

DRAFT EXPLANATORY MEMORANDUM

Minute No. of 2012 - Minister for Financial Services and Superannuation

Subject - *Corporations Act 2001*
 Corporations Amendment Regulations 2012 (No.)
 Corporations Amendment Regulations 2010 (No. 3) Amendment
 Regulations 2012 (No.)

The *Corporations Act 2001* (the Corporations Act) and the Corporations Regulations 2001 (the Corporations Regulations) provide for the regulation of corporations, financial markets, products and services, including in relation to licensing, conduct, financial product advice and disclosure.

Subsection 1364(1) of the Corporations Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed by regulations, or necessary or convenient to be prescribed by such regulations for carrying out or giving effect to those Acts.

The proposed Regulations would make a number of amendments to the Corporations Regulations. The changes reflect discussions with the trustee company industry and the States and Territories regarding the operation of Chapter 5D of the Corporations Act, as amended by the *Corporations and Other Legislation Amendment (Trustee Companies and Other Measures) Act 2011* (the Amendment Act).

The proposed Regulations would amend the Corporations Regulations to include:

- a definition of “publish”, in relation to a trustee company providing notice of a licence cancellation or of a voluntary transfer of estate assets and liabilities;
- changes to the trustee company common fund rules to better reflect industry practice;
- listing of entities (other than trustee companies or Public Trustees) authorised to carry out transfers of Division 3 securities under Part 7.11 of the Act;
- the deletion of a so-called “arm’s length” rule (this has been moved to section 601SCD of the Principal Act);
- name changes of licensed trustee companies (in Schedule 8AA); and
- additional State and Territory legislation which are not excluded by the Commonwealth trustee company provisions (in Schedule 8AD).

The proposed Regulations would also amend the Corporations Amendment Regulations 2010 (No. 3) to extend the current deemed licensing regime (for trustee companies seeking to be consolidated) until 31 December 2012.

Under the *Corporations Agreement 2002* (the Corporations Agreement), the State and Territory Governments referred their constitutional powers with respect to corporate regulation to the Commonwealth. Under subclauses 506(1) and 507(1) of the Corporations Agreement, the Commonwealth is required to consult with State and Territory Ministers of the Ministerial Council for Corporations (the Council) before making a regulation under the national law. The Council has been consulted about the proposed Regulations as required by the Corporations Agreement. Paragraph 507(1)(f) and subclause 511(2) of the Corporations Agreement provide that approval of the Council and the usual public exposure period are not required for amendments to regulations relating to financial products and services. Traditional trustee company services are “financial services” under the Corporations Act.

Details of the proposed Regulations are set out in Attachments A and B.

The Commonwealth consulted publicly on a draft of these regulations in January 2012 and also consulted with industry peak bodies (the Trustee Corporations Association of Australia and the Australian Custodial Services Association) and individual trustee, custodial and nominee companies. The purpose of the consultation was to ensure that the changes were technically correct and created no unintended or undesirable consequences for the industry or consumers.

The regulations will operate retrospectively to the extent that they deem entities listed in the revised Schedule 9 of the Regulations to have been authorised to effect transfers of Division 3, Part 7.11 securities from 13 April 2011 onwards. The retrospective change is necessary to ensure that no person is disadvantaged as a result of transfers being invalidated or possible offences having arisen. No person is disadvantaged or rendered liable for anything by this retrospective operation.

The Act specifies no other conditions that need to be satisfied before the power to make the proposed Regulations may be exercised.

The proposed Regulations would be legislative instruments for the purposes of the *Legislative Instruments Act 2003*.

The proposed Regulations would commence on the day following the day they are registered on the Federal Register of Legislative Instruments.

ATTACHMENT A

Details of the proposed *Corporations Amendment Regulations 2012* (No.)

Regulation 1 – Name of Regulations

This regulation would provide that the title of the Regulations is the *Corporations Amendment Regulations 2012* (No.)

Regulation 2 – Commencement

This regulation would provide for:

- regulations 1 to 3 and Schedule 1 to commence (retrospectively) on 13 April 2011; and
- the remainder of the regulations to commence on the day after they are registered on the Federal Register of Legislative Instruments.

Regulation 3 – Amendment of *Corporations Regulations 2001*

This regulation would provide that the *Corporations Regulations 2001* (the Principal Regulations) are amended as set out in Schedules 1 and 2.

Schedule 1 – Amendments taken to have commenced on 13 April 2011

Items [1], [2], [3], [4], and [5]

These items would amend or omit regulations 7.11.01, 7.11.02, 7.11.12, 7.11.13; paragraph 7.11.21(3)(a); and subregulation 7.11.40(5); to replace the now repealed term “authorised trustee corporation” with a new term encompassing:

- a licensed trustee company within the meaning of Chapter 5D of the Principal Act,
- a Public Trustee of a State or Territory, or
- a company listed in (amended) Schedule 9 of the Principal Regulations.

These entities will be empowered to perform functions under Division 3 of Part 7.11 of the Principal Act and Regulations (Division 3). Division 3 deals with the transfer of securities other than through a prescribed clearing and settlement (CS) facility (for example, off-market paper-based transfers).

Item [6]

This item would replace the existing Schedule 9 of the Principal Regulations with a new Schedule 9 listing certain entities which are authorised to effect transfers under Division 3, Part 7.11. It is no longer necessary to list licensed trustee companies and Public Trustees as they are already authorised to carry out such transfers. The item will apply from 13 April 2011 until the date of commencement of Schedule 2 of these Regulations.

Schedule 2 – Amendments commencing on day after registration

Item [1]

This item would replace existing regulation 5D.1.01 with two new regulations:

Proposed Regulation 5D.1.01A provides a definition of *publish* for the purposes of section 601RAA, paragraph 601WDA(1)(b) and subsection 601WDA(3) of the Principal Act. The latter two provisions govern the requirement to publish notice of the cancellation of a trustee company licence.

Proposed Regulation 5D.1.01B restates former regulation 5D.1.01. It provides that:

- to qualify as a “trustee company”, a company must be listed in Schedule 8AA of the Principal Regulations; and
- a company that performs the function of a State or Territory Public Trustee may only be listed as a trustee company if the responsible State or Territory Minister formally requests such a listing.

Item [2]

Regulation 5D.2.06 governs the operation of common funds by trustee companies. Paragraph 5D.2.06(5)(b) provides that a trustee company commits an offence other than for allocation to the accounts from which the fund is derived. Proposed subregulation 5D.2.06(6) would provide that such an allocation may be made subject to two conditions set out in paragraphs (a) and (b).

This item would delete the current paragraph 5D.2.06(6)(b). The effect of this deletion would be that an allocation authorised by paragraph 5D.2.06(5)(b) is subject to only one condition, that it must be made at intervals not exceeding 6 months.

Item [3]

Current subregulations 5D.2.06(10) and (11) permit a licensed trustee company to realise investments in a common fund subject to strict conditions.

This item would amend subregulation 5D.2.06(11) so that it reflects current industry practice. It would make it an offence for a licensed trustee company that has realised such an investment to not credit or debit any profit or loss to the unit holders:

- proportionately to the amount invested in the fund by the unit holders at the time of the realisation; and
- within 14 days of the realisation.

The item would retain the current level of penalty for breaches of subregulation 5D.2.06(11) (50 penalty units).

Item [4]

This item would omit regulation 5D.2.09, which deals with related party transactions by licensed trustee companies where the common fund is not a registered managed

investment scheme. This item is no longer required, as a similar provision has now been inserted into the Principal Act (section 601SCD).

Item [5]

Item 5 would insert a new Part 5D.4 into Chapter 5D of the Principal Regulations including new regulation 5D.4.01.

Regulation 5D.4.01

This regulation would confirm that, where there has been a transfer of estate assets and liabilities from a transferring trustee company to a receiving trustee company, the obligations of the receiving company include providing retail clients with access to the receiving company's compensation arrangements and dispute resolution system, in relation to any complaint arising from the provision of traditional trustee company services by the transferring company.

Items [6], [7] and [8]

These items would update the names of licensed trustee companies (and deemed licensees) in Schedule 8AA where those names have been changed.

Items [9], [10], [11], [12], [13], [14] and [15]

These items would update the list of State and Territory legislation in Schedule 8AD of the Principal Regulations. Schedule 8AD is a list of State and Territory legislation which is not excluded by the Commonwealth trustee company provisions.

Item 16

This item would replace the existing Schedule 9 of the Principal Regulations with a new Schedule 9 listing certain entities which are authorised to effect transfers under Division 3, Part 7.11. As noted above, it is no longer necessary to list licensed trustee companies and Public Trustees as they are already authorised to carry out such transfers. The item will apply from the date of commencement of Schedule 2 of these Regulations.

ATTACHMENT B

Details of the proposed *Corporations Amendment Regulations 2010 (No.3)* *Amendment Regulations 2012 (No.)*

Regulation 1 – Name of Regulations

This regulation would provide that the title of the Regulations is the *Corporations Amendment Regulations 2010 (No. 3) Amendment Regulations 2011 (No.)*

Regulation 2 - Commencement

This regulation would provide that the Regulations would commence on the day after they are registered on the Federal Register of Legislative Instruments.

Regulation 3 – Amendment of *Corporations Amendment Regulations 2010 (No. 3)*

This regulation would provide that the *Corporations Amendment Regulations 2010 (No. 3)* are amended as set out in Schedule 1.

Item [1] Regulation 5

Transitional arrangements for unlicensed trustee companies

This item would provide that the current transitional arrangements for unlicensed trustee companies that are listed in Schedule 8AA to the Principal Regulations are extended until 30 December 2012.

This proposed extension would allow the States and territories to pass complementary legislation, of the kind envisaged in paragraph 601WBA(2)(b)(iv) and section 601WBC of the Principal Act, to facilitate transfers of estate assets and liabilities from a transferring trustee company to a receiving trustee company.

Item [2] Subregulation 6(1)

Transitional arrangements about dispute resolution and compensation

This item would provide that the period during which a deemed trustee company licensee is exempt from the dispute resolution and compensation requirements of an Australian financial services licensee is extended from 30 April 2011 to 31 December 2012.