



New South Wales

Trustee Companies Amendment Bill 2009

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

In July 2008, the Council of Australian Governments agreed that the Commonwealth would assume responsibility for the regulation of trustee companies. Schedule 2 to the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* of the Commonwealth (the **Commonwealth Act**) amends the *Corporations Act 2001* of the Commonwealth (the **Corporations Act**) to give effect to the Commonwealth regulation of trustee companies. Under the new regime, the Commonwealth will have exclusive responsibility for “entity” level regulation of trustee companies’ traditional services, including licensing of the companies and regulating the fees they can charge for those traditional services. The *Trustee Companies Act 1964* (the **Principal Act**), and the rules of common law and equity, will continue to govern the functions and powers of trustee companies in New South Wales.

The object of this Bill is to amend the Principal Act consequentially on the enactment and commencement of the Commonwealth Act. The Bill:

- (a) removes the State approval mechanism for trustee companies and defines trustee companies as licensed trustee companies under the Corporations Act, and

- (b) omits provisions that will be unnecessary when the proposed amendments to the Corporations Act take effect or that are inconsistent with that Act, and
- (c) facilitates the transfer of a trustee company's business to another licensed trustee company when its licence is cancelled under the Corporations Act, and
- (d) provides for the making of transitional regulations and makes savings and transitional provisions to facilitate the transition to the new regime, and
- (e) makes consequential amendments to the *Trustee Companies Regulation 2005* and various Acts.

The Bill also amends the *Trustee Companies Regulation 2005* to prescribe certain matters under sections 15A and 15AA of the Principal Act as inserted by the *NSW Trustee and Guardian Act 2009* on 1 July 2009 relating to small estates.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation (with stated exceptions).

Schedule 1 Amendment of Trustee Companies Act 1964 No 6

Schedule 1 [1] removes spent savings and transitional provisions from the Principal Act.

Schedule 1 [2] omits definitions that will be unnecessary as a result of the repeal of various sections of the Principal Act.

Schedule 1 [3] redefines *Trustee company* as a licensed trustee company within the meaning of Chapter 5D of the Corporations Act as amended.

Schedule 1 [4] amends section 3 (2) of the Principal Act as a consequence of trustee companies being regulated under the Corporations Act as amended.

Schedule 1 [5]–[10] and [12] omit provisions that will be unnecessary as a consequence of trustee companies being regulated under the Corporations Act as amended. The provisions to be repealed relate to the following:

- (a) fees that may be charged by trustee companies for the provision of traditional trustee company services (as defined in section 601RAC of the Corporations Act as amended) and the disclosure of fees,
- (b) provision of accounts by trustee companies in relation to traditional trustee company services provided by the companies,
- (c) duties of officers and employees of trustee companies that provide traditional trustee company services, in their capacity as officers or employees of those companies,

- (d) regulation of the voting power that may be held in trustee companies that provide traditional trustee company services or that otherwise impose restrictions on the ownership or control of companies that provide such services,
- (e) the provision of financial statements,
- (f) minimum capital requirements, indemnity insurance and common funds.

Schedule 1 [11] inserts proposed sections 34A and 34B into the Principal Act.

Section 601WBA of the Corporations Act as amended enables the Australian Securities and Investments Commission (*ASIC*) to make a compulsory determination that there is to be a transfer of estate assets and liabilities from a trustee company whose licence ASIC has cancelled (the *transferring company*) to another licensed trustee company (the *receiving company*). To make this determination, ASIC must be satisfied (amongst other things) that legislation to facilitate the transfer that satisfies the requirements of section 601WBC of the Corporations Act as amended has been enacted in the State or Territory in which the transferring company and receiving company is situated. Proposed section 34A of the Principal Act will satisfy the requirements of section 601WBC for New South Wales legislation when an ASIC certificate of transfer comes into force.

Proposed section 34B exempts the transfer of the estate assets and liabilities of the transferring company to a receiving company from State taxes.

Schedule 1 [13] is an amendment by way of statute law revision to omit a provision that is superfluous because of section 42 of the *Interpretation Act 1987*.

Schedule 1 [14] omits the existing savings and transitional regulation-making power from the Principal Act. A replacement savings and transitional regulation-making power is inserted by Schedule 1 [15].

Schedule 1 [15] omits provisions that will be unnecessary as a consequence of trustee companies being regulated under the Corporations Act as amended and inserts savings and transitional provisions, including a savings and transitional regulation-making power.

Schedule 2 Amendment of other Acts and instrument

Schedule 2.4 amends the *Trustee Companies Regulation 2005* to omit provisions that will be unnecessary as a consequence of trustee companies being regulated by the Corporations Act as amended and inserts provisions relating to elections to administer small estates. In particular, the gross value of an estate which may be administered as a small estate is prescribed as being less than \$100,000.

Schedule 2.1–2.3 make consequential amendments to various Acts.

First print



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New South Wales

Trustee Companies Amendment Bill 2009

No. , 2009

A Bill for

An Act to amend the *Trustee Companies Act 1964* to facilitate the regulation of trustee companies by the Commonwealth; and for other purposes.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Trustee Companies Amendment Act 2009</i> .	3
2 Commencement	4
(1) This Act commences on a day or days to be appointed by proclamation, except as provided by subsection (2).	5 6
(2) Sections 1 and 2 and Schedule 2.4 [2] commence on the date of assent to this Act.	7 8

Schedule 1	Amendment of Trustee Companies Act	1
	1964 No 6	2
[1]	Section 2 Repeal and savings	3
	Omit the section.	4
[2]	Section 3 Interpretation	5
	Omit the definitions of <i>Commission</i> , <i>Financial institution</i> , <i>GST</i> , <i>Insurance company</i> , <i>New Tax System Price Exploitation law</i> , <i>Nominee corporation</i> , <i>Subordinated loan</i> and <i>Voting share</i> from section 3 (1).	6 7 8
[3]	Section 3 (1), definition of “Trustee company”	9
	Omit the definition. Insert instead:	10
	<i>Trustee company</i> means a licensed trustee company within the meaning of Chapter 5D of the <i>Corporations Act 2001</i> of the Commonwealth.	11 12 13
[4]	Section 3 (2)	14
	Insert “or the <i>Corporations Act 2001</i> of the Commonwealth” after “other Act”.	15
[5]	Section 3 (3)–(9)	16
	Omit the subsections.	17
[6]	Section 16 Common trust funds	18
	Omit the section.	19
[7]	Sections 17A–19F, 20A–25 and 29–29E	20
	Omit the sections.	21
[8]	Section 31 Managing director and others may represent trustee company	22 23
	Omit section 31 (3)–(6).	24
[9]	Part 3 Shareholdings in trustee companies	25
	Omit the Part.	26
[10]	Section 32B Excluded matters under section 5F of Corporations Act 2001 of the Commonwealth	27 28
	Omit the section.	29

[11] Sections 34A and 34B	1
Insert after section 34:	2
34A Compulsory transfer determinations	3
(1) This section applies if:	4
(a) the Australian Securities and Investments Commission (<i>ASIC</i>) cancels the licence of a trustee company (the <i>transferring company</i>) and makes a determination under section 601WBA of the <i>Corporations Act 2001</i> of the Commonwealth that there is to be a transfer of estate assets and liabilities from the transferring company to another licensed trustee company (the <i>receiving company</i>), and	5 6 7 8 9 10 11
(b) ASIC issues a certificate of transfer under section 601WBG of that Act for the transfer, and	12 13
(c) either the transferring company or the receiving company (or both) is registered in New South Wales.	14 15
(2) When the certificate of transfer comes into force, the receiving company is taken to be the successor in law in relation to estate assets and liabilities of the transferring company, to the extent of the transfer.	16 17 18 19
Note. Section 601WBG of the <i>Corporations Act 2001</i> of the Commonwealth requires the certificate of transfer to state when it is to come into force.	20 21 22
(3) Without limiting subsection (2):	23
(a) if the transfer is a total transfer—all of the assets and liabilities of the transferring company become assets and liabilities of the receiving company (without the need for any further conveyance, transfer, assignment or assurance), and	24 25 26 27 28
(b) if the transfer is a partial transfer—the assets and liabilities listed as referred to in section 601WBG (2) (c) of the <i>Corporations Act 2001</i> of the Commonwealth of the transferring company become assets and liabilities of the receiving company (without the need for any further conveyance, transfer, assignment or assurance), and	29 30 31 32 33 34
(c) to the extent of the transfer, the duties, obligations, immunities, rights and privileges applying to the transferring company apply to the receiving company, and	35 36 37
(d) if the certificate includes provisions of the kind referred to in section 601WBG (3) of the <i>Corporations Act 2001</i> of the Commonwealth specifying:	38 39 40

(i)	that particular things are to happen or are taken to be the case—those things are, by force of this section, taken to happen, or to be the case, in accordance with those provisions, and	1 2 3 4
(ii)	a mechanism for determining things that are to happen or are taken to be the case—things determined in accordance with the mechanism are, by force of this section, taken to happen, or to be the case, as determined in accordance with that mechanism.	5 6 7 8 9 10
(4)	The operation of this section is not to be regarded as:	11
(a)	a breach of contract or confidence or otherwise as a civil wrong, or	12 13
(b)	a breach of any instrument (including, without limitation, any provision prohibiting, restricting or regulating the assignment or transfer of assets or liabilities), or	14 15 16
(c)	an event of default under any contract or other instrument, or	17 18
(d)	giving rise to any remedy by a party to a contract or other instrument, or as causing or permitting the termination of, or exercise of rights under, any contract or other instrument.	19 20 21 22
34B	Exemption from State tax	23
(1)	In this section:	24
	<i>exempt matter</i> means the transfer of the estate assets and liabilities of a transferring company to a receiving company under Division 2 of Part 5D.6 of the <i>Corporations Act 2001</i> of the Commonwealth.	25 26 27 28
	<i>State tax</i> means application or registration fees, duty under the <i>Duties Act 1997</i> or any other tax, duty, fee or charge imposed by any Act or law of the State.	29 30 31
(2)	State tax is not payable in relation to:	32
(a)	an exempt matter, or	33
(b)	anything done because of, or for a purpose connected with or arising out of, an exempt matter.	34 35
[12]	Sections 35–36B	36
	Omit the sections.	37

[13] Section 37 Regulations	1
Omit section 37 (2).	2
[14] Section 37A Savings and transitional regulations	3
Omit the section.	4
[15] Schedule 1	5
Omit First–Third Schedules. Insert instead:	6
Schedule 1 Savings, transitional and other provisions	7
	8
Part 1 Preliminary	9
1 Regulations	10
(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:	11
	12
<i>Trustee Companies Amendment Act 2000</i>	13
<i>Trustee Companies Amendment Act 2009</i>	14
(2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.	15
(3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication on the NSW legislation website, the provision does not operate so as:	16
	17
(a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or	18
	19
(b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.	20
	21
	22
	23
	24
	25
	26
Part 2 Provisions consequent on enactment of Trustee Companies Amendment Act 2009	27
	28
2 Definitions	29
In this Part:	30
<i>amending Act</i> means the <i>Trustee Companies Amendment Act 2009</i> .	31
	32

	<i>trustee company</i> means a trustee company within the meaning of this Act as in force before the commencement of this clause.	1 2
3	General	3
	The provisions of this Part are subject to any regulations made under clause 1.	4 5
4	BNY Trust Company of Australia Limited	6
	Subject to the other provisions of this Part, this Act, as in force immediately before the commencement of Schedule 1 [3] to the amending Act, continues to apply to and in respect of any estate management function (within the meaning of section 601RAC of the <i>Corporations Act 2001</i> of the Commonwealth) carried out by BNY Trust Company of Australia Limited under any grant of administration in force before that commencement.	7 8 9 10 11 12 13
5	Court may review rate of commission	14
	Section 18 (3), as in force immediately before its repeal by the amending Act, continues to apply with respect to any application to the Court to review the commission (in whole or in part) or rate of commission charged in respect of an estate that was made before that repeal.	15 16 17 18 19
6	Charge on assets of estate or trust for advances	20
	Section 17A, as in force immediately before its repeal by the amending Act, continues to apply to any sum advanced before that repeal.	21 22 23
7	Court may order account	24
	Sections 20A–22, as in force immediately before their repeal by the amending Act, continue to apply to an application made to the Court with respect to the filing of an account, an order for an account or for an audit (as the case requires) made before that repeal.	25 26 27 28 29
8	Financial statements	30
	Section 29D, as in force immediately before its repeal by the amending Act, continues to apply to any financial statement required to be forwarded under section 29D (2) within a period occurring before that repeal.	31 32 33 34

Schedule 2	Amendment of other Acts and instrument	1
		2
2.1	Conveyancing Act 1919 No 6	3
[1]	Section 7 Definitions	4
	Omit the definition of <i>Trustee company</i> from section 7 (1). Insert instead:	5
	<i>Trustee company</i> means a licensed trustee company within the meaning of Chapter 5D of the <i>Corporations Act 2001</i> of the Commonwealth authorised by an Act of New South Wales to act as trustee.	6
		7
		8
		9
[2]	Schedule 9 Savings, transitional and other provisions	10
	Insert at the end of clause 1 (1):	11
	<i>Trustee Companies Amendment Act 2009</i>	12
[3]	Schedule 9, Part 8	13
	Insert after Part 7:	14
	Part 8 Provision consequent on enactment of Trustee Companies Amendment Act 2009	15
		16
	14 Trust corporations	17
	Any act, matter or thing done by a trustee company as a trust corporation that had effect under this Act as in force immediately before its amendment by the <i>Trustee Companies Amendment Act 2009</i> is taken to have effect under this Act as amended.	18
		19
		20
		21
2.2	Duties Act 1997 No 123	22
[1]	Section 54 Change in trustees	23
	Omit paragraph (b) of the definition of <i>special trustee</i> from section 54 (1).	24
	Insert instead:	25
	(b) a licensed trustee company within the meaning of Chapter 5D of the <i>Corporations Act 2001</i> of the Commonwealth, and	26
		27
		28
[2]	Section 54 (1), definition of “special trustee”	29
	Omit “or a trustee company referred to in paragraph (b)” from paragraph (c).	30

2.3	Probate and Administration Act 1898 No 13	1
[1]	Section 3 Definitions	2
	Omit the definition of <i>Trustee company</i> from section 3 (1). Insert instead:	3
	<i>Trustee company</i> means a licensed trustee company within the	4
	meaning of Chapter 5D of the <i>Corporations Act 2001</i> of the	5
	Commonwealth authorised by an Act of New South Wales to act	6
	as trustee.	7
[2]	Fifth Schedule Savings and transitional provisions arising from amendments to this Act	8
	Insert at the end of the Schedule with appropriate Part and clause numbering:	9
		10
	Part	11
	Provision consequent on enactment of	12
	Trustee Companies Amendment Act 2009	13
	Trustee companies	13
	Any act, matter or thing done by a trustee company that had effect	14
	under this Act as in force immediately before its amendment by	15
	the <i>Trustee Companies Amendment Act 2009</i> is taken to have	16
	effect under this Act as amended.	17
2.4	Trustee Companies Regulation 2005	18
[1]	Clause 3 Definitions	19
	Omit clause 3 (2) and (3). Insert instead:	20
	(2) Notes included in this Regulation do not form part of this	21
	Regulation.	22
[2]	Clause 3A	23
	Insert after clause 3:	24
	3A Small estates	25
	(1) For the purposes of sections 15A and 15AA of the Act, a trustee	26
	company may file an election to administer an estate if the gross	27
	value of the estate in New South Wales is less than \$100,000.	28
	(2) A notice of an election under section 15A or 15AA of the Act, or	29
	a notice under section 15AB of the Act, must state that the	30
	election has been made and may contain any other particulars of	31
	the election that the trustee company thinks fit.	32

Trustee Companies Amendment Bill 2009

Schedule 2 Amendment of other Acts and instrument

(3)	A notice of an election under section 15A or 15AA of the Act must be published:	1
		2
(a)	if the deceased person resided in New South Wales at the date of death—in a newspaper circulating in the area where the deceased resided, or	3
		4
		5
(b)	in any other case—in a Sydney daily newspaper.	6
(4)	This clause is taken to have commenced on 1 July 2009.	7
[3]	Clauses 4–8	8
	Omit the clauses and renumber clause 3A (as inserted by item [2]) as clause 4.	9
[4]	Schedules 1 and 2	10
	Omit the Schedules.	11