, and the capacity of the NSWTG to seek full cost recovery from different clients based on the nature of the service they require and the value of each client's assets or estates
- ▼ provide advice on options for meeting any funding shortfall, and
- ▼ consider how the NSWTG's fees and charges should be reviewed in the future.

We have also been asked to take account of our previous report on the Office of the Protective Commissioner's fees (September 2008) and the Regulatory Impact Statement of the Public Trustee (April 2008). In our report on the Office of the Protective Commissioner, we recommended similar fee structures and levels to the existing fees. However, we recommended introducing caps on fees to minimise cross-subsidies between high-wealth and low-wealth protected persons. We also found that the Office of the Protective Commissioner had inadequate information and recommended that it invest in a management information system. The Government has provided funding for this system, but it is yet to be fully implemented.

We are to provide a final report to Government with recommendations by 30 November 2014. Our Terms of Reference are provided in Appendix A.

## 1.2 What is our proposed approach for this review?

We have developed a proposed approach that will ensure we take account of all matters required by our Terms of Reference. However, we expect that limitations in the data available for this review will mean we cannot conduct a comprehensive, bottom-up review of the NSWTG's expenses and efficiency. Our proposed approach comprises the following key steps:

1. **Identify which of the NSWTG's client services should be regulated.** For each service and client group, we will consider whether the NSWTG is a monopoly supplier, or whether the client group has access to alternative suppliers in a competitive market. In general, only monopoly services should be regulated.

2. **Estimate the efficient costs of delivering these services by:**
  - a) Analysing the NSWTG's current costs using the data it provides. As noted above, this data may not be sufficient for us to undertake a full analysis to determine efficient costs. However, it will help us to understand its current cost base.
  - b) Observing the fees charged for similar services in the competitive market. This benchmarking will allow us to form a view on the efficient costs by proxy.
  - c) Considering the extent to which the costs of the NSWTG's services are likely to be higher than those provided in the competitive market due to specific needs of its client groups.
3. **Decide on an appropriate fee structure and fee levels**, taking account of the cost analyses in step 2, the appropriateness of recovering these costs from NSWTG's customers and the requirements in our Terms of Reference.
4. **Consider the extent to which the appropriate fee structure and levels will recover the NSWTG's full costs**, and decide how any funding shortfall should be met.
5. **Address any other relevant issues**, including how the NSWTG's regulated fees should be reviewed in the future.

In our view, this approach will enable us to recommend a clear, fair and transparent fee structure that is consistent across the NSWTG – including ensuring that any recommended subsidies to particular client groups are justified and the cost to the community is transparent.

### 1.3 How can you provide input to the review?

In conducting this review, we will undertake our own research and analysis as well as public consultation. This Issues Paper is the first step in our consultation process, and we invite all interested parties to make submissions in response to the paper by 16 June 2014. (More information on making a submission is provided on page iii at the front of this report.)

We will publish a draft report in August 2014, and seek further submissions in response to this draft. We will consider these submissions in forming our final recommendations, and provide our Final Report to the Government by the end of November 2014.

We will also hold a public roundtable in September, after the Draft Report, to give stakeholders another opportunity to provide input to the review. We will consider all stakeholder submissions and comments in developing our final recommendations.

Table 1.1 sets out an indicative timetable for the review.

**Table 1.1 Indicative timetable for this review**

Action	By
Release Issues Paper	9 May 2014
Receive submissions	16 June 2014
Release Draft Report	August 2014
Hold public roundtable	September 2014
Receive submissions on Draft Report	September 2014
Submit Final Report to Government	30 November 2014

## 1.4 The structure of this paper

The following chapters provide more information on the review, the issues we will consider in each step of our proposed approach, and our preliminary views on these issues (where we have them):

- ▼ Chapter 2 provides contextual information, including more information on NSWTCG and its functions and services, and the outcomes of past reviews of the fees charged by its predecessors.
- ▼ Chapter 3 discusses how we will decide which of the client services the NSWTCG provides should be regulated.
- ▼ Chapter 4 discusses how we will estimate the efficient costs of delivering these services.
- ▼ Chapter 5 discusses how we will decide on the appropriate structure and levels for fees.
- ▼ Chapter 6 looks at how we will assess the extent to which these recommended fees will recover the costs the NSWTCG incurs in providing the regulated services, and how any funding shortfalls should be met.
- ▼ Chapter 7 discusses the other issues we will consider.

## 1.5 List of issues for stakeholder comment

The following chapters highlight the issues on which we particularly seek stakeholder comment. For convenience, these issues are also listed below. Please feel free to comment on any or all of the issues, or provide other information or comments you consider relevant to the review and our Terms of Reference.

- |   |  |    |
|---|--|----|
| 1 | Do you think the broad principles we used for our 2008 review of the Office of Protective Commissioner fees are appropriate for the current review of the NSWTCG's fees? Should we add a principle that we should not recommend fees for services that are provided in a competitive market? | 14 |
| 2 | Do you agree with our preliminary view that we should recommend fees for the following NSWTCG services?  | 16 |

- Financial management services for protected persons (including services for 'intensive needs' directly managed, other directly managed and privately managed protected persons). 16
  - Trustee services for low-wealth customers. 16
- 3 Do you agree with our preliminary view that we should not recommend fees for the NSW TG's trustee services for market customers, but that the NSW TG should set its own fees for these services? If not, please provide your reasons. 16
- 4 Do you support our proposed approach for estimating the efficient costs of the NSW TG's regulated services, including identifying benchmark fees for similar services in the competitive market, and adding costs specific to serving protected persons, including 'intensive needs' protected persons? 20
- If so, what are the most appropriate benchmarks available? 20
  - If not, what methodology should we use to estimate these efficient costs? 20
- 5 Is IPART's previous interpretation of a 'clear, fair and transparent' fee structure appropriate for this review of the NSW TG's fees? If not, what would you recommend? 22
- 6 Do you agree with our proposed approach to identify the costs of serving protected persons before considering the fair proportion of those costs that protected persons should pay? If not, what methodology do you recommend we use? 24
- 7 What is the appropriate level of fees for protected persons? What level of community service obligation (CSO) should the Government provide? 26
- 8 Is the NSW TG's current policy for waiving fees and charges well-targeted, providing appropriate assistance only to the clients who need it? 26
- 9 Are the current caps on fees appropriate? Are they at the right levels? How should they be indexed over time? 27
- 10 Should the NSW TG charge market-based fees for preparing wills and powers of attorney? What is an appropriate fee for low-wealth customers? How should 'low-wealth customers' be defined? 29
- 11 Do you support our preliminary views that funding shortfalls should be met by the Government, including: 31
- Shortfalls resulting from the differences between the costs of providing financial service management to the NSW TG's clients and the fees that we recommend for these clients? 31
  - Shortfalls resulting from the application of the fee waiver policy? 31

– Shortfalls resulting from other ‘non-client’ activities and inefficiencies (through budget funding)?	31
12 Are you satisfied with the level of service provided by the NSW TG? Do you think it has improved over the last 5 years? Is the level of service similar to what you would expect from a private service provider (eg, a trustee company, solicitor or accountant)?	33
13 Should IPART index and publish a list of fees and charges annually and review the fees and charges after 5 years?	33
14 Should NSW TG use the fees that we recommend for protected persons as a guide in assessing the fees charged by private managers?	34

## 2 Context for this review

As Chapter 1 noted, the NSW TG was established in 2009 through the merger of the Office of the Protective Commissioner and the Public Trustee of NSW. The new entity provides the same services to clients as its predecessor organisations, and is administratively responsible for the Public Guardian. As context for our review, the sections below provide an overview of the:

- ▼ NSW TG's services and client base
- ▼ NSW TG's current funding and fee arrangements
- ▼ previous reviews of the NSW TG's predecessor organisations' fees.

Appendix B details the NSW TG's current fees and charges while Appendix C provides a snapshot of NSW TG's key operating statistics.

### 2.1 NSW TG's services and clients

The NSW TG provides a range of services which, for the purpose of this review, can be grouped into 3 categories:

- ▼ financial management services, which it provides to protected persons
- ▼ trustee services, which it provides to low-wealth customers and
- ▼ trustee services, which it provides to other 'market' customers.

It also has a range of other functions (including public education and managing the proceeds of crime), but these are outside the scope of this review.<sup>4</sup>

#### 2.1.1 Financial management services provided to protected persons

The NSW TG is assigned to manage the financial affairs of 'protected persons' by the Guardianship Tribunal, the Supreme Court, and the Mental Health Review Tribunal. 'Protected persons' are generally those who cannot manage their own financial affairs due to mental illness, dementia, intellectual impairment and catastrophic injury.<sup>5</sup>

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<sup>4</sup> *NSW Trustee and Guardian Act 2009* (Sect 11).

<sup>5</sup> NSW Trustee and Guardian, *Managed Clients*, <http://www.tag.nsw.gov.au/nswtg-managed-clients.html>, accessed 4 May 2014.

Its protected persons fall into 2 main groups:

1. **Directly managed protected persons.** These are protected persons who have no suitable family member or friend able or prepared to act for them. In this case, the NSW TG is assigned to directly manage their financial affairs. These people can be classified as ‘**intensive needs**’ and ‘**other**’, based on the service levels they require, due to their particular needs and circumstances.
2. **Privately managed protected persons.**<sup>6</sup> These are protected persons with a family member or other person assigned to manage their affairs. In this case, the NSW TG provides support and direction to this private manager.<sup>7</sup>

The NSW TG charges different fees and fee levels for the services it provides directly managed and privately managed persons.

### Protected persons

Currently there are around 14,000 protected persons in NSW. Around 75% are directly managed protected persons of the NSW TG and the remaining 25% are privately managed protected persons. Of the roughly 3600 privately managed protected persons:

- ▼ around 90% are directly managed by family or friends
- ▼ around 10% are managed on a commercial basis, either by private trustee companies, solicitors or accountants
- ▼ less than half a percent (very few) are managed by non-government organisations or charities.<sup>8</sup>

Family and friends who are private managers are not allowed to charge a fee for the services they provide, but can recover any out-of-pocket expenses.<sup>9</sup> Commercial entities and non-government organisations are allowed to charge fees for their services. There is currently no regulated limit on the fees these private managers can claim<sup>10</sup>, although the NSW TG provides support and direction to private managers.<sup>11</sup>

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<sup>6</sup> NSW TG, *Private Managers*, <http://www.tag.nsw.gov.au/private-managers-landing-page.html>, accessed 6 May 2014.

<sup>7</sup> It is important to note that the courts only tend to get involved in these cases where a person has not signed a power of attorney or where the courts have been made aware that the person exercising the power of attorney is not acting in the best interest of the incapacitated person.

<sup>8</sup> Email communication from NSW TG, 13 March 2014.

<sup>9</sup> Email communication from NSW TG, 11 March 2014.

<sup>10</sup> However there is an obligation to act in the protected person’s best interest under Section 39 of the Act.

<sup>11</sup> This is will be discussed in more detail in Chapter 7.

## Protected persons' assets

NSWTG protected persons vary widely in terms of their assets, needs and circumstances. For example:

- ▼ Some have been incapacitated due to accident and have received large compensation payouts. In this case, their assets can be worth millions of dollars, but they need support for the rest of their lives. The NSW TG must balance investments between reasonably liquid assets for current expenditure and longer term investments, including superannuation, for expenses in later life.
- ▼ Some have intellectual disabilities and their parents or guardians have passed away or are no longer capable of providing care. These protected persons may have received a significant inheritance, or may rely on Centrelink benefits.
- ▼ Some are aged people, perhaps with dementia, who can no longer manage their own affairs and have not given a power of attorney to anyone. Again, these protected persons range from having sizeable assets to relying on Centrelink benefits.
- ▼ Some have mental illnesses, and may be in and out of the mental health system, and may be homeless. Many protected persons in this category require significant levels of service from the NSW TG. It provides services to these protected persons at Clarence St, Sydney and in Parramatta. These services include providing small amounts of money each day for basic needs. This also reduces the risk of assault compared to clients receiving their fortnightly benefits in 1 transaction. Further, it limits the prospect of harm from potential substance abuse.<sup>12</sup>

### 2.1.2 Trustee services to low-wealth and market customers

The NSW TG makes wills, powers of attorney, administers estates, and establishes and manages trusts. It has a general legislative obligation to act for all persons who wish to engage its trustee services, regardless of their capacity to pay. However, it also offers these services in the competitive market, usually in direct competition to solicitors, trust companies and accountants. Thus it has 2 distinct customer groups:

- ▼ Low-wealth customers, who cannot afford to access trustee services in the competitive market.
- ▼ Market customers, who choose to use its services rather than an alternative service provider.

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<sup>12</sup> IPART, *Review of Fees of the Office of the Protective Commissioner, Final Report*, September 2008, p 18 and discussions with NSW TG senior staff.

Currently, the NSW TG is executor for approximately 5,500 wills and manages around 6,300 trusts. Box 2.1 provides a more detailed list of its customer functions.<sup>13</sup>

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**Box 2.1 NSW TG’s Public Trustee customer functions include to:**

- ▼ Make customer’s wills where they seek an executor and trustee.
- ▼ Provide estate administration for intestate estates.
- ▼ Manage deceased estates as both executor and administrator.
- ▼ Act as trustee of fixed or discretionary trusts created in wills, deeds and court orders for families, children and people with disabilities.
- ▼ Manage property in civil assets restraint and forfeiture.

**Source:** *NSW Trustee and Guardian Act 2009* (Sect 11).

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### 2.1.3 Other non-client functions

The NSW TG has a range of functions that don’t involve providing services to clients. For example, these include:

- ▼ providing public education about financial management and guardianship
- ▼ promoting the benefits of making of a will, enduring power of attorney and enduring guardianship
- ▼ providing advice to government on policy and legislation, and contributing to relevant law reform development
- ▼ managing the confiscated proceeds of crime on behalf of the State Government.

These other services are not directly relevant to our fee review. However, we will consider them in providing advice on how the NSW TG’s funding shortfalls should be met.

## 2.2 Current funding and fee arrangements

Historically, the NSW TG’s fees have not recovered the full costs of providing financial management services to protected persons. It has received government funding, in the form of community service obligation (CSO) payments, to meet the shortfall.

In contrast, its trustee service fees have historically generated an operating surplus. This reflects the fact that these services are provided in a competitive

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<sup>13</sup> Email communication from NSW TG, 26 February 2014.

market for a significant proportion of customers, and the NSWTG's fees for these customers reflect competitive rates. This operating surplus is currently used to meet part of the funding shortfall for financial management services for protected persons.

### 2.2.1 Current fund management arrangements

The NSWTG administers two common funds, which it can use to invest assets for protected persons, estates and trusts in this fund. At 30 June 2013, the value of the common funds was around \$2.5 billion.<sup>14</sup>

The NSWTG uses a commercial fund manager to manage investments in the common fund, which it selects using a competitive tender process. It pays this fund manager a commission, which is a percentage of total funds under management (regardless of whether the funds are being managed for a protected person or another client group). It considers that the tender process and increased value of the common fund has helped ensure this commission is a competitive rate.

The NSWTG's charges are listed in Appendix B. For example, it charges its clients a differential fee for investment in the common fund, depending on their client group:

- ▼ For directly managed protected persons, it charges an investment fee of 0.5% of the person's assets invested in the common fund. This is in addition to an establishment fee of 1% of chargeable assets,<sup>15</sup> and a management fee of 1.1% of chargeable assets.<sup>16</sup>
- ▼ For trustee customers, it charges an investment fee of 0.55% to 1.1% of the customer's assets in the fund, depending on the size of the assets and how long they have been held in the trust. For customers with assets over \$500,000 the fee is 1.1% after 2 years.<sup>17</sup>

### 2.2.2 Demand for NSWTG's services

Information provided by the NSWTG indicates that the number of protected persons assigned to it by the courts has increased in recent years. All else being equal, this suggests it is likely to require increased government funding. At the same time, the number of customers using its trustee services and paying competitive rates has declined (see Appendix C). A continuation of this trend will see the operating surplus for these services fall over time.

<sup>14</sup> Email communication from NSWTG, 26 February 2014.

<sup>15</sup> Up to a maximum of \$3,300.

<sup>16</sup> Up to a maximum of \$15,000.

<sup>17</sup> IPART, *Review of Fees of the Office of the Protective Commissioner, Final Report*, September 2008, p 9.

In the future, the demand for the NSW TG's services could be affected by a range of factors, including:

- ▼ the ageing of the population (which may increase demand)
- ▼ the increasing complexities of estates, for example due to increased use of self-managed super funds (which would increase the costs of managing estates).

### 2.2.3 NSW TG's fee waiver, remission, deferral and reduction policy

Section 111 of the *NSW Trustee and Guardian Act 2009* provides that the CEO of the NSW TG may waive, remit or reduce any fee where it appears just and reasonable to do so. The NSW TG has a fee waiver, remission, deferral and reduction policy.<sup>18</sup> This policy specifies that fees must be charged unless levying the fees would cause extreme hardship or would be inequitable. In considering whether to waive, remit or reduce a fee, the NSW trustee must take into consideration:

- ▼ the size of the estate
- ▼ the client's needs
- ▼ the estate's commitments and liabilities
- ▼ whether the payment can be deferred
- ▼ whether the estate could pay for the fees over time
- ▼ whether the estate can make a part payment
- ▼ whether the client would suffer any financial or other hardship in paying the fees
- ▼ the impact of any decision on the NSW TG's funding should it be applied to similar estates.

The policy states that NSW TG does not waive fees if there is any possibility of collecting them in part, in instalments or at a later date.

## 2.3 Previous reviews of Office of Protective Commissioner and Public Trustee fees

Our Terms of Reference for this review ask us to consider previous reports on the former Office of Protective Commission (OPC) and Public Trustee (PT), undertaken prior to the merger of these organisations to form the NSW TG. They include IPART's 2008 report on the OPC's fees, and the 2008 Regulatory Impact Statement on the PT's fees. The sections below outline what we consider to be the most relevant findings, recommendations and outcomes of these reports.

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<sup>18</sup> NSW Trustee and Guardian, *Fees – Waiver, Remission, Deferral and Reduction – Policy*, 4 February 2014.

### 2.3.1 IPART's 2008 review of the OPC's fees

The most recent review of the former OPC's fees was conducted by IPART. The final report on this review was provided in October 2008.<sup>19</sup> Those terms of reference were similar to the ones for the current review of the NSW TG's fees.

In making our recommendations for this 2008 review, we considered cost analysis, and aimed to balance the following 4 broad principles for a clear, fair and transparent fee structure:

1. Fees should reflect the costs of providing the service as far as practical, to minimise cross-subsidisation between activities and client groups in line with the principles of fairness and transparency.
2. Funding to cover the costs of meeting the OPC's social obligations—including waiving fees for protected persons who are unable to pay the full cost of the services they receive, providing services that benefit the wider community and meeting Government policy objectives—should come from the State Budget, in line with the principle of fairness.
3. Protected persons should pay no more for the services provided by the OPC than they would if these services were provided by commercial organisations operating in competitive markets. Such a principle avoids cross-subsidies between protected persons.
4. The criteria and process for assessing protected persons' capacity to pay, and waiving fees if they have no capacity, should strike a balance between simplicity (for example, using an adjustment based on a standard measure such as estate size or income) and flexibility (to reflect individual circumstances).

We found that our ability to assess the OPC's efficient costs and to set fees that reflect these costs was hampered by the limited data available from the OPC's financial and management information systems. We recommended these systems be upgraded as a matter of urgency, to ensure they could generate the information needed to fully consider the OPC's fee structure for future fee reviews.

The NSW TG's current fee structure for its protected persons broadly reflects our recommendations. One exception is that the NSW TG has not indexed the caps. Another is that it has imposed a 0.5% investment fee for privately managed customers' investments in the common fund, (which we did not specify). The NSW TG has allocated funds for upgrading the management information systems, but this work is not yet complete.

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<sup>19</sup> A copy of the Final Report is available at :  
[http://www.ipart.nsw.gov.au/Home/Industries/Other/OPC/Review\\_of\\_Fees\\_of\\_the\\_Office\\_of\\_the\\_Protective\\_Commissioner/25\\_Feb\\_2009\\_-\\_Release\\_Final\\_Report/Review\\_of\\_Fees\\_of\\_the\\_Office\\_of\\_the\\_Protective\\_Commissioner\\_-\\_Final\\_Report\\_-\\_September\\_2008](http://www.ipart.nsw.gov.au/Home/Industries/Other/OPC/Review_of_Fees_of_the_Office_of_the_Protective_Commissioner/25_Feb_2009_-_Release_Final_Report/Review_of_Fees_of_the_Office_of_the_Protective_Commissioner_-_Final_Report_-_September_2008).

For this review, we have been asked to consider the fees charged by NSWTG for trustee services. While NSWTG can be considered the 'last resort provider' for low-wealth clients seeking trustee services, the NSWTG also operates in competition to private providers for people with the capacity to pay for trustee services who choose the NSWTG to perform the functions. In this light, for this review, we propose to include an additional principle, which is that we should not recommend a fee structure for services that are subject to effective competition.

### 2.3.2 2008 Regulatory Impact Statement on the PT's fees

In 2008, the fee structure of the Public Trustee was reviewed internally within the Attorney General's Department by means of a regulatory impact statement (RIS). This resulted in:

- ▼ increases to most fees in line with changes in the CPI
- ▼ an increase in the cap on the common fund management fee
- ▼ increases in the value limits for small estates administration
- ▼ the addition of a profit margin to fees for service
- ▼ the introduction of an additional fee for long-term trusts (to reflect the fees applied by commercial trust companies).<sup>20</sup>

IPART seeks comments on the following

- 1 Do you think the broad principles we used for our 2008 review of the Office of Protective Commissioner fees are appropriate for the current review of the NSWTG's fees? Should we add a principle that we should not recommend fees for services that are provided in a competitive market?

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<sup>20</sup> Public Trustee, *Regulatory Impact Statement*, April 2008, pp ii-iii.

### 3 Identifying which NSW TG services should be regulated

In general, we consider that regulation should be used in markets where there is an absence of effective competition (which could be monopoly service provision). In this situation, regulation should aim to set prices that are similar to those that would exist in a competitive market, both to protect customers from abuses of market power, and provide incentives for efficiency improvements. Regulation is not necessary where effective competition already exists, as competition provides more effective customer protection and incentives.

This view suggests that the main issue we should consider in deciding which of the NSW TG's services should be regulated is whether the NSW TG is a monopoly supplier of the service or whether its clients can choose who supplies the service. We have formed a preliminary view on this issue for each of the NSW TG's services and client groups, including:

- ▼ Financial management services for protected persons, including directly managed and privately managed protected persons.
- ▼ Trustee services for low-wealth customers.
- ▼ Trustee services for market customers.

#### 3.1 Financial management services for protected persons

As Chapter 2 discussed, the NSW TG manages the financial affairs of 'protected persons' when the Guardianship Tribunal, the Supreme Court or the Mental Health Review Tribunal assigns these persons to its care.

Whether they are directly managed or privately managed protected persons, they are bound to pay the NSW TG charges for the services it provides. They cannot choose to use an alternative supplier. This makes the NSW TG a monopoly supplier of these services to protected persons.

On this basis our preliminary view is that the NSW TG's fees for financial management services for protected persons should continue to be 'regulated'.<sup>21</sup>

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<sup>21</sup> By 'regulated', we mean that IPART should recommend fees for those specific services provided.

### 3.2 Trustee services for low-wealth customers

As Chapter 2 noted, the NSW TG is generally obliged to provide trustee services to anyone who seeks its services, including low-wealth citizens of NSW. When the Public Trustee was originally established, the Government considered this obligation necessary because the competitive market, made up of private practice solicitors, wasn't providing these services to low-wealth customers.

Successive State Governments have continued to recognise that a public organisation should provide trustee services to low-wealth citizens, because this provides community benefits. This means that the NSW TG is effectively a supplier of last resort of trustee services to these customers (or a monopoly supplier).

On this basis our preliminary view is that the NSW TG's fees for trustee services for low-wealth customers should continue to be regulated.

### 3.3 Trustee services for market customers

The NSW TG also provides trustee services to customers who are not considered 'low-wealth'. These customers can choose to use its services or engage a lawyer, accountant or trustee company. This indicates that the NSW TG is not a monopoly supplier of these services to these customers.

On this basis, our preliminary view is that the NSW TG's trustee services to market customers should not be regulated. The NSW TG should set these fees itself, just like its competitors in this market.

IPART seeks comments on the following

- 2 Do you agree with our preliminary view that we should recommend fees for the following NSW TG services?
  - Financial management services for protected persons (including services for 'intensive needs' directly managed, other directly managed and privately managed protected persons).
  - Trustee services for low-wealth customers.
- 3 Do you agree with our preliminary view that we should not recommend fees for the NSW TG's trustee services for market customers, but that the NSW TG should set its own fees for these services? If not, please provide your reasons.

## 4 Estimating the efficient costs of providing the regulated services

Once we have decided which of the NSW TG's services should be regulated, the next step in our proposed approach is to estimate the efficient costs of delivering these services. Typically, when setting regulated prices for monopoly service providers we estimate the efficient costs of the regulated services using a detailed, bottom-up analysis, and then set prices that reflect those costs.

However, for this review, we do not expect to have sufficient data to conduct such detailed analysis. As Chapter 2 discussed, when we last reviewed the OPC's fees in 2008 we found its financial and management information systems could not generate the information needed for full consideration of its fee structure, and recommended these systems be upgraded. The NSW TG allocated funds for this purpose in 2009 following the merger of the OPC and PT to form the NSW TG. However, the new systems are not expected to be completed until 2017.

Given this, the NSW TG has engaged PricewaterhouseCoopers (PwC) to examine its costs and provide the best available information for our review. While we will analyse this information carefully, we expect that it will only allow us to understand and allocate the NSW TG's actual costs across its services – not necessarily the efficiency of these costs. Therefore, we also propose to:

- ▼ Consider the fees charged for similar services in the competitive market to establish efficient benchmark costs. Market prices can provide information on the efficient level of costs for a competitive firm, including a profit margin.
- ▼ Consider whether the NSW TG's costs are likely to be higher than these benchmark costs due to the specific needs of its client groups.

The sections below discuss our proposed approach to this step in more detail, and outline our preliminary views.

### 4.1 Analysing the NSW TG's actual costs

We will ask the NSW TG to provide information on its service delivery costs and fee revenues for each customer group for the past 4 years. We understand that it will provide this data in a form that allows it to be broken down into the various component functions (or tasks) that combine to form each service for its different customer groups.

We propose to analyse this data to assess:

- ▼ whether current fees reflect the actual expenditure on servicing each client group
- ▼ the extent to which the revenue generated by these fees recovers the total costs of providing the services, and the costs per client group.

This analysis will help us to understand the current level of cost recovery, and the extent to which cost recovery differs between client groups, as required by our Terms of Reference. It will also help us to assess the extent of any cross-subsidisation between client groups.

## 4.2 Establishing efficient benchmark costs

We propose to estimate the efficient costs of delivering the services to each client group by observing the fees charged for similar services in the competitive market, where possible. A number of other organisations manage assets and estates on behalf of clients, and their fees for these services may provide a relevant benchmark. The NSW TG also supplies some of its trustee services in competition with privately owned businesses, and we consider that the NSW TG's and its competitors' fees for these services may provide relevant benchmarks.

For example, in our preliminary view, there are close similarities between some of the NSW TG's financial management services for protected persons and its trustee services for market customers. In particular, it invests the assets of both these client groups in the same common fund, and charges them an investment fee:

- ▼ For protected persons, this fee is 0.5% of the value of the assets invested per annum. (This fee is exempt from GST.)<sup>22</sup>
- ▼ For high-wealth trustee customers, this fee is 1.1% pa.<sup>23</sup> (These fees include 10% GST.)

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<sup>22</sup> IPART, *Review of Fees of the Office of the Protective Commissioner, Final Report*, September 2008, p 9.

<sup>23</sup> This is the fee applicable for long-term trusts per annum, where the value of the assets invested in the common fund is \$500,000 or more. IPART, *Review of Fees of the Office of the Protective Commissioner, Final Report*, September 2008, p 9.

We note this 1.1% fee for high-wealth clients is consistent with the investment fees charged by the other Australian states' public trustees, and average investment fees in the commercial market.<sup>24</sup> However, we need to undertake further analysis in relation to the fee structures in other relevant jurisdictions to ensure that they are comparable.

The NSW TG also charges both directly managed protected persons and high-wealth trustee customers a management fee:

- ▼ For directly managed protected persons, this fee is 1.1% of chargeable assets, with a cap of \$15,000 pa on the total amount of the fee.<sup>25</sup>
- ▼ For high-wealth trustee customers (with trust assets valued over \$500,000) this fee is 1.1% of chargeable assets, with no cap. However, the fees range from 0.55% to 1.1%, depending on the value of the assets and the duration of the trust.<sup>26</sup>

We are interested in stakeholder comments on the appropriateness of the NSW TG's trustee service fees as a benchmark for its financial management service fees, as well as suggestions for other appropriate benchmarks.

Once we have established the most appropriate benchmarks we will use them to estimate the efficient level of costs per 'average client'. We recognise that many of the NSW TG's clients, particularly 'intensive needs' protected persons, are likely to need higher service levels than an average client. We will consider this issue and the associated costs separately, as discussed in section 4.3 below. We also note that the benchmark efficient costs per client will include a return (or profit) for providing the services.

<sup>24</sup> Appendix D provides a list of the trustee and protective management fees for all of the Australian States and Territories. The investment fee varies between 1.025% and 1.1%. We looked at some publicly available fees and charges from commercial trust companies (eg, The Trust Company) and the investment fee ranged from 0.83% for a bond fund to 1.79% for an Australian Share Fund. Source: [www.thetrustcompany.com.au/pdf/personal\\_services/documents/FSGEstatesandTrusts.pdf](http://www.thetrustcompany.com.au/pdf/personal_services/documents/FSGEstatesandTrusts.pdf). First State Super charges around 0.8% for a diversified fund. Source: [http://www.firststatesuper.com.au/tmp/PDS\\_Pension\\_%20Dec13%20WEB.pdf](http://www.firststatesuper.com.au/tmp/PDS_Pension_%20Dec13%20WEB.pdf) (pp32-33) ASIC identifies the medium rate for management costs for superannuation funds at 1.1% in its MONEYSMART Retirement Planner. Source: <https://www.moneysmart.gov.au/tools-and-resources/calculators-and-tools/retirement-planner>.

<sup>25</sup> IPART, *Review of Fees of the Office of the Protective Commissioner, Final Report*, September 2008, p 9. Note: Chargeable assets are essentially all assets other than the principal place of residence, household contents, motor vehicle, accommodation bond and antiques and jewellery of the protected person. IPART, *Review of Fees of the Office of the Protective Commissioner, Final Report*, September 2008, p 21.

<sup>26</sup> IPART, *Review of Fees of the Office of the Protective Commissioner, Final Report*, September 2008, p 9.

### **4.3 Considering whether the NSWTG's costs are likely to be higher due to specific needs of its client groups**

As Chapter 2 discussed, the client base of the NSWTG's financial management services are protected persons, who are unable to management their own affairs for a variety of reasons - including mental illness, dementia, and physical disability. Some of these clients are likely to be more costly to serve than the average client in the competitive market for trustee and financial management services.

We propose to analyse the information to be provided by the NSWTG to estimate the additional costs associated with protected persons, including 'intensive needs' directly managed protected persons. Our preliminary view is that for transparency, these additional costs should be analysed and quantified. Once we have considered the level of costs, we will consider what fees these customers should pay, with any shortfall funded through a subsidy from Government. This issue is discussed further in Chapter 5.

IPART seeks comments on the following

- 4 Do you support our proposed approach for estimating the efficient costs of the NSWTG's regulated services, including identifying benchmark fees for similar services in the competitive market, and adding costs specific to serving protected persons, including 'intensive needs' protected persons?
  - If so, what are the most appropriate benchmarks available?
  - If not, what methodology should we use to estimate these efficient costs?

## 5 Deciding on appropriate fee structure and levels

Once we have estimated the efficient costs of providing the NSW TG's regulated services, we will decide on the appropriate fee structure and fee levels to recover (or partly recover) these costs from its clients. In performing this step, we will take account of the estimated efficient costs per customer, as well as our Terms of Reference requirement for a fee structure that is 'clear, fair and transparent'. Broadly speaking, we will need to decide on the appropriate fees to charge, and the appropriate costs to be recovered through each of these fees.

Some of the key issues we will consider in this step are:

- ▼ what a 'clear, fair and transparent' fee structure means in the context of this review
- ▼ whether the current fee structure and levels for financial management services to protected persons are appropriate or can be improved
- ▼ whether the current fee structure and levels for low-wealth trustee customers are appropriate or can be improved.

### 5.1 What do 'clear, fair and transparent' mean in the context of this review?

The Terms of Reference for our 2008 review of the former OPC's fees also asked us to recommend a clear, fair and transparent fee structure. For that review, we considered that<sup>27</sup>:

- ▼ 'Clear' means that the fees should be readily understandable by clients or their representatives and advocates, and that the fee structure should not be unnecessarily complex or difficult to explain.
- ▼ 'Fair' means both that:
  - clients with the capacity to pay should not systematically pay more than the costs of the services they receive (in other words, they should not cross-subsidise the fees paid by other clients)
  - clients with limited capacity to pay should not be burdened beyond that capacity.

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<sup>27</sup> IPART, *Review of Fees of the Office of the Protective Commissioner, Final Report*, September 2008, p 4.

- ▼ 'Transparent' means that the fees charged should be publicly available and there are no hidden fees or unexpected expenses for clients.

We think that this interpretation remains appropriate for this current review of the NSW TG's services. However, we are interested in stakeholder views on this issue.

IPART seeks comments on the following

- 5 Is IPART's previous interpretation of a 'clear, fair and transparent' fee structure appropriate for this review of the NSW TG's fees? If not, what would you recommend?

## **5.2 Are the current fee structure and levels for financial management services appropriate?**

The current fee structure and levels for financial management services (Table 5.1) reflect the recommendations we made in our 2008 review of the OPC's fees. These recommendations involved largely maintaining the existing fee structure, with several changes to improve its cost-reflectivity and significantly reduce cross-subsidisation between high-wealth and low-wealth protected persons. These included:

- ▼ lowering the cap on management fees for directly managed protected persons from \$50,000 to \$15,000
- ▼ increasing the cap on the establishment fee for directly managed protected persons from \$2,200 to \$3,300
- ▼ introducing a cap on income fees for privately managed protected persons of \$2,000
- ▼ introducing a higher account management fee for privately managed protected persons with greater complexity and
- ▼ removing the threshold test for pension income and exempting pension income from the income fee for privately managed protected persons.

**Table 5.1 Current fee structure and levels for financial management services**

Fee	Directly managed protected persons	Privately managed protected persons
Establishment (%)	1% of chargeable assets, capped at \$3,300	N/A
Management (% pa)	1.1% of chargeable assets pa, capped at \$15,000 pa	N/A
Investment (% pa)	0.5% of assets invested in the common fund	0.5% of assets invested in the common fund
Income (% pa)	N/A	4.0% of income earned, capped at \$2,000 pa
Account keeping (\$ pa)	N/A	\$100 for simple accounts \$200-\$300 for more complex accounts

**Note:** The investment fee that applies to privately managed funds was not part of the recommended fee structure in the 2008 IPART review. Private Managers have a choice as to whether they invest the money with the NSW TG or with some other fund or in other assets.

During the 2008 review, we considered alternative fee structures, including a fee-for-service structure. This structure would have involved setting fees for each individual service (or task) that may be provided, so a protected person's total fees more closely reflected the costs of the specific services they received. However, we found there were inadequate data to set such fees. In addition, we considered that a fee-for-service structure may make it more difficult for protected persons and their representatives to understand what fees they will be charged and the total amount they will be charged in a given year, reducing the transparency of the fee structure.

For the current review of the NSW TG's fees, we expect there will still be inadequate data to set fees for individual services, given the NSW TG's upgraded management information system is not yet functioning. Therefore, our preliminary view is that we should not pursue a detailed fee-for-service fee structure (an itemised account). However, we will carefully consider whether the current fee structure can be further improved in terms of its fairness and transparency, and whether the level of fees is appropriate. Some of the specific issues we will consider include:

- ▼ Should fees for services provided to protected persons include the additional costs of serving these people? (also discussed in section 4.3)
- ▼ Should fees for services provided to protected persons include all the efficient costs of the NSW TG?
- ▼ Which protected person(s) should receive a subsidy towards paying these fees and what should the level of that subsidy be?
- ▼ Should caps be set on fees and if so, should the annual establishment fees, management fees, investment fees and/or income fees be included in a cap and what is the appropriate level of any resulting cap?

In considering these issues, we are mindful that the current fee structure for protected persons consists of a percentage of assets or income (depending on whether the protected person is privately or directly managed), which means that low-wealth protected persons are unlikely to pay for the costs of service provision.

We note that the fee structure varies between privately managed protected persons, who are charged on a percentage of income basis, and directly managed protected persons, who are charged on a percentage of assets basis. We intend to consider whether there continues to be a justification for the different basis of fees.

### **5.2.1 Should fees for protected persons include the additional costs of serving these people?**

As Chapter 4 discussed, we propose to establish the efficient costs of providing the NSW TG's financial management fees using benchmark fees for an 'average client' seeking similar services in the competitive market. As some of the NSW TG's clients require higher levels of service than 'average' clients, we also propose to quantify and account for these additional costs. This is important for transparency reasons. However, it is not necessarily appropriate to recover these additional costs in fees for some or all protected persons or trustee customers.

In general, we support a user-pays approach to setting prices, as it ensures those who impose additional costs bear those costs and creates an incentive for them to control the costs. However, by their nature, protected persons are unlikely to have control over their additional costs, and vary widely in terms of their capacity to pay for fees. Therefore, in the context of this review, a strictly user-pays approach may not be considered fair.

For this review we propose to estimate the efficient cost of providing financial management services for an average person. We will then consider the additional costs (or loadings) that the NSW TG faces in servicing protected persons. In doing this we will consider the total costs of service provision before deciding what level of fees these protected persons should pay and what proportion the Government should contribute.

IPART seeks comments on the following

- 6 Do you agree with our proposed approach to identify the costs of serving protected persons before considering the fair proportion of those costs that protected persons should pay? If not, what methodology do you recommend we use?

### 5.2.2 Does the current fee structure and fee waiver policy include appropriate discount arrangements for clients with limited capacity?

As previously discussed, protected persons assigned to the NSW TG vary widely in terms of their capacity to pay its fees. The current fee structure aims to ensure those with limited capacity to pay do not pay more than they are able. This is done in 3 ways. First, most fees are expressed as a percentage of the client's wealth – ie, their chargeable assets, their investments in the NSW TG's common fund, and their income. Second, for directly managed protected persons 'chargeable assets' are defined to exclude their principal place of residence,<sup>28</sup> and for privately managed protected persons, the income fee only applies to income above the level of a Centrelink pension (currently \$21,913 pa)<sup>29</sup>. Thirdly, the NSW TG can waive fees and charges.

This means, for example:

- ▼ A privately managed, low-wealth high-maintenance protected person (whose only source of income is limited to a Centrelink pension) would be liable for no fees other than a minimal account keeping fee.
- ▼ A directly managed adult protected person who has suffered an injury or illness and not received a compensation payout and who does not have a large value of chargeable assets would pay relatively low establishment and management fees because of the application of fees on a percentage basis to the value of their assets.

In addition, the current rate of the investment fee for all protected persons who have assets invested in the NSW TG's common fund (0.5% of the value of their investments pa) appears to include a significant discount compared to the market rate for similar investment services (which as Chapter 4 discussed, appears to be around 1.1% pa). However, we note that a 1.1% management fee also applies to chargeable assets for directly managed protected persons. Whilst a management fee does not apply to privately managed persons an additional 4% income fee does apply.<sup>30</sup>

Finally, the NSW TG can also waive fees for individual clients at its discretion.

<sup>28</sup> Once a superannuation account pays a lump sum, or starts paying an annuity, these amounts are included in the client's chargeable assets.

<sup>29</sup> Department of Human Services, *Age Pension*, <http://www.humanservices.gov.au/customer/services/centrelink/age-pension>, accessed 6 May 2014.

<sup>30</sup> IPART, *Review of Fees of the Office of the Protective Commissioner, Final Report*, September 2008, p 9.

We intend to consider the above arrangements to assess whether they remain appropriate. In general, our preliminary view is that protected persons with limited capacity to pay should pay discounted fees on fairness grounds. However, it is also important to ensure that those who do have capacity pay efficient fees for the services they receive.

For example, in principle, protected persons who have received a compensation payout should have the capacity to pay unsubsidised fees, because their payout ought to cover their financial management costs. However, it is not clear whether compensation payouts do cover these costs, and we seek stakeholder input on this issue.

In the 2008 review, IPART considered whether there should be a means test for access to subsidised rates and decided not to apply one in order to retain a simple fee structure.<sup>31</sup>

We note that the NSW TG has the discretion to waive or reduce fees for protected persons, due to the varied and sometimes extreme circumstances these people may face.<sup>32</sup> Our preliminary view is that the NSW TG's fee waiver, remission, deferral and reduction policy is comprehensive and appropriate and would provide well-targeted assistance.

IPART seeks comments on the following

- 7 What is the appropriate level of fees for protected persons? What level of community service obligation (CSO) should the Government provide?
- 8 Is the NSW TG's current policy for waiving fees and charges well-targeted, providing appropriate assistance only to the clients who need it?

### **5.2.3 Are the current caps on annual establishment fees, management fees and income fees set at the appropriate level?**

As Table 5.1 above indicates, several of the fees for financial management services include a maximum amount that an individual protected person may be charged for the associated services:

- ▼ the establishment fee is capped at \$3,300
- ▼ the management fee is capped at \$15,000 pa
- ▼ the income fee is capped at \$2,000 pa.

These dollar amounts were allowed to be indexed each year by the change in Sydney Consumer Price Index, however, the NSW TG has not applied indexation.

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<sup>31</sup> IPART, *Review of Fees of the Office of the Protective Commissioner, Final Report*, September 2008, p 2.

<sup>32</sup> The current fee waiver/reduction policy is available at:  
[http://www.tag.nsw.gov.au/verve/\\_resources/Fees\\_waiver\\_Remission\\_Deferral\\_and\\_Reduction\\_Policy\\_Feb\\_2012.pdf](http://www.tag.nsw.gov.au/verve/_resources/Fees_waiver_Remission_Deferral_and_Reduction_Policy_Feb_2012.pdf).

The purpose of these caps is to ensure that where the fee is expressed as a percentage of wealth, those with high-wealth do not pay more in fees than the cost of providing the services they receive. This is important to avoid cross-subsidisation between high-wealth and low-wealth protected persons.

We will consider whether the current caps on fees remain appropriate, and whether they can be modified to improve the fairness of the fee structure. It is important to consider the fee structure in deciding whether to apply a cap and what to apply the cap to. For example, we need to carefully consider the costs that the management fee covers compared to the investment fee and consider how these relate to each other and the incentives that are in place under a particular fee structure. We will also need to consider the practical application of any caps or combination of caps.

IPART seeks comments on the following

- 9 Are the current caps on fees appropriate? Are they at the right levels? How should they be indexed over time?

### **5.3 Are the current fee structure and levels for trustee services still appropriate?**

As Chapter 3 discussed, our preliminary view is that only trustee services for low-wealth customers should be regulated. The NSW TG's current fees for trustee services (which currently apply to all customers) are summarised in Table 5.2. These fees implicitly include discounts for low-wealth customers to the extent that they vary depending on the value of the trust or estate. Those fees for low-value trusts or estates are likely to be less than the marginal cost of providing the service. In addition, there is no fee for the preparation and safekeeping of wills and powers of attorney. The NSW TG can also waive fees in accordance with its policy.

**Table 5.2 Current fee structure and levels for trustee services**

Service	Fee
<b>Wills</b>	
Preparation and safekeeping	No charge
Executor services (% of estate value)	<ul style="list-style-type: none"> <li>▼ 4.4% -- up to \$100,000</li> <li>▼ 3.3% -- \$100,001 to \$200,000</li> <li>▼ 2.2.% -- \$200,001 to \$300,000</li> <li>▼ 1.1% -- Over \$300,000</li> </ul>
<b>Powers of attorney</b>	
Preparation and safekeeping	No charge
Establishment (\$ on activation)	\$550
Management	<ul style="list-style-type: none"> <li>▼ 1.1% of income-producing and invested assets, with minimum charge of \$1,100 pa</li> <li>▼ \$11 per month</li> </ul>
<b>Trusts</b>	
Establishment (% of trust value on set up)	<ul style="list-style-type: none"> <li>▼ 4.4% -- up to \$100,000</li> <li>▼ 3.3% -- \$100,001 to \$200,000</li> <li>▼ 2.2.% -- \$200,001 to \$300,000</li> <li>▼ 1.1% -- Over \$300,000</li> </ul>
Account keeping (\$ per month)	\$11
Tax return preparation (\$ per hour)	\$220 for first hour, then \$165 per hour
Investment planning (\$ per hour)	\$165 per hour
Commission – short-term trust (% of income earned by the trust)	5.775%
Commission – long-term trust (% of trust value pa)	<ul style="list-style-type: none"> <li>▼ 0.55% -- up \$250,000</li> <li>▼ 0.825% -- \$250,001 to \$500,000</li> <li>▼ 1.1% -- Over \$500,000</li> </ul>

**Source:** NSW Trustee and Guardian (2013), *Facts on Fees*, [http://www.tag.nsw.gov.au/verve/\\_resources/11401\\_Facts\\_on\\_fees\\_booklet\\_web.pdf](http://www.tag.nsw.gov.au/verve/_resources/11401_Facts_on_fees_booklet_web.pdf), accessed 23 April 2014.

We will consider whether these current fees and fee levels are appropriate. Further, we will consider whether they are appropriate for low-wealth customers, and how low-wealth customers should be defined. In considering a definition for low-wealth customers, we will examine the profile of customers (with respect to their assets) to determine which customers use the NSW TG as a provider of last resort.

We will also consider the extent to which the fees for similar services can be harmonised for protected persons and low-wealth trustee customers. As this will be the first time we have considered the NSW TG's trustee services and fees, we have not formed any preliminary views on these issues. We are interested in stakeholders' views.

We note that currently, the NSW TG prepares and keeps wills free of charge where it is named as executor. However, it charges fees for performing the executor services.<sup>33</sup>

<sup>33</sup> We note that preparing wills for free reduces future court and legal costs associated with people dying intestate.

In the private sector, a solicitor or private trustee company can be engaged to prepare a will. It is our understanding that in some circumstances a nominal or fixed fee is charged for the preparation and storage of wills. However, this may differ depending on the complexity of the will.

However, fees are typically charged for performing executor services once required.

For solicitors, there are typically 2 accounts. These are:

- ▼ the (regulated) fee for obtaining probate or administration
- ▼ the fee for the work involved in collecting and distributing the estate.

These accounts are in addition to disbursements paid to third parties.

For work carried out up to the grant of probate or letters of administration, a solicitor cannot charge fees higher than the scales set by Schedule 4 of the *Legal Profession Regulation 2005*.<sup>34</sup>

For the NSW TG, we will consider whether there should be a separate fee for the preparation of a will to improve cost reflectivity. We will consider whether the current levels of executor service fees are fair.

The NSW TG also currently prepares and keeps powers of attorney free of charge. Once the power is activated, it charges a \$550 establishment fee and an ongoing fee of 1.1% of the income-producing and invested assets. Again, we will consider whether there should be a separate fee for the preparation of the power of attorney to improve cost reflectivity.

Our preliminary views are that the NSW TG should have discretion to waive or reduce trustee service fees due to the varied circumstances its customers may face. However, there should be guidelines for exercising this discretion appropriately to ensure that people with the capacity to pay for services do pay.

IPART seeks comments on the following

- 10 Should the NSW TG charge market-based fees for preparing wills and powers of attorney? What is an appropriate fee for low-wealth customers? How should 'low-wealth customers' be defined?

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<sup>34</sup> *Legal Profession Act 2004*, s 329.

## 6 Considering cost recovery and how any funding shortfalls should be met

Our Terms of Reference ask us to review the capacity of the NSW TG to seek full cost recovery for the regulated services it provides to each client group, based on the nature of those services and the value of each client's assets or estate. They also ask us to provide advice on the options for meeting any funding shortfalls that might arise.

We note that we considered similar issues in our 2008 review of the former OPC's fees, and found that full cost recovery was not feasible for that organisation, given its clients' varied capacity to pay and its social and legislative obligations to serve those protected persons. It was also found that funding shortfalls due to these obligations should come from the State Budget, in line with the principle of fairness.<sup>35</sup>

To address these issues in our current review, we propose to assess the likely level of cost recovery under our recommended fee structure. This will be done by forecasting the revenue the NSW TG is likely to generate from that fee structure and then comparing this revenue to the organisation's reported or forecast costs.<sup>36</sup> The difference between these amounts will represent the funding shortfall.

### 6.1 Likely sources of the funding shortfall

There may be 4 sources of the funding shortfall, including:

1. The additional costs associated with providing services to protected persons, including high-maintenance directly managed protected persons. These costs were discussed in Chapters 4 and 5.
2. The costs associated with discount or fee waiver arrangements for protected persons with limited capacity to pay and low-wealth trustee customers. These costs were discussed in Chapter 5.
3. The costs associated with the NSW TG's other non-client functions such as advocacy and community education, discussed in Chapter 3.

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<sup>35</sup> IPART, *Review of Fees of the Office of the Protective Commissioner, Final Report*, September 2008, pp 5, 32.

<sup>36</sup> Accounting for revenue and costs associated with unregulated services.

4. The additional costs associated with any inefficiency in the NSW TG's operations, discussed in Chapter 4.

We will use the information provided by the NSW TG to estimate the likely shortfall due to each of these sources, where possible.

## 6.2 Preliminary views on meeting the funding shortfall

Our preliminary view is that funding shortfalls from all of these sources should be funded by the Government, as is currently the case.

As previously discussed, we will consider the difference between the NSW TG's costs of providing financial management services to its clients and our recommended fees. We consider that the Government (on behalf of the community) should fund this shortfall.

The shortfalls resulting from the NSW TG's other non-client activities (for example, public education) and inefficiencies should also be funded by the Government. Costs associated with non-client activities are driven by government policies and are within the Government's control. Therefore, it is not appropriate to recover them in fees for the regulated services. Costs associated with any inefficiency are also within the Government's control, and it is not appropriate to recover these costs in fees for regulated services.

We note that it is important for the funding shortfalls to be transparently and explicitly funded. Operating surpluses generated from the unregulated trustee services should be explicitly considered in dividend payments to Government, with an explicit CSO provided for any difference between the cost of service provision and fees for low-wealth trustee customers and protected persons.

IPART seeks comments on the following

- 11 Do you support our preliminary views that funding shortfalls should be met by the Government, including:
  - Shortfalls resulting from the differences between the costs of providing financial service management to the NSW TG's clients and the fees that we recommend for these clients?
  - Shortfalls resulting from the application of the fee waiver policy?
  - Shortfalls resulting from other 'non-client' activities and inefficiencies (through budget funding)?

## 7 Addressing other relevant issues

As part of our review, we will also consider other issues raised in our Terms of Reference, or which we consider relevant. At this stage, we have identified 3 other issues, including:

- ▼ whether the service standards provided by the NSWTG are appropriate
- ▼ how the NSWTG's fees should be reviewed in future
- ▼ whether IPART's recommended fees should be used as a guide for the fees for private managers of protected persons.

### 7.1 Are the NSWTG's service standards appropriate?

In our 2008 review of the former OPC, some stakeholders raised service standards as an area of concern, and indicated that the quality of service provided by the NSWTG was below their expectation. We recommended that it develop key performance indicators to measure its responsiveness to clients' needs. We also recommended that it undertake independent surveys of client and stakeholder satisfaction and measure the numbers of complaints and appeals.<sup>37</sup>

As part of this review, we will confirm that these measures have been implemented, and we will seek information from the NSWTG on this. If they have been implemented, we will consider whether there has been any improvement in the NSWTG's service levels over the past 5 years. We are interested in feedback from stakeholders about this issue, and whether they are generally satisfied with the quality of services they receive from the NSWTG.

We note the link between service provision and the level of fees that should be paid. In general, providing a lower level of service reduces costs and therefore the fees should be lower. Conversely, a higher level of service increases costs and therefore fees should be higher. We will consider this relationship in recommending fees.

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<sup>37</sup> IPART, *Review of Fees of the Office of the Protective Commissioner, Final Report*, September 2008, p 45.

IPART seeks comments on the following

- 12 Are you satisfied with the level of service provided by the NSW TG? Do you think it has improved over the last 5 years? Is the level of service similar to what you would expect from a private service provider (eg, a trustee company, solicitor or accountant)?

## 7.2 How should fees be reviewed in future?

In our 2008 review of the former OPC's fees, we recommended that a full review of these fees be conducted again in 5 years, in time for fee changes in July 2013. We also recommended that a mid-term review be conducted primarily to re-assess private management fees in the light of better data on capacity to pay, costs and revenues that should result from upgrades to the OPC's financial and management information systems.<sup>38</sup> We understand that these reviews did not go ahead, given the delay in implementing the upgraded management information systems due to the merger of the OPC and PT.

As part of the current review of the NSW TG's fees, we will consider the timing and process for reviewing fees in future years. We consider that greater clarity about future reviews will assist forward planning by both the NSW TG and its clients. Some of the issues we will consider include:

- ▼ what agency is likely to be best placed to review the NSW TG's fees in the future, and the matters that should be considered
- ▼ the appropriate timing of these reviews (for example, every 5 years)
- ▼ whether it is possible to set multi-year price paths between reviews, to provide greater certainty and allow fees to vary with efficiency assumptions and indexation.

Our preliminary view is that IPART would index and publish annually any caps or fees that we recommend, and that IPART should review the fees and charges after 5 years.

IPART seeks comments on the following

- 13 Should IPART index and publish a list of fees and charges annually and review the fees and charges after 5 years?

<sup>38</sup> IPART, *Review of Fees of the Office of the Protective Commissioner, Final Report*, September 2008, p 4.

### **7.2.1 Should IPART's recommended fees be used as a guide for private managers of protected persons?**

As Chapter 2 indicated, protected persons are assigned by a court or tribunal to either the NSW TG or a private sector manager, but overseen by the NSW TG. Once assigned by a court or tribunal protected persons are effectively receiving a monopoly service from the private manager.

Both the NSW TG and Supreme Court have the power to set fees for private managers.<sup>39</sup> The NSW TG could use the fees that we recommend in our final report as a guide or benchmark in assessing the reasonableness of the fees for private managers.

IPART seeks comments on the following

- 14 Should NSW TG use the fees that we recommend for protected persons as a guide in assessing the fees charged by private managers?

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<sup>39</sup> *NSW Trustee and Guardian Act (2009) Sect 115.*



## Appendices



## A Terms of Reference



## NEW SOUTH WALES TRUSTEE & GUARDIAN FEES REVIEW

### Terms of Reference

I, Barry O'Farrell, Premier of New South Wales, pursuant to Section 9(1)(b) of the *Independent Pricing and Regulatory Tribunal Act 1992*, request the Tribunal to review the fees charged by the New South Wales Trustee & Guardian (NSWTG) for services provided to its clients, in order to recommend a fee structure that is clear, fair and transparent.

#### In conducting the review, the Tribunal should:

- Review the costs of service delivery (including a full expense analysis) for all services delivered to clients;
- Review the extent to which there are differences in cost recovery between client groups;
- Review and harmonise the existing fee schedules which reflect the former Office of Protective Commissioner and Public Trustee of NSW's operating base; and
- Consider how NSW TG fees and charges should be reviewed in the future.

#### The Tribunal should also:

- Review the capacity of the NSW TG to seek full cost recovery for the services provided to each client group based on the nature of those services and the value of each client's estate.
- Advise on options for meeting any funding shortfall that may arise; and
- Have reference to IPART's report on the Office of the Protective Commissioner's fees dated October 2008 and the Regulatory Impact Process of the former Public Trustee of NSW dated April 2008.

The Tribunal is to conduct the review and provide a final report to both me and the Attorney General by 30 November 2014.



Barry O'Farrell  
Premier of New South Wales

## B Current charges

The current charges (as recommended by IPART in 2008) for financial management services provided to protected persons are presented in Table B.1 and B.2.

The current charges (as consulted on in the 2008 Regulatory Impact Statement) for trustee services are shown in Table B.3.<sup>40</sup>

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<sup>40</sup> IPART made recommendations on the fees and charges that could be charged for financial management service for protected persons in our 2008 Review. Fees and charges for trustee services were consulted on through the Regulatory Impact Statement for the Public Trustee Fees also in 2008. However, the power to actually charge fees is drawn from the *NSW Trustee and Guardian Regulation 2008* (NSWTG Regulation) which itself is delegated legislation from the NSW TG Act 2009.

The NSWTG has the discretion to waive or reduce any fees prescribed in the regulations. Clause 27 of the NSWTG Regulation also gives limited power to the NSWTG to charge for trust services it provides that were not considered in the Regulation.

**Table B.1 Current NSW TG charges for directly managed protected persons**

**Establishment fee**

1% of chargeable assets,<sup>a</sup> up to a maximum of \$3,300

**Management fee**

1.1% per annum of chargeable assets up to a maximum of \$15,000

**Investment fee**

0.5% per annum of the value of investments in the Common Fund

<sup>a</sup> 'Chargeable assets' exclude the principle place of residence and any income up to the level of a full Centrelink pension.

Source: NSW Trustee and Guardian (undated), *Fees for NSW TG Managed Clients*, <http://www.tag.nsw.gov.au/fees-for-fm-services.html>, accessed 23 April 2014 and IPART, *Review of Fees of the Office of the Protective Commissioner – Final Report*, September 2008, p 9.

**Table B.2 Current NSW TG charges for privately managed protected persons**

**Income fee**

4.0% per annum of Income up to a maximum of \$2,000

**Investment fee**

0.5% per annum of the value of investments in the Common Fund

**Accounts fee**

\$100 for simple accounts pa

\$200-\$300 for more complex accounts pa

**Note:**

1. The 0.5% investment fee was not part of the 2008 IPART recommended fee structure.
2. Other fees applicable to all clients include deduction of amounts paid to third parties, such as banks, solicitors, and authorised visitors, engaged on behalf of the client.

Source: NSW Trustee and Guardian (undated), *Managers of Clients (Private Management) Fees*, <http://www.tag.nsw.gov.au/supported-manager-fees.html>, accessed 23 April 2014 and IPART, *Review of Fees of the Office of the Protective Commissioner – Final Report*, September 2008, p 9.

**Table B.3 NSW TG current trustee and executor charges**

**Wills**

**Preparation and safe keeping** No charge

**Executor fees**

Up to \$100,000 4.4%

From \$100,001 to \$200,000 3.3%

From \$201,000 to \$300,000 2.2%

Over \$300,000 1.1%

**Account keeping fee** \$11 per month

**Tax return preparation** \$220 for first hour then \$165 per additional hour required

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**Power of Attorney**

<b>Preparation and safe keeping</b>	No charge
<b>Establishment fee</b>	\$550 once off fee when activated
<b>Account management fee</b>	1.1% per annum of income producing and investment assets (minimum charge of \$1,100 per annum)
<b>Account keeping fee</b>	\$11 per month

**Trusts****Capital commission on set up**

Up to \$100,000	4.4%
From \$100,001 to \$200,000	3.3%
From \$201,000 to \$300,000	2.2%
Over \$300,000	1.1%

<b>Tax return preparation</b>	\$220 for first hour then \$165 per additional hour required
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<b>Account keeping fee</b>	\$11 per month
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<b>Investment planning fee</b>	\$165 per hour
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<b>Commission</b>	5.775% of income earned by the trust
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**Long term trusts (comes into effect after 2 years and replaces the commission)**

Up to \$250,000	0.55%
From \$250,001 to \$500,000	0.825%
Over \$500,000	1.1%

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**Source:** NSW Trustee and Guardian (2013), *Facts on Fees*, [http://www.tag.nsw.gov.au/verve/\\_resources/11401\\_Facts\\_on\\_fees\\_booklet\\_web.pdf](http://www.tag.nsw.gov.au/verve/_resources/11401_Facts_on_fees_booklet_web.pdf), accessed 23 April 2014.

## C Overview of NSW TG operating statistics

Table C.1 below provides a numerical overview of the NSW TG before and after the merger of the Office of the Protective Commission (OPC) and the NSW Public Trustee (PT).

Of particular note:

- ▼ Full time equivalents (FTEs) have risen from 499 to 544 (by 45 or 9%) since the merger.
- ▼ There has been growth in the OPC functions and a decline in the PT functions.
- ▼ Dividend payments and tax equivalents have reduced to zero. Any surplus from the PT functions has been used to fund the OPC functions.

**Table C.1 Snapshot of the NSWTG 2008 and 2013 (\$nominal)**

	Units	OPC 2007/08	PT 2007/08	NSWTG 2013
<b>Staff</b>	FTE (no.)	230	269	544
	Cost (\$M)	19.59	28.11	52.73
<b>Revenue &amp; Costs</b>				
Commissions & Fees	Amount (\$M)		24.71	26.71
Management Fees	Amount (\$M)	24.77	5.99	29.69
CSO Payments	Amount (\$M)	2.83	2.39	5.11
Other Government Funding	Amount (\$M)	0	0	0
Dividend Paid	Amount (\$M)	0	3.54	0
Tax Equivalents	Amount (\$M)	0	2.16	0
<b>Funds Under Management</b>				
Financial Management Common Fund	Amount (\$M)	1,204		1,379
Trustee Common Fund	Amount (\$M)		1,289	1,135
<b>Clients</b>				
Directly Managed	No.	8,880		10,466
Privately Managed	No.	2,556		3,444
Banker	No.	759		42
Estates Administered	No.		5,819	5,487
Trusts Administered	No.		7,143	6,284
<b>Source of Clients</b>				
Guardianship Tribunal	%	86.3%		92.8%
Supreme Court	%	4.2%		2.4%
Mental Health Review Tribunal	%	7.2%		4.8%
Others ( Magistrate Orders)	%	2.3%		0.0%
<b>Client Impairment - Direct Management</b>				
Psychiatric	%	36.8%		40.0%
Intellectual	%	20.1%		27.2%
Age Related	%	0.1%		11.4%
Brain Injury	%	15.5%		12.1%
Other	%	1.3%		8.1%
Physical	%	1.0%		0.7%
Unknown	%	7.6%		0.5%

Source: Email communication from NSWTG, 26 February 2014.

| 7 Addressing other relevant issues

## D Fees and charges in other states

Table D.1 below presents an abridged comparison of the fees and charges for financial management services for ‘protected persons’.

The sources of these fees and charges are available for:

- ▼ Victoria at:  
<https://www.statetrustees.com.au/uploads/content/115-STL-Fees-Charges-Retail-10022014.pdf>
- ▼ Queensland at:  
<https://www.pt.qld.gov.au/publications/documents/fees-charges-2013-no1.pdf>
- ▼ South Australia at:  
<http://www.publictrustee.sa.gov.au/uploads/pdf/FAQ/FeesPersonalEstatesSep13.pdf>
- ▼ Western Australia at:  
[http://www.publictrustee.wa.gov.au/\\_files/scale\\_of\\_fees.pdf](http://www.publictrustee.wa.gov.au/_files/scale_of_fees.pdf)
- ▼ Tasmania at:  
<http://publictrustee.tas.gov.au/about/fees-charge>
- ▼ Australia Capital Territory at:  
[http://www.publictrustee.act.gov.au/inf/publications/ptact\\_fs\\_Fees2013.pdf](http://www.publictrustee.act.gov.au/inf/publications/ptact_fs_Fees2013.pdf)
- ▼ Northern Territory at:  
<http://www.nt.gov.au/justice/pubtrust/fees.shtml>

Many of the States also apply a cost pass through of third party disbursements eg, solicitors and estate agents charges. In particular, Queensland and Western Australia have a detailed and extensive list of fee for service charges.

**Table D.1 Comparison of fees and charges for directly managed protected persons (2013/14)**

	NSW	Victoria	Queensland	South Australia	Western Australia	Tasmania	ACT	Northern Territory
<b>Establishment Fee or Sale Commission</b>	1% Assets <b>\$3,300 Cap</b> Family home exempt	5.5% on all assets	N/A	0 to \$200K 4.4% \$201K to \$400K 3.3% \$401K to \$600K 2.2% Over \$600K 1.1%	N/A	\$550	<b>Commission on Sale of Assets</b> Cash assets 1.1% Non-cash assets 4.4% <b>Purchase or sale of personal dwelling</b> 1.1%	2.2% of any cash managed under trust & on other assets that are sold and bought into the trust
<b>Income Commission</b>	N/A	3.3% pensions 6.6% all other	N/A	8.25% rent by Trustee 2.75% rent by Agent 5.5% all other income	N/A	3.3% rent by Agent 6.6% all other income	<b>Pensions Annuities</b> Under \$410pw 2.5% From \$410pw 5.5% <b>Other Income</b> 5.5%	2.2% Pensions, DVA 6.6% Dividend, Rent & Interest 3.3% rent by agent
<b>Investment Fee</b>	0.5%	1.1%	Fund manager fee is deducted before distribution	1.025%	Fund manager fee is deducted before distribution	1.1%	1.1%	Fund manager fee is deducted before distribution
<b>Management Fee</b>	1.1% <b>\$15,000 Cap</b>	N/A	From 3.2% >\$5,000 down to 0.43% >\$2.5m <b>\$10,871 Cap</b>	N/A	From 3.1% >\$5,000 down to 0.44% >\$2.5m <b>\$11,100 Cap</b>	N/A	N/A	N/A
<b>Personal Financial Management Fee</b>	N/A	N/A	Ranges from \$1,054 for low effort to \$7,384 for high effort clients	N/A	Ranges from \$1,110 for low effort to \$11,544 for high effort clients	N/A	N/A	N/A