

## **DRAFT EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2009 No.**

Issued by the Authority of the Minister for Financial Services, Superannuation and Corporate Law

*Corporations Act 2001*

*Corporations Amendment Regulations 2009 (No. )*

The *Corporations Act 2001* (the Act) and the *Corporations Regulations 2001* (the Principal Regulations) provide for the regulation of corporations, financial markets, products and services, including in relation to licensing, conduct, financial product advice and disclosure.

Subsection 1364(1) of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed by regulations, or necessary or convenient to be prescribed by such regulations for carrying out or giving effect to the Act.

The *Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009* was introduced into the House of Representatives on 25 June 2009. Schedule 2 of the Act inserts Chapter 5D (Licensed trustee companies) into the Corporations Act. Schedule 2 also inserts a number of regulation making powers into the Corporations Act to specifically deal with trustee company matters.

Chapter 5D implements the transfer of entity level trustee company regulation from the States and Territories to the Commonwealth. Chapter 5D creates a national licensing system for trustee companies, because such companies will be required to hold an Australian financial services licence covering the provision of 'traditional trustee company services'. As a result, trustee companies will be subject to the consumer protection and disclosure requirements of the Corporations Act and the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

#### **Listing of trustee companies**

- The regulations create a list of trustee companies that will be required to hold an Australian financial services licence (AFSL) covering the provision of traditional trustee company services. Further, the regulations state that a State or Territory Public Trustee must only be listed if the State or Territory asks the Minister to list the trustee, and the Minister agrees.

#### **Ambit of legislation with respect to guardianship matters**

- The regulations provide that matters relating to the role of trustee companies as guardians remain subject to State and Territory laws and tribunals. In their guardianship role, trustee companies will however be subject to Commonwealth regulation in relation to their AFSL conditions, their charging of fees and certain other matters.

#### **Annual information return**

- The regulations create a requirement for a licensed trustee company to provide an annual information return when requested by certain specified persons. The regulations also provide that there must be certain specified content.

### **Power to seek transfer of an estate**

- The regulations empower a licensed trustee company to seek a Court order transferring an estate to another licensed trustee company within the same consolidated entity. The intent of the provision is to allow company groups that operate trustee company businesses to rationalise the activities and assets of numerous corporate trustees into one entity.

### **Persons taken to be provided with a traditional trustee company service**

- The regulations prescribe certain persons to whom a traditional trustee company service is taken to be provided. They are: a person entitled to request an annual information return (other than a beneficiary); and a person who requests the preparation of a will, a trust instrument, a power of attorney or an agency agreement.

### **Rights of beneficiaries**

- The regulations provide that beneficiaries are covered by the licensed trustee company's dispute resolution and compensation arrangements.

### **Exception from 'dollar disclosure' rules**

- The regulations provide trustee companies with an exception from the normal requirement to disclose fees, commissions and other charges as a dollar amount. The regulations permit the remuneration, commission or other benefits to be stated as a percentage of the income or the capital value of the estate.

Details of the Regulations appear in the [Attachment](#).

The Act does not specify any conditions that need to be satisfied before the power to make the proposed Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

**Details of the Corporations Amendment Regulations 2009 (No. )**

**Regulation 1 – Name of Regulations**

This regulation provides that the title of the Regulations is the *Corporations Amendment Regulations 2009 (No. )*.

**Regulation 2 – Commencement**

This regulation provides for the Regulations to commence on the day after they are registered.

**Regulation 3 – Amendment of Corporations Regulations 2001**

This regulation provides that the *Corporations Regulations 2001* (the Principal Regulations) are amended as set out in Schedule 1.

**Schedule 1 – Amendments**

**Item [1] – Chapter 5D**

Item 1 inserts new Chapter 5D into the Principal Regulations.

**Part 5D.1 Preliminary**

**Regulation 5D.1.01**

Subsection 601RAB(1) of the Act states that a trustee company is a company: (a) that is a corporation to which paragraph 51(xx) applies; (b) that is prescribed by the regulations as a trustee company for the purpose of this Act. Subsection 601RAB(2) states that companies may (for example) be prescribed by setting out a list of companies in the regulations.

Subregulation (1) provides that a company is prescribed as a trustee company if the company is listed in proposed Schedule 8AA.

Subregulation (2) provides that a Public Trustee of any State or Territory must only be listed in Schedule 8AA if: (a) the State or Territory requests the Minister to prescribe the company as a trustee company; and (b) the Minister agrees to the request.

**Regulation 5D.1.02**

The purpose of this regulation (in conjunction with subregulation 7.6.02(6)) is to ensure that matters relating to the role of trustee companies as guardians remain subject to State and Territory laws and tribunals. However, under Commonwealth law the trustee company would still:

- have to fulfil its general AFSL obligations (except in relation to dispute resolution);
- be prohibited from engaging in unconscionable conduct;
- be regulated in relation to common funds that contain guardianship moneys;
- be regulated in relation to fees charged to clients who are subject to a guardianship order); and

- be subject to the general duties of officers and employees.

Paragraph 601RAE(4)(b) of the Act states that the regulations may provide that the trustee company provisions (as defined in subsection 601RAE(1)) are intended not to apply to the exclusion of prescribed State and Territory laws, or prescribed provisions of State or Territory laws.

This regulation provides that the trustee company provisions are intended not to exclude the State and Territory laws listed in Schedule 8AB. Schedule 8AB contains a list of laws which deal with guardianship and administration of estates (on behalf of persons not fully able to manage their own affairs).

## **Part 5D.2 Powers etc. of licensed trustee companies**

### **Regulation 5D.2.01**

Section 601SAB of the Act states that the regulations may prescribe (amongst other things) additional powers, functions, liabilities and obligations of licensed trustee companies.

This regulation creates a requirement for a licensed trustee company to provide an ‘annual information return’ to a person who is entitled to request such a return. Those persons include a settlor or appointor of a trust, and a beneficiary of a deceased estate or (in some circumstances) of a testamentary trust.

The annual information return must be provided within 30 days of the request, and then annually.

The regulation specifies the various means by which the annual information return must be provided – for example, in writing, by email, or by publication on a website maintained by or on behalf of the licensed trustee company.

### **Regulation 5D.2.02**

This regulation specifies the required content for an annual information return, including:

- details of income and expenses and the net value of the trust (or, where the trust’s assets are invested in a common fund, of the trust’s assets in the fund), and
- if required under the terms of the trust – a copy of the trust’s audit report and financial statements for the year.

### **Regulation 5D.2.03**

This regulation is intended to allow corporate groups that have numerous corporate trustee subsidiaries to rationalise their operations by seeking a Court order transferring estates (including appointments and estate assets and liabilities) from entities that are to be wound up to another group entity. The role of the Court is (amongst other things) to consider the interests of the clients of both the transferring and the receiving entity.

### **Regulation 5D.2.04**

This regulation provides that nothing in regulation 5D.2.03 (regarding Court-approved transfers of estates) applies to or affects liabilities of the transferring trustee, or its officers and employees, for breaches of trust and certain other matters.

## **Item [2] – Regulation 7.1.28A**

New subsection 766A(1B) of the Act states that the regulations may, in relation to a traditional trustee company service of a particular class, prescribe the person or person to whom a service of that class is taken to be provided. These are:

- a person entitled to request an annual information return under regulation 5D.2.01 who is not a beneficiary mentioned in subparagraph 5D.2.01 (3) (a) (i) and (ii) and (c) (iii); and
- a person who requests the preparation of a will, a trust instrument, a power of attorney or an agency arrangement.

## **Item [3] - Subregulation 7.6.02(6)**

This subregulation provides that a trustee company acting as guardian does not have to comply with the dispute resolution provisions of the Corporations Act (paragraph 912A(1)(g)). This provision means that a trustee company will not have to maintain internal or external dispute resolution systems that cover guardianship matters.

## **Item [4]**

### **Regulation 7.6.02AI**

This regulation ensures that a beneficiary of a trust or estate has the right to access internal and dispute resolution mechanisms.

As a result of the trustee company provisions being inserted into the Act, paragraph 912A(1)(g) of the Act, which requires financial services licensees to have a dispute resolution system that complies with subsection 912A(2), will ensure that clients of trustee company services will have access to dispute resolution. However, there is a need to make special provision for beneficiaries.

The regulation provides that a licensed trustee company must have a dispute resolution system that complies with the normal requirements for such systems and that provides for complaints by beneficiaries.

Specifically, beneficiaries may make a complaint against a financial services licensee if the complaint relates to an alleged breach of the *financial services law* as defined in section 761A of the Act.

### **Regulation 7.6.02AJ**

This regulation ensures that a licensed trustee company must have compensation arrangements that cover beneficiaries of an estate.

Section 912B of the Act provides that, if a financial services licensee provides a financial service to persons as retail clients, the licensee must have arrangements for compensating those persons for loss or damage suffered because of breaches of obligations under Chapter 7. While this provision will cover clients of licensed trustee companies, special provision needs to be made for beneficiaries.

## **Items [5] and [8] – Subregulation 7.7.04(3) and 7.7.07(3)**

These subregulations provide trustee companies with an exception from the normal requirement to disclose fees, commissions and other charges as a dollar amount. The regulations permit the

remuneration, commission or other benefits to be stated as a percentage of the income or the capital value of the estate, in recognition of the normal practice followed by trustee companies.

**Items [6], [7], [9] and [10] – Subregulations 7.7.04(4) and (5) and 7.7.07(4) and (5)**

These subregulations correct a technical error in the regulations.

**Item [11]**

**Schedule 8AA Trustee companies**

This item inserts a list of trustee companies into the regulations. Each company listed will be a trustee company for the purposes of the Act.

**Schedule 8AB Prescribed State and Territory laws**

This item also inserts a list of prescribed State and Territory laws which are not excluded by the trustee company provisions. The prescribed laws deal with guardianship matters.