

LEGISLATIVE ASSEMBLY

Public Bodies Review Committee
REPORT INTO THE
PUBLIC TRUSTEE OF NEW SOUTH WALES

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Terms of Reference

That the Committee inquire into, and report back to Parliament on, the following issues:

- (a) How the Public Trustee of New South Wales fulfils its legislative functions under the *Public Trustee Act 1913*;
- (b) How the Public Trustee of New South Wales executes and administers clients' estates;
- (c) How the Public Trustee of New South Wales administers trusts;
- (d) The appropriateness of the current fee structures;
- (e) The appropriateness of the current dividend and TER regime in relation to the Public Trustee of New South Wales;
- (f) Case management systems;
- (g) How the Public Trustee of New South Wales administers the Common Fund;
- (h) Systems in comparative jurisdictions;
- (i) How the Public Trustee of New South Wales administers powers of attorney;
- (j) Any other related matters.

Chairman's Foreword

The Public Trustee serves a very important role in New South Wales and there are probably very few people within this state who have not either had direct dealings with the Public Trustee or known someone who has.

Virtually every jurisdiction in the world has a Public Trustee, even if some are purely agencies of last resort. Unlike most other jurisdictions both within Australia and internationally, New South Wales has chosen to separate out the functions of financial and lifestyle decision-making for those without capacity into separate agencies known as the New South Wales Protective Commissioner and the New South Wales Public Guardian. The Public Bodies Review Committee reviewed both those agencies in 2001 in their report entitled: *Personal Effects: A Review of the Offices of the Public Guardian and the Protective Commissioner*.

While the Public Trustee has a number of functions it is best known within the community for its free will making service and its estate management. It is also these functions which arguably result in the greatest level of complaint from families and friends of Public Trustee clients.

Clearly, there will often be a level of conflict between the wishes of a testator and his or her beneficiaries. This is exactly one of the reasons that we need a Public Trustee. A government agency is well placed to administer trusts and estates in situations of conflict. The Public Trustee also offers a “one-stop-shop” which provides testators with the peace of mind of knowing that their estate will be administered exactly to their wishes by a professional executor, regardless of their assets.

After examining the Public Trustee the Committee found that various legislative and administrative changes over the last decade had greatly improved the Public Trustee’s operations and it was generally running fairly well.

However, there were a number of key issues surrounding client satisfaction relating to cost, timeliness and service delivery, which need to be better addressed. The Committee acknowledges that these concerns may in some cases be based on perceptions rather than reality.

This points, therefore, to a need for greater transparency to be built into the Public Trustee’s operations and performance reporting systems. The Committee has therefore recommended that the Public Trustee explore a fee for service system which will provide both testators and beneficiaries with a more precise level of charges in relation to work actually performed and overcome the inequities of the commission based system.

Further, the Committee would like to see the Public Trustee introduce more precise achievement targets. Quantitative measures or statistics that are linked to outcomes and outputs delivered should be compared more strongly with set targets or benchmarks.

The Committee is keen to see the Public Trustee move towards setting benchmarks with comparative jurisdictions. It would also like to see these benchmarks, or at least a selection of these, published in the Public Trustee’s annual report each year.

With the implementation of these recommendations the Public Trustee should become a more transparent and accountable organisation which will inspire greater public confidence.

I would like to thank everyone who participated in the inquiry. In particular, the NSW Public Trustee, Peter Whitehead, and his staff. I would also like to thank the Queensland Public Trust and the Public Trustee New Zealand for making information relating to their fee for service structure so readily available to us. This assistance was extremely important in the Committee's deliberations.

I would also like to thank my fellow Committee Members for the time they have given to the inquiry, in particular, Wayne Merton, whose knowledge of probate systems has been invaluable.

Lastly, I would like to thank the Committee secretariat for their assistance throughout the inquiry and in preparing the draft report.



Matthew Morris MP
CHAIRMAN

List of Recommendations

RECOMMENDATION 1: That the NSW Public Trustee remain a general Government non-business agency

RECOMMENDATION 2: That the NSW Government consider the viability of the NSW Public Trustee adopting a fee for service pricing structure

RECOMMENDATION 3: That the NSW Public Trustee maximum Common Fund management fee be increased to 1.1% in line with private sector trustees

RECOMMENDATION 4: That the NSW Public Trustee comparatively benchmark case management service delivery operations, including timeframes for completion, with Public Trustees in other jurisdictions

RECOMMENDATION 5: That the NSW Public Trustee publish this benchmarking information in its Annual Report each year

RECOMMENDATION 6: That the NSW Public Trustee develop key performance indicators for all key result areas of its operations

RECOMMENDATION 7: That the NSW Public Trustee publish these key performance indicators in its Annual Report each year

Chapter One - The Role of the Public Trustee

- 1.1 The New South Wales Public Trustee was established in its present form by an Act of New South Wales Parliament in 1913. *The Public Trustee Act 1913 (NSW)* established an agency to take over the work of the existing Curator of Intestate Estates. Three other functions were given to the new agency: the ability to act as trustee; the ability to act as executor and administrator; and the ability to act as agent or attorney.
- 1.2 The then New South Wales Attorney-General, The Hon William Holman MLA who introduced the *Public Trustee Bill* into the New South Wales Parliament in 1912 said the model used for the New South Wales Public Trustee was very much influenced by those already operating in both Great Britain and New Zealand.
- 1.3 In relation to the Government's decision to extend of the Public Trustee's power to administer wills beyond intestate estates he said:
- I am anxious to briefly explain the circumstances in which he [the Public Trustee] may act in any one of those four capacities – that is to say, the three new capacities, and also as the curator is accustomed to act, and to show to the House the powers which have been given to him, and the circumstances under which his work will be carried out.
- Under clauses 12 and 13, non members will find that wherever any settlor testator has power to appoint a trustee to act in future he may appoint the Public Trustee; further, any person who has power to appoint a trustee under any instrument may appoint the Public Trustee unless the instrument expressly forbids it; or the Public Trustee may be an original trustee.
- The experience in New Zealand is that in a vast number of cases this last-named power is availed of, and persons making wills and drawing up settlements do not look among their friends for some one who will take up the thankless and arduous task of trustee, but go straight to the Public Trustee, and nominate him in the original document
- But in addition to that, where private trustees are acting today or where in future private trustees are appointed, they may at any time, if they think fit, and by unanimous resolution, substitute the Public Trustee for themselves. They can relieve themselves of the duties of private trustees, and replace themselves by the Public Trustee.¹
- 1.4 The government thereby created an agency that was no longer one of last resort for administration of estates and the Public Trustee's arguably best known function was born. Will making and will administration for anyone who chooses it have always been the activities the public of New South Wales most readily identify with the Public Trustee.
- 1.5 It is estimated that 40 per cent of Australians currently die without leaving a will. In October 2005 a Newspoll survey found that 48.8 per cent of adults living in Sydney did not have a will.
- 1.6 Despite the public focus on its will making and executor services the New South Wales Public Trustee currently provides the following services:
- Will making;
 - Administration of deceased estates;
 - Trustee of trusts created by wills, deeds, court orders and legislation;

¹ New South Wales legislative Assembly Hansard 13 November 1912 pp3125-3126

- Private client services through acting as an attorney;
 - Asset and fund administration; and
 - Financial management of “protected persons”.
- 1.7 The Public Trustee is also named in legislation as the trustee for:
- Workers compensation death benefits;
 - Assets pursuant to the *Confiscation of Proceeds of Crime Act 1989*, *Criminal assets Recovery Act 1990*; and the *Damages (Infants and Persons of Unsound Mind) Act 1929*.
- 1.8 The Public Trustee's total expenses and capital expenditure program are funded mostly through revenue generated from clients. The Public Trustee has a statutory obligation to accept all estates regardless of their value. The 2005-2006 Budget contains funding for community service obligation payments of approximately \$2.4m from the Consolidated Fund to meet obligations for administering low value estates and trusts and the preparation of small value wills.
- 1.9 The Public Trustee's fee structure was reviewed in 2001. The next fee structure review is due in 2007-2008.

Chapter Two - Previous Reviews of the Public Trustee

New South Wales Audit Office

- 2.1 In both his 1992 and 1993 reports to Parliament the New South Wales Auditor-General commented on the high level of undistributed earnings and pointed out that the Public Trustee had decided to maintain the established earnings distribution policy for 1992-93.
- 2.2 In addition, the Auditor General's Report of 1992 highlighted the transfer of earnings from the Common Fund to the Office Administration Account to cover accumulated superannuation and long service entitlements. The amounts transferred were found to be \$1.6m in excess of requirements.
- 2.3 The Auditor General's comments in that report were:
- During the year under review, the Public Trustee, after reviewing the Common Fund earnings and distributions, made the following decisions: to maintain the established earnings distribution policy for 1992-93; and to refrain from transferring funds to the Office Administration Account until future operating deficiencies offset the sum of amounts that were transferred in prior years in excess of real requirements.²
- 2.4 This lead the Auditor General to question whether the Public Trustee was retaining too high a proportion of the earnings of its Common Fund rather than distributing those earnings to beneficiaries.
- 2.5 In the Auditor General's 1996 Report further comment was made regarding the management practices of the Public Trustee. These included significant real estate losses.
- 2.6 The Auditor General identified a lack of in-house investment expertise as the Public Trustee operated under certain guidelines for investment purposes. However, these guidelines had not been formalised into an investment policy.
- 2.7 In comments on the lack of in-house investment expertise the Auditor General said that:
- Whilst aiming to maximise investment returns it is important to stay within the limits of proper risk management practices. Mortgage investments could be subject to better risk management practices and, as indicated above, after bringing to account losses of \$2.2m this year, no guarantee can be provided that further losses will not occur. The current investment committee – comprising executives of the Public Trustee who have other onerous responsibilities – may not have the full range of backgrounds expected of an investment manager controlling a \$0.7 billion portfolio.³*

New South Wales Public Accounts Committee

- 2.8 In its June 1994 Report *Matters Arising From the Auditor General's Reports* the New South Wales Public accounts Committee addressed the issues raised by the New South Wales Auditor General by inquiring into the three following areas:
- Whether the high level of the surplus held by the Public Trustee was the result of overly conservative distribution policies, or whether there are adequate reasons for the accumulation as it stood at the time;

² NSW Auditor General's Report for 1993, Volume Three, December 2003

³ NSW Auditor General's Report 1996 Volume Three p.565

- Whether there were adequate accountability mechanisms governing the operation of the Public Trustee; and
 - Whether there were appropriate accounting standards for financial disclosure by Public Trustee operations.
- 2.9 As a result of the discussions the Public Accounts Committee held with both the Public Trustee and Treasury, it came to the conclusion that there was a need for improved accountability in the Public Trustee's Office and therefore a broad based external review was warranted.
- 2.10 The Committee envisaged that this review should cover the sufficiency of the Common Fund including the mix and spread of investments, the adequacy of the capital base, the reserves of the Common Fund, the matching of earnings and prospective payments to beneficiaries and the appropriateness of investment practices.
- 2.11 It was considered that a mixed team from both the public and private sectors should conduct the review including the Government Actuary, as well as specialists in risk management, financial markets and funds management.
- 2.12 While this review was never carried out, the Public Accounts Committee identified the Public Trustee for further examination in its June 1997 report entitled: *Matters Arising from the Auditor General's 1996 Report*. This was largely done due to the possible corporatisation of the Public Trustee.
- 2.13 The Committee felt very strongly that wide public consultation should take place before any corporatisation legislation was placed before the Parliament. The Committee firmly believed that investors and beneficiaries should be consulted regarding the aims, costs, benefits and implications of corporatisation.
- 2.14 The Public Accounts Committee expressed disappointment that this consultation did not take place before the legislation was introduced into Parliament.

Public Trustee Corporation Bill (1998)

- 2.15 On 17 June 1997 the *Public Trustee Corporation Bill* was introduced into the New South Wales Legislative Assembly.
- 2.16 The Bill sought to repeal the *Public Trustee Act 1913* and to establish the Public Trustee Corporation as a State-owned corporation under the *State Owned Corporations Act 1989*.
- 2.17 Shares in the corporation were to be issued to the Treasurer and another Minister nominated by the Premier and a board of directors was to be established.
- 2.18 The corporation aims were to provide a comprehensive service of estate and asset management operating as efficiently as comparable businesses and to maximise the state's investment in the corporation.
- 2.19 Part 5 of the Bill provided for the charging of commission and fees which were set out in Schedule 2. It also provided for review of the commission and fees by the Supreme Court on the same basis as other trustee companies. It was proposed that management fees would replace the fees payable to the former entity as incidental fees under the *Public Trustee Regulation 1991*.

- 2.20 There was also provision for a fee to be charged for the management of the common fund which was intended to place the new entity on the same footing as its commercial competitors. Schedule 2 also provided for the payment of a fixed fee of 4% when estates are administered under an election of a value of less than \$50,000 to reflect the fact that the administration of low-value estates can often be complex and involve more professional time than is returned under the scale fees.
- 2.21 The most controversial part of the Bill involved the fate of the Common Fund surplus. Part 6 of the Bill provided for transitional arrangements, including abolition of the Office of the Public Trustee; dissolution of the Public Trust Office; and transfer of the general assets, rights and liabilities of the former entity to the new corporation. It also enabled specified assets of the former entity to be transferred to the Ministerial Holding Corporation and for assets of the new entity to be transferred to the Ministerial Holding Corporation for a period of 12 months after the dissolution of the current Office of the Public Trustee. The period of 12 months was available for the board, Ministers and shareholders to settle whatever assets were required for the corporation.
- 2.22 Division 2 Part 6 of the Bill, which was to commence on assent, provided for the appropriation into the Consolidated Fund of the surplus generated out of the income from investments made from the Common Fund under the *Public Trustee Act 1901*.
- 2.23 Schedule 3 provided that amounts determined from time to time, after consultation with the portfolio Minister and the corporation, to be surplus to the requirements of the continuing interest suspense account and estates guarantee reserve fund were to be paid to the Consolidated Fund, and that deficiencies are to be paid out of the Consolidated Fund. This appropriation was to prevent the accumulation of further surpluses.
- 2.24 The guarantee from the Consolidated Fund, provided under section 37 of the *Public Trustee Act* was also to be discontinued to new customers, with the argument that this would put the Public Trustee Corporation on the same footing as its private competitors.
- 2.25 The Bill was ultimately defeated in the NSW Legislative Council on a majority of 24 votes to 17 on 27 May 1998. There was disquiet expressed by Members on a number of points.
- 2.26 Firstly, there was concern that the Public Trustee was an organisation which was established primarily for the benefit of persons of low income. A view was taken by some Members that a more corporate focus may be impact upon the Public Trustee's public interest function. The Public Trustee was seen as providing a safeguard for people unable to effectively arrange their own estates and affairs. Many of its clients include disadvantaged older people, people with disabilities and low income families who are unable to pay private trustee rates or whose estates are of very low value.
- 2.27 It was believed that that by changing into a corporate entity the Public Trustee would be required to take on a more fiscally driven focus which would disadvantage these clients, particularly as it would now be required to be more market driven and provide a dividend stream to the Government.

- 2.28 There was also disagreement about the fate of the Common Fund surplus which was over \$35m at that time. The Bill proposed that it be transferred to Consolidated Revenue. As the Public Trustee had been always been completely self supporting and the surplus was derived from interest earned from clients' monies which had not been paid out, various Members took the view that the surplus did not rightly belong to the Government.
- 2.29 There was also disagreement as to whether this surplus should be used to fund social programmes, shared amongst Public Trustee clients or kept as a contingency fund for future Public Trustee operations.

Council On The Cost And Quality of Government Review

- 2.30 In 2002 the Council on the Cost and Quality of Government reviewed the NSW Public Trustee and made several recommendations to NSW Cabinet relating to its operations.
- 2.31 The Public Trustee was placed administratively under the NSW Attorney General's Department. As a result all Public Trustee staff were transferred to the NSW Attorney General's Department on 24th September 2003 by virtue of an Order made under the *Public Sector Employment and Management Act 2002*, which abolished the Public Trust Office as a Department of the Public Service.
- 2.32 The NSW Attorney General's Department is now the employer of staff and provides personnel services to the NSW Public Trustee.
- 2.33 On the recommendation of the Council the Public Trustee also began to pay annual Income Tax Equivalents and dividends to Treasury as of 30 June 2004 to place them on a more equal footing with the private sector. A tax rate of 30% on operating profit now applies. The current dividend payment is 70% of after tax revenue.
- 2.34 There were a number of other efficiency and cost saving recommendations concerning potential sharing of resources in information technology etc.

Chapter Three - Estate and Trust Management

- 3.1 The NSW Public Trustee administers deceased estates in the following capacities:
- Executor of wills prepared predominately by staff, but as well by solicitors and by people preparing their own wills;
 - Administration with the will annexed when executors renounce in the Public Trustee's favour, have died or cannot be located/ or fail to apply for probate;
 - Administration of intestate estates where there is no current valid will.
- 3.2 Estate administration is a process affected by legal requirements such as meeting Supreme Court requirements to obtain probate or administration, advertising for protection from creditors making claims after the estate is complete, and certification of entitlement of beneficiaries. As well, there are Trustee accounting and taxation requirements.
- 3.3 Primarily the functions relate to asset collection/disposal and clearance of debts and other obligations of the deceased or their estate. There is much reliance on provision of information by third parties, such as banks, corporations and financial institutions, and timeliness of management is affected by response from these institutions. As well there can often be disputes concerning claims and/or inconsistent or poor record keeping by the deceased which impacts on administration.
- 3.4 The current average delivery time for estate management is 5-6 months, although this can vary if disputes arise, or for staffing reasons, or there are delays beyond the control of the Public Trustee e.g. market forces in real estate delaying sale or difficulty in obtaining information. The Public Trustee's estate administration system (TEAMS) tracks timeliness and reports are generated by business information software.
- 3.5 Service delivery is provided through 19 Branch outlets:
- Sydney
 - Armidale
 - Bankstown
 - Blacktown
 - Bondi Junction
 - Broken Hill
 - Burwood
 - Chatswood
 - Country
 - Dee Why
 - Gosford
 - Hurstville
 - Lismore
 - Liverpool

- Miranda
- Newcastle
- Parramatta
- Port Macquarie
- Wollongong

- 3.6 These locations currently provide a full range of services. The Public Trustee is currently piloting an alternative model of service delivery based on a partial front office/ back office segregation of duties.
- 3.7 The branch locations are supported by specialist sections:
- **Legal:** providing conveyancing, litigation, advice, complex will making;
 - **Taxation:** providing full taxation return and advice service;
 - **Client Investment Planning and Asset Management:** providing compliance with trustee investment obligations and review of asset holdings, and CGT information;
 - **Trust Accounting:** providing specialist operational and policy advice and services including e.g. unclaimed money returns to Office of State Revenue;
 - **Property Services:** building inspection and maintenance;
 - **Technical Services & Knowledge Management:** operational manuals, templates for correspondence and internal processes, newsletters;
 - **Technical Training:** traineeship, induction and training, general technical training and development linked to Financial Services Certificate accreditation;
 - **Business Development:** marketing and communications, corporate and local marketing, communication strategies and materials.
- 3.8 Estate administration is also supported by external advice and services, including External lawyers, accountants, taxation agents, brokers, financial planners, real estate agents, valuers, vehicle/furniture/jewellery auctioneers and insurance brokers.
- 3.9 These service providers are essential third party relationships to estate management obligations of an executor/administrator.

Performance Review of Estate Management

- 3.10 There are 3 levels of review:
- Supervision at service locations facilitated by TEAMS, client feedback and obligations;
 - Review at management level by Branch Manager and General Manager Client Services facilitated by business reports (both system generated and manual), such as control self assessment;
 - Client feedback through both a compliment and complaint mechanism. Additionally estate clients are surveyed annually.

- 3.11 The Public Trustee is also subject to partial review by the NSW Ombudsman, and representations can be made to the NSW Attorney General. However, the Public Trustee's fiduciary decision making in estates cannot be interfered with or influenced by the Minister or other Parliamentary Officials.
- 3.12 In respect of the Public Trustee's fiduciary obligations, the Supreme Court is the ultimate arbiter in respect of executor/administrator obligations. ICAC also has powers of review and the Public Trustee has mandatory referral to ICAC on issues of corruption.

Trust Administration

- 3.13 Trusts are managed by PTNSW in the following categories:
 - Trusts arising from wills, such as life interests, disability trusts, discretionary trusts or fixed term and purpose trusts;
 - Trusts arising from court/tribunal orders, generally from compensation claims for personal injury, victims compensation, or workers compensation death benefits;
 - Trusts arising from deeds created by clients or arising from superannuation death benefits.
- 3.14 The current file load and trends for this business are outlined in Chapter Five. There has been a dramatic reduction in referral of trusts arising from tort law reform in NSW. Accordingly specific marketing is targeting three new/enhanced markets:
 - Employee entitlement trusts;
 - Superannuation trusts;
 - Agency/corporate trusts.
- 3.15 The Public Trustee has compliance obligations under the *Trustee Act 1925*. Trust management is facilitated by TEAMS as well as internal guidelines and policies.
- 3.16 Since 2002 the Public Trustee has decentralised trust management into trust service centres. This was driven by risk management, client service and efficient use of resources. Currently there are three centres located in Newcastle, Liverpool and Head Office in Sydney.
- 3.17 The trust service centres are supported centrally by:
 - **Legal staff:** conveyancing, advice;
 - **Taxation:** trustee taxation returns and beneficiary advice as to income;
 - **Business Development:** marketing and communications, corporate and local marketing, communication strategies and materials;
 - **Client Investment Planning:** compliance with investment obligations, particularly in respect of what is known as "prudent person" investment. This primarily is to match beneficiary needs with an investment plan/asset allocation taking into account such factors as term of the trust, taxation, and specific directions in the will or trust deed.

- 3.18 The Public Trustee has followed the practice of other Public Trustees in providing client investment analysis based on a risk assessment leading to standard asset allocation.
- 3.19 This means that short term trusts (less than 3 years) will be invested in their capital guaranteed portfolio while longer term trusts will have increasing exposure to growth from 10% to 70%.
- 3.20 Investment plans are reviewed annually to comply with the *Trustee Act 1925*.

Method of Performance Review

- 3.21 The Public Trustee's Trust Service Centres have targets for processing requests for support and maintenance and are supervised. The clients and, where applicable, carers, have access to supervisors and managers for review of decisions with escalation to General Manager Client Service and Public Trustee where necessary. Investment performance is reviewed annually and communicated to clients.
- 3.22 There is limited review allowed by the Ombudsman, and representations can be made to the Attorney General.
- 3.23 The Public Trustee's fiduciary decision making in trusts cannot be interfered with or influenced by the Minister or other Parliamentary Officials. The ultimate review forum is the Supreme Court by way of seeking removal and/or claim for breach of trust.

Case Management Systems

- 3.24 The Public Trustee has a fully integrated Trust Estate and Asset Management System (TEAMS).
- 3.25 TEAMS is fully featured trust accounting and asset management software developed by the Public Trustee.
- 3.26 Development commenced in 1998 using the services of an external integrator, DMR, and went live on 1 July 1999. The Public Trustee has undertaken ongoing enhancements to TEAMS and now manages all development work in-house.
- 3.27 Some of the features TEAMS provides include:
 - Full double entry accounting for approximately 15,000 matters including fee calculation and charging, interest accrual and crediting, receipts, apportionments etc;
 - Full electronic funds transfer capability. Funds can be transferred to clients' accounts overnight;
 - Review and supervision functions to ensure prompt administration of matters Full claim management functionality including cheque production and reconciliation, cheque numbering etc;
 - Full user management, access, authorities, audit trails etc;
 - Management of all types of assets including asset history, CGT information, acquisitions and disposals, value, insurance etc;

- Document production using a Word interface to export information held in TEAMS to word templates. Approximately 18,000 documents a month are produced using this system;
 - Indexing and tracking for approximately 400,000 wills and powers of attorney with approximately 11,000 new instruments being created annually;
 - Entitlement and distribution functionality allowing for the online distribution of client funds according to their entitlement.
- 3.28 Future enhancements currently under development for TEAMS include an interface with an intelligent will and power of attorney document production system and utilising S-pay to pay client accounts in bulk.
- 3.29 This system is integrated with their financial system SUN financials, to ensure proper accounting records.
- 3.30 In addition, the NSW Public Trustee has PTBis, a business information management system providing reports from a data warehouse managed by Business Objects software

Chapter Four - Governance Issues

Specific Governance Details

- 4.1 The Public Trustee operates under the *Public Trustee Act 1913*, as a self funded general government business unit in the Attorney General's Department. The Act provides that:
- The Governor appoints the Public Trustee for a renewable period of 5 years with provisions for suspension and removal from office;
 - The Governor may appoint Deputy Public Trustees;
 - The Public Trustee is a corporation sole, with perpetual succession, with the power to take proceedings, hold and deal with property in its corporate name, and do all things necessary for or incidental to the purposes for which it was constituted.

Internal Governance

- 4.2 The Public Trustee is the CEO of Public Trustee NSW which has the following divisions:
- Client Services;
 - Business Development;
 - Financial and Strategic Services;
 - General Counsel.
- 4.3 Internal Audit/Risk Management report to the Public Trustee as a direct report for Internal Audit, but through General Counsel for Risk Management.
- 4.4 An Executive Committee fulfils similar functions to a managing Board in that General Managers report monthly on budget performance, KRA performance to the Business Plan, and on new or ongoing projects. Key management reports are generated by a software program working from a data warehouse from financial, HR and client systems.
- 4.5 An Investment Committee meets monthly to review investment performance, set interest rates and deal with associated issues such as compliance, asset allocation and external manager relationships.
- 4.6 Other key committees are: Audit & Risk, Joint Consultancy (Management and Union representatives), OH&S and IM&T.

External Governance

- 4.7 The Public Trustee reports to the NSW Attorney General as Portfolio Minister - reporting administratively through the Director General, Attorney General's Department (AGD).
- 4.8 For purposes of trustee/fiduciary obligations, the Public Trustee is answerable ultimately to the Court through the operations of various relevant statutes: including the *Trustee Act*, the *Wills, Probate and Administration Act* and the *Damages (Infants and Persons of Unsound Mind) Act*. This arises out of individual fiduciary obligations in trusts and estates.

- 4.9 The Public Trustee's fiduciary decision making cannot be interfered with or influenced by the Minister or other parliamentary officers.
- 4.10 Corporate and trustee financial statements are audited by the Audit Office of NSW.
- 4.11 The governance arrangements in respect of corporate performance are:
- An annual Statement of Business Intent signed by NSW Treasurer and the Attorney General. This document contains as annexures:
 - Business Plan;
 - Marketing Plan;
 - Risk Management Return.
- 4.12 The Public Trustee pays tax equivalents, operating under the accounting profits model.
- 4.13 The current dividend payment is based on 70% of adjusted profit after tax. This dividend can be adjusted by negotiation with NSW Treasury. Guidelines exist covering the factors influencing this negotiation.
- 4.14 Monthly financial data is provided to NSW Treasury via their TOES system
- 4.15 Key financial performance measures (projected for 5 years) as contained in the SBI are:
- Earnings Before Interest and Tax (\$m);
 - Operating Profit Before Tax (\$m);
 - Target Dividend (\$m);
 - Return on Assets (%);
 - Return on Equity (%);
 - Income Tax Expense (\$m);
 - Operating Profit After Income Tax (\$m);
 - EBITDA margin (%);
 - Target Gearing (Debt to Total Assets) Ratio (minimum) Target Gearing Ratio (maximum);
 - Other relevant business performance indicators including debt service, capacity and liquidity;
 - Financial risk measures.

Risk Management and Internal Audit

- 4.16 Public Trustee's approach to Risk Management is continually evolving. A detailed Risk Management Plan is based on the following methodology:
- Identify the major processes, objectives, resources, sub processes and process dependents;
 - Identify and prioritise risk exposures;
 - Identify Risk Mitigation Strategies;
 - Prepare a Risk Management Plan;

- Develop a Risk Management Policy;
- Develop and Implement a Performance Monitoring Framework;
- Implement the Risk Management Plan;
- Develop a Business Continuity Plan and;
- Plan and provide for the required financial and human resources.

4.17 Internal Audit is currently managed by a mix of internal audit staff and by way of a contract with Deloitte. Trustee operational audits are completed under the supervision of Deloitte with action items being created for review. Deloitte complete an internal audit program focussing on corporate activities and some Trustee activities, such as fees and commission. The Deloitte engagement is part of their contract with AGO. The Public Trustee is also a member of the AGO Audit Committee.

Business Areas Included

4.18 The areas of the business covered by Risk Management and Audit are listed in the following table.

Major Function	Process
1. Finance	<ul style="list-style-type: none"> • Corporate Finance • Trustee Finance • Common Fund – Investments • Budgeting
2. Executive	<ul style="list-style-type: none"> • Executive governance and planning
3. Marketing	<ul style="list-style-type: none"> • Business Development
4. Estate/Trust Management	<ul style="list-style-type: none"> • Legal Processing • Deceased Estates • Private Client Services • Client Portfolio Services • Taxation • Trust Accounting • Wills • Trusts • Knowledge Management
5. Corporate Services	<ul style="list-style-type: none"> • Building Security • Asset Management • Information Technology • Procurement • Industrial Relations • Human Resources • Occupational Health and Safety • SES Management • Insurable Risk

4

⁴ Public Trustee Submission p.5

Monitoring

- 4.19 Regular monitoring of the Risk Management Plan incorporates procedures to capture any new risks arising from changing circumstances or work/business environment and reviews the effectiveness of risk reduction strategies implemented as they, themselves, may lead to new risk exposures. Risk is further managed with the use of additional risk management tools including further development of control self assessment (CSA), and the implementation of the risk management framework recommendations, arising from a collaborative project with Treasury Managed Fund.

Review

- 4.20 The framework document's recommendations are to be prioritised, activities allocated and deliverables determined. The priorities are to include overtly aligning business plan strategies to risk outcomes, aligning education and training to both corporate and operational risk and ongoing mechanisms to review risk. To ensure the Plan is kept up-to-date, triggers will be identified that require the Plan to be reviewed or analysed for appropriateness. Examples of changes that will activate a trigger are: business process redesign; policy development; new IT systems or IT system modification.

Management

- 4.21 Implementation and accountability of controls and risk mitigation strategies to assigned key staff members through CSA. The Risk and Audit review function will perform ongoing reviews to ensure compliance with the requirements of the Plan.
- 4.22 The Executive Management Team and Audit and Risk Committee will provide an overseeing function to ensure risk is appropriately managed and organisational objectives are achieved.

Chapter Five - Trends and Finances

5.1 The current activity and financial position of the NSW Public Trustee is as follows:

	Actual	Actual	Actual	Actual	Actual	Projected
	2001/02	2002/03	2003/04	2004/05	2005/06	2006/07
Product						
Wills made	9,959	10,075	9,811	10,396	10,984	11,250
POA made	1,270	1,598	1,262	1,452	1,674	1,700
New Estates	1,983	1,971	1,962	1,784	1,830	1,750
New Estates: Values	\$415.53m	\$475.61m	\$497.85m	\$460.18m	\$493.76m	\$450.00m
New Trusts	1,416	1,408	1,135	888	844	900
New Trusts: Values	\$86.14m	\$93.51m	\$66.56m	\$73.49m	%58.25m	\$55.00m
New Power of Attorney	210	163	161	134	125	180
New Power of Attorney: Values	\$39.40m	\$48.42m	\$31.18m	\$37.66m	\$34.68m	\$40.00m
Staff (fte)	277.5	285	283	288	281.5	281
Business Sites	19	19	19	19	19	19
Financials						
Revenue	\$27.04m	\$31.81m	\$35.40m	\$33.94m	\$54.31m	\$34.09m
Recurrent Expenditure	\$31.71m	\$31.71m	\$26.37m	\$28.57m	\$32.53m	\$32.68m
Accounting Result	\$4.67m	\$0.10m	\$9.03m	\$5.37m	\$21.78m	\$1.41m
Operational result (see Note)	\$1.25m	\$5.48m	\$7.49m	\$4.03m	\$4.59m	\$1.41m
Capital Expenditure	\$1.38m	\$2.08m	\$1.47m	\$1.40m	\$1.72m	\$2.97m
Note: Operational result excludes actuarial adjustments for deferred superannuation liabilities, and from 2005/06, also excludes unrealised gains/losses arising from market value movements for TCorp Long Term Growth Facility investments (source: PTNSW Business Plan 2006/07 p.9)						

Wills

5.2 The volume of wills made by the Public Trustee in 2005/06 increased by 8%. This was attributed to a number of marketing initiatives such as "Wills Days", customer conversion training for staff and an ongoing media campaign and sponsorships.

- 5.3 The Public Trustee routinely conducts "Wills Days" through its branch offices. These are days when Branch Offices operate outside of normal business hours on Saturdays on specified dates to allow people over the age of 18 to come and make a will. Over the past five years scheduled Saturday Wills Days and Community Wills Days have been conducted at alternative and remote locations away from Public Trustee branch offices. During 2005/06, a record 34 Saturday Wills Day branch openings and 23 Community Wills Days were conducted across NSW.
- 5.4 Notifications of cancellation of existing wills has also reduced by 30%. Analysis shows that an increase in estate administration to continue into 2007/08.
- 5.5 The balance between wills which attract community service obligations and wills of commercial value is 9% (uncommercial) and 91% (commercial), with 72% of wills for estates over \$200,000 in asset value.

Deceased Estate Administration

- 5.6 Seventy five per cent of the NSW Public Trustee's deceased estates are a result of clients making a will with the Public Trustee. Twenty per cent are intestacies and the remaining five per cent are estates which the original executors have renounced.

Trust Services

- 5.7 Trusts predominantly arrive at the Public Trustee through Court/Tribunal Orders, Deeds and Wills. Tort law reform has had a large impact on the volume of trusts being received with their numbers decreasing from 1,406 since 2002 to 844 in 2005/06. This decline appears to be levelling off as the amount received for 2004/05 was 888.
- 5.8 During 2005/06 the Public Trustee introduced a marketing strategy to increase the amount of superannuation trusts and corporate agencies in order to compensate for the loss of compensation trusts. During the year they secured eleven new clients with an average value of \$578,000.

Attorney Services

- 5.9 There are three ways that the Public Trustee receives attorney service clients: Future Assist (no current asset management required); Standby Assist (only fund management required); and Active Assist (a variety of services required).
- 5.10 The volume of new business for attorney services increased marginally in 2005/06. Future Assist powers of attorney increased by 17%. As 55% of active matter stem from Future Assist clients, this should translate into future business growth.

Financial Performance

Revenue

- 5.11 Current projections of the proportionate contributions to revenue by each category are displayed on the following page:⁵

⁵ Public Trustee of NSW Business Plan 2006/07 p.12

	2006	2007	2008	2009	2010	2011
Commission & fees	43%	67%	66%	65%	64%	64%
CSO	4%	7%	7%	7%	7%	7%
CFM	10%	21%	22%	22%	23%	24%
Interest	5%	5%	6%	6%	6%	6%
Other income	1%	0%	0%	0%	0%	0%
Change in Market value	8%	0%	0%	0%	0%	0%
Actuarial gain on Super	30%	0%	0%	0%	0%	0%

- 5.12 The revenue derived from fees and commissions is projected to decrease in 2006/07 by 1.5%. The Public Trustee has therefore budgeted for a 50% increase in the Common Fund management fee in 2006/07 in line with its private competitors. However, this is not likely to eventuate as the next Public Trustee fee review will now not be completed until 2007/08.
- 5.13 Investment revenue arising from units held in TCorp Hour Glass facilities are included in actual results to June 2006, but no estimates have been made for future years due to uncertainty. Community Service Obligations have been provided for at \$2.3m, down slightly from 2005/06.
- 5.14 The Public Trustee is keen to address declining revenue, particularly as a result of tort law reform:
- A key initiative in response to declining revenue is to ensure that our next pricing review due 2007/08 fully explores options for fees and charges which reflect cost of service delivery and profit margin, yet remain fair and reasonable. As well it will need to allow for annual CPI reviews rather than continued to be managed through the *Subordinate Legislation Act* five year staged repeal process.
- The review will focus on the following pricing options for Deceased Estate, Trusts and Attorney services:
- The status quo (existing rates of commission on assets or funds managed and fees for services at their existing level);
 - The status quo with incremental increase for current fees for services based on cost recovery for the delivery of those services; and
 - A revised commission / fee for service structure which is reflective of both executor / trustee / attorney responsibility and actual work done in individual matters.
- Pricing models will be developed and tested for each of these options.⁶
- 5.15 More discussion of the Public Trustee's current fee structure is contained in Chapter Five.

⁶ Public Trustee of New South Wales Business Plan 2006/07 p.13

Recurrent Expenditure

5.16 Details of expense components to total expenditure are as follows:⁷

	2006	2007	2008	2009	2010	2011
Personnel Services	72%	70%	70%	70%	70%	70%
Salary & Related	1%	1%	1%	1%	1%	1%
Operating Expense	18%	20%	20%	19%	19%	19%
Maintenance Expense	3%	3%	3%	3%	3%	3%
Depreciation	6%	6%	6%	7%	7%	7%

5.17 Total expenditure for 2006/07 is estimated to be similar to 2005/06 and is estimated to increase by 3.5% in 2007/08. The growth is primarily in Salary and Related Expenses due to Award increases and additional self-funding of leave and superannuation. Further growth is expected of between 3.0% and 3.5% per annum until 2010/11.

5.18 The Public Trustee has adopted the NSW Treasurer's Direction to reduce its operating expenditure by \$514,000 from original budget estimates. This has been applied to operating and maintenance items.

The Dividend and TER Regime

5.19 Following Council on the Cost and Quality of Government recommendations, the NSW Public Trustee was several years ago defined as a general Government non-budget agency. As such, the Public Trustee is now required to report to the NSW Attorney General and the NSW Treasurer by way of a Statement of Business Intent, in accordance with the commercial policy framework of NSW Treasury.

5.20 The relevant policy documents are:

- Financial Distribution Policy for Government Businesses June 2002;
- Tax Equivalent Regime for Government Business June 2003; and
- A Social Program Policy for NSW Government Trading Enterprises.

5.21 As of 30 June 2004 the Public Trustee has been required to pay an annual tax equivalent payment of 30% of accounting profit to the NSW Office of State Revenue.

5.22 The Public Trustee also pays an annual dividend payment of 70% of after tax revenue. This is negotiable with NSW Treasury.

⁷ Public Trustee of New South Wales Business Plan 2006/07 p.13

- 5.23 Impacting upon both the Tax Equivalent and Dividend Policies is the Social Program Policy. The Public Trustee is funded by NSW Treasury on an annual basis for Community Service Obligations for low value estates, trusts and wills. This is calculated annually based on the past year's business figures.
- 5.24 Further, when the Public Trustee's business runs at a loss there is provision under Section 36C of the *Public Trustee Act 1913* to meet any shortfall from Public Trustee's Common Fund reserves.

Chapter Six - The Fee Structure

Commission Based Fees

- 6.1 The NSW Public Trustee fees and commissions are regulated by the *Public Trustee Regulation 2001*.
- 6.2 There was much discussion throughout the inquiry as to whether, when an estate involves Sydney real estate and the estate itself is fairly uncomplicated, clients of the Public Trustee may be better off financially using a private solicitor on a fee for service basis.
- 6.3 This was difficult for the Committee to ascertain as most of the work done by the Public Trustee in estate management relates to work done as an executor rather than a solicitor as they require themselves to be nominated as executor as a precondition of preparing a free will.
- 6.4 The costs of solicitors applying for probate are regulated at a maximum and for estates with assets valued at not more than \$500,000 the charge is \$2,900. This fee generally covers: instructions to obtain probate; attending on executor verifying assets and liabilities; and preparing, executor signing and lodging court documents and answering requisitions. The remaining work is deregulated and charged at an hourly rate set by each practitioner.
- 6.5 When solely owned assets are realised or transferred, the following capital commission is charged on a sliding scale starting at 4.4%:⁸

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

- 6.6 The Public Trustee also charges an account keeping fee of \$8.80 per month and a \$121 lodgement fee and \$121 per hour for taxation returns. There are also out of pocket expenses for postage, phone calls and photocopying.
- 6.7 The Public Trustee provided the Committee with the following three alternate scenarios for administering a \$500,000 estate.
- 6.8 The scenarios assume the following:
- Beneficiaries are both located and able to give instructions with no searching required to locate or identify next of kin;
 - Administration is completed within the Public Trustee's average time of six months;
 - No taxation returns are required to be prepared;

⁸ NSW Public Trustee: Facts on Fees p.2

- No income commission (5.775% of gross income) is applied and no interest allowed (4.75% pa);
- All fees and commission include GST;

6.9 The commission fee covers:

- Locating the will;
- Making funeral arrangements;
- Preliminary conference with family;
- Advising beneficiaries and ascertaining immediate needs of the family;
- Protecting real and personal assets such as insurance, personal effects and cash;
- Ascertaining assets and debts/liabilities;
- Obtaining grant of probate/administration;
- Realising assets such as obtaining beneficiaries' instructions regarding method of sale and sale price, arrange sale and negotiate sale price with the real estate agent, conveyancing costs, dealing with other assets such as bank accounts;
- Paying debts;
- Certifying entitlement and distribute the estate including transfer procedure and including the reconciliation of accounts and the final distribution settlement.

Scenario One

Estate valued at \$500,000 with assets not comprising real estate	
Account administration fees	\$52.80
Postage, telephone and photocopying	\$110.00
Tax investigation fee	\$82.50
Capital Commission (effective rate 2.42%)	\$12,100.00
Total	\$12,345.30

Scenario Two

Estate valued at \$500,000 with real estate being sold or transferred to beneficiaries other than a spouse	
Account administration fees	\$52.80
Postage, telephone and photocopying	\$110.00
Tax investigation fee	\$82.50
Title search fee	\$33.00
Stamping and registration attendance fees	\$66.00
Capital Commission (effective rate 2.24%)	\$12,100.00
Total	\$12,444.30

Scenario Three

Estate valued at \$500,000 with sole asset being matrimonial home being transferred to spouse	
Account administration fees	\$52.80
Postage, telephone and photocopying	\$110.00
Tax investigation fee	\$82.50
Title search fee	\$33.00
Stamping and registration attendance fees	\$66.00
Capital Commission (effective rate 1.1%)	\$5,500.00
Total	\$5,844.30

Fee For Service

- 6.10 The issue of whether the Public Trustee should go to a fee-for-service based pricing system rather than a commission-based one was the single biggest focus of this inquiry.
- 6.11 The sharp rise in property values in Sydney, in particular, has raised questions about whether the NSW Public Trustee offers value for money as opposed to using a family member as executor and a solicitor to handle the legal matters. Solicitors will charge on the basis of the work performed rather than on the basis of a fixed percentage of the gross value of the estate.
- 6.12 The difference in price between real estate in Sydney and elsewhere in New South Wales also creates inequities in what people pay for the same amount of work.
- 6.13 The Committee was unable to form a firm view on this issue without detailed comparative costings. As the Public Trustee is a “one stop shop” in relation to the handling of estates, not only performing the legal work but also handling real estate sales, conveyancing, the sale and transfer of shares and bonds, taxation, accounting etc, its overall fee cannot be directly compared with the work done by a solicitor in acting for an executor.
- 6.14 An Adelaide firm of Barristers and Solicitors, Johnston Withers, argues on their website that the difference in many estates between using a Trustee Company and a private solicitor can be many thousands of dollars. The following examples are provided to illustrate this point:

Example One:

In the case of a testator with a house worth \$150,000, furniture worth \$10,000 and investments worth \$40,000, Johnston Withers estimate their administration fees at \$2,200 while they estimate the South Australian Public Trustee's fees at \$7,700.

Example Two:

In the case of an estate consisting of: a house worth \$200,00; furniture worth \$60,000; shares worth \$100,000, investments worth \$100,000, a pre-paid funeral fund of \$5,000; a motor vehicle worth \$15,000; jewellery worth \$10,000; a loan to a relative of \$10,000, a mortgage of \$75,000; and \$5,000 owed on credit cards, Johnston Withers estimate that they would charge \$6,600 to administer the estate while the South Australian Public Trustee would charge \$14,300.

This second scenario demonstrates the effect of the South Australian Public Trustee assessing its commission on the gross estate rather than the net estate.

Example Three:

The third scenario involves an instance where assets in an estate are very valuable but also highly geared. For example, the testator owns a business with a gross value of \$1,200,000 but a debt of \$1,000,000 leaving the estate with a nett value of \$200,000. Johnston Withers estimates that they would charge \$6,600 to administer the estate while the Public trustee would charge \$20,900.⁹

Queensland

- 6.15 On 1 December 2001 the Queensland Public Trustee adopted a fee for service model. The move away from a commission based fee structure was a result of feedback received from the Public Trustee's core service areas of disability services, trusts and estate administration.
- 6.16 According to the 2002 Annual Report of the Public Trustee:
- Generally, customers, their families and members of their support networks felt the introduction of a fee for service approach was fairer and would better reflect the value of the service received.¹⁰
- 6.17 At a meeting with a Committee delegation on Wednesday 2 November 2005 Greg Klein, the Queensland Public Trustee told the Committee that pressure to reform the fee structure came primarily from work done for financially represented persons as it was difficult to charge commission fees of people with disabilities.
- 6.18 Rising property values were also substantially increasing the income earned by the Office and customers were increasingly considering the commission fees unfair.
- 6.19 Further, the disparity in property values between different areas of Queensland lead to the Public Trustee earning vastly different amounts of income for the same amount of work performed.
- 6.20 As a result, the Queensland Law Society was running an aggressive advertising campaign which targeted the commission fee system and sold the advantages of using a private solicitors.
- 6.21 The Public Trustee of Queensland funds their own Community Service Obligations (CSOs) to clients of low or no income or assets or where persons have been unable to obtain trustee services elsewhere.
- 6.22 Community Service Obligations are taken from the Public Trustee's surpluses generated from their Common Fund and are therefore provided at no cost to the Queensland government.
- 6.23 The cost of administering estates classified as a CSO for 2004-2005 was \$121,525. The Queensland Public Trustee believes that the fee for service pricing structure has enabled the actual cost of delivering CSOs to be more accurately determined:

⁹ Johnston Withers Barristers and Solicitors Press Release

¹⁰ Public Trustee of Queensland Annual Report 2001-2002 p6

From a service provider perspective the new fee for service model allows us to accurately determine the costs associated with the provision of identified Community Service Obligations (CSOs).....Through greater understanding of the costs associated with CSOs we are in a better position to develop commercially profitable activities to enable the funding of CSOs.¹¹

- 6.24 Ernst and Young undertook a major study on reforming the fee structure over a two year period. Based on this study a fee for service model was recommended over other options such as a time based model. It was considered that a time based model offered predictability as well as offering beneficiaries' the reassurance that the testator understood the administration costs involved at the time of making their will. A signed acknowledgement of costs is included in the will documentation.
- 6.25 Estimates for the costs of services are computer generated and therefore offer Public Trustee staff a fast and reliable method of estimating of what future costs will be for each client.
- 6.26 Greg Klein, the Public Trustee of Queensland told the Committee that prior to the introduction of fee for service some people were definitely being over charged. These were typically those with large estates. Correspondingly, there were clients who were being undercharged but were not attracting a Community Service Obligation.
- 6.27 Like the NSW Public Trustee the Public Trustee of Queensland also offer a free will making service. However, unlike New South Wales this service is available irrespective of whether or not they are appointed as executor or co-executor. The free will making service is considered a service to the community. In 2004-2005 it cost the Public Trustee \$2,867,220.¹²
- 6.28 Well over half the people who choose to get their wills drawn up by the Public Trustee do still use them as executor. During 2004-2005 people who made wills with the Public Trustee of Queensland appointed the Public Trustee as executor in 66.09 per cent of matters.¹³
- 6.29 It must be acknowledged that the Queensland Public Trustee has a much wider scope of business activities than the New South Wales Public Trustee and is the largest Public Trustee in Australia. Whereas New South Wales has a separate Protective Commissioner for financial representation, this function is combined into the Public Trustee's Office in Queensland.
- 6.30 Another variation is the auctioneering function. The Public Trustee of Queensland acts as auctioneer in the disposal of a great deal of the Queensland Government's assets, including motor vehicles, real estate, jewellery, computers, furniture and hardware. In addition it acts as a rental agent for properties throughout Queensland.

New Zealand

- 6.31 Prior to 1 March 2002 the Public Trustee New Zealand operated with a commission based fee structure comparable to that of New South Wales.

¹¹ Public Trustee of Queensland Annual Report 2001-2002 p6

¹² Public Trustee of Queensland Annual Report 2004-2005 p26

¹³ Public Trustee of Queensland Annual Report 2004-2005 p26

- 6.32 Subsequently it has moved towards a fee and service pricing structure, primarily using a time and attendance based model. This transition has taken place in two stages.
- 6.33 The first stage in the change in pricing structures coincided with new governing legislation, the *Public Trust Act 2001* (NZ), on 1 March 2002. The new legislation established a new statutory corporation, public Trust, as successor to the former corporation sole known as the Public Trustee.
- 6.34 Previously, the Public Trustee was responsible for both the governance and management of the Public Trust Office and was directly accountable to the relevant Minister. By convention the Public Trustee acted independently of the Minister and the Crown when dealing with estates and trusts.
- 6.35 The *Public Trust Act 2001* transferred governance of the Public Trust to a board which is appointed by the responsible Minister. A Chief Executive is accountable to the Board.
- 6.36 The 2001 Act authorised Public Trust to set its own charges. Previously, as in New South Wales, charges were fixed by regulation. This change brought Public Trust into line with the New Zealand private sector trustee companies which have statutory power to set their charges subject to certain limitations. The principal limitation is that the maximum total charges for administering an estate cannot exceed five per cent of the income and capital of the trust assets.
- 6.37 Rather than rolling over the equivalent of the previous commission based fee system a hybrid fee structure was introduced which was intended to reduce charges. This reflected a strategic decision by the Board and management to aggressively grow Public Trust's deceased estates business. There had been increasing evidence of customer resistance to the administration charges of the former Public Trustee. These largely stemmed from comparisons between the amounts actually charged by the Public Trustee with those actually or allegedly charged by private solicitors.
- 6.38 During the 1980s New Zealand solicitors and legal firms by and large adopted time and attendance pricing structures. During the passage of the *Public Trust Act 2001* through Parliament, the New Zealand Law Society criticised Public Trustee charges for administering estates in submissions to the Select Committee on the Bill. These submissions contained the results of a survey it had undertaken of solicitors' fees for administering a deceased estate in four typical scenarios compared with the commission fees charged by the Public Trustee.
- 6.39 While the survey presented the Public Trustee's fees to be substantially higher in all four scenarios, the Public Trust argues that there were fundamental flaws in the survey methodology which made the comparisons both inaccurate and misleading. Nevertheless, the results of the survey seemed to resonate in the marketplace and increased unease at both the public and political level regarding the commission based charging system.¹⁴
- 6.40 This lead to the newly formed Public Trust Board considering changing the pricing structure from a commission/value basis to a time and attendance version of charging on fees for services basis.

¹⁴ Letter to the Committee from Public Trust New Zealand, 17 August 2005, p.4

- 6.41 A review of the possible options lead to the conclusion that a move towards adopting a full scale time and attendance based pricing structure was the only practicable course.
- 6.42 However, the new structure stopped short of totally adopting such a system. New Zealand and Tasmanian market survey evidence indicated solid customer preference for the certainty of commission based charging over risks of open-ended time and attendance fees. Further, the time recording and costing processes then in place in Public Trust were relatively unsophisticated.
- 6.43 Given that customers appeared more interested in the amounts charged rather than the method of charging, the Public Trust aimed at achieving greater comparability with private solicitors in its new pricing structure.
- 6.44 The table below compares the charges between solicitors and the Public Trust under the pricing structure introduced in March 2002 under four different scenarios:
- **Scenario 1:** Only asset \$80,000 in bank with one beneficiary;
 - **Scenario 2:** House worth \$1000,000 and \$20,000 in the bank with two beneficiaries sharing equally;
 - **Scenario 3:** Assets of home worth \$300,000 and \$50,000 in investments (shares and bank account) with three beneficiaries sharing equally;
 - **Scenario 4:** Estate comprising a house worth \$250,000 and \$300,000 in investments (shares, life insurance, term deposit and debentures) with one beneficiary.¹⁵

Scenario	Solicitors charges – no charge for making a will	Solicitors charges – separate charge for making a will	Public trust post March 2002 charges	Reduction from previous commission based charges
	Mean	Mean		
1	\$900	\$1010	\$1700	1095 (39%)
2	\$1290	\$1430	\$1900	2080 (52%)
3	\$2050	\$2220	\$2200	5880 (73%)
4	\$3170	\$3240	\$4700	5380 (53%)

- 6.45 The reductions in what the Public Trust was charging its customers as a result of the new pricing schedule were substantial. It was estimated that increases in deceased estate market share would need to be 15-20% per year to off-set it.
- 6.46 However, both the Board and management recognised that drastic pricing structure changes had to be made to counteract negative public perceptions , to minimise the competitive cost advantages held by solicitors, and to protect the inflow of deceased estate business which is a key driver of the long term sustainability of the Public Trust.

¹⁵ Letter to the Committee from Public Trust New Zealand, 17 August 2005, p.5

- 6.47 Since the introduction of the March 2002 fee for service pricing structure there have been very few customer complaints regarding charges for deceased estate work. This is in contrast to the preceding years where customers openly disputed commission charges in 20-25% of cases. In addition, the previous decline in deceased estates appears to be reversing.¹⁶
- 6.48 Improved time recording facilities and better utilisation with them by staff were also factors in the decision to move to a time and attendance based model while still offering the benefits of certainty associated with fixed base fees for selected common services.
- 6.49 The fixed base fee components of the pricing structure introduced in March 2002 were refined by separating the underlying common services into two groups: those associated with obtaining a grant of administration and those relating to other estate "establishment" activities. A reappraisal of the costs of each of these types of services was also undertaken. This resulted in a subsequent reduction in the establishment fee and an introduction of a new probate fee. This has lead to a modest increase in costs to customers and a corresponding improvement in Public Trust revenue.
- 6.50 All other administration services are now charged for on a time and attendance basis.

Competition Principles

- 6.51 The NSW Public Trustee provides services in the market place in commercial competition primarily with public trustee corporations.
- 6.52 There are eight private trustee companies currently active in New South Wales. While data is not available on a state-by-state basis the Trustee Corporations Association of Australia administer approximately 11,000 deceased estates annually Australia-wide. These companies also administer assets of over \$10 billion on behalf of their clients and prepare some \$58,000 wills and 8,500 powers of attorney each year.
- 6.53 Private trustee corporations typically target the upper end of the market, that is estates over \$600,000. While the NSW Public Trustee has a legislative obligation to not refuse estates on the basis of low value, it targets its services to all socio-economic groups. However, it is limited by its legislation regarding the range of services it can provide.
- 6.54 A dividend payment and tax equivalence were introduced in 2003/2004 to provide for greater competitive parity between the Public Trustee and private trustee corporations.
- 6.55 While the fees charged by trustee corporations are regulated, they allow for greater maximum fees than the Public Trustee including the ability to charge a 1.1% Common Fund management fee. The Public Trustee is capped at 0.55% for this charge.

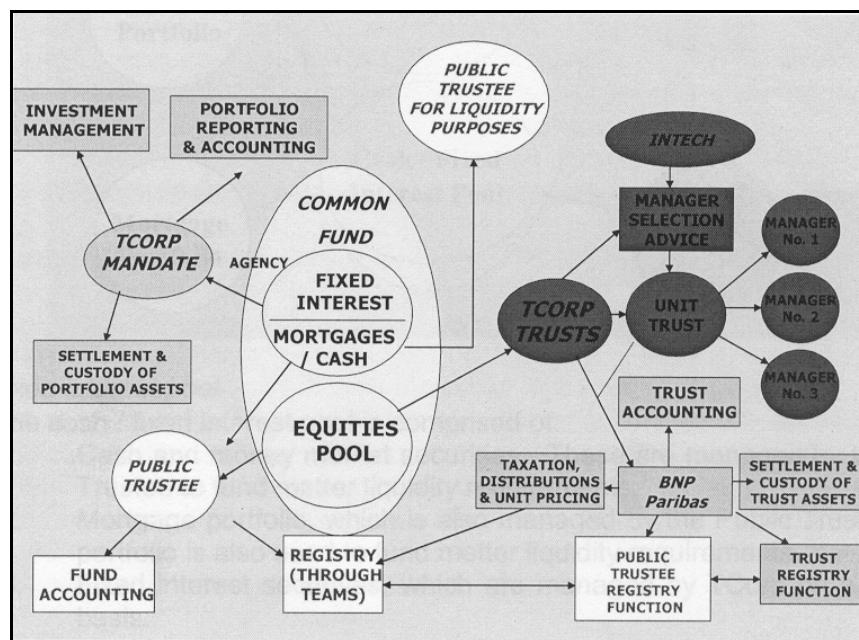
¹⁶ Letter to the Committee from Public Trust New Zealand, 17 August 2005, p.6

Chapter Seven - The Common Fund

Administration of the Common Fund

- 7.1 In March 1998 the *Trustee Amendment (Discretionary Investments) Act* came into operation. This Act fundamentally altered the way Trustees were allowed to invest clients' funds.
- 7.2 Previously investment options available to Trustees were limited and confined largely to low risk, income producing investment products such as interest bearing deposits, short term money market investments, bills of exchange and Government securities.
- 7.3 The new legislation essentially freed up Trustees to invest where they saw fit as long as the "Prudent Person Principle" was followed. This Principle requires Trustees to diversify funds into a wide range of investments, including fixed interest securities and equities, to provide for both income and capital growth.
- 7.4 The complexity involved in diversifying investments required both the NSW Public Trustee and the NSW Protective Commissioner to outsource their investments. Both agencies initially outsourced to Treasury Corporation (TCorp).
- 7.5 The Public Trustee of NSW reviewed the operation of its common fund in 2000 and commenced partial outsourcing of its financial management from July, 2001.
- 7.6 An Investment Committee was also formed and meets monthly to review the performance of the fund and to deal with issues arising out of our investment obligations under the Trustee Act.
- 7.7 The structure of the Common Fund is illustrated by the following diagram:¹⁷

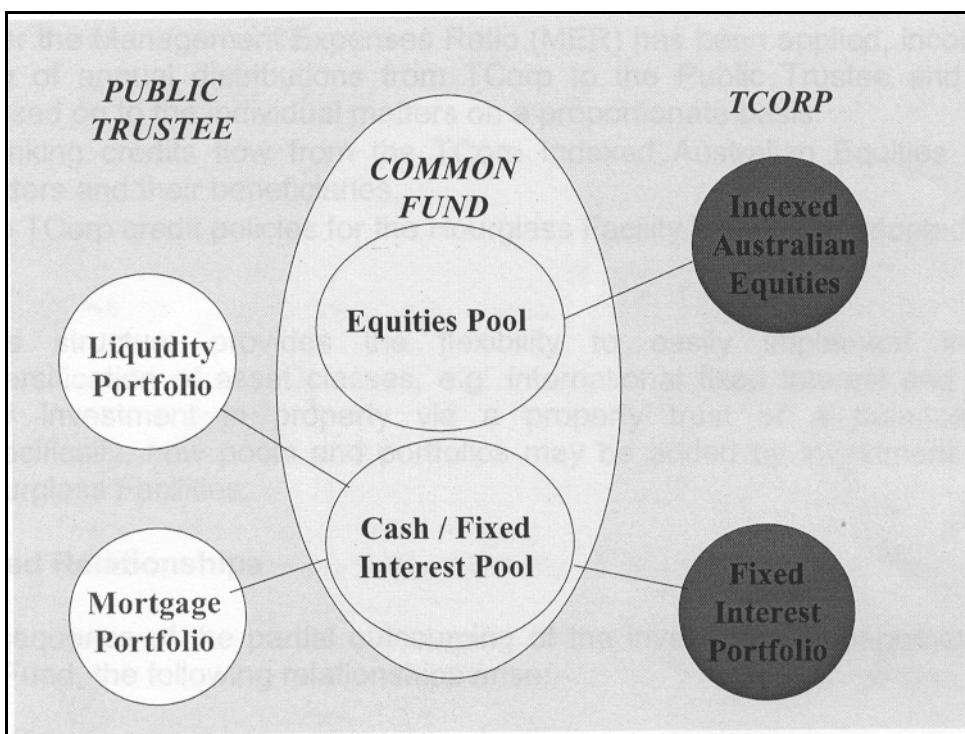
Structural Framework of the Common fund



¹⁷ Submission from the Public Trustee of NSW May 2005 p16

- 7.8 The Common Fund of the Public Trustee was established by Section 36A of the *Public Trustee Act 1913* as amended and its operation is detailed in Sections 36A and 36G of that Act. The total of all current account balances held by the Public Trustee comprise the Common Fund. The current account balances are in the names of the various trust, estates and agencies, powers of attorney etc under administration by the Public Trustee. These current account balances are referred to as "matters" in this document.
- 7.9 The Common Fund is comprised of two pools as illustrated in the following diagram. These pools are a cash / fixed interest pool and an equities pool.¹⁸

Composition of the Common Fund



Cash/Fixed Interest Pool

- 7.10 The cash / fixed interest pool is comprised of:
- Cash and money market securities. These are managed by the Public Trustee to fund matter liquidity requirements.
 - Mortgage portfolio, which is also managed by the Public Trustee. This portfolio is also used to fund matter liquidity requirements.
 - Fixed interest securities, which are managed by TCorp on a mandate basis. The cash / fixed interest pool will remain a non-unitised structure.
- 7.11 The Public Trustee has over the years set different rates of return for each class of matters in advance. This approach continues for the cash / fixed interest pool.
- 7.12 The credit policy for the fixed interest securities within the TCORP mandate is A-/A3 or greater and excludes unrated bonds.

¹⁸ Submission from the Public Trustee of NSW March 2005 p.17

Equities Pool

- 7.13 The equities pool within the Common Fund is comprised of the units held in the TCorp Indexed Australian Equities Trust. This is a unit trust and is part of the TCorp Hourglass Facility. The units are in the name of the Public Trustee and are held on a notional basis on behalf of individual matters administered by the Public Trustee. These units give the notional holder an equal proportionate interest in the pool but do not give rights over any particular part of the portfolio or any of its investments.
- 7.14 After the Management Expenses Ratio (MER) has been applied, income is by way of annual distributions from TCorp to the Public Trustee and is then passed on to the individual matters on a proportionate basis.
- 7.15 Franking credits flow from the TCorp Indexed Australian Equities Trust to matters and their beneficiaries.
- 7.16 The TCorp credit policies for the Hourglass Facility have been adopted.
- 7.17 This structure provides the flexibility to easily implement increased diversification of asset classes, e.g. international fixed interest and equities and investment in property via a property trust or a balanced fund. Specifically, new pools and portfolios may be added by investment in other Hourglass Facilities.

Outsourced Relationships

- 7.18 As a consequence of the partial outsourcing of the investment management of the Common Fund, the following relationships arise:

TCorp and Public Trustee

- 7.19 Fixed interest portfolio: TCorp manages this portfolio as agent for the Public Trustee, i.e. the Public Trustee mandates TCorp to act on its behalf in managing this portfolio. TCorp provides the required administrative services, eg transactional reporting and settlements-
- 7.20 Equities pool: The Public Trustee appoints TCorp to act as a manager of the fund managers and relies on TCorp's expertise in the selection and ongoing management of the chosen fund managers.

In tech and TCorp

- 7.21 In tech is a specialist investment advisor retained by TCorp. Their advice is outsourced by TCorp when selecting fund managers and asset classes for the Public Trustee portfolio. A component of TCorp's fee is for this service.
- 7.22 The Public Trustee and In tech do not have a direct contractual relationship under the outsourcing arrangement. However, the Investment Committee may consider it appropriate to appoint In tech or other asset consultants to conduct specific consultancy assignments as required.

BNP Paribas and Public Trustee

- BNP Paribas performs the wholesale equities registry functions required for the TCorp trust. In this role they provide transaction details, distributions and unit prices. The cost of these services is included in the MER of the trust.

- BNP Paribas also acts as a retail registry service provider for the Common Fund notionally-unitised equities pool. All of the standard retail services are provided with the exception of tax parcelling. The cost of these services is borne primarily by the matters.

Income Distributions to Matters

7.23 Matter income is sourced as follows:

- For the equities pool, TCorp provides the Public Trustee with income details for crediting to the Interest Suspense Account;
- BNP Paribas provides the Public Trustee with the annual distributions and corresponding statements for the TCorp Indexed Australian Equities Trust on a matter basis. The statements include the data required for Capital Gains Tax (CGT), franking credits etc;
- The Public Trustee sets an equivalent distribution rate for notional matter holdings;
- TCorp provides an income statement to the Public Trustee in respect of the portion of the fixed interest portfolio managed by them, for crediting to the Interest Suspense Account;
- The Public Trustee credits the Interest Suspense Account in respect of cash and mortgages; and
- For the cash / fixed interest portfolio, the Public Trustee continues periodically to set the rate of return to the matters for the semi annual distribution to clients.

Public Trustee Revenue

The Public Trustee Regulations allows a management fee of up to 0.5% of the value of the Common Fund.

Reserves

7.24 The reserves of \$73 million in the Common Fund represent the difference between the total value of the matters comprising the Common Fund and the quantum of the Common Fund.

7.25 The reserves are currently used for three main purposes:

Stabilisation of Fund Returns

- Interest stabilisation, whereby fluctuations in net Fund returns may be smoothed on a year to year basis so that beneficiaries are substantially protected from the effects of changes in interest rates; and
- Covering capital losses that may be incurred by the Fund.

Corporate Funding

- When the Public Trustee's revenue is exceeded by expenditure in anyone year, an appropriation can be made from the reserves under Section 36C of the *Public Trustee Act*.

Estates Guarantee and Reserve Account

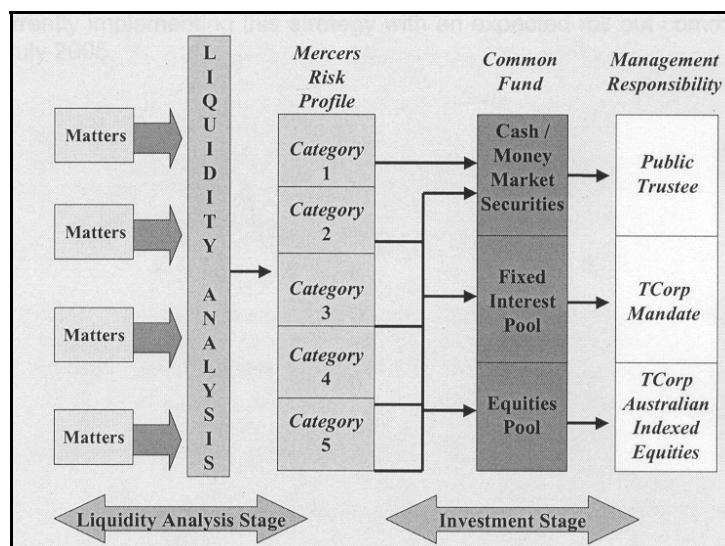
7.26 The Estate Guarantee and Reserve Account is funded from the Interest Suspense Account to cover:

1. Payment to the Common Fund of an amount equivalent to the loss upon realisation of any investment made from the Common Fund;
2. Payment of any costs incurred in protecting investments made from the Common Fund;
3. Payment of such other expenses or charges incurred in respect of the Common Fund or investments made therefrom as in the opinion of the Public Trustee are properly chargeable against the Estates Guarantee and Reserve Account;
4. Payment of any legal costs, charges and expenses not ordered by the Court to be charged against a particular estate or trust or otherwise not properly chargeable against a particular estate or trust;
5. Payment of any legal costs, charges and expenses not ordered by the Court to be charged against a particular estate or trust but otherwise properly chargeable against a particular estate or trust where there are insufficient funds in the particular estate or trust to meet such costs, charges and expenses;
6. Costs and expenses incurred by the Public Trustee in obtaining legal advice or in legal proceedings to which the Public Trustee is or is made a party where such costs and expenses are such that by reason of general interest and importance of the subject matter of the advice or proceedings, they should not, in the opinion of the Public Trustee, be charged against a particular estate or trust.

Client Profile

7.27 A key requirement of the current trustee investment obligations is to ensure that each matter is reviewed regularly to determine the appropriate investment profile. Consequently this means that a "bottom up" approach is necessary for calculating the quantum of funds to be invested in the cash / fixed interest and equities pools.

7.28 The following diagram illustrates how this approach works:



7.29 The steps involved are as follows:

- A client places a matter with the Public Trustee;
- Matter liquidity requirements are determined, with the balance being available for investment;
- The individual matters are risk profiled using the Mercers Risk Profile Model. This will determine on a scale of 1 to 5 the need for, and proportion of, exposure to non-equities and equities. The allocation between these asset classes has been based on advice from TCorp and Intech;
- The resulting portions will form part of the cash / fixed interest and equities pools of the Common Fund.

Components of Assets under Management and Common Fund Portfolio¹⁹

	2004/05 \$'000	2003/04 \$'000
Deceased Estates	614,259	587,958
Trusts	607,242	569,833
Attorney Services	178,224	192,230
Other	28,372	20,808
TOTAL NET TRUSTS	1,428,097	1,370,829
Represented by:		
Funds in Common Fund		
- Primary Portfolio	860,421	856,169
- Growth Portfolio	220,640	167,593
Estimated Unrealised Client Assets		
- Real Estate	269,461	259,952
- Investments	64,243	73,080
- Mortgages	3,842	19,173
Other Personal Property	20,434	4,592
Total Client Funds and Unrealised Assets	1,439,041	1,380,559
Deduct		
Estimated Trust Liabilities -		
Client Payable	10,944	9,730
TOTAL NET TRUSTS	1,428,097	1,370,829

Client Returns

7.30 The “at call” interest rates for Client funds in the Primary portfolio have remained high, as illustrated by the tables on the following page:

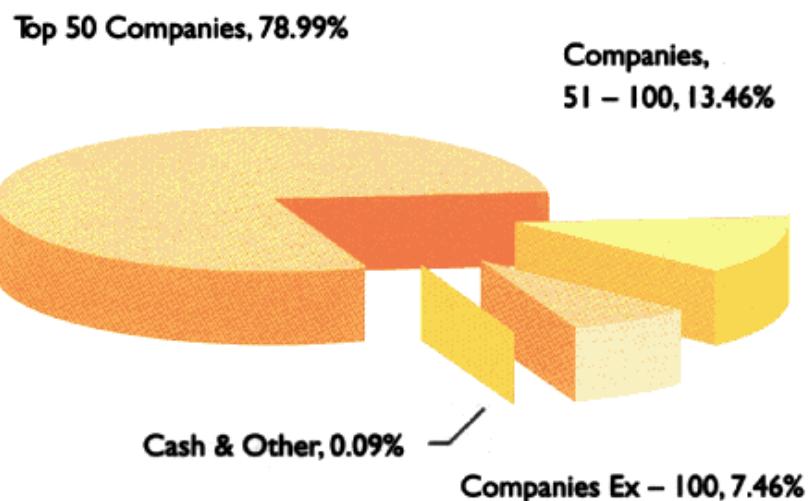
¹⁹ Public Trustee NSW Annual Report 2005 .p12

	Period	Rate
Ongoing Estates and Trusts	01.07.04 to 30.09.04	6.50% pa
	01.10.04 to 12.04.05	6.25% pa
	13.04.05 to 30.06.05	6.50% pa
Agencies	01.07.04 to 30.06.05	6.50% pa
Ordinary Estates and Trusts	01.07.04 to 30.09.04	5.00% pa
	01.10.04 to 30.06.05	4.75% pa

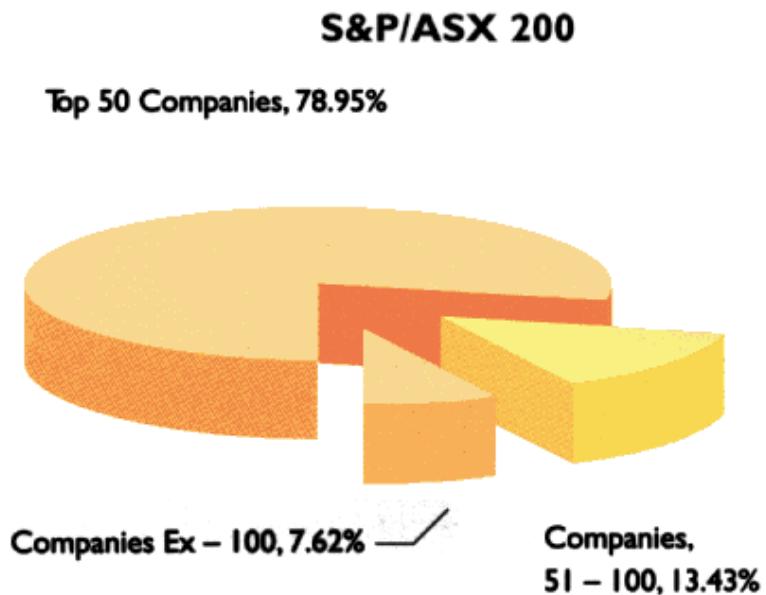
Bonds	7.72% pa
Mortgages	7.14% pa
Cash (Liquidity)	5.53% pa
Total Portfolio	7.56% pa

- 7.31 The Growth Portfolio had a return of 25.44% in 2005 as compared to 21.48% for 2003/04. The Portfolio benchmarks against the S&P/ASX 200 Accumulation Index.²⁰ The benchmark return was 26.35% as compared to 21.61% for 2003/04.

Indexed Australian Share Portfolio



²⁰ Public Trustee NSW Annual Report 2005 p13



Current Issues with the Common Fund

Surplus in the Common Fund

7.32 There is a surplus in the common fund which was created from a mismatch of income earned and distributed. A Senior Officer's Group has considered issues arising from this surplus. PTNSW has obtained Actuarial Reports on this which are currently being considered by NSW Treasury.

Amending Asset Allocation in Growth Portfolio

7.33 Advice has been obtained that an exposure to International Equities will be appropriate in order to better manage risk. The Investment Committee is currently implementing this strategy with an expected rollout commencing on 1 July 2005.

Chapter Eight - Public Comment

Beneficiary Surveys

- 8.1 Each year the Public Trustee contracts an independent survey company, currently Marketing Matrics, to obtain feedback from recent beneficiaries of estates administered by the NSW Public Trustee.
- 8.2 In addition to rating the performance of the Public Trustee in a number of key areas, respondents are also asked to nominate areas which could be improved.

2005 Survey

- 8.3 In 2005 74% of respondents rated the overall performance of the Public Trustee favourably. However, not as highly as in 2004 when 80% of respondents were favourable.
- 8.4 77% of respondents stated that they would recommend the Public Trustee to others while 81% had said this in 2004.
- 8.5 Overall there was a decrease in satisfaction levels in many factors compared to 2004. Three factors exhibited significant decreases in satisfaction. These were:
 - Information provided in the early stages about the costs of administration which was down 15 percentage points.
 - The provision of regular updates of progress in the estate which was down 10 percentage points.
 - The information provided in the early stages about the procedures involved which was down 9 percentage points.
- 8.6 The following factors were the highest unfavourable factors:
 - The time taken to complete the estate administration (24%);
 - The overall value for money (20%);
 - The provision of regular updates of progress in the estate (18%);
 - The information they provided in the early stages about the costs of administration (15%).
- 8.7 Overall, these are higher than in 2004.
- 8.8 The number one specific factor that respondents wanted improved more than any other was the time taken to complete the estate administration (24%).

2006 Survey

- 8.9 Respondents rated the overall performance of the Public Trustee favourably (71%). However, this was not as high as in 2005 when 74% responded favourably.
- 8.10 21% rated the overall performance of the Public Trustee unfavourably compared to 14% in 2005.
- 8.11 69% of respondents stated that they would recommend the Public Trustee to others compared to 77% in 2005.

- 8.12 Overall there was a decrease in satisfaction levels in all factors compared to 2005.
- 8.13 Three factors exhibited significant decreases in satisfaction. These were:
- The provision of regular updates of progress in the estate which was down 12 percentage points.
 - The time taken to complete the estate administration which was down 12 percentage points.
- 8.14 The highest unfavourable factors were:
- The time taken to complete the estate administration (37%);
 - The overall value for money (28%);
 - The provision of regular updates of progress in the estate (27%);
 - The information they provided in the early stages about the costs of administration (18%).
- 8.15 As in previous years respondents (52%) nominated that they wanted the time taken to complete the estate administration improved more than any other factor.

Submissions to the Committee

- 8.16 Submissions received by the Committee to this inquiry were primarily from non-government organizations representing persons who dealt with the Public Trustee.
- 8.17 While generally most agencies were reasonably satisfied with the Public Trustee and all recognized and were grateful for, the important role the Public Trustee played in looking after the estates of disadvantaged persons of low incomes, general comments and observations included comments upon the Public Trustee's charging structure:
- The Public Trustee of NSW is often perceived as charging high fees for services such as Executor Services and Estate Administration.²¹
- 8.18 The NSW Department of Community Services questioned whether it was appropriate for the Public Trustee to apply fees in relation to the estates of children and young people who were under the parental responsibility of the Minister for Community Services.²²
- 8.19 The Dementia Care Team from St Vincent's Community Health Service expressed concern about the Public Trustee's lack of flexible financial management practices in relation to the administration of Powers of Attorneys, fee structures and case management systems. It was considered that the Public Trustee did not allow their clients sufficient "access to limited amounts of cash for the maintenance of routines such as small local purchases and visits to the bank"
- "This is an area of case management policy, which we argue could be reviewed. In the interests of equity for all in the community, whether funds are managed privately or by the Public Trustee, it would seem a more flexible model would be appropriate. On the face of it, it would not require significant resources to implement and monitor."

²¹ Submission from Council on the Ageing p2

²² Submission from department of Community Services 18 May 2005

It is a model which is utilized by the Office of the Protective Commissioner of New South Wales.”²³

- 8.20 The Committee also received a number of informal submissions via email and telephone. The main concerns expressed in these were about the Public Trustee charges and the length of time taken to administer estates

²³ Submission from Dementia Care team, St Vincent's Community health 29 April 2005

Chapter Nine - Conclusions and Recommendations

Corporate Structure

- 9.1 The Committee generally considered that the Public Trustee appears to be operating reasonably well. There appears to have been significant strides taken within the last decade to ensure that the Public Trustee is a more robust commercial organisation.
- 9.2 The Public Trustee has placed a strong focus on both its financial performance and governance issues, including risk management, in recent years and should be commended for this.
- 9.3 In addition, the changes made to the *Trustee Act* in 1997 have allowed NSW government enterprises to diversify investments and ensure more competitive rates of return for clients.
- 9.4 The conversion of the Public Trustee to a general government non-budget agency and the accompanying requirements for the organisation to prepare an annual Statement of Business Intent, a Business Plan and for the payment of tax equivalents and dividends to NSW Treasury each year have also added a stronger commercial focus and placed the Public Trustee on a more even playing field with its competitors.
- 9.5 The concerns expressed by Members of the NSW Legislative Council during the debates on the *Public Trustee Corporation Bill 1998* show a strong level of disquiet about the Public Trustee becoming corporatised given its strong public interest function of accepting and administering estates of little or no value.
- 9.6 As no public comment was sought on the Bill at the time, it is difficult to gain anything more than anecdotal views regarding what the community perceptions and expectations are in 2006 of the role and functions of the Public Trustee.
- 9.7 However, there is undeniably a perception within elements of the community, which may be now somewhat outdated, that the Public Trustee exists at least partly for the “battler” – the legally unsophisticated working man or woman whose sole asset is likely to be his or her matrimonial home.
- 9.8 Clearly, the Public Trustee also exists for those who die intestate and those who are disadvantaged physically and/or mentally. It is also agency to which the courts can refer matters such as compensation payments for minors with confidence.
- 9.9 The Public Trustee has always been intended to not only operate commercially but also as an agency of last resort. However, unlike the NSW Office of the Protective Commissioner it has also always been able to operate as a totally self-funding organisation due to the substantial amount of its clients who have large enough estates and trusts to “pay their way”.
- 9.10 Whether the Public Trustee’s ability to operate effectively for these clients would be compromised by corporatisation and an arguably more profit driven focus is difficult to say. This certainly was a concern expressed by many of the Bill’s opponents in the Legislative Council. There was also concern about the removal of the “government guarantee” that the Public Trustee offers as an agency of Government.

- 9.11 The subsequent changes to the *Trustee Act* in 1997, the restructuring of Public Trustee investments into portfolios, and the reclassification of the Public Trustee into a government non-budget agency with all the accompanying requirements seem to have negated any further operational benefits which could have been gained by corporatisation of the Public Trustee at this time.
- 9.12 Further, the addition of a board and a director would add further layers of administration and cost.

RECOMMENDATION 1: That the NSW Public Trustee remain a general Government non-business agency

The Pricing Structure

Commission Based Fees

- 9.13 There is definitely a community perception amongst beneficiaries that the Public Trustee charges can be too expensive. The Public Trustee's own Beneficiary Surveys list cost as being the second most complained about factor concerning the Public Trustee's services.
- 9.14 These detail many individual comments on this subject. Examples include:
- Levy fee on value of estate was totally inequitable;
 - Felt the cost was not worth the time it took to settle such a small estate;
 - Fee structure was too high as it was based on a percentage (of the estate) and this has not taken into account property market increases;
 - Very straight forward estate, not much work involved but a high dollar value of assets. Meant high cost for little work.²⁴
- 9.15 Given the rapid rise in Sydney real estate prices during the last decade and the great variances between house prices in different areas of the state it is hard to argue that the commission based fee system is equitable in that it is in anyway reflective of the amount of work performed. The single beneficiary of an estate consisting of one house in Rose Bay will be paying far more in estate administration fees than the single beneficiary of an estate consisting of one house in Kandos for exactly the same amount of work.
- 9.16 Conversely another result of the commission based charging system is that the Public Trustee is not being fairly compensated for work done on complicated estates whose value may be low but not low enough to attract a Community Service Obligation reimbursement.
- 9.17 As discussed in Chapter Six, surveys done within Tasmania and New Zealand have shown a decided preference amongst testators for the certainty of commission based fees. However, given the often long time period between the making of a will and the granting of probate this may not present real certainty. It may be very difficult for the testator to estimate the future wealth of his/her assets without having a clear idea of when they will die and how the property and share market will be performing at that time.

²⁴ Public Trustee Beneficiary Survey 2006 Appendix 2 p.3

RECOMMENDATION 2: That the NSW Government consider the viability of the NSW Public Trustee adopting a fee for service pricing structure

9.18 The Public Trustee has been paying tax equivalents and dividends to the government since 2003/04 and has therefore been placed on greater parity with its private competitors. It appears inequitable that private competitors have the ability to charge a 1.1% Common Fund management fee when the NSW Public Trustee is capped at 0.55%. This disparity will be even more evident if the Public Trustee adopts a fee for service structure.

RECOMMENDATION 3: That the NSW Public Trustee maximum Common Fund management fee be increased to 1.1% in line with private sector trustees

Executor Costs versus Legal Costs

- 9.19 Aside from the issues of inequitable charging surrounding the current pricing structure, it is clear that the main misconception in relation to the Public Trustee's charges relates to beneficiaries' inability to separate the role of an executor and a solicitor.
- 9.20 The Public Trustee is a professional executor service akin to the other Trustee companies such as Perpetual Trustees. However, the Public Trustee costs are very often compared to that of solicitors. Fulfilling the administrative tasks of an executor is often complex and time consuming. There are tasks such as ascertaining and valuing estate assets, conveyancing, locating beneficiaries, disclosure obligations to the ATO, resolving disputes between beneficiaries and ultimately defending the will in court, if required.
- 9.21 A solicitor, unless nominated as an executor, only carries out legal work relating to the estate on behalf of the executor so their charges are far lower as the work done is far less exhaustive.
- 9.22 In a situation where a solicitor acts as an executor for an estate he or she can apply to the Equity Division of the NSW Supreme Court and claim an Executor's Commission. A commission is then levied upon the estate of between two and five per cent, depending upon the amount of work carried out. The solicitor will then add on his or her professional fees to this commission. Therefore, the cost of a private solicitor acting as an executor may be way above the cost of engaging the Public Trustee.
- 9.23 Given that private trustee companies generally only take high value estates, the Public Trustee's main competitors in their area of expertise are not solicitors but non-professionals such as family members who are nominated by testators as their executors as these people rarely charge for their service.
- 9.24 It is probably fair to say that some of the confusion that arises regarding the actual functions of the Public Trustee relates to their free will making activity. This is most people's initial point of contact with the Public Trustee and, as will-making is also a key task of private solicitors, confusion can arise amongst friends and relatives after the testator's death about the obligations of the Public Trustee under the will versus that of a private solicitor.

The Public Trustee as Sole Executor

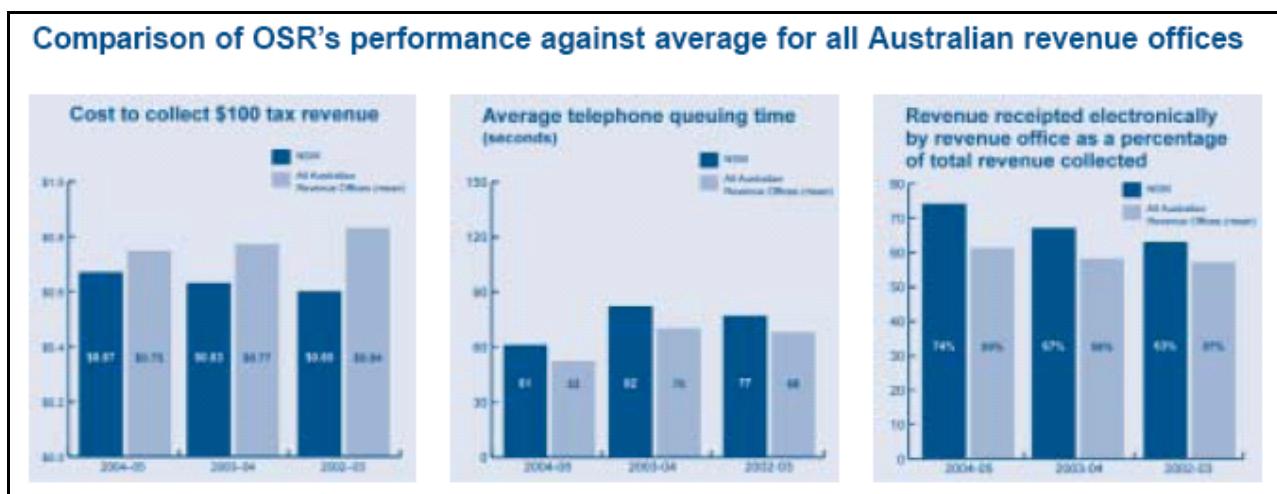
- 9.25 As discussed in Chapter Four, unlike the NSW Public Trustee, the Queensland Public Trustee offers a free will making service to everyone, regardless of whether they nominate them as executor or not.
- 9.26 The Committee considered whether this may be a service that the NSW Public Trustee would be in a position to provide. This option was largely considered due to some community perception (particularly relating to estates of less educated elderly people) that a Public Trustee made will locked testators into their services and that the free will was a “con” in that testators thought they were receiving a free service then after their death their estate was paying for it disproportionately.
- 9.27 If the Public Trustee was not required to be nominated as a sole executor then it could no longer be accused of having a conflict of interest in offering the service.
- 9.28 However, after consideration of all the issues the Committee did not believe that such a service was viable on a number of grounds:
- The service is extremely costly to provide. The Queensland Public Trustee cross-subsidises it at a cost of nearly \$3m per year;
 - Such a service is unlikely to be well accepted by the NSW Law Society or their members as it would impact significantly upon private solicitors’ workload and revenue;
 - Placing the Public Trustee in the position of co-executor exposes them to joint liability for the decisions and actions of other executors.

Case Handling Times

- 9.29 As demonstrated by the Public Trustee’s Beneficiary Surveys, this is the single biggest complaint concerning the Public Trustee in relation to their estate administration.
- 9.30 Comments included:
- Dragged out for what it was. Should have been simple and easy;
 - The whole process was painstakingly slow;
 - Our mother’s will only took 3 months through a solicitor, our father’s through the Public Trustee took 9 months when it was not difficult;
 - Too long, still not finalised after 17 months, the case should have been taken care of sooner, six months would have been satisfactory;
 - It took over two years. I was initially told three to six months. After six months I was told “another two weeks”, “another two weeks etc.” They should have been upfront at the outset.²⁵
- 9.31 The Public Trustee cites its current average delivery time for estate management as five to six months. Obviously, a number of factors can impact on this such as disputes, staffing levels or external factors such as difficulty obtaining information. The TEAMS administration system is designed to track timeliness and generates reports.

²⁵ Public Trustee Beneficiary Survey 2006 Appendix 2 p1

- 9.32 Clearly, beneficiaries want estates finalised as quickly as possible as they are not only anticipating their entitlements from estates but also, in many instances, viewing settlement of the estate as a milestone in achieving some level of “closure” following a loved one’s death.
- 9.33 Despite anecdotal evidence of some estates taking seemingly far too long, the Committee finds it difficult to assess whether the Public Trustee’s case handling times are reasonable in all cases.
- 9.34 The Committee raised the issue of benchmarking against other state jurisdictions with the Public Trustee. Many NSW public sector agencies such as the NSW Audit Office and the NSW Office of State Revenue benchmark their activities against their interstate counterparts for internal comparison purposes.
- 9.35 Some of this information is published within an agency’s annual report. The report of the NSW Office of State Revenue, for example, included the following benchmarking information in its 2004-2005 Annual Report:²⁶



- 9.36 Peter Achterstraat, the then Chief Commissioner of State Revenue, wrote to the Committee on 15 May 2006 and outlined the process which was used:

The State Revenue Offices began benchmarking many years ago and have progressively refined the process in the past five years.

The benchmarking process is outsourced to the Hay Group who collect data annually and produce the collated material. A committee of representatives for each jurisdiction oversight the process, review draft reports, and make recommendations for improvements. The group agreed the definitions of each measure to ensure that there was consistency in what was being measured and concluded.

The jurisdictions have agreed on 27 measures which are important to benchmark and they range from core revenue collection activities to service level measures and staffing measures, (e.g. sick leave and training days). These include organisational KPIs.

The annual Benchmarking Report comprises measures over time, showing the minimum, mean and maximum value for each measure and the individual revenue office for each measure.

²⁶ NSW Office of State Revenue Annual Report 2004-2005 p.4

The representatives find the process simple and useful although there are limitations. However, it does provide objective data to allow any revenue office to compare itself to like organisations and compare its progress over time.²⁷

- 9.37 The Committee commends the Offices of State Revenue for this initiative. While best practice dictates that all agencies should attempt to benchmark, very few actually are in practice.
- 9.38 This type of benchmarking process would be a useful exercise for the Public Trustees around Australia to undertake. While the Committee observes that the NSW Public Trustee does benchmark aspects of its performance against its performance in past years, comparative benchmarking between like agencies would be even more useful.
- 9.39 Peter Whitehead, the NSW Public Trustee, said comparing case management times for estates is problematic given the differences in succession laws across the states. However, the recent passing of the *Succession Bill* in the NSW Parliament and the ongoing harmonisation of the laws between the states in this area should make benchmarking easier.
- 9.40 While all the Australian jurisdictions operate in a commercial framework there are differences in the nature of activities performed. A major difference is that NSW is the only jurisdiction to have a separate Public Trustee and Protective Commissioner. However, all jurisdictions provide will making, trust, estate and attorney services and many are funded for community service obligations.
- 9.41 Despite the existing differences between the states there are still opportunities for the Public Trustees to find commonalities to benchmark.
- 9.42 Benchmarking areas of case management and service delivery between the states would, in particular, provide a clearer picture of how the NSW Public Trustee compares with its counterparts and highlight areas for improvement.

RECOMMENDATION 4: That the NSW Public Trustee comparatively benchmark case management service delivery operations, including timeframes for completion, with Public Trustees in other jurisdictions

RECOMMENDATION 5: That the NSW Public Trustee publish this benchmarking information in its Annual Report each year

Quantitative Performance Reporting

- 9.43 The Committee also examined the NSW Public Trustee's 2004-2005 Annual Report and Business Plan. While the Committee consider that the Public Trustee is reporting well on its performance in the areas of Financial Performance and Clients Funds Management, it considered that key performance indicators are needed for all result areas.
- 9.44 There should also be more information included on all major factors, events and trends affecting agency performance.

²⁷ Letter to the Committee from Chief Commissioner of State Revenue 15 May 2005

RECOMMENDATION 6: That the NSW Public Trustee develop key performance indicators for all key result areas of its operations

RECOMMENDATION 7: That the NSW Public Trustee publish these key performance indicators in its Annual Report each year