

**NATIONAL COMPETITION POLICY
LEGISLATION REVIEW**

Public Trustee Act 1995

**Final Report
August 2000**

The views expressed in this Report are the views of the Review Panel and do not necessarily represent the views of the South Australian Government. Any action taken in anticipation of the outcomes of the review process is at the risk of persons taking such action.

1. INTRODUCTION

1.1 Obligation to review legislation

The present review meets the South Australian Government's obligations under clause 5 of the Competition Principles Agreement. This is one of three agreements signed by the Commonwealth, State and Territory Governments in April 1995 giving effect to the National Competition Policy. The Agreement obliges the Government to review and, where appropriate, reform, legislation which restricts competition.

The review follows the Terms of Reference which are attached as Appendix 1. The guiding principle in competition review is that the *Public Trustee Act 1995* should not restrict competition unless:

- * the benefits of the restriction to the community as a whole outweigh the costs; and
- * the objectives of the legislation can only be achieved by restricting competition.

In addition, the review considers whether administrative procedures required by the *Public Trustee Act 1995* are unnecessary or impose an unwarranted burden on any person.

To satisfy the requirements of clause 5 of the Competition Principles Agreement the following documents are to be reviewed

Public Trustee Act 1995
Public Trustee Regulations 1995

They are referred to generally in this paper as 'the legislation'.

References to sections are references to sections of the *Public Trustee Act* (the "Act") unless otherwise indicated. References to regulations are references to regulations contained in the *Public Trustee Regulations 1995* (the "Regulations") unless otherwise indicated.

However, it is also recognised that some of the functions of the Public Trustee are conferred by other legislation, in particular the *Administration and Probate Act*, the *Aged and Infirm Persons Property Act* and the *Guardianship and Administration Act*. Although these Acts are not the subject of competition review, their application is considered where relevant in reviewing the role and functions of the Public Trustee.

1.2 Background to review of Public Trustee Act

The *Public Trustee Act* is to be reviewed and substantially amended so as to corporatise the Public Trustee using the structure provided by the *Public Corporations Act*. In the process, it is intended to remove any barriers to competition between the Public Trustee and other corporate trustees arising from the *Public Trustee Act*, and hence to bring about competitive neutrality as between the private and public participants in this industry.

It is proposed, to amend the *Public Trustee Act* to provide for a new corporate structure. The Public Trustee, though remaining a corporation sole, will operate in accordance with a Charter and receive advice from a Business Advisory Board on commercial and strategic matters. In consequence of corporatisation, the Public Trustee's present regulatory role in respect of administrators and managers will devolve elsewhere within the Government and the Public Trustee's fee structure will be brought into line with that applicable to other corporate trustees.

The review also needs to be seen against the background of the current national project to devise uniform laws regulating trustee companies. That project will consider the operation and regulation of the corporate trustee industry as a whole. Hence, competition issues which arise for the whole of the market will be dealt with as part of that national project. The present legislation review of the *Public Trustee Act*, therefore, is concerned only with the restrictions of competition identified within the Act. This review will not address the issues to be addressed in the wider review.

1.3 Competition Analysis

The competition analysis process followed by the review is detailed in the Terms of Reference (Appendix 1). It can be summarised as follows:

- Identify any restrictions on competition which arise from the legislation. These can include restrictions such as constraints on who may enter the market, limitations on business structures which may be used, monopolies and the like.
- Assess the severity of each identified restriction. In general, competition review is concerned with restrictions of competition which are "intermediate" or "serious", rather than merely "trivial" restrictions.
- Identify the public benefits, if any, conferred by any restriction which is more than "trivial", and weigh up the costs against these benefits to form a view as to whether the restriction is justifiable.
- Consider whether the legislative restriction is necessary to achieve these benefits, or whether they could be achieved by a less regulatory structure. Options such as partial and total deregulation may be considered.
- Identify any administrative burdens encompassed in the legislation and consider less burdensome alternatives.

1.4 Consultation

This review is considered a minor review, in that the legislation regulates the actions of one market participant, rather than regulating the whole market. There has therefore been only one opportunity to make submissions to the Review Panel.

Submissions were invited on any competition aspect of the legislation with the closing date for comment, Monday the 29th of May 2000. Eight submissions were received from both representatives of the private trustee industry and advocates for those in the community who currently benefit from the Public Trustee's services. References to the submissions are made within the body of the report, appendix 2 provides the distribution list, appendix 3 outlines the "Requests for Comment" which were made in the Consultation Paper and appendix 4 contains a list of the respondents to the targeted public consultation.

The eight submissions received agreed with the Consultation Paper's discussion of both the objectives of the Act and the description of the relevant market. Support was also expressed for the public benefits of the Act and the positive role of the Public Trustee within the South Australian community. No unconsidered community costs, nor any unidentified restrictions on competition, were submitted and the submissions agreed with the Paper's assessment of the weighting given to the identified restrictions as being "trivial". None of the submissions suggested that there were any administrative burdens placed on market participants, which had not been addressed in the Consultation Paper.

Many of the submissions responded to the discussion in paragraph 2.6 of alternate means of delivering the objectives and benefits of the legislation. Those submissions which were received from private sector trustee companies suggested that the proposal to tender out community services to the private sector would not be viable as it was unlikely that a private trustee company would seek to tender for such unprofitable work. It was also considered inappropriate to force private trustee companies to undertake charitable work.

A submission suggested some new alternatives to those outlined in the Consultation Paper. It was suggested that the Government could utilise not-for-profit organisations to provide the community services currently undertaken by the Public Trustee. It was also suggested that the Government should combine the roles of the Public Advocate and the Public Trustee. Both of these suggested alternatives have been considered in greater detail under the "2.6 Alternatives" heading.

2. COMPETITION ISSUES

2.1 Purpose of the Legislation

2.1.1 Background

The Public Trustee was established as a body corporate by statute in 1891, by the *Administration and Probate Act 1891*, replacing the former 'Curator of Intestate Estates'. It was given statutory powers to act as administrator of intestate estates, where there was no other suitable person available to act, on request of the person who would otherwise act, or in other circumstances. It could also be appointed by the Court as a trustee, guardian, or next friend, particularly for persons under a disability. Various powers and duties were created to enable the Public Trustee to perform these functions.

The Public Trustee has existed continuously since that time, and although the Act was amended in 1904, 1914, 1922, 1932, 1937, 1960, 1971, 1972, 1973, 1975, many of the changes were formal or minor, and there has been little change in the role of the Public Trustee over this century.

In 1995, a new *Public Trustee Act* was passed, which removed the provisions of Part IV of the *Administration and Probate Act* into a separate Act. The language of the provisions was modernised and obsolete references were removed, but the substantial functions of the Public Trustee did not change. The new Act went some way toward opening up Public Trustee common funds to the public, by permitting the Public Trustee to charge management fees on such funds and allowing investment in the funds by classes of persons approved by the Minister.

The Public Trustee has continued to operate under the 1995 Act, with the bulk of its work being in private client services, including will-making and the administration of deceased estates, management of trust funds under court orders, and administration of the affairs of protected persons.

2.1.2 Objects of the Act

Although the Act does not specify the objects of continuing the existence of the Public Trustee, a number of objects can be discerned. Primarily, from a historical point of view, the Public Trustee exists to ensure that there will always be an administrator of intestate estates, and of estates of persons under disability, even where no relative or other suitable person willing to act can be found and where no-one will undertake the management on a commercial basis. The Public Trustee is an administrator and manager of last resort. Such an office is required as part of good government.

However, the Public Trustee's operations were not limited to its community service obligations. It was clearly also contemplated at the time of enacting the 1995 Act, that the Public Trustee would operate commercially, similarly to any other trustee company, offering

the services of an executor and trustee to persons who wished to purchase such services. Provision was made for the Public Trustee to charge management fees on common funds in the same way as other trustee companies, and for common funds to be opened for use as investment vehicles by persons of a class approved by the Minister.

The objects of the Act, then, are:

- to ensure that there is always a person available to act as the manager, administrator, executor or trustee of an estate or of property, regardless of whether such a role will yield a commercial return and regardless of the duration and demands of the role;
- to establish a publicly-owned trustee company to provide services to the public on a commercial basis under the direction of the Minister.

Three of the submissions received in response to the Consultation Paper confirmed that the above objectives are those of the Act. A submission also suggested that there was an underlying objective for the Public Trustee to operate in a commercial environment, the profits from which to be used to offset the costs of its non commercial work.

2.2 Markets

Evaluating the impact of legislative restrictions upon competition requires that relevant markets are identified and the impact of the restriction in the market is assessed. Delineation of the relevant markets involves identifying those products which are substitutable for one another. All substitutable products will be included in a single market. This approach to delineating markets is the same as is reflected in section 4E of the *Trade Practices Act 1974* (Commonwealth) which defines "market" as "a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first mentioned goods or services".

Substitutability is considered from two perspective's. First, demand side Substitutability exists where consumers would shift their consumption from one product to another when faced by a small, but not insubstantial, price rise. Secondly, where a producer can shift production from one product to another in response to a price rise in the second product, there is said to be supply side substitution.

2.2.1 Aspects of the Market

There are four aspects of a market which need to be considered in determining the relevant market. These are:

- a) the product aspect;
- b) the geographic aspect;
- c) the functional aspect; and
- d) the temporal aspect.

2.2.2 Competition within markets

It should be borne in mind that whereas much of the legislation required to be reviewed as a result of the National Competition Agreement is legislation which covers the field of a particular market, such as Acts regulating the right to practise a profession or trade, the *Public Trustee Act* 1995 does not do so. By contrast with other legislation which has been the subject of review (such as the *Carriers Act*, *Conveyancers Act*, *Land Agents Act*, *Medical Practitioners Act*, and others), this legislation does not directly regulate any field of business, but only regulates the activities of one particular market participant.

2.2.3 The trustee services and investment products markets

(a) *The Product*

There are two relevant markets, distinguishable by the type of product sold. One is the market for the provision of the product, estate and trustee services and allied personal services. Examples of the latter include preparation of taxation returns, bill-paying services, safe custody of documents, and funeral bonds. Indeed, one can identify two product groups in this market, being legal documents (such as wills and powers of attorney) and administration services (such as acting as the executor of a will or the administrator of an estate).

This market consists of all sellers and buyers of executor, administrator, trustee and like services. Sellers competing for business in this market include trustee companies and solicitors. In the case of the document products, sellers also include the distributors of kits for the preparation of wills, powers of attorney and powers of guardianship, who do not offer any associated services. Buyers include private individuals wishing to make wills, establish trusts, or confer powers of attorney in the management of their private affairs, as well as those who have been appointed as executors or trustees and wish to hand over or seek assistance with the management of these responsibilities.

There may also be 'clients' in this market who are not purchasers of the services, but who are intermediate between the buyer and the seller, and have power of determining who will act and on what conditions, and to some extent of directing their action. These include the Court and the Guardianship Board.

The second market is that for investment products, that is persons offering common funds for public investment and persons wishing to invest in such funds, who may be individuals or bodies corporate. This market also includes the products: corporate trusteeship and custodianship services, trusteeship of personal superannuation and portfolio management. Hence, in addition to the market participants listed above, approved deposit-taking institutions may also be sellers.

(b) The Functional level

The functional level in these markets is usually the retail level, ie, the purchaser of the service is its ultimate consumer.

(c) The Geographical Extent of the Markets

The market for private executor, trustee and allied services, although not necessarily geographically restricted, tends to have a geographical base. That is, the executor or trustee ordinarily will be selected to be in the same State as the majority of the property to be administered. Administration of an estate will entail recourse to the Courts and Guardianship Board of this State. South Australian residents, and those whose assets are mainly located here, are likely to select trustees who are South Australian based or have offices here.

The market for commercial investment services is not confined in this way. In the case of common fund investment, selection is more likely to be based on anticipated returns, and on the investment strategy and investment classes of the relevant fund, rather than on location. In the case of corporate trusteeship and custodianship, general market factors such as commercial reputation and standing will be relevant. A South Australian resident is no more likely, in principle, to choose a product based in South Australia than one based elsewhere. Conversely, products offered by South Australian based trustee companies may be purchased by consumers in other jurisdictions if they so choose. The commercial investment market is best regarded as national.

(d) The Temporal Aspect of the Markets

There is some temporal elasticity in both markets. A will can be made, or a trust created, at any time during capacity. This permits intending purchasers to shop and compare what is available, to take advantage of 'special offers' (such as the 'wills for charity' fundraiser during Law Week). Similarly, there are no constraints on when an investor may invest in a common fund, and fund performance over some time may be studied when making an investment choice. However, this does not apply to all aspects of the market. For example, the need to appoint an administrator arises unpredictably, depending on when a person dies, loses capacity, or become entitled to property. In that case, the service must be purchased 'at need', with corresponding reduction in purchaser choice.

Submissions, which responded to the relevant request for comment, agreed that the above discussion is an accurate description of the trustee services market within South Australia.

The Review Panel also notes that some of the submissions identified the inability of the Public Trustee to refuse an administration as a factor which disrupts competition within the market. It was also suggested that private sector trustee companies may not be willing to actively compete for low value estates.

2.3 Restrictions of competition

There are three types of restrictions upon competition:

- (a) barriers to entering (or re-entering) markets;
- (b) restrictions on competition within markets; and
- (c) discrimination between market participants.

South Australia has adopted the legislation review methodology of giving restrictions on competition an initial analysis and then categorising them as either: "trivial", "intermediate" or "serious". This assists in prioritisation, and determines the level of resources that should be applied to the legislation review.

A "trivial" restriction on competition imposes, at most, an insignificant cost upon the competitive process relative to the 'natural commercial cost of doing business in the relevant market'. At lowest level, it may be a restriction on competition simply because it fits an analytical pattern, but on examination, has no practical adverse impact on relevant markets. A categorisation as 'trivial' carries with it an intuitive cost-benefit analysis of net public benefit, given that relevant markets have been identified and the objectives of the legislation are known. However, if an Act contains administrative or reporting burdens that are not necessary to achieve the objects of the Act, the Government has required that they should be removed even if their cost is insignificant relative to the cost of doing business in the relevant market.

An "intermediate" restriction upon competition imposes a cost upon the competitive process that is, at least, more than nominal or trivial. It has a measurable effect such that it is capable of altering, in an identifiable way, the dynamic characteristics of a market, or the level of economic activity in a market, or if there is a lack of countervailing power, it will be able to be identified that the cost is being passed on to consumers or suppliers.

A "serious" restriction upon competition imposes high costs on market participants and/or on consumers. This may occur because there are high barriers to entry or re-entry (such as numerical restrictions), because there is a prohibition on certain conduct that is commercially desirable, or by placing certain market participants in a highly advantageous position such that their market power is increased and they are able to demand a rent. Such a restriction will probably already be contentious and the subject of reaction by, at least, a segment of the public.

It is noted that the Act applies only to the Public Trustee itself, therefore, to the extent that an examination of the Act discloses any provisions which distort free market conduct, they would relate only to the conduct of the Public Trustee itself and would fit the description of "(c) discrimination between market participants" referred to above.

2.4 Costs of Restrictions

The types of cost generated by restrictions contained in the *Public Trustee Act 1995* are:

- (a) costs on participants within affected markets generated by complying with restrictions contained in the *Public Trustee Act 1995*;
- (b) costs associated with efficiency losses or the sub-optimal allocation of resources that may result from direct intervention in an otherwise freely operating market, including costs generated by restrictions on the levels of competition; and
- (c) costs to the public of administering the regulatory regime established by the *Public Trustee Act 1995*.

Where a single market participant is subject to legislation, the provisions of that legislation may influence the relevant market through the activities of that participant. This influence on the market may lead to the distortion of free market conduct resulting in costs being incurred by the community.

An example of such a distortion would be where the legislation bestowed special advantages upon a market participant, such that they dominated the market. This domination could discourage other potential participants from entering the market and could also allow the advantaged participant to exact a premium on their prices which would be eventually met by consumers.

2.4.1 Compliance costs to market participants

a) *Reporting requirements*

Under the *Guardianship and Administration Act*, and under the *Aged and Infirm Persons Property Act*, obligations arise for the administrators of certain estates to lodge reports and statements of account with the Public Trustee for scrutiny. The Public Trustee is entitled to charge a fee for this work.

It is considered that this role is inappropriate for the Public Trustee under corporatisation and it is proposed that it be conferred on some other authority which does not compete in either market. A majority of the submissions received supported this view and agreed that the monitoring role of the Public Trustee should be retained within Government.

b) *Fee restrictions*

Maximum fees chargeable by the Public Trustee and by private trustee companies are both fixed by separate statutes. The Public Trustee's fees by the regulations of the Act and private trustee companies fees through the provisions of the *Trustee Companies Act 1988*. This could be a compliance cost, in that higher fees might be won in a deregulated regime. The question of fee deregulation in the industry will be considered in conjunction with the competition review of the model uniform legislation and is beyond the scope of this review.

2.4.2 Efficiency losses

The Public Trustee in managing estates operates very much as does any private trustee. Rather than dictating how estates are to be managed, the legislation provides a framework within which the Public Trustee can carry out the ordinary obligations of a trustee. The general law obligations on a trustee, executor or attorney are onerous, but no efficiency losses traceable to the legislation have been identified.

2.4.3 Costs of regulatory regime

Rather than establishing a regulatory regime for the industry, the legislation establishes another market participant. The Public Trustee is required to operate on a commercial basis, in the sense that it is financially accountable and a dividend is payable to the Treasurer. That is, costs are borne primarily by the users of the services and products supplied.

No further costs arising from the legislation were identified by the submissions received.

2.5 Public Benefit

The review must consider whether there are characteristics of the executor and trustee services market which may warrant special restrictions on services for the public benefit. The term 'public benefits' refers to benefits to the community as a whole. Benefits to a particular interest group, such as members of a profession, or to individual industry participants, are not public benefits.

2.5.1 Information Asymmetry

In a perfect market, the quality and value of services and products on sale can be critically assessed by potential purchasers. The purchaser can gather information sufficient to make a fully informed choice about the purchase. Such information may include matters such as price, function, and quality. Armed with the information, the purchaser chooses the product which best meets his or her requirements.

This model works well in the context of most consumer goods, but less well in the context of professional services, because of the special knowledge required to form an independent assessment of the service offered. Information asymmetry arises when, by virtue of the nature of what is sold, the purchaser cannot be perfectly informed about the proposed purchase. For example, in purchasing surgery, the purchaser will usually lack access to sufficient information to fully compare and evaluate the surgical service, creating a degree of reliance on the skill and expertise of the seller.

This problem arises in the market for executor and trustee services, in that, for example, the purchaser of a will, power of attorney or trust deed is unlikely to be able to determine for him, or herself, whether the deed does what he or she intends and whether it is legally valid. The purchaser relies on the skill of the seller.

It is compounded, however, in the case of the vulnerable purchasers found in this particular market, who are unable to exercise scrutiny and choice because they are under disability. This includes protected persons, for whom administration services are required, minors for whom judgment monies are held on trust, and absent persons, for whom a trustee acts while the person is located or identified (as in the case of a missing beneficiary of a will, a potential beneficiary of a disputed estate, or the owner of unclaimed property). It should be remembered that one of the purposes of the institution of trusts, powers of attorney, powers of management and the like is precisely to ensure that the interests of such persons are protected. It can also include those who, although not under disability, quite reasonably choose to place reliance on the seller of the service rather than seeking to scrutinise it for themselves. This might include for example frail elderly persons making a will or persons of non-English-speaking background setting up a family trust.

Hence, one of the public benefits sought to be delivered by regulation in this market is the protection of consumers, and in particular, vulnerable consumers.

2.5.2 Community Service

One feature of the market for trustee and executor services is that there will always be some consumers who require these services but are unable to pay a commercial rate. This includes, for example, estates which are bankrupt or are of very low value, or smaller estates which entail very considerable administrative work, such that the cost of administration exceeds or compares very unfavourably with the estate value. The Act permits the Court to appoint the Public Trustee to manage such estates and also permits private individuals to appoint the Public Trustee, regardless of whether the Public Trustee would be willing to undertake this work having regard to commercial considerations.

The public benefit thereby conferred is that no estate is left un-administered for want of commercial viability. This enables property to be managed or distributed, or debts paid or compromised, in an orderly and lawful manner. It means that there will always be an executor, administrator or trustee, as required, for any estate.

2.5.3 Third Parties

This market is also different from the market for consumer goods, in that the service may be required for the purpose of creating rights in third parties. For example, a testator intends to benefit certain persons by a will, or a settlor by a trust. The arrangements entered into may take effect at an unpredictable later time, and may continue to operate for many years, or even in perpetuity, as in the case of a charitable trust.

While the purchaser, when contemplating entering into these arrangements, may select any seller and may change from one supplier to another if dissatisfied, the third parties whose rights are ultimately affected by the arrangements cannot do so. Executors, administrators and trustees can ordinarily only be removed by consent or by Court order. Thus, the ordinary market sanction that a dissatisfied customer will simply take their business elsewhere does not operate in this case.

Another factor to be considered is that purchases in this market are often made by intermediaries. For example, the appointment of an administrator of an aged or infirm person or the administrator of an intestate estate is a matter for the Court. In the case of a protected person under the *Guardianship and Administration Act*, the Guardianship Board appoints the administrator. These are not typical purchasers and may not be influenced by commercial considerations. Selection of appointees may be a different process from the open-market selection which the person might engage in if he or she were able.

The Act provides the public benefit of creating a statutory body which can be entrusted with the administration of estates and trusts for the benefit of vulnerable beneficiaries. The Public Trustee which as a government body is bound by greater regulation than a private sector equivalent and has its debts and liabilities secured by the Crown.

2.5.4 Investment products

It is fair to say that investment products are a different kind of product from will-making and executor and trustee services. Purchasers will normally be sui juris and are free to shop around before making the investment decision. Very detailed information will be available about the product, both initially in the form of a prospectus (where required) and on an ongoing basis in the form of reports. Purchasers who are dissatisfied with the product can withdraw their investment and select another product, subject to any penalties for which they have contracted to be liable. The rights of third parties are not at stake.

The proposed inclusion of the ability for the Public Trustee to provide common fund investment to the public has the public benefit of creating a mechanism by which the Public Trustee may generate a profit and possibly contribute to the public purse. The proposed opening up of the common fund would also provide greater competition within the market which may lead to a reduction in prices. To avoid bestowing an unfair competitive advantage, commercial investment in any common fund offered by the Public Trustee would be on ordinary market terms and not guaranteed by the Government.

The submissions received in response to the Consultation Paper supported the role of the Public Trustee within the community and agreed that the above discussion did correctly identify the public benefits conferred by the Act.

2.6 Alternatives

The Terms of Reference of this review require consideration of alternative means of delivering the objects and benefits of the legislation.

An obvious alternative approach would be to remove the separate regulation of the Public Trustee and instead permit it to operate as though it were a private trustee company. It would then be subject to the provisions of the *Trustee Companies Act*. In this scenario, there would be an obvious question of the accountability of the Public Trustee. The question also arises how the community service benefits, currently delivered by means of the Public Trustee's statutory obligations, would be delivered. One solution would be that this work be purchased by the Government from the market on a tender basis. Whether this is viable depends on whether this work has, or could be made to have, a market value. Another solution would be that statutory authorisation to operate as a trustee company be granted only on condition of accepting a share of community service obligation work. In this scenario, the role of the legislation would be merely to establish the Public Trustee as a body corporate and confer on it the powers of a trustee.

However, the argument may be made that the effect of such measures on competition in the market would be negligible, amounting to no more than a theoretical increase in competition for what is largely non-commercial work. Hence, any benefit may prove illusory.

Also, arguably, this alternative would not result in a reduction in costs to the community.

In response to the alternative outlined above a submission from a private trustee company suggested that it was unlikely that private sector trustee companies, or a corporatised Public Trustee, would be attracted to tender for community service obligation work on a commercial basis. It was also suggested by the submissions, that it would be inappropriate for the Government to impose charitable work on commercial organisations.

A submission proposed two alternatives for the Review Panels consideration. It was suggested that the community service role could be carried out by a third party such as a not-for-profit Community Trust. Another alternative forwarded was to combine the roles of the Public Advocate and the Public Trustee. The Review Panel has considered both of the proposed alternatives.

Utilising not-for-profit organisations.

At common law, trustees are natural persons. However, by statute, a body corporate may be permitted to act as trustee. In South Australia, the mechanism for this is inclusion in Schedule I to the Trustee Companies Act 1988. Applicants for inclusion must first satisfy the Minister that they are appropriate bodies to offer trustee services to the public. Matters such as skill and expertise, proper insurance, capital adequacy and the like are considered. The amendment of the Schedule is then required to pass State Parliament.

The question of what should be the criteria for a body corporate to be able to act as a trustee is beyond the scope of this review, because it is not the *Public Trustee Act* which prevents

incorporated associations from operating in this way. It may be observed that in any system, there would need to be safeguards to ensure that a body corporate offering trustee services carried adequate insurance, had the skill and knowledge required to deliver the services, and was of adequate resources to undertake the work. It is beyond the scope of this review to seek to identify what an appropriate regime or set of safeguards might be.

Amalgamation of the Public Trustee and the Public Advocate

As to the suggestion that the Public Trustee and the Public Advocate should be amalgamated, the Review Panel notes that this review is limited to consideration of restrictions of competition which arise from the Act and that it does not extend to consideration of policy issues such as the most appropriate delivery structure for Government's guardianship and administration services.

Recommendation No1:

Separate legislation regulating the Public Trustee should be retained.

3. RESTRICTIONS IDENTIFIED

3.1 Restrictions of competition in the *Public Trustee Act 1995*

The legislation has been assessed to identify potential restrictions of competition which should be addressed in this review of the Act. This has been done by comparing the position of the Public Trustee with that of other market participants. Restrictions identified fall into three categories:

1. Legislated advantages not available to other trustees.
2. Legislated disadvantages not imposed on other trustees.
3. Fee regulation.

These will be considered in turn.

3.2 Special advantages conferred on Public Trustee

3.2.1 Section 5(3) - Acting in different capacities in the same matter

By s.5(3) of the Act, the Public Trustee is given the unusual power, by leave of the Court, to act in different capacities in the same case. The section provides:

'(3) The Public Trustee may, with the approval of the Court, act in the same matter or transaction in different capacities or in the same capacity but as representative of different persons or interests and, in so doing, may commence and maintain proceedings against the Public Trustee.

(4) The Court may, in granting its approval, give directions to the Public Trustee.'

Although at first it may seem puzzling that the Public Trustee can thereby sue the Public Trustee or defend proceedings brought by the Public Trustee, this measure may be considered necessary as a result of the role of Public Trustee. For example, by reason of the fact that the Public Trustee can be appointed as the administrator of last resort in the case of a protected person, when no other person is suitable and willing to act, or can become executor by renunciation of the executor appointed in a will, the Public Trustee may on occasion find herself acting for persons whose interests do not coincide. For example, the Public Trustee may be at once the executor of a will, and the administrator of a protected person who has a claim on the estate.

Without this provision, in cases where the Public Trustee has been appointed because the estate is not commercially profitable, or because no-one else is willing to act, conflicts of interest would be intractable. The effect of the provision is that such conflicts do not arise.

a) Restriction of competition

It could be argued that this provision gives the Public Trustee a competitive advantage over other trustees, who cannot accept work in conflict of interest and must turn it away. It enables the Public Trustee to take on work which would otherwise be unavailable to it and which might otherwise fall to competitors.

b) Scope of restriction

Whether this restriction is of great significance depends on how much additional profitable work accrues to the Public Trustee which would otherwise fall to a competitor, as a result of the provision. If, as seems likely, the power will be used mainly in the case of protected persons, it may be that it does not generate any significant commercial advantage.

It is also arguable that private trustees would be unlikely to choose to engage in acting for more than one party in the same dispute. The inherent risk of breaching their trustee duties would be likely to dissuade them from engaging in such an action, even if the option was available.

It should be noted that such action requires the leave of the Court. Clearly, the Court will need to be satisfied that proper reasons exist for the granting of leave. Probably, leave would only be granted where this is necessary in the interests of one or other of the parties represented by the Public Trustee. It is suggested that this safeguard also tends to ensure that the power cannot be used to gain a commercial advantage and would be only likely to be granted in cases where the Public Trustee was fulfilling its community service obligations. For these reasons, it appears that this restriction could be considered "trivial".

c) Public benefit

It can be argued that this power to act in different capacities is a necessary corollary of the community service obligations of the Public Trustee, including the inability to decline appointment. Since it is necessary to have a person who can be appointed to act when an estate is not commercially viable or where no-one else is willing to act, it is also necessary to provide for full power to act when, as a result of those obligations, the Public Trustee would otherwise have a conflict of interest, or the interests of one party could be compromised. Such a power is not needed in the case of other trustees, who are at liberty to refuse to accept an appointment.

It is considered that this benefit is still required and should be retained under corporatisation.

d) Alternatives

It would be possible to provide, alternatively, that in such cases the Public Trustee may act only for one party and must hand over the representation of the other party to some other trustee. However, this would not be available in the most common situation, ie where there is no commercial profit to be derived from acting for the person concerned. Thus, this method might not significantly enhance competition. Further, there would be additional costs and

administration entailed by this requirement, for what may be in many cases a brief intervention to resolve a temporary conflict, for example, by negotiation.

Submissions received agreed that the restriction created through the operation of section 5(3) represents no more than a "trivial" restriction on competition.

The Victorian approach was forwarded, in a submission, as an alternative to section 5(3). In Victoria when the State Trustees acts for an estate and is the administrator of a represented person, the Victorian Guardianship and Administration Board will appoint another administrator for the represented person, limited to the specific action. This alternative does reduce the potential for a conflict of interest, however considering the limited circumstances, it would not enhance competition within the market and is therefore more of a policy issue that should be considered as part of the corporatisation process.

Recommendation No 2:

Sub-section 5(3), which allows the Public Trustee to act in different capacities in the same matter, should be retained.

3.2.2. Section 10 - Public Trustee not required to pay administration bond

By section 10 of the Act, the Public Trustee is exempted from the requirement, usual for administrators, to lodge as security for the proper administration of the estate, an administration bond. The section provides:

'10. The Public Trustee need not, on obtaining administration, enter into a bond or give any security.'

a) *Restriction of competition*

If this section results in the Public Trustee being exempt from lodgement of a bond when another administrator would be required to lodge one, this could be a competitive advantage. The Public Trustee, as compared to its competitors, may be able to avoid having money tied up for periods in the form of securities.

b) *Scope of restriction*

This section should be read with s.31 of the *Administration and Probate Act*, which provides for the Court to require a bond from individual person administrators in various cases. A bond will be required, for example, where one or more of the beneficiaries of the estate is a child, or where the administrator has an interest in the estate. However, by s.31(3):

'(3) Notwithstanding the provisions of subsection (2) of this section no administration bond shall be required of—

- (a) any agency or instrumentality of the Crown; or
- (b) the Public Trustee; or
- (c) any body corporate authorised by a special Act to administer the estates of deceased persons.'

Hence, this advantage is not limited to the Public Trustee but also applies to private trustee companies, who are the major competitors of the Public Trustee. Any restriction of competition therefore only arises in the context of competition between private individual administrators and corporate trustees.

The concern addressed by the requirement for a bond is the fear that an administrator who is given access to the funds of the estate may mishandle them to the detriment of beneficiaries. Presumably also it is considered that this risk is negligible in the case of corporate trustees, who have expertise and experience in handling estates, are not likely to have any conflict of interest with the beneficiaries, and are financially able to meet any liability claims arising out of the estate (either directly or through insurance).

Because this advantage is not limited to the Public Trustee but applies to agencies of the Crown and private trustee companies, it is considered that the restriction of competition between corporate and individual trustees is "trivial". The panel notes that it is an issue which has been raised in the broader context of succession law, in the current National Uniform Succession Laws project, and that there is opportunity for public comment on this issue provided through that process.

3.2.3 Section 18 - Power of Attorney to endure.

(a) *Restriction of competition*

Section 18 provides that a power of attorney appointing the Public Trustee to act will endure during a subsequent incapacity of the appointor, subject to its terms. This suggests that a power which is not expressed to be enduring, but would otherwise lapse upon incapacity of the donor, does not lapse where the attorney is the Public Trustee. Ordinarily, unless the power is expressed as an enduring power, it would not continue in effect once the donor lost capacity and an administration order would be needed.

(b) *Cost*

Any donor of a power of attorney can elect for the power to endure after incapacity. A person seeking professional advice about a power of attorney, whether from a solicitor, trustee company or elsewhere, is likely to be advised about this option. The practical effect of the operation of section 18 is that any grant of administration to the Public Trustee is one which will endure past the incapacity of the appointor.

Such a provision has the potential to disadvantage the Public Trustee if it would restrict the range of products the Public Trustee could provide to clients. However, the power granted the Public Trustee to continue to hold power of attorney is subject to the terms upon which the power of attorney was granted. The Public Trustee may, therefore, still provide a non-enduring power of attorney to a potential client, the power must nevertheless be expressed as subject to capacity in the terms of appointment.

Hence, the operation of section 18 provides an advantage to the Public Trustee, as compared with private trustee companies, as it allows the Public Trustee to avoid the extra costs involved in seeking the Court's approval to continue to act for a person who has lost capacity.

It is important to also note that private trustee companies may provide for an enduring power of attorney by ensuring that the terms of the instrument of appointment bestow such a power upon the trustee. The operation of section 18 will only be of relative benefit to the Public Trustee, in the unlikely event, that the private trustee company failed to gain the consumers consent to such terms.

Section 18 represents a theoretical restriction on competition, however, considering the nominal extra costs involved and the infrequency of such administration applications, it has no real impact on the estates and trustee services market.¹ This section has been assessed as being a "trivial" restriction on competition within the market.

(c) Public benefits

The rationale for the provision would appear to be that it is desirable that some person be able to act in the event of the donor's incapacity, and the Public Trustee can be trusted to act in the person's best interests. This is convenient for the person concerned and for the community, in that no other person willing to act need be found, and no application for administration orders will be required. The provision could therefore be identified as providing a public benefit in the administration of the affairs of incapacitated persons.

The Review Panel also recognises that the powers of attorney, so far drafted, may have neglected to include a term which grants the Public Trustee power of attorney in the event of the incapacity of the donor. A public benefit of retaining section 18 is that it will avoid any transitional costs which may be incurred due to the need for either the redrafting of the affected powers of attorney or the addition of further transitional provisions in the amending legislation.

It is therefore arguable that the restriction of competition is justified by the public benefit.

¹ It has been noted by the Review Panel that the Public Trustee does not recall this power ever being used, which suggests the infrequent use of this power.

Recommendation No 3:

Section 18, which provides that the appointment of the Public Trustee to act will endure any subsequent incapacity of the appointor, should be retained.

3.2.4 Section 25 - Advances of funds

By s. 25, when there is insufficient cash available in an estate to pay immediate claims, the Public Trustee is empowered to advance against the estate property, money up to the value of estate property. The section provides:

'25. (1) When the Public Trustee is administering an estate and property is vested in or under the control of the Public Trustee on account of the estate but there is insufficient money in the estate to make payments as authorised or required (whether to beneficiaries or creditors, for costs or expenses incurred in administering the estate or for any other purpose), the Public Trustee may advance and pay money on account of the estate as authorised or required (but no greater amount may be advanced and paid than the value of the property so vested in or under the control of the Public Trustee).'

If this power is unique to the Public Trustee, it may constitute a competitive advantage, in that it would enable the Public Trustee to offer to beneficiaries of estates the advantage of an earlier distribution or partial distribution than would be available through another executor or administrator. It also ensures that any penalties associated with late payment of the liabilities of the estate can be avoided.

a) Restriction of competition

It is suggested that the practical effect of this restriction is "trivial". In many cases, wills will be drafted to ensure that the executor has wide powers to deal with the estate in the interests of the beneficiaries, possibly including power to advance money. Also, under the *Administration and Probate Act*, it is always open to an executor or administrator to apply to the Court for directions or special orders to deal with issues which arise during the administration of the estate. Hence, it may be that if permission is required to make such payments, it will be available by this means.

b) Public benefits

It would appear that the provision provides a benefit to the Public Trustee and those standing to benefit from estates under its administration, rather than to the community as a whole. The benefit to the beneficiaries is often, however, substantial in both financial and emotional terms. The advancing of funds allows for the timely payment of debts, including funeral expenses and avoids the family perceiving the failure of the estate to immediately pay debts, as a slur against the deceased.

c) Alternatives

One alternative would be to deprive the Public Trustee of this power and require the Public Trustee to apply to the Court for orders. This would also provide a safeguard against any unwise advance or any over-valuing of the estate by the Public Trustee. However, this would entail additional cost to the estate concerned, and would lead to delay in meeting the interim financial needs of beneficiaries. In some cases, these persons may have few other resources and may suffer inconvenience.

Another alternative would be to provide this power to all trustees or all corporate trustees, unless excluded by the appointing instrument, if in fact it is not already available.

Recommendation No 4

Section 25 allows the Public Trustee, where there is insufficient available cash, to advance funds against an administered estate so as to pay any immediate claims. It is recommended that section 25 should be retained.

3.2.5 Section 39 - Charges on property

1. Management of unclaimed property

(a) Restriction of competition

Pursuant to section 39 of the Act, where the Public Trustee is appointed manager of unclaimed property, its fees and charges for the work are a charge on the property which comes next in priority to a pre-existing mortgage or charge. The amount so charged on the property bears interest at a rate fixed by the Public Trustee.

Other trustees are not entitled to fix the interest rates applicable to such charges, as rates of commission are subject to statutory maxima, or are fixed by the Court. This could constitute a market advantage and should be reconsidered if this work is opened to other trustees.

(b) Cost

Assessment of cost depends on the volume of work available to the market from unclaimed property. It would appear to be rare that property of any substantial value goes unclaimed. Where property is unclaimed, this is commonly because the property is of negligible value, or its value is exceeded by the debts or obligations attached to it. An example is the case of a land purchase during a subdivision for a proposed new town, where the town was never built. By the time the property is considered unclaimed, it may be that the council rates owing in respect of the land equal or exceed the land value. In view of its rarity, it is considered that the restriction is likely to be of little effect on the operation of the trustee services market as a whole. The management of unclaimed property provides a negligible advantage, if not a

burden, to the Public Trustee. The impact upon competition is also minimal and this restriction has been assessed as "trivial".

(c) Public benefit

This power is a corollary of the need to have low value or valueless unclaimed property administered. It may be argued that the public benefit provided is that there is a manager for any unclaimed property even where there is no commercial benefit to be derived. It is unlikely that a private trustee company would take on the management of low value or valueless unclaimed property. The charge on the property provides the only form of remuneration for the work.

However, this is only applicable to low value unclaimed property. There would be no public benefit in the case of unclaimed property of high value, but of course, such a situation is very uncommon.

Recommendation No 5:

Section 39 provides that where the Public Trustee is appointed manager of unclaimed property, its fees and charges constitute a charge on the property which comes next in priority to a pre-existing mortgage or charge. It is recommended that section 39 be retained.

3.2.6 Section 43 - Use of common fund

At present, by s.43(3), the Public Trustee may apply money from a common fund for the purposes of acquiring an interest in land, or erecting or fitting out a building, for use in carrying out the Public Trustee's operations. The Minister determines the interest and terms of repayment to the common fund, provided that the interest rate is not less than the long-term bond rate.

The Public Trustee may also, by s.46(3), borrow money on overdraft and deposit as security any securities representing money invested in a common fund. This requires Ministerial approval, which may be given on such terms as the Minister sees fit. Again, other trustee companies are unable to do this.

Generally, as a matter of law, trustees have not been permitted to borrow from or against the estate held on trust for the trustee's own purposes. The trustee has been required to keep his or her own affairs entirely separate from those of the trust and act scrupulously to avoid gaining any kind of benefit from the trust. The latter rule has been relaxed in the context of trustee companies, which are permitted to make a commercial profit from trustee work. The policy reason for the relaxation is that it makes possible the existence of a trustee in perpetuity, an advantage which is not otherwise available. However, arguably, it should be kept to the minimum compatible with this policy.

It is proposed that under corporatisation, these powers to borrow against the common fund would be removed. There is no current borrowing of this type. Instead, the Public Trustee would be subject to the requirements of the *Public Corporations Act* and of its charter, which would deal with the power to borrow. These would be similar to the borrowing powers of private trustee companies. As this restriction will be dealt with by the corporatisation process, the Review Panel will not consider it further.

3.2.7 Section 45 - Power to sell estate property

(a) *Restriction*

By s. 45(3)(b), the Public Trustee, with the approval of the Court, is also entitled to raise its fees for management of an estate by the sale of the estate property. Possibly, this could constitute a competitive advantage, or equally, it could be considered a necessary corollary of the obligation to administer bankrupt or unprofitable estates. It would seem that recourse is unlikely to be had to this provision except in the case of estates without commercial value.

(b) *Cost*

The entitlement could provide a competitive advantage to the Public Trustee. Possibly, this entitlement allows the Public Trustee to undertake the administration of estates whilst avoiding the risk of not being able to recover its expenses. The avoidance of this risk may allow the Public Trustee to reduce its overheads and undercut private sector competitors.

As against this, it is very common in drafting a will to provide that the trustee has power to sell property, and under the *Aged and Infirm Persons Property Act*, s.16, there is a specific power to sell, mortgage or charge the property of a protected estate. Where no power is provided, it is always open to the trustee to apply to the Court for an order for sale. Thus, it may be that in practice, the private trustee will have similar powers.

In practice, it is not considered that any significant anti-competitive cost arises from the provision, for two reasons. One is that, so far as can be established, it appears that the power has never in fact been used by the Public Trustee as a mechanism to recover expenses, and that as a matter of policy it is not used. The other is that generally, private trustee companies would probably be unwilling to accept appointments which are considered not to be commercially viable.

Section 45(3)(b) requires that the Public Trustee seeks the Court's approval for the sale of an estate's property to cover its expenses. The provision of the Court's approval represents an exercise of a statutory discretion, nevertheless, the exercise of this discretion influences the practical effect of the competitive restriction inherent within the section and the Review Panel has, therefore, considered its application.

The Public Trustee may recover its expenses subject to the discretion of the Court. It is the opinion of the Review Panel that the approval of the Court is only likely to be granted with respect to low value estates which would have been unprofitable for a private trustee company to administer. Private trustee companies, pursuant to the original instrument of

appointment, often have the power of sale granted to them by the consumer. As the likely competition for the administration of these unprofitable estates is limited and the practical effect of this restriction on the trustee services market is also nominal, the restriction is therefore considered to be "trivial".

(c) Public benefits

The possible public benefit of this provision is that the Public Trustee is enabled to undertake the administration of commercially unrewarding estates, which might not otherwise be able to be administered.

The Review Panel notes that the submissions received from the private trustee companies all suggested that the special advantages bestowed on the Public Trustee under the Act, as outlined above, represented no more than "trivial" restrictions on competition.

Recommendation No 6:

Sub-section 45(3)(b), which allows the Public Trustee to sell estate property, should be retained.

3.3 Special disadvantages

3.3.1 Requirements for Ministerial approval

At present, the Public Trustee requires the approval of the Minister before borrowing money on overdraft, investing monies (other than trust monies), opening a common fund to a class of persons, acquiring an interest in land or a building for its operations, or before dealing with such land or building (s.43). As it is proposed that corporatisation will include a provision that the Public Trustee be under the direction of the Minister, these specific requirements are to be removed. Instead, the proposed Charter will deal with these matters and is expected to include a general power to borrow and invest money as the Public Trustee sees fit. The Charter is a requirement of the *Public Corporations Act*, and requires the approval of the Minister and of Cabinet.

The requirement that the Public Trustee seek the Minister's approval under the Charter is still a restriction on the Public Trustee's practice within the market. The obvious public benefit in providing some control over, and Ministerial responsibility for, a Government body such as the Public Trustee, in the Review Panel's view, outweighs the associated costs to the community and this has been assessed as a "trivial" restriction upon competition.

3.3.2 Community Service Obligations

a) *Restriction of competition*

Part 3 of the Act provides for the Public Trustee to be appointed as administrator, executor or trustee to the appropriate deceased estates or trust property. The Public Trustee may be appointed under the relevant provisions of Part 3 by the Courts, executors, administrators, trustees or testators. Once so nominated the Public Trustee is required to accept the appointment, unless it is granted leave to refuse by the Court.

The Public Trustee cannot, for example, decline appointment as the guardian or administrator of a protected person under the *Guardianship and Administration Act* (s.51). That Act also provides that the Public Trustee should only be appointed when there is no other person, more closely connected with the protected person, who may appropriately be appointed. Thus, the appointment is only likely to arise where the person has no friends or family members who are considered willing and suitable by the Board, and no professional adviser who would act on a commercial basis.

Similarly, any person may appoint the Public Trustee as executor of his or her estate, or trustee of a trust, and the Public Trustee may not decline appointment unless it can show the Court that its appointment would be undesirable in view of the nature of the trusts and duties to be performed (s.14).

These may be considered restrictions of competition, in the sense that they restrict the free operation of market forces. The rationale for the restriction is that there would otherwise be no person who would undertake these responsibilities. The restriction thus supplies the public benefit that there will always be an executor available to any person who wishes to make a will, or an administrator available to a protected person, even if that person has no friend, relative or professional adviser suitable to act.

Other examples include:

- appointment as administrator of a bankrupt estate;
- appointment by the court as trustee of a judgment sum, where the sum is small and considerable work is involved in managing the trust;
- appointment under a power of attorney of a person who loses capacity but has only a pension and no substantial assets.

(b) *Cost*

These obligations are a cost on the Public Trustee, in that it is obliged to undertake unprofitable work. It is unlikely that the restriction has any appreciable effect on the operation of the trustee services market as a whole. Purchasers are at liberty to appoint the executor or trustee of their choice and the work coming to the Public Trustee as a result of these obligations is likely to be only a small fraction of the market.

Unprofitable work represents a significant component of the Public Trustee's deceased estate work (38%) and personal estate and long term trust work (58%). However, it is unlikely that

such work is undertaken anywhere else in the market to any great degree, because of the commercial imperative.

Given that the Public Trustee's charges are limited by regulation in much the same way as are the costs of private trustee companies, and given that in many cases the estate concerned is likely to be small, the 'monopoly' on disadvantaged estates is unlikely to have a significant market effect in terms of costs to the community through the impediment of competition.

This operation of Part 3 represents a restriction on competition, however, due to the likely lack of competition to provide these services, the practical effect of the restriction is likely to be nominal, this restriction has been assessed as a "trivial" restriction upon competition.

(c) Public benefits

The benefit delivered by the community service obligations is that no estate will go un-administered, or property unmanaged, for want of a trustee or executor. It is proposed under corporatisation that the Public Trustee retain its community service obligations, which would be the subject of a contract for services with the Government. In this way, there would be no requirement that the Public Trustee make a profit from this aspect of its work, and no corresponding overall commercial disadvantage. In view of the nature of the work, it is not considered that there is any competitive advantage to the Public Trustee if it retains this work.

(d) Alternatives

However, from the point of view of the purchaser, it may be undesirable that the Public Trustee have a monopoly on the work, given that the precise content of the work from year to year is unpredictable.

Of course, it may be that no other market participant would be willing to undertake this work, or it may be that another participant would, if tendering, charge a higher sum, so that alternatives are illusory or more costly.

Submissions received from private trustee companies suggests that there would be a lack of interest by the private sector to tender for the Public Trustee's current community service obligations. Concern was also voiced as to the anticipated lag time in the implementation of the tendering process and the resultant loss of services which may occur.

Recommendation No 7:

That the provisions of the Act which prevent the Public Trustee from declining appointment should be retained.

3.3.3 Investment in common funds

Pursuant to section 29, the Public Trustee may establish common funds for the investment of monies forming part of an estate, or for the investment of money on behalf of other classes of

persons approved by the Minister. The provisions governing the operation of the Public Trustee's common funds are very similar to those governing the operation of common funds by trustee companies under the *Trustee Companies Act*. However, private trustee companies are not restricted by any requirement for approval as to who may invest in the common funds. Rather, privately managed common funds are investment vehicles open to the general public.

Under a corporatisation regime, this restriction of competition would be removed so that any person could invest in a common fund run by the Public Trustee, in the same way as they can invest in a common fund offered by any other corporate trustee. To avoid bestowing an unfair competitive advantage, commercial investment in any common fund offered by the Public Trustee would be on ordinary market terms and not guaranteed by the Government. This potential restriction on competition will, therefore, not be considered further by the Review Panel.

3.3.4 Document safe-keeping

By s.52, the Public Trustee is able to accept the deposit of documents prepared by the Public Trustee for safe-keeping. As private trustee companies may act as depositories for any documents, the Public Trustee would be at a disadvantage if section 52 were interpreted to confine the deposit of documents with the Public Trustee to those which the Public Trustee had prepared. In order to achieve competitive neutrality, it is proposed to broaden this provision to permit the Public Trustee to accept deposit of any document.

3.3.5 Delegations

The Public Trustee may only delegate his or her statutory duties to a person employed in the public service (s.8). This means that it is unable to appoint private commercial fund managers to manage individual portfolios under a delegation of authority. To the extent that such appointments would be an efficient and cost-effective method of managing some estates, this could constitute a restriction of competition.

This restriction has two aspects. In so far as it restricts delegation in general, it simply reflects the general law position of trustees. All trustees are bound by a general law requirement to act personally. This duty has been described as follows:

"The duty to act personally prevents the trustee from employing others to execute her or his trusts or to exercise her or his powers and discretions, requires the trustee to resist dictation, and to make decisions appositely in point of time."

(Ford and Lee, *Principles of the Law of Trusts*, loose leaf, paragraph 9030).

In general, a trustee has very limited powers of delegation. The Act enables a trustee to delegate but only by power of attorney created by deed, only to a person resident within the State and only for a period of 12 months (section 17). The appointment of a delegate is also subject to other formalities described in that section. It is not considered that this aspect of the

restriction is anti-competitive, since it applies to all trustees. Hence, it is not proposed to give the Public Trustee a broad power of delegation.

The second aspect of the restriction relates to the limitation to public servants as opposed to other persons. As to this, it is proposed under corporatisation to permit delegation to any employee of the Public Trustee.

3.4 Fees and charges

3.4.1 Regulation of Fees

(a) Restriction

The Public Trustee's charges are provided for, generally, in section 45 of the Act and follow the scheme set out in the *Public Trustee Regulations* 1995. These Regulations fix two main scales of fees, ie, commissions chargeable on common fund investments, and those chargeable on other estate funds. All of these fees are subject to review by the Court (s.45(5)), which may increase or reduce them, having regard to the circumstances of the case. Either the Public Trustee or an interested person may apply to the Court in respect of fees.

Other trustee companies must charge at rates no higher than the maxima fixed by the *Trustee Companies Act*. By section 9 of that Act, a trustee company may charge a rate fixed by the company, but no higher than 7.5% of income and 6 % of capital. Where money is invested in a common fund, the fee must be no more than 1/12 of one percent per month (s. 15). Special provision is made for an administration charge on a perpetual trust (s.10) and there is an allowance for disbursements. There is no sliding scale, so the maximum is the same regardless of the value of the estate.

Charges are reviewable by the Court at the instance of an interested party (s. 12) and while the Court may reduce them, there is no provision for an increase.

(b) Cost

When the Public Trustee Regulations are compared with the charges permitted under the *Trustee Companies Act*, it will be seen that the Public Trustee is disadvantaged compared with a private trustee company, as to the amount of income commission it may charge, where the income does not derive from rental, and also in the amount of capital commission. On the other hand, as above, it is advantaged by the option to apply to the Court to increase its charges.

Because the Public Trustee can apply to the Court to increase the fees chargeable in any given matter, it is arguable that the ceiling is of less significance. However, this overlooks the additional time and cost involved in making such applications on a case-by-case basis,

and the likelihood that the Court will have regard to the scale fixed by Regulation, departing from it only in special cases.

The imposition of statutory maxima on fees may encourage the Public Trustee not to fully account for its costs which would avoid the strict application of competitive neutrality. This is "trivial" as a breach of full costs attribution is a matter which must be dealt with by market participants regardless of the level at which the price has been set.

In most markets, there is a trade-off between price and quality. It could be argued that an enforced lower price might result in a reduction in the quality of service provided. Any such reduction in quality might not be identifiable by the average consumer due to the inherent information asymmetry in the estate and trustee services market. However, any such reduction in quality would occur independently of the operation of the Act in circumstances where any market participant reduces their prices to enhance their competitiveness. Hence, this restriction on competition is "trivial" unless the maxima are set so low as to be significantly less than the possible market value for the services provided.

The most important factor, however, is that all the rates fixed by the *Trustee Companies Act* are maxima, and trustee companies are free to charge at lesser rates. Most of the Public Trustee's rates are also maxima, and to that extent price competition can occur between the Public Trustee and private trustees, and also among private trustees. The fixing of a ceiling does not put a stop to competition, and in an intensely competitive market, unless the ceiling is quite unrealistic, it may be of little or no relevance, since competitors will try to undercut one another to secure business.

(c) Public Benefit

The market will operate imperfectly in respect of clients under disability, who may be unable to shop around and make price and service comparisons. Many such persons are clients of the Public Trustee as a result of appointment by the Guardianship Board or the Court. A lower ceiling protects these persons from exploitation. However, in a deregulated market, these persons could be clients of any corporate trustee, and if the aim is to protect them, one method would be to set ceilings in respect of their affairs, or to permit the appointor to do so, rather than to fix maxima across the board.

As the fees set for private companies are only maxima, and are reviewable by the Court, there is an incentive to keep these fees below the maxima to gain market share. This could mean that in practice fees charged by private companies do not exceed those charged by the Public Trustee, and possibly the existence of a competitor with a lower fee ceiling will maximise this incentive.

(d) Recommendation

The panel's preliminary view is that under a regime of corporatisation there is no satisfactory justification for restricting the Public Trustee to lower charging ceilings than those which apply elsewhere in the industry. While competition is possible within such a regime, because the fees fixed are only maxima, the restriction cannot be justified by a corresponding public benefit. However, the panel considers that special provision may well

be required in respect of persons under disability and persons of very limited means (as is currently provided by sub-clause 9(4) of Schedule 2 to the Regulations). This would apply not only to the Public Trustee but to all trustee companies.

The Review Panel notes that the submissions received from private trustee companies all suggested that it was appropriate that a corporatised Public Trustee should be subject to the same pricing regulation as private companies, so that all participants in the market would compete on a level playing field.

Suggested Recommendation No 8:

The Public Trustee's pricing should be subject to the same restrictions as Private Trustee companies. The Review Panel therefore recommends that either:

- the regulations of the Public Trustee Act are modified to reflect the pricing regime of the *Trustee Companies Act 1988*; or
- the amending legislation states that the Public Trustee is subject to the relevant provisions of the *Trustee Companies Act 1988*.

3.4.2 Charging for Wills

The Public Trustee is unable to charge for wills which are not prepared by a legal practitioner. However, this arises as a result of the operation of the *Legal Practitioners Act 1981* which designates the preparation of wills for fee or reward the 'practice of law' and restricts it to legal practitioners. The position is the same for trustee companies and private individuals who are not lawyers.

That Act is the subject of separate review and the issue is not considered here.

It should also be noted that, unlike private trustee companies, the Public Trustee cannot employ solicitors, because of the operation of the *Public Sector Management Act 1995*. Under corporatisation, this restriction will no longer apply.

5. ADMINISTRATIVE BURDEN

The Public Trustee Act regulates only the conduct of the Public Trustee and not of its competitors in the market. Administrative burdens imposed by the legislation therefore tend to fall on the Public Trustee rather than on others.

Examples of such burdens include the requirements of accounting in respect of estates and common funds, of audits and annual reporting, and the liability to audit at any time by the Auditor-General.

The panel was inclined to consider that these burdens are no greater than are imposed on other trustees and fund managers, and in any event are justified by the public benefit in the form of accountability. A very high standard of accountability has traditionally been applied to trustees, whether corporate or individual.

Another type of administrative burden imposed by the legislation is the requirement to apply to the Court for appointment, for direction and in other cases. However, such requirements also apply to other trustees. The panel considered that this requirement follows from the inherent jurisdiction of the Court to regulate trusts, and is also necessitated by the need for certainty and clarity in the administration of estates.

However the panel identified requirements for Ministerial approval as administrative burdens which should be removed as part of corporatisation.

The Review Panel notes that the submissions received did not identify any further administrative burdens which are placed by the Act on participants within the trustee services market.

6. RECOMMENDATIONS

1. Separate legislation regulating the Public Trustee should be retained.
2. Sub-section 5(3), which allows the Public Trustee to act in different capacities in the same matter, should be retained.
3. Section 18, which provides that the appointment of the Public Trustee to act will endure any subsequent incapacity of the appointor, should be retained.
4. Section 25 allows the Public Trustee, where there is insufficient available cash, to advance funds against an administered estate so as to pay any immediate claims. It is recommended that section 25 should be retained.
5. Section 39 provides that where the Public Trustee is appointed manager of unclaimed property, its fees and charges constitute a charge on the property which comes next in priority to a pre-existing mortgage or charge. It is recommended that section 39 be retained.
6. Sub-section 45(3)(b), which allows the Public Trustee to sell estate property, should be retained.
7. That the provisions of the Act which prevent the Public Trustee from declining appointment should be retained.
8. The Public Trustee's pricing should be subject to the same restrictions as Private Trustee companies. The Review Panel therefore recommends that either:
 - the regulations of the Public Trustee Act are modified to reflect the pricing regime of the *Trustee Companies Act 1988*; or
 - the amending legislation states that the Public Trustee is subject to the relevant provisions of the *Trustee Companies Act 1988*.

APPENDICES

Appendix 1: Terms of Reference

Preamble

Under the *Competition Principles Agreement* ("the Agreement") the State is required to review and, where appropriate, reform legislation which restricts competition by the end of 2000. In accordance with the State's legislation review timetable, the *Public Trustee Act 1995* is to be reviewed.

The *Public Trustee Act 1995* and regulations made under that Act will be examined during the legislation review in accordance with the obligation contained in clause 5 of the Agreement.

Review Panel

The review of the *Public Trustee Act 1995* will be undertaken by a panel consisting of representatives of the Public Trustee, the Attorney-General, the Treasurer, and the Crown Solicitor.

Objectives of the Review

When considering the appropriate form of regulation, the Review Panel will consider the following objectives:

1. Regulation should only be retained if the benefits to the community as a whole outweigh the costs, and if the objectives of the regulation cannot be achieved more efficiently through other means, including non-legislative approaches.
2. Pursuant to clause 1(3) of the Agreement, in assessing the benefits of regulation regard shall be had, where relevant to:
 - (a) effects on the environment and ecologically sustainable development;
 - (b) social welfare and equity, including community service obligations;
 - (c) occupational health and safety, industrial relations and access equity;
 - (d) economic and regional development, including employment and investment growth;
 - (e) consumer interests;
 - (f) the competitiveness of Australian business, including small business; and

- (g) efficient allocation of resources.
3. Compliance costs and the paper work burden on small business should be reduced where feasible.

Issues to be Addressed

Issues to be addressed by the Review Panel include:

1. Clarify the objectives of the *Public Trustee Act 1995*, including the identification of the public benefits of the Act, and provide an assessment of the importance of these objectives to the community.
2. Identify the restrictions to competition contained in the *Public Trustee Act 1995* and regulations made under that Act:
 - (a) describe the theoretical nature of each restriction (eg. barrier to entry, restriction on conduct etc);
 - (b) identify the markets upon which each restriction impacts; and
 - (c) provide an initial categorisation of each restriction (ie "trivial", "intermediate" or "serious").
3. Analyse and describe the likely effects of the restrictions on competition in the relevant markets, and on the economy generally:
 - (a) what are the practical effects of each restriction on the market;
 - (b) assign a weighting to the effect of each restriction in the market; and
 - (c) assess what is the relative importance of each restriction in a particular market to the economy as a whole.
4. Assess and balance the costs and benefits of the restriction.
5. Where the restriction is justifiable on the basis of public benefit, consider whether there are practical alternative means for achieving the objectives of the *Public Trustee Act 1995*, including non-legislative approaches.
6. Consider whether any licensing, reporting, or other administrative procedures are unnecessary or impose an unwarranted burden on any person.

Consultation

The circulation list for this Review appears as Appendix 2.

Report

The Review Panel will present to the Attorney General, a report detailing:

- (a) the Terms of Reference for the review;
- (b) the stakeholders consulted during the review;
- (c) the analysis of the *Public Trustee Act 1995* in accordance with these Terms of Reference; and
- (d) the recommendations of the Review Panel.

Appendix 2: Distribution List

Ms Dawn Brooks
Co-ordinator
Brain Injury Network of SA Inc
1 Northcote Street
Torrensville SA 5031

Mr Moss Politis
Executive Officer
MALSSA Inc
PO Box 23
Findon SA 5023

Mr Philip Beddall
Chairperson
Disability Action Inc
62 Henley Beach Road
Mile End SA 5031

The Manager
Aged and Community Care Services
PO Box 2407
Kent Town SA 5071

Ms Robin Byrne
Co-ordinator
Independent Advocacy SA Inc
99 Frome Street
Adelaide SA 5000

Ms Helen Dundon
State Manager
ANZ Trustees
GPO Box 1819
Adelaide SA 5001

Ms Cynthia Betterman
Executive Director
Parent Advocacy Inc
5 Ninth Street
Bowden SA 5007

Chris Guille
Managing Director
Estate Administration Services
345 King William Street
Adelaide SA 5000

Ms Julie Maerschel
Co-ordinator
Citizen Advocacy North East (SA) Inc
598 Lower North East Road
Campbelltown SA 5074

Mr Kenneth Taplin
General Manager
IOOF Australia Trustees Limited
212 Pirie Street
Adelaide SA 5000

Mr David Arblaster
Manager
Disability Complaints Service Inc
3/178 Henley Beach Road
Torrensville SA 5031

Mr Ian Witton
Managing Director
IOOF SA Friendly Society
47 Gawler Place
Adelaide SA 5000

Mr Brian Waite
Operations and Personal Trusts
Manager
National Australia Trustees Limited
22 King William Street
Adelaide SA 5000

The Registrar of Probates
Probate Registry
Supreme Court
1 Gouger Street
Adelaide SA 5000

Mr Steve Davis
General Manager
Perpetual Trustees SA Ltd
91 King William Street
Adelaide SA 5000

The Manager
Intellectual Disability Services Council
Inc
108 Kermode Street
North Adelaide SA 5006

Mr Brenton Wood
Managing Director
Tower Trust Limited
44 Pirie Street
Adelaide SA 5000

The Executive Director
Strategic Planning and Policy Division
Department of Human Services
11 Hindmarsh Square
Adelaide SA 5000

Ms Kerrie Kelly
National Director
Trustee Corporations Association of
Australia
GPO Box 1595
Sydney NSW 2001

The Manager
Children's Interest Bureau
11 Hindmarsh Square
Adelaide SA 5000

The President
Law Society of South Australia
124 Waymouth Street
Adelaide SA 5000

The Manager
Council on the Ageing
45 Flinders Street
Adelaide SA 5000

Mr John Harley
The Public Advocate
85 North East Road
Collinswood SA 5081

The General Secretary
Public Service Association of South
Australia Inc
122 Pirie Street
Adelaide SA 5000

The Registrar of the Supreme Court
1 Gouger Street
Adelaide SA 5000

The Director
Mental Health Services
226 Fullarton Road
Eastwood SA 5063

The Manager
Australian Nursing Homes' & Extended
Care Association SA Inc
Suite 11, 71-73 Fullarton Road
Kent Town SA 5067

The Manager
Alzheimer's Association (S.A.) Inc.
27 Conyngham Street
Glenside SA 5065

The Manager
Seniors Information Service
45 Flinders Street
Adelaide SA 5000

The Manager
Australian Plaintiff Lawyers
Association
GPO Box 2658
Sydney NSW 2001

The Chairperson
Joint Legislative Review Committee of
the ICA and the SCPA
C/o Australian Society of Certified
Practising Accountants
280 Pulteney Street
Adelaide SA 5000

The Manager
Australian Competition and Consumer
Commission
13 Grenfell Street
Adelaide SA 5000

The Manager
Cleland McFarlane Selth
Chartered Accountants
191 Flinders Street
Adelaide SA 5000

Mr Ian Shepherd
The President
Guardianship Board
85 North East Road
Collinswood SA 5081

The Manager
Kennedy and Company
Chartered Accountants
140 Greenhill Road
Unley SA 5061

The Manager
Multicultural Aged Care
45 Flinders Street
Adelaide SA 5000

The Manager
Aged-Care Organisations' Association
(S.A. & N.T.) Inc
11 Angas Street
Kent Town SA 5071

The Manager
South Australian Council of Social
Services
220 Victoria Square
Adelaide SA 5000

The Manager
Aged Rights Advocacy Service
45 Flinders Street
Adelaide SA 5000

The Manager
Aboriginal Legal Rights Movement
321-325 King William Street
Adelaide SA 5000

**The Manager
Citizen's Advice Bureau
44 Pirie Street
Adelaide SA 5000**

**The Manager
Consumers Association of South
Australia Incorporated
33 Pirie Street
Adelaide SA 5000**

**The Manager
Legal Services Commission
92-98 Wakefield Street
Adelaide SA 5000**

Appendix 3: Requests for Comment

2.1.2 Objects of the Act

Request for comment No 1

Are these the objects of the Act?

Are there any other objects?

Are these objects still relevant in the present day?

2.2.3 The Trustee services and investment products markets

Request for Comment No 2

Does the above discussion accurately describe the relevant market(s) in South Australia?

Are there any other features of the market which are relevant to competition analysis?

What factors add to, or reduce, the intensity of competition within this market?

2.4 Costs of Restrictions

Request for comment No 3

Are there any other costs arising from the legislation which should be considered in competition review?

In each case, how does such cost arise?

In each case, how significant is the cost in comparison with the public benefit conferred?

2.5 Public Benefits

Request for Comment No 4

Does the above discussion correctly identify the public benefits conferred by the Act?

Are there any others?

2.6 Alternatives

Request for comment No 5

Comment is sought on the alternative model discussed above.

Are there other alternatives to the present legislation which would deliver comparable benefits?

How would community service benefits be delivered by these alternatives?

3.2.1 Section 5(3) - Acting in different capacities in the same matter

Request for comment

Comment is sought as to whether s.5(3) amounts to any more than a "trivial" restriction of competition, and, if it does, whether there is some feasible, more competitive, alternative.

3.2 Special advantages conferred on Public Trustee

Request for comment No 6

Do any, and which, of the above, constitute restrictions of competition in the executor and trustee services market or the investment market?

Are there any other provisions of the legislation which constitute such restrictions?

In the case of identified restrictions, are they trivial, intermediate or serious?

What, if any, public benefits are conferred by the restrictions? Are these benefits still necessary and relevant in the present day?

Could these benefits be achieved by other means?

3.3.2 Community Service Obligations

Request for Comment. No 7

Should the community service obligations be opened to tender, rather than automatically assigned to the Public Trustee?

Would this have any beneficial effect on the cost of these services?

3.3 Special disadvantages

Request for comment No 8

Do any, and which, of the above features of the legislation restrict competition within the market for executor and trustee services, or the market for investment services?

Are there other such restrictions arising from the legislation?

Are such restrictions trivial, intermediate or major?

What public benefits, if any, are conferred by the restrictions?

Could these benefits be conferred in any less restrictive or less costly manner?

3.4.1 Regulation of Fees

Request for comment No 9

Comment is sought as to whether the benefits gained through the operation of section 45 outweigh the cost incurred by the community due to the restriction on competition.

Comment is sought as to whether there is any justification for regulating the Public Trustee's fees and charges differently from those of other corporate trustees, and if so, how they should be regulated.

Comment is not sought, however, on the more general issue of deregulation of fees in the trustee services market, as this is the subject of separate and broader review.

5. AMINISTRATIVE BURDEN

Request for Comment No 10

Does the *Public Trustee Act 1995* impose any other administrative requirements on participants within the relevant markets?

Do any of the administrative requirements imposed by the *Public Trustee Act 1995* create an unnecessary or onerous administrative burden on any person?

Appendix 4: Materials Considered by the Review Panel

Submissions

NAME

Tower Trust Limited
44 Pirie Street
ADELAIDE SA 5000

Trustees Corporations Association of Australia
National Secretariat
Level 22, 68 Pitt Street
SYDNEY NSW 2000

National Australia Trustees Limited
2nd Floor
22-28 King William Street
ADELAIDE SA 5000

IOOF Financial Group
IOOF Building
47 Gawler Place
ADELAIDE SA 5000

Aged Rights
Advocacy Service (Inc)
45 Flinders Street
ADELAIDE SA 5000

Chief Magistrate's Chambers
Magistrates Court
260-280 Victoria Square
ADELAIDE SA 5000

Alzheimer's Association (SA) Inc
27 Conyngham Street
GLENSIDE SA 5065

Council on the Ageing (South Australia) Inc
45 Flinders Street
ADELAIDE SA 5000