



# IPART – Submission

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



**NSW Trustee & Guardian**  
Attorney General & Justice



## Contents

<b>Contents</b>	1
<b>1. Background</b>	3
1.1 Previous Fee Reviews	3
1.2 Current Fee Review	3
<b>2. NSW Trustee and Guardian</b>	5
2.1 History	5
2.2 Current Operating Environment	5
2.3 Financial Position	8
2.4 Future Challenges	10
<b>3. Client Service Guide</b>	14
3.1 Wills & Other Pre-Planning Instruments	14
3.2 Deceased Estates	17
3.3 Trusts	20
3.4 Powers of Attorney	21
3.5 Financial Management – Direct Management	23
3.5 Financial Management – Private Management	28
<b>4. Specialist Services Guide</b>	30
4.1 Disability Advisory Services	30
4.2 Financial Planning Services	31
4.3 Property Management Services	32
4.4 Legal Services	32
4.5 Genealogy Services	33
4.6 Taxation Services	33
<b>5. Other Services</b>	34
5.1 Seized or Confiscated Assets	34
5.2 Dormant Funds	34
5.3 Warehousemen's Lien Act	35
5.4 Court Investments	35
<b>6. Community Engagement</b>	35
6.1 Client Surveys	35
6.2 Complaints	36
6.3 Community Education	36
<b>7. Governance</b>	37
7.1 Executive	37
7.2 Corporate Management	37
7.3 Committees	37
7.4 Compliance Program	38
7.5 Planning	39
<b>8. Public Guardian</b>	39
<b>9. Fee Structure Proposal</b>	40
9.1 Current Fees	40
9.2 Fee Waivers	40
9.3 Foundation Principles	40
9.4 Key Inputs	41
9.5 Model	41
9.6 Explanatory Notes	41
9.7 Proposed Fee Structure	43

<b>Appendices</b>	44
I – IPART Issues Paper – Comments	i
II – List of Abbreviations	iii
III – Legislation and Policies	iv
IV – Current Fee Schema	vi
V – Case Studies – Pre-Planning Instruments	xiv
VI – Case Studies – Deceased Estates	xvi
VII – Case Studies – Trusts	xix
VIII – Case Studies – Powers of Attorney	xx
IX – Case Studies – Financial Management – Direct Management	xxi
X – Case Studies – Financial Management – Private Management	xxiii
XI – Case Studies – Disability Advisory Service	xxiv
XII – Case Studies – Financial Planning Services	xxv
XIII – Case Studies – Property Services	xxvii
XIV – Case Studies – Legal Services	xxviii
XV – Case Studies – Genealogy Services	xxxi
XVI – Case Studies – Taxation Services	xxxii

## 1. Background

The Premier, at the behest of NSW Trustee and Guardian requested that the Independent Pricing and Regulatory Tribunal of NSW (IPART) review the fee structure of the NSW Trustee and Guardian (NSWTG). This submission is in response to the invitation from IPART to provide comment on their Issues Paper titled *A fair and transparent fee structure for the NSW Trustee and Guardian*.

This submission sets out the background to NSWTG, our strategic goals, operating environment, current fee schema and proposed fee schema. A detailed description of the work undertaken in the delivery of services is provided together with client profiles and case studies.

### 1.1 Previous Fee Reviews

IPART undertook a review of fees for the previous Office of the Protective Commissioner in 2008. NSWTG progressively implemented fee changes recommended under that review from 1 April 2009. The former Public Trustee fees were established after a Regulatory Impact Statement (RIS) process was completed in 2008.

It was intended that a review of fees would be conducted after three (3) years of operation of NSWTG. It was also hoped that an integrated more modern client information management program would be in place in this 3 year period. For various reasons, that has not been able to be implemented. As a consequence we have continued to rely on fees that are now over five (5) years since the last review. The fees are not harmonised, have not kept pace with CPI increases and are not in any way an accurate measure of cost to serve.

### 1.2 Current Fee Review

IPART put out an issues paper in May 2014 calling for submissions by 16 June 2014. NSWTG has identified corrections to some of the information provided in that paper. These are provided in this submission at Appendix A.

IPART have identified a list of fourteen (14) issues for stakeholder comment. They are:

1. Do you think the broad principles we used for our 2008 review of the Office of Protective Commissioner fees are appropriate for the current review of the NSWTG's fees? Should we add a principle that we should not recommend fees for services that are provided in a competitive market?
2. Do you agree with our preliminary view that we should recommend fees for the following NSWTG services?
  - Financial management services for protected persons (including services for 'intensive needs' directly managed, other directly managed and privately managed protected persons).
  - Trustee services for low-wealth customers.
3. Do you agree with our preliminary view that we should not recommend fees for the NSWTG's trustee services for market customers, but that the NSWTG should set its own fees for these services? If not, please provide your reasons.

4. Do you support our proposed approach for estimating the efficient costs of the NSW TG's regulated services, including identifying benchmark fees for similar services in the competitive market, and adding costs specific to serving protected persons, including 'intensive needs' protected persons?
  - If so, what are the most appropriate benchmarks available?
  - If not, what methodology should we use to estimate these efficient costs?
5. Is IPART's previous interpretation of a 'clear, fair and transparent' fee structure appropriate for this review of the NSW TG's fees? If not, what would you recommend?
6. Do you agree with our proposed approach to identify the costs of serving protected persons before considering the fair proportion of those costs that protected persons should pay? If not, what methodology do you recommend we use?
7. What is the appropriate level of fees for protected persons? What level of community service obligation (CSO) should the Government provide?
8. Is the NSW TG's current policy for waiving fees and charges well-targeted, providing appropriate assistance only to the clients who need it?
9. Are the current caps on fees appropriate? Are they at the right levels? How should they be indexed over time?
10. Should the NSW TG charge market-based fees for preparing wills and powers of attorney? What is an appropriate fee for low-wealth customers? How should 'low-wealth customers' be defined?
11. Do you support our preliminary views that funding shortfalls should be met by the Government, including:
  - Shortfalls resulting from the differences between the costs of providing financial service management to the NSW TG's clients and the fees that we recommend for these clients?
  - Shortfalls resulting from the application of the fee waiver policy?
  - Shortfalls resulting from other 'non-client' activities and inefficiencies (through budget funding)?
12. Are you satisfied with the level of service provided by the NSW TG? Do you think it has improved over the last 5 years? Is the level of service similar to what you would expect from a private service provider (eg, a trustee company, solicitor or accountant)?
13. Should IPART index and publish a list of fees and charges annually and review the fees and charges after 5 years?
14. Should NSW TG use the fees that we recommend for protected persons as a guide in assessing the fees charged by private managers?

NSW TG provides this report as a public document to inform the review by IPART.

## 2. NSW Trustee and Guardian

### 2.1 History

NSWTG was formed through the merging of the organisations previously known as the Public Trustee (PT) and the Office of the Protective Commissioner (OPC). This was effected by the *NSW Trustee and Guardian Act*, which came into effect on 1 July, 2009.

NSWTG continues to provide the essential services that both former organisations offered. People who wish to have an independent and impartial executor, attorney or trustee can make a will, power of attorney or establish a trust with NSWTG. Those with diminished capacity<sup>1</sup> to manage their financial affairs receive direct or indirect oversight of their estate to protect them from exploitation or mismanagement.

The Public Guardian is a statutory officer under the *Guardianship Act, 1987*. The Public Guardian operates independently but reports administratively to the Chief Executive Officer of NSWTG. For the purposes of this submission, NSWTG refers to all operations of NSW Trustee and Guardian, excluding the Public Guardian.

### Our Vision

To support our community to effect their future life choices.

### Mission

We provide quality personal trustee, financial management and decision making services. We advocate for, protect and promote the rights and interests of our clients.

### Legislative Framework

NSWTG operates under the *NSW Trustee and Guardian Act 2009* and the *NSW Trustee and Guardian Regulation 2008*. NSW Trustee and Guardian charges fees for its services in accordance with the NSW Trustee and Guardian Regulations 2008. A full list of enabling and other legislation and policies is provided at Appendix III.

### 2.2 Current Operating Environment

Since the merger, NSWTG's achievements must be placed in the context of a difficult operating environment. We were affected by the global financial crisis, changes in the machinery of government, the requirement to deliver Employee Related Savings and a continued increase in demand for financial management services.

Trends specifically impacting on NSWTG include the ageing population and an increase in the number of people with acquired brain injury and mental illness. As an example, while the population in NSW is projected to increase to 9.1 million or 16% between 2006-2036. In the same period, the number of people over 65 is projected to increase by over 111%. This projection has been extrapolated to 10.3 million in 2050<sup>2</sup>. As a result of this significant growth in the ageing population, dementia prevalence in NSW is projected to increase by 388% overall in NSW between 2009-2050.<sup>3</sup>

---

<sup>1</sup> Throughout this paper we use the term diminished capacity in preference to the term lacking mental capacity. We note the work currently undertaken by the Australian Law Reform Commission (ALRC) and proposed changes to move away from the term “mental capacity” to that of “legal capacity” and “legal agency”. NSWTG supports this direction but for the purposes of this paper have adopted diminished capacity as a bridging term.

<sup>2</sup> ABS Population Projections, Australia (updated 2 December 2013)

<sup>3</sup> Access Economics Projections of dementia prevalence and incidence in NSW, P 11

### **Service Delivery Model**

The merger entailed a number of activities, including the development of a new model for delivering our services. We extended service delivery to clients under a financial management order from one central office to 10 decentralised offices. We intend to convert a further 8 offices when viable.

Importantly, NSW TG was able to expand services to regional NSW by opening new dual service delivery offices in Bathurst and Wagga Wagga.

### **Information and Communication Technologies**

To integrate information technology systems, we successfully introduced a new Standard Operating Environment across the organisation. We are entering Phase II of a major project to integrate the two aged and bespoke Client Management Systems into one system that maximises automation of function to garner efficiencies. The Integrated Service Information System (ISIS) will also provide consistent and reliable data on cost to serve.

We are introducing an integrated phone system that will include modern functions and bring call recording into operation for the first time.

### **Public Relations and Marketing**

A significant public relations campaign was mounted to assist the community to recognise the name change to NSW Trustee and Guardian and understand the role of the new organisation. The re-badging program continued for three years and has been replaced by our own advertisements and augmented by the Whole of Government Get it in Black and White Campaign. NSW TG has taken a lead role in the development of the latter campaign.

### **What we do**

NSW Trustee and Guardian has six core businesses:

1. wills and other pre-planning instruments
2. estate administration
3. executor services
4. trust management
5. power of attorney management
6. financial management services.

We also manage seized or confiscated assets under the *Criminal Assets Recovery Act 1990* and the *Confiscation of Proceeds of Crime Act 1989*.

Under an agency agreement NSW TG can hold funds in the Primary Portfolio and/or the Growth Portfolio of one of our Common Funds. As such, we act as agent for organisations such as retirement villages, unions, sporting associations, superannuation companies and other trustees.

The Chief Executive Officer also carries out the role of the Commissioner of Dormant Funds, making determinations on charitable or public funds that have become dormant. See sections 4 and 5 of the *Dormant Funds Act 1942*.

## **Our services**

We help our clients and the community of NSW in the following ways:

- We act as financial manager for people with decision-making disabilities.
- We authorise and direct the performance of private managers appointed by the Supreme Court and Guardianship Division of NCAT.
- We manage clients' assets and help plan for their future under a power of attorney.
- We make clients' wills should they need an independent, impartial and professional executor and/or trustee
- We provide estate administration expertise for intestate estates including providing the resources of our Genealogy Unit.
- We manage deceased estates as both executor and administrator so assets at death are dealt with according to clients' wishes or the laws of intestacy.
- We act as trustee of fixed or discretionary trusts created in wills, deeds and court orders for families, children and people with disabilities.
- We manage property in civil assets restraint and forfeiture.
- We act as trustees for protected defendants.
- We manage the affairs of people who are declared missing persons.
- We provide systemic advocacy to support for vulnerable clients.
- We provide community education about financial management and guardianship.
- We promote the making of a will, enduring power of attorney and enduring guardianship.
- We provide advice on relevant aspects of government policy and legislation.
- We contribute to relevant law reform development.

See section 3 of this submission for detailed descriptions of services provided.

## **Our clients**

Our key clients are:

- the people of NSW
- the NSW Government.

## **Our key business risks**

Key business risks for the organisation are:

- inability to attract and retain the right staff
- maintenance of our skills and reputation as a prudential asset manager
- failure of our internal governance
- maintenance of client and stakeholder engagement and generation of an ongoing demand for our services that continue to fund operations
- the balancing of the fiduciary responsibilities of executor, trustee, attorney and financial manager against the expectations of clients for expeditious service
- security of clients' assets
- meeting Employee Related Savings in the context of reducing employee numbers while demand for our services increases.

### **Strategic Goals – 2017 and Beyond**

In late 2012 the Executive and a small group of Senior Managers mapped out a broad strategic direction for the organisation to 2017 and beyond. There were two strategic goals identified:

1. Increased uptake of pre-planning mechanisms: Wills, Power of Attorneys, Enduring Guardianship and Advance Health Care directives, and
2. A strategic shift in the appointment of NSW TG as a direct financial manager by Courts and Tribunals from the current ratio of 3:1 (Direct:Private FMO) to 1:3 by 2020.

To address these two goals, NSW TG is currently engaged in a major organisational review process. This will fundamentally change the nature of our work in relation to people who are the subject of a Court or Tribunal Financial Management Orders. We will shortly engage in extensive community and stakeholder consultation about this new direction. For the purpose of this paper it is sufficient to note that our proposed changes are intended to support the intention of the UN Convention on the Rights of People with Disabilities; reduce the footprint of government in private lives while strengthening safeguards for vulnerable individuals; provide greater support to enable people to regain control of their finances wherever possible; provide enhanced support for and increase the pool of private managers and increase our focus on getting adults to plan for their future by making a will, Enduring Power of Attorney and Enduring Guardian instrument.

For this reason and the introduction of improved technology (ISIS) and processes, we believe there may be some value in IPART considering a staged fee review process. That is revisiting NSW TG fees at strategic point in the coming 5 year period as each change is implemented.

### **Staffing Establishment**

As at 31 December 2013 NSW TG consisted of 595 positions dispersed across 19 business locations. All staff are employed under the *Government Sector Employment Act 2013*. The majority of staff (93.6%) are employed under the Administrative and Clerical (A&C) Award ranging from General Scale through to Clerk 11/12.

NSW TG also employs a range of professional staff including solicitors and paralegals, Psychologists and Social Workers. (6.39%).

There are 6 SES Officers<sup>4</sup>

A significant number of staff employed under the A&C Award possess professional qualifications that may or may not be a pre-requisite for their position.

## **2.3 Financial Position**

NSW TG is largely self funding with an operating budget of \$75.549m of which government contributes \$5.115m.

Our revenue comes from:

- commissions and fees on estates, trusts and agencies
- fees for managing our clients' estates and assets

---

<sup>4</sup> At the time of writing three of these officers are Senior Officers in transition to the new award arrangements

- income on corporate investments
- our community service obligations payment from government.

### **Common Funds**

The *NSW Trustee and Guardian Act 2009* directs NSW TG to establish one or more common funds. The Act also provides for the existing common funds (both Trustee and Financial Management) to continue indefinitely, albeit with some changes to the way that the Trustee Common Fund Primary Portfolio operates.

In 2011 we commenced a major project which entailed the:

- harmonisation of the fund manager, custodian and unit registries of the two existing funds with the new fund
- restructuring of the existing Trustee Primary Portfolio.
- establishment of a set of new portfolios within a new NSW TG Common Fund – following a private ruling from the ATO it was decided not to proceed to a new common fund but to retain the existing funds.

In its review of NSW TG fees in relation to the exemptions under Division 81 of the GST Act, the ATO has ruled that financial management fees are exempt from GST, while Trustee fees are subject to GST.

The Financial Management Common Fund represents funds owned by clients whose financial affairs are directly managed by NSW TG, as well as funds of a number of clients whose affairs are managed by a private manager. This Common Fund consists of the Access Fund, best described as an interest-bearing working account for client transactions, and seven diversified investment funds.

The total value of the common funds as at 30 June 2013 was:

Trustee	\$1,135 million
Financial Management	\$1,259 million

### **Other Client Assets**

NSW TG also manages other assets, such as real estate, boats, caravans, commercial interests, investments, vehicles, personal property etc. The total value of these client assets as at 30 June 2013 was:

Trustee	\$607 million
Financial Management	\$1,305 million

### **Community Service Obligation**

NSW TG is for the most part self-funding. The exception is payment received from NSW Treasury for Community Service obligation. Currently that is set at:

Trustee	\$2.344 Million
Financial Management	\$2.771 Million

Should NSW TG ever be directed to become fully self-funding thereby bringing in a cost recovery regime, a significant number of people who rely heavily on NSW TG's services would not be able to afford them. The cost to the community would be significant.

In Financial Management, 40% of clients under direct management have psychiatric disabilities. Many of them have a dual diagnosis that is another accompanying clinical condition, not infrequently substance abuse. A significant proportion of this group rely on benefits alone in order to survive in the community and many are homeless. NSWTG, through managing their finances in a prudent fashion, is often able to influence a more regular life style which will include practical assistance in the payment of accommodation, food and regular outgoings. This type of intervention is often an important factor in increased consistency for individuals and facilitating a more stable lifestyle and in some cases leading to regained capacity.

In Trustee Services, the percentage of deceased estates below \$50,000 represents 32% of work. The percentage Trusts below \$50,000 is 72%. The essence of Trustee Services is to provide a service to people who could not otherwise afford private services. Estates and Trusts below these levels manifestly fall into that group. Many clients with such modest assets also live on pensions/ benefits and have the same right as other members of our community to have their affairs professionally managed.

NSWTG has a lead role in the implementation of the NSW Ageing Strategy and the focus on planning for the future. We prepare Wills, Powers of Attorney (PoA) for clients using our service and we witness Enduring Guardianship appointments. We do not charge for the preparation of these documents. The making of these instruments are not only important for the individual concerned but also the future costs of the administration of Justice. It is argued that value of the community service aspect of our work needs to be recognised in any future fee and funding arrangement.

The Systemic Advocacy provided by NSWTG is outlined further in 3.5 of this document. The need for advocacy will continue in the new areas of the implementation of NDIS and the closure of large public residential facilities. NSWTG has spent significant time and efforts ensuring the needs of people with decision making disabilities are able to access and use NDIS packages. As this group makes up a small, complex and vulnerable sector of all people with disabilities, the challenge for NSWTG has been to seek modifications in approach to meet clients' needs and reflect their issues.

NSWTG also provides Community Education to relevant service providers, professional groups and the general community about the financial management, guardianship and the importance of pre-planning. This work provides important awareness raising of the mechanisms available to support individuals in the community.

## **2.4 Future Challenges**

### **Service Delivery**

NSWTG will continue work on the state-wide delivery of services. Client services plans to continue to improve with the expansion of dual service offices throughout the State, especially in regional areas not currently well served; increased direct contact by our branch staff with clients; and greater client contact outside of NSWTG office locations.

We intend, and have budgeted for the upgrade of all our offices to enable dual service delivery, with the exception of our specialised financial management service in the city (see 4.5).

NSWTG provides an essential public service to clients who are either vulnerable by view of disability or who might otherwise be unable to access and pay for services in the "market" e.g. make a Will, Power of Attorney etc.

### **Pre-Planning**

In line with the NSW *Ageing Strategy*, work continues to promote pre-planning by making wills and powers of attorney, as well as witnessing Enduring Guardianship appointments.

NSWTG is committed to encouraging all people in NSW to plan for later life as far as possible. We are working collaboratively with other agencies to promote making the necessary individual plans to meet the challenges of the future. Part of this work is to encourage people to take advantage of the planning tools available which articulate personal arrangements each of us may require as we get older. The *Get it in Black and White* Campaign and the *planningaheadtools* website are the cornerstones of this strategic effort.

### **Technology**

NSWTG is currently working with other State trustees to evaluate existing programmes, and identify and purchase the most effective on line will making program.

NSWTG completed the preliminary phase of the new client data management system project, ISIS, to bring together the systems from our parent organisations. ISIS is being designed to meet the increasing demand for services. It represents a major capital project which aims to make the best possible use of advanced technology to streamline our work processes. We will adopt cloud technology versus an “on-premise” solution which is in line with the whole of government approach to IT.

Our capital works program will fund the transition to the new client software application ISIS and unified telephony services. The development of our new ISIS system also forms a key component of CAPEX for the coming five (5) years. It should be noted that NSW TG funds its own CAPEX budget.

### **Client Consultation**

Senior staff at NSW TG have developed a new assessment and ongoing management tool called the Client Consultation Framework (CCF). The preliminary work was presented to the 2012 World Guardianship Conference in Melbourne and again in Washington in May 2014. The tool received immediate and extensive interest from comparable bodies across Australia and internationally.

The CCF is a holistic approach to obtaining information about a client's life to enable staff of NSW TG to consider all relevant aspects prior to making financial decisions. Certain sections of the CCF have been trialled by the Intake Team in a paper based format, which is impractical for full implementation. The information obtained through the CCF will ultimately be automated into ISIS. Staff using the tool have provided extensive positive feedback and early evidence suggests that the number of complaints about decisions made in this area of our work may be reducing.

The CCF for direct financial management clients has been expanded to include specific information to refine the information needed for specialist team functions. Its full implementation is dependant on ISIS and will improve the quality of decisions and consider the impact on all areas of clients' lives. The CCF will inform the client relationship management component of ISIS to enhance the client service information platform for all clients of NSW TG. The marrying of the two tools will mean workflows are streamlined and consistent in the implementation across services where relevant.

### **Systemic Advocacy**

Systemic Advocacy is an important and increasing part of our work for which we are not funded, nor do we derive a fee. Because of our involvement in the lives of so many disadvantaged people we frequently come upon situations where multiple clients are adversely impacted by the practices of service providers. The closure of Grand Western Lodge, a boarding house in Western NSW, is a classic example involving 37 residents of whom 14 were under a pre existing financial management order. NSW TG had held great concern for residents over a ten year period and advocated for change through all legal avenues. Finally application to the then Guardianship Tribunal was made, 26 Guardianship Orders and 23 Financial Management Orders were given effect and all residents moved.

### **National Disability Insurance Scheme**

The advent of the NDIS represents another unfunded challenge in systemic advocacy as NSW TG senior staff worked relentlessly on commenting upon drafts of legislation, rules and regulations prior to the passage of the legislation. We are now working on implementation implications. This is flowing through most levels of the organisation. The workload in this area will increase as the scheme is rolled out across the State.

### **Increased Complexity**

NSW TG, along with other Trustee organisations, note the increasing complexity of estates – whether they be under financial management or deceased estate administration. The days of a house, car and bank account alone are all but gone. This is particularly so with the advent of Self Managed Superannuation Funds (SMSF's), family trusts, investment properties and shareholdings. There is also increased complexity in familial relationships. The nuclear family is no longer the norm. The work involved in managing these estates is greater and inevitably more complex than a simple estate. This trend will continue and will have a consequential impact on the cost of service delivery.

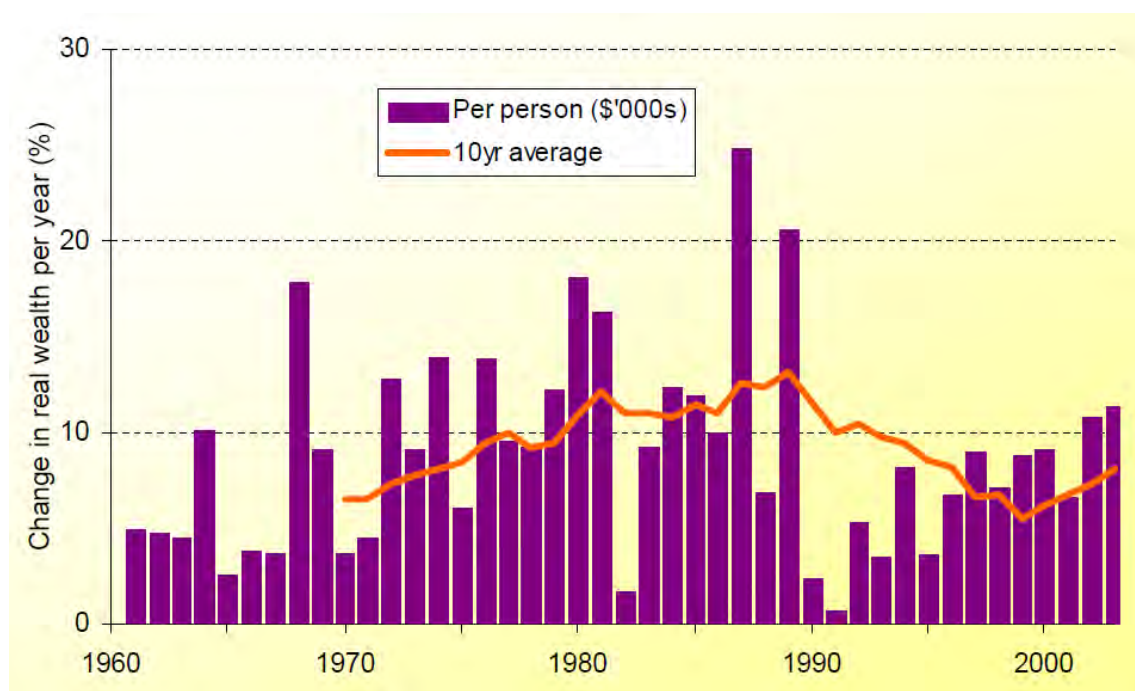
The average size and complexity of estates has also grown over time and therefore the question of “fee caps” should be revisited. Data obtained for this review clearly shows the higher cost of servicing these estates.

The AMP/NATSEM Income and Wealth Report provides important insight. In the first half of the last century the trend was for larger families, Self Managed Superannuation Funds did not exist and share portfolios and diversified investments comparatively rare. Housing prices remained relatively stable compared to recent trends in appreciation. The report measured the extent to which the value of a household's assets exceeded liabilities.

—Between 1960 and 2005 growth in wealth averaged around 10% per annum. This is shown by the following graph<sup>5</sup>:

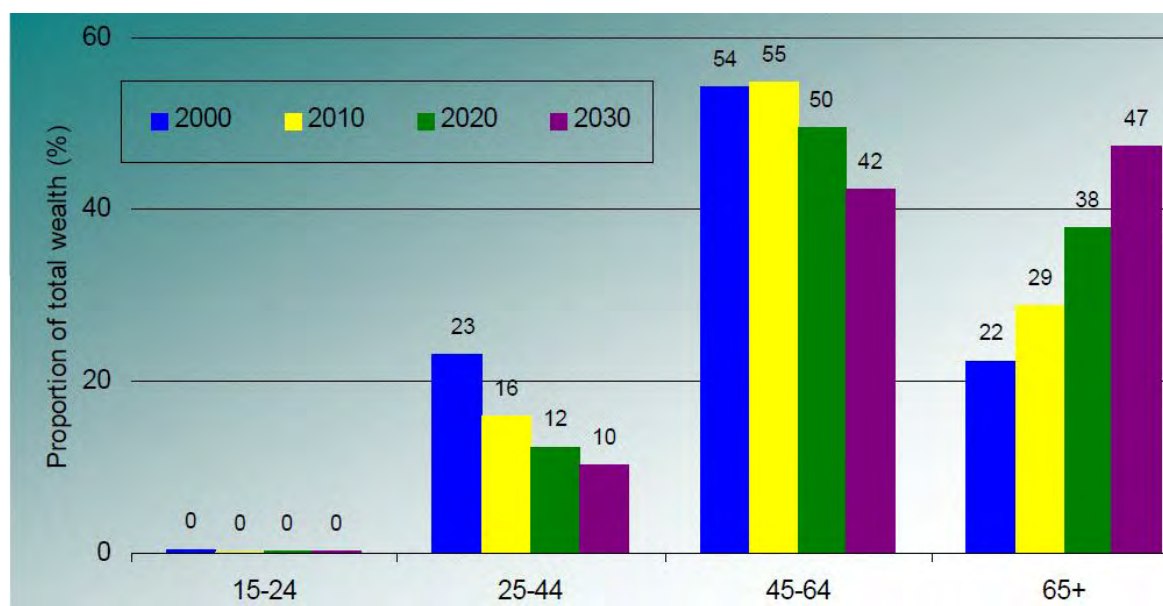
---

<sup>5</sup> NATSEM: *Intergenerational Transfer of Wealth- Great Expectations: Presentation: March 3, 2005.*



**Figure 1: Increases in Real Wealth 1960-2005**

The report also looked at the correlation between age and wealth. The following table clearly shows the expected growth in wealth of the plus 65 age group – the group which currently makes up over half of the applications for financial management<sup>6</sup>:



**Figure 2; Distribution of Wealth by Age Changing Over Time**

The impact of this growth and complexity will also be felt in the area of estate administration – *Total household wealth potentially available by bequest was projected to rise from \$8.8 billion per annum in 2000 to more than \$70 billion in 2030.*<sup>7</sup>

<sup>6</sup> *Ibid.*

<sup>7</sup> Diana Olsberg : *Shifts in Values and Priorities of older Australians presents a Challenge for Elder law: Elder Law Review* (2006)

### **Judicial Impacts**

Judicial changes present other challenges for NSW TG, two examples are provided as follows:

1. NSW TG has seen an increase in matters being referred resulting from its appointment by the Supreme Court as executor or trustee without first seeking consent. Section 13 *NSWTGA* provides that NSW TG may refuse to act in a trust capacity, however must not refuse merely on the ground of small value of trust property. The majority of these matters where NSW TG has not been consulted or asked for its consent by the Court are matters that no other individual or organisation will take on.
2. Section 61 *Probate & Administration Act 1898* provides that between the death of a person and a grant of probate/administration their estate is deemed to vest in NSW TG. Judicial opinion until mid 2013 was that NSW TG had no active duty to play under s61. However, as a result of the 2013 Supreme Court decision of *GEL Custodians Pty Limited v Estate of the late Geoffrey Francis Wells*, NSW TG is now being joined as a party in mortgage default cases where the mortgagee has died and where no executor/administrator has yet been appointed. As a consequence NSW TG is becoming involved in estates which are mainly impecunious and for which no fee can be charged or costs claimed. Each month NSW TG is served with about 20 of these matters.

### **Staff Establishment Impacts**

A key component of being able to deliver the service clients require is the right number and mix of staff. The mix needs to cover not only the technical skills but to also reflect the diversity of the NSW community across age, ethnicity, disability and Aboriginal and Torres Strait Islander communities. Our staff will also need to take into account local needs.

This will become more challenging in the coming years as NSW TG faces an ageing workforce, with many close to retirement age. Added to this is the prospect of meeting Employee Related Expenses savings requirements while expanding and improving service levels to meet client needs. While the tight budgetary framework is common to all public sector agencies, the complexity of clients' lives and circumstances and the number of clients without adequate community support adds to our challenges. The workload review conducted in the previous reporting period will continue to be refined and provide important information for our costing and service needs.

## **3. Client Service Guide**

### **3.1 Wills & Other Pre-Planning Instruments**

NSW TG has a key role in promoting the importance of all adults making arrangements for the future through the making of a valid will, power of attorney and enduring guardianship.

Initial enquiries for pre planning documents can be received in various forms such as web enquiries, telephone calls or face to face attendance at branches. Often enquires are just of a general nature regarding preplanning documents and estate administration. When the assistance of NSW TG is required appointments are made for face to face interviews either at the office, at an off-site —“NSW TG Wills Day” event or at the client's home if they are unable to attend the branch. During this appointment the client's preplanning needs are assessed and services that NSW TG can provide are discussed in-depth. This interview can take up to 1-3 hours depending on the complexity and the number of preplanning instruments required. In more complex matters more than one visit may be required.

Generally these preplanning documents are prepared at the regional branches by accredited staff with the support of a dedicated specialist wills section in O'Connell Street. All wills and POA's are checked by qualified solicitors to ensure their accuracy and legal compliance.

For the year ending 30 June 2013, the following total pre planning instruments were made:

<b>Instruments</b>	<b>Legal Services</b>	<b>Branches</b>	<b>TOTAL</b>
<b>Enduring Guardian</b>	57	67	124
<b>Power of Attorney</b>	211	1224	1435
<b>Will</b>	1065	8616	9681

### **Will Making**

While NSW TG has been able to maintain a free will writing service since inception (of the Public Trustee) in 1914, the current costs of preparation, storage and revision are such that we believe a change of policy may be warranted.

NSW TG makes between 9-10,000 wills per annum. Wills Days are held at locations such as courthouses, libraries and community centres to ensure that our services are as widely available as possible across the State.

Other activities conducted to maximise access for potential clients include:

- community talks in metropolitan and regional areas;
- Saturday Wills Days across branches during community education initiatives, such as Law Week in May or Make Your Will events in October, as well as additional individual branch Thursday evening/Saturday openings;
- remote Wills Days, which generate wills and powers of attorney;
- home visits to clients unable to attend branch offices, including the sick, elderly and those with a disability.

Based on historic performance Wills conversion to Deceased Estates is 11.6%, over 14 years, resulting in 0.8% per year in average. Unless NSW TG makes an additional 16,000 new Wills per annum we will not have a sufficient bank of future estates to underpin financial viability. The average cost to make a Will is \$398 and derives no direct income.

### **Storage and Record Keeping**

NSW TG has a dedicated Wills Safe to store all preplanning instruments. In addition to this we offer a limited free safe custody service for our clients for important documents such as title deeds. All original Wills, POA & EG documents are scanned and stored electronically in TRIM. Client details are entered into our client management system and the completed instructions together with copies of original documents are stored in the branch.

### **Wills Safe Storage**

Despite investing time and money maintaining a current and valid Will, many people do not think about the need for it to be safely stored. Inevitably that means that at the time the Will is required it may not be located. NSW TG receives an increasing number of enquiries from distressed relatives unable to locate a Will in the hope that we may have it.

NSWTG will launch the new Wills Safe service in the fourth quarter of 2014, coinciding with NSWTG's 100 years of Will making celebrations across NSW. This will be a Will, Power of Attorney and Enduring Guardianship document storage service to the community, regardless of whether they have prepared their legal documents with NSWTG, to enable the easy location of documents if and when they are required.

By introducing a Wills Safe, NSWTG will enhance the opportunity for increased executor business, leading to increased long term revenues. Creating something that is relevant and tangibly valuable for the NSW community is the strategy behind the NSWTG Wills Safe. The take-up of a NSWTG Wills Safe option may also deliver the desired community service outcome of fewer people in NSW dying without a known and securely-held Will.

### **Power of Attorney**

NSWTG executes over a 1,000 Powers of Attorney per year.

Appointments of Power of Attorney (POA) are made when requested by an existing NSWTG client or a member of the public. NSWTG will only act when appointed as sole attorney or substitute attorney for a spouse or de facto spouse or a person living in a close and caring relationship with the principal in the same household, e.g. two sisters caring for each other.

If NSWTG is named as substitute attorney, then the Power of Attorney is only to operate if the first named attorney is ~~unable~~ "unable or unwilling to act".

NSWTG will take instructions, prepare the document and then act as the document's prescribed witness. A Power of Attorney must be witnessed by a ~~prescribed~~ "prescribed witness" who certifies that the effect of the Power of Attorney has been explained and understood before it was signed.

### **Enduring Guardianship**

Appointments of Enduring Guardian (EG) are made when requested by a NSWTG client or a member of the public. In the case of a NSWTG client we take instructions, prepare the document and then act as the document's prescribed witness. In the case of a member of the public who is not otherwise a NSWTG client, we will take instructions and act as the prescribed witness. Instructions are taken in both cases as a means of determining and recording that the person making the document and the person being appointed as Guardian understand the nature and effect of the document.

The person appointing the Guardian and the Guardian may attend the same interview or may attend on different occasions. Whilst it is our preference that appointor and Guardian attend the same interview, two separate interviews may be required.

### **Fees**

Currently, there are no fees for the making of any pre-planning instruments. Fees are charged on deceased estates that may arise from the making of a Will. Fees are also charged when a POA is activated.

### **Work Involved**

There is approximately 1-2 hours work involved in the drafting of pre-planning instruments. It involves meeting with the party / parties and interviewing them about their circumstances, financial estate and documenting their future plans for the management.

### **Market**

NSWTG retains approximately 7% of the market for Will making. The majority share in the market (81%) sits with the legal profession. PoA's can be set up by the legal profession, Trustee Companies and other financial institutions. Enduring Guardianship is a new area of growth and there is limited information on the market for these.

### **Community Service Component**

Making pre-planning instruments is for the most part a community service. Revenue is only derived when NSWTG acts as executor of deceased estates or where a POA is activated.

Case studies in relation to pre-planning instruments are provided at Appendix V to provide a deeper understanding of the work involved.

## **3.2 Deceased Estates**

NSWTG acts as an executor in estates where we have been appointed as such under a valid Will. NSWTG can act as Administrator, when asked to do so and is entitled as of right to a grant of administration in matters where a person dies intestate, the executor is unwilling or unable to act or no executor has been named.

NSWTG's commission is based on the traditional concept of executor's commission, although it is still regulated through the *NSW Trustee and Guardian Act 2009* and its regulations. Section 86 of the *Probate and Administration Act 1898* allows commission for —~~pi~~as and trouble as is just and reasonable". Trustee Corporations' commission is regulated in the Trustee Companies Act 1964.

—~~pi~~as and trouble" has been defined in *Re McLean* (Dec'd) (1912) 31 NZLR139 at 139 and 144: —~~pi~~a" covers responsibility, anxiety and worry; —~~tr~~ouble" covers the work done. The NSW Succession Law and Practice Service by Mason and Handler (paras [1441.2 & 3]) states that what has been done by the executor in the performance of executorial duties may be affected by the nature, complexity and size of the estate.

As NSWTG is a professional executor it is necessary to consider, but distinguish our role from both that of an executor who happens to be a professional, e.g. solicitor or accountant and an executor who completes the role as a family member or friend.

The estate administration process can be explained by seven steps which are:

- Obtain Administration
- Collect Assets
- Advertise for creditors
- Lodge Tax to get Date of Death Clearance
- Pay Claims
- Establish Entitlement
- Distribute Funds.

Depending on the nature and complexity of the estate, each of these steps may involve a range of activities. Commission covers the NSW TG's professional services in the course of normal estate administration such as obtaining grant of administration, asset collection or transfer, legal work on property, establishing entitlement, paying outstanding claims, providing regular informative progress reports, and sending out a comprehensive financial statement when the estate is finalised. In matters where there are complex issues such as business interests, family conflict and litigation, NSW TG may charge under the regulation additional fees.

### **Fees**

Historically, Trustee Corporations and Public Trustees have charged both commission and fees for services with commission relating to fiduciary responsibilities, and fees for services relating to additional professional services which have been in-sourced for efficiencies.

A copy of the list of fees and charges is attached as Appendix IV.

On analysis of NSW TG's regulations the following observations are relevant:

- Current fees contain a mix of activities which require additional professional skills (eg taxation, carrying on a business, common fund, investment planning) and those requiring standard estate administration responsibilities for an executor (attendances at properties and a variety of service providers, file administration, accounts and audit). The latter fees would normally be included in commission for private executors who were professional (eg an accountant) unless the complexity warranted additional expense.
- Commissions relate to capital realisation or transfer of assets, income earned, next of kin inquiries. These regulatory commissions relate to values of assets reflecting —responsibility, anxiety and worry” and by logical conclusion, government approval has been obtained for —the greater the value, the higher the amount paid”. It is also noted that the effective rate of commission for lower value estates is higher, reflecting the observation by Helsham J *In the Will of Shepherd* that this will be a necessary consequence of commission charges as well reflecting that similar mandatory work is required no matter what the value of the estate.
- Charges in the NSW TG Regulation are also additional sources of revenue – some being corporate (executor and production of documents) others being matter specific (legal or the general power to charge for service not specifically covered by the regulation).

### **Deceased Estates**

NSW TG manages both testate (will) and intestate (no will) estates. Importantly, we cannot decline an estate purely on the basis of its low value (see the reference to Community Service Component at the end of this section). We also accept referral of estates from executors or administrators who wish to discontinue their involvement. Estates administered covered a wide range of value and complexity.

In 2013, we obtained administration of 1,769 new estates with a total value of \$563.1 million and had 5,487 estates on hand. The average value of estates under grant of administration rose from \$509,336 in 2011–12 to \$530,352 in 2012-13. This increase in value has been largely driven by the impact of the economy on property prices and

investments. We also administered 680 smaller estates without the need for formal administration, transferring property to the surviving joint tenant and arranging funerals where no-one else was available.

### **Work Involved**

There are various activities undertaken in the management of an estate and every person's situation is different. It is an individualised approach with consistent practices where similar assets / issues are identified.

The process involves:

- Establishment of the estate
  - This involves interviewing the family / friends and review of the deceased's personal papers to ascertain details of the estate
- Preliminary Enquiries
  - Obtain copy of the original will (not possible for intestate matters)
  - Identify form of administration required depending on the estate circumstances - Probate Grant, Intestate Grant CTA<sup>8</sup> Grant. Or in the case of lower value estates Probate Election, Intestate Election, CTA Election, Section 31 application or to administer informally as a miscellaneous matter.
  - Identify and secure all assets. This includes inspection and inventory for deceased's home
  - Identify all estate liabilities. This includes determining the type of claim (ordinary or preferential)
  - Identify potential beneficiaries and obtain instructions. This includes searches for kinship, reviewing and processing declarations of identify and interviewing potential stakeholders
  - Identify potential legal issues. This can include situations such as questions on the validity of the Will; s.8 documents, litigation re occupancy of real property, FPA<sup>9</sup> claims, ownership of assets, application for judicial advice, next of kin enquiries etc
- Administration Obtained
  - Communicate with beneficiaries
  - Advertise for creditors
  - Collect assets and any income derived. This can include sale of real property.
  - Meet tax obligations. This includes Date of Death tax liability and the application for a tax file number for Trustee tax
- Entitlement Established
  - Communicate with beneficiaries
  - Pay estate liabilities
  - Finalise taxation requirements
  - Transfer assets as per beneficiary instructions and entitlement
  - Full file audit, fee charging and distribution of estate as per entitlement

---

<sup>8</sup> Cum Testimento Annexto – literally "with the Will annexed" - we use this to indicate there is a Will, however NSW TG was not the executor appointed in the Will

<sup>9</sup> Acronym used to denote Family Provision Act. March 2008, replaced by Succession Act. We also refer to the action taken under this Act as FPA.

- Final correspondence to beneficiaries including statement of account and tax advice.

**NOTE:** In estates where the Will provides for funds or property to be held in trust there is a formal change in role. The estate administration and the role of the executor is considered completed at this point and the role of trustee commences.

Case studies in relation to deceased estates are provided at Appendix VI to provide a deeper understanding of the work involved.

### **Market**

Of the 7% market share of Wills drafted by NSW TG, only 11.6% actually convert to deceased estates over 14 years after the drafting of a will.

### **Community Service Component**

Historically, Government has recognised the community service aspect of our operations for the management of estates with a value of less than \$50,000. As at 31 December 2013, 32% of deceased estates had a cash balance less than \$50,000.

## **3.3 Trusts**

NSW TG can act as trustee, manager or receiver of funds for infants or those unable to manage their funds. The appointment is usually made by the Court under the *Civil Procedure Act 2005* and the *Workers Compensation Act 1987*. Trusts can be created by individuals or organisations, including government agencies.

Trusts are managed by NSW TG in the following categories:

- Trusts arising from Wills such as life interests, disability trusts, discretionary trusts or fixed term and purpose trusts
- Trusts arising from court/tribunal orders generally from compensation claims for personal injury, victims compensations or workers compensation death benefits
- Trust deeds created by Clients or arising from superannuation death benefits.

### **Fees**

To date, Trustee Corporations and Public Trustees have charged both commission and fees for services with commission relating to fiduciary responsibilities, and fees for services relating to additional professional services which have been in-sourced for efficiencies.

A copy of the list of fees and charges is attached as Appendix IV.

### **Work Involved**

There are various activities undertaken in the management of a Trust and every Trust is different. It is an individualised approach with consistent practices where similar assets / issues are identified.

The process involves:

- Establishment of new Trust
  - Review the Deed, Order or Instrument that created the trust to determine type of trust and the terms, conditions and powers of the trustee from the instrument and relevant legislation
  - Create Trust record
  - Identify and secure trust assets. This includes financial assets and physical assets (real property etc)
  - Identify and manage trust liabilities
  - Identify beneficiary access to income and capital
  - Communicate with beneficiaries
  - Manage and respond to beneficiary requests to access the trust
  - Establish regular payments, as required
- Develop financial plan
  - Consult with beneficiary
  - Draft financial plan
- Ongoing Trust Management
  - Collection of income
  - Payments to beneficiaries / third parties
  - Securing acquired Trust assets
  - Manage Trust assets (repairs and maintenance)
  - Compliance with taxation requirements. This includes preparation of tax returns under the Trust tax file number
  - Communicate with beneficiaries / stakeholders
  - Annual review of file
  - Annual review of financial plan

Case studies in relation to trusts are provided at Appendix VII to provide a deeper understanding of the work involved.

### **Community Service Component**

There is a community service aspect for NSW TG for the management of estates with a value of less than \$50,000. As at 31 December 2013, 72% of Trusts had a cash balance less than \$50,000.

A significant number of Beneficial Trusts that are established under a Will have a low value. Typically they are gestures from Grandparents to grandchildren and who may not come of age for many years. If NSW TG was to levy the fee to which it is entitled the trust would be extinguished well before the beneficiary came of age. Similarly small trusts can emerge from victims' compensation. At the present time NSW TG waives these fees however the sustainability of this approach needs to be addressed in the context of the community service aspect of our operations.

### **3.4 Powers of Attorney**

NSW TG has a tiered management plan under attorney services, allowing clients to choose as much or as little help as they require while giving them the security of an independent, professional attorney. It comprises:

- Future Assist — where we act only at client request or when they are no longer able to look after their own affairs. These remain dormant until that time.
- Active Assist — where the client requires ongoing assistance in dealing with part or all of their financial affairs, these include Enduring Powers of Attorney.

Last financial year NSW TG received 55 new matters with a value over \$18.9 million. We made 1435 powers of attorney for prospective Active Assist clients. As at 30 June 2013 NSW TG was managing the financial affairs of 429 clients under powers of attorney.

NSW TG makes up to 1,500 dormant Powers of Attorney for prospective clients each year. Currently NSW TG holds a dormant Power of Attorney for 21,359 clients.

Based on historic performance PoA instruments conversion to an active PoA matter is around 4%, with over half of all conversions occurring within 4 years.

### **Fees**

Trustee Corporations and Public Trustees charge both commission and fees for services with commission relating to fiduciary responsibilities, and fees for services relating to additional professional services which have been in-sourced for efficiencies.

A copy of the list of fees and charges is attached as Appendix IV.

### **Work Involved**

There are various activities undertaken under the authority of a Power of Attorney and every individual's estate is different. It is an individualised approach with consistent practices where similar assets / issues are identified.

The process involves:

- Establishment of new PoA client
  - Establish if client has capacity
  - Determine whether to accept PoA

The process for PoA clients is similar for clients with or without capacity. The difference lies in taking directions from clients with capacity or assisted decision making or substitute decision making for clients without capacity.

- Management for PoA client
  - Establish scope of management with client
  - Identify and secure any included assets and income
  - Identify any included liabilities
  - Identify and manage entitlements
  - Payments to clients / third parties
  - Manage assets (repairs and maintenance, purchase / sale)
  - Compliance with taxation requirements
  - Communicate with client
  - Annual review of file

Case studies in relation to powers of attorney are provided at Appendix VIII to provide a deeper understanding of the work involved.

### **Community Service Component**

As only 4% of PoA documents drafted by NSW TG actually convert to active management under PoA, there is a community component in the work undertaken to draft the documents. See section 4.1 of this paper.

### **3.5 Financial Management – Direct Management**

NSW TG can be appointed as Financial Manager for clients defined as managed persons under the *NSW Trustee and Guardian Act 2009*. Terminology under previous legislation was protected persons. This function is named Financial Management. (Private persons / organisations can also be appointed as Financial Manager – see section 4.6 of this paper).

NSW TG is appointed as a Financial Manager by means of a Financial Management Order (FMO). These are issued for persons with diminished capacity to manage their own financial decision making, where there is a need for the Order.

People under financial management and their families sometimes oppose the NSW TG being appointed to directly manage an estate. However, the NSW TG will only be appointed if a court or tribunal considers:

- that the person has a disability
- There is a problem which cannot be overcome without an order
- there is no suitable alternative manager
- that someone independent needs to be involved in managing the estate, and
- that it is in the persons best interests.

NSW TG works with the managed person, his or her support network (family, friends etc) and service providers when directly managing an estate.

A FMO can be issued by the following:

- NSW Civil and Administrative Tribunal (NCAT)– Guardianship Division
- Mental Health Review Tribunal
- Supreme Court

NSW TG also has an agreement in place to manage the financial estates of missing persons in NSW upon request. We also have a small legacy of Banker Clients. These are residents of group homes managed by Ageing Disability and Home Care, where an agreement was reached many years ago for the then OPC to hold the funds in a banker only arrangement. These Banker Clients are in the process of being transitioned by the Guardianship Division of NCAT to be under an appropriate FMO.

As at 31 December 2013, there were 10,640 clients under direct financial management with NSW TG.

### **Client Service Delivery**

NSW TG provides client service delivery at eleven of its branches for financial management clients. NSW TG plans to roll out service delivery to these clients across all NSW TG branches.

Additionally, there are five specialist financial management client service teams:

- Intake Team — initial client contact, securing the estate and setting up the client file
- Clarence Street Team — serving clients with challenging behaviours and homeless / itinerant clients
- Intensive Team — serving clients with significant family conflict, complex communication issues and complex estates
- Long-term Residential Team — serving clients living in supported accommodation, gaol or clients managing part or all of their own estate under s.71 arrangements with low-complex estates and needs
- Finalisation Team — finalising estates on the death of clients or where the FMO has been revoked.

### **Disabilities**

The diminished capacity of financially managed clients to make decisions is due to various disability categories. As at 31 December 2013, the breakdown of disabilities was:

<b>Disability</b>	<b>Number</b>	<b>%</b>
<b>Age Related</b>	1228	11.5%
<b>Brain Injury</b>	1276	12.0%
<b>HIV Dementia</b>	9	0.1%
<b>Intellectual</b>	2888	27.1%
<b>Physical</b>	69	0.6%
<b>Psychiatric</b>	4238	39.9%
<b>Other/Not Recorded</b>	932	8.8%
<b>Total</b>	<b>10640</b>	<b>100.00</b>

***Types of disability for financial management clients – 31 December 2013***

It has generally been accepted that the higher percentage of clients with a psychiatric disability under direct management is due to the practical difficulties which families have faced in supporting their family member. Many families have been exhausted by the effort of trying to manage in a less restrictive manner. This results in the work of NSW TG often being much more than just basic management of financial aspects.

### **Rights of Review**

The decisions of NSW TG made in relation to financial management clients can be reviewed, first internally and then on application to NCAT. This financial year three applications have been made to the NCAT: two have been withdrawn and one set aside.

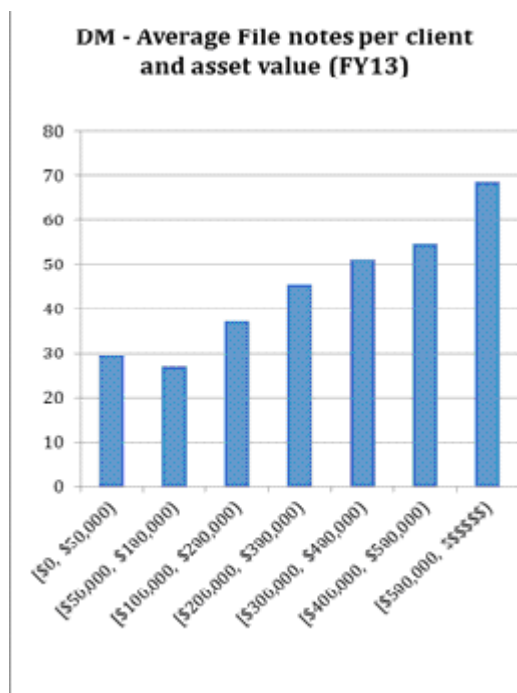
### **Fees**

The fees for clients under direct financial management have been streamlined so that all activities undertaken by NSW TG are covered under the one flat fee, with an establishment fee and an investment fee. A copy of the fee structure for Financial Management (both direct and private management) is attached as Appendix IX.

While the current directly managed clients fees are charged on an ad valorem basis (i.e. on a percentage basis) similar to our competitors the income derived is very dependent on market movements. Due to the fluctuations in the share market since November 2007, NSWTG's investment management fee has decreased by 10%. We note that this is also affecting our competitors however they do not accept —unprofitable” estates as NSWTG does. NSWTG's client base is determined by decisions of Courts and Tribunals and cannot be individually selected as is done by the Trustee Companies. The result is that 59.5% of NSWTG's clients have financial assets of less than \$50K and almost 73.4% of NSWTG's clients have financial assets below \$100K.

It was previously assumed that higher value estates under an FMO were cross subsidising lower value estates in that the majority of effort was spent on clients with assets under \$50,000. Our recent work on cost to serve shows this to be a false assumption with analysis showing that value and intensity (i.e. the volume of work required to service a client) appearing to be more closely aligned than previously accepted.

Figures below demonstrate, on average terms, that the intensity (measured by file notes per client) broadly increases with the value of the clients assets.



### **Competitors and their fees**

NSWTG is often quoted as the benchmark against which these organisations compare their fees, however these other groups are not subject to the same level of regulation and therefore have considerably more flexibility in what they can charge for very large estates. In addition, they often have substantial charges for any activities beyond a very basic service as well as benefit significantly from investment fees (generally referred to as Management Expense Ratio (MER) plus additional investment administration charges such as platform fees when the estate moneys are invested in their own funds and/or through their platforms such as Mastertrusts or Wrap Accounts.

As noted above the services offered by these —competitors” are often limited to activities such as basic bill-paying, financial planning and taxation. Any other services may often be outsourced at additional cost to the client, however this is not detailed in their promotional material.

The core activities of these organisations are not related to clients with a disability and consequently their level of expertise varies greatly. This may not always result in the optimum investment mix for these clients. By way of comparison, NSWTG's financial planners and other specialists work with and regularly consult with NSWTG's Disability Services Branch to ensure that the client's full needs and objectives are incorporated in all of NSWTG's investment and client planning.

Investment options for clients have expanded considerably in the past 6 years with the changes to superannuation. Previously, clients who had never worked could contribute to superannuation but were unable to then access those funds. The changes announced on 30 April 2007 allowed existing clients to contribute any amount to superannuation and access the proceeds by allocated pension providing the contribution was made before 30 June 2007. As a consequence NSWTG contributed approximately \$45 million on behalf of nearly 200 clients to an industry superannuation fund (Sunsuper) in April and June 2007.

The current rule applied since 1 July 2007 is that clients in receipt of damages awards, can contribute any amount to superannuation as a tax free contribution provided it occurs within 90 days of the award or settlement proceeds being received. Once the 90 days period expires contributions are limited to \$150,000 per annum as a tax-free contribution and \$25-35,000 per annum as a tax-deductible contribution depending on age. If appropriate to their circumstances, clients are able to bring forward the next two years tax-free contributions to make a total contribution of \$471.2 – 479.7K as a lump sum (i.e. 3 years at \$150K plus 1 year at \$25- 35K). By the end of the 2013 calendar year NSWTG had invested a total of \$201,624,459 for over 600 clients. NSWTG receives no commission on investment fees on client funds invested with Sunsuper, however continues to receive a 1.1% management fee. Courts and Tribunals have been critical of Trustee companies' past failure to invest client funds in Superannuation. In particular QCAT removed management from a trustee company and imposed penalties for its failure to take advantage of tax effective investments for the client.

As a general rule, trustee companies and other organisations dealing with protected estates are more expensive than NSWTG for the smaller and medium-sized estates and are more flexible in their approach to fees on larger estates.

### **Work Involved**

There are various activities undertaken for direct financial management clients (FM).

The processes involved include:

- Establishment of new FM client
  - Identify and secure all assets and income
  - Identification of all liabilities
  - Payment of client's immediate and short term needs and liabilities
  - Establishment of regular payments to client / third parties (rent etc)
  - Development of a client plan
  - Identification and referral of any legal issues
  - Development of a budget / financial plan
- Ongoing management (Note not all will apply to every client)
  - Collection of income
  - Collection of any money owed to the client
  - Evaluation of claims for past care / debts
  - Regular payments to the client

- Arrangement and payment of insurance
- Assistance with negotiating employment of carers
- Payments to third parties on behalf of clients
- Secure storage of valuable items
- Sale / purchase of assets
- Negotiation and payment of accommodation bond for aged care facility
- Management of all liabilities
- Management of real property (inspections, repairs & maintenance)
- Management of investment properties / commercial interests / investments
- Management of leasing arrangements
- Development of disability and challenging behaviour plans
- Management of legal issues
- Compliance with tax requirements (tax returns etc)
- Communication with clients / stakeholders
- Development of an annual budget
- Development of an annual Financial Plan
- Reporting to NCAT – Guardianship Division for Hearings
- Reviews of management

Case studies in relation direct financial management are provided at Appendix IX to provide a deeper understanding of the work involved.

### **Community Service Component.**

A significant amount of work in direct financial management can be identified as community service aspect of our operations. Typically 52% of clients have been diagnosed with a brain injury and / or with psychiatric disability and due to the behavioural issues and involvement in the criminal justice system, for many of these clients, NSW TG is the only consistent aspect of their life. Frequently these clients require other services. NSW TG is not established or staffed to take on the role of Case Manager. This evident service gap in the broader community means that we often find ourselves needing to advocate for services, despite the fact that it is not our role and we are not funded to undertake this activity. We also undertake a significant role in advocacy in relation to Licensed Residential Centres (See below).

### **Licensed Residential Centres**

There are approximately 31 Licensed Residential Centres (LRCs) in NSW and they accommodate approximately 305 of NSW TG's clients. These centres are spread across NSW and the majority of residents have a psychiatric disability. Many also may have an intellectual disability. There have been significant changes to the regulations to address the concerns with licence conditions. One of the changes relates to the protection of financial affairs of residents. This has made it clear that a resident must not be assisted by the licensee, licensed manager or other staff member in operating the residents' bank account or managing their financial affairs.

NSW TG works closely with the Public Guardian, Ageing Disability and Home Care, and other non-government organisations to support individuals residing in LRCs. We meet with these organisations annually for each facility ( 31 facilities meeting minimum 2 hours per facility plus travel time for two NSW TG staff). As financial managers NSW TG assists clients to open up bank accounts, set up regular payments for personal spending, accommodation and living expenses. We meet with each resident, annually, to discuss their current needs and future plans. These meetings are carried out by three to four staff over one or two days depending on number of clients.

NSWTG and the Stockton Residential Centre (Newcastle) meet quarterly. These sessions provide NSWTG staff with a more comprehensive understanding of the roles and functions of residential and nursing unit staff/managers, as well as providing a very real picture of NSWTG clients' lives within these large style residential facilities.

The work surrounding the current residents of Stockton and other large institutions will increase as in 2019, facilities are closing and residents will move into group home settings in the community. This move will impact on approximately 400 NSWTG clients and will increase the level of activity required in the management of their financial affairs.

### **3.5 Financial Management – Private Management**

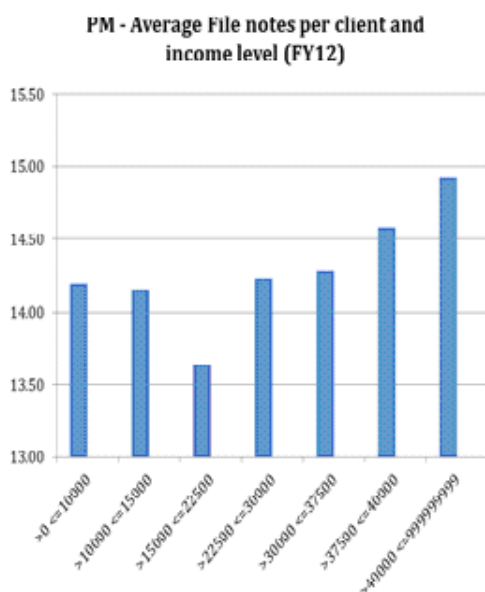
NSWTG is also responsible for authorising and directing people and organisations appointed as Private Financial Managers under an FMO in NSW. The biggest challenge facing Private Management Branch (PMB) is the increase in the demand for private management services resulting from the increase in private management FMOs. Currently the ratio of Direct to Private Financial Management is 2:1.

#### **Fees**

The fees for clients under private management financial management have been streamlined so that all activities undertaken by NSWTG are covered under the one flat fee, with an establishment fee and an investment fee. A copy of the fee structure for Financial Management (both direct and private management) is attached as Appendix IX.

Privately managed clients have an Income Fee structure based upon net annual income the changes made to superannuation since 2007 have had a major impact upon the fees received by this Branch. The amendments to the taxation provisions of superannuation draw downs and the changes to allow people with disability to access their superannuation funds has resulted in large amounts of funds being invested in superannuation. The managed person then draws down funds from the superannuation investments which are tax exempt and are not included in the calculation of the Income Fee for private management clients.

Figures below demonstrate, on average terms, that the intensity (measured by file notes per client) broadly increases with the value of the client income.



#### **Private Managers**

Private Managers can be individual family members or friends. They can also be professionals (accountants, solicitors etc) or they can be Trustee Companies. In the past 2-3 years smaller firms of —on traditional” private managers have emerged. The advent of the NDIS and self directed funding has already seen the emergence of professional brokers offering to manage funding packages and the complex process of employing carers, services etc on behalf of people with a disability who are capable of managing their affairs. It is only a matter of time before these firms seek to extend their —offerings” into the area of clients with decision making impairment. NSW TG is currently working through options for managing this new private manager category. This is particularly the case in relation to private manager fees.

Under the current legislation, fees that can be charged by a Private Manager can be set by Supreme Court. Family and friends in the role of Private Manager do not charge a fee. They can make a claim for reimbursement of costs to NSW TG for consideration. Traditional Trustee Companies are heavily regulated. Prior to March 2014 professionals submitted fee structures to NSW TG for approval. These were reviewed and approved on a case by case basis for professionals, as they generally only have one client for whom they are private manager. As a result of a decision in the Supreme Court it is evident that only the Court can approve fees charged by professionals and companies other than a Trustee Company. The case has brought to light the emerging category of NGO’s seeking to provide support under a court or tribunal order and fees that can be charged.

Since March 2014 NSW TG, in its role as Amicus Curae has been requested by the Supreme Court, to provide an opinion on whether a proposed fee schedule can be considered “fair and reasonable”. At present no fee is levied for this work.

The oversight of family / friends can be labour intensive for NSW TG as they do not necessarily have financial management skills. NSW TG provides assistance and support with requests from these private managers.

The oversight of private trustee companies as managers is on the one hand easier for PMB for the examination of their accounts as they have been prepared by professionals. On the other hand, the oversight of these private managers may as labour intensive as the spouse/parent private manager in the area of provision of services to and substitute decision-making on behalf of protected persons. It is also our experience that once the quantum of funds depletes to a level below \$500,000 Trustee Companies may seek a replacement Manager (i.e. NSW TG) for commercial reasons.

The oversight of —no traditional” private managers is a new area for NSW TG and we are currently defining processes as to how that will work. We are open to advice and guidance on fees and management of this category of private managers.

### **Work Involved**

There are various activities undertaken for private financial management clients (PM).

The processes involved include:

- Establishing new matter, developing and issuing Directions and Authorities;
- Determining and setting security;
- Considering Private Manager’s proposals eg: Purchase/Sale of Major Assets, Investments, Legal actions etc;
- Providing information to Private Managers;

- The examination and passing/noting of Private Manager's annual accounts;
- The calculation and collection of fees payable to NSW TG;
- Obtain Authorised Visitor or in lieu reports on managed person's circumstances;
- Review Private Managers performance against the Directions and Authorities;
- Referring for review/reporting to the Guardianship Division/Supreme Court;
- Finalising deceased/discharged estates.

Case studies in relation private financial management are provided at Appendix X to provide a deeper understanding of the work involved.

### **Community Service Component**

NSW TG has recognised that affordability of fees may be an issue for all of its clients. In the case of clients under private management, provision has been made for clients in receipt of government benefits. This has been provided for by the adoption of recommendation 4 of the 2008 IPART review. All Centrelink, Department of Veterans' Affairs and any overseas pension (equivalent to a Centrelink pension) income up to the level of the Centrelink Single Aged Pension are now exempt from the income fee.

Additionally, support and guidance provided to family / friends appointed as private managers, who generally have no financial management background is not factored into the current fee structure.

## **4. Specialist Services Guide**

For each of the service types defined in section three (3) of this paper, there are elements that involve specialist service provision from internal and external sources. These additional specialist services can involve further fees for clients. See Appendices for fees charged.

### **4.1 Disability Advisory Services**

The Disability Advisory Service (DAS) is a support service to the Client Services Division of NSW TG. DAS is designed to be an advisory service primarily for Client Service staff but also has a role with Private Management and other specialist units such as Legal, Assets and Financial Planning. DAS has also provided specialist support in cases where we hold a Trust for a person with a disability.

DAS includes both a panel of external independent professionals (Authorised Visitors) and an in-house team of Disability Advisors (DAs) which provides advice to NSW TG and administers the Authorised Visitor service.

The service performs 2 key functions:

- Provision of specialist advice and advocacy function to assist and inform decision making, planning and communication for NSW TG clients
- Provision of education about disability-specific matters impacting on financial management decisions for NSW TG clients.

The service also receives and acts upon crisis referrals, such as where a child is at risk or a threat of homelessness or self harm.

The cost of this service is absorbed in the current fee structure however the service is not used by all clients. Case studies in relation disability advisory services are provided at Appendix XI to provide a deeper understanding of the work involved.

### **Authorised Visitors**

Authorised Visitors (AV's) are sourced externally. These professionals must be qualified and working with people with disabilities to be eligible to be appointed. Authorised Visitors provide independent advice to NSW TG in either the oversight role with Private Managers or decision making functions as financial manager.

The cost of an AV report is borne directly by the client. This has the effect of limiting its use to those clients who can afford to pay.

### **Advocacy**

There are many circumstances where the challenges facing clients are shared and require a systemic response. These examples often involve exploitation and abuse with a financial vulnerability present within the issue which impacts on our clients' finances.

An example of systemic advocacy, which DAS provides an advisory service, is the sanctioning and closure of Nursing Homes. When the Commonwealth notifies NSW TG that a facility is either sanctioned or closing, NSW TG arranges to meet with the facility / clients and provide an external assessment of their needs, where necessary, and advocate for the client to be moved to the most appropriate facility. DAS have been involved in the closure of 2 Boarding Houses in the last 3 years and attend area and state wide meetings which occur regularly around this area of service provision which is an open market and increases our clients' financial vulnerability.

## **4.2 Financial Planning Services**

The financial planning strategies adopted for the trustee and financial management clients have been historically different. The application of client funds in both cases complied with the *Trustee Act 1925*. With the harmonisation of the Common Funds, the financial planning staff will be amalgamated and one financial planning approach will be adopted. The interests and needs of the clients will inform our decision making while complying with the Trustee Act.

For financial management clients NSW TG develops and regularly reviews individual financial plans for clients with assets over \$250,000 and aged up to 80 years. For clients with less than \$250,000 NSW TG has adopted a policy to diversify investments between cash and fixed interest. This ensures that assets are invested appropriately to meet their immediate and longer term needs. At 30 June 2013 approximately \$1,655.3 million was invested on behalf of our clients based on recommendations in these plans. This year NSW TG developed and reviewed 1064 financial plans and 2945 investment reviews.

NSW TG contributed over \$8.8 million to superannuation on behalf of 159 clients and has a total of over \$183 million invested in superannuation/account based pensions. NSW TG managed a further \$104 million of our clients' direct shares, managed funds and term deposits.

While the majority of work from this branch is directed towards clients directly managed by NSW TG and Trusts there has been some demand in the area of Private Management. The strategic direction of NSW TG but also the increasing complexity in estates under management should result in more demand for these services.

Financial Planning also provide Financial Planning Advice to Client Service staff to inform in the decision making process regarding the affordability (impact on funds over a client's lifetime) their annual and ongoing expenditure needs and wants, one-off large purchases such as property (purchase, sale and purchase), modified vehicles, past care claims. When clients enter an aged care facility advice is provided on the affordability of the accommodation bond, extra service fees and the future of client's property.

Case studies in relation financial planning services are provided at Appendix XII to provide a deeper understanding of the work involved.

### **4.3 Property Management Services**

NSWTG ensures that all client assets are, where possible, secured and protected.

As at 30 June 2013, NSWTG had responsibility for the management of 3,520 real properties. The activities undertaken on behalf of clients in 2012-2013 included:

- selling of 499 properties, valued at \$215,965,279
- purchase of 21 properties, valued at \$7,355,950
- management of the rental for 433 properties
- 2,992 insurance renewals
- 941 new insurance policies
- 162 insurance claims
- 587 repairs and maintenance tasks for properties belonging to managed persons.

Last financial year NSWTG oversaw the management of 84 commercial operations, which operated under complex company structures, trusts, partnerships and sole trader entities, many of which were actively trading.

NSWTG also identifies and secures client personal property. This can include items such as jewellery, coin collections, furniture etc. Smaller items can be secured on NSWTG premises. Larger items can be negotiated and agreed with stakeholders for other forms of storage and security or disposal.

Case studies in relation to property management services are provided at Appendix XIII to provide a deeper understanding of the work involved.

### **4.4 Legal Services**

NSWTG employs qualified solicitors to provide specialist services and to ensure compliance with legislative requirements.

The following functions are provided by qualified legal officers:

- high level legal technical advice, support and direction to client services staff, senior management and the executive
- provide advice to client services in relation to making Wills, Powers of Attorney and Enduring Guardianship Appointments
- draft complex Wills for NSWTG clients either in support of Branches preparing the will or where clients are referred directly to Wills Section.
- legal communication and advice for clients

- provide verbal and written responses to solicitors and the public about wills, powers of attorney, enduring guardianship appointments and other important documents held for clients
- case management of a variety of legal matters on behalf of clients:
  - conduct of litigation
  - mediation and disputes
  - Supreme Court Protective List matters
  - Applications to Court pursuant to the Succession Act, Trustee Act and Probate Administration Act
  - Local court work
  - Equitable remedies
  - NCAT applications
  - CTTT matters
  - Legal costing
  - Accommodation Agreements
  - Arranging representation for criminal matters
  - Debt recovery
  - Equitable relief
  - Family Law
  - Personal Injury
  - Property law(conveyancing, obtain vacant possession)
  - Registration services
  - Advice and services related to criminal assets recovery litigation
  - Commercial law
  - Corporate files
  - Transfer of international assets
- legal work for both NSW TG and the Public Guardian such as appeals to the NSW Civil and Administrative Tribunal and Supreme Court Protective work

Case studies in relation to legal services are provided at Appendix XIV to provide a deeper understanding of the work involved

#### **4.5 Genealogy Services**

NSW TG employs specialists to be responsible for the investigation and obtaining of certificate evidence to prove entitlement in intestate estates and to locate missing beneficiaries and financial management clients. This includes genealogy traces in Australia and overseas. This is a complex area and it requires significant resources and time in some matters to trace beneficiaries entitled in deceased estates.

Case studies in relation to genealogy services are provided at Appendix XV to provide a deeper understanding of the work involved

#### **4.6 Taxation Services**

NSW TG employs specialists to be responsible for the management of compliance with taxation requirements for clients.

The following functions are provided by taxation specialists:

- High level taxation advice, support and direction to client services staff, senior management and the executive
- Applications for ATO ruling

- Tax returns
- Land tax
- Tax assessments

### **Complexities**

Preparation of tax returns for deceased estates poses unique challenges because the client is not available to clarify or assist with issues. Records, particularly those relating to capital gains tax in companies that have undergone takeovers, mergers and de-mergers, are often either incomplete or non-existent and in some cases impossible to reconstruct. Time spent to prepare an estate tax return will vary vastly from estate to estate.

Similarly, clients under financial management will generally have had a gradual decline for a number of years prior to coming under management. Records are generally poor or non-existent and often taxation issues have been left unmanaged for some time.

Case studies in relation to taxation services are provided at Appendix XVI to provide a deeper understanding of the work involved

## **5. Other Services**

### **5.1 Seized or Confiscated Assets**

NSWTG manages assets seized and confiscated under the *Criminal Assets Recovery Act 1990* and the *Confiscation of Proceeds of Crime Act 1989*. Assets can include real estate, cash, jewellery, motor vehicles and livestock. The assets may have to be sold immediately or held and either managed or maintained until further court orders are issued. In 2012-13 NSW TG paid over \$15 million earned from asset management to NSW Treasury.

#### **Fees**

Prescribed fees for administration of restrained/forfeited matters are set out in the Criminal Assets Recovery Regulation 2012 and the Confiscation of Proceeds of Crime Regulation 2010. Any additional out of pocket expenses are set out in the NSW Trustee and Guardian Regulation 2008.

### **5.2 Dormant Funds**

The Chief Executive Officer of NSW TG is the Commissioner of Dormant Funds and makes recommendations to the Attorney General on dealing with funds relating to charitable purposes or purposes of a public character which have become dormant. The dormant fund mechanism is intended as a cheaper and quicker alternative to an application to the Court. Over the 2012-13 reporting year the Commissioner determined one fund to be dormant. The decision in this matter was appealed to the Charity Referees and the decision was ultimately affirmed.

#### **Fees**

Under the Dormant Funds Regulation, a fee equivalent to 5% of the value of the dormant fund is payable to the Commissioner with respect to any proposal formulated. However, the Attorney General can consider on a case by case basis a fee reduction or waiver. Over the last 10 years 10 matters have been managed. In these 10 matters mentioned there were 2 reductions and 2 waivers.

Recovery of the commission is also subject to reduction or waiver by the Minister. In a 2010 matter the Commissioner's fee was reduced to the cost of recovery of the advertising (waiving a fee of \$11,944.20). The Commissioner does not object to the reduction of commission in appropriate cases.

### **5.3 Warehousemen's Lien Act**

NSWTG is to receive funds paid by a warehouse after the sale of goods held for a missing person. This is an infrequently used vehicle but nevertheless remains one of our responsibilities.

#### **Fees**

The fees payable have not altered and are 5% or \$20 whichever is greater. The 2007 Regulation does not provide for any fee waiver capacity.

### **5.4 Court Investments**

Funds paid into Court pursuant to Orders of the Court or pursuant to Part 4 of *Trustee Act 1925* are invested in a NSW TG Common Fund per Part 41.7 of the *Uniform Civil Procedure Rules 2005* and in accordance with Section 105 of *NSW Trustee and Guardian Act 2009*. This can be from any of the following sources:

- Supreme Court,
- Land and Environment Court,
- District Court,
- Dust Diseases Tribunal,
- Local Court,
- Any other court or tribunal prescribed by the regulations.

#### **Fees**

Interest is paid on these funds as they are invested in the Common Fund. Interest accrues daily and is credited biannually. Interest credited is subject to a commission charge of 5.25% + GST per Regulation 19 of *NSW Trustee and Guardian Regulation 2008*. This is the only fee allowed on these matters under legislation and regulation.

## **6. Community Engagement**

NSWTG undertakes significant activities to engage our clients, and also the wider NSW community.

### **6.1 Client Surveys**

In order to improve our relationship with clients, we continued to measure customer satisfaction according to two indices — the Customer Satisfaction Index (CSI) and Process Improvement Satisfaction Index (PISI).

Our annual survey of wills clients showed that customer satisfaction was 94 compared with 95 in the previous year and the Process Improvement Satisfaction Index 92 compared with 93 in 2011-12. Our beneficiaries' client survey indices were 69 for the Customer Satisfaction Index in 2012-13 and 62 for the Process Improvement Satisfaction Index, representing decreases of 5 per cent in the CSI and 8 percent in the PSI on the previous year.

The same CSI was used to measure the satisfaction of financial management clients. The CSI for directly managed clients was 58, while the CSI for private financial managers was 66. This provided a mean for financial management services of 62 and represents an increase from 60 in 2012-13. Dual services office clients rated more highly factors such as the respect shown by staff; the knowledge of staff; the provision of updates about their assets and the time taken by staff to respond to their enquiries.

An external service audit was conducted across all branches and benchmarked against the previous year. Client satisfaction with our telephone service was 71 per cent (a decrease of 3 per cent on June 2012) and 79 per cent for face-to-face service (a decrease of 5 per cent on 2012). The telephone and face-to-face audits assisted us in identifying opportunities for improvement in our interactions with potential clients, and for further training as required for those branches needing improvement. This information is being used by NSW TG to focus on the areas of our current service that need to be improved.

## **6.2 Complaints**

NSW TG takes complaints seriously and every effort is made to resolve issues in a fair and timely way. The resolution of complaints and IRODs within set timeframes is part of NSW TG best practice procedures.

NSW TG recorded 349 complaints in 2012-13 compared with 386 in 2011-12. Overall 72% of complaints included commentary on service provided by NSW TG. This included complaints about communication, delays in making decisions and length of time to receive a response. Thirteen percent of complaints related to decisions made by NSW TG, 6% related to policy and procedures, 3% relates to fees and the remaining 6% related to other issues.

Internal Reviews of Decisions (IROD) allow clients who are under private and direct management to a review mechanism for decisions made on their behalf. The internal reviewer can affirm, vary or set aside and make a substitute decision in line with Section 53(3) of the *Administrative Decisions Review Act 1997* (NSW). In 2012-13 there were 58 requests for IROD received. Of those received, 32 were affirmed, 9 varied, 14 set-aside and 3 withdrawn.

## **6.3 Community Education**

As part of life planning, NSW TG promotes and provides community education about will-making, power of attorney, trustee and executor services, financial management and guardianship services. In 2012-13 NSW TG presented to approximately 100 community education sessions across NSW. These presentations covered the role and operations of all NSW TG services.

As the state's largest will maker, NSW TG provides a professional, independent and impartial alternative for the people of NSW, as it does for trusts and powers of attorney. NSW TG markets our extensive experience in estate planning and administration and encourage people to take up these life planning instruments.

An integrated marketing approach supports our radio campaign, including coordinated corporate and branch marketing plans and strategies. Other strategies used are direct mail campaigns targeting business activities, online services and promotions and business development alliances. NSW TG media campaign is coordinated with community education campaigns conducted during the year, including Good Will Week campaign and NSW Seniors Week.

A particular focus is on broadening access to trustee services through remote wills days. Using courthouses, libraries, community and council facilities, NSWTG conducts wills days in areas outside of NSWTG's offices across metropolitan Sydney and regional NSW. This provides significantly expanded coverage and access to areas NSWTG would otherwise not reach from NSWTG branch locations, and brings an alternative will maker, power of attorney service, executor and trustee to areas such as regional towns where options may be limited. Approximately 240 wills day events were conducted in the 2012-13 financial year.

NSWTG is also significantly involved in the following community focus activities:

- Good Will Week
- Get it in Black and White Campaign
- Law Week

## **7. Governance**

### **7.1 Executive**

#### **Chief Executive Officer**

#### **Commissioner of Dormant Funds**

Imelda Dodds BSocSc, MA Public Policy, Adjunct Professor of Social Work, University of Sydney

#### **Director Client Services**

Damon Quinn, BA, MA, MBA

#### **A/Director Specialist Services**

Tracy Burgess, BBA, EMPA

#### **Director Financial and Funds Management**

Bernie Farrell CFP, DFP, SA Fin, Dip Fin Mkts

### **7.2 Corporate Management**

NSWTG has the following divisions:

- Client Services
- Specialist Services
- Finance and Funds Management.

The Executive works to a board structure in that directors of each division report monthly on budget performance, performance in key result areas, performance under the Business Plan and new or ongoing projects.

### **7.3 Committees**

NSWTG has an Independent Investment Advisory Committee. This includes internal and external members. The IAC advises the CEO on issues relating to investment of clients' funds. NSWTG is represented on the committee by the CEO and directors. There are three external members

NSWTG also has an Advisory Committee, with 9 external members, to provide high level advice and comment to the CEO on:

- the strategic planning and strategic directions;
- key policy and service delivery issues;
- proposed initiatives, legislative change and new programs provided by or impacting on NSWTG;
- the effectiveness of client satisfaction, complaints and review mechanisms;
- community relation strategies and contact with the media;
- systemic advocacy issues and strategies relevant to NSWTG.

**Other key committees** are: Joint Consultative Committee, Occupational Health and Safety, Business Support Group and Information Technology Steering Committee.

## **7.4 Compliance Program**

NSWTG continues to improve its governance, risk management and general compliance. NSWTG maintain a high level of awareness of risk management, with greater emphasis at the corporate management level, complemented by ongoing inclusion of risk managed components in all staff induction and technical training courses.

### **Risk Management and Audit**

NSWTG Risk Management Plan addresses both operational and corporate risks. Some of the operational and corporate risks are mitigated by:

- compliance with Treasury Policy TPP09-05 Internal Audit and Risk Management Policy for the NSW public sector, including:
- an Audit and Risk Committee with an Independent chair and a majority of independent members to provide transparency
- clearly defined charters for the Audit and Risk Committee operations and for the internal audit function
- an enterprise-wide approach to ongoing implementation and maturity of risk management practices
- establishment of a Chief Audit Executive with independence and objectivity through operational reporting to the independent chair of the Audit and Risk Committee
- professional development of the Chief Audit Executive to ensure proficiency and due professional care
- development of a quality assurance and improvement program by means of a fraud control strategy and prevention framework and control self- assessment framework
- annual review of the risk management framework
- a strategic audit framework and vigorous, annually reviewed internal audit program for all operational areas and corporate, strategic and operational risks
- external oversight and assessment through the Audit Office of NSW
- a comprehensive training program for all staff in fraud awareness and workplace expectation.

NSWTG has an overarching risk management framework. The framework is subject to review for continuous improvement and changes in industry practice, including ongoing refinement of risk assessment methodology. Estate property and assets are protected by internal procedures and by comprehensive insurance of all estate property. Wills and selected items of client property are protected by secure storage.

NSWTG is a member of the NSW Treasury Managed Fund, which provides insurable risk protection. Our insurance cover includes:

- comprehensive motor vehicle insurance
- liability insurance, including public liability and professional indemnity
- property insurance covering corporate property
- workers compensation insurance
- miscellaneous insurance for liabilities not specifically covered.

## **7.5 Planning**

NSWTG has the following plans at the corporate level:

- Business Plan
- Marketing Plan
- Risk Management Plan
- Business Continuity Plan
- Total Asset Management Plan (included with the DJAG overall plan).

## **8. Public Guardian**

The Public Guardian (PG) is a legally appointed guardian for people who lack capacity to make major health and personal decisions (but not financial or property-based decisions).

The Public Guardian and staff are administratively responsible through the CEO of NSWTG. The Public Guardian's funding is derived from a Treasury grant through DAGJ.

Prior to the Public Guardian's funds coming through Treasury grants, the former OPC cross subsidised the cost of operation of the OPG. This was recognised as inappropriate as this was causing disadvantage to the clients of the former OPC. As a result, the Treasury Grant program commenced in 1996-97 financial year.

Since that time the level of funding has continually become insufficient to such a state that in effect the NSWTG has to once again cross subsidise the cost of service delivery by absorbing some administrative costs as much as possible in order to free up funds for service delivery. In addition, funding subsidies are provided to the PG for certain expenditures and projects including:

- Training costs for PG staff in excess of the PG training budget
- Planning Ahead Tools Website Project – a joint project of both NSWTG and OPG, however totally funded by NSWTG
- Supported Decision Making Pilot Project – This is jointly funded by ADHC and NSWTG. PG will benefit from the outcome of the project.

### **Community Service Component**

The entire operations of the Public Guardian are a community service. No fees are charged. In 2012-13, \$7.92 million was received for Community Service Obligation payment. With the imposition of efficiency and other savings on all government agencies, the Public Guardian's yearly grant had been reduced in the budget by the NSWTG share in Procurement savings.

This will effectively reduce the funds available for the Public Guardian's operations. Any such shortfall will have to be met by NSWTG, if full amount is not allocated by DAGJ.

## 9. Fee Structure Proposal

### 9.1 Current Fees

NSWTG is entitled to charge fees according to regulation. At the commencement of the Act the regulations of the two former organisations were carried forward into the new framework.

Across all services, NSWTG's commercial competitors actively pursue high value clients where it is economically advantageous for their business and or shareholders. NSWTG is appointed to financially manage the affairs of people with a wide range of estates – from pension only to multi million dollar estates. NSWTG cannot ~~—sell~~ its clients and would never seek to do so. NSWTG may refuse to act in a trust capacity but strives to accept matters as far as is reasonably possible.

### 9.2 Fee Waivers

NSWTG waives, reduces or foregoes commissions and fees to allow community access to our professional services. We do so for reasons of hardship, on certain property passing to the spouse of the deceased, because the value of the matter does not warrant the fee or due to special circumstances. Decisions are guided by policy and procedure. Commissions and fees waived, reduced or foregone in 2012-13 totalled approximately \$13 million.

### 9.3 Foundation Principles

NSWTG used the following key principles to develop a proposed new fee structure:

1. Fee structures and funding arrangements should be **fair** for NSWTG clients
2. Fees should be **transparent and clear**, so that NSWTG clients can easily understand, and where appropriate, compare the fees they will pay
3. Fees should be **reflective of costs** of providing the service as far as practical
4. NSWTG clients should pay no more for the services provided by NSWTG than they would if these services were provided by commercial organisations operating in **competitive markets**
5. Fee structures should **support financial sustainability** of NSWTG – including the capacity to fund capital requirements
6. Fee structures should be **operationally feasible**
7. Fee structures should be **consistent and standardised** across NSWTG service areas, as much as possible

## 9.4 Key Inputs

NSWTG modelled the proposed fee structure on the following key inputs:

### **Current Costs**

Costs for all services have been modelled on agreed allocation of resources, on-costs and support costs.

### **Current Fees**

The existing fee structures and actual revenues have been modelled for revenue impacts and capacity to provide services.

### **Benchmark Data**

Existing fee structures from trustee agencies in other jurisdictions, private trustee companies and other market based providers have informed options for some fee rates.

## 9.5 Model

There were three model options for the fee structure considered:

### **Activity Based Only**

This is not an approach that was identified in benchmark data. It would require significant administration. The difficulties in capturing activity volume data would increase current costs to serve and add to the complexity for clients to understand the fees being charged.

### **Commission Based Only**

A flat commission based fee is simple and clear. However, this would limit NSWTG's ability to flexibly respond to fluctuations in demand. It would also not be an equitable approach as it would increase the potential for cross-subsidising.

### **Blended Approach**

This approach was the most common in the market. It allows for basic services on a commission base, with additional specialist services charged on actual usage.

## 9.6 Explanatory Notes

The schema is divided into Service Areas with identification of commission based fees and fee per service (activity based) for each area. Fees provided in black text are the existing fees with no change. Fees provided in blue text are proposed changed or added fees. Fees for —Out of pocket expenses” in trustee services have been removed from this model and would no longer be charged.

NSWTG proposes this model as it meets the foundation principles in the following way:

1. Fee structures and funding arrangements should be **fair** for NSWTG clients

All clients would pay a basic commission fee and then per service fees for extra services required (legal, taxation, financial planning, property management). This would mean that those clients with a greater cost to serve are going to pay for those services. The investment fee is commission based fee for the service provided to invest and manage those funds.

2. Fees should be **transparent and clear**, so that NSWTG clients can easily understand, and where appropriate, compare the fees they will pay

The proposed model is a simplified one that provides consistency across NSWTG services with basic commission fee and then per service fees for extra services required.

3. Fees should be **reflective of costs** of providing the service as far as practical

The costs to serve NSWTG clients are better reflected in the proposed model as those clients that use specialist, professional services such as taxation, legal, financial planning and property management are covering the extra cost of those services.

4. NSWTG clients should pay no more for the services provided by NSWTG than they would if these services were provided by commercial organisations operating in **competitive markets**

The per service fees are proposed to be the same for all service areas of NSWTG. Service areas such as POA's, Trusts etc rely on the marketability of NSWTG fees. By using the same fees for involuntary clients (Financial Management) as we do for voluntary clients, should ensure the fees are aligned with a competitive market.

5. Fee structures should **support financial sustainability** of NSWTG – including the capacity to fund capital requirements

NSWTG has modelled this proposal and we believe it does allow us to be financially sustainable.

6. Fee structures should be **operationally feasible**

The structure is already in place in NSWTG to charge fees for service in trustee services. It is feasible to operationally extend this approach.

7. Fee structures should be **consistent and standardised** across NSWTG service areas, as much as possible

This model allows for clients to have consistent and standardised fees. In particular, the management of clients under Power Of Attorney and Financial Management Order arrangements would be subject to the same fees.

## 9.7 Proposed Fee Structure

Using the identified key inputs and a model based upon the blended approach, NSW TG has drafted the following proposed fee structure.

Service Area	Commission Fee	Fee Per Service
Trusts	Capital commission + 0.5% each tier <sup>10</sup>	Specialist Services Fees
	Income Fee	Admin Fee – Increase from \$10 to \$20
	Long Term Trust Fee	
Deceased Estates	Capital commission + 0.5% each tier	Specialist Services Fees
	Income Fee	Admin Fee – Increase from \$10 to \$20
	Long Term Trust Fee	
POA's	Management Fee – Increase from 1% to 1.1% <sup>11</sup>	Specialist Services Fees
	Establishment Fee	Admin Fee – Increase from \$10 to \$20
Wills	-	Will Drafting Fee – Increase from Nil to \$400
Financial Management – Direct	Management Fee Cap – Increase from 15k to 25k <sup>12</sup>	Specialist Services Fees from Nil to current rate charged for Trusts, Deceased Estates and POA's
Financial Management – Private	Income Fee Cap – Increase from 2k to 3k	Account Fee
Common Fund Management	Investment Fee - Financial Management increase from 0.5% to 0.75% <sup>13</sup>	-

<sup>10</sup> Capital Commission increased to 4.5% first \$100,000, 3.5% on next \$100,000, 2.5% on next \$100,000 and 1.5% on \$300,000 and over

<sup>11</sup> POA and Financial Management Clients are currently charged different fee rates for similar services. This anomaly needs to be addressed

<sup>12</sup> See NSW TG response to Issue 9 in section 9 of this submission in relation to the rationale to increase the current cap

<sup>13</sup> The Investment fee on Trustee Common Fund is 0.75% currently. This needs to be the same fee across both common funds.

## **Appendices**

## ***I – IPART Issues Paper – Comments***

The IPART Issues Paper *A fair and transparent fee structure for the NSW Trustee and Guardian* was informed in part by background information provided by, and discussions with NSW TG. Due to miscommunication, some aspects of the Issues Paper require clarification. NSW TG submits the following clarifications:

- Page 1            Second footnote – refers to fees charged by the Public Guardian'. The Public Guardian does not charge any fees for services.
- Page 2            Paragraph 2 - States The Government has provided funding for this system, but it is yet to be fully implemented'. NSW Government have not provided any funds for a new system. NSW Treasury have endorsed NSW TG using its own funds as capital expenditure for a new system.
- Page 8            First paragraph – states that directly managed protected persons' are those who have no suitable family member or friend prepared or able to act for them. This ignores private and non-government sector organisations. It is more accurate to say that NSW TG is the financial manager of last resort for directly managed protected persons'. NSW TG directly manages where there is no individual or organisation willing or able to provide financial management services. Or where there is significant conflict between various potential private financial managers.
- Page 10           2.1.3, dot point 4 – states that NSW TG administers the Public Guardian'. The Public Guardian has operational independence. NSW TG has administrative responsibility for the Public Guardian.
- Page 11           First paragraph – states that Trustee Services have historically generated an operating surplus'. Not all functions within Trustee Services operate on a surplus. There are components that attract a community service obligation and have historically operated at a loss.
- Third paragraph – states that NSW TG administers a common fund'. NSW TG actually administers two common funds.
- Fourth paragraph – there is some confusion in relation to the investment fee and the Long Term Trust fee. The paper states For Trustee customers, it charges an investment fee of 0.55% to 1.1% of the customers' assets in the fund, depending on the size of the assets and how long they have been held in the trust. For customers with assets over \$500,000 the fee is 1.1% after 2 years'. This is a description of the Long Term Trust fee, not the Investment fee.
- Page 13           Last paragraph – States The NSW Government has allocated funds for upgrading the management information systems, but this work is not yet complete'. NSW Government have not provided any funds for a new system. NSW Treasury have endorsed NSW TG using its own funds as capital expenditure for a new system.

- Page 17      Second paragraph – States ‘The NSW Government allocated funds for this purpose in 2009...’ Refer to points above from pages 2 and 13, NSW Government have allocated no funds to NSW TG for this. The development of a new information management system is being completely self funded by NSW TG.
- Page 18      Last paragraph – similar to the fourth paragraph from page 11 (see above) there is confusion between the Investment fee and the Long Term Trust fee. The paper states ‘For high-wealth Trustee customers, this fee is 1.1% pa’. This is the Long Term Trust fee, not the Investment fee.

## ***II – List of Abbreviations***

ACF	Aged Care Facility
AD	Assistant Director
ADHC	Ageing, Disability & Home Care
ALI	Active Linking Initiative
CGT	Capital Gains Tax
CIS	Client Information System (for clients under financial management)
CSO	Client Service Officer
CTA	Cum Testamento Annexo (literally “with the Will annexed” )
DAS	Disability Advisory Service
DVA	Department of Veterans’ Affairs
EFN	Electronic File Note
EG	Enduring Guardianship
FPA	Family Provisions Act (note replaced by <i>Succession Act</i> )
FPU	Financial Planning Unit
GT	Refers to the former Guardianship Tribunal now known as the Guardianship Division of NCAT
IROD	Internal Review of Decision
JPM	Joint Private Managers
L&D	Learning & Development
LPI	Land & Property Information Office
NCAT	NSW Civil & Administrative Tribunal
NEAMI	North Eastern Alliance for the Mentally ill
NH	Nursing Home
OSR	Office of State Revenue
PG	Public Guardian
PLO	Principal Legal Officer
PM	Private Manager
POA	Powers of Attorney
QCAT	Queensland Civil & Administrative Tribunal
S&L	Sale & Leasing Report
Task	A subset of the CIS system which is a specific requirement for action
TFN	Tax File Number
TRIM	Tower Record Information Management (electronic management system)
TRIM Desktop	Tower Record Information Management (electronic management system - simpler version of TRIM)
VCAT	Victorian Civil & Administrative Tribunal

### ***III – Legislation and Policies***

In relation to its Trustee functions:

- NSW Trustee and Guardian Act 2009
- NSW Trustee and Guardian Regulation 2008
- Probate & Administration Act 1898
- Succession Act 2006
- Succession Regulation 2008
- Trustee Act 1925
- Trustee Regulation 2010
- Charitable Trusts Act 1993
- Dormant Funds Act 1942
- Dormant Funds Regulation 2009
- Civil Procedure Act 2005
- Civil Procedure Regulation 2012
- Confiscation of Proceeds of Crime Act 1989
- Confiscation of Proceeds of Crime Regulation 2010
- Criminal Assets Recovery Act 1990
- Criminal Assets Recovery Regulation 2012
- Minors (Property and Contracts) Act 1970
- Powers of Attorney Act 2003
- Powers of Attorney Regulation 2011
- Government Information (Public Access) Act 2009
- Government Information (Public Access) Regulation 2009
- Supreme Court Rules 1970
- Warehousemen's Lien Act 1935
- Warehousemen's Lien Regulation 2007

In relation to its FM functions:

- NSW Trustee and Guardian Act 2009
- NSW Trustee and Guardian Regulation 2008
- Administrative Decisions Review Act 1998
- Administrative Decisions Review Regulation 2009
- Civil Procedure Act 2005
- Civil Procedure Regulation 2012
- Government Information (Public Access) Act 2009
- Government Information (Public Access) Regulation 2009
- Guardianship Act 1987
- Guardianship Regulation 2010
- Mental Health Act 2007
- Mental Health Regulation 2012
- Supreme Court Rules 1970

In relation to overall governance:

- NSW Trustee and Guardian Act 2009
- NSW Trustee and Guardian Regulation 2008
- Annual Reports (Statutory Bodies) Act 1984
- Government Information (Public Access) Act 2009
- Health Records and Information Privacy Act 2002
- Independent Commission Against Corruption Act 1988
- Public Interest Disclosures Act 1994
- Public Sector Employment and Management Act 2002
- Public Finance and Audit Act 1983
- Privacy and Personal Information and Protection Act 1998
- NSW TG Authorities and Delegations Procedures
- NSW TG Records Management Policy
- NSW TG Risk Management Policy
- NSW TG Corporate Governance Policy
- NSW TG Cash Handling Procedures
- NSW TG Workplace Health & Safety Policy
- Media Management Policy
- Treasurer's Directions
- NSW Public Sector policies, procedures, circulars and memoranda issued by Department of Premier and Cabinet
- DAGJ Use of Internet and Email Code of Practice
- DAGJ Fraud & Corruption Prevention Policy and Strategic Plan
- DAGJ Settling Workplace Grievances Policy & Procedure
- DAGJ Internal Reporting Policy
- DAGJ Code of Conduct
- DAGJ Dignity & Respect Policy
- DAGJ Corporate Administrative Delegations
- DAGJ Media Policy
- DAGJ Corporate Records Classification and Control Policy
- DAGJ Risk Management Policy and Strategy

## IV – Current Fee Schema

# Facts on Fees

## NSW Trustee & Guardian Trustee Services



*NSW Trustee & Guardian  
provides clear information  
on fees and charges for  
Trustee Services.*



**NSW Trustee & Guardian**  
Attorney General & Justice



Contents

About NSW Trustee & Guardian ..... 3

What does it cost to make a Will with NSW Trustee & Guardian? ..... 4

What does NSW Trustee & Guardian charge for administering an estate? ..... 4

What does it cost for a Power of Attorney? ..... 6

What does it cost to set up a Trust? ..... 7

What are the main costs of administration of a continuing Trust? ..... 7

Is interest paid on monies held in the  
NSW Trustee & Guardian Common Fund? ..... 7

**Please note:** The fees outlined in this section are current at the time of publication. NSW Trustee & Guardian advises clients (and/or a person nominated by the client) of any changes in fees, except where it is considered not practicable to do so by reason of state of health or mental capacity and where there is no nomination.

## About NSW Trustee & Guardian

NSW Trustee & Guardian (NSWTG) was formed on 1 July 2009 following the passing of legislation by NSW Parliament to merge the former Public Trustee NSW and the Office of the Protective Commissioner. NSW Trustee & Guardian continues to provide professional services in Will making, Powers of Attorney, Trusts and Executor Services.

NSW Trustee & Guardian's fees and commissions are fixed by government and applied in accordance with the circumstances of the client and the tasks involved. We encourage our clients to discuss our fees upfront. This is a benefit to you, as you know what you will be charged. We will always explain this to you and provide assurance that our professional service specialising in estate, trust and asset administration is value for money. If you are making comparisons you need to be fully aware of what NSWTG does in administering your estate, trust or your affairs under a power of attorney.

We are specialists in deceased estate administration, which means we deal with your assets exactly as you wish. This can include selling of your house, its contents, what you want done with the money that results from sales of items, administration or sales of businesses and dividing proceeds among your chosen beneficiaries.





## What does it cost to make a Will with NSW Trustee & Guardian?

We do not charge for drafting a Will, and will prepare one for you when you appoint NSW Trustee & Guardian as executor. We will hold your original Will and other important documents in safe custody – free of charge. There is also no charge to update your Will as often as your life circumstances change e.g. marriage, birth of a child, or other events that may impact on how you want your assets distributed.

## What does NSW Trustee & Guardian charge for administering an estate?

When **solely owned** assets are realised or transferred, the following capital commission is charged on a sliding scale starting at 4.4% as follows:

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

For example: % fee payable for the following estate values is:

\$500,000 (estate value) = 2.42% (fee);

\$750,000 (estate value) = 1.98% (fee);

\$1,000,000 (estate value) = 1.76% (fee).

We charge an account keeping fee of \$11.00 (incl. GST) per month. For the investigation and lodgement of tax returns a minimum fee of \$250 (ex. GST) up to one hour applies, plus up to maximum \$200 (ex. GST) per hour for extra hours required. There are also out of pocket expenses for postage, phone and photocopying. Charges also apply if additional work is required for resolving disputes, for example if legal work is required.

If your solely owned assets are a matrimonial home or a rollover of superannuation inherited by your spouse/partner the commission will be reduced to 1.1% if the value of the matrimonial home or superannuation is over \$100,000. If the value is less than \$100,000 there is a minimum fee of \$1,100 (incl. GST) or 2.2% of the value (whichever is the lesser).

No commission is charged on assets owned as joint tenants. A fee of \$330 (incl. GST) plus out of pocket expense is necessary to cover the legal work involved for transferring property to surviving joint tenants.

Where assets earn income – for example interest, dividends or rent, NSW Trustee & Guardian charges an income commission of 5.775% (incl. GST) on the gross amount collected. In cases where a Managing Agent collects rent, a reduced commission of 2.75% (incl. GST) is charged on the gross rental amount.



Ошибка

**а! Закладка не определена.**

## What does it cost for a Power of Attorney?

There is no charge to prepare a Power of Attorney document and hold it in safe custody, if NSW Trustee & Guardian is appointed sole attorney or in substitution of your spouse, de facto spouse or partner/person you are living with in a close, caring relationship.

### Future Assist – because you never know what may happen.

Future Assist is a Power of Attorney designed as a safety net to provide you with peace of mind should you be unable to manage your financial affairs in the future.

<b>Preparation Fee</b>	NIL.
<b>Ongoing Fees</b>	NIL. NSW Trustee & Guardian does not charge an ongoing fee for having been appointed as an attorney. Fees commence when NSW TG is required to act in the capacity noted below.

Where the Future Assist is upgraded to Active Assist, a \$550 (incl. GST) establishment fee will apply.

### Active Assist – tailored to meet your personal and financial needs.

Active Assist through a Power of Attorney gives you the freedom to choose the exact level of financial assistance that you require.

<b>Establishment Fee</b>	\$550 (incl. GST) including when you convert from Future Assist.
<b>Annual Ongoing Fee</b>	1.1% of the value of income producing and investment assets under NSW Trustee & Guardian administration, charged half yearly in arrears (minimum fee – \$1,100 (incl. GST) p.a.).
<b>Account Keeping Fee</b>	\$11.00 (incl. GST) per month.

For further details please refer to our Guide for Powers of Attorney.

## What does it cost to set up a Trust?

If NSW Trustee & Guardian administers an estate including a continuing trust, no additional commission is charged. In setting up a new trust, capital commission is charged in accordance with the table of fees set out earlier.

---

## What are the main costs of administration of a continuing Trust?

An account keeping fee of \$11.00 (incl. GST) per month is charged for the continuing maintenance of the Trust fund. For the investigation and lodgement of tax returns a minimum fee of \$220 (incl. GST) up to one hour applies, plus up to maximum \$165 (incl. GST) per hour for extra hours required. Our Investment Planning Fee is \$165 (incl. GST) per hour. Commission of 5.775% (incl. GST) is charged on income earned by the trust.

A long term trust fee comes into effect where a trust exceeds 2 years and, where charged, income commission ceases to apply. The fee is on a sliding scale (incl. GST) to an annual maximum of 0.55% on 1st \$250,000 to 0.825% on 2nd \$250,000 to 1.1% on amounts over \$500,000. The primary place of residence is not included in the capital value while the beneficiary of the trust is using it as their residence.

Long term trust fees do not apply to charitable trusts.

---

## Is interest paid on monies held in the NSW Trustee & Guardian Common Fund?

All money received from an estate, trust or power of attorney forms part of the NSW Trustee & Guardian Common Fund. This earns interest calculated on daily balances and is credited to each account in June and December each year. Interest earned from the Common Fund can sometimes partially offset or even exceed the cost of administration.

## Services

- Will Making
- Power of Attorney
- Trusts
- Deceased Estate Administration
- Financial Management Services

Contact our friendly staff for more information on our services.

## Branches

- |               |              |                  |
|---------------|--------------|------------------|
| • Armidale    | • Chatswood  | • Newcastle      |
| • Bankstown   | • Gosford    | • Parramatta     |
| • Bathurst    | • Hurstville | • Port Macquarie |
| • Blacktown   | • Lismore    | • Sydney CBD     |
| • Broken Hill | • Liverpool  | • Wagga Wagga    |
| • Burwood     | • Miranda    | • Wollongong     |

There is an agent for NSW Trustee & Guardian at every Local Court in NSW.

## Contact us

**1300 364 103** *(local call cost only)*

**+61 2 9252 0523**

**[www.tag.nsw.gov.au](http://www.tag.nsw.gov.au)**



**NSW Trustee & Guardian**  
Attorney General & Justice

© NSW Trustee & Guardian 2013 06/13

## ***V – Case Studies – Pre-Planning Instruments<sup>14</sup>***

### **The need for pre-planning:**

#### **Without a Will, your wishes may not be legally recognised**

Steven and his girlfriend Kelly were 23 years old, and had been living together for two years when Steve died suddenly without a Will. The court decided that Kelly was his legal de facto spouse, and she received his entire, substantial estate. His parents received nothing.

#### **DIY Wills can be dangerous**

A husband filled in a ‘do-it-yourself’ Will form – intending to leave the whole estate to his wife. He inserted his wife’s name in the section of the form appointing her the executor, but did not put her name in the section for nominating a beneficiary – in effect; he left the whole estate to nobody.

#### **It can be too little, too late**

Gwen suddenly suffered a heart attack and went to ask her neighbour to call an ambulance. While waiting, Gwen said she wanted to leave her apartment to ‘Helen Hughes’, so the neighbour scribbled the details on the nearest piece of paper – a post-it note. Sadly, Gwen’s heart attack proved fatal and the court held the note was not a valid Will and so the estate was distributed with no regard for Gwen’s wishes.

#### **Don’t forget to update your Will - I**

Mrs K moved to Australia from Europe. Her husband was executor and sole beneficiary in her Will but after he died, she failed to update her Will and when she died, her estate was intestate. Though she had a good relationship with her step-daughter, her estate was then put toward covering the expense of searching for relatives in Europe – people she barely knew.

#### **Don’t forget to update your Will - II**

Mr F purchased a Will kit from the post office. His only asset was his house. His good friends Sam and Sally had cared for him for many years as his health declined, and he decided he wanted to leave everything to them. In his Will he said —“give my house to Sam and Sally Brown”. A few years after making his Will, Fred sold his house and began living with Sam and Sally. He deposited the proceeds of sale of his house into his bank account. He died several weeks later, and had not updated his Will. As Fred did not complete the Will properly, he did not leave any of his assets to Sally or Sam, or indeed to anyone.

The result was that Fred’s closest living relatives, who happened to be nieces and nephews he had not seen for years, were entitled to the whole of Fred’s estate. If Fred’s Will had been professionally drafted, this kind of problem could have been very easily avoided.

<sup>14</sup> Names have been changed in all case studies in order to protect privacy

### **When there's complexity**

#### **Without a Will, your wishes may not be legally recognised**

Steven and his girlfriend Kelly were 23 years old, and had been living together for two years when Steve died suddenly without a Will. The court decided that Kelly was his legal de facto spouse, and she received his entire, substantial estate. His parents received nothing.

#### **Complex Estate**

A recent complex Will was referred by a NSW TG branch with the branch continuing to be the client's point of contact, and they would obtain instructions with Wills Section drafting the Will. That Will provided for gifts of a farm, residential real estate, commercial real estate subject to a lease to a laundry business then owned by the testator, a trust and a right of residency. The drafting took approximately 2 hours.

#### **Charitable Gifts**

Another client was initially seen by the Branch and referred directly to Wills Section. The Will was complex and the residual estate was left in trust for two charitable purposes. The Wills Section saw the client on four occasions and overall process took about six hours.

## **VI – Case Studies – Deceased Estates**

### **Deceased Estate with Executor not NSWTG**

Mrs M appointed her accountant as executor to her estate. Mrs M's estate was initially worth several million dollars, and she had bequeathed her estate to each of her three children and also set up in her Will an education fund in favour of her grandchildren.

When Mrs M passed away, the accountant used her funds to assist in his own business and could not account for large amounts of money that had gone —missing”.

The beneficiaries commenced action to have the accountant removed as executor. The court ordered that NSWTG be appointed administrator of the estate and that the previous executor, the accountant, be removed for misappropriation of estate funds.

By that stage, the beneficiaries/plaintiffs had accrued huge legal costs that they were unable to recover from the accountant as he had no assets in his name. They were only recoverable from the estate. As a result, all the beneficiaries received a lot less than set out in the Will due to an unscrupulous executor.

### **Intestate Estate – No Will**

The deceased was a male in his thirties who committed suicide. He had a net estate worth a little under \$200,000 but also had death benefits of about \$230,000 that were paid outside of the estate. The deceased had one child, a minor aged about 7 years at the time of his death. He was living in the same household as the child's mother (Ms H) and whilst there was no doubt they had been in a de facto relationship for a number of years, there was some doubt as to whether the de facto relationship had continued up to the deceased's death. Ms H claimed the relationship was continuing but acknowledged there were problems and they had considered separating.

The deceased's father and brother were adamant that the relationship had ended and that the whole estate should pass to the child. The deceased's father was aware that the deceased had contacted a solicitor about separation and a property settlement a few months before he died, and documentary evidence was obtained about that. The father, brother and the deceased's friend gave statements about things the deceased had said to them indicating the relationship was over, notwithstanding they were living under the same roof.

This was not a case where the potential beneficiaries could negotiate a settlement because there was a minor child involved, and any settlement involving a minor would require court approval.

NSWTG briefed counsel and applied to the Court for determination of the entitlement. The court application meant that a tutor had to be found to represent the minor child. An informal settlement conference was held and the matter was resolved, and the Court approved the settlement which resulted in some funds being set aside for the child and the remainder passing to Ms H.

### **High Value Complex Estate – NSW TG as Executor**

The deceased made five different wills over a two year period appointing NSW TG executor. The client died and probate was granted by the Supreme Court to NSW TG two months later. The value of the whole estate at the date of death was approximately \$6m.

The estate assets consisted of an extensive real estate portfolio. Some owned solely by the deceased and some owned as in tenants in common with other parties. Some were a combination of commercial premises and unit blocks. There was an extensive investment portfolio, an overseas compensation claim which needed to be finalised, various bank accounts, household goods and personal effects and a motor vehicle.

After probate was granted NSW TG's work involved the transfer of the motor vehicle, collecting the bank accounts and finalising the compensation settlement overseas. Part of the ongoing administration required collection of dividends and investment income, including rents due and these were apportioned to the estate ledger.

Leases were transferred into name of NSW TG and new lease agreements, including commercial leases, were negotiated. NSW TG also investigated and finalised outstanding claims against the estate, including taxation liabilities (such as capital gains tax) dating back to the date of death.

Due to the complexity of the matter administration of this estate it took seven years and administration will continue as the life interest continues to be current.

Once general administration was completed NSW TG's role as an executor ended and NSW TG became trustee in respect of the life interests. It is expected that the life interests will continue for at least another 10 years and therefore the continuing administration actions include monthly receipt of rental payments and apportionment to ledger; insurance renewals; preparation and lodgement of trustee tax returns; preparation and lodgement of quarterly BAS returns; preparation and lodgement of land tax returns; payment of tax assessed; advice to beneficiary re taxable income; payment of property outgoings; arranging repairs and maintenance of estate properties; annual survival check; pay available income to life tenant following full vouch and audit process; statements of account and communication with beneficiary; communication with real estate agents and co owner of properties, and review and renewal of lease agreements.

On death of life tenant NSW TG will be required to locate and contact remaindermen\*; keep remaindermen informed of progress; confirm entitlement in accordance with terms of Will; sell or transfer estate interest in real estate; prepare and lodge final trustee tax, land tax and BAS returns; finalise all liabilities; cancel insurances; calculate final entitlements and distribute to residuary beneficiaries.

\* A remainderman is a legal term for the person who will receive a remainder in real property under the terms of a will. For example, a property can be left to person A as a life interest and under the terms of the will, upon the death of A the property is to revert to person B. Person B is a remainderman.

### **Low Value Complex Estate – NSWTG as Executor**

After the deceased's death his de facto spouse obtained Letters of Administration from Supreme Court to administer his estate, however she died without completing the estate administration. Both estates were reported to NSWTG by a friend who had little knowledge of the assets and liabilities of the estates. The friend handed over five large boxes of paperwork which then needed to be sorted through in order to determine the extent of the estate. Included in the paperwork were over 50 un-banked stale dividend cheques. NSWTG as executor of the de facto spouse's estate became administrator by representation of her partner's estate and was required to complete the administration of his estate.

The de facto spouse had dealt with the high value assets being several parcels of real estate and superannuation, however she failed to deal with the low value assets consisting of two small value bank accounts and an extensive share portfolio spread across 62 companies.

NSWTG was required to investigate each holding by sending out in excess of 100 initial letters to confirm holding details. All stale cheques were returned and replaced by the companies and then banked and apportioned to the estate ledgers. As part of the continuing administration further dividends due were collected and apportioned to the estate ledger and sale arranged of the numerous shareholdings.

NSWTG also investigated and finalised any outstanding claims against the estate including any taxation liabilities dating back to the date of death. Finalise trustee tax was calculated including the disclosure of any capital gains tax in relation to the shareholdings.

As the estate was intestate NSWTG was required to establish entitlement under the laws of intestacy at the time the deceased died. Certificate searches were required and supporting evidence regarding his de facto relationship had to be obtained. A family tree was prepared and referred to legal branch for final entitlement approval.

The value of the realised assets was ascertained and NSWTG's commission and fees were calculated as per the regulations.

The estate took 36 months to finalise due to the difficulties in finalising the sale of the unmarketable share parcels and trustee tax requirements. It is normally expected to administer an estate of this value within six to nine months.

## ***VII – Case Studies – Trusts***

### **Appointed as Additional Trustee**

NSWTG was appointed additional trustee of a family discretionary trust that was set up under a Will. NSWTG administered the deceased estate and then together with the co-trustee administered the discretionary family trust. The trust assets were held by four companies. The trust assets comprised seven pieces of real estate, ten bank accounts, motor vehicles, multiple shareholdings and a life policy.

The trust assets had to be secured, insured and maintained. There were quarterly meetings between three members of NSWTG staff, the co-trustee, the accountant, solicitor and beneficiaries of the trust. The purpose of the meetings was to review the administration of the trust and make decisions about the trust assets and investments.

Regular income distributions were made to the many beneficiaries who increased as the years passed as existing beneficiaries had children and these new beneficiaries had to be ascertained and identified as eligible.

Assets were realised and sold and along with maintenance of the assets came the usual types of issues e.g. there was a dividing fence dispute in one of the properties with a neighbour and the sale of one of the properties involved dealing with contaminated land.

### **Small Trust**

The Supreme Court made an order for NSWTG to hold funds in trust for a beneficiary resulting from a family provision claim he made on his late father's estate. The award made was very small.

The beneficiary wanted an overseas holiday. NSWTG organised payment for the holiday and spending money. Unfortunately the beneficiary spent all his spending money in one week instead of making it last the duration of the holiday.

NSWTG receives communications from various third parties regarding the beneficiary's whereabouts, admissions to hospital and his mental health state including the police, a hospital and a mental health centre.

Prior to his departure of his overseas holiday NSWTG was paying him from the trust a weekly income payment and accommodation expenses. The beneficiary also made irregularly requests for additional funds for food.

In more recent months his attendance and requests for additional funds have become more regular and his behaviour become more challenging. He has been noticed sleeping rough in the neighbourhood and stopping staff on the streets asking for additional funds.

## ***VIII – Case Studies – Powers of Attorney***

### **High Value Power of Attorney**

NSWTG was appointed additional trustee of a family discretionary trust that was set up under a Will. NSWTG administered the deceased estate and then together with the co-trustee administered the discretionary family trust. The trust assets were held by four companies. The trust assets comprised seven pieces of real estate, ten bank accounts, motor vehicles, multiple shareholdings and a life policy.

The trust assets had to be secured, insured and maintained. There were quarterly meetings between three members of NSWTG staff, the co-trustee, the accountant, solicitor and beneficiaries of the trust. The purpose of the meetings was to review the administration of the trust and make decisions about the trust assets and investments.

Regular income distributions were made to the many beneficiaries who increased as the years passed as existing beneficiaries had children and these new beneficiaries had to be ascertained and identified as eligible.

Assets were realised and sold and along with maintenance of the assets came the usual types of issues e.g. there was a dividing fence dispute in one of the properties with a neighbour and the sale of one of the properties involved dealing with contaminated land.

### **Enduring Power of Attorney – Active Assist**

The client made an enduring POA and Will appointing NSWTG attorney and executor. The POA was activated by the client before losing capacity. NSWTG staff met with the client obtaining details of her financial affairs and instructions for the work NSWTG is to undertake on her behalf. The client had significant assets including two rental properties in WA, her principle place of residence, various bank deposits and a considerable share portfolio. Whilst she had capacity NSWTG would seek instruction from her in regard to payment of liabilities and investment and the management of her assets.

Later, following the death of the principal's husband, NSWTG involvement increased and the work was carried out to collect dividends from shares and rental income on two properties; payment of all outgoings on the three properties including rates, insurances, levies, utilities, repairs and maintenance. There was the payment of personal expenses including credit card bills, veterinary bills, carers and home support services, tax assessments; arrangements for sale of both WA rental properties; client visits at home to discuss management of affairs; preparation and lodgement of three years worth of outstanding tax returns as requested by the principal, and arrangements for sale of a motor vehicle.

Eventually the principal lost capacity and was placed in an aged care facility. NSWTG was then required to manage her financial affairs without her ongoing instructions. At the most active stage of the matter over 100 claims were paid during a 12 month period. NSWTG continues to manage the client affairs' taking into account her initial instruction and what is deemed to be in her best interest.

## ***IX – Case Studies – Financial Management – Direct Management***

### **Holiday in a War Zone**

Mr A is a homeless man who migrated from Afghanistan to Australia in 1995. He has a chronic mental illness, cognitive impairment and a gambling addiction. Mr A first approached NSW TG in 2008 to ask for assistance in travelling to Afghanistan for a family reunion holiday. This was a most complex decision. Afghanistan is a war zone with a DFAT warning and Mr A is on a 'pension in/pension out' budget. Even though Mr A consistently expressed a wish to visit his wife, daughter and parents, he also attended every day requesting funds for other needs. NSW TG staff worked with Mr A to establish a budget which would allow for his immediate needs to be met and for the slow accumulation of funds to pay for a return air ticket. Almost every day it was necessary for staff to patiently remind Mr A of the long term plan. Working with refuge staff, NSW TG arranged a passport application and medical assessments and liaised with Mr A's family.

Mr A has now had three trips to Afghanistan, one in 2009, 2011 and early 2013. NSW TG is currently assisting with plans for his next trip.

Despite the significant economic and practical challenges, NSW TG support has resulted in an outcome which has significantly improved Mr A's quality of life.

### **Challenging Behaviours - Clients**

Bill and Ben are 50 year old twin brothers who have struggled with homelessness and alcohol abuse for two decades. They are well known to Sydney services partly because of their identical appearance and their long history of 'rough sleeping' at a train station, but also because of their raucous, gregarious, good humour. NSW TG worked intensively with Bill and Ben - and a range of other service providers - over the past 24 months. During this time the brothers have been through detoxification programs and residential rehabilitation and both are now accommodated in Housing NSW units in Sydney's south.

NSW TG also administered the estate of the twins' late mother.

Substance abuse and challenging behaviour issues have made the management of the twins' affairs complex and time consuming. Considerable professionalism and patience and understanding have been required to achieve greatly improved lifestyle outcomes for these two vulnerable men.

### **Challenging Behaviours - Stakeholders**

Ms X is a 27 year old woman with an acquired brain injury. She came under direct financial management after receiving a court payout. She is in a defacto relationship with a violent partner with substance abuse issues.

The defacto of Ms X has had to be banned from our offices due to threats against staff. Money is provided to Ms X in innovative ways (Coles Accounts etc) in order to ensure the defacto does not take it from her. NSW TG has worked with social work services to get support for Ms X.

### **The Accidental Tourist**

John is a 30 year old man, diagnosed with bi-polar disorder. He is subject to a Community Treatment Order (CTO) through NSW Health and must take his medication regularly under that CTO.

NSWTG received an email from an employee at the Australian Embassy in Warsaw Poland. John had travelled to Europe three weeks earlier with a ticket purchased by his parents as a gift. NSW TG had been unaware he had left the country. The Embassy advised that John had befriended less than honourable people who had stolen his passport, wallet and all of his personal possessions. Because of the time difference between Poland and Australia, NSW TG was unable to respond until the following morning. The Embassy advised that John had left the embassy. NSW TG staff asked that the Embassy advise if and when he returned that NSW TG would organise to get him home.

NSWTG staff contacted John's parents who were by now quite concerned for his welfare. They had not heard from him. A few days later, the Embassy again contacted NSW TG and advised John had travelled to the Czech Republic. John seemed to be travelling through Europe with a band of people who were EU citizens and was able to cross borders with no paperwork.

At this stage, because John had been out of the country, his Centrelink payments had been stopped. NSW TG was holding no funds for him. NSW TG staff contacted the Australian Embassy in the Czech Republic. An overdraft was organised and NSW TG coordinated with Department of Foreign Affairs and Trade to have a new passport issued and a flight home was organised.

### **Identity Fraud**

Joan is an elderly woman under direct financial management due to psychiatric disabilities. Joan had a friendship with Betty. Betty was a high care dementia patient in an aged care facility. Betty was under private management with her two brothers as joint private managers.

Joan stole the identity of Betty and was somehow able to get a bank account in Betty's name. She then tried to have money transferred from Betty's actual bank account into the fraudulent one. NSW TG identified the issue and worked with Betty's brothers to implement security around the identity.

Then Betty died. Some months later, Joan went to a solicitor and tried to write a will in the name of Betty. The solicitor contacted NSW TG as Joan told them to contact us for payment. NSW TG had to inform the solicitor that the will was fraudulent and needed to be destroyed. We also contacted Betty's brothers and assisted them to finalise probate so that Joan could be blocked from causing any further issues.

## ***X – Case Studies – Financial Management – Private Management***

### **Family Conflict**

A complex matter existed where there was a trustee company appointed, severe family conflict, a past Power of Attorney, guardianship issues and a review of decisions.

The client is a widowed woman with advanced dementia recently moved into a nursing home. She has two sons who in the past have taken out AVO's against each other.

The estate consisted of the residential home and a business (with a number of assets) of which the client was the majority shareholder and Director.

The first son (A) was appointed as power of attorney. The other son (B) resided at the client's house as he was reportedly the carer prior to her entry to the nursing home. Son B paid himself funds from the estate to take care of his mother prior to the FMO being granted. He also borrowed funds from the client's friend to pay himself funds after the power of attorney was granted without authority.

Son B was required to vacate the client's residence after the client moved to the nursing home however refused to do so. He made an application to have the power of attorney revoked by NCAT and a private Trustee Company was appointed as private manager (the OPG were also appointed as Guardian).

The Guardian and son B proposed to have the client reside at home with nursing care. This was opposed by son A and was heard at the ADT and after further procedural hearings at NCAT involving NSW TG the matter was resolved.

The ability of the estate to fund the client's care at home was dependent upon the winding up of the client's company and the completion of renovations at the residence. This took over 12 months to achieve to a point where the client could return home.

## ***XI – Case Studies – Disability Advisory Service***

### **Missing Person**

Mrs G was 85 years old when she moved to a retirement village. Her best friend Enid took her shopping and banking every week as Mrs G had no children, only a nephew, Scott. Scott came to visit Mrs G several times in the first 2 months and then arranged one day to take her for a 'visit' to his home for the weekend, packing some clothes for her along with a few pieces of antique furniture.

Mrs G didn't return from the visit. After a month passed, Enid became very concerned as the Village had no contact from Mrs. G either. Attempts to contact Scott failed. Enid visited the local bank and discovered Mrs G's bank accounts had been closed. She drove past Mrs G's house and found a 'sold' sign outside.

Enid went through a lengthy process of talking to the police, doctors and the Guardianship Tribunal; further attempts were also made to contact Scott. However he refused entry and there were reports from neighbours of someone screaming on the property. NSW TG, Public Guardian and Enid then traveled to Scott's property, the police forced entry and found Mrs G living in a caravan some distance away. She was confused, distressed, unkempt and unwell, and had not been bathed in several weeks. Her walking stick and glasses had also been lost and she was prisoner in the caravan as without her glasses and her stick, she was unable to get out of the caravan.

Scott had forced Mrs G through blackmail, to appoint him as Power of Attorney, change her Will and withdraw funds from her bank account – all of which were lost. NSW TG began to investigate the return of any available funds and moved to protect any remaining assets. After time in hospital, Mrs G was later transferred back to a nursing home in Sydney to recuperate from the experience. She never returned to her retirement village and remained traumatised by the experience. She also refused to charge her nephew out of respect for her deceased sister.

### **Challenging Behaviours**

Kylie is a young woman with a long history of trauma including childhood neglect and abuse who was 'sleeping rough' at Woolloomooloo and misusing a range of substances including solvent 'sniffing'. She is known as a kind and generous person who was an 'easy touch' for exploitation. The police approached NSW TG staff to plan intervention because of their concerns that Kylie would not survive her high risk lifestyle and particularly the physical and sexual abuse that she was suffering.

NSW TG worked with homeless outreach services to engage Kylie with a number of services including the Public Guardian. The support team planned hospitalisation and long stay rehabilitation. Kylie is now resident in the community with an intensive support package and doing well – safe from the cold and dangers of the street.

## ***XII – Case Studies – Financial Planning Services***

### **Italian Pension**

Mr C was placed under financial management following an order by NCAT. There is conflict and allegations of misappropriation among family members.

After Mr C came under management, NSWTG attempted to secure Mr C's Italian pension. This included updating Mr C's postal address, account details for payment and establishing NSWTG's authority to transact on his behalf. These letters were not answered and pension payments stopped.

NSWTG liaises with three organisations to manage Italian Pensions. These are:

1. the Istituto Nazionale Previdenza Sociale (INPS) who is responsible for overall management of the Italian Pension determining the amount paid to each client;
2. Citibank in the United Kingdom has been contracted by INPS to manage payment to recipients who live outside of Italy; and
3. the Istituto Nazionale Assistenza Sociale (Patronato INAS) has also been contracted by INPS to help recipients around the world manage their Italian Pensions.

In addition, Centrelink must be informed of the amount each client receives as it may impact on the amount they receive from Centrelink.

Citibank advised that NSWTG would need to provide an original bank statement showing the client's name. NSWTG could not meet this requirement as all payments were to be made into NSWTG's Trust account and then allocated to the client. This is the most efficient and effective way to secure a client's income particularly where there are allegations of misappropriation. The issue had been raised previously with Centrelink as it affects all client's whose Italian pensions are paid into NSWTG's trust account. Centrelink in turn raised the issue with INPS. The issue was acknowledged but no resolution found.

The issue was also discussed with the Patronato INAS. They agreed to update Mr C's address and account details directly with INPS as well as follow up about re-instatement of payments. Mr C's pension payments have now re-commenced and over 2 years of back payments have been made.

This is typical of the challenges that can be involved with securing and managing a client's Italian Pension. Each case can involve numerous calls or emails to either Citibank in London (calling involves managing time differences), Centrelink or the Patronato INAS (or a combination of all three). It can also involve arranging for a medical practitioner or Director of Nursing to sign a Life Certificate confirming the client is alive or arranging for documents to be translated.

Each case, however, is unique. This means that the approach we adopt for each client will be slightly different depending on the client's particular circumstances. For some countries the issues can be more complex as there is no information in English nor do we have access to anyone who can speak English.

### **Managing Depletion**

Mr C is a USA citizen who sustained a traumatic brain injury after a workplace accident. Mr C's parents are divorced with the father residing in Australia and the mother in the USA.

Mr C came under NSW TG direct management following Guardianship Division, NCAT decision to replace the father as private manager. The reasons for this included a conflict of interest where financial benefits flowed to the private manager, non compliance with the implementation of financial plan provided by NSW TG, lack of security over investments, a change in possible future accommodation arrangements overseas, and acting contrary to Mr C's best interests.

The future residency of Mr C is an unresolved and contested issue where the mother wishes for Mr C to reside in the USA and while the father wants Mr C to remain in Australia.

NSW TG's Financial Planning Services identified Mr C with a life expectancy of 49 years based on his current age. Rental accommodation expenses, other annual expenses (such as provision of 24 hour care and mobility for wheelchair and motor vehicle) and based on the value of other financial assets, a fund depletion issue within 30 years was estimated.

Financial Planning Services have been required to assess budget expenses and manage an investment portfolio in uncertain market conditions with the objective to extend the life of the funds and ameliorate depletion risk. NSW TG's Financial Planning Services has also been required to assess a budget and accommodation proposals submitted by Mr C's mother with the attendant capital costs for Mr C to move overseas. Currency risk needed consideration for if the Australian Dollar (AUD) weakened in relation to the US Dollar, there will be a negative impact on the annual budget cashflow as well as the depletion of Mr C's funds. If however the AUD strengthens, the impact on budget cashflow and depletion will be a positive one. Mr C's overseas tax position also needed consideration.

A proposal submitted by Mr C's father was also evaluated.

Financial Planning Services will be required to attend an NCAT hearing where our assessments will be examined in detail.

### ***XIII – Case Studies – Property Services***

#### **Property Sale**

Mrs X is an elderly client with dementia who recently moved into an aged care facility. A decision was made to sell her property. Mrs X has a lot of furniture and personal effects in her house and there is conflict within her family.

NSWTG's Property Services initially sought to have all family members meet at the property at the same time in the presence of a NSW TG Property Officer to try and reach agreement over the contents. After initial agreement from all family members, two family members said they couldn't attend on the designated day. They objected to the visit going ahead on the planned day unless they were present. After extensive negotiation another date was agreed on. Just prior to the date other family members said they couldn't attend on the designated day and they wanted to have the date changed in the same way that it was changed to accommodate the needs of other family members previously. After further negotiation this was agreed.

A visit eventually took place almost 5 months after the initial planned visit, which delayed the sale of the property. It took a further two months to reach agreement between family members regarding who got which personal items. The client did not have sufficient funds to enable storage of items. Because the property was in such a poor state it was not until all the contents were removed that the property could be cleaned up ready for presentation to sell. The property was finally sold many months after the decision was made. The negotiation and administration associated with resolving this matter included numerous, often lengthy phone calls and correspondence from multiple family members.

#### **Repairs and Maintenance**

Mr Y is a middle aged client with bi-polar disorder. He lives in his own home and tends the maintenance around the property, which he is able to. The house is an old inner city terrace. Mr Y has resisted attempts to have his property inspected because of the cost. This means that the extent of the repairs and maintenance that may be required on Mr Y's property are not known. Mr Y contacts his Client Service Officer to ask for funds to be released from his trust account to repair a leaking roof.

Mr Y agrees to obtain three quotes. The quotes are \$750.00, \$880.00 and \$8,500. The two lower quotes are to fix the immediate problem of the leak, the larger quote is to do the whole roof because the roofer said other parts of the roof were in poor condition and would start to leak soon too. Mr Y wanted to go with the lower quote, Property branch had to consider the longer term impact and cost of doing piecemeal repairs. This resulted in back and forth communication between the client, Property Branch and Client Services. The negotiation with builders, the client, Client Service Officers as well as the subsequent actioning of tasks and record keeping resulted in many tens of hours work, which far exceeded the fees charged to the client for managing his affairs.

## ***XIV – Case Studies – Legal Services***

### **Complex Will Drafting**

Some particularly complex Wills were prepared for an elderly couple who have two sons who both have intellectual disabilities. The spouses of their children also have intellectual disabilities. NSWTG is the appointed executor and they are leaving their estates to each other in the first instance. When the last of them dies, they are leaving their estates to NSWTG as trustee to divide into two parts - one part each to be held on a discretionary trust for each of their sons. As each son dies, NSWTG may use any remaining funds held in trust for that son on their funeral/burial/cremation expenses, and then the funds in that trust will then be held on trust by NSWTG for the spouse of the son, if the spouse is then living. If the spouse isn't alive, and otherwise after her death, the remaining funds pass to the trust for the other son if he is then alive. If that other son isn't alive, and otherwise after his death, the funds would be held in trust for that other son's spouse. When both of their sons and their spouses are all deceased, the remaining funds (if any) then pass to two charities.

The drafting of these Wills has been particularly complex as it involved drafting the terms of the trust for the four separate beneficiaries. Whilst the terms of each trust are the same, what happens at the end of each trust differs (that is, flowing between the sons and their spouses in the order set out above) and there are many inter-clause references throughout the Will, referring to the terms of the various trusts.

### **Legal Issue - Accommodation Bond**

A client under financial management with no funds but had an outstanding nursing home accommodation bond fee of over \$100,000. The nursing home sued the client for an outstanding accommodation bond fee naming NSWTG as client's tutor, but without obtaining the consent of NSWTG as required by the Civil Procedure Rules. The nursing home named the client's daughter as second defendant as she had signed the accommodation agreement.

NSWTG Legal Services carried out considerable correspondence with the plaintiff's solicitor, the daughter, the daughter's legal representatives and the client's de facto partner. The partner had indicated he would pay the outstanding fees but the de facto died and communication was entered into with the de facto partner's solicitors overseas. Considerable time was spent investigating whether the overseas estate had funds, however it was eventually disclosed that there were no funds in the estate.

Legal Services also entered into correspondence with the District Court to explain that the proceedings taken against the client were done without the consent of NSWTG and the pleadings were therefore improper.

The daughter obtained discontinuance of proceedings, but proceedings continue against client. Legal Services will be attending the status conference and then the court hearing to argue its lack of consent to act as tutor and the improper nature of proceedings.

### **Complex Legal Matter**

Mr X executed a Will appointing NSWTG executor and trustee and died one year later. During his life time Mr X had a property that was under a contract for sale. The Will stated that the property was to be sold and proceeds to be given to an overseas charity and the residue to go to a children's hospital.

#### Complexity 1 – Will vs. Informal Will

After making his Will appointing NSWTG, he gave instructions for a new Will (a week before he died) to the solicitor of Firm A. The brief handwritten instructions taken by the solicitor, appointed Ms Y as executor and NSWTG as substitute executor. A small sum of money was to be given to a friend and relative and the rest to go to the children's hospital. The Solicitor prepared a typewritten version (but this was never seen by Mr X). NSWTG was of the view that the draft unsigned Will would fail as it was in draft form and until the draft was approved and signed by Mr X it could not be regarded as an Informal Will.

#### Complexity 2 – Will contest by step daughter

Ms Z, the step daughter of Mr X initiated court proceedings naming NSWTG as defendant. Ms Z stated that her mother was the original owner of the property and she was promised by her mother, the wife of Mr X that she would give a life interest in the property to Mr X and when Mr X died the property would pass to Ms Z. However, shortly after her marriage to Mr X Ms Z's mother transferred the property to Mr X and herself as joint tenants. The mother died and Mr X became the sole owner.

If NSWTG is appointed to the executor of the earlier Will and confirms the contract for sale, this may affect the entitlement of the overseas beneficiary because if an interpretation is given that as the property was sold during the lifetime of the deceased, then the whole estate would now pass to the children's charity and the overseas charity will miss out entirely and receive nothing. Further proceedings may need to be commenced for the Court to make a determination on the construction of the Will. This could all take several months to be resolved by the Court.

#### Complexity 3 – Sale or rescission of sale of property

The contract for the sale of the property had a provision for the vendor to rescind the contract in the event of death of Mr X. NSWTG once appointed executor, needs to decide whether to rescind the contract or confirm the settlement. NSWTG acting as vendor to rescind the contract, however in so doing will affect the different rights of the beneficiaries in the Will.

The outcome of the proceedings by Ms Z will also affect the entitlement of the beneficiaries under the draft Will and the earlier Will. Whatever decision NSWTG makes will adversely affect one of the beneficiaries in the Will and that party will not be happy with the outcome.

### **Complex Legal Matter – Small Value**

Ms X was a financially managed client who made a Will with a solicitor and appointed NSW TG as her executor. Her main assets comprised real estate, car and funds held by NSW TG. She did not have any bank accounts. In her Will, she gave her real estate and car to a friend, a few small legacies to various friends and relatives and to an overseas orphanage and "the residue of my bank accounts" to four named relatives.

A relative of the deceased, who claims she would have been one of the intestate beneficiaries if there was no Will, claimed that the deceased did not have capacity to make the Will and opposed NSW TG's grant of probate. It was discovered through this process that the deceased had signed an informal Will document later than the date of the formal Will. The informal Will left the estate to this relative who opposed NSW TG's grant. There was a video tape of the deceased signing the document in the presence of this relative, who ultimately decided that she wouldn't seek probate of the informal document as she took the view the deceased didn't have capacity either when she made the formal will, or the informal Will. NSW TG still had to disclose the informal document to the Court, and ultimately the Court overlooked it and granted probate of the formal Will.

The overseas orphanage appears to have been incorrectly named as NSW TG cannot find an organisation by the name used in the Will. The family members have identified an orphanage that the deceased's husband used to donate to which may be the one in question, but NSW TG needs to be satisfied that is who the deceased intended. The legacy is only for a very small amount of money.

Legal staff had to try to identify the persons entitled on intestacy as the Supreme Court Rules required that they be notified of the proceedings for rectification and construction. The deceased had been born overseas and moved to NSW when she was a young woman so this would have involved searches in the country of birth. NSW TG's Genealogy Unit estimated it would cost at least \$6000 and possibly \$12,000 to do the searches as a researcher would need to be employed. Legal sought an order that the Court dispense with service on the intestate beneficiaries.

Legal was supposed to serve notices on the beneficiaries named in the Will who would be affected by the rectification/construction action. Some of them resided in the deceased's country of birth in very remote villages. Legal engaged a local process server to co-ordinate the efforts to have them served, but discovered it would have taken a process many hours, and possibly more than a day, to get to where these people lived. So again, we asked that the Court dispense with service.

A mediation before a registrar of the Court was held, and the matter settled on the basis that NSW TG obtain probate of the formal Will, and the various beneficiaries including the intestate beneficiaries agreed how the estate would be divided.

## ***XV – Case Studies – Genealogy Services***

### **Lost Family**

Giuseppe was born in Trieste, Italy. At the age of 25 he immigrated to Australia with his younger brother. After a long life in Australia, Giuseppe's final years were spent at a nursing home. When Giuseppe finally passed away it was over 20 years since he'd last seen his siblings, having lost contact with his family. Having no contact with Giuseppe's family, the nursing home referred his details to NSW TG to collect the proceeds of Giuseppe's estate and locate any entitled beneficiaries. Starting with only Giuseppe's name and his date of birth, NSW TG began its efforts to research his family tree and locate any surviving next of kin. NSW TG found Giuseppe's nieces and nephews who shared in the estate, including two born of Giuseppe's younger brother in Victoria and two born of his sister who remained in Italy.

Both pairs of siblings were surprised to learn of the existence of their cousins having grown-up on opposite sides of the world with no knowledge of one another. After receiving contact from NSW TG the children of Giuseppe's sister visited Australia and met cousins they had never known and learned of two uncles they had never heard of.

### **Legal Issue - Accommodation Bond**

Joseph, a World War II veteran, travelled extensively before finally settling in Sydney. He never married and had one nephew who he had not seen for decades. Joseph lived alone and died alone in his apartment one weekend in late 2008.

Joseph failed to make a Will and therefore there was no one to look after his estate. After Joseph's funeral a locksmith repaired the lock on his apartment door which was damaged when the Police gained access. For more than two years Joseph's apartment remained untouched.

A staff member at Energy Australia, who noticed that the electricity accounts for Joseph's home remained unpaid and alerted NSW TG. Staff visited the property with a and found everything covered with an inch of accumulated dust. NSW TG secured the property and removed any valuables and paperwork that would assist with our role in administering the estate and locating beneficiaries.

Because of Joseph's many moves, the process of locating his next of kin was complicated. Through using certificates located among his personal papers to start this process, significant searches were required. NSW TG also interviewed a neighbour and a friend to glean information about Joseph's history. The research for this matter was compiled by NSW TG's Genealogy Unit.

Ultimately it took two years to located Joseph's nephew who had returned from overseas. NSW TG established his entitlement and distributed to him the proceeds of the estate. In the end, without having left behind a Will, it took almost five years to fully deal with Joseph's estate.

## ***XVI – Case Studies – Taxation Services***

### **Share Trading**

The deceased owned shares in over 245 different companies at date of death and had been trading shares on a daily basis. Unfortunately, records were not maintained. Determining the composition of each of the 245 share holdings remaining at the date of death, in terms of when they were acquired and at what prices, required sifting through a vast number of pages of Commsec transaction statements going back many years. This process had to be repeated for every share holding and in many instances the final balance could not be reconciled from analysing purchases and sales listed in the Commsec transaction statements.

### **Taxi Plate Licences**

The deceased has a taxi plate leasing business, rental property income and share holdings valued at \$1.5m with four years of tax returns outstanding and had not maintained proper records. Returns had to be lodged based on industry benchmarks and estimations that erred on the side of caution.