

NSW Trustee and Guardian Act 2009 No 49

[2009-49]



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—

- **Does not include amendments by**
[Bail \(Consequential Amendments\) Act 2014 No 5](#) (not commenced — to commence on 20.5.2014)
- **See also**
[Government Sector Employment Legislation Amendment Bill 2013](#)

Authorisation

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NSW Trustee and Guardian Act 2009 No 49



New South Wales

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NSW Trustee and Guardian Act 2009 No 49



New South Wales

An Act to constitute the NSW Trustee and Guardian; to confer on it functions as a trustee, executor or administrator and functions relating to the financial and other management of estates; to repeal the *Public Trustee Act 1913* and the *Protected Estates Act 1983*; and for other purposes.

Chapter 1 Preliminary

1 Name of Act

This Act is the *NSW Trustee and Guardian Act 2009*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

(1) In this Act:

adult means an individual who is aged 18 years or over.

Chief Executive Officer means the Chief Executive Officer of the NSW Trustee.

common fund—see section 104.

costs includes fees, charges, commission, disbursements, expenses and remuneration.

Director-General means the Director-General of the Attorney General's Department.

exercise a function includes perform a duty.

function includes a power, authority or duty.

legal representative has the same meaning as it has in the *Succession Act 2006*.

managed missing person—see section 38.

managed person—see section 38.

management of a trust matter includes administration of an estate.

manager—see section 38.

MHRT means the Mental Health Review Tribunal constituted under the [Mental Health Act 2007](#).

mortgage includes a charge.

NSW Trustee and Guardian or **NSW Trustee** means the NSW Trustee and Guardian constituted by this Act.

operational funds means funds of or under the control of the NSW Trustee that are not trust funds or protective funds.

patient—see section 38.

protected person—see section 38.

protective capacity means a capacity exercised by the NSW Trustee under this Act in relation to managed persons or the management of their estates.

protective funds means funds of the NSW Trustee that the NSW Trustee holds in any protective capacity.

Reserve Fund means the Fund established under section 109.

spouse means:

- (a) a husband or wife, or
- (b) the other party to a de facto relationship, in which the parties have cohabited for a period of not less than 2 years,

but where more than one person would so qualify as a spouse, means only the last person to so qualify.

Note—

“De facto relationship” is defined in section 21C of the [Interpretation Act 1987](#).

trust capacity means any of the capacities specified in section 11 (1).

trust funds means funds of the NSW Trustee that the NSW Trustee holds in any trust capacity.

trust instrument means the will, settlement or other instrument (if any) establishing or regulating the trust or other arrangement giving rise to a trust capacity or to an appointment to a trust capacity.

trust matter means any trust, estate, fund, asset, agency or affairs.

(2) Words and expressions used in this Act have the same meaning as they have in the *Probate and Administration Act 1898*.

(3) Notes included in this Act do not form part of this Act.

Note—

For the purposes of comparison, a number of provisions of this Act contain bracketed notes in headings, drawing attention (“cf”) to equivalent or comparable (though not necessarily identical) provisions of other laws. Abbreviations in the notes include PT Act (*Public Trustee Act 1913*) and PE Act (*Protected Estates Act 1983*).

4 (Repealed)

Chapter 2 Constitution of NSW Trustee

Part 2.1 Constitution and management of NSW Trustee

5 Constitution of NSW Trustee and Guardian

There is constituted by this Act a corporation with the corporate name of the NSW Trustee and Guardian.

Note—

In this Act, the NSW Trustee and Guardian is referred to as the NSW Trustee (see section 3 (1)).

6 Status of NSW Trustee

The NSW Trustee is a NSW Government agency.

7 Chief Executive Officer

- (1) The Governor may appoint a Chief Executive Officer of the NSW Trustee.
- (2) The Chief Executive Officer may be appointed for a term not exceeding 5 years but is eligible for re-appointment.
- (3) The employment of the Chief Executive Officer is subject to Part 3.1 of the *Public Sector Employment and Management Act 2002*, but is not subject to Chapter 2 of that Act.
- (4) The Governor may remove the Chief Executive Officer from office only for misbehaviour, incapacity or incompetence, despite anything to the contrary in section 77 of the *Public Sector Employment and Management Act 2002*.
- (5) The Chief Executive Officer is responsible for the day-to-day management of the affairs of the NSW Trustee.
- (6) Any act, matter or thing done in the name of, or on behalf of, the NSW Trustee by the Chief Executive Officer is taken to have been done by the NSW Trustee.

8 Acting Chief Executive Officer

- (1) The Minister may, from time to time, appoint a person to act in the office of the Chief Executive Officer during the illness or absence of the Chief Executive Officer (or during a vacancy in the office of Chief Executive Officer) and a person, while so acting, has all the functions of the Chief Executive Officer.
- (2) The Minister may, at any time, remove a person from the office of acting Chief Executive Officer.
- (3) The acting Chief Executive Officer is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine.

9 Delegation

- (1) The NSW Trustee may delegate to an authorised person any of its functions, other than this power of delegation.
- (2) The Chief Executive Officer may delegate to an authorised person any of the Chief Executive Officer's functions, other than this power of delegation.
- (3) A delegate may sub-delegate to an authorised person any function delegated by the NSW Trustee or Chief Executive Officer if the delegate is authorised in writing to do so by the NSW Trustee or Chief Executive Officer.
- (4) In this section, **authorised person** means:
 - (a) a member of staff of the Division of the Government Service comprising the group of staff who are employed under Chapter 1A of the [Public Sector Employment and Management Act 2002](#) to enable the NSW Trustee to exercise its functions, or
 - (b) a person, or committee of persons, of a class approved by the Minister or prescribed by the regulations.

Part 2.2 General functions

10 Functions generally

- (1) The NSW Trustee has such functions as are conferred or imposed on it by or under this or any other Act.
- (2) The NSW Trustee may do all such supplemental, incidental or consequential acts as may be necessary or expedient for the exercise of its functions.
- (3) However, the NSW Trustee cannot employ any staff.

Note—

Staff may be employed under Chapter 1A of the [Public Sector Employment and Management Act 2002](#) in

the Government Service to enable the NSW Trustee to exercise its functions.

11 General trustee and other functions (cf PT Act, ss 12 and 13)

- (1) The NSW Trustee may be appointed to and act in any of the following capacities:
 - (a) trustee,
 - (b) executor or administrator,
 - (c) collector of estates under an order to collect,
 - (d) agent or attorney,
 - (e) guardian or receiver of the estate of a minor,
 - (f) receiver of any other property.
- (2) The NSW Trustee may be appointed to and act in the capacity of a financial manager of the estate of a managed person.
- (3) The NSW Trustee may prepare wills and carry out professional services in connection with wills, probate and administration.
- (4) The NSW Trustee, if appointed to act in a trust or protective capacity:
 - (a) has the same liabilities, and
 - (b) is entitled to the same rights and immunities, and
 - (c) is subject to the same control and orders of any court,as a private person acting in the same capacity.

12 Appointment as trustee

- (1) The NSW Trustee may be appointed to be a trustee under a trust instrument as an original, new or additional trustee.
- (2) The NSW Trustee may be appointed as sole trustee, even though the trustees originally appointed were 2 or more, and despite the provisions of the trust instrument as to the number of trustees.
- (3) However, the NSW Trustee must not be appointed as trustee if the trust instrument contains a direction to the contrary or prohibits the appointment.

13 Refusal of appointment as trustee or manager (cf PT Act, s 12 (3) and (4))

- (1) The NSW Trustee may refuse to act in a trust capacity or may accept subject to conditions. However, the NSW Trustee must not refuse merely on the ground of the small value of the trust property or estate concerned.

- (2) The NSW Trustee must not accept:
- (a) any trust under a deed of arrangement for the benefit of creditors, or
 - (b) any trust exclusively for religious purposes, or
 - (c) any trust or trust capacity, if the instrument that creates the trust or duty concerned prohibits the appointment of the NSW Trustee.

14 Court may waive consent requirement for appointment (cf PT Act, s 17)

- (1) This section applies if a trust instrument requires the consent of a person to the appointment of a trustee.
- (2) The Supreme Court may direct that consent is not required to the appointment of the NSW Trustee if:
- (a) the person refuses or fails to consent, or
 - (b) the person is, for any reason, not capable of consenting.

15 Functions exercised jointly (cf PT Act, s 12 (1A))

- (1) This section applies if the NSW Trustee jointly accepts a trust or is appointed to act jointly in a trust capacity with another person.
- (2) The NSW Trustee and the other person jointly have and may exercise the same functions as the NSW Trustee would have and may exercise if the NSW Trustee were acting alone.
- (3) Any money or other property under the control of the NSW Trustee and the other person must be dealt with in the same manner as money or other property under the sole control of the NSW Trustee.
- (4) If money or other property is payable, transferable or deliverable to the NSW Trustee and the other person jointly:
- (a) a written receipt given by the NSW Trustee alone is a sufficient discharge for that payment, transfer or delivery, and
 - (b) any person required to make the payment, transfer or delivery is not required to make it to the other person and is not liable for any subsequent loss or misapplication of the money or property.

16 Powers of NSW Trustee relating to property and other matters (cf PT Act, s 35, PE Act, s 24)

- (1) The NSW Trustee may exercise the following functions when acting in a trust capacity or protective capacity:

- (a) receive money, rent, income and profit of real and personal property,
- (b) grant leases of property for a term not exceeding 10 years and give to a lessee an option of renewal if the aggregate duration of the lease and any such renewal does not exceed 10 years,
- (c) enter into a share-farming agreement for a period not exceeding 3 years,
- (d) surrender a lease and accept a new lease,
- (e) accept a surrender of a lease and grant a new lease,
- (f) execute a power of leasing vested in a person having a limited estate only in the property over which the power extends,
- (g) buy, sell, realise and mortgage (with or without a power of sale) real and personal property,

Note—

Mortgage includes charge (see section 3 (1)).

- (h) pay interest secured by a mortgage out of capital, if income is insufficient,
- (i) postpone the sale, calling in and conversion of any property that the NSW Trustee has a duty to sell, other than property that is of a wasting, speculative or reversionary nature,
- (j) settle, adjust and compromise a demand made by or against the estate,
- (k) exchange or join in a partition of property and give or receive money for equality of exchange or partition,
- (l) carry on a business, so far as may appear desirable for the purpose of more advantageously disposing of, or winding up, the business or preserving the business of a managed person until the managed person is able to carry it on,
- (m) agree to an alteration of the conditions of a partnership into which a managed person has entered, for the purpose of more advantageously disposing of an interest in the partnership or terminating liability,
- (n) carry out a contract entered into before the appointment of the NSW Trustee or enter into an agreement terminating the liability,
- (o) surrender, assign or otherwise dispose of, with or without consideration, onerous property,
- (p) exercise a power, or give a consent required for the exercise of a power, where the power is vested in a managed person for the benefit of the person or the power of consent is in the nature of a beneficial interest in the person,

- (q) sequester the estate under the bankruptcy laws,
- (r) take proceedings to cause a company to be placed in liquidation and vote or act by proxy at meetings of creditors or shareholders, whether the company is in liquidation or not,
- (s) bring and defend actions, suits and other proceedings,
- (t) without limiting paragraph (s), take criminal proceedings touching or concerning property,
- (u) pay rates, taxes, assessments, insurance premiums, debts, obligations, costs and expenses and other outgoings,
- (v) without limiting paragraph (u), pay the reasonable costs of the erection of a memorial or a tombstone over the grave of a deceased person or, if a deceased person is cremated, the reasonable costs of a memorial or any arrangements for the preservation of the ashes of the deceased person,
- (w) repair and insure against fire or accident any property,
- (x) bring land under the *Real Property Act 1900*,
- (y) do or omit all things, and execute all documents, necessary to carry into effect the functions of the NSW Trustee.

(2) The functions conferred by this section are in addition to, and do not restrict, any other functions of the NSW Trustee.

17 Power to use funds for benefit of minors and other incapable persons (cf PT Act, s 34)

(1) This section applies if:

- (a) a minor is entitled to money held by the NSW Trustee or is entitled to any such money contingently on attaining an age specified in an instrument creating the entitlement, or
- (b) a person (an **incapable person**) is entitled to money held by the NSW Trustee and is, in its opinion, not capable of giving a good discharge.

(2) The NSW Trustee may pay, or pay to any person it thinks fit, amounts of the money to be used for the past or future maintenance, education, advancement or benefit of the minor or incapable person (including the reimbursement of expenses already paid in that connection).

(3) The Supreme Court may, on application by the NSW Trustee, give or vary or revoke directions as to the payment or application of money held by the NSW Trustee to or in respect of a minor or incapable person or determine any related manner.

(4) Any such direction or determination exonerates the NSW Trustee from any claim or demand from any person at all.

(5) The NSW Trustee is not required to see to the application of money paid under this section.

18 Power to pay small amounts of money due to deceased persons (cf PT Act, s 34C)

(1) The NSW Trustee may pay an amount payable by the NSW Trustee to a person who has died to another person without requiring administration to be taken out in the estate of the deceased person if:

(a) the amount does not exceed the amount prescribed by the regulations for the purposes of this section, and

(b) the NSW Trustee considers that the other person is entitled to the amount.

(2) A person to whom an amount is paid under this section must apply the money as required by law in the administration of the estate.

(3) A payment made by the NSW Trustee under this section is valid against all persons and the NSW Trustee is discharged from all liability in respect of all money so paid by the NSW Trustee.

(4) This section does not affect any right of a person to claim or recover money paid under this section from a person other than the NSW Trustee.

19 No bond by NSW Trustee (cf PT Act, s 49)

No bond or other security is required from the NSW Trustee before being appointed, by or under this or any other Act, in any trust capacity.

20 Appointment of agents and other persons

(1) The NSW Trustee may appoint agents and act as an agent for other persons.

(2) The NSW Trustee may appoint a registrar or deputy registrar appointed under the [Local Court Act 2007](#) as an agent of the NSW Trustee.

(3) Any such registrar or deputy registrar has, and may exercise, the agency functions which he or she is appointed to exercise.

(4) Without limiting subsection (1) or (2), the NSW Trustee may employ another person to transact any business or do any act that is required to be done by it, or to advise or assist it, when exercising its trust or protective capacities.

(5) The NSW Trustee is not responsible for any default of any agent so employed.

21 NSW Trustee may sue itself in another capacity

- (1) The NSW Trustee, acting in one capacity, may maintain proceedings against itself acting in another capacity.
- (2) However, in any such case the NSW Trustee may apply to the Supreme Court for direction as to the manner in which the opposing interests are to be represented and must comply with the Court's directions.

Chapter 3 Deceased estates

Part 3.1 Appointment of NSW Trustee as executor or administrator or collector under order to collect

22 Grant of probate or administration to NSW Trustee (cf PT Act, s 18 (1))

- (1) The Supreme Court may grant:
 - (a) probate of a will, or
 - (b) administration of any estate (whether for general, limited or special purposes), to the NSW Trustee.
- (2) This section does not limit the generality of the powers or other functions of the Supreme Court or the NSW Trustee.

Note—

Under section 61 of the [Probate and Administration Act 1898](#), a deceased person's estate vests in the NSW Trustee until probate, administration or an order to collect is granted.

23 Intestacy where no letters of administration (cf PT Act, s 18 (1A))

- (1) The NSW Trustee is, on application, entitled as of right to a grant of administration of the estate of a person who died intestate leaving property in New South Wales if:
 - (a) letters of administration of the deceased person's estate have not been granted, or
 - (b) letters of administration of the estate granted to a person other than the NSW Trustee are revoked, or
 - (c) a person granted letters of administration of the estate dies without completing administration of the estate.
- (2) The NSW Trustee is not required to provide, and the Supreme Court may not require the provision of, any citation or consent before administration of the estate of the deceased person is granted.

- (3) However, if the NSW Trustee and any other person severally apply for the administration of the deceased person's estate, the Supreme Court may grant administration of the estate to the NSW Trustee or other person, as the Court thinks fit.

24 Transfer of administration of estate to NSW Trustee (cf PT Act, s 18 (2))

- (1) The Supreme Court may make an order transferring an estate to the NSW Trustee for administration, on application by an executor who has been granted probate or an administrator who has been granted administration. This section applies despite the existence of any other executor or administrator.
- (2) The Supreme Court may, in any such order, determine the extent to which the existing executor or executors or the existing administrator or administrators remain liable for any matters arising after the making of the order.
- (3) On an order transferring an estate being made, section 75A of the *Probate and Administration Act 1898* applies as if the NSW Trustee had been appointed as an administrator under that section.

25 Administration of estates in cases of supposed deaths (cf PT Act, s 23)

- (1) The Supreme Court may order the NSW Trustee to administer the estate of a person if it appears to the Court that there are reasonable grounds to suppose that the person has died intestate (whether in or outside New South Wales) leaving property in New South Wales.
- (2) If such an order is made, the NSW Trustee may:
 - (a) collect, manage and administer the personal estate of the person, and
 - (b) enter and manage the real estate of the person, including receiving the rents and profits of any such estate, and
 - (c) pay and discharge the debts and liabilities of the person.
- (3) The NSW Trustee may exercise any such function as if the person were certainly dead and the NSW Trustee had obtained a grant of probate or administration.
- (4) The NSW Trustee must not distribute any assets of the person's estate except in accordance with an order of the Supreme Court specially authorising the distribution.
- (5) Nothing in this section affects the application of sections 40A–40C of the *Probate and Administration Act 1898*.

Part 3.2 Small estates

Division 1 Elections to administer small estates

26 Election to administer where no previous executor or administrator (cf PT Act, s 18A (1)–(3))

- (1) The NSW Trustee may file an election to administer the estate of a deceased person who died testate or intestate in the registry of the Supreme Court, instead of applying for probate or administration, if:
 - (a) the gross value of the estate in New South Wales, as estimated by the NSW Trustee, is less than the amount prescribed by the regulations for the purposes of this section, and
 - (b) no person has obtained probate of the estate or taken out administration, and
 - (c) the NSW Trustee is entitled to obtain probate or letters of administration of the estate, and
 - (d) the NSW Trustee has made due inquiries as to the will, if the deceased person died testate.
- (2) An election must be sealed by the NSW Trustee and must set out:
 - (a) the name, residence and occupation (as far as it is known to the NSW Trustee) of the deceased person, and
 - (b) particulars of property forming the deceased person's estate, and
 - (c) the date of the deceased person's death as then known to the NSW Trustee, and
 - (d) if the deceased person died testate, state that, after due inquiries, the NSW Trustee believes that the document annexed to the election is the testator's last will and that the will has been validly executed according to the law governing the execution of wills.
- (3) On an election being filed, the NSW Trustee is taken to have been appointed by the Supreme Court as the executor of the estate or the administrator of the estate.

27 Election to administer where previous executor or administrator (cf PT Act, s 18A (3A))

- (1) The NSW Trustee may file an election to administer the unadministered estate of a deceased person who died testate or intestate in the registry of the Supreme Court, instead of taking out administration de bonis non, if:
 - (a) the executor or administrator of the estate has died and no other person has taken out administration de bonis non in respect of the estate, and

- (b) part of the estate is unadministered, and
 - (c) the gross value of the unadministered part of the estate in New South Wales is less than the amount prescribed by the regulations for the purposes of this section, and
 - (d) the NSW Trustee is entitled to take out administration de bonis non.
- (2) An election must be sealed by the NSW Trustee and must set out:
- (a) the fact of the original grant, and
 - (b) the fact of the death of the executor or administrator, and
 - (c) particulars of the property left unadministered.
- (3) On an election being filed, the NSW Trustee is taken to have been appointed by the Supreme Court as the administrator de bonis non of the estate.

28 Estate not small estate (cf PT Act, s 18A (5))

- (1) If, after an election takes effect under this Division, the NSW Trustee becomes aware that the gross value of the estate or the unadministered estate exceeds the amount prescribed for the purposes of making an election, the NSW Trustee must file a notice to that effect in the registry of the Supreme Court.
- (2) The NSW Trustee is not entitled to continue to administer the estate under this Division but must obtain probate or administration in the ordinary manner.

29 Discovery of later will (cf PT Act, s 18A (5A))

- (1) If, after an election takes effect under this Division, a later will, or a will, is found, the NSW Trustee must file a notice to that effect in the registry of the Supreme Court.
- (2) On filing the notice, the NSW Trustee ceases to be the executor or administrator of the estate and may, if it is otherwise entitled to do so, obtain probate or administration in the ordinary manner or make a new election under this Division.
- (3) If the NSW Trustee does not obtain probate or letters of administration or make a new election under this Division, the *Probate and Administration Act 1898* applies as if a grant of probate or administration to the NSW Trustee had been revoked.

Note—

See section 40D of the *Probate and Administration Act 1898*.

30 Notices and elections

- (1) The NSW Trustee must publish, in accordance with the regulations, notice of an election made by, or a notice filed by, the NSW Trustee under this Division.

- (2) A notice under this Division is to be in the form (if any) prescribed by the regulations and to contain the particulars prescribed by the regulations.
- (3) A notice that complies with this section is conclusive evidence that the NSW Trustee is entitled to administer an estate under this Division.

Division 2 Small estates for which probate or administration not required

31 No probate or administration required (cf PT Act, s 34A)

- (1) This section applies to the estate of a deceased person who died testate or intestate if:
 - (a) the net value of the estate in New South Wales is less than the amount prescribed by the regulations for the purposes of this section, and
 - (b) the NSW Trustee has no knowledge of any application having been lodged for probate of the will or for the administration of the estate, and
 - (c) the NSW Trustee has given notice in accordance with the regulations of its intention to act under this section.
- (2) The NSW Trustee may deal with the estate as if probate of the will of the deceased person or administration of the estate had been granted to the NSW Trustee.
- (3) The NSW Trustee is entitled to the same commission as it would be entitled to if the NSW Trustee had been granted probate or administration of the estate. The commission is a first charge on the estate.
- (4) The NSW Trustee must deposit any will of a deceased person with an estate to which this section applies in accordance with section 51 of the *Succession Act 2006*.

Part 3.3 General

32 NSW Trustee not required to file accounts (cf PT Act, s 35A)

- (1) The NSW Trustee, when acting alone in relation to any estate, is not required to file or pass accounts relating to the estate unless the Supreme Court, on the application by or on behalf of a person interested in the estate, so orders.
- (2) The NSW Trustee, when appointed and acting jointly with any other person in relation to any estate, is not required to file or pass accounts relating to the estate unless:
 - (a) the other person wishes to claim commission for his or her pains and trouble, or
 - (b) the Supreme Court, on application by or on behalf of a person interested in the estate, so orders.

33 Entitlement to costs (cf PT Act, ss 43A and 43B)

- (1) The NSW Trustee is entitled to the NSW Trustee's costs out of an estate for any application by the NSW Trustee for probate of any will or for administration with a will annexed.
- (2) The NSW Trustee is entitled to the NSW Trustee's costs out of an estate if the NSW Trustee applies for administration at the request of one or more beneficiaries of a deceased estate who cannot agree as to the person to be appointed administrator, whether or not the NSW Trustee is appointed administrator.
- (3) The NSW Trustee is not liable for the costs of any other person in respect of an application or estate referred to in subsection (1) or (2).

34 Proceeds of sale of goods of third person (cf PT Act, s 47)

- (1) If the NSW Trustee disposes of goods of a person other than a person for whom the NSW Trustee is acting in a trust capacity, the NSW Trustee must pay the proceeds of any such sale to the person on proof of ownership.
- (2) The NSW Trustee is not liable to pay the proceeds of the sale to any such person if the proceeds have, in good faith and without notice of the person's interest in the goods, been applied to the debts of the deceased person or in the course of the distribution or administration of the estate of the deceased person.

35 Reciprocal arrangements for intestacy (cf PT Act, ss 55 and 56)

- (1) In this section:

Public Trustee of a reciprocating State means a person or body that exercises functions equivalent to the trust capacities of the NSW Trustee in the reciprocating State.

reciprocating State means:

- (a) any other State or a Territory of Australia, or
 - (b) any country prescribed by the regulations as a reciprocating State for the purposes of this section.
- (2) The NSW Trustee may pay to the Public Trustee of a reciprocating State the proceeds of an estate of a person for which the NSW Trustee is acting as collector of the estate, after payment of creditors and any costs under this Act, if:
 - (a) the person was domiciled in the reciprocating State when the person died, and
 - (b) the Public Trustee of the reciprocating State is the administrator of the estate or is the collector of the estate in the reciprocating State.

- (3) The NSW Trustee:
- (a) is not required to see to the application of, and is not liable in respect of, any money paid to the Public Trustee of a reciprocating State under this section, and
 - (b) is not liable for any act or omission of the Public Trustee of a reciprocating State in the exercise of functions referred to in this section.
- (4) The NSW Trustee may receive from the Public Trustee of a reciprocating State the proceeds of the estate of a person in the reciprocating State that is being administered by that Public Trustee or for which that Public Trustee is acting as the collector of the estate if:
- (a) the person was domiciled in this State when the person died, and
 - (b) the NSW Trustee is the administrator of the person's estate.
- (5) The proceeds of an estate received by the NSW Trustee under this section form part of the estate of the deceased person and are to be dealt with in accordance with the law of this State.

36 Appointment of other persons to conduct business of estate (cf PT Act, s 57)

- (1) This section applies to an estate of a deceased person if the NSW Trustee is acting in a trust capacity and the testator or settler has directed in a trust instrument that a specified person is to conduct the legal or other business of the estate.
- (2) The specified person is entitled to conduct the legal or other business of the estate in accordance with the direction.
- (3) The NSW Trustee is not liable for any act or omission of the specified person in conducting the legal or other business of the estate.
- (4) The Supreme Court may, on application by the NSW Trustee, or any other person interested in the estate, on cause being shown, direct that the specified person is not to conduct the legal or other business of the estate and may appoint any other person to conduct the business concerned.

37 Disclosure of property to NSW Trustee (cf PT Act, s 54)

An association, corporation or other person must, on or as soon as is reasonably practicable after becoming aware of the vesting of the estate of a deceased person in the NSW Trustee, notify the NSW Trustee of the following matters:

- (a) any property of the deceased person that is in the possession of the association, corporation or other person,
- (b) any amount owed to the deceased person by the association, corporation or other person,

- (c) any share of the deceased person in the assets of a partnership,
- (d) in the case of a corporation, any shares held by the deceased person in the corporation,
- (e) in the case of an association, any entitlement of the deceased person to the assets of the association.

Maximum penalty: 10 penalty units.

Chapter 4 Management functions relating to persons incapable of managing their affairs

Part 4.1 Preliminary

38 Interpretation

In this Chapter:

estate of a person means the property and affairs of a person and, if only part of the estate of a person is under management under this Chapter, means only that part of the property and affairs of the person.

involuntary patient has the same meaning as it has in the [Mental Health Act 2007](#).

managed missing person means a person in respect of whom an order is in force under Part 4.4 that the person's estate be subject to management under this Act.

managed person means a protected person, managed missing person or patient whose estate is subject to management under this Act.

manager of an estate means the NSW Trustee, if management of the estate is committed to the NSW Trustee, or any person who is appointed as the manager of the estate of a managed person.

mental health facility has the same meaning as it has in the [Mental Health Act 2007](#).

mental health inquiry means a mental health inquiry under section 34 of the [Mental Health Act 2007](#).

patient has the same meaning as it has in the [Mental Health Act 2007](#).

person under guardianship has the same meaning as it has in Part 3 of the [Guardianship Act 1987](#).

protected person means a person in respect of whom an order is in force under Part 4.2 or 4.3 or the [Guardianship Act 1987](#) that the whole or any part of the person's estate be subject to management under this Act.

39 General principles applicable to Chapter

It is the duty of everyone exercising functions under this Chapter with respect to protected persons or patients to observe the following principles:

- (a) the welfare and interests of such persons should be given paramount consideration,
- (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,
- (c) such persons should be encouraged, as far as possible, to live a normal life in the community,
- (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,
- (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,
- (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,
- (g) such persons should be protected from neglect, abuse and exploitation.

40 Orders for management may apply to part of estate

An order may be made under this Chapter for the management of the whole or part of the estate of a person.

Note—

Orders for the financial management of the estates of persons under guardianship may also be made under Part 3A of the [Guardianship Act 1987](#). Such persons are protected persons for the purposes of this Act.

Part 4.2 Orders by Supreme Court that estates of persons subject to management

41 Orders by Supreme Court for management of affairs (cf PE Act, s 13)

- (1) If the Supreme Court is satisfied that a person is incapable of managing his or her affairs, the Court may:
 - (a) declare that the person is incapable of managing his or her affairs and order that the estate of the person be subject to management under this Act, and
 - (b) by order appoint a suitable person as manager of the estate of the person or commit the management of the estate of the person to the NSW Trustee.
- (2) The Supreme Court may make an order on its own motion or on the application of any person having a sufficient interest in the matter.

- (3) For the purposes of this section:
- (a) evidence of a person's capability to manage his or her own affairs may be given to the Supreme Court in any form and in accordance with any procedures that the Court thinks fit, and
 - (b) the Court may personally examine a person whose capability to manage his or her affairs is in question or dispense with any such examination, and
 - (c) the Court may otherwise inform itself as to the person's capability to manage his or her own affairs as it thinks fit.
- (4) Subsection (3) also applies to an application arising out of the operation of section 37 (2) of the *Powers of Attorney Act 2003*.

42 Orders relating to persons outside New South Wales (cf PE Act, s 14)

- (1) If a person has been found to be incapable of managing his or her own affairs by a legal inquiry in another State or a Territory, or a country to which this section applies, the Supreme Court may:
- (a) direct a copy of the inquiry or the finding of the inquiry, duly certified by an officer of the court or other authority to which the finding has been returned, to be filed with the Court, and
 - (b) declare that the person is incapable of managing his or her affairs and order that the estate of the person in this State be subject to management under this Act, and
 - (c) by order appoint a suitable person as manager of the estate of the person in this State or commit the management of the estate of the person in this State to the NSW Trustee.
- (2) The Governor may, by proclamation published on the NSW legislation website, extend the application of the provisions of this section to another country.

Part 4.3 Orders for management of estates of mental health patients

Division 1 Orders by MHRT

43 Notice to be given at mental health inquiry of possible estate management (cf PE Act, s 15)

An authorised medical officer who intends to bring a person before a mental health inquiry must:

- (a) when giving the information required to be given to the person under section 76 of the *Mental Health Act 2007*, give to the person the information prescribed by the regulations with respect to the question of the capability of the person to manage his

or her affairs, and

- (b) when giving the notice required to be given under section 76 of that Act, give to each of the persons required to be given that notice the information prescribed by the regulations with respect to the question of the capability of the person subject to the inquiry to manage his or her own affairs.

44 Consideration of capability to manage affairs at mental health inquiries

If the MHRT after conducting a mental health inquiry orders that the person subject to the inquiry be detained in a mental health facility, it must:

- (a) consider whether the person is capable of managing his or her own affairs, and
- (b) if satisfied that the person is not capable of managing his or her own affairs, order that the estate of the person be subject to management under this Act.

45 Consideration of capability of forensic patients to manage affairs (cf PE Act, s 18)

If the MHRT, after reviewing a person's case under Part 5 of the *Mental Health (Forensic Provisions) Act 1990*, orders that a person be detained in a mental health facility, it must:

- (a) consider whether the person is capable of managing his or her own affairs, and
- (b) if satisfied that the person is not capable of managing his or her own affairs, order that the estate of the person be subject to management under this Act.

46 Other orders by MHRT (cf PE Act, s 19)

- (1) The MHRT may, on application, consider a patient's capability to manage his or her affairs and, if satisfied that the patient is not capable of managing his or her affairs, must order that the estate of the person be subject to management under this Act.
- (2) An application under this section may be made by any person who has, in the opinion of the MHRT, a sufficient interest in the matter.
- (3) An order may be made under this section even though there has been no change in the capability of the patient's ability to manage his or her own affairs since that capability was last considered under this Part.

47 Interim orders (cf PE Act, s 20)

- (1) The MHRT may, if it appears to the MHRT to be necessary or convenient to do so, make an interim order under this Part for a specified period not exceeding 6 months, pending further consideration of the person's capability to manage his or her affairs.
- (2) If the further consideration of the capability of the person to whom the interim order relates to manage his or her own affairs is not completed before the expiry of the period specified in the order, the order is taken to be revoked on that expiry.

48 MHRT may review interim orders

- (1) The MHRT may, in an order made under section 47 (an *interim order*) or a subsequent order, order that the interim order be reviewed within a specified time.
- (2) The MHRT must begin any required review within the time specified in the relevant order.
- (3) The MHRT may, at any time on its own motion, review an interim order.
- (4) If an interim order would cease to have effect before the completion of a review, the order is taken to be extended until the completion of the review.
- (5) Before carrying out the review, the MHRT must cause a notice specifying the date on which, and the time and place at which, the MHRT will carry out the review to be served on each party to the proceedings. The review is taken to have commenced on the issue of such a notice.
- (6) A failure to serve notice in accordance with this section does not vitiate the decision of the MHRT on the review.

49 Appeals to Supreme Court against management orders (cf PE Act, s 21)

- (1) An appeal may be made to the Supreme Court by a person who is subject to an order made by the MHRT that the estate of the person be subject to management under this Act.
- (2) An appeal:
 - (a) is to be by way of a new hearing, and
 - (b) fresh evidence or evidence in addition to, or in substitution for, the evidence in relation to which the order in respect of which the appeal is made may be given on the appeal.
- (3) If the person to whom the order relates has appealed to the Civil and Administrative Tribunal under this Division against the order, the person may not appeal to the Supreme Court under this section against the same order. However, the person may appeal to the Court under this section if the appeal is withdrawn with the approval of the Civil and Administrative Tribunal for the purpose of enabling the Court to deal with the matter.
- (4) On an appeal, the Supreme Court may revoke or confirm the order in respect of which the appeal is made.
- (5) Neither the MHRT nor any member of the MHRT is liable for any costs relating to an order of the MHRT in respect of which an appeal is made or the appeal.

50 Appeals to NCAT against estate management orders made by MHRT (cf PE Act, s 21A)

- (1) An appeal may be made by the following persons to the Civil and Administrative Tribunal against an order by the MHRT that the estate of a person be subject to management under this Act:
 - (a) the person to whom the order relates, or
 - (b) any other person who was a party to the proceedings in which the order was made.

Note—

An appeal under this section is an external appeal to the Tribunal for the purposes of the *Civil and Administrative Tribunal Act 2013*.

- (2) An appeal may be made:
 - (a) as of right, on any question of law, or
 - (b) by leave of the Tribunal, on any other grounds.
- (3) If the person to whom the order relates has appealed to the Supreme Court under this Division against the order, the person may not appeal to the Civil and Administrative Tribunal under this section against the same order. However, the person may appeal to the Tribunal under this section if the appeal is withdrawn with the approval of the Court for the purpose of enabling the Tribunal to deal with the matter.

51 Notice of reasons for orders and appeal rights (cf PE Act, s 21B)

- (1) If the MHRT makes an order that the estate of a person be subject to management under this Act, the MHRT must, if requested to do so by any party to the proceedings (including the person to whom the order relates), provide the party with formal written reasons for the order as soon as practicable after making the order.
- (2) In providing those reasons, the MHRT must also advise the party concerned that an appeal may be made to the Civil and Administrative Tribunal against the order under this Part.

52 Estates committed to management of the NSW Trustee (cf PE Act, s 22)

The estate of a person that is ordered, under this Part, to be subject to management under this Act is committed to the management of the NSW Trustee, subject to any special order of the Supreme Court.

Division 2 Applications by patients who are not protected persons

53 NSW Trustee may undertake management of estates of certain patients (cf PE Act, s 63)

- (1) The NSW Trustee may, on application in writing, undertake the management of the

whole or part of the estate of a patient who is not a protected person.

- (2) An application may be made by a patient if the patient is 18 years or over or, if the patient is under 18 years of age, by the person having parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*) for the patient.
- (3) If the NSW Trustee undertakes the management of the whole or part of the estate of a patient, the whole or part of the estate is taken to be committed to the management of the NSW Trustee.

Part 4.4 Orders for management of estates of missing persons

54 Declaration and order where person missing (cf PE Act, s 21C)

- (1) The Supreme Court may:
 - (a) declare that a person is a missing person and order that the estate of the person (or any part of it) be subject to management under this Act, and
 - (b) by order appoint a suitable person as manager of the estate of the person or commit the management of the estate of the person to the NSW Trustee.
- (2) A declaration and order may be made for the estate of a person under this section only if the Supreme Court is satisfied that:
 - (a) the person is a missing person, and
 - (b) it is not known whether the person is alive, and
 - (c) all reasonable efforts have been made to locate the person, and
 - (d) the person's usual place of residence is in this State, and
 - (e) persons residing at the place where the person was last known to reside, or relatives or friends, with whom the person would be likely to communicate, have not heard from, or of, the person for at least 90 days, and
 - (f) it is in the best interests of the person to do so.
- (3) An application for a declaration and order under this section in relation to a person may be made by any of the following persons:
 - (a) the spouse or de facto partner of the person,
 - (b) a relative of the person,
 - (c) a business partner or employee of the person,
 - (d) the Attorney General,

(e) the NSW Trustee,

(f) any other person who has an interest in the estate of the person.

Note—

“De facto partner” is defined in section 21C of the [Interpretation Act 1987](#).

(4) On the hearing of an application for the purposes of this section, evidence may be given to the Supreme Court in such form and in accordance with such procedures as the Court thinks fit.

Part 4.5 Management of estates

Division 1 Management of estates by NSW Trustee

55 Application of Division

This Division applies in respect of the estate of a managed person that is committed to the management of the NSW Trustee.

56 General management functions (cf PE Act, s 24)

The NSW Trustee has, and may exercise, in respect of the estate of a managed person, the following functions:

- (a) all functions necessary and incidental to its management and care,
- (b) such other functions as the Supreme Court or the Civil and Administrative Tribunal (in the case of a person under guardianship) may direct or authorise the NSW Trustee to have or exercise.

Note—

See also section 16, which sets out the general powers of the NSW Trustee with respect to property.

57 NSW Trustee has all functions of managed person (cf PE Act, s 26 (1) and (1A))

- (1) For the purposes of its protective capacities in respect of a protected person or patient, the NSW Trustee has, and may exercise, all the functions the person or patient has and can exercise or would have and could exercise if under no incapacity.
- (2) For the purposes of its protective capacities for a managed missing person, the NSW Trustee has, and may exercise, all the functions that the person has and can exercise or would have and could exercise if the person were not missing.

58 Execution of documents for managed persons (cf PE Act, s 26 (2) and (3))

- (1) The NSW Trustee may execute and sign any document in the name of and on behalf of a managed person for the purpose of exercising a function in a protective capacity.

- (2) An exercise of a function by the NSW Trustee under this section:
 - (a) is as effective as if it were exercised by the managed person, and
 - (b) to the extent to which that person lacks capacity to exercise the function, is as effective as if the person did not lack capacity.
- (3) A person acting on a document executed or signed by the NSW Trustee under this section is not bound to inquire as to the NSW Trustee's power to execute or sign the document or as to the application of any money paid pursuant to any dealing with the NSW Trustee as a consequence of the document.

59 Application of money of managed estates

The NSW Trustee may apply money of the estate of a managed person towards any one or more of the following purposes:

- (a) the payment of the debts and engagements of the person and the repayment of expenses chargeable to the estate of the person,
- (b) in the event of the death of the person, the person's funeral expenses,
- (c) the maintenance of the spouse of the person or any child, parent or other person dependent upon the person, or for whose maintenance the person provided when not a managed person or would be expected to provide,
- (d) the payment of all proper costs incurred in or about the care, protection, recovery, sale, mortgage, leasing, disposal and management of the estate of the person,
- (e) the preservation and improvement of the estate of the person,
- (f) the taking up of rights to issues of new shares, or options for new shares, to which the person may become entitled by virtue of any shareholdings,
- (g) the maintenance (including future maintenance), clothing, medicine and care, past and present, of the person.

60 Arrangements during absence of patient from mental health facility (cf PE Act, s 37)

- (1) While a protected person who is a patient is absent from a mental health facility, the NSW Trustee may, at the discretion of the NSW Trustee:
 - (a) pay to the patient or to any person on behalf of the patient who gives satisfactory security to the NSW Trustee for the proper management and disposal of it, or as the patient or person directs, the whole or any part of the money standing to the credit of the current account of the patient in the common fund, and
 - (b) hand over to the patient or person, or as the patient or person directs, all or any chattels or documents forming part of the estate of the patient.

- (2) The receipt of a person in accordance with whose direction money is paid or chattels or documents are handed over under this section is an absolute release to the NSW Trustee from liability in respect of any action taken by the NSW Trustee under this section.

61 Supreme Court may give directions to NSW Trustee (cf PE Act, s 12)

- (1) The Supreme Court may give to the NSW Trustee such directions as the Court thinks necessary with respect to the exercise by the NSW Trustee of its functions in its protective capacities.
- (2) An application for directions may be made by any of the following:
- (a) the NSW Trustee,
 - (b) a managed person,
 - (c) a relative, friend or debtor of a managed person,
 - (d) any other person who has, in the opinion of the Supreme Court, a sufficient interest in the matter.

62 Administrative review by NCAT of decisions by NSW Trustee under this Division

- (1) An affected person may apply to the Civil and Administrative Tribunal for an administrative review under the [Administrative Decisions Review Act 1997](#) of a decision of the NSW Trustee that:
- (a) is made in connection with the exercise of the NSW Trustee's functions under this Division, and
 - (b) is of a class of decision prescribed by the regulations for the purposes of this section.
- (2) Each of the following is an **affected person**:
- (a) a managed person in respect of whose estate the decision was made,
 - (b) the spouse of a managed person in respect of whose estate the decision was made,
 - (c) any other person whose interests are, in the opinion of the Civil and Administrative Tribunal, adversely affected by the decision.
- (3) Subsection (1) does not apply if the decision of the NSW Trustee was made in accordance with a direction given by the Supreme Court to the NSW Trustee.

Division 2 Management of estates by other persons

63 Application of Division

This Division applies in respect of the estate of a managed person for whom a manager (other than the NSW Trustee) has been appointed, whether under this Act or under section 25M of the *Guardianship Act 1987*.

64 Orders by Supreme Court and NSW Trustee as to management of estates

- (1) The Supreme Court or the NSW Trustee may make such orders as it thinks fit in relation to the administration and management of the estates of managed persons.
- (2) The Supreme Court or the NSW Trustee may also make such orders as it thinks fit in connection with authorising, directing and enforcing the exercise of the functions of managers under this Act.
- (3) The Supreme Court may also make such orders as it thinks fit in connection with supervising the exercise of the functions of managers under this Act.
- (4) An order by the NSW Trustee is subject to the regulations or to any direction by the Supreme Court or to any order of the Civil and Administrative Tribunal (in the case of a person under guardianship).

65 Orders by Supreme Court and NSW Trustee as to property

- (1) **General power** The Supreme Court or the NSW Trustee may make such orders as appear to it necessary for rendering the property and income of a managed person available for the following purposes:
 - (a) the payment of the debts and engagements of, and otherwise for the benefit of, the person,
 - (b) the maintenance and benefit of the family of the person,
 - (c) otherwise as it thinks necessary or desirable for the care and management of the estate of the person.
- (2) **Orders as to disposal of estate** Without limiting the generality of subsection (1), the Supreme Court or the NSW Trustee may order that any property of the person be sold, mortgaged, dealt with or disposed of as the Court or the NSW Trustee thinks most expedient for the purpose of raising or securing or repaying with or without interest money which is to be or which has been applied to any one or more of the following purposes:
 - (a) payment of the person's debts or engagements,
 - (b) discharge of any encumbrance on property of the person,

- (c) payment of any debt or expenditure incurred for the maintenance (including future maintenance), or otherwise for the benefit, of the person,
- (d) payment of the costs of any proceeding under this Act or of any sale or other disposition made under this Act,
- (e) payment of such other sum or sums to such person or persons as the Court or the NSW Trustee thinks fit.

(3) **Orders as to application of money** Without limiting subsection (1), the Supreme Court or the NSW Trustee may authorise and direct the application of money comprising the whole or any part of the estate of the person to any one or more of the following purposes:

- (a) the preservation and improvement of the estate of the person,
- (b) the taking up of rights to issues of new shares, or options for new shares, to which the person may become entitled by virtue of any shareholdings,
- (c) the investment of money, being money not required for the time being for any of the other purposes specified in this subsection, in such manner as the Court or the NSW Trustee thinks fit.

(4) An order by the NSW Trustee is subject to the regulations or to any order of the Supreme Court or to any order of the Civil and Administrative Tribunal (in the case of a person under guardianship).

66 NSW Trustee may authorise and direct functions of other managers

(1) The NSW Trustee may, by order:

- (a) authorise a manager to have all, or any specified, functions necessary and incidental to the management and care of an estate and such other functions as the NSW Trustee may direct or authorise the manager to have or exercise, and
- (b) give a manager such directions in respect of the orders, authorities and directions authorised by this subsection as the NSW Trustee thinks fit.

(2) Without limiting any other provision of this Division, the NSW Trustee may authorise a manager to have functions of a kind specified in section 16.

(3) An order by the NSW Trustee is subject to the regulations or to any order of the Supreme Court or to any order of the Civil and Administrative Tribunal (in the case of a person under guardianship).

(4) This section is in addition to sections 64 and 65.

67 Managers may execute documents (cf PE Act, s 26 (2) and (3))

- (1) A manager may, in accordance with an order or direction of the Supreme Court, the NSW Trustee or the Civil and Administrative Tribunal (in the case of a person under guardianship), execute and sign any document and do any other thing in the name of and on behalf of the managed person.
- (2) An exercise of a function by a manager under this section:
 - (a) is as effective as if it were exercised by the managed person, and
 - (b) to the extent to which that person lacks capacity to exercise the function, is as effective as if the person did not lack capacity.
- (3) A person acting on a document executed or signed by a manager under this section is not bound to inquire as to the manager's power to execute or sign the document or as to the application of any money paid pursuant to any dealing with the manager as a consequence of the document.

68 Security may be required in respect of estate management (cf PE Act, s 31)

- (1) The Supreme Court or the Civil and Administrative Tribunal may require a manager it appoints to give security (including security comprising the assets of the managed estate) to the NSW Trustee in respect of the management.
- (2) A manager is not taken to have complied with a requirement under subsection (1) unless the security given has been approved by the NSW Trustee.
- (3) The NSW Trustee is to ensure that the conditions of any security provided under this section, or before the commencement of this section, in respect of the management of the estate of a managed person are complied with.
- (4) The NSW Trustee must report any failure to comply with any such condition to the Supreme Court or the Civil and Administrative Tribunal (as the case requires) immediately on becoming aware of the failure.
- (5) The provisions of Part 7A of the *Bail Act 1978* and Part 7 of the *Fines Act 1996* apply to the forfeiture of any security and to the recovery of any security so forfeited in the same way as they apply to the forfeiture of bail money and to the recovery of any bail money so forfeited.

69 Managers may lodge estate funds with NSW Trustee (cf PE Act, s 31A)

A manager may, subject to any order of the Supreme Court under this Part or of the Civil and Administrative Tribunal, lodge with the NSW Trustee any money that comprises the whole or part of the estate of the managed person.

70 Administrative review by NCAT of decisions by NSW Trustee in relation to managers

- (1) Each of the following persons may apply to the Civil and Administrative Tribunal for an administrative review under the *Administrative Decisions Review Act 1997* of a decision by the NSW Trustee under this Part in relation to the functions of a person appointed as a manager:
 - (a) the person appointed as manager,
 - (b) any other person who, in the opinion of the Civil and Administrative Tribunal, has a genuine interest in the matter to which the NSW Trustee's decision relates.
- (2) Subsection (1) does not apply if the decision by the NSW Trustee was made in accordance with a direction given by the Supreme Court to the NSW Trustee.

Division 3 Management of estates generally

71 Managed person cannot deal with estate (cf PE Act, s 23A)

- (1) The power of a managed person to deal with his or her estate is suspended in respect of so much of that estate as is subject to management under this Act.
- (2) However, the manager may, by instrument in writing, authorise the managed person to deal with so much of the estate as the manager considers appropriate and specifies in the instrument.
- (3) The authorisation may be given at any time and may be withdrawn, wholly or in part, at any time.
- (4) More than one authorisation may be given under this section.
- (5) An authorisation must not be given or withdrawn by a manager who is not the NSW Trustee without the approval of the NSW Trustee.
- (6) Each of the following persons may apply to the Civil and Administrative Tribunal for an administrative review under the *Administrative Decisions Review Act 1997* for a review of a decision of the NSW Trustee about whether or not to approve of the giving or withdrawal of an authorisation:
 - (a) the manager,
 - (b) the managed person,
 - (c) the spouse of the managed person,
 - (d) any other person who, in the opinion of the Civil and Administrative Tribunal, has a genuine interest in the matter to which the NSW Trustee's decision relates.
- (7) (Repealed)

72 Consultation by NSW Trustee (cf PE Act, s 50)

- (1) The NSW Trustee must take the following steps before taking any action in respect of the estate of a managed person:
 - (a) the NSW Trustee must determine whether the action is of such a nature that the person or a relative or relatives of the person should be consulted about the action,
 - (b) if the NSW Trustee determines that consultation should take place, the NSW Trustee must cause to be taken all steps that are reasonably practicable in the circumstances to give notice to the person or the relative or relatives of the person of the action,
 - (c) the NSW Trustee must consider any submissions made in response to the notice within the time specified in the notice.
- (2) In determining whether consultation is required in relation to the action, the NSW Trustee must consider all relevant circumstances and matters, including (without limitation) the following:
 - (a) the value of the estate,
 - (b) the value and nature of any particular property proposed to be affected,
 - (c) the consequences of the proposed action,
 - (d) the necessity or practicality of the proposed action,
 - (e) the extent (if any) to which the estate may be prejudiced by any delay in the proposed action being taken.

73 Temporary provision for maintenance (cf PE Act, s 72)

- (1) The NSW Trustee may, if of the opinion that it is desirable to do so, make an order authorising payments from any part of the estate of a managed person for the provision of maintenance and other necessary requirements of the managed person or the managed person's family, pending orders being made as to the management of the estate.
- (2) An order:
 - (a) is to be in writing addressed to the person holding the relevant part of the estate and the person to whom payment is to be made, and
 - (b) is to specify the person or persons, or the purposes, for which the payment is to be made, and
 - (c) may specify the purposes for which the payment is to be used, and

(d) is to specify the amount payable.

- (3) A person to whom an amount is paid under this section must, if directed to do so by the NSW Trustee, account to the NSW Trustee for the application of the amount.

74 Financial plans

- (1) The NSW Trustee may prepare a financial plan for the estate of a managed person and may charge a fee for the preparation of the financial plan.
- (2) The NSW Trustee may prepare a financial plan for the estate of a managed person for which it is not the manager only if requested to do so by the manager.

75 Personal items to be preserved (cf PE Act, s 51)

A manager must, as far as is reasonably practicable, ensure that any items in the estate of a managed person that are of a personal nature and that the managed person or relatives of the managed person has or have requested to be preserved are preserved.

76 Gifts

- (1) A manager may use property of the estate of a managed person for the following gifts:
- (a) a gift to a relative or close friend of the managed person that is of a seasonal nature or is given because of a special event (such as a birthday or marriage),
 - (b) a donation of a nature that the managed person made when the managed person had capacity to do so or that the managed person might reasonably be expected to make.
- (2) A manager may make a gift under this section only if the value of the gift is not more than what is reasonable having regard to all the circumstances and, in particular, the managed person's financial circumstances and the size of the managed person's estate.

77 Improvements of estate property may be charged on estate (cf PE Act, s 49)

- (1) The cost of the improvement of property of the estate of a managed person may, with interest, be charged on the property improved or on any other property of the estate.
- (2) A charge on property under this section may be created in favour of a person as trustee for the managed person, if the cost is paid from the personal estate of the managed person.
- (3) A charge on property under this section must not confer any right of sale or foreclosure during the lifetime of the managed person.
- (4) Any interest payable under a charge on property under this section must, during the

lifetime of the managed person, be at a rate that is generally able to be paid out of the income of the estate. The interest must, as far as practicable, be paid out of that income.

78 Enforcement of trustee powers (cf PE Act, s 71)

- (1) The Supreme Court may, on application by an interested person, order that the manager, on behalf of and in the name of the managed person:
 - (a) exercise a power vested in the managed person as a trustee or guardian, or
 - (b) give consent as a trustee or guardian to the exercise of a power.
- (2) The Supreme Court may, on such an application:
 - (a) make an order as to the manner in which the power is to be exercised, and
 - (b) if it is appropriate in the circumstances of the case, make any order respecting the trust property that it could have made on the appointment of a new trustee.
- (3) The manager may exercise a function in accordance with an order under this section.
- (4) If the manager, in accordance with an order of the Supreme Court under this Act, appoints a trustee on behalf of and in the name of a managed person, the trustee has the same functions as the trustee would have had if lawfully appointed by the Court.

79 Supreme Court may dissolve partnership of managed person (cf PE Act, s 69)

The Supreme Court may, on application by an interested person, by order, dissolve a partnership if a member of the partnership becomes a managed person.

80 Manager may obtain copy of will

- (1) A manager may, by notice in writing, require a person who has custody of the will of the managed person to give a copy of the will, certified in accordance with the regulations, to the manager within 14 days of the notice being given.
- (2) The Supreme Court may, on application by a person who has custody of a will, direct that the person is not required to provide a certified copy of the will to a manager of the estate.
- (3) A person must not, without reasonable excuse, fail to comply with a notice given under this section.

Maximum penalty: 5 penalty units.

81 Reciprocal arrangements for management of estates

- (1) In this section:

management functions of the NSW Trustee or the Public Trustee of a reciprocating State means functions that may be exercised in the management of the estate of a person by the NSW Trustee or the Public Trustee of the reciprocating State.

Public Trustee of a reciprocating State means a person or body who exercises functions equivalent to the protective capacities of the NSW Trustee in the reciprocating State.

reciprocating State means:

- (a) any other State or a Territory of Australia, or
 - (b) any country prescribed by the regulations as a reciprocating State for the purposes of this section.
- (2) The Public Trustee of a reciprocating State may, by notice in writing to the NSW Trustee, authorise the NSW Trustee to exercise specified management functions of the NSW Trustee in relation to the estate in New South Wales of a person who resides in the reciprocating State and is certified by the Public Trustee of the reciprocating State to be incapable of managing his or her own affairs (an **interstate protected person**).
- (3) The NSW Trustee has the same functions in relation to the management in this State of the estate of an interstate protected person as it has in the management in this State of the estate of a protected person.
- (4) The NSW Trustee must pay or deliver to the Public Trustee of the reciprocating State the balance of any property or money of the estate of an interstate protected person received by the NSW Trustee, after payment of creditors and any charges under this Act.
- (5) The NSW Trustee may, by notice in writing to the Public Trustee of a reciprocating State, authorise the Public Trustee to exercise specified management functions of the NSW Trustee in relation to the estate in the reciprocating State of a managed person.
- (6) The NSW Trustee:
- (a) is not required to see to the application of, and is not liable in respect of, any money or property paid or delivered to the Public Trustee of a reciprocating State under this section, and
 - (b) is not liable for any act or omission of the Public Trustee of a reciprocating State in the exercise of functions referred to in this section.

82 Protection of interests of managed person on partition (cf PE Act, s 47)

If property is exchanged under this Act on behalf of a managed person, it is subject to the same uses, trusts, charges, dispositions, devices and conditions that the property given in

exchange would have been subject to if it had not been exchanged.

83 Protection of interests in property of beneficiaries and other persons (cf PE Act, s 48)

- (1) Any managed person and any beneficiary of a managed person has the same interest in any surplus money or other property arising from any sale, mortgage or disposition of any property or other dealing with property under this Act as the managed person or beneficiary would have had in the property the subject of the sale, mortgage, disposition or dealing, if no sale, mortgage, disposition or dealing had been made.
- (2) The surplus money or other property arising as referred to in subsection (1) is taken to be of the same nature as the property sold, mortgaged, disposed of or dealt with.
- (3) Except as provided by subsection (4), money received on or for equality of partition and exchange, and all fines, premiums and sums of money received on the grant or renewal of a lease where the property the subject of the partition, exchange or lease was real estate of the managed person are to be considered as real estate.
- (4) Fines, premiums and sums of money received on the grant or renewal of leases of property of which the managed person was the tenant for life are to be considered as personal estate of the managed person.
- (5) The Court may make such orders as it thinks fit to give effect to this section.
- (6) In this section:

beneficiary of a managed person means a beneficiary under a will of the person or an executor, administrator or assign of the managed person.

Note—

Mortgage includes a charge (see section 3 (1)).

84 Powers of attorney

A managed person may give a power of attorney even though the estate of the person is subject to management.

Note—

See section 50 of the [Powers of Attorney Act 2003](#) for provisions relating to the suspension or termination of powers of attorney given by persons whose estates are managed under this Act.

Part 4.6 Suspension or termination of management

Division 1 Revocation of management orders

85 Termination by revocation of orders

The management of the estate of a managed person under this Act is terminated if the order that the estate be subject to management is revoked.

Note—

The Civil and Administrative Tribunal may revoke a management order relating to a person under guardianship, see Division 2 of Part 3A of the [Guardianship Act 1987](#).

86 Revocation of orders by Supreme Court (cf PE Act, s 35)

- (1) The Supreme Court, on application by a protected person and if the Court is satisfied that the protected person is capable of managing his or her affairs, may:
 - (a) revoke any declaration made that the person is incapable of managing his or her affairs, and
 - (b) revoke the order that the estate of the person be subject to management under this Act, and
 - (c) make any orders that appear to it to be necessary to give effect to the revocation of the order, including the release of the estate of the person from the control of the Court or the manager and the discharge of any manager.
- (2) For the purposes of this section:
 - (a) evidence of a person's capability to manage his or her own affairs may be given to the Supreme Court in any form and in accordance with any procedures that the Court thinks fit, and
 - (b) the Court may personally examine a person whose capability to manage his or her affairs is in question or dispense with any such examination, and
 - (c) the Court may otherwise inform itself as to the person's capability to manage his or her own affairs as it thinks fit.

87 Orders where person no longer missing (cf PE Act, s 35A)

The Supreme Court, on application by a managed missing person or other person and if satisfied that a managed missing person is alive, may:

- (a) revoke any declaration made that the person is a missing person, and
- (b) revoke the order that the estate of the person be subject to management under this Act, and
- (c) make any orders that appear to it to be necessary to give effect to the revocation of the order, including the release of the estate of the person from the control of the Court or the manager and the discharge of any manager.

88 Revocation of order by MHRT (cf PE Act, s 36)

The MHRT, on application by a protected person who was, but has ceased to be, a patient, may revoke the order that the estate of the person be subject to management under this

Act, if it is satisfied that the protected person is capable of managing his or her affairs.

Division 2 Termination by NSW Trustee

89 NSW Trustee may terminate management of protected persons or patients (cf PE Act, s 38)

- (1) The NSW Trustee may certify that management of the estate of a protected person or patient by the NSW Trustee is terminated if:
 - (a) the protected person ceases to be a person under guardianship, or
 - (b) the protected person or patient ceases to be a patient,and the NSW Trustee is satisfied that the person is capable of managing his or her own affairs.
- (2) Any order that the estate of the person is subject to management under this Act ceases to have effect on certification by the NSW Trustee.
- (3) The NSW Trustee may refer to the Supreme Court, the MHRT or the Civil and Administrative Tribunal (in the case of a person under guardianship) the question of whether a protected person or patient referred to in subsection (1) is capable of managing his or her own affairs.

90 Continuation of management after discharge etc (cf PE Act, s 41 (2))

- (1) This section applies if the NSW Trustee becomes aware that a protected person or patient whose estate is managed by the NSW Trustee:
 - (a) ceases to be under guardianship, or
 - (b) ceases to be a patient.
- (2) If the NSW Trustee is not satisfied that the person is capable of managing his or her own affairs, the NSW Trustee must do all reasonably practicable things to inform the person:
 - (a) if the person is a protected person, that the person may apply to a specified body for the revocation of the order that the person's estate be subject to management, and
 - (b) if the person is a patient who is not a protected person, that the person may apply to have the management terminated, and
 - (c) in any case, that if the order is not revoked or an application for termination is not made, management of the estate will continue at the discretion of the NSW Trustee.

- (3) The NSW Trustee may, at the discretion of the NSW Trustee, continue to manage the property and affairs of the person until:
- (a) the order that the estate of the person be subject to management under this Act is revoked or, in the case of a person who is not a protected person, an application for termination is made, or
 - (b) the NSW Trustee is satisfied that the person is capable of managing his or her affairs,
- whichever first occurs.

91 NSW Trustee may terminate management where person no longer missing (cf PE Act, s 35A)

- (1) The NSW Trustee may, if satisfied that a managed missing person is alive, certify that management of the estate of the person is terminated.
- (2) Any order that the estate of the protected person is subject to management under this Act ceases to have effect on certification by the NSW Trustee.
- (3) The regulations may make provision for or with respect to information that the NSW Trustee may take into account for the purpose of being satisfied that a managed missing person is alive.

92 NSW Trustee may terminate management of patients who are not protected persons (cf PE Act, s 64)

- (1) The NSW Trustee may, on application, terminate the management of the estate by the NSW Trustee of a patient who is not a protected person.
- (2) An application may be made by a patient if the patient is 18 years or over or, if the patient is under 18 years of age, by the person having parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*) for the patient.

Division 3 Termination on death

93 Termination on death of person

The management of the estate of a managed person under this Act is terminated on the death of the person.

94 Estate to be handed over to legal representative of deceased person (cf PE Act, s 42 (1) (b))

- (1) On the death of a managed person, the NSW Trustee:
 - (a) must pay to the legal representative of the person all money standing to the credit

of the current account of the person in the common fund, and

(b) must hand over all chattels and documents forming part of the estate of the person to the legal representative.

(2) This section is subject to any order of the Supreme Court and to section 95.

Note—

The legal representative includes the executor or administrator of an estate and other persons entitled to administer the estate, see section 55 (2) of the *Succession Act 2006*.

95 Amounts may be paid to beneficiaries or other persons (cf PE Act, s 42 (1) (a))

(1) The NSW Trustee may, at the discretion of the NSW Trustee:

(a) pay to a person claiming to be entitled in the distribution of the estate or under the will of a deceased managed person (a **beneficiary**) any sum (not exceeding the prescribed amount) out of money standing to the credit of the account of the deceased person in the common fund, or

(b) hand over to the beneficiary any chattels having a value not exceeding that amount and forming part of the estate of the deceased person or any documents having a value not exceeding that amount, or relating to property having a value not exceeding that amount, and forming part of the estate of the deceased person.

(2) The NSW Trustee may exercise functions under this section:

(a) whether or not probate of the will or letters of administration of the estate have been obtained, and

(b) whether or not legal proof is given of the right or title of the beneficiary.

96 NSW Trustee may complete transactions (cf PE Act, s 42 (2) and (3))

(1) If a managed person dies, the NSW Trustee may take such steps as are necessary to complete any transaction:

(a) that relates to the person's estate, and

(b) that was commenced before the death of the person, and

(c) to which the person was a party immediately before the person's death.

(2) This section does not empower the NSW Trustee to do anything in contravention of:

(a) the directions of any executor, administrator or trustee of the person's estate, or

(b) any court order.

Division 4 General matters relating to termination of management of estates

97 NSW Trustee may continue to act after termination event occurs (cf PE Act, s 43)

The NSW Trustee may continue to act as, and exercise the functions of, the manager of the estate of a person under this Act until:

- (a) in the case of a deceased person, the NSW Trustee is satisfied that the person has died, or
- (b) in the case of the revocation of management under this Act by order of the Supreme Court, the MHRT or by the Civil and Administrative Tribunal, a copy of the order is served on the NSW Trustee.

98 Estate to be handed over on termination of management (cf PE Act, ss 39 and 40)

- (1) If the management of the estate of a managed person by the NSW Trustee terminates (other than because of the death of the person), the NSW Trustee must, subject to any order of the Supreme Court or the Civil and Administrative Tribunal:
 - (a) pay to the person, or as the person directs, all money standing to the credit of the current account of the person in the common fund, and
 - (b) hand over to the person, or as the person directs, all chattels and documents forming part of the estate of the person.
- (2) The receipt of a person in accordance with whose direction money is paid or chattels or documents are handed over under this section is an absolute release to the NSW Trustee from liability in respect of any action taken by the NSW Trustee under this section.

99 Protected person or legal representative bound by acts of NSW Trustee (cf PE Act, s 45)

If the management of an estate of a person by the NSW Trustee is terminated, the person or the legal representative of the person is bound by and may take advantage of an act lawfully done by the NSW Trustee on behalf of the person:

- (a) as if the act had been done by the person himself or herself, and
- (b) to the extent to which the person had no capacity to do the act, as if the person were under no such incapacity.

100 Unclaimed personal effects and money (cf PE Act, s 44)

- (1) The NSW Trustee may sell all personal effects in the hands of the NSW Trustee belonging to a person, and not claimed within 2 years from the date of termination of management of the estate of the person. The proceeds of the sale must be paid into the Consolidated Fund.

- (2) All money standing to the credit of the current account of a person in the common fund at the end of 6 years from the date of termination of the management of the estate of the person must be paid to the Consolidated Fund.
- (3) The owner of the proceeds of a sale referred to in subsection (1) or of any money referred to in subsection (2) is, on proving ownership, entitled to recover the proceeds or money from the Treasurer.
- (4) Any such proceeds are, or money is, appropriated from the Consolidated Fund for the purpose of enabling its payment to the person and the Treasurer may withdraw the proceeds or money from the Consolidated Fund and pay the proceeds or money to the person accordingly.

Chapter 5 Investments and funds

Part 5.1 Investments

101 Investment of trust and protective funds

- (1) The NSW Trustee may invest trust funds and protective funds in accordance with the [Trustee Act 1925](#).
- (2) Any other manager of an estate of a managed person may invest funds of the estate in accordance with the [Trustee Act 1925](#).

102 Additional investment powers of managers relating to protective funds (cf PE Act, s 28)

- (1) **Purchase of real estate** A manager may purchase real estate out of part of the estate of a managed person if it appears to the manager to be desirable for the purpose of:
 - (a) protecting the estate from injury or deterioration in value, or
 - (b) increasing the value or facilitating the sale of other lands of the estate, or
 - (c) providing a home for the person or any dependants of the person.
- (2) **Preferred investments** A manager may invest any money that is part of the estate of a managed person and is not required under this Act to be applied for any other purpose in the form of investment preferred by the person, if the manager is aware that the person prefers a particular form of investment.
- (3) For the purpose of ascertaining whether or not a managed person prefers a particular form of investment, the manager may have regard to the following matters:
 - (a) any investments of which the manager is aware that were made by the person before the person became a managed person,
 - (b) any statements made to the manager by relatives of the person, and verified by statutory declaration, as to the views expressed to them by the person, either

before or after the person became a managed person, regarding his or her preferred forms of investment,

(c) any views expressed to the manager by the person regarding the person's preferred form of investment.

(4) **Section prevails** This section has effect despite section 101.

Part 5.2 Common funds and Reserve Fund

103 Separate accounts to be kept

The NSW Trustee must keep a separate account in a common fund with respect to each trust matter of the NSW Trustee and each estate for which the NSW Trustee is the manager.

104 Common funds

- (1) The NSW Trustee is to establish one or more funds to be known as common funds.
- (2) If there is more than one common fund, each common fund must have a distinguishing number.
- (3) The NSW Trustee may from time to time, without liability for breach of trust, pay into or withdraw money from a common fund in accordance with this Act.
- (4) Without limitation, money may be paid into a common fund in respect of one or more trust matters and in respect of one or more clients or managed estates.
- (5) Amounts credited to a common fund are held on trust by the NSW Trustee.
- (6) The NSW Trustee may:
 - (a) establish such portfolios and accounts within a common fund as it thinks fit, and
 - (b) establish a common fund on the basis of a unitised system or any other appropriate basis.

105 Amounts that may be included in common funds

- (1) A common fund may include only the following:
 - (a) trust funds or protective funds, or both,
 - (b) amounts payable to the common fund from the Reserve Fund,
 - (c) money paid into court that has been subsequently paid to the NSW Trustee for payment into a common fund,
 - (d) any other money required under any Act to be paid into a common fund under this

Act.

- (2) An amount must not be included in a common fund if:
 - (a) the relevant trust instrument prohibits investment in the common fund, or
 - (b) the amount is held by the NSW Trustee with another person who has objected in writing to the amount's inclusion in the common fund.
- (3) In this section, **court** means the following:
 - (a) the Supreme Court,
 - (b) the Land and Environment Court,
 - (c) the District Court,
 - (d) the Dust Diseases Tribunal,
 - (e) the Local Court,
 - (f) any other court or tribunal prescribed by the regulations.

106 Application of income of common funds

- (1) Income from investment of a common fund may be applied, as determined by the NSW Trustee, for the following:
 - (a) investments authorised by this Act,
 - (b) payment into the Reserve Fund,
 - (c) payment of costs incurred by the NSW Trustee in the exercise of functions under this Act,
 - (d) payments in respect of the accounts from which the fund is derived.
- (2) For the purposes of subsection (1) (d), payments (including any debits) in respect of accounts from which the fund is derived:
 - (a) are to be made periodically, and
 - (b) are to be divided between each account in the common fund in proportion to the amounts invested from those accounts and the period of the investment.
- (3) Payments for costs incurred by the NSW Trustee in the exercise of functions under this Act must not exceed the amount approved by the Director-General.

107 Policies about common funds

- (1) The NSW Trustee may determine policies, not inconsistent with this Act, relating to the

nature, management and operation of a common fund, and in particular for or with respect to all or any of the following:

- (a) the class or classes of money that may be included in the fund,
- (b) the class or classes of investment in which money to the credit of the fund may be invested,
- (c) the portfolios and accounts of a fund,
- (d) the manner in which interest is to be credited and apportioned,
- (e) the manner in which profit or loss of a capital nature is to be determined and apportioned,
- (f) the manner of entry to and exit from the fund,
- (g) the determination, and the frequency of determination, of the value of investments in the fund,
- (h) the determination of the method of valuation by reference to which investments in and withdrawals from the fund are to be made,
- (i) the intervals at which, and the method by which, payment or allocation of the income arising from the fund is to be made.

(2) The NSW Trustee may amend or replace the policies from time to time.

108 Operation of common fund

- (1) The NSW Trustee may sell investments belonging to a common fund and may withdraw any of the money belonging to a common fund for any purpose of or relating to its trust capacities or protective capacities.
- (2) The NSW Trustee may, in its discretion, at any time withdraw from a common fund any amount at credit in the common fund on account of a trust matter or a managed estate and invest the amount on the separate account of the matter or estate.
- (3) Amounts so withdrawn from a common fund, as from the date of the withdrawal, cease to have any claim for interest or otherwise from the common fund.

109 Reserve Fund

- (1) The NSW Trustee is to establish a Reserve Fund.
- (2) The Reserve Fund may be applied, as determined by the NSW Trustee, for the following:
 - (a) payment to a common fund of amounts determined by the NSW Trustee to be equivalent to the loss on realisation of any investment of the common fund,

- (b) payment of any costs incurred in protecting investments of the common fund,
 - (c) payment of any other costs incurred in respect of a common fund or the Reserve Fund or investment of the common fund or Reserve Fund that the NSW Trustee determines are appropriate to pay from the Reserve Fund,
 - (d) payment of any costs not ordered by a court to be charged against a particular trust or estate (including a managed estate) or otherwise not properly chargeable against a particular trust or estate (including a managed estate),
 - (e) payment of any costs not ordered by a court to be charged against a trust or estate (including a managed estate) but otherwise properly chargeable against a particular trust or estate (including a managed estate) where there are insufficient funds in the particular trust or estate to meet the costs,
 - (f) payment of any costs incurred by the NSW Trustee in obtaining any kind of advice or in any legal proceedings to which the NSW Trustee is or is made a party if the costs are such that, because of general interest and the importance of the subject-matter of the proceedings, they should not, in the opinion of the NSW Trustee, be charged against a particular trust or estate (including a managed estate).
- (3) The NSW Trustee may invest the Reserve Fund as if it were money held in a common fund.
- (4) In this section:

managed estate means the estate of a managed person.

110 Advances (PT Act, s 36F, PE Act, s 59)

- (1) The NSW Trustee may make advances from a common fund for any purpose of or relating to a trust matter or estate of a managed person.
- (2) The NSW Trustee may, on application by a person beneficially entitled to a trust or estate (including an estate of a managed person) managed or administered by the NSW Trustee, make an advance to the person of an amount not exceeding half of the value (as estimated by the NSW Trustee) of the person's beneficial interest.
- (3) Any advance bears interest at the rate fixed by the NSW Trustee.
- (4) The advance, and any interest on the advance, are a charge on the assets of the trust or estate, or on the specific asset or the beneficial interest, in respect of which the advance was made.
- (5) If the advance is applied towards the discharge of any debt or liability, the charge under this section ranks in the same order of priority as the debt or liability.
- (6) Any sum advanced from a common fund under this section is, for the purposes of the

rules for the fund, taken to be invested in a class of investments in which money to the credit of the fund may be invested.

Chapter 6 General

Part 6.1 Fees and charges

111 Fees (cf PT Act, s 9 (1), PE Act, s 8 (1) and (2))

- (1) Fees may be charged in respect of the functions of the NSW Trustee.
- (2) The amount of any such fees may be determined by way of percentage or otherwise and is to be prescribed by the regulations.
- (3) The NSW Trustee may, at the discretion of the NSW Trustee, waive, remit or reduce any fees payable under this section.

112 Payment of costs and fees from trust property (cf PT Act, s 9 (2) and (4))

- (1) The NSW Trustee may retain or pay out of any trust property any costs that the NSW Trustee could retain or pay if it were a private trustee. Any fees charged under this Act may be retained or paid in the same manner as, and in addition to, any such costs.
- (2) The incidence of the fees and costs as between corpus and income is to be determined by the NSW Trustee.

113 Payment of costs relating to management of estates by NSW Trustee (cf PE Act, ss 7 and 8 (3) and (4))

- (1) The NSW Trustee may retain or pay out of the estate of a managed person, or any money of any such person received by the NSW Trustee, any costs of the NSW Trustee incurred in the care and management of the estate of the person or in the supervision of the management of the estate of the person.
- (2) The costs are chargeable on and payable from the estate of the person whether or not the management under this Act of the estate of the person has terminated.

114 Costs may be recovered on summary application to Court

Any costs due or payable to the NSW Trustee may be recovered as a debt in a court of competent jurisdiction.

115 Supreme Court or NSW Trustee may order certain costs to be paid out of managed estate (cf PE Act, s 77)

- (1) The Supreme Court or the NSW Trustee may order that the following costs be paid, in accordance with the order, from the estate of a managed person:
 - (a) costs with respect to actions taken for the purposes of complying with any order

or direction under this Act, or any transfer or conveyance under Chapter 4,

(b) remuneration, of a specified amount, to the manager of the estate.

- (2) The NSW Trustee may make an order under this section only in relation to costs arising from an order or direction given by the NSW Trustee under Chapter 4 or work carried out by the manager of an estate of a managed person in connection with any such order or direction.

Part 6.2 Miscellaneous

116 NSW Trustee may require information and documents to be provided

- (1) The NSW Trustee may, by notice in writing given to a person, order the person to furnish to the NSW Trustee such information or records (or both) as the NSW Trustee requires in connection with any matter relating to the responsibilities of the NSW Trustee when acting in a protective capacity.
- (2) Any such notice must specify the manner in which the information or records are required to be furnished and a reasonable time (not less than 14 days after the giving of the notice) by which the information or records are required to be furnished.

117 Supreme Court may set aside dealing by patient (cf PE Act, s 75)

- (1) The Supreme Court may, on application by the NSW Trustee, set aside the disposition of an interest in real or personal property by a patient while a managed person and may make any consequential orders the Court thinks fit.
- (2) The NSW Trustee must give notice of an application to such persons as the Supreme Court directs.
- (3) For the purposes of an application, the patient is, in the absence of evidence to the contrary, taken to have been mentally ill when the patient disposed of the interest concerned.

118 Orders and directions of NSW Trustee must be complied with

- (1) An order by the NSW Trustee under this Act has effect according to its tenor.
- (2) A person must not, without reasonable excuse, fail to comply with an order or direction given to the person by the NSW Trustee in accordance with this Act.

Maximum penalty: 10 penalty units.

119 Service of orders on NSW Trustee (cf PT Act, s 51)

- (1) This section applies to an order made by a court or a tribunal, on the application of a person other than the NSW Trustee, that:

- (a) directs a payment to be made to the NSW Trustee, or
 - (b) vests property in the NSW Trustee, or
 - (c) appoints the NSW Trustee as a trustee, executor or administrator.
- (2) A person who obtains an order to which this section applies must:
- (a) serve a copy of the order on the NSW Trustee, and
 - (b) serve on the NSW Trustee a written statement as to any property affected by the order, the location of any such property and the name of any person who possesses the property, if known to the person who obtained the order, and
 - (c) provide the NSW Trustee with any other information that the NSW Trustee reasonably requires the person to provide.
- (3) A person who obtains an order to which this section applies must not, without reasonable excuse, fail to comply with subsection (2).

Maximum penalty: 10 penalty units.

120 Appropriation of Consolidated Fund (cf PT Act, s 37)

- (1) Any amount required to discharge a liability of the NSW Trustee that the NSW Trustee would be personally liable to discharge if it were a private trustee is payable from the Consolidated Fund (which is appropriated for that purpose).
- (2) An amount is not payable under this section for a liability, and the NSW Trustee is not subject to a liability, if the liability:
 - (a) does not arise out of any act or omission of the NSW Trustee or a member of staff of the NSW Trustee, and
 - (b) could not have been reasonably avoided by the exercise of reasonable diligence by the NSW Trustee or a member of staff of the NSW Trustee.

121 Personal liability

- (1) A matter or thing done or omitted to be done by the Chief Executive Officer, a member of staff of the NSW Trustee or a person acting under the direction of the NSW Trustee or any other person does not, if the matter or thing was done or omitted to be done in good faith for the purpose of executing this or any other Act or the functions of the NSW Trustee, subject the Chief Executive Officer, member of staff or a person so acting personally to any action, liability, claim or demand.
- (2) Subsection (1) also applies to any act or omission done or omitted in good faith for the purpose of executing the NSW Trustee's functions, if the NSW Trustee, in good faith, takes out probate or administration of the estate of a deceased person,

administers an estate under statutory powers or acts as a trustee under a will and subsequently it is discovered that:

- (a) the person is not deceased, or
 - (b) if administration is granted or carried out, the person did not die intestate, or
 - (c) if probate is granted or the NSW Trustee is acting under a will, the will was revoked or altered by a later will or is invalid.
- (3) Subsection (2) does not affect any remedy of a person against any person who has shared in the distribution of the estate concerned or received the benefit of any such trust administered or executed by the NSW Trustee.
- (4) Any disposal of an interest in property, or any payment made, in the exercise of the protective capacities of the NSW Trustee in accordance with this Act is valid and binding on all persons.

122 Evidentiary provisions

- (1) A certificate signed or purporting to be signed by the Chief Executive Officer or a person authorised in writing by the Chief Executive Officer and stating that:
- (a) the NSW Trustee is, or the NSW Trustee and any other persons are, the administrators of an estate of a deceased person and the basis and date on which the NSW Trustee and any other persons became authorised to administer the estate of the person, or
 - (b) the NSW Trustee has, or the NSW Trustee and any other persons have, been granted probate or letters of administration of an estate of a deceased person on a specified date,

and the name, residence and occupation of the deceased person, is, despite any Act or other law to the contrary, admissible in any legal proceedings and is evidence of the death of the deceased person and of any of the matters stated in the certificate and of the authority of the NSW Trustee to act as administrator or executor.

- (2) A certificate signed or purporting to be signed by the Chief Executive Officer or a person authorised in writing by the Chief Executive Officer and stating that, on a specified date or during a specified period, the estate of a specified person was or was not subject to management under this Act is admissible in any legal proceedings and is evidence of the matters stated in the certificate.

123 Directions by NSW Trustee as to visitors (cf PE Act, s 79)

The NSW Trustee may make the following orders:

- (a) an order directing a specified person to visit a managed person (other than a person

who is a patient) and to report in writing to the NSW Trustee on the state of mind, bodily health and general condition of the managed person and on the care and treatment of the managed person,

- (b) an order directing that such information as the NSW Trustee thinks necessary be given to the person directed to visit the managed person as to the nature and extent of the assets of the managed person and as to the orders made under this Act in respect of the person,
- (c) an order that any fees and expenses arising in connection with the visit be paid out of the estate of the managed person.

124 Service of documents on NSW Trustee

- (1) A document may be served on the NSW Trustee by leaving it at, or by sending it by post to, the head office of the NSW Trustee.
- (2) Nothing in subsection (1) affects the operation of any provision of a law or of the rules of a court authorising a document to be served on the NSW Trustee in a manner not provided for by subsection (1).

125 Nature of proceedings for offences

Proceedings for an offence under this Act or the regulations may be dealt with summarily.

126 Submission of budgets

- (1) Whenever directed to do so by the Director-General, the NSW Trustee is to submit a budget to the Director-General in relation to the NSW Trustee's costs, including projected costs, in connection with the exercise of the NSW Trustee's functions.
- (2) The budget is to relate to such period, and include such information, as the Director-General directs.

127 Savings, transitional and other provisions

Schedule 1 contains savings, transitional and other provisions consequent on the enactment of this Act.

128 Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) In particular, regulations may be made for or with respect to the following:
 - (a) the custody of property placed with the NSW Trustee and instruments of title relating to any such property,

- (b) the fixing of scales of commission and other charges by the NSW Trustee under this Act,
 - (c) the waiver or reduction of costs by the NSW Trustee.
- (3) A regulation may create an offence punishable by a penalty not exceeding 20 penalty units.

Schedule 1 Savings, transitional and other provisions

(Section 127)

Part 1 General

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:
- this Act
- (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.
- (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:
- (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
 - (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.

Part 2 Provisions consequent on enactment of this Act

Division 1 Preliminary

2 Definitions

In this Part:

appointed day, in its application to any act, matter, thing or circumstance referred to in this Part means:

- (a) in relation to a provision of a former Act that is repealed by this Act, the day on which the provision is repealed, or

(b) in relation to a provision of this Act, the day on which the provision commences.

existing common fund means:

- (a) a common fund established under the Public Trustee Act and in existence immediately before the commencement of Part 5.2 of this Act, or
- (b) an investment fund established under the Protected Estates Act and in existence immediately before that commencement.

existing reserve fund means:

- (a) the Estates Guarantee and Reserve Account established under section 36B of the Public Trustee Act, or
- (b) the reserve fund established under Part 4 of the Protected Estates Act.

Interest Suspense Account means the Account of that name established under section 36A of the Public Trustee Act.

Protective Commissioner means the Protective Commissioner under the Protected Estates Act.

Public Trustee means the Public Trustee under the Public Trustee Act.

the former Acts means the Protected Estates Act and the Public Trustee Act.

the former corporations means the corporations sole constituted under section 7 of the Public Trustee Act and section 5B of the Protected Estates Act.

the Protected Estates Act means the [Protected Estates Act 1983](#), as in force immediately before its repeal by this Act.

the Public Trustee Act means the [Public Trustee Act 1913](#), as in force immediately before its repeal by this Act.

Division 2 General provisions

3 Construction of references

- (1) Subject to this Schedule and the regulations, in any Act or instrument (whether enacted or made before or after the commencement of this clause):
 - (a) a reference to a provision of the former Acts for which there is a corresponding provision in this Act extends to the corresponding provision of this Act, whether or not in identical terms, and
 - (b) a reference to any act, matter or thing referred to in a provision of the former Acts for which there is a corresponding provision in this Act (including anything arising under paragraph (a)) is taken to have been done or omitted under the

corresponding provision of this Act, and

- (c) a reference (however expressed) to a protected person or a protected missing person under the Protected Estates Act is to be read as a protected person or managed missing person within the meaning of this Act, and
- (d) a reference to the Public Trustee or Protective Commissioner is to be read as a reference to the NSW Trustee, and
- (e) a reference to anything being done under the seal or hand of the Public Trustee or the Protective Commissioner is taken to be a reference to its being done under the seal of the NSW Trustee.

- (2) The regulations may contain provisions that deal, among other things, with the interpretation of references (however expressed) to an Act repealed or amended by this Act or a provision of an Act repealed or amended by this Act.

4 General saving

Subject to this Schedule and the regulations:

- (a) anything begun before the appointed day under a provision of the former Acts for which there is a corresponding provision in this Act extends to the corresponding provision of this Act, and
- (b) subject to paragraph (a), any act, matter or thing done or omitted under a provision of the former Acts for which there is a corresponding provision in this Act (including anything arising under paragraph (a)) is taken to have been done or omitted under the corresponding provision of this Act.

5 NSW Trustee to exercise existing functions and responsibilities of Public Trustee and Protective Commissioner

(1) Subject to this Schedule and the regulations:

- (a) any act, matter or thing done or omitted by, to or in relation to the Public Trustee or the Protective Commissioner before the commencement of this clause is taken to have been done or omitted by, to or in relation to the NSW Trustee, and
- (b) without limiting paragraph (a), anything commenced to be done by, to or in relation to the Public Trustee or the Protective Commissioner in an official capacity before that commencement is taken to have been commenced to have been done by, to or in relation to the NSW Trustee.

(2) Subject to this Act and the regulations:

- (a) this Act and the regulations extend to and in relation to acts, matters and things occurring before the commencement of this Act, and

- (b) without limiting paragraph (a), this Act extends to and in relation to:
 - (i) trust instruments and other documents made or executed before as well as on or after that commencement, and
 - (ii) persons who died before as well as to persons who die on or after that commencement.

6 Certificate evidence

- (1) This clause applies to a certificate issued before the commencement of this clause under:
 - (a) section 50 of the Public Trustee Act, or
 - (b) section 79A of the Protected Estates Act, or
 - (c) section 57 of the *Confiscation of Proceeds of Crime Act 1989*.
- (2) Neither the enactment of this Act nor its operation affects the existence, validity, admissibility or evidentiary value of such a certificate on or after the repeal or amendment of those provisions by this Act.

7 Continuation of Protected Estates Regulation 2003

- (1) The *Protected Estates Regulation 2003*, as in force immediately before the repeal of the Protected Estates Act, continues in force and is taken to be a regulation under this Act.
- (2) The Regulation may be amended or repealed in the same way as any other regulation made under this Act.
- (3) A reference in the Regulation to the Protective Commissioner is to be read as a reference to the NSW Trustee.

8 Continuation of Public Trustee Regulation 2008

- (1) The *Public Trustee Regulation 2008*, as in force immediately before the repeal of the Public Trustee Act, continues in force and is taken to be a regulation under this Act.
- (2) The Regulation may be amended or repealed in the same way as any other regulation made under this Act.
- (3) A reference in the Regulation to the Public Trustee is to be read as a reference to the NSW Trustee.

9 References to MHRT relating to mental health inquiries

- (1) A reference in section 44 to the MHRT is to be read as a reference to a Magistrate who conducts a mental health inquiry under the *Mental Health Act 2007*.

- (2) A Magistrate may refer the question of a person's capability to manage his or her own affairs to the MHRT.
- (3) If a Magistrate refers the question of a person's capability to manage his or her own affairs, the MHRT must consider the capability of the person to manage his or her own affairs and, if satisfied that the person is not capable of managing his or her own affairs, must order that the estate of the person be subject to management under this Act.
- (4) An order by the MHRT has effect as if it were made under Part 4.3.
- (5) Sections 47, 48, 49, 50 and 51 apply in respect of a Magistrate who conducts a mental health inquiry in the same way as they apply in respect of the MHRT.
- (6) This clause ceases to have effect on the commencement of section 34 of the *Mental Health Act 2007*, as inserted by Schedule 16 [6] to the *Courts and Crimes Legislation Further Amendment Act 2008*.

Division 3 Dissolution of offices and corporations

10 Abolition of offices and dissolution of corporations sole

- (1) The office of Public Trustee is abolished and the corporation sole constituted by section 7 of the Public Trustee Act is dissolved.
- (2) The office of Protective Commissioner is abolished and the corporation sole constituted by section 5B of the Protected Estates Act is dissolved.

11 NSW Trustee to be same entity as former corporations sole

The NSW Trustee is taken, for all purposes, including the rules of private international law, to be a continuation of and the same legal entity as the former corporations.

12 Former Public Trustee and Protective Commissioner not entitled to compensation

- (1) In this clause:

former Protective Commissioner means the person holding office as Protective Commissioner immediately before the abolition of the office of Protective Commissioner by this Act.

former Public Trustee means the person holding office as Public Trustee immediately before the abolition of the office of Public Trustee by this Act.

- (2) The former Public Trustee and the former Protective Commissioner cease to hold office as Public Trustee and Protective Commissioner, respectively, on the abolition of those offices by this Act.
- (3) The former Public Trustee and the former Protective Commissioner are not entitled to

any compensation for loss of office.

- (4) Subclause (3) does not affect any compensation that may be payable under the *Public Sector Employment and Management Act 2002*.

13 No forced redundancies for permanent staff

- (1) This clause applies to persons who were members of the Government Service and were employed (otherwise than on a temporary or casual basis) as members of staff of the Public Trustee's Office or the Office of the Protective Commissioner immediately before the dissolution of the offices of Public Trustee and Protective Commissioner.
- (2) A person to whom this clause applies must not be removed from the Government Service (other than on disciplinary or incapacity grounds) within the period of 5 years commencing on the date of dissolution of those offices.
- (3) This clause does not apply to the former Public Trustee or the former Protective Commissioner as referred to in clause 12.

Division 4 Investment and existing funds

14 Existing common funds

- (1) The existing common funds are continued by this clause and are taken to be common funds established under this Act.
- (2) The regulations may provide that an existing common fund forms part of another common fund established under this Act.
- (3) The provisions of the Public Trustee Act and the Protected Estates Act, as in force immediately before the commencement of Chapter 5, continue to apply to and in respect of the existing common funds established under those Acts.
- (4) Despite subclause (3):
- (a) interest from investments from the existing common fund established under the Public Trustee Act, or any other amount payable under that Act to the Interest Suspense Account or under section 36C of that Act, is to be paid to the existing common fund or the Reserve Fund in accordance with Chapter 5, and
 - (b) interest and other amounts must not be credited to the Interest Suspense Account, and
 - (c) amounts may be paid from the existing common fund for any purposes for which they can be paid under Chapter 5 (including, without limitation, for the costs incurred by the NSW Trustee in the exercise of the NSW Trustee's functions under this Act).

(5) Despite subclause (3):

- (a) section 36A (4) of the Public Trustee Act ceases to apply to the distribution of interest to accounts forming part of an existing common fund established under that Act at the end of the period of 12 months commencing on the commencement of section 106 of this Act, or at the end of such further period as may be prescribed by the regulations, and
- (b) section 106 (2) of this Act applies on and from that date to the distribution of interest to accounts forming part of any such existing common fund.

(6) The provisions of Chapter 5 do not apply to and in respect of the existing common funds, except as provided by this Schedule.

(7) Policies may be determined under Chapter 5 with respect to the existing common funds.

(8) This clause is subject to the regulations.

15 Application of existing interest distribution provisions to new common funds

(1) This clause applies to a common fund established under this Act.

(2) Despite any other provision of this Act, interest may be distributed among accounts forming part of a common fund in the same manner as is permitted under clause 14 in respect of existing common funds established under the Public Trustee Act.

(3) This clause ceases to have effect on the date that section 36A (4) of the Public Trustee Act ceases to apply to an existing common fund.

(4) This clause is subject to the regulations.

16 Interest Suspense Account

(1) The NSW Trustee must, not later than 12 months after the commencement of Part 5.2, determine the following matters:

- (a) the part of the Interest Suspense Account that should be allocated to the Reserve Fund for the purposes of that Fund,
- (b) the part of the Interest Suspense Account that should be allocated to the existing common funds,
- (c) the part of the Interest Suspense Account referred to in paragraph (b) that should be allocated for the current and future payment of the costs incurred by the NSW Trustee in the exercise of its functions under this Act.

(2) In making such a determination, the NSW Trustee is to have regard to the purposes for which the Interest Suspense Account would have been used if the Public Trustee

Act had not been repealed and to the purposes for which the common funds under this Act and the Reserve Fund may be used.

- (3) Any part of the Interest Suspense Account identified under subclause (1) (a) is taken to form part of the Reserve Fund and may be used for the purposes of the Reserve Fund.
- (4) Any part of the Interest Suspense Account identified under subclause (1) (b) is taken to form part of the existing common funds and may be used for the purposes of the existing common funds.
- (5) In addition, any part of the Interest Suspense Account identified under subclause (1) (c) may be applied, in accordance with Chapter 5, for the costs incurred by the NSW Trustee in the exercise of the NSW Trustee's functions under this Act.
- (6) Payments for costs out of the part allocated under subclause (1) (c) must not exceed the amount approved by the Director-General.
- (7) This clause is subject to the regulations.

17 Existing reserve funds

- (1) The existing reserve funds are continued by this clause and are taken to form part of the Reserve Fund established under this Act.
- (2) Any part of the existing reserve funds may be applied for the purposes for which the Reserve Fund may be used under this Act.
- (3) The Reserve Fund may be applied for any purpose for which the existing reserve funds could have been used immediately before the commencement of Part 5.2.
- (4) The provisions of Chapter 5 apply to and in respect of the existing reserve funds, except as provided by this Schedule.
- (5) This clause is subject to the regulations.

Schedule 2 (Repealed)