

CRITICAL REVIEW OF IPART DRAFT REPORT (2014)
OF THE NSW TRUSTEE AND GUARDIAN

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N. B. This document is intended for public reading. It has also been distributed to interested third-parties.

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INTRODUCTION

I am a client of the NSW Trustee and Guardian (hereafter NSWTG). My Will and enduring Power of Attorney have been made appointing the NSWTG respectively as my executor and trustee in the future event of my death, and as my attorney contingent on the future event that during my life I lose the capacity to manage my financial affairs. NSWTG is my preferred choice for an Executor, Trustee and Attorney. I would not appoint next-of-kin or friends as an executor because the tasks are onerous, and unlike mortal individuals the NSWTG has perpetuity to its existence.

I also have next-of-kin and friends who are clients of NSWTG and they have told me that they are very satisfied with the delivery of services to them.

As a professional writer, public speaker, and part-time academic, I hold a wide range of interests across a variety of disciplines. My interests also encompass matters of public policy and the jurisprudence of human rights, particularly as they impinge on the aged and people with disabilities. On previous occasions I have corresponded with state government bodies in both NSW and Queensland concerning public reviews on the question of legal capacity and the disabled.

Over the past decade I have read IPART's previous reports on the now defunct government agencies: the Public Trustee (hereafter PT) and Office of the Protective Commissioner (hereafter OPC). I have read the current draft report on NSWTG. I have also read the publicly available submissions that IPART received in June-July 2014 from various individuals, NGOs, and the NSW Premiers & Cabinet Office.

My firm conviction is that NSWTG performs an *essential* and *indispensable service* to the community. It serves the citizens of NSW in ways that the private, corporate, ecclesiastical, and NGO sectors are unable or unwilling to do. This submission is presented in the same spirit as the policy of a Community Service Obligation that is undertaken without any remuneration. It is not based on any obligations to the NSWTG, its employees, or any third-parties. It is my critical commentary on IPART's draft review (released 9 September 2014) of the fees and services of the NSWTG.

The current Attorney General and his colleagues voted against the corporatisation of the Public Trustee in 1998, and also opposed the 2009 merger. Since the Liberal-National coalition has shown that level of interest in the recent history of the organisation, one hopes that the coalition state government will be a strong supporter of NSWTG so that it will flourish into the future.

1 INITIAL CONCERNS

Unfortunately, older people sometimes become victims of financial abuse, and often the perpetrators are the people closest to them. NSW Trustee and Guardian is a professional body with years of experience helping reduce the risk of costly investment mistakes. It also provides a Power of Attorney service as an alternative to friends and family members taking on the role.

Hon. Greg Smith MP, former Attorney-General of NSW¹

In the above remarks, which were published on 5 March 2014 by the Liberal Party of NSW on the party's website, the then Attorney-General of NSW gave a fine endorsement of the work of NSW TG. He went on to illustrate his point about NSW TG's services and professionalism by referring to a case involving an elderly lady who was living in reduced and unhealthy circumstances and was being abused by her sons. As soon as NSW TG had carriage of her affairs as her attorney, she experienced a dramatic improvement in her accommodation, health-care, and in the provision of meals.

The elderly, disabled, and cognitively impaired are susceptible to being exploited by next-of-kin, friends, acquaintances, and by institutions. Human self-centred interest, greed and the opportunity to wield power over the weak all too often over-rides altruistic behaviour. One reason why NSW TG exists is the tacit recognition that humans are not essentially "good" and that social interdependence and accountability is required as a necessary restraint on unbridled self-centrism. This point is also implicit in the need for the NSW TG to be under scrutiny via external financial audits, reports to Parliamentary committees, and the implementation inside the agency of risk management procedures to monitor employees.

The abovementioned anecdote from the former Attorney-General is one small example of the good social capital that stems from what NSW TG does best: serving its clients. It is lamentable that NSW TG does not receive sufficient credit for the services that it provides. While NSW TG is not immune from scrutiny, and it will never be a perfect agency, there should always be a fair and even-handed treatment of both its strengths and shortcomings. One expects that IPART will exemplify a high standard of professionalism, and not just relate a half-told story based on complaints from aggrieved individuals.

1.1 Endorsements

A disturbing impression is that the draft report is constructed around negative remarks that have been accepted at face-value and cherry-picked to create a lopsided portrait. It is curious that the above endorsement from the former NSW Attorney General was overlooked, and that the following positive endorsements in two submissions to IPART are not quoted:

I consider it is important to recognise the leadership strengths of the Trustee and her executive in inventively leading change to best practice and financial sustainability in

¹ "Protect Yourself Against Elder Financial Abuse" at <https://www.nsw.liberal.org.au/news/state-news/protect-yourself-against-elder-financial-abuse>

a very complex area of service, accountabilities, legislative strictures and changing community and political expectations.²

I have recommended these services to clients whose relative no longer has the capacity to make decisions for themselves and do not have enduring guardianship or enduring power of attorney. I have always had positive outcomes and sound advice. This is a much needed service.³

NSWTG should be called to account when complaints are factually justified, and clearly people do complain to members of Parliament, to the Ombudsman and so on. Some complaints may be justified due to an individual employee's failure in duty. Other complaints may relate to bureaucratic failures in service in a given quadrant of the organisation. However, it does not logically follow that because some people complain that this constitutes definitive proof that organisation is a ship-wreck. Not all clients have complaints. It is a feature of human behaviour that more people complain than those who write letters of appreciation.

IPART does not exist to arbitrate on complaints nor does the report presume to take that role. However, by only quoting complaints, and in the absence of any caveat statement that acknowledges there are two sides to a story, IPART's draft report is lamentably lop-sided.

1.2 Acknowledge Good Social Capital

NSWTG plays a vital and integral role in producing good social capital that flows specifically to the vulnerable people whom they serve. Social capital refers to the cohesion, mutual sympathy and goodwill that build up in a community through the actions of individuals, social networks, voluntary institutions, and those institutions that make a positive contribution to social welfare. Social capital is not synonymous with the ownership of material goods.⁴

NSWTG's good social capital is found in undertaking the difficult and sometimes thankless tasks associated with caring for clients in protected estates. It is also found in its trustee work administering the files on behalf of children (who are vulnerable and protected at law), estate beneficiaries, and in acting as an attorney on behalf of the elderly. NSW TG stands in the social chasm where many vulnerable persons would otherwise languish and be exploited by selfish individuals and by corrupt employees in private institutions. We would be much the worse for wear if NSW TG did not exist.

1.3 Concerns about the Draft Report

In the previous decade IPART's reports concerning the OPC and PT demonstrated a reasonable understanding about those agencies. The past reports were characterised by a fair and balanced treatment of the issues under discussion, and contained constructive advice that was premised on IPART being a positive assistant. For example, past reports indicated areas

² Submission, Robert G. Haebich, 4.

³ Submission, Alzheimer's Australia, 3.

⁴ On the concept of "social capital" refer to Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000). R. M. Silverman, *Community-Based Organizations: The Intersection of Social Capital and Local Context in Contemporary Urban Society* (Detroit: Wayne State University Press, 2004).

where the OPC could take remedial steps. Such steps not only discussed the prospects of improvements coming via internal restructures but also considered ways to sustain the OPC with appropriate adjustments to fees (as per both the 2003 and 2008 reports).

The current report does contain recommendations which are no doubt intended to assist NSW TG in its financial operations. However, it is not altogether clear if *all* of the recommendations are properly grounded in a holistic and accurate understanding of *both* NSW TG *and* its clients.

1.3.1 Background

Eleven years ago an agreement for better funding of the OPC from NSW Treasury initially showed some promise:

Recently the Budget Committee of Cabinet agreed to increase the allocation to OPC in 2003-2004 to \$9 million as part of a new OPC fee structure. The new fee structure commenced on 1 October 2003.⁵

However, this situation deteriorated due to a refusal on the part of NSW Treasury to keep its promises. Indeed, IPART observed in 2008 that a definite pattern was discernible from 2004/05 onwards where NSW Treasury arbitrarily and deliberately reduced contributions:

The arbitrary nature of the cut in subsidy is neither satisfactory to the OPC or its clients or indeed to Budget processes.⁶

The OPC was directly accountable to the Director-General of the Attorney-General's department:

The Director General of the Attorney General's Department approves the OPC operating budget.⁷

The legislation that brought about the merger of OPC and PT in 2009 conferred the same authority about approving budgets on the Director General of the Attorney General's Department. From 1991 until mid 2014 the position of the Director-General was occupied by the same person. In the years leading up to the 2009 merger the OPC's budgets went into a CSO deficit.

By September 2008 the cumulative debt was \$10.6 million and the short-term "fix" to the problem was to access the PT's surplus funds. The PT's surplus existed as its self-funding system that enabled it to always be off the state's budget (a point that successive Labor and Liberal-National state governments and other observers have conveniently chosen to forget). *It evident that the October 2008 mini-budget's claim that the merger would achieve savings of \$100,000 per annum for a period of four years was wide of the mark.*⁸

⁵ General Purpose Standing Committee No. 3, 031015 answers to QON AG.doc available at <http://143.119.255.90/isysquery/1f4c2401-0295-4c9c-b469-be3b0e10af64/42/doc/>

⁶ IPART, *Review of Fees of the Office of the Protective Commissioner*, Final Report September 2008, 40.

⁷ *Office of the Protective Commissioner and Public Guardian Annual Report 2008*, 33-34.

⁸ Mini-Budget 2008-09, Appendix A, p. A-4.

1.4. Critical Observations

Even allowing that this is only a draft report, some of its content leaves much to be desired. It is susceptible to valid criticism concerning various methodological, analytical, and factual points.

- It is highly curious that the draft report was made digitally available for public scrutiny *prior* to the scheduled round-table forum for stakeholders in late September. This action represents a shift in procedure as compared with previous reviews.
- It also represents a departure from having a closer consultative time with NSWTG before preliminary findings are finalised.
- The draft report's negative preliminary findings could prompt both prospective and existing clients of executor-trustee-attorney services to look elsewhere. That would be an ironic outcome given that IPART is meant to be assisting both NSWTG and the NSW Parliament in establishing a fair system of fees that is supposed to sustain and presumably expand an existing service.

1.4.1 Negative Tone

A change in attitude and tone is very apparent from IPART's previous reviews. The negative tone of the draft report casts NSWTG in the worst possible light. This negative tone cannot be construed as simply reflecting marginalised voices of aggrieved individuals who have complaints. The narrative tone appears to reflect an ideological stance taken by IPART particularly since there is little evidence in the narrative that complaints must be understood as a half-told story.

1.4.2 Rhetorical Use of Evidence

Some very weak morsels of evidence are clumsily strung together to support a lack lustre argument. There are isolated quotes cited from some submissions, and these are added to summary remarks based on the findings from a finalised report by the NSW Ombudsman. All of this material is lumped together to magnify and exaggerate the negative theme, and is used to justify IPART's analytical claims about "efficient costs."

The draft report draws on some statistics contained in an NGO submission. The NGO submission only reported just four statistical results about NSWTG that it obtained from a survey of its members. At first glance the statistics look alarming. However, as is shown in chapter four, the survey was not a proper piece of social-scientific research.

It beggars belief that the draft report does not analyse the submitted statistics. Instead, the statistics are used as evidence to prop up an analytically slipshod argument. The manner in which the statistics are used could pull uninformed readers by the nose. Furthermore, there is an acute disparity between the submitted statistics and those reported by NSWTG's customer satisfaction survey. It is astonishing that a review which purports to be prepared in a professional and impartial manner never acknowledges—let alone critically probes—the most obvious and elementary problem of the disparity in the statistical data.

1.4.3 Welfare not Commerce

In general, it appears that much of the analysis about NSW TG's costs and revenue is premised on the reductionist presuppositions of a free market economic rationalist theory. The horizons for the review have become one-dimensional.

Eleven years ago IPART made this astute observation concerning the OPC:

OPC is a small organisation operating in an environment that has more welfare than commercial characteristics.⁹

The creation of NSW TG in 2009 has not altered this fact: The protective fiduciary administration of clients still involves a large degree of welfare rather than commerce.

NSW TG is an agency that is administratively accountable to, and comes underneath the canopy of the Department of Justice & Attorney General (DJAG).¹⁰ It is a strange and contradictory point that the units which are within DJAG's control are referred to as "business centres", and that an excessive amount of corporate vocabulary and imagery pervades their respective annual reports. Even the Attorney General's department reflects the commercial language and yet paradoxically the department avows:

The Attorney General's Department is a NSW government department. The Department is a not-for-profit entity (as profit is not its principal objective) with no cash generating units.¹¹

The draft report is characterised by the peculiar and elitist use of economic jargon that is not part of vernacular usage. No definitions are provided for the jargon which makes the document somewhat inaccessible to comprehend unless the general public fossick around in other publications. For example:

In relation to will and power of attorney drafting externalities arise in connection with low wealth clients.¹²

On ABC-TV's "The Business" edition broadcast on 1 October 2014 the presenter Ticky Fullerton interviewed Dr Brian Czech. Fullerton prefaced a question to Dr Czech by saying, "that dreadful word 'externalities.'" ¹³

The term "externalities" is used in the IPART report as if it was a commonly used part of vernacular speech. It is highly unlikely that most members of the public would have the faintest idea what the term "externalities" refers to. Externalities was a neologism—a new word—that was coined in the nineteenth century by the utilitarian economist Henry Sidgwick, and then developed as a concept by the neo-classicist Arthur Pigou. Most members of the general public are not conversant with this jargon.

⁹ IPART, *Office of the Protective Commissioner Fees Review*, Final Report May 2003, 22.

¹⁰ The moniker DJAG is used despite the dubious decision in 2014 to join together Justice, Attorney-General and Police.

¹¹ *Attorney General's Department of NSW Annual Report 2007-08*, 61.

¹² IPART Draft Report, *Review of Fees of the NSW Trustee and Guardian*, 11. Also used on pages 48-49, 97, 99, 116, 117.

¹³ Fullerton's remark can be accessed from the following six minutes and fifty-one seconds video segment (the remark occurs around the five minute sixteen second mark) at www.abc.net.au/news/2014-10-01/in-the-studio-with-brian-czech/5784102

In a footnote the draft report states:

An externality arises where NSW TG is unable to recover through fees their efficient costs of providing these services to low wealth clients.¹⁴

Three observations are warranted. First, there is no clear definition supplied to explain what is meant by the economic theory of “externality.” Secondly, the repetitive use of this undefined term makes the report an obscurantist document—that is, it is vague and thus becomes impenetrable to comprehend on the part of the general public.

Thirdly, there is the fallacy of begging the question: why does NSW TG have to “recover through fees their efficient costs of providing these services”? The point is assumed as being valid but it is never justified with any critical argument. It is the underlying methodological assumption of economic rationalism that everything should be measured in terms of costs. In effect, providing a service in all its facets to both vulnerable people and to those of low income is reduced down to questions about money. The unexamined presupposition is converted into the yard-stick by which NSW TG is measured and assessed as being “efficient” or “inefficient.” This is sheer reductionism that ignores broader considerations, and therefore the report lacks a holistic perspective as it proceeds in its analysis.

The report also tediously and repetitively belabours the use of the words “efficient”, “efficiency” and their antonyms to a total of 181 times. The report principally employs the jargon from economic theory. The expression “efficient costs” is over-used and not defined. The unjustified use of the expression begs the logical question as to “who” determines what makes up an efficient cost, and “what” criteria are used. The report presupposes that everyone automatically knows what the concept means because of the vernacular use of the word “efficient.” The frequent usage of the expression creates some confusion because the report also occasionally uses the words “efficient” and “inefficient” in the vernacular.

1.5 Methodological Flaw

One methodological flaw was to commission the CIE—an external consultant—to report on benchmarking based on a survey of fees levied by private trustee companies. It is difficult to view this exercise as anything other than a waste of money. IPART has acknowledged in past times behind that the majority of NSW TG’s protected estate clients are on low-incomes. Private trustee companies only serve a wealthy clientele and their respective websites reveal that they all levy higher rates of commission than does the NSW TG in estate administration and trustee services.¹⁵

Even the CIE report admits:

The private sector companies for which information has been collected do not provide services to lower asset clients for trust management and Power of Attorney administration.¹⁶

¹⁴ See footnote 1 in *Review of Fees of the NSW Trustee and Guardian*, 11.

¹⁵ See Perpetual Trustee’s website www.perpetual.com.au/advice-estates-fees-and-charges.aspx

¹⁶ *The CIE Final Report. NSW Public Trustee and Guardian: Cost benchmarking with the private sector*, 5-6.

CIE should be acutely embarrassed that on both the cover of its report, and throughout the twenty pages of discussion, that the NSW TG is misnamed:

The CIE Final Report. NSW Public Trustee and Guardian: Cost benchmarking with the private sector.

There used to be the Public Trustee of NSW, and since 2009 there is NSW Trustee and Guardian *but there is no such organisation as NSW Public Trustee and Guardian*. It is extraordinary that the CIE, which presents itself as a highly professional outfit, has repeatedly made such a careless mistake.

It is also pertinent to ask: where is the value for the tax-payers' money when from the outset there is no doubt that trustee companies only serve an elite clientele? If the consultant's report is an example of what IPART deems an "efficient cost" in its processes of a review, then it is difficult to take seriously remarks made about NSW TG's fiscal "inefficiencies."

1.6 Competition?

The private sector trustee companies in NSW are only interested in clients whose portfolios are valued at one million dollars or more. NSW TG apparently has a very limited number of clients with such asset portfolios. On that basis alone, it should be apparent that the NSW TG is not a competitor with the private sector of trusteeship, even though both NSW TG and private trustee companies are governed by the *Trustee Act 1925*. Indeed the private companies do not give NSW TG a second glance precisely because of the great gulf fixed between wealthy clientele on one hand and the low-income clients of NSW TG on the other hand. To insist that NSW TG is in competition with the private trustee sector is an example of invincible ignorance.

1.6.1 A Word from the PT WA

Consider this poignant observation made by the Public Trustee of Western Australia on what it deems is a "significant issue":

The trustee and financial marketplace is increasingly competitive and private trustee companies target the most profitable business with attractive incentives, *leaving the low value, more difficult cases to the Public Trustee*. The perception of 'trustee of last resort', together with market concerns about caseloads and fully disclosed fees, impacts negatively on the Public Trustee's corporate image and ability to compete.¹⁷

The above paragraph states the obvious with reference to private trustee companies: they refuse to touch the proverbial "dregs." This paragraph uses euphemistic terminology when mentioning the extent of the problem that it faces. Instead of referring up-front to "stakeholder complaints" it substitutes the bland expression "market concerns" about the heavy caseload borne by the Public Trustee. It also refers to external concerns "about fully disclosed fees." This is ironic given that its forty-one page Scale of Fees brochure reproduces what is specified in the legislation and includes a clear tabulation of fees under various

¹⁷ *Public Trustee Western Australia Annual Report 2012-2013*, 22. Emphasis added.

headings for its different services.¹⁸ If the Public Trustee of Western Australia receives complaints about fees it surely cannot be on the basis of a lack of transparency! It also becomes apparent that the kinds of complaints levelled at NSW TG are also made about the interstate Public Trustees.

1.6.2 NSW TG and Solicitors

Similarly, NSW TG is hardly a cut-throat competitor with solicitors in making Wills and providing an executor-trustee-attorney service. The free will-making service of NSW TG is not unique given the prevalence of free do-it-yourself will-making kits available via the internet, and packets on sale at Australia Post and from stationery suppliers.

There are blogs operated by individual legal practitioners who under the guise of consumer advice challenge NSW TG's "free will" service. A few isolated examples of tabular comparisons between a solicitor's fee and NSW TG's commission exist on the Internet. The tabulated results make the NSW TG's charges seem exorbitant, and some stakeholders refer to the digitally circulated schedule of fees as evidence that NSW TG appears to over-charge. Unfortunately, the "consumer advice" on the blogs is just a half-told story. The advertised fees for solicitors only refer to the costs of applying to the court for a grant of probate. If, as is often the case, a solicitor is instructed to undertake the entire administration of a deceased estate then there are more charges that will be levied than what is found in the advertised schedule. IPART has a duty to clear up that misnomer once and for all in its final report.

While a handful of solicitors take a negative stance, it is my understanding that accredited specialists in the law of succession regard NSW TG's services as indispensable. I understand that some solicitors refer difficult cases of deceased estates to NSW TG because of (a) technical complexity, (b) involve parties immersed in interpersonal conflict, or (c) the matters may simply be too painstaking and time-consuming for a practitioner to administer. This system of handing over difficult estates or referring private executors to renounce in favour of the NSW TG hardly looks like cut-throat competition.

When one turns to the area of managing the financial affairs of clients under a court/tribunal order, NSW TG is not monopolising the area. While it clearly has under its care several thousand people, it does not have a juridical or commercial monopoly. The private trustee companies are never appointed to administer the affairs of pensioners who become incapacitated. Moreover, since NSW TG's fees and commission are lower than those offered in the commercially cut-throat arena of private trustee companies, the result is already obvious. NSW TG is not in "competition"—nor should it be understood as being in any competition—with the private trustee companies in regards to protected estates. *It is a protected fiduciary duty specified in the law.*

The end result is that even the CIE admits that private trustee companies are not touting for business in the protective fiduciary care of low-income people.

¹⁸ Public Trustee Scale of Fees Commencing 1 July 2014 available at www.publictrustee.wa.gov.au/files/scale_of_fees.pdf

There needs to be a fundamental “push-back” against this absurd discourse about “competition.” It skews the context in which NSW TG operates as a servant of the people.

1.6.3 Profit-making and Interest Suspense Account

*NSW TG and its twin predecessors the PT and OPC were not created to be profit-making entities.*¹⁹ Nevertheless, from 2003 until the 2009 merger the state government took a profit-based approach to policy and required the PT to pay an annual dividend to NSW Treasury. Fortunately that dividend was abolished as part of the bargaining in the merger. Nonetheless it serves as a salutary example of how state governments have so belaboured the expression “profit-making” to the point of rhetorical redundancy. It over-shadows all other considerations by being reducing matters to a flat one-dimensional form of understanding and analysing everything as “business.”

In the case of the PT, and now NSW TG, this also serves as a reminder that since the late 1990s successive state governments have attempted to treat the Interest Suspense Account like a “hollow log” that may be raided for here-today-gone-tomorrow revenue.²⁰ This same thinking is reflected in the draft report’s erroneous interpretation:

Using this asset to support NSW TG’s operations results in forgone services in other areas (for example, in health and education), which could otherwise be provided with these funds.²¹

The basic piece of history that has been forgotten is that the McKell government established the Interest Suspense Account in 1942. It had sufficient long-range foresight to enable the PT to become perpetually self-supporting. The funds in the Interest Suspense Account always belonged to the PT and not Treasury. This basic point of fact about who “owns” the fund was re-established during the uproarious debate in 1997-1998 over the proposal to corporatise the PT. The merger transitioned the control from the PT to NSW TG, and the funds in the Interest Suspense Account were once again acknowledged as not something that Treasury “owned.”

1.7 The “Missing” Public Trustees

In previous reports IPART did compare the services, and fees and commission charged by the interstate Public Trustees. These bodies engage in comparable work to that of NSW TG in both the financial management of protected estates and in attorney and executor-trustee services. The information about fees and commission is freely accessible from the websites of each Public Trustee, and particularly in their respective annual reports. Some interstate Public Trustees charge even higher fees and rates of commission than does the NSW TG.

¹⁹ See the remark “we were not created with the express purpose of making a profit” in *Public Trustee NSW Annual Report 2008*, 25.

²⁰ A point that was made in the Parliamentary debate that led to the defeat of the proposed bill to corporatise the Public Trustee. Refer to remarks made by Hon. F. J. Nile, Hansard, 27 May 1998 and by Hon. R. L. S. Jones, Hansard, 27 May 1998, and also by Mr Raymond Chappell (MLA Northern Tablelands) on 18 June 1997. Hansard <http://www.parliament.nsw.gov.au/prod/PARLMENT/hansArt.nsf/V3Key/LA19970618049>

²¹ *Review of Fees of the NSW Trustee and Guardian*, 11.

The only interstate body that has fundamentally altered its revenue base is the Public Trustee of Western Australia, which since July 2009 no longer levies a commission but operates on a schedule of fees for services.

Each serves a growing body of aged citizens. Each face similar challenges in delivering services to people managed in protected estates. Each is subjected to similar complaints about its services from next-of-kin and/or clients of protected estates. Each body has a social welfare emphasis and quite correctly operate under a Community Service Obligation policy.

Each state body also has its own peculiar context and unique range of services so that nuanced comparisons between NSW TG and its interstate counterparts must be made. Thus, one cannot naively assume that they can all be flattened out like a batch of identical pancakes and compared without recognising nuances and differences.

It appears that the interstate Public Trustees have been quarantined from IPART's review processes precisely because the entire exercise is myopically conceived on economic rationalist principles about competition, markets, benchmarks, and profits inside NSW. Apparently the rationale for not bothering with the interstate Public Trustees is pivoted on the fact that NSW TG is not competing with them in seeking clients.

The whole point of making the comparison in past reviews was to discover in what way(s) they may be stronger or weaker and how NSW TG might benefit from a comparison:

- In the delivery of services
- In their budgetary activities, and specifically with reference to their Community Service Obligations
- Their fees and commission for services.

The only instance where the draft report alludes to the interstate Public Trustees is in a passing reference to fees for the preparation of a will.²²

Conclusion

In its present form the draft review starts to bear an uncanny resemblance to a desktop panel discoursing about a subject based solely on the limited knowledge that is aired in a boardroom. One wonders how external stakeholders, reviewers, and members of Parliament would cope if they had to spend a day at an NSW TG workstation or reception counter, and directly serve the clients and listen to complaints!

²² *Review of Fees of the NSW Trustee and Guardian*, 96.

2 COMMUNITY SERVICE OBLIGATIONS

Those who cannot remember the past are condemned to repeat it.

George Santayana²³

In the late twentieth century it became fashionable to refer to one role of Government by the expression “Community Service Obligations” (CSO) or “valuable service obligation.”²⁴ This role involves social obligations on the part of government departments to make services accessible to people who are living in reduced circumstances. At the heart of the current review of NSW TG’s fees and commission stands the enduring problem of funding its CSO. IPART’s draft report does not refer back to CSO trends from the past decade or any recent comparative data drawn from the interstate Public Trustees.

2.1 Background

In its original charter in 1913 the PT had a social welfare role to play. This entailed providing an affordable Will-making and executor service for low-income citizens. During the Second World War the PT administered the deceased estates of servicemen killed on active duty free of charge. This represented good social capital to the community. The welfare role of the PT remained an integral part of its operations up to 30 June 2009, where it reduced or waived fees on very small-value deceased estates and trustee matters.

2.1.1 PT CSOs 2003-2008

Prior to 2003-2004 the PT met its CSO expenditure out of its profits. However, due to the reductionist philosophy of the whole-of-government policy about “National Competition,” the complexion changed.²⁵ The PT reported as one of its “key results” of 2003-04 that it “received, for the first time, funding for Community Service Obligations.”²⁶

What could be inferred from the PT’s annual reports spanning the years 2003-2008 is that it followed a procedure of making a budgetary forecast. Treasury then remitted the funds needed by deducting it from the dividend that the PT paid to the Government at the end of each financial year. This particular accounting practice looked very much like a fiscal version of table-tennis exchanging funds back and forth. This practice was introduced by NSW

²³ George Santayana, *The Life of Reason or The Phases of Human Progress* (London: Archibald Constable, 1906), 284.

²⁴ Kevin Baird, “What is a Community Service Obligation (CSO)? An Analysis of the Issues Involved in Identifying and Accounting,” *Australian Journal of Public Administration* 60/4 (2001): 50-56. Jacqueline Martin, “Corporatisation and Community Service Obligations: Are They Incompatible?” *Australian Journal of Public Administration* 55/3 (1997): 111-117. Steering Committee on National Performance Monitoring of Government Trading Enterprises, April 1994. National Rural Health Alliance, *Community Service Obligations: Meaning, Impact and Application* (Deakin West ACT: National Rural Health Alliance, 1998).

²⁵ *Public Trustee NSW Annual Report 2004*, 5.

²⁶ *Public Trustee NSW Annual Report 2004*, 8.

Treasury in 2003-04 but had been foreshadowed in the mid-1990s when Treasury argued its lamentably dubious case to corporatise the PT.²⁷

The funds that were allocated for CSO were recorded as revenue received.²⁸

Table 1: PT Community Service Obligations 2003-2008

2003-04	2004-05	2005-06	2006-07	2007-08
\$1,730,000 ²⁹	\$1,730,000 ³⁰	\$2,390,000 ³¹	\$2,480,000 ³²	\$2,390,000 ³³

Over those five financial years the grand total of expenditure on CSOs for the PT amounted to \$10,720,000.

2.1.2 Treasury Disbursements to OPC 2003-2008

The OPC was never a profit-making entity nor should it have ever been viewed in that fashion. Due to the nature of its work in protected estates, and the fact that the overwhelming majority of its clients were on low-incomes, the OPC also observed the socially beneficial policy of waiving and reducing fees as part of its Community Service Obligations. The OPC's revenue base was very different from that of the PT, and the problem that affected its budgets related to the rising costs of the CSOs.

In the period from 2003-2008 Treasury had agreed to provide the requisite subsidy to cover the CSOs. Lamentably, it was Treasury that adopted the mentality of an Uncle Scrooge using a bean-counter method. It deliberately reduced its annual contributions to the OPC budget to meet the CSO. This table documents the decline in Treasury's support:

Table 2: Treasury Disbursements for OPC CSOs 2003-2008³⁴

2003-04	2004-05	2005-06	2006-07	2007-08
\$9,000,000	\$8,616,000	\$7,918,000	\$7,432,000	\$2,825,000

It was IPART's astute observation in 2008 that "the arbitrary nature of the cut in subsidy is neither satisfactory to the OPC or its clients or indeed to Budget processes."³⁵

²⁷ Treasury's proposal to cover the CSO from an annual dividend was treated with appropriate scorn by the Hon. John Hannaford on 27 May 1998 in the NSW Legislative Council. See <http://www.parliament.nsw.gov.au/prod/PARLAMENT/hansArt.nsf/V3Key/LC19980527035>

²⁸ *Public Trustee NSW Annual Report 2008*, 56.

²⁹ *Public Trustee NSW Annual Report 2004*, 12.

³⁰ *Public Trustee NSW Annual Report 2005*, 10.

³¹ *Public Trustee NSW Annual Report 2006*, 11.

³² *Public Trustee NSW Annual Report 2007*, 26.

³³ *Public Trustee NSW Annual Report 2008*, 30.

³⁴ The tabulated figures are extracted from IPART, *Review of Fees of the Office of the Protective Commissioner*, Final Report September 2008, 19.

³⁵ IPART, *Review of Fees of the Office of the Protective Commissioner*, Final Report September 2008, 40.

2.2 Protected Estate Clients

The draft report does not acknowledge that each year the numbers of clients who are placed under financial management in protected estates are increasing. There are no signs of this trend abating. Instead a superficial generalisation over-rides the need for a probing analysis:

While expenses have increased, the number of clients and matters managed by NSW TG has decreased.³⁶

The following table shows client numbers spanning two successive financial years in the previous decade. The client numbers of the former OPC are set alongside those of Western Australia, Victoria and Queensland.

Table 3: Protected Estate Client Numbers 2006-2008³⁷

Year	PTWA	STVIC	PTQLD	OPC ³⁸
2006-07	4,212	8,749	6,535	11,038
2007-08	4,403	9,000	6,887	11,436

In those years each organisation experienced an increase in client numbers. The OPC had carriage of more protected estate clients than any other interstate body. It was during this period of time that all of the interstate Public Trustees were increasing their CSO budgets hand-in-glove with the increase in client numbers. Meanwhile, in the exact same period, the NSW Treasury eroded the OPC's capacity to meet its CSO budgets.

Now consider the following comparative data for client numbers in protected estates for the year ended 30 June 2013.

Table 4: Protected Estate Client Numbers 2012-2013

PT ACT ³⁹	PT TAS ⁴⁰	PT SA ⁴¹	PT WA ⁴²	PT QLD ⁴³	ST VIC ⁴⁴	NSWTG ⁴⁵
486	693	4,010	5,014	8, 217	9,500	13,910

Just as it was in the period 2006-2008, NSW still has the highest number of protected estate clients. One might legitimately infer, as does the Australian Bureau of Statistics, that on the basis of existing demographic data that across the next three decades NSW's population will

³⁶ *Review of the Fees of the NSW Trustee and Guardian*, 32.

³⁷ Client figures extracted from *Public Trustee Western Australia Annual Report 2008*, 15; *State Trustees Victoria Annual Report 2007*, 8; *State Trustees Victoria Annual Report 2008*, 5; *Public Trustee of Queensland Annual Report 2007-2008*, 31; *Office of the Protective Commissioner and Public Guardian Annual Report 2008*, 11.

³⁸ The OPC figures combine the direct and privately managed clients. If the private managed clients are deducted, the OPC still had more clients than the interstate Public Trustees.

³⁹ *Public Trustee for the ACT Annual Report 2012-2013*, 5.

⁴⁰ *Public Trustee [Tasmania] Annual Report 2012-2013*, 5.

⁴¹ *Public Trustee South Australia Annual Report 2012-2013*, 25.

⁴² *Public Trustee Western Australia Annual Report 2012-2013*, 14.

⁴³ *Public Trustee of Queensland Annual Report 2012-2013*, 7.

⁴⁴ *State Trustees Victoria Annual Report 2012-2013*, 27. The tabulated figure in the annual report is described as "approximately."

⁴⁵ *NSW Trustee and Guardian Annual Report 2012-2013*, 12. The figure cited combines both directly managed and privately managed clients. If the privately managed clients are deducted, then the total number of clients at 30 June 2013 equalled 10,466.

increase. Not everyone who will suffer from dementia and other forms of cognitive impairment is going to become a client of NSW TG. Nevertheless it is very plausible to infer that NSW will continue to have the largest number of people under protected estate management. The other jurisdictions are experiencing an increase in client numbers, and their respective CSO budgets are rising.

2.2.1 Comparing CSO Budgets

It is instructive to look back in the previous decade to consider what sums of money were expended by interstate public trustees in their respective CSO budgets. The Public Trustee of South Australia and Public Trustee Northern Territory do not furnish the same kind of financial information about CSO and are thus not included in the table below.

Table 5: CSO Budgets 2003-2008

Year	PTACT ⁴⁶	PTTAS ⁴⁷	PTWA ⁴⁸	STVIC ⁴⁹	PTQLD ⁵⁰	PTNSW	OPC
03-04	397,000	722,918	n/a	9,883,000	15,513,812	1,730,000	9,000,000
04-05	403,000	793,000	n/a	9,826,000	16,309,799	1,730,000	8,616,000
05-06	407,000	793,000	n/a	9,562,000	17,161,573	2,390,000	7,918,000
06-07	415,000	793,000	3,967,690	9,851,000	17,400,000	2,480,000	7,432,000
07-08	428,000	1,070,000	4,445,046	14,681,000	18,100,000	2,390,000	2,825,000

The above table also includes the amounts that the NSW Treasury contributed to the OPC. It should be noted that by the 2007-08 and 2008-09 financial years that the OPC was in serious debt.⁵¹

It is clear that during the period from 2003-2008 that in the ACT, Tasmania, Western Australia, Victoria, and Queensland that the annual CSO budgets underwent increases. Both Queensland and Victoria had the largest CSO budgets, and their respective protected estate client numbers were less than those in NSW. Yet, both entities were spending larger sums of money on CSO than the miserly amount that the NSW Treasury allocated for the OPC. The OPC had more clients under management than Queensland or Victoria, and yet both these states had larger CSO commitments.

Table 6: Client Numbers and CSO

Year	PT WA	ST VIC	PT QLD	OPC
06-07 Clients	4,212	8,749	6,535	11,038
06-07 CSO	\$3,967,690	\$9,851,000	\$17,400,000	\$7,432,000
07-08 Clients	4,403	9,000	6,887	11,436
07-08 CSO	\$4,445,046	\$14,681,000	\$18,100,000	\$2,825,000

⁴⁶ Figures extracted from *Public Trustee for ACT Annual Report 2005*, 60; *Annual Report 2006*, 67; *Annual Report 2007*, 40; *Annual Report 2008*, 25 & 34.

⁴⁷ Figures extracted from *Public Trustee Tasmania Annual Report 2003*, 23; *Annual Report 2004*, 21; *Annual Report 2005*, 23; *Annual Report 2006*, 22; *Annual Report 2007*, 17 and 21; *Annual Report 2008*, 16 & 20.

⁴⁸ Figures extracted from *Public Trustee Western Australia Annual Report 2007*, 15; and *Annual Report 2008*, 16.

⁴⁹ Figures extracted from *State Trustees Annual Report 2005*, 41; *Annual Report 2006*, 39; *Annual Report 2007*, 12; *Annual Report 2008*, 42.

⁵⁰ Figures extracted from *Public Trustee of Queensland Annual Report 2003-2004*, 9; *Annual Report 2004-2005*, 14; *Annual Report 2005-2006*, 6; *Annual Report 2006-2007*, 6; *Annual Report 2007-2008*, 28.

⁵¹ This point can be verified by looking at IPART's 2008 review of the OPC, and by perusing the financial statements in the OPC's annual reports for 2008 and 2009.

The obvious point is that both the client numbers and the CSO budget commitments were rising in Western Australia, Victoria, and Queensland. At the same time, the OPC had more clients but nowhere near enough funds. In the same period the PT in NSW had a modest sized CSO budget in relation to deceased estates and trustee matters.

Table 7 indicates that the present decade manifests the same upward trend in CSO budgets in the interstate jurisdictions. Yet NSW TG, which has more protected estate clients than does any other state in Australia, receives a capped level of support from the NSW Treasury to assist in covering its CSO budget.

Table 7: Comparing Recent CSO Budgets 2011-2014

Year	PT ACT	PT TAS	ST VIC	PT QLD	NSWTG
2011-12	459,000 ⁵²	1,894,984 ⁵³	15,364,000 ⁵⁴	27,225,860 ⁵⁵	5,112,000 ⁵⁶
2012-13	466,000 ⁵⁷	1,906,150 ⁵⁸	15,419,000 ⁵⁹	26,943,559 ⁶⁰	5,112,000 ⁶¹
2013-14	473,000 ⁶²	N/A	15,751,000 ⁶³	28,416,346 ⁶⁴	N/A

It should also be noted that the column of figures for NSW TG in Table 7 does not represent its entire budget for CSO. It merely discloses that the NSW Treasury has capped its support at 5.11 million per annum.

Note what the Public Trustee in Tasmania (the smallest state of the Commonwealth) says concerning its upward trends:

As at June 2003 there were 268 such clients of whom 70% were Community Service Obligations (CSOs) or 187 clients. As at 30 June 2013 there were 693 clients (73% CSOs or 508 clients). This number will continue to increase. These clients now constitute 35% of the Public Trustee's business up from 12% in 2003. Many of this client base, particularly the CSO clients, have challenging behaviours and the relative resources required to service them exceeds the proportion of total matters that they represent. The resources required to service them will increase.⁶⁵

The admission from Tasmania that the “resources to service them will increase” is not isolated to it but applies nation-wide.

⁵² Public Trustee for the ACT Annual Report 2011-2012, vii.

⁵³ Public Trustee [Tasmania] Annual Report 2011-2012, 20.

⁵⁴ State Trustees Annual Report 2012, 47.

⁵⁵ Public Trustee of Queensland Annual Report 2011-2012, 9.

⁵⁶ NSW Trustee and Guardian Annual Report 2011-12, 30.

⁵⁷ Public Trustee for the ACT Annual Report 2012-2013, 99.

⁵⁸ Public Trustee [Tasmania] Annual Report 2012-2013, 19.

⁵⁹ State Trustees Annual Report 2013, 36.

⁶⁰ Public Trustee of Queensland Annual Reports 2012-2013, 9.

⁶¹ NSW Trustee and Guardian Annual Report 2012-13, 24.

⁶² Public Trustee of the ACT Annual Report 2013-2014, 17.

⁶³ State Trustees Annual Report 2014, 21.

⁶⁴ Public Trustee of Queensland Annual Report 2013-2014, 8.

⁶⁵ Public Trustee [Tasmania] Annual Report 2012-2013, 5.

2.3 Queensland Clients and CSO Budget

A very large budget exists in Queensland because the Public Trustee there has responsibilities which are peculiar to its operations. In other words, NSW TG and the Public Trustee of Queensland both overlap and diverge in some areas of their operations. In its latest annual report the Public Trustee of Queensland advises:

The Public Trustee is a self-funding organisation that receives no financial assistance from the Queensland Government.

The Public Trustee has a Community Service Obligation (CSO) scheme (which is a safety net limit on the annual fees payable by certain clients. The CSO scheme provides a rebate of fees for some clients with limited assets. The rebate may apply for services where there are limited assets including the financial administration for clients with impaired capacity, or administration of deceased estates or trusts. The Public Trustee also provides free Will making services for Queenslanders ... For the 2013-14 financial year the total estimated cost of CSO delivered by the Public Trustee to Queenslanders at no cost to government was \$28.4M representing an increase of 7% from the previous financial year.⁶⁶

It further advises that its CSO budget forecast for 2014-2015 will be:

Provision of a range of CSO at no cost to Government which are expected to increase by \$2.3M to \$30.7M.⁶⁷

However, as their annual reports have invariably shown these estimates tend to be below what the actual cost turns out to be.

It has been noted that the Public Trustee of Queensland operates in some areas where NSW TG does not, and that is a key factor to keep in mind when making budgetary comparisons.

The 2013-2014 annual report for Queensland supplies the following break-down in the allocation of CSO funds:⁶⁸

CSO OBLIGATIONS 2013-2014	AMOUNT
<i>Fees rebated for disadvantaged clients</i>	\$20,231,363
Fees rebated for principal residence and other	\$748,382
Management of prisoners' criminal compensation and civil action	\$120,041
<i>Public education to the community and advice to courts and tribunals</i>	\$1,056,593
<i>Provision of free will making (25,195 free wills made)</i>	\$5,041,680
Grant to the Office of the Public Guardian	\$1,063,000
Civil Law Legal Aid – outlays written off, administrative support	\$155,287
TOTAL	\$28,416,346

⁶⁶ Public Trustee of Queensland Annual Report 2013-2014, 8.

⁶⁷ Public Trustee of Queensland Annual Report 2013-2014, 6.

⁶⁸ Public Trustee of Queensland Annual Report 2013-2014, 8.

There are three rows above with the amounts placed in italics. Those rows are pertinent when comparing them with NSW TG’s CSO budget and revenue.

According to Queensland’s annual report, the sum of \$20,231,363 comprised “fees rebated” for “Disability Services clients,” and it represents “approximately 81.4% of all Disability Services clients.”⁶⁹ **The number of Queensland clients for whom financial management services were provided as at 30 June 2014 numbered 8,380 adults.**⁷⁰ Queensland’s client numbers are several thousand less than those under the care of the NSW TG. Since the Public Trustee expended over twenty million dollars in CSO on behalf of Queensland’s protected estate clients, it is difficult to fathom how the NSW TG, which has many more clients than Queensland (see table 8 below), can cover its CSO budget in the absence of a long-range financial plan.

Notice that the Public Trustee in Queensland calculated its provision of free information about its services at \$1,056,593 and that the “cost” of making free wills was \$5,041,680. Added together these twin costs amounted to \$6,098,273. These latter two “costs” ought to be kept in mind in the deliberations about NSW TG’s will-making, and its provision of free information. Both items are borne under Queensland’s CSO budget. There is no apparent hand-wringing angst from the Public Trustee of Queensland over its budgetary commitment to CSO. *In colloquial jargon it is a case of “people matter and to hell with the money.”*

2.4 NSW TG Protected Estate Clients

It needs to be reiterated that *the Public Trustee of Queensland spends more in its CSO budget on protected estate matters but has fewer clients in this category than does the NSW TG*. The NSW TG has disclosed its client numbers spanning the years 2010-2013:

Table 8: NSW TG Managed Clients 30 June 2010 to 30 June 2013⁷¹

NSW TG	2009-10	2010-11	2011-12	2012-2013
Direct Managed Clients	9,579	9,758	9,968	10,466
Private Managed Clients	2,961	3,112	3,185	3,444
TOTAL	12,540	12,870	13,153	13,910

Conclusion

The number of clients of protected estates keep rising each year in NSW, and the CSO budget requirements of NSW TG are in an upwards trend. This mirrors the broad national data concerning the burgeoning size of an ageing population, which will finally reach a plateau around the year 2050. The figures from each Public Trustee outside NSW show no sign of abating, and the CSO budgets in each state and territory are rising. Since NSW is the most populous state and NSW TG continues to lead all the other Public Trustees in its number of protected estate clients, it logically follows that funding cuts make no sense at all.

⁶⁹ *Public Trustee of Queensland Annual Report 2013-2014*, 8.

⁷⁰ *Public Trustee of Queensland Annual Report 2013-2014*, 7.

⁷¹ Figures extracted from a table in *NSW Trustee and Guardian Annual Report 2012-2013*, 12.

3 NSWTG FEES DISCLOSED

The Public Trustee of NSW was not allowed to make a profit, with commissions and charges set to cover working expenses only.⁷²

IPART's draft report claims that NSWTG employees—i.e. those who interview clients, those who have carriage of files, answer the telephone and correspondence—fail to fully disclose to clients an accurate and comprehensive explanation of what fees and charges will be levied. Some complaints appear to stem from clients who are aggrieved about the fees in the administration of protected estates.

The draft report over-simplifies matters and makes sweeping generalisations:

Many stakeholders are highly critical of the service NSWTG provides, particularly in view of the fees charged. In their submissions, these stakeholders noted:

- Service quality is poor, particularly with regard to communication, property management and payments not being made on time
- Fees are excessively high for some services which appear to involve minimal work by NSWTG, and are eroding the value of clients' accounts over time
- There is no clear rationale for some fees (eg [sic] 4% income fee for private financial management clients which does not reflect the cost to serve these clients)
- Fees are not clearly set out in Statements of Account, or do not reconcile with fee details publically available on NSWTG's website.⁷³

Some of the above bullet points must refer to problems, complaints and possible misperceptions about protected estates. However, it appears that points 1 and 4 are directed at all divisions within NSWTG. IPART takes sample complaints and incorrectly extrapolates from them that NSWTG clients have not been properly advised about fees.

3.1 "Fees We Were Never Told About"

The draft report insinuates (pages 16, 95 & 96) that clients who give instructions to NSWTG for the preparation of Wills and Powers of Attorney are never told the full extent of fees and charges levied. The allegation that there is a lack of transparency does not correlate to my experiences as a client.

If the employees of NSWTG routinely fail to fully inform clients, then one would expect a tsunami of emails and letters to NSW parliamentarians and to IPART. One would hear the radio "shock-jocks" expressing outrage, and whipping up the public into a frenzy of antagonism. One would also expect a massive "walk-out" with thousands of clients protesting

⁷² *Public Trustee NSW Annual Report 2008*, 3.

⁷³ IPART, *Draft Report Review of Fees of the NSW Trustee and Guardian*, 13.

on social media, and taking the decisive step of revoking their Wills and Powers of Attorney *en masse*.

IPART has overlooked a valuable statistic that is found in the NSW TG Annual Report 2012-2013. It is reported that during that financial year NSW TG received a total of 349 complaints: 222 related to protected estates and 127 about trustee services. It is stated that only 3% of complaints were about fees (in other words 10 complaints in the one year concerning fees).⁷⁴ It is not clear if the 10 complaints simply represent an “outrage” or “please explain” over fees deducted, or if these are specifically about a failure to inform clients at the outset. Ten complaints hardly represent significant evidence that NSW TG has consistently failed to be clear and transparent about its fees.

3.2 Why is the Auditor-General Silent?

Complaints about fees and charges never rate a mention in any of the NSW Auditor-General’s annual reports. If NSW TG is consistently and constantly guilty of failing to be transparent in disclosing to clients all of its fees, then presumably the Auditor-General’s report would note such a significant lapse. The Auditor-General would go a step further and make a formal recommendation to correct such lapses. However, the topic never rates a mention, which strongly suggests that some people simply resent the fact that NSW TG had carriage of a file.

3.3 Fees and Charges ARE Explained

Over against that lopsided portrait, I have invariably found NSW TG’s frontline workers demonstrate:

- Respect and courtesy
- Punctuality
- A high degree of professionalism in the execution of their assigned duties
- A competent attention to detail in explaining to me the range of services offered by NSW TG and a transparent disclosure of fees and charges

On each occasion that I have given instructions to NSW TG the frontline staff who prepared the legal instruments (i.e. Will, Power of Attorney) explained in detail the fees and charges. Thus in the event of my death I fully understand that NSW TG will ascertain what assets and liabilities exist, and that such information is collated into affidavits that form an application for a grant of probate to administer my estate.

3.3.1 Commission and Fees on my Estate

I know that once probate is granted that NSW TG will ensure that any outstanding debts (including my income tax and funeral account) will be deducted from my assets and all valid creditors will be paid before any funds are distributed to my beneficiaries. The NSW TG acts on my instructions that are stipulated in my Will because I am their client and I am a true stakeholder in what is going to be done on my behalf. The beneficiaries in my Will may be

⁷⁴ NSW Trustee and Guardian Annual Report 2012-2013, 21.

regarded as a belonging to a separate category of “stakeholder” but technically they cannot be regarded as “clients” of NSW TG.

I am fully aware that a sliding scale of commission applies to the value of my assets and that this commission will be deducted when my assets are collected/sold. The current rate for commission is very clear:

Value of Assets	% Fee Payable (inclusive of GST)
Up to \$100,000	4.4
From \$100,001 to \$200,000	3.3
From \$200,001 to \$300,000	2.2
\$300,000 and above	1.1

In addition to the commission, I realise that NSW TG will be obliged to pay fees to various outside parties for:

- lodging the Probate application
- Legal notice to creditors
- Office of State Revenue and the Land Titles Office in transferring or selling any real estate I may own.
- Instructing a real estate agent to advertise and sell my realty.
- Maintenance and insurance on my property until it is disposed.
- Council rates and other utilities.

I realise that NSW TG will also levy charges for other work that it does in administering my estate such as:

- Preparation and lodgement of any final income tax returns, and any trustee tax returns.
- Expenses incurred in postage, telephone, photocopying.
- A monthly account keeping fee.

Similarly, I had it explained to me that in the event of incapacity that there is a once-off establishment fee for activating my Power of Attorney. There is also the recurring management fee of 1.1% of my income producing assets, and that charges will be levied for expenses incurred in administering my affairs (e.g. preparing tax returns, sundry costs for correspondence, phone and photocopying).

NSW TG will not just deduct expenses when administering my affairs. I am also aware that the NSW TG in its capacity as a Trustee will also pay interest on the funds that it holds when my assets are collected. The same point holds true that interest is paid on any income and

assets that NSW TG may collect and hold in trust on my behalf should the time come to operate my Power of Attorney.

Beyond the context of staff-client interviews, I have access to the details about NSW TG fees via:

- information brochures about fees and services, and client newsletters
- NSW TG Annual Reports
- NSW TG community talks and media interviews about services

3.4 Administration of next-of-kin estates

At the risk of dredging up past history, I cite the following cases, which stand in contrast to remarks made by others who have complained about the now defunct PT.

The affairs of my father's estate were settled promptly, efficiently, and without any "shock" surprises regarding charges and expenditure. The same point holds true in the case of my deceased uncle's estate. The service was efficient, prompt, and various relatives of mine were beneficiaries to the estate. They were all very satisfied with the professionalism exhibited by staff. The correspondence contained lucid information about the steps in administration, and the initial letter explained all the fees and charges. The closing statement of account furnished a full disclosure of receipts and disbursements, along with the commission, fees and sundry charges that were deducted. There was no obscuring of the fees in the statement of account.

More than thirty years ago my mother-in-law had a Will prepared by a solicitor and appointed one of her children as the executor and trustee. Unfortunately, she never updated her Will, to reflect changed circumstances regarding all her beneficiaries. After she died, there was discord between the beneficiaries and her executor took the prudent step of renouncing. Three beneficiaries threatened a Family Provisions Action but this matter was successfully settled without recourse to a court hearing. There were no complaints from the beneficiaries about a lack of transparency over the fees and services provided by the organisation.

3.5 Next-of-kin Power of Attorney

For a very brief period of time my mother gave instructions for her Power of Attorney to be operative. For the duration of the work undertaken on her behalf, she was fully aware of the fees and charges. She had no grounds for any complaints about the services provided or of any alleged lack of transparent disclosure of costs.

3.6 Are Do-It-Yourself Will-Kits Clear and Transparent?

Unlike what NSW TG discloses about its commission, fees and charges, there is nothing comparable to be found in the unregulated do-it-yourself will-kits that one can buy from Australia Post and stationer's stores. The same point does apply to some online will kits, e.g. <http://www.legalkits.com.au/willkits/>. I have examined some of these kits and there is no clear and transparent consumer advice to be found in these kits concerning what the future costs are associated with:

1. Filing for a Grant of Probate
2. The costs that ensue after Probate as the executor and trustee proceeds to administer the estate
3. There is no technical guidance on what are the duties of an executor and trustee in administering a deceased estate.

Since most citizens lack the technical skills and knowledge, and often do not have the time to set aside to apply for a grant of probate, most privately appointed executors need the assistance of a qualified legal practitioner.

Conclusion

When one draws on the NSW TG's publications, and also acknowledges the quality experiences that clients such as myself have had, then it is inappropriate to make sweeping statements about a lack of clarity or transparency. The correct inference to draw is that NSW TG actually goes out of its way to be clear and transparent, and there are isolated cases of complaints where two sides to the story should be heard. *Those who are complaining are not necessarily representative of what the majority of clients experience.*

4 STATISTICS AND DELIVERY OF SERVICES

While all improvement comes from change, all change is not necessarily improvement.

Hon. R. L. S. Jones NSW MLC⁷⁵

The draft report uses statistical data to cast doubts about the delivery of NSW TG's services. At first glance some readers may be impressed. However the statistics do not qualify as precise scientifically measured data, and the IPART compounds the issue by making errors in the rhetorical use of the data.⁷⁶

The first analytic step is to consider the statistics that were submitted to IPART. The second step is to consider the way in which IPART uses those statistics.

4.1 Statistics Submitted

One NGO whose charter commendably includes an advocacy role has tried to be helpful in submitting to IPART some statistical data after it "conducted a survey of its members with a series of questions."⁷⁷ On the basis of the survey feedback, four pieces of statistical data are included in the submission:

Of the survey respondents who had used Trustee and Guardian services for either financial management (50%) or trustee services (50%), just over half were satisfied with the level of service provided (56%). This correlates with the response to the subsequent question which asked if the standard of service is equal to a trustee company, solicitor or accountant with 56% saying it isn't.

In relation to the transparency of the Trustee and Guardian about its fees, 56% said they were provided with information about fees, and the results indicate that if they were provided with information then it was easily understood.⁷⁸

Survey respondents were split 50/50 over whether the fees for the level of service are too high or about right. No one responded that they were too low.⁷⁹

IPART's draft report specifically cites this submission as evidence of poor service:

... member survey indicated that of the survey respondents who had used NSW TG services for either financial management (50%) or trustee services (50%), just over half were satisfied with the level of service provided (56%). On the question of

⁷⁵ Hon. R. L. S. Jones, Hansard, 27 May 1998, remarks made during the debate over the (now failed) corporatisation of the Public Trustee.

⁷⁶ Patrick McNeill, *Research Methods*, 2nd Ed (London and New York: Routledge, 1990). Paul Hague and Paul Harris, *Sampling and Statistics* (London: Kogan Page, 1993). Darrell Huff, *How To Lie With Statistics* (London: Penguin, 1991).

⁷⁷ Submission W14/2091, Alzheimer's Australia NSW, 13 June 2014, 2.

⁷⁸ Submission, Alzheimer's Australia NSW, page 2.

⁷⁹ Submission, Alzheimer's Australia NSW, page 3.

whether the standard of NSW TG's service is equal to a private trustee company, solicitor or accountant, 56% of survey respondents indicated that it isn't.⁸⁰

4.1.1 Critical Defects in the Use of Statistics

Although the NGO has sought in good faith to be helpful the statistical data that it supplies has a very low value in terms of valid evidence.

4.1.1.2 What were the original survey questions?

In order to establish the value of the statistics, the first key piece of analytic work concerns the questionnaire. It is essential that a survey questionnaire consists of statements or questions that are not susceptible to built-in bias. A great mistake is framing questions that ensure respondents supply answers that yield a slanted outcome.

The survey questions were not attached to the original submission. One can infer that the questionnaire is based on the list of fourteen issues for stakeholder comment that is contained in IPART's Issues Paper released in May 2014.⁸¹ That this is highly likely can be inferred from this sentence in the NGO's submission, "the response to the subsequent question which asked if the standard of service is equal to a trustee company, solicitor or accountant." This sentence clearly reflects the twelfth issue for stakeholder comment found in IPART's Issues Paper:

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, [sic] a trustee company, solicitor or accountant)?⁸²

The time-frame set by IPART for which client feedback is sought spans the five-year period 2009-2014. Yet, paradoxically, the IPART draft report cherry-picks negative comments that must predate June 2009 because the complainants name the "Public Trustee." Some comments that pre-date 2009 might have currency if the case involves a long-running and still current matter. Otherwise, complaints that stem from matters that were finalised before 2009 are not particularly relevant.

4.1.1.3 Misleading Survey Question

Here is an example of a question that is based on IPART's twelfth stakeholder issue:

Is the level of service similar to what you would expect from a private service provider (e.g., a trustee company, solicitor or accountant)?

The problem with this particular question is that it conflates the dual services of NSW TG into one thing. It illegitimately flattens out the legal and operational differences that exist between the duties of an executor-trustee-attorney and the fiduciary duties of a manager of protected estates.

⁸⁰ Review of fees of the NSW Trustee and Guardian, 35.

⁸¹ IPART, A fair and transparent fee structure for the NSW Trustee and Guardian. Other Industries—Issues Paper May 2014, 4-6.

⁸² IPART, fair and transparent, 6.

The question then invites people to make a fallacious comparison between NSWTG and other professions in the private sector without there being any checking to determine if the respondents have ever availed themselves of the services of a private trustee company or a solicitor in undertaking the administration of a deceased estate. It is pointless to include accountants since they do not carry out protected estate work or administer deceased estates, and anyway one must distinguish between a Certified Practising Accountant (CPA) and an accountant who is not a CPA.

4.1.1.3.1 Error of Conflating the Issue

A proper social-scientific survey questionnaire would pose a range of questions that clearly differentiates between NSWTG's FM services, and its executor/trustee/power of attorney services. One need not even be a lawyer to know that there is a critical difference in the definition and duties of the financial manager of a protected estate, and the definition and duties of an executor/trustee and attorney. The differences clearly exist not just in legislation but also exist in both the substance and the processes of delivering the actual services provided.

4.1.1.3.1.1 Analogy of a Bank

Let us lay aside for a moment the technical legal nuances between FM and trusteeship at NSWTG. Think about the division of labour and the boundaries that exist within a bank. The division in a bank that receives applications for mortgages and other loans functions quite differently in the service provided, from the kinds of service that a customer receives in transactions handled over the counter by a bank teller. Both the mortgages-loans section and the bank teller are delivering services related to money (the superficial similarity) but the content, processes and contexts in which they interact with customers are not at all identical.

4.1.1.3.1.2 Law Does Matter

Anyone devising a proper questionnaire must keep in clear view that while NSWTG is one organisation, it necessarily has to differentiate between the services of FM and Trusteeship. The distinction between the two divisions is quite explicit in the annual reports of the NSWTG. The same point is recognised in the NSW Auditor-General's reports to the NSW Parliament.

This twin division exists not just due to a quirk of history. This division between what is FM and what is Trusteeship is something that exists in the law. There is a distinct set of technical legal responsibilities associated with a Financial Manager in a protected estate all of which is defined at law (e.g. in *NSW Trustee and Guardian Act 2009*, and it was also quite clear in the now repealed legislation the *Protected Estates Act 1983*). The duties in turn relate to the different processes by which a client's affairs and assets are administered.

The duties and responsibilities of a Financial Manager of a protected estate in the law are poles apart from the duties and responsibilities in law that defines an Executor/Trustee and Attorney.

The duties and responsibilities of any Executor and Trustee are set out in the *Succession Act 2006*, the *Trustee Act 1925*, and other stipulations that specifically apply to NSWTG are

contained in *NSW Trustee and Guardian Act 2009*. The role and duties of a Trustee are not identical to or synonymous with being a Financial Manager of a protected estate. To claim otherwise on the basis of a very superficial comparison is to actually state a position based on invincible ignorance.

4.1.1.3.1.3 Oversimplification

The draft report makes a mistake by over-simplifying matters:

For example, services provided to direct financial management and power of attorney clients are similar.⁸³

The preceding sentence is an example of a fundamental oversimplification: A financial manager of a protected estate pays bills on behalf of the client; An Attorney operating a Power of Attorney likewise pays bills on behalf of the client. This is a function that seems to all intents and purposes to be an identical activity. However, what stands behind the actions of a financial manager is legally and then functionally different from that of an Attorney.

If there is no functional or real difference in “paying bills” then presumably I can infer that I must be both an Attorney and a Financial Manager because of a function that I sometimes undertake. I take cash handed to me by my wife with a bill that is issued in her name, and on her behalf I conduct a transaction to settle the account at the Post Office. Does that function of paying the bill on her behalf make me an Attorney or a Financial Manager? The definition and duties of a financial manager of a protected estate, and the definition and duties assigned to an Attorney are clearly differentiated in the law.

4.1.1.4 Getting the Differences Clarified

To overcome the error of conflating NSW TG’s services—and thereby obtaining skewed survey results—an accurate measurement can only be obtained by sub-dividing the survey of customer satisfaction into distinct segments:

- FM services must be evaluated as a distinct and separate category
- Trustee services must be evaluated as a distinct and separate category.

In other words, a questionnaire would be structured along this line:

Are you currently, or have you in the past been, a client of NSW TG in its role as the financial manager of a protected estate? (Yes/No)

If you answered “No” then go directly to the next section of the questionnaire. If “Yes” then please answer the next set of questions.

The same thing would then appear in another section related to Trustee services:

Are you currently, or have you in the past been, a client of NSW TG in its role as the Executor and Trustee of a deceased estate, or a Power of Attorney, or other

⁸³ *Review of fees of the NSW Trustee and Guardian*, 144. Also see the exact same error is repeated on page 144 in footnote number 157.

Trusteeship services (e.g. Victims Compensation, Workers Compensation, Infants and Damages Trust)? (Yes/No)

If you answered “No” then go directly to the next section of the questionnaire. If “Yes” then please answer the next set of questions.

For a scientifically valid survey to yield a satisfactory measurement of customer attitudes, perceptions and views, the above distinctions must be made. If the services are conflated into one thing, then the results obtained from a survey will be hopelessly skewed. The data is naively reduced into something uniform which negates difference and context, and thus fails to constitute valid social-scientific evidence.

4.1.1.5 Analytically Meaningless Statistics

There are several problems that undermine the evidential value of the statistics supplied. One major problem, known in social science as the built-in bias, occurs by unintended (or even intentional) “visible sources” in the preparation of a survey. The results obtained can be rendered meaningless in terms of statistical theory as having a built-in bias by omitting to declare some basic but essential points. Unfortunately, the reported results reflect visible sources of a built-in statistical bias at the outset by omitting essential information:

1. Failing to supply a copy of the questionnaire, so that one can evaluate whether the survey questions were fair or if they unwittingly contained a built-in bias that predetermined the survey outcome.
2. Failing to disclose how many questionnaires were distributed and declaring how many surveys were returned.
3. Failing to disclose how many survey respondents answered every question. Incomplete survey questionnaires will skew the overall statistical results.
4. All that has been quoted in the submission in terms of statistics are four items (discussed below), which is unhelpful because the data is extracted from the whole without there being access to all the results obtained.
5. Alongside the four statistical results, some selected written comments that were obtained from respondents are reproduced in the submission. The basic difficulty in quoting the comments is that the writer/editor of the submission has made a decision based on an unstated criterion of selectivity. The decision over what has been included and what has been excluded carries with it an invisible bias that raises legitimate concerns about the evidential value of what has been submitted.

Darrell Huff reminds us that, “It is worth keeping in mind also that the dependability of a sample can be destroyed just as easily by invisible sources of bias as by these visible ones. That is, even if you can’t find a source of demonstrable bias, allow yourself some degree of scepticism about the result as long as there is a possibility of bias somewhere. There always is.”⁸⁴

⁸⁴ Huff, *How To Lie With Statistics*, 20-21.

4.1.1.5.1 An even number of respondents?

According to the NGO, exactly half of the survey respondents use, or have used, NSWTG's FM services. While, the other half use, or have used, NSWTG's trustee services. At first glance, this might look fortuitous. However, consider the discussion above about framing questions into distinct categories to evaluate FM services and Trustee services separately. Unless the questionnaire fairly differentiated between these services, then the reported statistics are analytically worthless.

- Unless it is disclosed how many people completed the survey, it is difficult to give much credence to the stated result.
- If the total number of survey respondents was say eighty, then at least we would know that forty people used FM services, and forty people used trustee services. There is no indication whether there were any respondents who might have used both FM and Trustee service.
- For a truly scientifically valid survey to be of any assistance what was needed was a large sample (i.e. over one thousand) so that there is a very small room for a margin of error in the tabulated results.

4.1.1.5.2 Fifty-Six%—Means What?

An indicator that the survey suffers from incorrectly conflating categories is when it is stated: “just over half were satisfied with the level of service provided (56%).”⁸⁵ It is assumed that what is meant here is that 56% of all respondents were satisfied with NSWTG's services. The problem here is that the statistics may be gleaned from a question that fails to differentiate between the uniqueness of Trustee services, and the uniqueness of FM services.

Even if the problem of conflating services is set aside, this figure, if it could be ascribed any great analytical value, must be further refined by specifying the sub-percentages. That is, out of the total of 56%, what % of the respondents rated FM services, and what % rated Trustee services. It is quite conceivable (especially when one looks at the customer satisfaction indices published in NSWTG's annual reports) that more respondents were satisfied with Trustee services than FM services. Furthermore, what is needed for greater clarity is supplying the break-down of the remaining 46% into the other categories of response.

The next problem concerns the very next statistic which is reported in the submission:

This correlates with the response to the subsequent question which asked if the standard of service is equal to a trustee company, solicitor or accountant with 56% saying it isn't.⁸⁶

It is difficult to fathom how the first statistic mentioned where 56% were satisfied with NSWTG's services actually correlates to the second statistic where 56% say the services *are not equal* to the standard of service offered in the private sector. If anything the two figures are contradictory because one can infer that if one is satisfied then presumably the same respondents thought that the standard of service was satisfactory when compared to other

⁸⁵ Submission, Alzheimer's Australia, 2.

⁸⁶ Submission, Alzheimer's Australia, 2.

service providers. It does not logically follow that if 56% are satisfied, that the same 56% of respondents then agreed that the standard of service is poor. There is clearly something amiss with both the reporting and the interpretation of the data.

There is a third citation where the statistic also amounts to 56%:

In relation to the transparency of the Trustee and Guardian about its fees, 56% said they were provided with information about fees, and the results indicate that if they were provided with information then it was easily understood.⁸⁷

The way this sentence reads seems to imply that 56% could confirm that they were supplied with information about NSW TG fees, and that the information was helpful. What the sentence is implying is that the remaining 44% of respondents claimed they were not informed about fees. The difficulty with this latter possibility is that NSW TG discloses its fees in correspondence to beneficiaries (and the PT did this pre-merger), and it also supplies brochures outlining fees. It is therefore difficult to believe that NSW TG would have such a massive gap or lapse in declaring and distributing the information.

4.1.1.5.3 Statistics for Comparison

Finally, greater clarity is needed in order to properly interpret these two statements:

... if the standard of service is equal to a trustee company, solicitor or accountant with 56% saying it isn't.⁸⁸

Survey respondents were split 50/50 over whether the fees for the level of service are too high or about right.⁸⁹

In the case of the standard of service, it was noted above that the survey question is verbally similar to IPART's twelfth stakeholder point. In order for the comparison to be fair, and for the statistics collated to have genuine validity, the questionnaire would first of all have to pose some tick-the-box questions to confirm that the respondents have indeed used private sector services, and to also confirm the nature of those services. Otherwise, if one has not used these services then how can one meaningfully and honestly the answer the question?

4.1.1.5.3.1 Fees for Deceased Estates

The same problem emerges with the statistic cited about a 50/50 split over fees. On what basis are respondents supposed to make a genuinely informed judgment about NSW TG's fees being high or low or somewhere in the middle? What comparative criteria should one use?

It would basically proceed along these lines:

Have you ever employed the services of a private trustee company to act as an Executor and Trustee? (Yes/No) If no, then proceed to question number#. If yes then please respond to this question:

⁸⁷ Submission, Alzheimer's Australia, 2.

⁸⁸ Submission, Alzheimer's Australia, 2.

⁸⁹ Submission, Alzheimer's Australia, 3.

Have you ever employed the services of a private trustee company to act on your behalf by appointing it through a Power of Attorney? (Yes/No)

A critical point undermines this 50/50 statistic. The question seems to presuppose that respondents have direct experiences of other services which are comparable to those of NSW TG. In this case what IPART suggested, and what the NGO followed, is to suggest that one can make a legitimate comparison of NSW TG's services with three different kinds of service providers in the private sector.

These are disparate professions: private trustee companies, solicitors and accountants. It is absurd to lump them together as a basis for comparison, particularly when accountants do not file applications for a grant of probate or act as a financial manager of funds in a protected estate. Moreover if one thinks of the stereotypical character Shylock as an archetypal precursor to today's accountants, then one might easily confuse ethically dubious penny-pinching with acute business acumen.

What vitiates this statistic from having any analytic or evidentiary value is that there is no way of knowing if the survey included questions to ascertain if their members have actually been clients of private trustee companies, and in what context(s) they may have employed the services of a solicitor and accountant. If the survey questionnaire failed to ascertain this point, then how can one take seriously the claim that NSW TG's standard of service is below that offered by a solicitor or private trustee body?

4.2 Solicitors' Fees to Obtain a Grant of Probate

The other problem in making a fair comparison is referring to the work of solicitors. Solicitors do indeed handle matters of deceased estates but their profession is regulated by a very different method of charging for service. Solicitors charge fees not a commission. It simply must be acknowledged from the outset that there is a profound difference between the two systems of fees versus commission. One must also exercise some detached reflections where solicitors' fees are cited as evidence that NSW TG's commission is exorbitant and unfair.

Some anchor their criticism by pointing to an enormous disparity between solicitors' fees and NSW TG's commission to administer a deceased estate:

It is our view that many clients will assume that the government regulated body will provide the best oversight and accountability, as well as the best value for money. However, some information suggests that this may not be the case as evidenced by this example posted on the internet by a legal practice in NSW.⁹⁰

The submission then reproduced a comparative chart from a solicitor operating in the central coast area of NSW. The solicitor operates a blog known as Legal Issues Blog.⁹¹ The figures

⁹⁰ Submission, Mental Health Co-ordinating Council, 2.

⁹¹ <http://brazelmoorelawyers.com.au/blogs/legal-help-nsw-blog/item/free-will-offers>



incorporated
legal
practice—
section 135
(2) of the
Act

42 Notice of
termination
of provision
of legal
services—
section 139
of the Act

43
Disqualifications
and
prohibitions
—sections
153, 154
and 179 of
the Act

**Part 7
Legal
practice by
foreign
lawyers—
Part 2.7 of
the Act**

44 Scope of
practice—
section 188
of the Act

45 Trust
money and
trust
accounts—
section 195
of the Act

46
Professional
indemnity
insurance
—section
196 of the
Act

47 Fidelity
cover
(contributions)
—section
197 of the
Act

Legal Profession Regulation 2005

Current version for 1 July 2013 to date (accessed
21 September 2014 at 14:00)

Schedule 4

<< page >>

**Schedule 4 Costs for legal services for
probate and administration matters**

(Clause 114)

**Part 1 Obtaining first time grant or the
resealing of probate**

Disclosed value of assets	Costs payable
Not exceeding \$30,000	\$560 Plus \$13.33 for each \$1,000 up to \$30,000
Exceeding \$30,000 but not exceeding \$150,000	\$960 Plus \$5.90 for each \$1,000 in excess of \$30,000
Exceeding \$150,000 but not exceeding \$1,000,000	\$1,670 Plus \$4.47 for each \$1,000 in excess of \$150,000
Exceeding \$1,000,000 but not exceeding \$3,000,000	\$5,470 Plus \$1.66 for each \$1,000 in excess of \$1,000,000
Exceeding \$3,000,000 but not exceeding \$5,000,000	\$8,800 Plus \$1.10 for each \$1,000 in excess of \$3,000,000
Exceeding \$5,000,000 but not exceeding \$10,000,000	\$11,000 Plus \$0.90 for each \$1,000 in excess of \$5,000,000
Exceeding \$10,000,000	\$15,500

**Part 2 Obtaining of any grant or resealing of
probate after the first, up to and
including the uplifting of the probate so
granted or resealed**

Value of assets remaining at the time of application	Costs payable
Not exceeding \$30,000	\$460 Plus \$10.83 for each \$1,000 up to \$30,000

cited list the solicitor's fees in one column and the NSWTG's commission in another column. Another column lists the value of assets starting from \$200,000 and ending at \$10 million.

The comparison shows that the solicitor's fees are vastly less than the NSWTG's commission for every listed asset. For example a solicitor charges \$1,510.30 on an estate valued at \$200,000; while NSWTG charges \$4,400.00. The difference of \$2889.70 looks exorbitant. It is not surprising that people would infer from such a comparative table of costs that NSWTG over-charges clients.

Unfortunately, what is stated in the Legal Issues Blog is a half-told story. It is akin to one restaurant advertising that it offers a meal for \$30 while a competitor offering the same meal is charging \$150. However, if it was known that the \$30 only covered the appetisers while the \$150 is for a three course-meal then one has a very different picture to contemplate.

The solicitor operating the blog does not candidly admit a very fundamental point. The fees that are cited on the blog for solicitors stem from the Legal Profession Regulation 2005, *which solely covers the fee for preparing and filing an application for a grant of probate*. The fees in the Regulation (and reproduced on the blog) do not refer to the total costs involved for the entire administration of an estate. Therefore, the solicitor's blog is very misleading.

What is missing is a basic piece of consumer advice: if a solicitor is instructed to administer a deceased estate *after* the grant of probate is obtained, then there will be additional fees charged for income tax returns, collecting assets, settling estate debts, expenses for correspondence, third-party fees (e.g. fees related to stamp duty, transfer of real estate, etc). Thus the solicitor's blog offers an unfair table of comparison. The Legal Profession Regulation 2005 fees to obtain just a grant of probate are reproduced on the next page. In some instances a Solicitor's final bill may be a lot less than NSWTG, and in others it may be on a par or even higher.

Finally, the NSWTG commission can be viewed in a more positive light. In the event of my death there will be a team of NSWTG officers who will contribute to the processes of administering my estate: the trust officer who has primary carriage of the file, a tax officer lodging tax returns, legal staff involved in the conveyance of real estate and so on. Since the commission collected goes toward funding NSWTG and paying the salaries of several people, it is hardly an exorbitant cost.

In the case of a solicitor's office the division of labour will ordinarily just be shared between two sets of hands: the solicitor and a clerical assistant.

4.3 Survey Respondents' Comments

The NGO in its submission included examples of written comments from the people they surveyed that relate to the question about NSWTG's commission as compared to solicitors' fees:

The public trustee charges a percentage of the total of the estate where in most cases the predominant asset is the family home. This is highway robbery compared to the fees prescribed by the law society for solicitors etc.

The Public Trustee charges a percentage of estate on probate much more than a solicitor will!⁹²

The first point to note is that both comments come from individuals who speak of the “Public Trustee” which ceased to exist on 1 July 2009.

The second and more crucial point is that both comments allude to solicitors’ fees being cheaper. *What is plainly not understood is that the fees quoted only relates to the solicitor making an application to the court for a grant of probate. Thus, it is thoroughly unhelpful to make a facile comparison between NSWTG’s commission for the whole of an estate versus the solicitor’s fee just to obtain a grant of probate. The grant of probate is simply step one in the administration of a deceased estate.*

There are other written responses about timeliness and response, and it is difficult to weigh up the complaints made in the absence of hearing the NSWTG’s side of the story. IPART’s draft report quotes at face-value this comment from a survey respondent:

They took 18 months to process a modest estate and charged the earth.⁹³

The above comment clearly contains hyperbole “charged the earth” and asserts that the estate took eighteen months to complete. The entire complexion might be radically altered if one could refer to the estate file which might reveal a chain of external problems, including a lack of co-operation among beneficiaries. In the absence of a right of reply from NSWTG, one must say that this is a half-told story that seems to verge on exaggerating a point.

IPART uses the quote almost as if it is irrefutable evidence but then steps back after citing it. There is a tepid reference to a “perception” that the delivery of service by NSWTG is substandard:

Without improvement, it would appear difficult to justify any increases in pricing when the perception is that the service is of a lesser standard than available privately.⁹⁴

Unfortunately IPART does not issue a cautionary statement or even indicate that NSWTG might be exonerated if the full facts are known.

4.4 IPART’s Use of Statistics

Prior to the creation of NSWTG in July 2009, the Public Trustee had already implemented a system to measure client satisfaction. Such a system of measurement never existed in the

⁹² Submission, Alzheimer’s Australia, 3.

⁹³ *Review of fees of the NSW Trustee and Guardian*, 110. The comment is uplifted from Alzheimer’s Australia, 3.

⁹⁴ *Review of fees of the NSW Trustee and Guardian*, 110.

Office of the Protective Commissioner.⁹⁵ The Public Trustee's client satisfaction index was based on survey feedback from beneficiaries to deceased estates and other trustee clients.

IPART claims credit for urging NSWTG to implement this system of surveying client satisfaction.⁹⁶ While the IPART draft report does indicate that this feedback system is in place it does not give full coverage to the reported statistics from 2010-2013.

The report speculates in light of the stakeholder concerns about poor service:

This may indicate that the existing measures are not identifying service problems in sufficient detail, or that NSWTG is not effectively using them to improve its services.⁹⁷

The first problem in the draft report is that the negative statistics supplied from the NGO survey are taken almost at face-value to lend support to suit a narrative about poor service. The methodological and analytical problems discussed above about the inherent weaknesses of the survey are never once entertained. In other words, IPART fails to critically probe the survey results or to ask appropriate questions that would warrant further research.

Secondly, there is an acute gulf between the statistics reported in NSWTG's annual customer satisfaction survey, and the low results obtained in the NGO survey. One has to ask, why is it that the survey yielded a low result of customer satisfaction at 56%, when NSWTG's customer survey of 2013 discloses a 95% satisfaction rating from the Trustee division, and 62% from the FM division?

The NSW Auditor-General reported to Parliament that:

- In 2007 the index for clients' rating of the Public Trustee's services was 73%.
- By 2009 the client rating of services had risen by 14 points up to 87%.⁹⁸

The Auditor-General indicated that "for the first time customer satisfaction was measured for Financial Management clients in 2010-2011."⁹⁹ This is a reference to the fact that such a feedback system was never used at the OPC.

In 2011, the client index rating for financial management services stood at 66%, while at the same time the client index for Trustee services stood at 84%.¹⁰⁰ This figure of 84% it turns out was a typographical error and should read 94%. As the Auditor-General gives comparative figures tabulated year by year it is worth noting that in the 2012 and 2013 reports respectively the Auditor-General has adjusted the 2011 sum to 94%.

⁹⁵ *NSW Auditor-General's Report Volume 7 2011: NSW Trustee and Guardian*, 45.

⁹⁶ *Review of fees of the NSW Trustee and Guardian*, 142.

⁹⁷ *Review of fees of the NSW Trustee and Guardian*, 143.

⁹⁸ *Auditor-General's Report 2011*, 45.

⁹⁹ *Auditor-General's Report 2011*, 45.

¹⁰⁰ *Auditor-General's Report 2011*, 45.

Notice then that according to the 2011 index of client feedback that there was as a considerable gap of 28% points difference between the Trustee clients' rating of service, and the Financial Management clients' rating of service.

Each year since 2011, the Auditor-General has reported on the NSW TG client satisfaction index, with figures tabulated separately for Trustee services and for financial management services.

Here are the annual figures tabulated:

	2011 ¹⁰¹	2012 ¹⁰²	2013 ¹⁰³
Customer Satisfaction – Trustee Services	84% (actually 94%)	95%	94%
Customer Satisfaction – Financial Management Services	66%	60%	62%

The Auditor-General has repeatedly stated:

The Trustee Services customer satisfaction index has remained stable, and at a high level.¹⁰⁴

The above quote from the Auditor-General is strangely absent from IPART's review. Meanwhile, the customer satisfaction index for financial management clients languishes far behind those of the Trustee clients. Take the annual figure for rating Trustee satisfaction and subtract the figure for rating Financial Management satisfaction and the comparative gaps in satisfaction ratings stand as follows:

- The percentage gap for 2011 for Financial Management satisfaction is **28% lower** than that for Trustee Services.
- The percentage gap for 2012 for Financial Management satisfaction is **35% lower** than that for Trustee Services.
- The percentage gap for 2013 for Financial Management satisfaction is **32% lower** than that for Trustee Services.

However, as the Auditor-General also points out every year, the low rating in satisfaction of services from financial management clients is explained as follows:

The difference in satisfaction ratings between Trustee Services and Financial Management clients is mainly due to Financial Management clients being

¹⁰¹ Auditor-General's Report 2011, 45.

¹⁰² NSW Auditor-General's Report to Parliament Volume 6 2012, 66.

¹⁰³ NSW Auditor-General's Report to Parliament Volume 6 2013, 45.

¹⁰⁴ Auditor-General's Report 2013, 45; cf. Auditor-General's Report 2012, 68.

required by an order of a court or tribunal to use the Trustee and Guardian, whereas Trustee clients voluntarily choose the Trustee and Guardian. Financial Management clients may be unhappy and/or do not understand the need for the order.¹⁰⁵

4.5 Interstate Public Trustees

IPART did not consider comparing the customer/client satisfaction surveys that interstate Public Trustees conduct annually. Not all annual reports provide an adequate or detailed break-down of statistics but presumably IPART could request such data.

NSWTG's survey results are quite good when compared to what some interstate Public Trustees report.

4.5.1 PT Queensland Customer Survey

According to the most recent annual report, the PT Queensland only instituted a client survey/feedback system in 2012-2013. In the 2014 annual report it indicates that one of its "key achievements" comprised:

The second annual Client Survey to measure and identify areas for improvement in the provision of services:

- For deceased estate management
- For financial management for clients with impaired capacity
- In the course of front desk and telephone reception for clients¹⁰⁶

The Public Trustee of Queensland is sometimes extolled as the paradigm for others to imitate. Yet it was the PT in NSW and its successor NSW TG that were ahead by several years in seeking annual feedback from clients.

According to Queensland's annual report there were just two measuring targets in the client survey for rating its efficiency and performance standards. The report states that for 2014-2015 this is about to change with four measuring standards and it supplies the following table:¹⁰⁷

SERVICE STANDARDS	2013/14 Target/Estimate	2013/14 Actual	2014/15 Target/Estimate
Overall client satisfaction with deceased estate administration service as measured by client satisfaction index	65%	67%	70%
Overall client satisfaction with financial management service as measured by client satisfaction index	New Measure	New Measure	70%
Overall client satisfaction with Will preparation service as measured by client satisfaction index	90%	95%	90%
Percentage of deceased estates administered within target time-frame	New Measure	New Measure	70%

¹⁰⁵ Auditor-General's Report 2013, 45.

¹⁰⁶ Public Trustee of Queensland Annual Report 2013-2014, 4.

¹⁰⁷ Public Trustee of Queensland Annual Report 2013-2014, 9.

Notice that the PT Queensland will for the first time be surveying its clients under financial management for the year ending 30 June 2015. Notice that the client satisfaction results in its Wills preparation service is quite high. However, notice that Queensland's estate administration services are rated by its clients at 67% which is almost the same level that NSW TG has received from its clients under financial management (66%, 60% and 62%)! If NSW TG is rated as having a poor result in protected estates, the Public Trustee of Queensland's services in deceased estates is hardly any better!

4.5.2. Public Trustee South Australia

For the very first time the Public Trustee in South Australia distributed in 2010-11, via a social research company, a written customer survey to 21,000 clients encompassing financial management, Wills and deceased estates. Only 8% of clients responded and returned the survey questionnaire. It was reported that:

The results of the survey indicated that the overall results were positive for the Public Trustee:

- 72% of respondents stated that they were either satisfied or very satisfied with the overall quality of service delivered
- 71% were either satisfied or very satisfied with the Public Trustee's services; and
- 68% were either satisfied or very satisfied with the timeliness of those services.¹⁰⁸

Notice that the % rate for "satisfaction" is substantially lower than the rating figures for NSW TG's trustee services, and only marginally higher than the ratings for NSW TG's protected estates.

In the same annual report it was stated that 83% of Wills clients, "were most likely to recommend the Public Trustee."¹⁰⁹ It was further reported that "some Personal Estate clients provided feedback that they wanted more timely communication, and a cheaper service."¹¹⁰

In 2013 the PT South Australia began a telephone survey (instead of a written questionnaire) to obtain feedback from their clients under financial management. The survey seeks answers to questions posed "Do you agree ..." with responses rating from 1 to 5 (strongly disagree to strongly agree), with 5 being the highest score.

The number of those in protected estates who were surveyed in 2014 is as follows:¹¹¹

Personal Estates Branch Telephone Survey	Surveyed	Surveys Completed	% of Total Called
Liaison Persons (i.e. private managers)	305	287	94.09
Protected customers	146	84	57.53

¹⁰⁸ *Public Trustee South Australia Annual Report 2010-11*, 51.

¹⁰⁹ *Public Trustee of Queensland Annual Report 2013-2014*, 51.

¹¹⁰ *Public Trustee of Queensland Annual Report 2013-2014*, 51.

¹¹¹ Locher Human Resources, *Public Trustee Customer Satisfaction Survey: Protected Estates Customers*, June 2014, 3. Available at <http://www.publictrustee.sa.gov.au/uploads/pdf/CustomerSatisfaction/ClientSatisfactionSurvey2014-PersonalEstatesClients.pdf>

It should be noted that the above small sample comes from a much larger client base that numbers just over 4,000 in total. A rating of 3.05 was given in response to the statement, “The cost of personal estate admin were explained”, and 3.06 for “I understood the costs.”¹¹² The report goes on to comment on these statements:

When the results for Personal Estates Customers were broken down into Protected customer and Liaison Persons, it was noted that Liaison Persons gave slightly lower mean ratings ... This trend was evident in the 2013 survey results but to a smaller extent.¹¹³

It is apparent that the Public Trustee in South Australia is perceived by a % of private managers and protected clients as not being transparent about fees. The key word, I believe, is “perception.”

The survey results for each year from 2011 onwards can be accessed on their website.¹¹⁴

4.5.3 State Trustees Victoria

In 2011, the State Trustees provided a simplistic bar-graph concerning client satisfaction ratings for its “Personal Financial Solutions clients” (i.e. protected estates) and its “retail clients” (i.e. estates and trustee matters). The annual report stated that “In 2011 we spoke to nearly 1,500 clients about their experience with State Trustees and our performance against expectations.”¹¹⁵

The bar graph results for protected estates did not reveal how many protected estate clients were interviewed. Instead the only % of data reported from protected estate clients is:

- In 2009-10 the result was 82% perceived that the State Trustees “acts in the best interests of clients, and willingness to recommend us to others.”
- In 2010-11 the result had dropped to 75%.

The results for estate-trustee clients:

- In 2009-10 the result was 68% and in 2010-11 it was 70% that the State Trustees were measured as the preferred service provider “over competitors” and the “willingness to buy more of our services and likelihood of recommending us to others.”¹¹⁶

In 2013-14 the State Trustees only disclosed the following feedback:

Each year State Trustees gathers client feedback across Retail and Personal Financial Administration (PFA) services via the Client Value Index (CVI) survey. In 2013/14, feedback was sought from 266 PFA clients and their support networks, and 1008 retail clients about their experience with State Trustees, and performance against expectations.

¹¹² Public Trustee Customer Satisfaction Survey: Protected Estates Customers, June 2014, 12.

¹¹³ Public Trustee Customer Satisfaction Survey: Protected Estates Customers, June 2014, 19.

¹¹⁴ See <http://www.publictrustee.sa.gov.au/main/publications/consumer-research-summary.html>

¹¹⁵ State Trustees Annual Report 2010-2011, 9.

¹¹⁶ State Trustees Annual Report 2010-2011, 9.

The overall result is a weighted combination of retail and personal financial administration scores. The target of 68.8% was exceeded slightly with a result of 69.9%.¹¹⁷

State Trustees' overall combined rating of client satisfaction at 69.9% stands in stark contrast to NSW TG's client satisfaction rating in trustee services. State Trustees rating is only slightly above the most recent rating for NSW TG's protected estates (62%).

4.5.4 Summing up the comparisons

IPART has latched onto the unscientific results of the NGO survey which gives a low rating for client satisfaction. This data is not properly analysed against the annual results for NSW TG's client satisfaction surveys. NSW TG's survey results disclose a high positive rating in its trustee services. NSW TG's service ratings in this division of its work are as good as or in other cases outstrip the results obtained in Queensland, South Australia and Victoria.

The ratings for NSW TG's financial management service are found to range from 66% to 60%. It would no doubt be an aspiration in NSW TG for those ratings to rise. However, it has to be borne in mind that this area of service is complicated in terms of client perceptions and reactions as much as it may be affected by any lead-weight in organisational bureaucracy. NSW TG's ratings in this area are not necessarily as "bad" as what is dimly revealed in results obtained by the Public Trustees in other jurisdictions. When that fact is brought into the picture it ought to alter the complexion of the highly prejudicial interpretation of statistics in IPART's review.

4.6 Annual Complaints against NSW TG

The Auditor-General reports on the annual tally of written complaints lodged against NSW TG. Here are the tabulated figures:

- 2010 – 287 complaints received
- 2011 – 377 complaints received
- 2012 – 386 complaints received
- 2013 – 349 complaints received

Consider what the Auditor-General remarked in looking back at the year when the merger of the Public Trustee and Office of Protective Commissioner occurred:

There was a decrease in complaints received from trustee clients and the number of complaints requiring corrective action. The number of complaints received and requiring action in 2009-10 is considered to be minimal in the context of dealings with over 25,000 trustee clients, and particularly positive in the first year of the merged organisation.¹¹⁸

¹¹⁷ *State Trustees Annual Report 2013-2014*, 4.

¹¹⁸ *Auditor-General's Report to Parliament 2010 Volume 8*, 55.

In 2009 the former Public Trustee received a total of 134 complaints *but only* 37 required any corrective action; while in 2010 the Trustee division received a total of 121 complaints *but only* 22 required any corrective action.¹¹⁹

It is important to note then that the Auditor-General reports on the quantity of annually received complaints. The seemingly large quantity of complaints made is one thing, but the reality of how many are genuinely in need of “corrective action” is actually small.

In 2012, there were 386 written complaints made against NSW TG. The Auditor-General observed:

Complaints made to NSW Trustee and Guardian increased by 2.4% during 2011-12. Over half of the complaints related to delays in responses and decisions, and provision of information. *A significant proportion of the complaints (271) came from the Financial Management area of operations.*¹²⁰

In 2013 there 349 written complaints and once again the Auditor-General remarked:

Over half of the complaints related to delays in responses and decisions, and provision of information. *A significant proportion of the complaints (222) came from the Financial Management area of operations.*¹²¹

Notice that in 2012 and 2013 that around two-thirds of the complaints made in both years stemmed from financially managed clients.

Conclusion

The administration of protected estates is highly prone to complaints, and there is no magic panacea for the problem. The way in which IPART depicts NSW TG’s service delivery as inefficient is based in part on a faulty use of limited statistical data.

¹¹⁹ Auditor-General’s Report 2010 Volume 8, 55.

¹²⁰ Auditor-General’s Report 2012, 68. Italics not in the original report.

¹²¹ Auditor-General’s Report 2013, 45.

5 TOWARD THE FUTURE

“Whatever it is, I’m against it”

Groucho Marx¹²²

Over a period of almost two and a half decades, I have maintained an active interest in the NSW TG and its predecessors the PT and OPC. During the 1990s I suggested to some employees of the PT that it would be prudent to institute an annual “Wills Awareness Week,” and to sponsor seminars and other activities in conjunction with “Seniors Week.” I was pleased to discover that my original suggestions were taken up.

The idea has subsequently been taken up by interstate Public Trustees:

The Public Trustee has decided to celebrate Wills Week along with all other Public Trustees. The first Wills Week was conducted in October 2011 and the Public Trustee utilised radio marketing for the first time. The Public Trustee proposes to hold seminars in Seniors Week in March and Wills Week in October each year.¹²³

Wills Week Community Awareness seminars were organised with the accessibility needs of the attendees considered.¹²⁴

In 2012 the NSW Law Society followed suit with its own annual wills-promotion programme.¹²⁵ In light of my past proposals, which are now integrated into the annual routines of NSW TG, I am putting forward in this chapter some suggestions for NSW TG’s future.

5.1 Free Wills or Pay-As You-Go?

In the quest for more revenue, the NSW TG proposes to charge clients a fee for the preparation of wills. IPART recommends that a nominal \$10 fee be levied on customers who qualify for a full Centrelink pension, while having a higher fee charged for other clients based on their asset portfolio.

It is noted that there was a dip in the number of wills being prepared by NSW TG in 2011-2012, which appears to have improved somewhat in 2012-2013.

2010-2011 ¹²⁶	2011-2012 ¹²⁷	2012-2013 ¹²⁸
10,639	9,290	9,562

¹²² *Horse Feathers*, Paramount Productions, 1932.

¹²³ *Public Trustee for the ACT Annual Report 2012-2013*, 32.

¹²⁴ *Public Trustee Western Australia Annual Report 2012-2013*, 25.

¹²⁵ <http://www.lawsociety.com.au/community/Solicitorsinthecommunity/willawarenessday/index.htm>

¹²⁶ *NSW Trustee and Guardian Annual Report 2010-2011*, 14.

¹²⁷ *NSW Trustee and Guardian Annual Report 2011-2012*, 6.

¹²⁸ *NSW Trustee and Guardian Annual Report 2012-2013*, 10.

As a Wills client, I am not convinced that the proposal to introduce a fee is going to be the best approach. I have doubts that it will (a) improve the annual statistics for Wills drafted, and (b) increase the conversion rate of Wills into deceased estates.

First, it seems to me that what NSW TG will reap in commission and fees on my deceased estate more than compensates for the “price” and “time” in taking my instructions to prepare the Will.

Secondly, there is the vexed technical consumer-quality issue of how legitimate is it for NSW TG to charge for the preparation of a Will when the majority of its employees are not licensed legal practitioners? If every branch of NSW TG had a solicitor who interviewed clients in preparing a Will, then there is no consumer risk involved. However, since it is primarily trained trust officers who draft a lot of the Wills, they are limited precisely because they do not hold a degree in Law.

I know that the “plain English Wills” is something that was created by a solicitor in the Public Trustee. It is clear that the non-legal clerks who interview clients in the preparation of a Will have been competently trained in that task. It is also very clear that more complex Wills are referred to credentialed solicitors. It is also true that the trust officers who handle deceased estates undertake tasks which a solicitor does in private practice. While I do not have any doubts about the professionalism of its staff in executing these tasks, the proposed levying of fees in preparing a Will by non-lawyers does stray into a rather grey area of consumer affairs.

Thirdly, there is the potential for a reversal of custom through introducing a fee. The NSW TG has a century long pedigree of offering the free Will-making service. From the inception of the PT in 1914 the principle of CSO took pride of place in serving the people of NSW. This was reiterated in 1942 as the PT’s CSO produced good social capital (e.g. the estate administration of NSW military personnel killed in action in World War Two). The McKell government in 1942 sought to make a range of legal reforms that would enable low income people—including war widows and the children of deceased soldiers—have access to an affordable and equitable service.¹²⁹

The introduction of a fee for making a Will can be construed as a back-flip on the social contract where NSW TG has been committed to making legal services accessible. In effect, instead of improving NSW TG’s social standing, it could very well stimulate a counter-productive trend of driving away a percentage of potential clients.

For some the prospect of paying for a Will may entrench an obstinate predisposition to die intestate. An intestate estate may be deemed as something that is “inefficient” both in terms of the law and in costs because the deceased person was careless and did not contemplate the mess that is created by dying without a Will. An intestate estate which comprises assets that

¹²⁹ See the NSW Parliamentary debate concerning the amended *Public Trustee Act 1942*. On the social welfare and legal reforms of the McKell government start with Don Fleming and Francis Regan, “Evatt’s Bastard Child: The Commonwealth Legal Service Bureaux 1942-1951,” *Australian Journal of Legal History* 15 (2003) available at www.austlii.edu.au/au/journals/AJLH/2003/15/html#fn28

must be legally administered (a) generates more costs than does a Will, and (b) includes more bureaucratic steps in the processes of estate administration. To its credit NSW TG drives home this message that making a Will is a prudent step in its promotional talks and media interviews.

Fourthly, the proposed full-fee for a Will looks unattractive for non-retired individuals on modest salaries who already juggle the costs of living by surviving on a pay-packet-by-pay-packet approach. Wills that are priced in terms of \$300-\$500 start to resemble an unaffordable luxury that one may very well procrastinate about because there are too many quarterly bills that are equal to or greater than what is proposed for making a Will.

The proposed full-fee runs the risk of the NSW TG pricing itself over time beyond the reach of those who really need its services. The net result would be counter-productive since the NSW TG is concerned about sustaining its operations financially. There is not much to be gained from eroding its existing client base let alone shrinking its ability to appeal to more new clients over time.

Fifthly, the “free Will” service has a long heritage of attracting low-income clients. Some people not only want an executor who has perpetuity but are genuinely reluctant to pay a solicitor’s bill for making a Will.

Sixthly, I know some pensioners who would feel their dignity is being denuded if they were asked to divulge their Centrelink details in order to justify levying a nominal fee of \$10. IPART’s suggested nominal fee might initially appear to be reasonable if one compares it to the cost of one fast-food meal. It might seem like a Will is at an affordable price for those on very low-incomes such as pensioners. To some extent one must recall though that among the aged the notion of the user-pays simply prompts a good deal of resistance. If one has to pay \$10 then some people might feel it is a whole lot simpler to grab a do-it-yourself Will packet from the Post Office.

Seventhly, the proposed \$10 fee is simply going to add in yet another layer of bureaucracy since the recommendation from IPART entails setting up the infrastructure for monitoring the programme over a three year period. The costs associated with the set-up and then the monitoring processes look like being counter-productive. Instead of creating a more efficient service, another layer of bureaucracy, economic monitoring and risk management procedures are added on to the task. NSW TG will simply be expending more money in a futile exercise akin to a dog chasing its own tail.

Eighthly, IPART’s suggested fee for Centrelink pensioners in NSW could be construed as a form of consumer discrimination and hence regarded as “unfair” when one notes that:

- The Public Trustee of Queensland makes free Wills for every client;
- The Public Trustee of South Australia makes free Wills for all clients who appoint it as the executor;
- The Tasmanian Public Trustee makes free Wills to holders of a Seniors Card;
- The Public Trustee of the ACT makes free Wills for anyone aged over sixty.

Clearly, in those jurisdictions the prudent decision was to not place any burden at all on pensioners. Moreover, consider these two facts:

- The Tasmanian Public Trustee has settled on a nominal fee for anyone who is not sixty years old: \$20 (individual) and \$30 (couples).
- The Public Trustee of the Northern Territory does charge for making Wills but in the case of anyone who is the holder of a concession card the fee is \$23.

The proposed \$10 fee for NSW hardly seems worth the effort of collecting.

Ninthly, the free Will-making service appears to be one of the strong points associated with the successful operations of the Public Trustee in Queensland. It has prepared more than 25,000 Wills per annum over the past three financial years.

Tenthly, it is worth reframing what NSW TG accomplishes through the preparation of a free Will. One could just as easily view the free Will-making service as being parallel to the “free estimate” of a tradesperson’s quote.

According to the logic of IPART’s “cost” analysis one must recover costs for time spent on a task, otherwise it is apparently interpreted as an inefficient cost in delivering a service. If the NSW TG was to slavishly pursue this analysis, and apply it consistently, then anyone who makes an inquiry about NSW TG’s services ought to pay a fee for the technical information. Since staff time is taken up answering inquiries by telephone, letter, e-mail, or in person presumably this needs a price-tag. One could argue that the advice is about professional trustee services, and so inquirers should be treated like drivers on a freeway where the e-tag is activated to deduct the toll.

One could logically infer that all tradespeople who tout for customers are inefficient because they do not charge prospective clients for the time taken to supply a quote. Tradespeople know full well that not everyone they supply a quote to is going to convert into a paying client. Yet the time taken to estimate the costs is all part and parcel of promoting their services. If NSW TG’s free Will-making service is likened to a tradesperson’s “quote”, then it need not be analysed as a cost that must be recovered in the present by a fee. The cost of making Will is in effect recouped in the commission charged on the deceased estate.

Perhaps another rationale behind imposing a fee is that it is believed it is going to be a deterrent to non-genuine clients—i.e. those whose affairs will not convert into commission because there won’t be any estate administration. Not every Will that NSW TG currently prepares convert into estates for administration. It is being assumed then that this represents “inefficiency.” Therefore it should give way to a system that culls out fickle clients and “secures” loyal clients. The assumption here maybe that if one has paid for a service then one will remain loyal to the provider or the brand. However, it does not necessarily follow in consumer behaviour today that paying for a service translates into a long term outcome of customer loyalty.

The reasons why not every Will convert into estates for NSW TG are bound to be many and varied:

- Some choose NSW TG as an executor just like having an insurance policy that covers certain periods of life (such as when parents have under-aged children).
- There are patterns to discern in the disposal of inter-generational assets, which is a point that has been taken up in studies by NatSem in Canberra.
- People's assets do not always accrue in value, and one may have prepared a Will in times of prosperity whilst dying in poverty.
- For many couples their assets are often held as joint tenants so that estate administration is often not needed when the first member of the couple dies.
- A point of vulnerability for the loss of Will clients is when a partner or spouse dies, and the surviving party decides to change their domicile. If a bereaved party decides to sell their realty, it is highly likely that they will be "poached" by a solicitor who handles the contract for sale, and advises its "time" to update your will.
- Some retirees move out of NSW and become domiciled in an interstate jurisdiction (such as Queensland).
- Some revoke their Will because they accept at face value negative tales that circulate about poor service from NSW TG.

What NSW TG has tried to do to ensure that some client loyalty is instilled and retained is to cultivate continuing contact via its bi-annual client newsletter.

5.1.1 Interstate Public Trustee Wills Service

There are also hints to be gleaned from the experiences of the interstate Public Trustees that are currently charging for Wills. Charging a fee does not necessarily increase revenue to any great extent. While a more thorough study should be undertaken, a few scattered details emerge from the hints contained in the annual reports of interstate Public Trustees.

There is no consistent approach adopted by the interstate Public Trustees in which they cover the costs for preparing wills. While Victoria, Western Australia, and the Northern Territory have adopted a fee system, the other jurisdictions have retained some free Will-making component in their delivery of services.

5.1.1.1 Queensland

The Public Trustee of Queensland states that "our will making service is 100% free."¹³⁰ In chapter two it was also noted that the Public Trustee gauges its free will-making service in terms of a CSO. It reports that in 2013-2014 its total annual cost for making free wills equalled \$5,041,680 and that it also equates the cost of giving free advice to both the community and to tribunals at \$1,056,593.¹³¹ As far as the Public Trustee of Queensland is concerned these costs are not a cause for alarm or proof it must be fiscally inefficient.

¹³⁰ <http://www.pt.qld.gov.au/wills/>

¹³¹ Refer to chapter two, section 2.4 Queensland Clients and CSO Budget, or see *Public Trustee of Queensland Annual Report 2013-2014*, 8.

In recent years, the Public Trustee of Queensland has been preparing more Wills than its counterparts.

2011-2012 ¹³²	2012-2013 ¹³³	2013-2014 ¹³⁴
27,834	25,309	25,195

The large volume of Wills prepared is undoubtedly enviable, though it is worth noting that the past two financial years have shown a slight downwards trend. The Public Trustee of Queensland offers evidence that a free-Will making service can have a strong commercial appeal in the community.

5.1.1.2 South Australia

The Public Trustee in South Australia does not charge for making a will where it is named as the executor.¹³⁵ In 2012-2013 the Public Trustee prepared 2,080 wills (both new and revised).¹³⁶ However, notice that in 2012-2013 the Public Trustee of South Australia admitted that its “core business revenue had decreased”:

Public Trustee achieved an operating surplus before tax of \$1.895 million. The operating surplus after income tax equivalents was \$1.327 million compared to a budgeted operating loss of \$400,000 ... the revenue return from core business services was \$1 million below budget. This was primarily due to a lower than expected number of deceased estates being administered.¹³⁷

5.1.1.3 Victoria

State Trustees in Victoria charges \$230 per person where it is named the executor and \$580 if a different executor is named. It has also taken the exceedingly risky commercial venture in 2014—because in the long run it could erode their client base—of selling a will-kit on-line for the retail price of \$29.99.¹³⁸

It is curious that for the periods 2012-2013 and 2013-2014 that the State Trustees has not divulged the number of wills that it prepared in these two financial years. One might surmise that the results are not positive. It is interesting that the 2013-2014 annual report diverts attention by alluding to the launch of two “new products”, namely its Will Bank and its online Will Kit.¹³⁹

¹³² *Public Trustee of Queensland Annual Report 2011-2012*, 9.

¹³³ *Public Trustee of Queensland Annual Report 2012-2013*, 7.

¹³⁴ *Public Trustee of Queensland Annual Report 2013-2014*, 7.

¹³⁵ <http://www.publictrustee.sa.gov.au/uploads/pdf/FAQ/FeesEstateServicesJuly14.pdf>

¹³⁶ *Public Trustee South Australia Annual Report 2012-2013*, 23.

¹³⁷ *Public Trustee South Australia Annual Report 2012-2013*, 47.

¹³⁸ <http://statetrustees.com.au/uploads/content/115-State-Trustees-Fees-and-Charges-23-07-2014.pdf>

¹³⁹ *State Trustees Annual Report 2013-2014*, 10.

Here are the figures for the preparation of Wills from 2010-2012:

	2010-2011	2011-2012 ¹⁴⁰	2012-2013	2013-2014
Number of Wills prepared	2,483	2,678	Not disclosed	Not disclosed

5.1.1.4 Tasmania

The Public Trustee in Tasmania charges \$20 to prepare a will for an individual and \$30 for a couple. It provides incentives for making a free will to anyone who fits into these three categories:

- The person is (or was) a beneficiary to an estate administered by the Public Trustee.
- A holder of a Seniors Card.
- A pre-existing will client who updates their will.¹⁴¹

During 2012-2013 the Public Trustee of Tasmania prepared 707 new wills and updated 1,024 wills.¹⁴² However, it is not disclosed out of the 707 new wills how many clients paid fees and how many qualified for a free will. Tasmania's Public Trustee relies on an injection of funds from the Treasury to cover its CSO budgets. According to its annual report the current three year agreement involves the Public Trustee supplying around \$500,000 from its revenue while the Tasmanian Treasury adds on these sums:

2012-2013	\$1,360,000
2013-2014	\$1,420,000
2015-2016	\$1,456,000 ¹⁴³

The fees that are collected for preparing new wills must be regarded as a pin-prick compared to the burgeoning increases in Tasmania's CSO budget.

5.1.1.5 ACT

The Public Trustee for the ACT charges for wills along these lines:

- Single person \$155
- Couples \$210
- Seniors (i.e. anyone aged 60 years or more) – free will
- Home visits incur a charge of \$226
- Complex wills cost \$453.¹⁴⁴

The numbers of wills prepared by the Public Trustee for the ACT have been modest, and it is not at all clear how many Wills are from new clients and how many are updates for existing clients:

¹⁴⁰ Figures for 2010-2012 in *State Trustees Annual Report 2011-2012*, 11.

¹⁴¹ <http://publictrustee.tas.gov.au/about/fees-charges/>

¹⁴² *Public Trustee [Tasmania] Annual Report 2012-2013*, 7.

¹⁴³ *Public Trustee South Australia Annual Report 2012-2013*, 17.

¹⁴⁴ <http://publictrustee.act.gov.au/inf/fact-sheet-fees.pdf>

- 704 in 2011-2012
- 743 in 2012-2013¹⁴⁵
- 752 in 2013-2014¹⁴⁶

5.1.1.6 Western Australia

The Public Trustee of Western Australia is a stand-alone entity in terms of how it charges for its services. On 1 July 2009 it abolished the system of charging a commission, and shifted to a fee system.

For the preparation of a will nominating the Public Trustee as executor it charges:

- \$45 for a single person who holds a concession card
- \$35 per client for couples where one client holds a concession card
- \$300 for a single person (no concession)
- \$200 per client for a couple (neither holds a concession card)

For the preparation of wills nominating a different executor the above four categories are charged as follows:

- \$240 for a single person who holds a concession card
- \$160 per client for couples where one client holds a concession card
- \$300 for a single person (no concession)
- \$200 per client for a couple (neither holds a concession card)¹⁴⁷

However, charging for the preparation of wills is not translating into more business. Instead, the number of wills being prepared by the Public Trustee has declined, and the decline coincides with the period in which the new fee system has replaced the older system of charging by commission:

	2008-2009	2009-2010	2010-2011 ¹⁴⁸	2011-2012 ¹⁴⁹	2012-2013 ¹⁵⁰
Number of Wills Prepared	3,650	3,481	3,284	2,862	2,916

Since the Public Trustee in Western Australia no longer uses a commission based system, it is instructive to note what it has reported in terms of its expenditure and revenue for 2012-2013:

The Public Trustee had an operational budget of \$22.4 million and a revenue budget of \$21.2 million, an increase of 2.3% and 1.9% respectively.¹⁵¹

Notice that the expenditure exceeded its revenue.

¹⁴⁵ Figures for 2011-2013 contained in *Public Trustee for the ACT Annual Report 2012-2013*, 5.

¹⁴⁶ *Public Trustee for ACT Annual Report 2013-2014*, 16.

¹⁴⁷ Schedule 14 Preparation of Wills, 37 at www.publictrustee.wa.gov.au/files/scale_of_fees.pdf

¹⁴⁸ The figures spanning 2008-2011 are contained in *Public Trustee Western Australia Annual Report 2010-2011*, 18.

¹⁴⁹ *Public Trustee South Australia Annual Report 2012-2013*, 20.

¹⁵⁰ *Public Trustee South Australia Annual Report 2012-2013*, 15.

¹⁵¹ *Public Trustee Western Australia Annual Report 2012-2013*, 18.

5.1.1.7 Northern Territory

The Public Trustee of the Northern Territory charges to make wills as follows:

- \$114 for an uncomplicated will appointing the Public Trustee as executor
- \$284 for a complex will
- \$23 for a holder of a concession card
- \$57 for an updated will.¹⁵²

Although it has offered a service of preparing wills where other executors are appointed this has eroded the business and its capacity to deliver basic services. Since it has proven to be counter-productive to prepare Wills naming other executors, the Public Trustee observed in its 2012-2013 annual report:

During 2009-10 the Public Trustee introduced a policy to limit the circumstances in which instructions will be accepted from individuals who do not nominate the Public Trustee as executor. Accordingly, since 2009-2010 there has been a reduction in the number of wills prepared but an improvement in the timeliness of will preparation. This is a trend observed in other jurisdictions which have implemented such changes.¹⁵³

From the preceding survey it is apparent that:

- Charging for Wills is not necessarily matched by a corresponding rise in attracting new clients.
- Offering a service to make Wills where the Public Trustee is not the executor seems to erode the long-range client base (i.e. creating deceased estates), and it merely adds to the bureaucratic processes in organisations whose staff capacities are already strained.
- Several interstate Public Trustees have specifically exempted pensioners from paying any fee for a Will.
- A fee system for estate administration as introduced in WA has not brought the Public Trustee out of the budgetary “red” zone.
- The largest producer of free wills is the Public Trustee of Queensland, who makes twice the number made by NSW TG at present.

5.2 Consultant Burnout

Since the late twentieth century it has become fashionable for state government departments to draw on the services of external consultants. It has reached the point where it is almost a reflex reaction to refer all kinds of matters (beyond financial audits) to private consultants. While there can sometimes be merit in this, there are a variety of studies which raise concerns that one does not always get value for money from consultants’ advice. Indeed it is possible

¹⁵² <http://www.nt.gov.au/justice/pubtrust/fees.shtml>

¹⁵³ *Public Trustee for the Northern Territory Annual Report 2012-2013*, 8.

for a department to be in a state of fatigue as a result of the frequency in which consultants are called in.¹⁵⁴

This kind of weariness is neatly captured by the spy novelist John Le Carre:

All his professional life, it seemed to Smiley, he had listened to similar verbal antics signalling supposedly great changes in Whitehall doctrine; signalling restraint, self-denial, always another reason for doing nothing. He had watched Whitehall's skirts go up, and come down again, her belts being tightened, loosened, tightened. He had been the witness, or victim—or even reluctant prophet—of such spurious cults as lateralism, parallelism, separatism, operational devolution, and now, if he remembered Lacon's most recent meanderings correctly, of integration. Each new fashion had been hailed as a panacea: 'Now we shall vanquish, now the machine will work!' Each had gone out with a whimper, leaving behind it the familiar English muddle, of which, more and more, in retrospect, he saw himself as a lifelong moderator.¹⁵⁵

A moment's look back to the OPC might prompt some reflections as to whether the NSW TG is in danger of suffering from "consultant burnout" as it strives to improve its structures and services. From 1999-2008 the OPC was the object of study in the following reviews some of which involved state government entities and others were external consultants:

1. NSW Audit Office Performance Audit Report 1999
2. NSW Government Actuary 2000
3. Public Bodies Review Committee of the Legislative Assembly 2001
4. Senior Officers Group from 2001-2003
5. Council on Cost and Quality of Government 2002
6. Hawkless Consulting 2002
7. IPART Review of fees 2003 (included assistance from RSM Bird Cameron)
8. NSW Audit Office Performance Audit Report 2003
9. RSM Bird Cameron Efficiency Review 2005
10. NSW Treasury 2005-2006.
11. RSM Bird Cameron on Private Management Fees Review 2006
12. Deloitte 2007
13. IPART Review of fees 2008 (included assistance from Ernst & Young)

Despite all those reviews the OPC ended up as a merged entity in 2009, and as NSW TG continues to be subject to external criticism. To some extent, one is entitled to ponder: what

¹⁵⁴ Start with these discussions, John Dupre, "Do Consultants Really Practice What They Preach?" *Journal for Quality and Participation* 22 (1999): 32-35. David Collins, "Assaying the 'Advice Industry'," *Culture and Organisation* 12 (2006): 139-152. Denis Saint-Martin, "The New Managerialism and the Policy Influence of Consultants in Government: An Historical-Institutionalist Analysis of Britain, Canada and France," *Governance: An International Journal of Policy and Administration* 11 (1999): 319-356. Michael Laff, "Stop the Blame Game," *T & D* (June 2008): 47-51. Stuart Macdonald and Mike Simpson, "Learning from Management Consultants: the Lesson for Management Researchers," *Prometheus* 19 (2001): 117-133.

¹⁵⁵ John Le Carré, *Smiley's People* (London: Hodder & Stoughton, 1980), 161-162.

value for money was there in the 13 listed reviews related to the OPC if the outcomes did not yield the hoped for transformation and improvement of services?

The problem of state government is that departments become over-governed and over-managed by policies and requirements that end up chewing into the time that employees ought to be spending in serving clients. Instead, there emerges under the guise of efficiency and performance enormous layers of monitoring and feedback that takes employees away from their primary duties.

There also emerges the real problem that employees bear the brunt of criticism for decisions they did not make when consultants have recommended restructures that in the end when implemented have failed to function. The failure need not necessarily be the fault of employees but may have something to do with original desktop advice that failed to take into account the workstation and street-life realities of both employees and clients.

The IPART draft report scoops up an observation attributed to the PSA about NSWTG employees: “It is simply the fact that there is insufficient staffing numbers to provide a higher level of service.”¹⁵⁶ In the pursuit of greater efficiency and cost savings it will be counter-productive to reduce the staffing numbers at NSWTG. Fewer staff available to serve clients and to support the office’s operations will not produce greater efficiency in the delivery of services.

5.3 Future Fund

My parting suggestion for NSWTG is to look beyond the annual reviews of the office’s performance, annual budgets and annual Treasury advice, and look beyond the periodic reviews from IPART.

A fundamental problem that will ensue through to the year 2050 is how to financially sustain the NSWTG when an ageing population and protected estate client numbers are increasing annually. I suggest that NSWTG explore the feasibility of creating its own “future fund” so that it can indeed be off the state’s budget. This was, after all, what the McKell government created in 1942 for the Public Trustee through the Interest Suspense Account.

What could be explored is:

- Create a future fund that is developed over the next five years, so that at the end of that period the fund should be at a level where NSWTG is self-sufficient and completely off the state budget.
- Seeking a capital injection from Treasury alongside of some NSWTG revenue to set up a future fund that will generate income and out of the income generated NSWTG covers its CSO budget.
- If Treasury injected capital roughly equivalent to its current CSO assistance (5.11 million per annum) for say three years (i.e. over \$15 million), and NSWTG also

¹⁵⁶ *Review of fees of the NSW Trustee and Guardian*, 36.

designated some capital sums from its revenue, it might be feasible at the end of 5 years for the organisation to once again be self-sufficient.

It would be easy to dismiss the suggestion along the lines of Groucho Marx's quip "whatever it is, I'm against it". However, there has to be long-range thinking and not short-sighted goals concerning improvements to revenue. Unless there is some drastic shift in thinking and a move away from cosmetic tinkering about fees, then NSW TG will indeed end up in a disastrous fiscal cul-de-sac.

