Trustee Corporations Association of Australia

Review of Fees of the Office of the Protective Commissioner

Submission to the Independent Pricing and Regulatory Tribunal

July 2008

Introduction

The Trustee Corporations Association (TCA) is the peak representative body for the trustee corporations industry in Australia.

It represents 17 organisations, comprising all 8 regional Public Trustees and the great majority of the 10 private statutory trustee corporations (see Attachment).

We are pleased to provide comments in relation to IPART's review of OPC's fees.

Our members have a long history of managing people's financial affairs, including for those in the community who lack the capacity to do so themselves.

Each year our members:

- write or revise about 60,000 wills
- administer about 10,000 deceased estates

TCA members currently manage assets for:

- 10,000 clients under power of attorney or other agency arrangements
- 35,000 clients under court and tribunal orders
- the beneficiaries of 20,000 various other trusts, including about 2,000 charitable trusts

Comments

<u>General approach to setting OPC fees</u>

We note that in its 2003 Review, IPART recommended the following principles for setting OPC's fees:

1. *Fees should reflect the* ***costs of providing the service*** *as far as practical, to minimise cross-subsidisation between activities and client groups in line with the principles of fairness and transparency.*
2. *Funding to cover the costs of meeting OPC's* ***social obligations*** *– including waiving fees for clients who are unable to pay the full cost of the services they receive, providing services that benefit the wider community and meeting Government policy objectives - should come from consolidated revenue, in line with the principle of fairness.*

3. *Clients should pay no more for the services provided by OPC than they would if these services were provided by commercial organisations operating in* ***competitive markets****. Such a principle avoids cross-subsidies between clients.*
4. *The criteria and process for assessing clients'* ***capacity to pay*** *and waiving fees if they have no capacity should strike a balance between* ***simplicity*** *(for example, using an adjustment based on a standard measure such as estate size or income) and* ***flexibility*** *(to reflect individual circumstances through client*-specific waivers).

We believe that those principles remain valid today, but acknowledge the practical difficulties faced in applying them in practice given the nature of OPC's client base and the often complex nature of the services being provided.

We also note from IPART's current analysis that some of OPC's directly managed clients with assets worth less than $50,000 may be paying less in fees than is being supplied to them in services.

On the other hand, some clients with assets worth more than $1 million may be paying more in fees than is being supplied to them in services, thereby effectively cross-subsidising the remainder of OPC's client base.

We believe that, irrespective of the way in which fees are to be calculated (ie: as a % of assets, on a fee-for-service basis, etc), the aim should be to minimise cross-subsidisation between clients.

If fees are to be waived or reduced for some clients because of their inability to pay the full cost of services as assessed by OPC, and as a result OPC's total revenue does not cover its total expenses, the Government should fund the shortfall via Community Service Obligations. It is essential in calculating payment for CSOs that an accurate as possible cost base is determined so that cross-subsidisation is minimised.

This would seem to be a fair and transparent approach.

It is also imperative that the cost of providing services take into account the risk and responsibility for which OPC is accountable, ie: while the work carried out in relation to estates of varying values may follow similar processes, the risks are far greater for higher value estates.

Accordingly, fees determined as a % of the value of assets under management can properly reflect risk and responsibility, whereas fees based on activities undertaken can easily discount these factors.

<u>OPC supervision of private managers</u>

The TCA has long been concerned that OPC charges a fee of 4% of a protected person's annual income for overseeing the administration of that person's financial affairs by a private manager, even where the manager is a professional trustee corporation (ie: a private trustee company or the NSW Public Trustee).

It should be noted that:

- <u>trustee corporations are regulated</u>
  - private trustee corporations are subject to a strict licensing regime under the *Trustee Companies Act 1964*, which includes "fit and proper" person tests for directors and senior managers, and minimum capital and insurance requirements.
  - the NSW Public Trustee operates pursuant to the requirements of the *Public Trustee Act 1913.*
  - private trustee corporations and the NSW Public Trustee report to and are overseen by the Attorney General and are subject to strict audit requirements.

    [Note: In March, the Council of Australian Governments (COAG) agreed that the Commonwealth would assume responsibility for regulating private trustee corporations. The two approaches being considered are a 'consumer protection and disclosure' model under ASIC or prudential supervision under APRA.]
- <u>trustee corporations are experienced</u>
  - trustee corporations have a long history of managing the affairs of persons who are unable, for reason of age or mental disability, to do so themselves. They have the necessary experience, culture and resources to carry out this function in a professional and efficient manner.

- <u>trustee corporations are required to demonstrate high operating standards</u>
  - trustee corporations carry onerous fiduciary responsibilities. Like other trustees, they are subject to the "Prudent Person Principle" provisions of the *Trustee Act 1925*.
  - however, because trustee corporations are in the business of investing money on behalf of other persons, the legislation requires them to demonstrate a higher standard of care, diligence and skill than that of "non-professional" managers and they can be held liable for mismanagement of assets entrusted to their care.
  - trustee corporations are required to hold client money in trust to avoid co-mingling with their own funds.
- <u>trustee corporations offer perpetuity</u>
  - unlike individual persons acting as financial managers, trustee corporations offer perpetuity.

We believe that the clear distinction between trustee corporations and other private managers, in terms of the resources and attributes that they bring to the role of financial manager for protected persons, and the respective liabilities they bear in carrying out that role, should be reflected in the nature and cost of OPC's oversight.

Those clients whose estates are under the financial management of a trustee corporation are burdened with the additional fees charged by OPC, whose guidance and services are not utilised to any great degree. The trustee corporation generally does all the background work and then makes a recommendation to OPC.

<u>We firmly believe that OPC oversight of trustee corporations is an anomaly and recommend that it be removed in the interests of promoting consumer choice and reducing costs for protected persons.</u>

If there is to be some OPC supervision of trustee corporations when acting as financial managers for represented persons, the fee should more clearly relate to the work actually handled by OPC.

We would also note that the treatment of superannuation when calculating the 4% supervision fee can present equity issues, ie: a pension payment from a superannuation fund will go into the client's account as income - although there is often a bit of capital being returned as part of the pension.

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Attachment

TCA members

- ANZ Trustees Ltd
- Australian Executor Trustees Ltd
- Elders Trustees Ltd
- Equity Trustees Ltd
- National Australia Trustees Ltd
- Perpetual Ltd
- Public Trustee for the ACT
- Public Trustee New South Wales
- Public Trustee for the Northern Territory
- The Public Trustee of Queensland
- Public Trustee South Australia
- The Public Trustee Tasmania
- Public Trustee Western Australia
- Sandhurst Trustees Ltd
- State Trustees Ltd
- Tasmanian Perpetual Trustees Ltd
- Trust Company Ltd

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