Final Submission to IPART
Review of Fees for NSW Trustee and Guardian

Executive Summary

NSW Trustee and Guardian (NSWTG) has provided two previous submissions in relation to this review; on 16 June 2014 in response to the original IPART Issues Paper and on 23 September 2014 in response to the IPART Draft Report. Both of these submissions are available on the IPART website. This final submission provides clarification and elucidation of issues covered in the previous two submissions and further information in relation to issues raised at the Hearing on 23 September 2014.

NSWTG continues to hold the view that it accepts many of the recommendations, but has considerable concern with others. We maintain the position that several recommendations are based on inaccurate assumptions, are unreasonable or overly costly to implement and manage, or would make our fee structure complex and difficult to understand from a client's point of view.

While we understand IPART's economic approach to cost recovery, we believe they have adopted an academic position that fails to recognise the nature and type of business of NSWTG and the economic cycles over which it has no control but which materially impact our clients and finances.

We believe IPART has fundamentally failed to understand what constitutes a reasonable ongoing surplus required for NSWTG to remain a self-funding entity, one that is capable of delivering vital and quality services to our clients into the future particularly in light of the likely significant increase in demand for our services in the future due to the aging population. Our analysis indicates that the draft review's suggested surplus of $1.5m is short by around $7m - $8m and this will threaten our sustainability and therefore service delivery.

We submit that our revised fee schedule, provided in the 23rd of September is the minimum required in order to ensure that services to our clients, agreed by all to be amongst the most vulnerable in the community, are not adversely affected.

We continue to refute, in the strongest terms, the IPART analysis of what does and does not constitute an involuntary client. We provide a series of real case studies to further explain our position.

We have answered several questions and provided clarification on statements arising from the hearing which, left unaddressed could be misleading.

We have provided further, very clear data, which demonstrates an increase not decrease in workload as suggested by IPART.

We have provided further information on capital adequacy requirements and our clear responsibilities under the Trustee Act, neither of which we believe IPART has taken into appropriate consideration.

We repeat for the record – NSWTG is not a controlled entity and is therefore not an "on Budget" agency and must be largely self-funding including provision for its own capital works program. Many of the reforms which we seek to implement and IPART would presumably support (new Client data management system and greater automation of activity) will not be possible under the IPART proposed fee schedule. CAPEX expenditure for NSWTG has not, in recent history, if ever come from Government.

We have provided publicly available comparative data on fees for funds under management which clearly show the 0.1% proposed by IPART to be nowhere near an industry standard. In fact the existing NSWTG fees are considerably lower than any other Trustee.

From the outset of the IPART Review NSWTG has been concerned to simplify its fee structure in the interest of client's ability to understand fees and as a secondary benefit to streamline administration where possible. We believe the proposed IPART fees achieve the exact opposite on both levels. They will be very hard to understand and will be overly cumbersome to administer and are likely to drive costs to serve upwards.

IPART has now been provided with access to additional information not preciously able to be provided. We respectfully request that they consider all of the available information before them and revise their draft recommendations accordingly.

Structure of this Submission

This document is in two parts – the first part dealing with specific comments made during the hearing on 23rd September 2014 and the second part dealing with more general supporting evidence for our position.

IPART Hearing

All parties present were, we believe, genuinely concerned about the impact of change in any direction on the clients of NSWTG, particularly those most vulnerable. Throughout the course of the hearing a number of issues were canvassed and some clarification provided. Others were taken on notice and we provide answers below.

Page 34 commencing at line 13 (related to NSWTG fees)

If a person has only a Centrelink benefit and no other feeable assets NSWTG charge approx $0.70 per fortnight in management fees. This is not reflective of the cost of work undertaken, even in the most basic of matters.

Where a person has chargeable investment assets NSWTG levies a fee of 1.1 % per annum. In the first year of management an additional fee of 1% is charged. The maximum fee any person under Financial Management will pay is $17,000 for the first year and $15,000 in subsequent years. **To reach those amounts; chargeable assets would need to be $1.35 million or over**.

Page 36 commencing at line 6

NSWTG has never and would never force the sale of a client's home simply to pay our fees. Situations do arise where, following a client moving into an Aged Care Facility (ACF), the sale of the home becomes the best option financially for the client, due to the accommodation bond and fee liability from the ACF.

It is important to note the most recent changes in ACF legislation, fees and the impact on clients. The new scheme came into effect on 1 July 2014 and introduces new caps on chargeable fees by ACF providers. People admitted to an ACF prior to 1 July 2014 will remain on the old fee system. Should they move facilities or elect to be reassessed, the new fee structure will apply. Where a person leaves a facility and does not re-enter a facility within 28 days, the new fees structure will apply.

Aged care fees are set by the Federal Government. The basic daily care fee is 85% of the aged pension. Every person is required to pay this amount regardless of income or assets. A person may also be asked to pay an accommodation charge or a bond. These amounts are determined by the Department of Health and Aging and are calculated on the basis of assets owned by the person at the date of entry into the facility including the family home.

The interest on unpaid accommodation charges or bonds levied is also set by the Federal Government, currently 6.69% and adjusted every 6 months. Facilities do not have to charge the maximum. They can elect to charge a lesser amount although NSWTG has not seen any instances where this has occurred. Applications for a reduction in bond or fees can be made based on hardship grounds and a determination is then made by Dept of Health and Aging. Once NSWTG are informed of the fees or bond that is required we have a legal obligation to pay those costs. This may result in the sale of a home if no other funds are available.

If the client has an accommodation liability (i.e. is paying an accommodation charge or there is a balance owing on the bond) and the property is rented the home and rental income will remain exempt for Centrelink purposes. Centrelink will allow a person two years from the date of entry into a facility before deeming the value of the home for pension calculation purposes. It is important to note that Department of Health and Aging and Centrelink treat each assessment of fees on an individual basis.

So the liabilities arising from a move into an ACF are not the result of any NSWTG fees. As noted in the transcript at page 37, line 28, NSWTG is not able to make the determination as to when the move into an ACF is best for the client, our role is generally to manage the client's financial position following such a decision.

Page 36 commencing line 27

NSWTG does not take a commission for selling a property.

Page 37 line 44

The Chairman provided a possible clarification of one of Ms X's points. As noted above, we reiterate that NSWTG does not sell homes to recover fees. NSWTG fees will be deferred until the sale of a property occurs (for another reason such as the client moving to an ACF), and may be reduced or waived in circumstances of financial hardship. Where the rental of a property will produce a return which is sufficient to meet expenses, and there are no outstanding liabilities, NSWTG will retain the home where possible.

One scenario that can occur is that the client's home is sold when it is unsafe for the client to stay there due to structural or hygienic reasons and the client does not have the cash flow or cash reserves to pay for the necessary repairs and maintenance. In this instance NSWTG consults with the client, the client's carers and / or guardian in coming to a decision. Conflict does sometimes arise between parties however NSWTG's responsibility is to make a decision in the client's best interests. The decision to sell a property is reviewable both internally and on application to NCAT. In the unlikely event that NSWTG ever sought to sell a property to recoup fees the decision would be the subject of careful independent scrutiny.

Page 51 line 18

The Chairman noted the following;

There is the CSO and, as I understand it, there is the draw down on the interest suspense account that is over and above the CSO, as I understand it. That is, in a sense, another way of funding a shortfall and so from the standpoint of the New South Wales budget, that is a ***contribution made by the New South Wales budget****.* (our emphasis)

We repeat that the Interest Suspense Account is not and never has been part of the NSW Budget. The latter is funded by Treasury for controlled entities and NSWTG is not a controlled entity.

The Interest Suspense Account (ISA) was the means by which the former Public Trustee paid a near fixed interest rate on the common fund Primary Portfolio. From around 1941, interest on all investments of the Primary Portfolio was paid to the ISA and interest rates payable to estates, trusts and PoAs was then determined. The various "classes" of investors (ie estates, trusts etc) were paid different interest rates. Following the merger between our parent organisations, the NSW Trustee and Guardian Act 2009 directed NSWTG to cease using the ISA for this purpose and utilise some of the proceeds to fund the shortfall between IPART's 2008 recommended level of CSO funding and the Government's actual level of CSO funding.

NSWTG Further Comments

Workload

Page 32 of the IPART Draft Report notes that workload has decreased over the period from 2010 to 2013/14. NSWTG rejected this assertion in our interim response and at the hearing, noting an increase in workload.

The number of Electronic File Notes for clients increased from 346,616 in 2009-10 to 619,882 in 2013-14, an increase of nearly 79%. A further measure is the number of financial transactions undertaken for and on behalf of clients. This data is measured in the CIS System (financial management and the TEAMS System (Estates & Trusts)[1].

The total number of transactions in CIS increased from 1,340,573 in 2009-10 to 1,605,680 in 2013-14 an increase of nearly 20%. While the total number of transactions in TEAMS decreased from 426,254 in 2009-10 to 407,072 in 2013-14, this was more than offset by the increase in FM transactions.

Capital Expenditure and NSWTG Budget

In our Interim submission we noted requirements upon Trustee companies, Private or Public to ensure that they meet capital adequacy guidelines or equivalent. The following provides the background to our contention that the IPART recommended fee structure will not allow for the proper provision of capital adequacy.

NSW Trustee & Guardian commenced operations on 1 July 2009 merging the Public Trustee NSW and the Office of the Protective Commissioner. The Public Trustee held an Australian Financial Services Licence (AFSL). As a result of the merger, new legislation and changes in the regulatory framework for private trustees from state based to federal regulation licences were no longer required. However the obligations pertaining to trustees remained intact.

ASIC Guide

In November 2013 ASIC REGULATORY GUIDE 166 Licensing: Financial requirements (RG166) were issued. The GUIDE sets out the financial requirements for holders of Australian financial services (AFS) licences. As NSWTG is an arm of the NSW government it is not required to meet AFS licence obligations, however its requirements can be used as a guide as to the minimum levels of capital/funding that should be in place/available for NSWTG.

Appendix 5 of RG166 relates to Trustee companies providing traditional services. In summary paragraph RG 166.295 requires net tangible assets (NTA) of at least $5 million must be held at all times.

In addition there are requirements concerning:

- solvency and positive net assets
- cash needs
- audit
- surplus liquid funds (Minimum $100,000)

[1] Note these two bespoke systems are set to be replaced in 2015 with a new and integrated client data base to be known as TAGS

While NSWTG is not bound by these regulations there is an expectation that State Trustees will broadly mirror the requirements set for all other Trustee organisations. RG 166 also sets out capital adequacy requirements for some Responsible Entities (RE) operating managed investment schemes (i.e. where custody requirements are not met),where they can be required to hold the greater of $10 million or 10% of the RE's revenue as NTA.

APRA Requirements

In paragraph 19 of the Prudential Practice Guide SPG 230 – Adequacy of Resources, APRA does not specify a specific minimum NTA but places the onus on the Trustee to demonstrate adequate financial resources to meet licence conditions. However in Explanatory Statement – Determination of Requirements for an approved guarantee, an amount of $5 million is prescribed.

Operating Capital

The definition in paragraph RG 166.159 of NTA is "the AFS licensee's adjusted assets minus adjusted liabilities". Accordingly the NTA can be used to fund operating working capital and capital expenditure provided the minimum balances are maintained at all times. It is a requirement for these balances to be liquid or readily convertible to cash.

This requirement for NSWTG to have adequate capital as a trustee needs to be viewed in light of the other calls on NSWTG's capital, including the need to meet Pillar superannuation adjustments (which have cost NSWTG a net of $55m expense in the past 6 years) as well as sufficient to replace ageing branch facilities and equipment .

NSWTG capital expenditures are internally funded and come out of reserves. Details as below:

(in $M)	2009/10	2010/11	2011/12	2012/13	2013/14
Capital Expenditure (Budget)	5.664	7.532	7.849	7.000	9.360
Capital Expenditure (Actual)	1.886	1.693	2.861	6.115	5.667
Depreciation (Actual)	3.662	2.909	2.944	2.786	3.399
Net Capital Expenditures	-1776	-998	-83	3.330	2.267

For 2009-10 to 2011-12, capital expenditures were within the depreciation expense for those years.

IPART's draft report recommends that NSWTG improve efficiency by at least 20% within the next two years. IPART's report does not consider any implementation costs that will be required to achieve such efficiency gains. NSWTG's 2017 and Beyond transformation program has identified a range of initiatives to reduce operating costs through redesigned processes and improved systems. These initiatives will require substantial funding for:

- capital for the new unified client management system with activity based costing capability (currently being designed with a full build and implementation cost of nearly $20 million)

- one-off expenditure for NSWTG staff and consultants to design and deliver initiatives
- redundancy payments associated with any FTE reduction.

IPART has recommended the NSW government provide additional budget funding to cover the shortfall between the immediate implementation of the new fee structure and the time taken to achieve efficiency savings ($1.7 million per year for two years) (p. 147). This funding relates to the operating shortfall only, and does not include any funding for implementation costs of the efficiencies identified above.

NSWTG is not a controlled entity

This has been tested on two occasions since 2009, the first as a result of a Question by the Audit Office of NSW in relation to the appropriateness or otherwise of the Common Fund being included in the then Department of Attorney General & Justice accounts. The Crown Solicitor provided and opinion that NSWTG could not be considered controlled because the income derived came overwhelmingly from fees for service and that the Government contribution was minimal. In other words these were not the funds of government. Further the Common Fund is very clearly comprised of client funds. This opinion was later confirmed by a second review conducted by PwC at the request of the Director General.[2]

Sustainability of Services

NSWTG has already noted a wide ranging plan to change its model of service delivery including incorporating an appropriate set of efficiencies to deliver improved and streamlined services. We have provided IPART with as much briefing on the detail that we are able to do at this point in time. We continue to be concerned by the lack of recognition of these discussions and work in the IPART interim report. Our intent is to deliver a sustainable organisation capable of delivering on going quality services. We maintain our strong view that the existing IPART proposal will not only render this impossible but may well lead to the inability of the organisation to functionally operate. IPART has since been provided with additional detailed and previously not available information on our reform agenda.

Common Fund – Returns

Comments at the hearing & in submissions suggest that the returns on the NSWTG common funds are less than those currently available on term deposit. We believe that these comments refer to returns on the Access Fund (Financial Management) and Primary Portfolio (Trustee).

There are two factors to note. Firstly, these funds form the clients' day-to-day trust accounts (e.g. their NSWTG bank accounts) and the interest rate received should only be compared to normal bank transaction accounts. Taking that comparison, the rates paid compare well. These funds are required for day-to-day client expenses and therefore must be accessible, low risk of loss and may be used at any time. Accordingly NSWTG invests these funds in a range of bank bills and other short term deposits.

[2] Please note that the PwC team conducting this work had no relationship to the PwC audit team contracted by NSWTG. The sections of this very large international organisation were quite distinct.

The second factor that should be noted is the change in the banking landscape since the Global Financial Crisis (GFC). Prior to the GFC, organisations such as NSWTG could receive more favourable interest rates from banks than individual investors. However many internationally based banks either failed or required government intervention to survive. One of the issues identified was that banks weren't holding sufficient capital to cover a run on deposits in the event of a GFC and that some deposits were "stickier" (ie more likely to remain with the bank than others. International research indicated that retail (i.e. individual's) deposits tended to stay while institutional (wholesale) deposits (such as by NSWTG) did not.

As a result the Basel Committee on Banking Supervision agreed on what is known as the Basel III (or Third Basel) Accord as a global, regulatory standard on bank capital adequacy, stress testing and market liquidity. Part of this meant that banks were rewarded as it were for holding more retail deposits and fewer institutional ones by having to set aside less capital to cover them.

In practical terms this means banks now offer NSWTG lower rates than they do individual investors for essentially the same funds. NSWTG is actively seeking ways to improve the return on these funds while maintaining the high degree of security of capital. We are currently negotiating with a range of banks to place a proportion of our Access, Primary and Cash portfolios in short term deposits. We are mindful of the need to balance our clients' need for access to their funds with the need to maximise the interest they receive. We anticipate (presuming interest rates stay stable), that over the next couple of years we can improve the performance of these funds by at least 0.20%-0.30%.

Common Fund – Fees

Throughout the IPART discussion paper, CIE report, and course of the hearing it has never been clear the extent to which IPART has used other organisations as a benchmark against which it measures NSWTG's service.

During the hearing the chairman noted that NSWTG does not compete with other State Trustees, therefore they cannot be used as in comparison. We disagree. While we do not compete with each other we provide near identical services and all operate some form of common fund and are required to invest according to the identically worded Prudent Person Principle in the Trustee Acts in our respective jurisdictions. We do however compete with Private Companies in each jurisdiction. Private companies are bound by federal legislation and we are all required to publish our fees. The following chart is developed from publicly available information and clearly demonstrates that the IPART proposed fee schedule is well below market levels. .

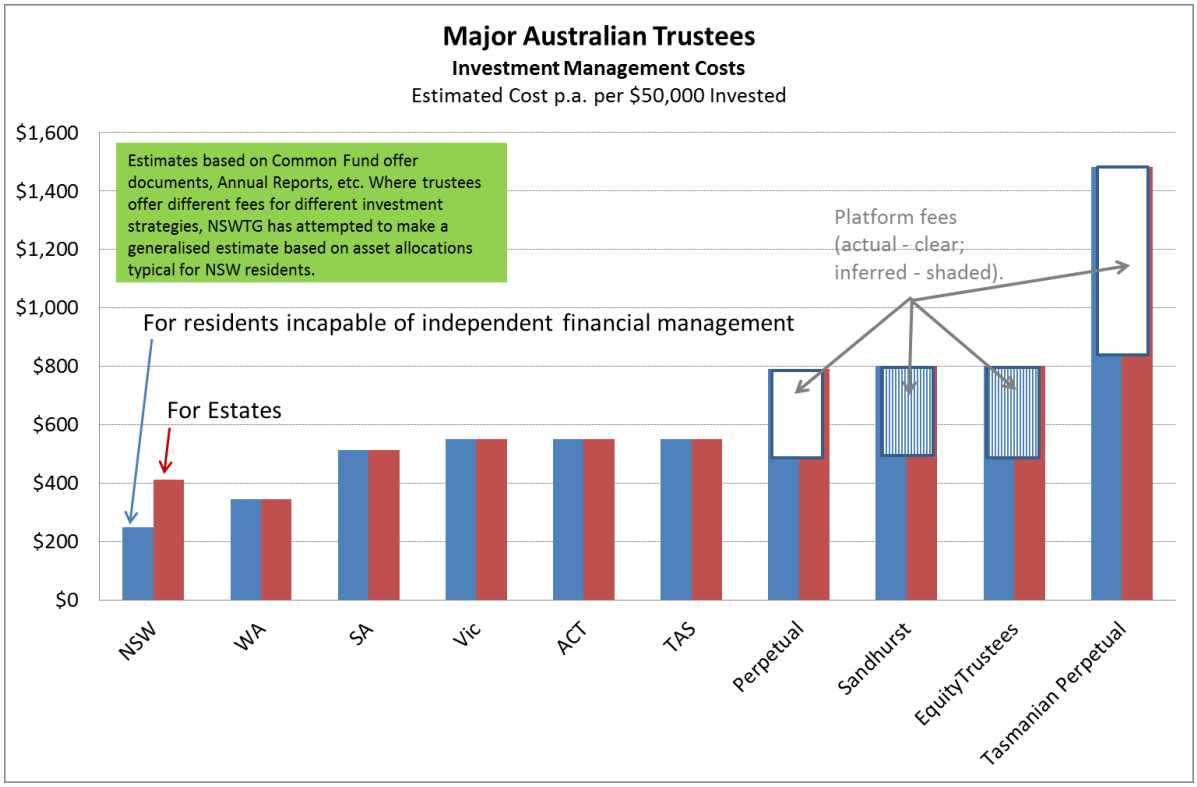
The chart provides an indication of the costs charged by various major Australian trustees for investment management.

The chart attempts to illustrate the costs which clients pay for investment management and consolidated reporting of those investments. This means that where service providers have segregated consolidation into a distinct reporting platform, platform fees are also included.

In some cases, trustees do not offer consolidated reporting and clients are expected to pay for that separately. In those cases, NSWTG has inferred that clients would pay (at least) the cost charged by the lowest cost peer provider which does supply that service in order to achieve consolidated reporting.

Many trustees offer a wide range of funds, with different fees applying to each fund. We have attempted to apply a similar asset allocation to all cases here, to maximise comparability of the results. Also, in cases like Perpetual, which offers a large range of investment strategies within each asset class, we have selected the particular funds which *most closely parallel the low-cost index funds typically used by NSWTG's common funds.*

Based on this picture, we feel the only conclusion possible is that NSWTG's investment management costs are compellingly low.



Complexity Driving Cost

NSWTG is dealing with more and more complexities in all areas of service provision. Much of this is as a direct result of people's lives becoming more complex in the twenty first century. There is an increased prevalence of second and third marriages, mixed families and other complex familial and social arrangements. NSWTG also notes an increase in people having self managed super funds, diversified investments and complex financial arrangements. This changing sociological environment translates to increased complexity in all areas of service. Estate administration becomes more complex with children from various marriages, current and previous partners and other domestic arrangements. PoA arrangements and clients under financial management bring the same types of complexities into NSWTG processes management of financial estates.

Direct Financial Management

There has been some focus on the establishment fees – in reality we rarely if ever actually receive the full Establishment Fees because of the time it takes to establish a client's assets.

The NSW Trustee and Guardian Regulation allows the charging of an Establishment Fee "for the first year" of management. In the vast majority of cases, particularly where the client is suffering from an age related illness, there are no reliable records of assets and these must be established by redirecting mail. As it can take up to 6 months to receive all investment statements and a further 1-2 months to confirm and secure those assets, NSWTG often only receive the Establishment Fee for 4-5 months. Even where documents are received early in management, assets must be confirmed with the relevant organisation prior to them being entered in CIS. Some organisations are very slow to acknowledge and accept Financial Management Orders and the process can take some months during which time NSWTG is unable to charge the fee.

Private Financial Management

From time to time client files move between Direct Management and Private Management. This can occur because a family member has been identified who is willing, suitable and able to take on the role of a Private Manager; the existing Private Manager can no longer continue; or in some cases NSWTG seeks a removal of the Manager because of a failure to comply with requirements or evidence of exploitation.

Into the future NSWTG will seek to transfer management from direct to private management wherever suitable. This will occur over a number of years and will not commence before some legislative change and the introduction of a bond security scheme.

Clearly when a client moves from one form of management to another there is already a great deal of information about their estate on file. The process of establishment is therefore significantly reduced. It will only be increased in those cases of financial abuse by a private manager giving rise to detailed searches in order to track assets that may have been misappropriated. We believe these will be the exception rather than the rule.

At this point in time it is difficult to estimate the income foregone if the establishment fee is waived in these matters. However NSWTG believes there should not be an establishment fee for a client moving from direct management to private management as all information is available. Where a client is moving from Private to direct management a modified fee can be applied if information is incomplete. Fee waiver provisions will also apply.

Trusts: Voluntary vs Involuntary

We understand from the draft report and the round table that IPART considers damages trusts and Workcover trusts to be involuntary but family and other trusts are voluntary. We believe this is an inconsistent application of IPART's own voluntary/involuntary rule. For family and other trusts that NSWTG are requested to establish and manage, IPART apply the voluntary / involuntary rule to the initiator of the trust. They deem that the individual or organisation that has requested the trust be established and managed by NSWTG is acting in a voluntary manner when doing so. However, for Workcover and damages trusts, IPART are applying the voluntary / involuntary rule to the recipient / beneficiary of the trust.

Estate Administration: Voluntary vs Involuntary

Intestacies – We understand from a meeting following the round table that IPART still maintains the view that intestacies are not voluntary. NSWTG continues to reject this assertion as false. The Macquarie Dictionary defines Involuntary as **1.** *not voluntary; acting, or done or made without one's own volition, or otherwise than by one's own will or choice:*

Every person on the planet will die one day. That is an inescapable fact. Every person has a choice to plan for the possibility that they may lose capacity and the eventuality that they will die. If they determine not to plan ahead they are making a decision not to make an EPA, EG or a will. This cannot be classed as involuntary.

NSWTG conducts an annual Newspoll survey of pre planning intentions and behaviours. The results tell us that many people actively decide not to make a will.

In our most recent survey when asked why they did not have a will 31% stated "they did not want to think about dying"; 37% believed they did not have enough assets; 30% felt they were not old enough and 22% said they felt it would cost money and that they would rather spend it on other things. These are all choices.

More detailed research is currently being undertaken in a joint project between the University of Queensland (UQ), Queensland University of Technology (QUT) and Victoria University supported by the Australian Research Council. All seven public trustee organizations' across Australia are supporting this project. The over goals and link to the web site are provided below.

The project will develop the first national data set on who does and does not make a will and why, as well as the grounds on which decisions about challenges to wills are made within the legal system. Research findings will provide a basis for public education campaigns and advise legal will drafters of the key issues of concern for people with complex assets and family circumstances.

http://www.uq.edu.au/swahs/.

Appendix 1 provides a series of real case studies to illustrate choice, complexity, onward referrals from legal firms and those occasions where and why we exercise our right to decline to administer.

NSWTG, in its interim submission at pages 5 & 11 stated that only 6% of letters of administration were provided to NSWTG;

Statistics supplied by the Supreme Court NSW from JusticeLink reveal that during the first 6 months of 2014 there were 783 applications in the Probate (Uncontested) List that were for letters of administration (not special administration and not administration with will annexed).

Of these only 45 (6%) were filed by NSW Trustee & Guardian. The remainder are by individuals or private trustee organisations. It is clear NSWTG does not have a monopoly on intestate estate administration.[3]

NSWTG needs to provide further clarification on this figure. The Supreme Court register does not keep separate figures for applications for an Election under S26 & 27 of the *NSW Trustee and Guardian Act 2009*. An application for an election can be filed in estates where the gross value of the property or estate does not exceed $100,000. The Courts data on elections contains both testate and intestate applications. NSWTG has been able to split out data on the percentages of testate vs intestate elections *for the first 6 months of 2014*.

In total NSWTG obtained administration of 171 intestate estates, representing 22% of the total of intestate estates filed during the same period. Therefore the remaining 78% are filed by solicitors, private trustees companies or private administrators. NSWTG apologies for the confusion but retains its clear view that 22% does not constitute a monopoly position.

Further, during the financial year 2013/14 NSWTG handled 311 intestate estates of which 123 (40%) related to matters where the potential beneficiaries either asked us to administer the estate or were unwilling to do so themselves. The remaining 188 (60%) of estates were where there were no known next of kin or next of kin were missing and NSWTG acts as the last resort.

EPAs

IPART has classified some EPA instruments as involuntary on the basis that once a person has lost capacity they have lost choice. This is of course technically true. It is also they very reason why people make them in the first place. When they do have capacity they exercise choice to appoint someone they trust to manage their affairs. This applies to individuals, solicitors, accountants and private trustee companies alike. Does IPART mean to insist that the market also consider this as involuntary and therefore regulate a lower fee, when the person has made a conscious pre incapacity choice to engage the services of a particular provider?

Fees that lead to a depletion in estates

We are unable to identify any instance where a client's asset or assets have been redeemed purely to pay NSWTG fees. Our policy is to waive or defer fees where NSWTG fees would result in such a situation.

One example is where a client may have moved into an ACF and their former carer also on a Centrelink benefit is residing in the principle place of residence. Although the property would be feeable under the Regulation, in such circumstances NSWTG would normally waive this fee.

[3] Pages 12 & 23 NSWTG Submission to IPART in response to Draft Report

Another example is where the client has moved to an ACF and the property is assessable as an asset by both Centrelink and NSWTG however there may be some delay in the sale of the house. Such delays are typically due to repairs being needed, rubbish removed or family conflict. In this instance NSWTG would normally defer Management fees until the property is sold.

CSO Funding

IPART has quite properly identified that some members of the community will be unable to afford fees for service. This has traditionally been the purpose of CSO funding. However we are very concerned that the balance of CSO funding recommended in the report is not reflective of reality and will be overly costly to implement.

In our previous submission we noted the cost to implement a $10.00 voucher system will be greater than the benefit.

Fee Complexity

NSWTG acknowledges that the definition surrounding what does and does not constitute a CSO obligation requires further work in discussion with NSW Treasury. In their 2011 audit of NSWTG fees PwC noted that existing trustee fees were too complex and needed simplifying.

In the former OPC there existed a complex range of fees, principal among which was a sizable charge on the common fund which was determined at the end of the year. Assets outside the common fund such as term deposits, shares, superannuation etc. only attracted an income fee (no Admin or Management Fee) so there was a tremendous incentive to liquidate these assets and invest in the common fund. Estate Managers cashed in external investments as a matter of course. The policy changed in approx. 2000 to ensure that only the Financial Planning Unit[4] were the decision-makers. The 2003 IPART report bought in the management fee for the first time which largely removed the incentive and resulted in a more transparent and less complex fee structure.

If the IPART recommended fees are adopted this will introduce greater, not less complexity and extend this to clients under a financial management order.

A further anomaly appears to be the exclusion of Trusts from CSO funding. NSWTG currently waives fees for small trusts and that includes the unregulated "out-of-pockets" such as photocopying, postage and telephone. It has already been noted by IPART that NSWTG manages a number of small trusts. This income foregone is not otherwise accounted for by any CSO.

[4] Staffed by accredited Planners

Summary

NSWTG stand by the views expressed in our interim submission and the comments contained in this final submission.

We believe that he fee schedule proposes by IPART will have a significant and adverse impact on the most vulnerable clients of our organisation. We believe that many of the assumptions made by IPART are flawed and do not take into account the reality of the operating environment. Further we believe the recommendations as they stand will render the organisation unable to operate within a 3 year time frame.

NSWTG is in the process of finalising a multi-layered transformation project which we believe will deliver a far better service to clients in a financially responsible and prudent manner.

This plan is currently being considered by government and has been provided to IPART to enable it to consider the details when finalising their recommendations.

NSWTG remain, as they have throughout, available to provide responses to any questions the Tribunal may have.

Imelda Dodds
Chief Executive Officer
10 October 2014

Appendix – Case Studies

To die intestate indicates that a person has failed to have adequate instructions in place as to what decisions are to be made about their estate upon their demise. Failure to make arrangements is a decision in itself. Not all intestacy matters are referred to NSWTG to administer. Those that are, can often be defined by the complexity of issues due to voluntary decisions and actions by the deceased or other parties. The question raised is whether these matters referred to NSWTG should have regulated fees below market rate and often funding from the public purse.

Before NSWTG can take an intestate matter to court for distribution, we must be able to show that we have exhausted all reasonable searches and provide evidentiary proof of the enquiries we have made. These searches can be made more complex by locations of sources, complex family relationships etc. The following case studies are provided for the types of intestacy matters that NSWTG has to manage.

Note: The legal term for children in succession law is “issue”. For ease of reading we use the plain English term “children”.

The Search Continues I

Estate Value: $233,310

Mr A died intestate with no spouse or children. Mr A’s mother was already dead. Searching for any siblings has been difficult as she had multiple marriages and lived in multiple jurisdictions within Australia and South Africa. The mother also has a large extended family.

Searches for Mr A’s father are complex. NSWTG need to obtain confirmation of the father’s death. His father was born in South Africa, worked as a circus performer travelling with the circus to India and Australia and South Africa. He travelled by ship and may have died at sea; whereby we are only given latitude and longitude. Or he may have been on a boat that was torpedoed from India to Africa during the war. NSWTG is currently attempting to confirm possible leads. The matter of ascertaining whether Mr A may have siblings through his father is difficult. NSWTG needs to ascertain the areas where the father had lived to conduct the searches. The father also served in the war and was posted in various places overseas.

If the father was dead before Mr A died, with no other children, we need to establish the grandparent’s death and any aunts and uncles of Mr A. The paternal line migrated from the Netherlands to South Africa with an extended family all with similar names. Mr A’s grandfather had possibly 12 children in South Africa. NSWTG will need to establish the birth and date of death of each of them. There are different registries all over South Africa. There is no online searching and South Africa does not issue a birth or death certificate. If found, the registry will allow you to transcribe the contents, but not issue you with a document. Secondary evidence such as grave sites, while admissible in the absence of primary evidence, holds inconclusive recordings or scant recordings.

Voluntary / Involuntary: In this situation, Mr A voluntarily made no provision for his estate upon his death. While he was not voluntary in being born into a family with such complexities, he did have the option to ensure those complexities did not impact on the administration of his estate. He chose not to do so.

The Search Continues II

Estate Value: $47,510

Mr C migrated to Australia from Hungary and lived in NSW, VIC and QLD. He died without spouse or children. His parents were born in Russia and the Ukraine in the 1800's. While Mr C had no spouse or children NSWTG must hen search back through the entire family tree to locate beneficiaries. In Russian surnames can change depending if you are female or male in the same family as they hold different endings. Also in some countries the new wife has an option as to what new name she wants to acquire and to find that out you need to locate her marriage certificate or you will not find a death certificate. Searching registers in former war torn countries is extremely difficult with many registers having been destroyed in conflicts. Other than the difficulty in searching the registries in war torn areas, this estate identified children that were adopted out and other people of a similar name.

Voluntary / Involuntary: In this situation, Mr C voluntarily made no provision for his estate upon his death. While he was not voluntary in being born into a family with such complexities, he did have the option to ensure those complexities did not impact on the administration of his estate. He chose not to do so.

The Search Continues III

Estate Value: $xxxxxxx

Mr B died intestate and was not survived by a spouse or children. Mr B's mother and father lived in New Zealand and Australia and both had multiple marriages. The searching to establish the correct family tree must now go back to the 1860's. There were 4 major beneficiary estates identified with 35 beneficiaries and 1 possible beneficiary that has been omitted from some declarations. The difficulty in matters involving New Zealand, is that their privacy laws do not allow searching in the central registry.

Voluntary / Involuntary: In this situation, Mr B voluntarily made no provision for his estate upon his death. While he was not voluntary in being born into a family with such complexities, he did have the option to ensure those complexities did not impact on the administration of his estate. He chose not to do so.

Everybody Onboard

Estate Value: $965,000

Mr and Mrs E both died intestate. Mr E died first in 2004. Mrs E died in 2005. Mrs E was granted administration of her husband's estate but died prior to completing the estate administration. The closest next of kin in Australia was Mrs E's sister, with all other relatives being in Italy. As the only Australian resident Mrs E's sister engaged a Solicitor who acted on behalf of Mrs E in relation to her husband's estate to apply for administration of Mrs E's estate. However she died before obtaining a grant of administration.

Other next of kin include 2 sisters who are already dead leaving their children and 2 sisters who still survive, all living in Italy. A solicitor in Italy represents the family in Italy. Further, two sisters of Mr E instructed another solicitor who prepared a Deed of Family Arrangement to be signed by surviving next of kin of both husband and wife. This Deed was not valid as no one had standing to act, nor had entitlement been established.

The families through their solicitors continued to unsuccessfully attempt to obtain administration for numerous years until October 2013, when the matter was referred to NSWTG. NSWTG was granted administration of Mrs E's estate in December 2013, and in turn became the Administrator by Representation of Mr E's estate. The major asset is a property in the husband's sole name which has been vacant since Mrs E's death in 2005. Entitlement in the estates is still to be determined.

As they were born and married in Italy, searches for next of kin, including any possible children, must also be conducted in Italy. At the time the estates were reported to NSWTG, unnecessary solicitors costs had been incurred, water rates were in arrears in excess of $6000, council rates in excess of $10 000 and land tax of over $24 000 was outstanding. The property had to be cleared of vegetation to allow access and cannot be rented due to the state of disrepair. NSWTG can't list the property for sale as the solicitor is unwilling to release the title deeds until his costs are paid. NSWTG legal is now involved in having the deeds released.

Voluntary / Involuntary: In this situation, Mr and Mrs E voluntarily made no provision for their estates upon death. While Mrs E did not voluntarily die before she could finalise the administration of her husband's estate, she did voluntarily fail to make provisions as to what would happen upon her own death. She chose not to do so. The various family members voluntarily made decisions and took actions to add further complexity to the situation.

Business Rules

Estate Value: $Nil

Mr B died intestate in rural NSW. Mr B was not married and had no children. He was a sole trader running a large earth moving business. At the time of his death he was involved in a number of contracts both written and oral. He owned a large amount of heavy machinery and earth moving equipment with the ownership of some being questionable. He had a number of employees. He had a number of creditors. He had an outstanding overdraft, various outstanding loans and many other debts. He didn't keep proper business records. His brother refused to apply for administration and NSWTG was asked to administer the estate. NSWTG commenced administration and it became apparent that the estate was insolvent. NSWTG was in the process of appointing a liquidator when one of the creditors commenced bankruptcy proceedings with a receiver being appointed.

Voluntary / Involuntary: In this situation, Mr B voluntarily made no provision for his estate upon death. He also made voluntary decisions throughout his life to have questionable business dealings, debts, failure to keep proper business records etc that all contributed to this being a very complex estate.

The Issue of Children

Estate Value: $83,500

Mr M died intestate leaving real property in the country valued at $66,500 and cash of $17,000. His parents who live interstate and lost contact with him at various times throughout his life tried to obtain letters of administration but failed as it was revealed, over an extended period of time, that the deceased had children born in different states of Australia to different women, but he was not recorded as their father on any certificate evidence.

The children cannot be located. A person claiming to be a former partner is making a claim on the estate in respect of an alleged debt owed to her. There is a mortgage over the real estate.

The parents thinking they would obtain administration, sold the estate realty and allowed the purchaser early occupation under licence. To ensure the sale does not fall through and the mortgage company does not call up the mortgage it is imperative for NSWTG to act quickly to obtain administration

Voluntary / Involuntary: In this situation, Mr M voluntarily made no provision for his estate upon death. He also made voluntary decisions throughout his life to have various children with various women creating complexity in the administration of the estate.

All too Hard

Estate Value: $68,000

Mr F died intestate. Mr F was German. He had never married and had no children. He had several siblings, but only one survived. A solicitor applied for administration on behalf of the sister, who now lives in Canada on the basis that as she was the last surviving sibling, she was the sole beneficiary. The whereabouts of the children of the predeceased siblings is unknown. The court asked for consents from all possible beneficiaries, so the matter was referred to NSWTG by the solicitor. The solicitor has lodged a claim for over $15,000 for his failed application.

Voluntary / Involuntary: In this situation, Mr F voluntarily made no provision for his estate upon death. The solicitor made the voluntary decision to refer it to NSWTG due to the difficulties in obtaining administration.

There are also deceased estate matters where there is a Will in existence, but either the court or the executor makes the decision to refer it to NSWTG for administration. These invariably have a level of complexity beyond a normal deceased estate due to voluntary decisions or actions by the deceased or other parties. Again, the question raised is whether these matters referred to NSWTG should have regulated fees below market rate and often funding from the public purse.

The following case studies are provided of these types of matters.

Mistaken Identity

Estate Value: $128,000

Mr X died as a result of a gunshot wound inflicted by his wife, who committed suicide whilst in prison awaiting trial.

The estate was reported to NSWTG, after solicitors for Mrs X's family were unable to obtain a grant of probate. Letters of administration were granted to NSWTG. Mr and Mrs X made mirror wills leaving the whole estate to each other, but made no substitute beneficiaries. As the wife died after the husband, her next of kin would inherit.

However, as Mrs X committed suicide before going to trial and the evidence of her guilt / innocence was not clear, the issue of forfeiture became a focal point. Running the matter in court would have been difficult and the costs would have escalated. It was agreed that to save costs, the husband's next of kin needed to be found and asked if they would agree to settle the matter with the wife's family.

A Hungarian Trust Company was engaged to locate the husband's next of kin. However, there were actually two women with the same first and last names, born three years apart in the same village in Hungary. Both women had a son out of wedlock and both named their son the same name. The deceased was the son of one of those women. The Hungarian Trust Company provided the details of the wrong family for next of kin. This took some time to identify and sort out.

Finally, and regrettably, some extended family members with similar names to possible beneficiaries attempted to be included in the distribution of estate and some relatives attempted to conceal the existence of other beneficiaries.

Voluntary / Involuntary: In this situation, neither the husband nor the wife voluntarily nominated NSWTG as executor. However, they both voluntarily signed wills that transferred their entire estates to each other and failed to account for what would happen if they were both dead. When the husband died, the estate was to transfer to the wife. Putting aside the potential forfeiture issue, she voluntarily chose to kill herself leaving a will that made no provisions for the estate. The extended families of both the husband and wife voluntarily chose to obfuscate and create further complexities.

My Brother's Keeper

Estate Value: $1.4 million

Mr Y died with a will in place. However, the will was inoperable as his brother, who was named as sole beneficiary and executor, was already dead. The estate was then administered under Succession law. The solicitor for the brother who predeceased Mr Y approached NSWTG to obtain administration in Mr Y's estate so that he could complete the administration of the brother's estate. Next of kin searches are continuing in England. This matter involves a property that had been left vacant for a substantial length of time.

Voluntary / Involuntary: In this situation, Mr Y had not voluntarily nominated NSWTG as executor. However, he voluntarily signed a will that nominated his brother as sole beneficiary and executor and made no allowance for distribution of the estate if his brother was dead. Further, when his brother died, Mr Y failed to update his will, making it inoperable upon his death.

Where There's a Will

Estate Value: $166,000

Ms H died with a will in place. However, her will appointed her son as sole beneficiary and executor. Her son had died before she did. A family member applied for administration through a local solicitor. The court asked for details of and consent from all beneficiaries. There is a very complex family tree, as some people were raised by family members, but were not named on genealogy searches.

We also then administered the estate of the predeceased son, whose estate passed to the estate of his mother after searches proved his father died in Fiji.

Voluntary / Involuntary: In this situation, Ms H had not voluntarily nominated NSWTG as executor. However, she voluntarily signed a will that nominated her son as sole beneficiary and executor and made no allowance for distribution of the estate if her son was dead. Further, when her son died, Ms H failed to update her will, making it inoperable upon her death.

Remarried

Estate Value: $344,710

Mr T had a will in place. However, many years after writing his will, he got married. This was his second marriage. His first wife was dead. He failed to update his will and so the will was revoked by the second marriage. His second wife has dementia and is incapable of making an application for administration. His step-daughter from the second marriage engaged solicitors to manage administration process. The solicitors referred it to NSWTG to manage. Mr T had children from his first marriage.

Voluntary / Involuntary: In this situation, Ms T had not voluntarily nominated NSWTG as executor. However, he voluntarily signed a will and then voluntarily got married. He voluntarily failed to update his will and made no allowance for distribution of his estate. Further, solicitors acting for the wife voluntarily referred it to NSWTG as it was complex to manage.