

NSW Trustee and Guardian Regulation 2008

[2008-364]



New South Wales

Status Information

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Provisions in force

The provisions displayed in this version of the legislation have all commenced.

Notes—

- **Previously named**
Public Trustee Regulation 2008
- **Note**
The *NSW Trustee and Guardian Regulation 2008* (formerly *Public Trustee Regulation 2008*) made under the *Public Trustee Act 1913* is on and from 1.7.2009 taken to be a regulation under the *NSW Trustee and Guardian Act 2009*. See clause 8 of Schedule 1 to the *NSW Trustee and Guardian Act 2009*.

Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the *Interpretation Act 1987*.

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NSW Trustee and Guardian Regulation 2008



New South Wales

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NSW Trustee and Guardian Regulation 2008



New South Wales

Part 1 Preliminary

1 Name of Regulation

This Regulation is the *NSW Trustee and Guardian Regulation 2008*.

2 Commencement

This Regulation commences on 1 September 2008.

Note—

This Regulation replaces the *Public Trustee Regulation 2001* which is repealed on 1 September 2008 by section 10 (2) of the *Subordinate Legislation Act 1989*.

3 Definitions

(1) In this Regulation:

estate, in Parts 2 and 3, includes trust or fund.

the Act means the *NSW Trustee and Guardian Act 2009*.

trustee includes an administrator or executor or any other person acting in a similar fiduciary capacity.

(2) Notes in the text of this Regulation do not form part of this Regulation.

Part 2 Fees, commissions and charges for trust matters

Division 1A Application

3A Application of Part

This Part applies to trust matters and matters other than matters relating to managed estates.

Division 1 Fees

4 Taxation returns

If, in any estate in respect of which the NSW Trustee acts either solely or jointly with any other person or persons as trustee, returns are required by any authority of the Commonwealth or of this or any other State or Territory for the purpose of assessment of any tax or duty, the NSW Trustee may charge to the estate:

- (a) an investigation fee, and
- (b) an additional fee for each return lodged,

that the NSW Trustee determines to be appropriate.

5 Real estate inspections and valuations

The NSW Trustee may charge the following fees:

- (a) a fee (not exceeding \$150 per hour) for any inspection, valuation or report regarding real estate,
- (b) a fee (not exceeding \$150 per hour) for preparation of specifications for repairs or renovations to any building or work,
- (c) a fee (not exceeding \$116 per hour) for a second or subsequent inspection (including a report arising from the inspection) on the progress of any such repairs or renovations.

6 Dealings affecting shares in an estate

- (1) The NSW Trustee may charge a fee (not exceeding \$68) for the notation and recording of the assignment or mortgage of, or of any dealing affecting, a beneficiary's share in an estate.
- (2) Any such fee is payable from the share of the beneficiary concerned.

7 Attendance fees

The NSW Trustee may charge the following fees:

- (a) a fee (not exceeding \$40) for attending at the Office of State Revenue for the purpose of search, or of marking or stamping documents, or at Land and Property Information New South Wales for the purpose of search, or of lodging or uplifting documents,
- (b) a fee (not exceeding \$75) for obtaining an exemplification of grant of probate or administration and preparation of a power of attorney for the purpose of collecting assets situated outside New South Wales,
- (c) a fee (not exceeding \$150 per hour) for any other attendances outside the offices

used by members of staff.

8 Work done if representation not subsequently obtained

If, for the purpose of obtaining representation in an estate, the NSW Trustee takes steps incidental to the NSW Trustee's duties but does not subsequently obtain representation, the NSW Trustee may charge to the estate a fee (not exceeding \$450) for the work involved.

9 Attempted realisation of assets

If:

- (a) the NSW Trustee attempts, at the request of a beneficiary, to realise an asset in an estate, and
- (b) the asset is subsequently transferred or delivered unconverted into money to the beneficiary,

the NSW Trustee may charge to the estate a fee (not exceeding \$300) for the work involved.

10 Carrying on business

If the NSW Trustee finds it necessary to carry on a business in connection with the NSW Trustee's administration of an estate, the NSW Trustee may charge to the estate a fee that, having regard to the work involved, the NSW Trustee considers just and reasonable.

11 Administration account and audit fee

The NSW Trustee may, on a monthly basis, charge to an estate administered by the NSW Trustee an administration account and audit fee (not exceeding \$10) on each account kept by the NSW Trustee in respect of the estate.

12 Remuneration of registrars of Local Court

If the NSW Trustee appoints a Local Court registrar to act as agent of the NSW Trustee in respect of the administration of an estate, the NSW Trustee may charge to the estate such fee as the NSW Trustee considers just and reasonable to cover the remuneration payable to the registrar for acting as such an agent.

13 Fee for management of common fund

- (1) The NSW Trustee is entitled to receive from or out of the income received by a common fund under the Act in respect of matters to which this Part applies a fee (according to the value of the work done and the services rendered) for the establishment, keeping (including the keeping of books of account) and conduct of the common fund in respect of matters to which this Part applies.

- (2) The fee is to be calculated at a rate not exceeding 1.0% per year on the capital sums invested in the common fund in respect of matters to which this Part applies during the period in respect of which the income is received or allocated.

14 Fee for trust investment planning

The NSW Trustee may charge a fee (not exceeding \$150 per hour) for preparing, managing and reviewing an investment plan in respect of a trust.

15 Trust fee for long-term trusts

- (1) The NSW Trustee is entitled to receive an annual trust fee in respect of any trust (other than a charitable trust) committed to its administration or management for 2 years or more, not exceeding the maximum fee determined in accordance with subclause (2).
- (2) The maximum annual trust fee is:
- (a) if the corpus or capital value of the trust property at the time of calculation is \$250,000 or less, an amount equal to 0.5% of the corpus or capital value, or
 - (b) if the corpus or capital value of the trust property at the time of calculation is greater than \$250,000 and not more than \$500,000, an amount equal to the sum of:
 - (i) \$1,250, and
 - (ii) 0.75% of the amount by which the corpus or capital value exceeds \$250,000, or
 - (c) if the corpus or capital value of the trust property at the time of calculation is more than \$500,000, an amount equal to the sum of:
 - (i) \$3,125, and
 - (ii) 1% of the amount by which the corpus or capital value exceeds \$500,000.
- (3) The trust fee to which the NSW Trustee is entitled under this clause is to be paid by quarterly or half-yearly instalments, as determined by the NSW Trustee, by such dates as are determined by the NSW Trustee.
- (4) A quarterly instalment is to be equal to one-quarter, and a half-yearly instalment to one-half, of the annual fee. However, if the NSW Trustee administers or manages a trust to which this clause applies for only part of the quarter or half-year period to which an instalment relates, the amount of the instalment is to be reduced on a pro rata basis, according to the proportion that the period of the NSW Trustee's administration or management of the trust in that quarter or half-year bears to 3 or 6 months, respectively.

- (5) The annual trust fee to which the NSW Trustee is entitled under this clause may be paid wholly from the corpus or capital, or wholly from the income, of the trust property or partly from the corpus or capital of the trust property and partly from the income of the trust property.
- (6) The NSW Trustee is to consult with the beneficiaries, if it is practicable to do so, before determining from where a trust fee is to be paid. The NSW Trustee must attempt such consultation at least once every two years.
- (7) In this clause:

charitable trust means a trust established for charitable purposes and includes a trust established for charitable purposes and also for non-charitable purposes.

corpus or capital value, in relation to a trust committed to the administration or management of the NSW Trustee, means the gross amount of the value of the assets (whether real or personal) of the trust without deduction of debts or liabilities secured or unsecured.

Division 2 Scales of commission

16 Commission where NSW Trustee realises capital

- (1) The NSW Trustee is authorised to charge to an estate commission in respect of any matter in which the NSW Trustee is appointed or acts (either solely or jointly with any other person or persons) as trustee in respect of the estate, calculated at the rate of:
 - (a) 4% on the first \$100,000, and
 - (b) 3% on the next \$100,000, and
 - (c) 2% on the next \$100,000, and
 - (d) 1% on any amount exceeding \$300,000.
- (2) The NSW Trustee may impose a minimum charge under this clause of \$250 in respect of an estate.
- (3) Commission under this clause is payable on a capital asset at the time it is realised unless the NSW Trustee directs that payment be deferred, either wholly or partially, until the period of any distribution.

17 Commission on capital realised by former trustees

- (1) The NSW Trustee is authorised to charge to an estate commission, at the rate of:
 - (a) 4% on the first \$100,000, and
 - (b) 3% on the next \$100,000, and

(c) 2% on the next \$100,000, and

(d) 1% on any amount exceeding \$300,000,

on such of the capital of the estate realised by a former trustee as becomes vested in the NSW Trustee.

(2) The NSW Trustee may impose a minimum charge under this clause of \$250 in respect of an estate.

(3) Commission under this clause is payable on a capital asset as at the time it becomes vested in the NSW Trustee unless the NSW Trustee directs that payment be deferred, either wholly or partially, until the period of any distribution.

18 Commission on unrealised property

(1) The NSW Trustee is authorised to charge to an estate commission on the value (as fixed by the NSW Trustee) of unrealised real or personal property (except money) transferred or delivered unconverted into money to a devisee, legatee, beneficiary, widower, widow, next of kin or other similar class of person, under any will, settlement, trust or intestacy administered by the NSW Trustee in respect of the estate, calculated at the rate of:

(a) 4% on the first \$100,000, and

(b) 3% on the next \$100,000, and

(c) 2% on the next \$100,000, and

(d) 1% on any amount exceeding \$300,000.

(2) The NSW Trustee may impose a minimum charge under this clause of \$250 in respect of an estate.

19 Commission on income

(1) The NSW Trustee is authorised to charge to an estate (other than a trust to which clause 15 applies) commission on the gross amount of income received by the NSW Trustee in respect of any matter in which the NSW Trustee is acting as trustee in respect of the estate.

(2) The commission is to be calculated at the rate of:

(a) except as provided by paragraph (b)—5.25%, or

(b) in the case of gross income received by way of rent that is subject to an agency charge for collection—2.5%.

20 Commission where NSW Trustee acts as attorney or agent

The commission that is payable to the NSW Trustee in any matter in which the NSW Trustee is acting as attorney or agent is, in respect of both capital and income, to be as arranged between the principals and the NSW Trustee.

21 Locating beneficiaries

(1) If:

- (a) the existence or identity of any or all of the persons beneficially entitled to share in an estate or of the next of kin is unknown or is not definitely established, and
- (b) it is necessary for the NSW Trustee to make inquiries or to advertise for the purpose of locating any such persons or next of kin,

the NSW Trustee is authorised to charge to the estate, or to the share of the estate in respect of which it is necessary to make inquiries or advertise, a commission that the NSW Trustee considers just and reasonable.

(2) The amount of the commission is not to exceed 5% of the net value of the estate after payment of original claims.

Division 3 Charges

22 Charges incidental to exercise of power of sale

(1) If, in respect of an estate, the NSW Trustee is authorised by an order of a court to sell land, the NSW Trustee may (unless otherwise directed by the court) impose a charge on the estate.

(2) If the land is sold, the charge on the estate is not to exceed:

- (a) 4% on the first \$100,000, and
- (b) 3% on the next \$100,000, and
- (c) 2% on the next \$100,000, and
- (d) 1% on any amount exceeding \$300,000.

(3) If the land is not sold, the amount that may be charged is not to exceed \$450.

23 Execution of documents

The NSW Trustee may (except in respect of an estate administered by the NSW Trustee) impose the following charges in respect of the execution of documents:

(a) a charge (not exceeding \$68) for executing any assurance of property by direction,

- (b) a charge (not exceeding \$68) for executing any assurance by way of confirmation,
- (c) a charge (not exceeding \$68) for executing any necessary consent for a mortgagee to exercise powers in respect of a mortgage.

24 Production of documents

The NSW Trustee may impose a charge (not exceeding \$40) for producing any deeds or documents of title.

25 Search of records

(1) The NSW Trustee may impose a charge for making a search of records held by the NSW Trustee in any case in which, in the opinion of the NSW Trustee, an amount should be charged because of the time involved or of the nature or volume of the information sought.

(2) The amount that may be charged is not to exceed \$150 per hour.

26 Legal advice and proceedings

The NSW Trustee may charge to an estate an amount to cover all costs and expenses incurred by the NSW Trustee in providing any legal advice, or in conducting any legal proceedings, in connection with that estate.

27 General power to charge for services

The NSW Trustee may charge such amount, for any service or matter not otherwise mentioned in this Regulation, as is agreed on or (in the absence of agreement) as the NSW Trustee determines to be just and reasonable.

Division 4 General

28 Fees cumulative

Any fee, commission or charge that is payable from an estate under a provision of this Part is additional to any other fee, commission or charge, and to any other cost or expense, that is payable from the estate.

29 Amount of fees to be determined by NSW Trustee

The amount of any fee, commission or charge payable in any particular case is, subject to this Part, to be determined by the NSW Trustee.

30 (Repealed)

31 Deduction of fees etc from funds

The NSW Trustee may deduct any fee, commission or charge that is payable under this Part in connection with an estate from any money that belongs to the estate and that is

held by the NSW Trustee or is under the NSW Trustee's control.

32 GST may be added to fees, commission or charges

- (1) The NSW Trustee may, in addition to any fee, commission or charge payable under this Part, charge the amount of any GST payable in respect of the service for which the fee, commission or charge is payable.
- (2) Subclause (1) does not permit the NSW Trustee to charge an amount that is greater than:
 - (a) 10% of the maximum amount payable to the NSW Trustee apart from that subclause, or
 - (b) the amount permitted under the New Tax System Price Exploitation law, whichever is the lesser.
- (3) This clause has effect despite any other provision of this Part limiting an amount that may be charged by the NSW Trustee.
- (4) In this clause:

GST has the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999* of the Commonwealth.

New Tax System Price Exploitation law means:

- (a) the New Tax System Price Exploitation Code, as applied as a law of New South Wales by the *Price Exploitation Code (New South Wales) Act 1999*, or
- (b) Part VB of the *Trade Practices Act 1974* of the Commonwealth.

Part 3 Other matters relating to deceased estates

33 Application of Part

This Part applies to trust matters.

34 Index of wills

The NSW Trustee is to maintain an index of all wills lodged with the NSW Trustee for safe custody.

35 Small estates etc

- (1) For the purposes of sections 26 and 27 of the Act, the NSW Trustee may administer property or an estate (as referred to in the subsection concerned) by election if the gross value of the property or estate does not exceed \$100,000.

- (2) For the purposes of section 28 of the Act, the NSW Trustee must file a memorandum and obtain probate or letters of administration as referred to in that subsection if the gross value of the property to be administered exceeds \$120,000.
- (3) For the purposes of section 31 of the Act, the NSW Trustee may deal with an estate without probate or administration if the net value of the estate does not exceed \$20,000.
- (4) For the purposes of section 18 of the Act, the NSW Trustee may deal with money payable by the NSW Trustee in the manner referred to in that subsection if the amount of the money does not exceed \$20,000.

36 Notices and elections under Division 1 of Part 3.2 of the Act

- (1) A notice of an election under Division 1 of Part 3.2 of the Act must state that the election has been made and may contain any other particulars of the election that the NSW Trustee thinks fit.
- (2) A notice of an election under Division 1 of Part 3.2 of the Act must be published:
 - (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
 - (b) in any other case—in a Sydney daily newspaper.

36A Notice of administration of certain small estates

The NSW Trustee is to give such notice, by advertisement or otherwise as it thinks fit, of its intention to act under section 31 of the Act.

Part 4 Managed estates

37 Interpretation

Words and expressions used in this Part have the same meaning as they have in the [Mental Health Act 2007](#).

38 Fees payable to the NSW Trustee

- (1) The prescribed fees payable to the NSW Trustee in respect of the management of estates of managed persons are as follows:
 - (a) for the management of an estate:
 - (i) for the first year—2.1% of the value of the estate, and
 - (ii) for every subsequent year—1.1% of the value of the estate,
 - (b) for the management of an investment for a managed person in a common fund—0.5% per annum of the value of the investment,

- (c) on the net annual income of a managed person in respect of whom a manager of the estate (other than the NSW Trustee) has been appointed—4% per annum,
 - (d) for the investigation, preparation or lodgment of a return required by a taxation authority in respect of an estate in which the NSW Trustee acts—such reasonable fee for the investigation, preparation or lodgment as the NSW Trustee may fix,
 - (e) for the development of a financial plan for a person in respect of whom a manager of the estate has been appointed—such reasonable fee as the NSW Trustee may fix,
 - (f) for filing, examination and passing of accounts—such fee (not exceeding \$300) as the NSW Trustee may fix,
 - (g) for any other service provided, or any other disbursement incurred, by the NSW Trustee in the administration of an estate—such reasonable fee as the NSW Trustee may fix.
- (2) The NSW Trustee must certify to the manager of an estate of a managed person:
- (a) the annual amount of the fee payable to the NSW Trustee under subclause (1) (c), and
 - (b) the name of the person who is required to pay the fee, and
 - (c) the time within which the fee is to be paid.
- (3) The NSW Trustee may, in addition to any fee prescribed under subclause (1), charge the amount of any GST payable in respect of the service for which the fee is payable.
- (4) Subclause (3) does not permit the NSW Trustee to charge an amount that is greater than:
- (a) 10% of the maximum amount payable to the NSW Trustee apart from that subclause, or
 - (b) the amount permitted under the New Tax System Price Exploitation law, whichever is the lesser.
- (5) In this clause:
- GST** has the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999* of the Commonwealth.
- New Tax System Price Exploitation law** means:
- (a) the New Tax System Price Exploitation Code, as applied as a law of New South Wales by the *Price Exploitation Code (New South Wales) Act 1999*, or

(b) Part VB of the *Trade Practices Act 1974* of the Commonwealth.

value means:

- (a) in relation to a managed person's estate (other than a managed missing person), the gross amount of the value of the assets (whether real or personal) of the estate without deduction of debts or liabilities secured or unsecured, but does not include the value of the person's principal place of residence, or
- (b) in relation to a managed missing person's estate, the gross amount of the value of the assets (whether real or personal) of the estate without deduction of debts or liabilities secured or unsecured, but does not include the value of the person's last known principal place of residence.

39 Information relating to mental health inquiry

- (1) For the purposes of section 43 (a) of the Act, the prescribed information to be given is that specified in Schedule 1.
- (2) For the purposes of section 43 (b) of the Act, the prescribed information to be given is that specified in Schedule 2.

40 Form of order or interim order that estate be managed under the Act

- (1) The Magistrate or MHRT is to complete a notice of an order or interim order made by the Magistrate or MHRT that the estate of a person be subject to management under the Act.
- (2) The notice is to be in the form specified in Schedule 3.

41 Medical superintendent to notify NSW Trustee of certain orders

- (1) The medical superintendent of a mental health facility must give written notice to the NSW Trustee of the making of an order or interim order by a Magistrate or the MHRT to the effect that the estate of a patient be subject to management under the Act.
- (2) The medical superintendent must give the written notice within 7 days of the making of any such order and must attach a copy of the order to the notice.

42 Medical superintendent to notify NSW Trustee of certain events

The medical superintendent of a mental health facility must, as soon as practicable, give written notice to the NSW Trustee of the occurrence of any of the following events in respect of a patient who is or was a managed person:

- (a) the patient's discharge from the mental health facility,
- (b) the patient's transfer from the mental health facility,

- (c) the patient's absence with or without leave from the mental health facility,
- (d) the patient's return to the mental health facility from leave,
- (e) the patient's death at the mental health facility.

43 Review by ADT of estate management decisions of NSW Trustee

All decisions made by the NSW Trustee in connection with the exercise of the NSW Trustee's functions under Division 1 of Part 4.5 of the Act are prescribed for the purposes of section 62 of the Act.

44 Copies of wills

For the purposes of section 80 (1) of the Act, a copy of a will may be certified as a true copy of the will by any person of or over the age of 18 years.

45 Information that missing person is alive

For the purposes of section 91 (3) of the Act, the NSW Trustee may take into account any relevant information provided by the Commissioner of Police for the purposes of being satisfied that a managed missing person is alive.

46 Restriction on NSW Trustee's discretion to deal with certain estates—prescribed amount: section 95 (1) (a)

For the purposes of section 95 (1) (a) of the Act, the prescribed amount is \$10,000.

Schedule 1 Information to be given to person detained

(Clause 39 (1))

If the Magistrate directs that you are to be detained in a mental health facility, the Magistrate will then decide if you are able to manage your property and affairs.

You have the right to have a barrister or solicitor represent you before the Magistrate. If you do not want a barrister or solicitor, you can have another person of your choice represent you, but you can only do this if the Magistrate agrees.

If the Magistrate thinks that you are able to manage your property and affairs, you can continue to do so. However, if you wish, you can have the NSW Trustee and Guardian manage your property and affairs. You can ask the medical superintendent to arrange for the NSW Trustee and Guardian to do this.

If the Magistrate decides that you are not able to manage your property and affairs, the Magistrate will order that your property and affairs be managed by the NSW Trustee and Guardian.

If you do not agree with the Magistrate's decision that your property and affairs should be managed by the NSW Trustee and Guardian, you have the right to appeal to the Supreme Court.

Schedule 2 Information to be given to nearest relative, guardian and

friends of person detained

(Clause 39 (2))

If the Magistrate considers the patient should be further detained, the Magistrate will also consider whether or not the patient is able to manage his or her property and affairs.

If the Magistrate considers that the patient is able to manage his or her property and affairs, then the patient can continue to do so. The patient can ask that his or her property and affairs be managed by the NSW Trustee and Guardian.

If the Magistrate is not satisfied that the patient can manage his or her property and affairs, then the Magistrate will make an order that the NSW Trustee and Guardian manage the patient's property and affairs.

If the patient does not agree with the Magistrate's decision that his or her property and affairs should be managed by the NSW Trustee and Guardian, the patient has a right to appeal to the Supreme Court.

Schedule 3 Notice of order or interim order for management

(Clause 40 (2))

An order*/interim order* has been made today that the estate of

.....

[name]

be subject to management under the [NSW Trustee and Guardian Act 2009](#).

Date

*[Signature and name of Magistrate]**

*[Signatures and names of Members of Mental Health Review Tribunal]**

[Delete if inapplicable]*