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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CORPORATIONS AND OTHER LEGISLATION AMENDMENT (TRUSTEE COMPANIES AND OTHER MEASURES) BILL 2011

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Assistant Treasurer and Minister for Financial Services and Superannuation,
the Hon Bill Shorten MP)

Table of contents

Glossary

The following abbreviations and acronyms are used in this explanatory memorandum.

Abbreviation	***Definition***
AFSL	Australian financial services licence
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
ATM	automatic teller machine
Bill	Corporations and Other Legislation Amendment (Trustee Companies and Other Measures) Bill 2011
CCA	*Competition and Consumer Act 2010*
COAG	Council of Australian Governments
Corporations Act	*Corporations Act 2001*
Minister	Minister responsible for administering the Corporations Act determined in accordance with section 19A of the *Acts Interpretation Act 1901*
PSRA	*Payment System Regulation Act 1998*
RBA	Reserve Bank of Australia
regulations	*Corporations Regulations 2001*
TCA	Trustee Corporations Association of Australia

General outline and financial impact

General background

This Bill amends the trustee company provisions in Chapter 5D of the *Corporations Act 2001* (the Corporations Act) to make the provisions more effective, in particular by facilitating the consolidation of the industry through voluntary transfers, but also by clarifying certain powers of trustee companies and strengthening compliance.

Chapter 5D, which took effect on 6 May 2010, was the outcome of a Council of Australian Governments (COAG) decision to create national regulation of trustee companies. The creation of a single national regulatory regime has created a need to allow corporate groups with multiple trustee company subsidiaries to transfer the business of those subsidiaries into one licensed entity. Accordingly, the Bill provides an administrative process for the voluntary transfer of estate assets and liabilities as a whole (rather than individually).

The Bill will also improve the existing 'compulsory' transfer of business provisions by enabling such a transfer to State and Territory Public Trustees, provided (amongst other things) the Public Trustee agrees to accept the transfer.

A number of other concerns have also been raised by industry participants and the Trustee Corporations Association of Australia (TCA) regarding the operation of Chapter 5D since commencement. These measures will address these concerns by:

- requiring that a prospective licensee write to the Minister responsible for administering Chapter 5D explaining how it satisfies certain criteria before the Governor-General considers making a regulation to list the applicant as a licensed trustee company;

- clarifying and strengthening the operation of Chapter 5D by increasing the magnitude of penalties; and

- clarifying the powers of trustee companies to charge for preparing tax returns and to draw management fees and common fund administration fees from capital (as a last resort).

The Bill also amends the *Payment System Regulation Act 1998* (PSRA) to provide ongoing protection for payment system participants, from Part IV of the *Competition and Consumer Act 2010* (CCA), when complying with the ATM Access regime as determined by the Reserve Bank of Australia (RBA).

Under its mandate for promoting competition and efficiency in the payments system, the RBA has put in place reforms in the ATM system which are designed to promote competition and efficiency in the payments system by putting in place transparent pricing and improving ease of access into the ATM system.

- This measure will allow participants in the payments system to continue to comply with the RBA ATM reforms, as prescribed through the ATM Access regime, without breaching Part IV of the CCA.

Dates of effect:

Sections 1 to 3 of the Bill commence on Royal Assent.

Items 1 to 7, of Schedule 1 commence the day after Royal Assent.

Items 8 and 13 to 36 of Schedule 1 (which impose penalties) commence on the 28th day after Royal Assent.

Item 12 of Schedule 1 has been backdated to the commencement date of Schedule 2 of the *Corporations Amendment Legislation (Financial Services Modernisation) Act 2009*, to put beyond doubt that a Commonwealth licensed trustee company has always been authorised to charge a reasonable fee for the work involved in the preparation and lodging of returns for the purpose of assessments of any duties or taxes related to the trustee company's performance of estate management functions. The retrospective operation of this item is not expected to cause detriment to consumers because the previous State and Territory (State) trustee company acts allowed trustee companies to charge such fees and it was always intended that trustee companies should be able to charge such fees whenever it prepares and lodges tax returns for a client.

Proposal announced:

The measures were not publicly announced, although the trustee company provisions in the draft Bill were released for both public consultation and targeted consultation with the Ministerial Council for Corporations and industry participants on 27 January 2011.

Financial impacts:

The Bill has no significant financial impact on Commonwealth expenditure or revenue.

Compliance cost impacts:

Low. The trustee company measures will mainly affect industry participants with operations in more than one jurisdiction. The ATM measure will allow entities to continue to comply with the existing regime. There is no ongoing compliance cost impact and a minimal transitional impact.

Chapter 1
Assisting transition to national regulation and restructuring of trustee companies

Outline of chapter

1.1 The Bill provides an administrative process for the voluntary transfer of estate assets and liabilities from a transferring entity (generally, a trustee company previously authorised under State or Territory legislation) to a trustee company prescribed by the Corporations Regulations 2001 (Regulations). It also improves the existing compulsory transfer regime, specifies criteria for the Minister to consider when assessing trustee company applications, makes it an offence for a person to falsely represent itself to be a licensed trustee company, and replaces the now outdated term 'authorised trustee corporation'.

Context of amendments

1.2 Prior to the commencement of a national regulatory framework for trustee companies on 6 May 2010 and under the former State and Territory (State) based system, many corporate groups operating across State borders operated multiple subsidiaries whose purpose was to hold a trustee company authorisation in a particular jurisdiction. With the advent of national licensing, many corporate groups wish to transfer the 'traditional' business of these subsidiaries (namely, the management of trusts and estates) to a single Australian financial services licence (AFSL) holder with a trustee company authorisation. The Government supports the rationalisation of the industry as an important way of reducing compliance costs. However, no feasible and cost-effective process for transferring large numbers of trusts and estates currently exists. As the TCA has put it, the industry is seeking an administrative (rather than a judicial) process to 'allow existing trustee companies to expeditiously, and at minimum cost, rationalise their operations by transferring all estate management functions to one licensed trustee company within the same group.' However, transfers need not be confined to intra-group situations.

1.3 At present, Chapter 5D provides for compulsory, but not voluntary, transfers of business. The voluntary transfer process is similar to the already existing compulsory transfer process. The change is being made by extending the existing compulsory transfer provisions in

Part 5D.6 to include voluntary transfers. Complementary State legislation would also be required to make the voluntary transfer regime fully effective (e.g. to effect land title transfers).

1.4 Currently, Chapter 5D precludes the transfer of trustee company business from a licence-cancelled company to a State Public Trustee by virtue of subsection 601WBA(1) (because the Public Trustees are not licensed trustee companies). It is appropriate and important for the purpose of protecting the assets and stakeholders of failing or demonstrably non-compliant licensed trustee companies to rectify this situation by creating an exception to allow compulsory transfers to State Public Trustees.

1.5 At present there is no formal procedure under which a prospective licensee applies to the Government to be listed as a licensed trustee corporation. This contrasts with the former State based system where most jurisdictions published administrative (rather than legislative) criteria for applicants.

1.6 To preserve the integrity of the new regime in Chapter 5D and to prevent misrepresentations to the public, an entity should be prohibited from holding itself out as a 'licensed trustee company' unless it holds an AFSL with a trustee company authorisation.

1.7 The term 'authorised trustee corporation' is used throughout the Corporations Act with reference to marketable securities, and the right to marketable securities. It is only applicable to a body corporate which has been declared an authorised trustee corporation by the regulations made under the Corporations Act. Broadly, any body corporate which holds marketable securities, or the right to marketable securities, in trust for the beneficial owner of the securities as an ordinary part of its business, will be declared an authorised trustee corporation. The list of authorised trustee corporations is in Schedule 9 of the Corporations Regulations. With the advent of licensed trustee companies, it is necessary to delete the old term 'authorised trustee corporation' where it appears in the Corporations Act and replace it with the term 'a licensed trustee company within the meaning of Chapter 5D or the Public Trustee of a State or Territory'. A similar change is also made to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

Summary of new law

1.8 The Bill deals with:

- voluntary transfers of trustee business between entities;

- compulsory transfers of business to Public Trustees;
- Ministerial approval for listing of a trustee company;
- prohibiting persons from holding themselves out as a licensed trustee company when that is not the case; and
- replacing the term 'authorised trustee corporation'.

Comparison of key features of new law and current law

New law	***Current law***
A licensed trustee company (company A) is able to apply to ASIC for approval of a voluntary transfer of estate assets and liabilities from another ASIC-licensed trustee company or a company previously licensed under law of a State or Territory (company B) .	A licensed trustee company (company A) will not be able to apply for the transfer of estate assets and liabilities from trustee company (company B) unless ASIC has cancelled the licence of company B.
ASIC may make a determination that there is to be a transfer of estate assets and liabilities from a trustee company that has had its licence cancelled, to a Public Trustee of a State or Territory.	ASIC may make a determination that there is to be a transfer of estate assets and liabilities from a trustee company that has had its licence cancelled, to another ASIC-licensed trustee company.
To provide transparency, certainty and enhanced administrative law rights, a prospective applicant is required to write to the Minister responsible for administering Chapter 5D explaining how it satisfies certain criteria before the Governor-General considers making a regulation listing the applicant as a licensed trustee company.	No formal procedure under which a prospective licensee applies to the Government to be listed as a licensed trustee company.
An entity is prohibited from holding itself out as a licensed trustee company unless it holds an AFSL with a trustee company authorisation.	No equivalent.

New law	*Current law*
The old term 'authorised trustee corporation' is deleted where it appears in the Corporations Act and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, and is replaced with references to a licensed trustee company within the meaning of Chapter 5D [of the Corporations Act] or the Public Trustee of a State or Territory'.	The term 'authorised trustee corporation' is used throughout the Corporations Act with reference to marketable securities, and the right to marketable securities. It is only applicable to a body corporate which has been declared an authorised trustee corporation by the regulations made under the Corporations Act.

Detailed explanation of new law

ASIC-approved (compulsory and voluntary) transfers of estate assets and liabilities

1.9 Where ASIC has cancelled the AFSL of a licensed trustee company, Part 5D.6 of the Corporations Act provides for the transfer of estate assets and liabilities from the former licensee to another licensed trustee company, if certain conditions are satisfied.

1.10 Subsection 601WAA(1) of the Corporations Act defines several key terms for the purposes of Part 5D.6 which deals with the consequences of cancellation of an AFSL. The following definition substitutes for the current definition of 'estate assets and liabilities':

- ***estate assets and liabilities***, of a company, means assets (including assets in common funds) and liabilities of an estate, or incurred in relation to an estate, in relation to which the company was performing estate management functions, if the assets and liabilities were vested in or otherwise belonged to the company:
  - (a) because of its performance of those functions; and
  - (b) immediately before:
  - (i) if ASIC has cancelled the company's licence—the cancellation; or
  - (ii) otherwise—a relevant certificate of transfer comes into force. ***[Schedule 1, item 14, subsection 601WAA(1)]***
- ***transfer determination*** has the meaning given by subsection 601WBA(1). ***[Schedule 1, item 15, subsection 601WAA(1)]***

- ***voluntary transfer determination*** has the meaning given by subsection 601WBA(1). ***[Schedule 1, item 16, subsection 601WAA(1)]***

1.11 In this context, where a company within a trustee company group relinquishes its licence, its future roles, such as 'appointments' as executor under wills written in its name and where probate has not yet been granted, may be voluntarily transferred to the licensed company in that group (this is made explicit in section 601WBJ).

1.12 Previously, under section 601WBA, ASIC could only make compulsory transfer determinations. This Bill amends the law to enable ASIC to also make voluntary transfer determinations.

1.13 Under subsection 601WBA(1) as amended by this Bill, ASIC can make a transfer determination if:

- ASIC has cancelled the licence of the transferring company (the determination is a ***compulsory transfer determination***); or

- the transferring company has applied in the prescribed form for a determination (the determination is a voluntary transfer determination). [Schedule 1, item 17, subsection 601WBA(1)]

1.14 The existing subsection 601WBA(2) of the Corporations Act provides for compulsory transfers of business. In addition to compulsory transfer determinations, the subsection is amended to provide for voluntary transfers of business. ***[Schedule 1, item 18, subsection 601WBA(2)]***

1.15 Various technical amendments to Part 5D.6 of the Corporations Act are made to facilitate voluntary transfers of business. ***[Schedule 1,item 19, subparagraph 601WBA(2)(ab); item 24, subparagraph 601WBA(3)(d); item 25, subsection 601WBE(1); item 26, section 601WBF; item 27, paragraph 601WBG(1)(a); item 29, paragraph 601WBG(2)(ca)]***

1.16 Division 4 of Part 5D.6 deals with miscellaneous provisions. Subsections 601WDA(1) and (2) set out the obligation of the transferring company to notify persons of the cancellation of its licence and the transfer of estate assets and liabilities to the receiving company. This is to ensure that, as far as possible, persons affected by the cessation of the trustee company's business have notice of it.

1.17 This Bill provides that (when there is a voluntary transfer determination) the transferring trustee company must, as soon as practicable, publish notice of the transfer of estate assets and liabilities. The meaning of the term ***publish*** is affected by section 601RAA and any regulations made thereunder. ***[Schedule 1, item 28, subsection 601WDA(3)]***.

1.18 Failure to comply with subsection 601WDA(3) is an offence. The maximum penalty for non-compliance is 120 penalty units or imprisonment for 2 years, or both. This penalty is commensurate with the penalties imposed for other broadly similar offences under the Corporations Act. ***[Schedule 1, item 34, Schedule 3 to the Corporations Act, table item 173U]***

Compulsory transfer of business to Public Trustee

1.19 In circumstances where a private licensed trustee company becomes unviable, the only practical option may be to transfer its business to a State Public Trustee, if only temporarily; for example, because no private licensed trustee company is able or willing to accept the transfer. Another example is that there may be an economic downturn in the local economy where the licensed trustee company operates which necessitates the transfer of its trustee company business to the State Public Trustee. These examples should not limit the circumstances in which a transfer to a State Public Trustee or a private licensed trustee company could be made.

1.20 Accordingly:

- for a compulsory transfer of business, the receiving company must be a licensed trustee company or the Public Trustee of a State or Territory (however described); ***[Schedule 1, item 19, paragraph 601WBA(2)(aa)];*** and

- for a voluntary transfer, the transferring company must be a licensed trustee company or a company that was previously authorised as a trustee company under a law of a State or Territory, and the receiving company is a licensed trustee company. ***[Schedule 1, item 19, paragraph 601WBA(2)(ab)]***

1.21 The Bill recognises that Public Trustees are constituted in varying ways and have differing governance structures. It provides that a Public Trustee may be deemed to be a 'receiving company' for the purposes of a compulsory transfer determination, and that references to 'a company' or 'the board of a company' are taken to be references to a Public Trustee, as applicable. ***[Schedule 1, item 22, subsection 601WBA(2A)]***

1.22 Various other technical amendments to Part 5D.6 of the Corporations Act are made to facilitate compulsory transfers of business to Public Trustees. ***[Schedule 1, item 20, subparagraph 601WBA(2)(b)(ii); item 21, subparagraph 601WBA(2)(b)(iv)]***

1.23 It is possible that neither a Public Trustee nor a private trustee company is prepared to accept a compulsory transfer of business. In that

case, there is a distinction between the failed trustee company and the trusts and estates it administers.

1.24 A failed trustee company would be wound up in the normal way. The assets of trusts and estates would be quarantined from the trustee company's own assets, as the trustee company is not the beneficial owner, subject to the trustee company's right of indemnity.

1.25 In contrast, under the general law, there is no such thing as the winding up of a trust. State and Territory law may confer on the Court the power to appoint either a new trustee, for example in substitution for a corporate trustee which is in liquidation or is dissolved, or a new administrator or executor: see for example *Trustee Act 1925 (NSW)* section 70 and *Administration and Probate Act 1958 (Vic)*, section 34.

Ministerial approval for listing of a trustee company

1.26 A formal procedure under which a prospective licensee applies to the Government to be listed as a licensed trustee corporation is required to increase transparency, certainty and accountability in the licensing process.

1.27 A prospective licensee will need to write to the Minister responsible for administering Chapter 5D explaining how it satisfies the following criteria before the Governor-General considers making a regulation about being listed as a licensed trustee company. The relevant considerations are that the applicant:

- is a corporation to which the corporations power in the Australian Constitution applies;
- undertakes to provide probate and deceased estate administration services and functions, and at least one other estate management function;
- is, and will continue to be, capable of providing the services and functions it has undertaken to provide;
- is a fit and proper person;
- is compliant with rules setting a limit on control of licensed trustee corporations; and
- satisfies any other matters that the Minister specifies by written notice to be relevant.

[Schedule 1, item 5, subsection 601RAB(2)]

1.28 It is expected that applicants will provide probate and deceased estate administration services and functions, as these are integral to the concept of a trustee company. In terms of capability, an applicant for listing would be expected to demonstrate that it has a strong financial basis and some level of professional expertise and/or experience.

1.29 These criteria are not intended to supersede the general and specific obligations of Australian financial service licensees (specifically, licensees with a trustee company authorisation) as set out in the Corporations Act and in the Australian Securities and Investments Commission's (ASIC's) guidance.

Prohibition on holding out as a licensed trustee company

1.30 A person is prohibited from holding itself out as a 'licensed trustee company' unless it holds an AFSL with a trustee company authorisation. ***[Schedule 1, item 33, section 601XAB]***

1.31 Failure to comply with this prohibition is an offence. The maximum penalty for non-compliance is 50 penalty units or imprisonment for 12 months, or both. This is in line with the penalty for holding out under section 911C. ***[Schedule 1, item 36, Schedule 3 to the Corporations Act, table item 173V***]

1.32 Because of section 1312, if a body corporate contravenes the regulations a court may impose a penalty of up to 5 times the penalty specified for the contravention. ***[Schedule 1, item 34, note to subsection 1364(2)]***

Replacing the term 'authorised trustee corporation'

1.33 The term 'authorised trustee corporation' is deleted from the *Corporations (Aboriginal and Torres* Strait *Islander) Act 2006* and replaced with the term 'a licensed trustee company within the meaning of Chapter 5D of the Corporations Act or the Public Trustee of a State or Territory'. ***[Schedule 1, items 1 and 2, section 700-1]***

1.34 Similar amendments are also made to the Corporations Act. ***[Schedule 1, items 3 and 4, section 9 and paragraph 53(b)]***

Chapter 2
Amendments to operation of common funds, drawing down, and imposition, of fees

Outline of chapter

2.1 The Bill provides for an administrative process for ASIC to approve payment of an annual management fee or a common fund administration fee drawn down from either the income or the capital of a charitable estate. The Bill also addresses other issues, such as the relationship between Chapter 5D and Chapter 5C, the interaction of fee regulation provisions and the regulation of related party transactions.

Context of amendments

2.2 Chapter 5D does not apply to common funds which are also registered managed investment schemes given that there is already a legislative regime applying to such funds in the form of Chapter 5C.

Summary of new law

2.3 The Bill addresses:

- the relationship between common funds and registered schemes;
- arm's length transactions;
- inconsistency in fee regulation provisions in the Act;
- drawing down of fees from income or capital;
- allowing trustee companies to charge a reasonable fee for tax returns; and
- transition of charging of fees to the national scheme.

Comparison of key features of new law and current law

New law	*Current law*
In relation to a common fund that is also a registered scheme, where a provision of Chapter 5D is inconsistent with Chapter 5C or Part 7.9 of the Corporations Act (registered scheme provision), the registered scheme provision prevails to the extent of the inconsistency.	There is no explicit provision governing the relationship between the common fund provisions in Chapter 5D and the managed investment scheme provisions in Chapter 5C.
Licensed trustee companies are not able to give a financial benefit in relation to a common fund to a related party unless such benefit would be assessed as a reasonable arm's length transaction; or if such financial benefit was done on terms less favourable than an arm's length transaction.	Regulation 5D.2.09 of the *Corporations Regulations 2001*.
A note is inserted into section 601TAB which states that there are other provisions in Chapter 5D and in the regulations which limit the ability of a licensed trustee company to increase fees. This amendment does not prevent a licensed trustee company from reducing fees for current clients below the statutory limit.	Section 601TAB (disclosure to clients of changed fees) does not explicitly address how it interacts with other provisions.
If a trustee company charges an annual management fee or a common fund administration fee in respect of a charitable trust, those fees can be drawn down from the capital of the estate or the common fund if first approved by ASIC.	If a trustee company charges an annual management fee or a common fund administration fee in respect of a charitable trust, those fees can only be drawn down from the income of the estate or the common fund.
Licensed trustee companies permitted to charge a reasonable fee for tax return preparation on behalf of any trust or estate under its management.	No equivalent.

Detailed explanation of new law

Common funds and registered schemes

2.4 In some cases, a trustee company common fund (which is normally regulated under Chapter 5D) is also a 'managed investment scheme' or MIS as defined in section 9 of the Act (these are normally regulated under Chapter 5C of the Corporations Act). This is explicitly acknowledged by a note to subsection 601SCA(2) of the Corporations Act. If investments in common funds are offered to the public, trustee companies must comply with the managed investment scheme requirements in Chapter 5C and Part 7.9 (financial product disclosure and other provisions relating to issue, sale and purchase of financial products) of the Corporations Act.

2.5 To provide certainty in relation to a common fund that is also a registered scheme (noting that Chapter 5D was passed after Chapter 5C), where a provision of Chapter 5D (or a regulation or other instrument made for the purposes of that chapter) is inconsistent with any of the following (a ***registered scheme provision***):

- a provision of Chapter 5C or a regulation or other instrument made for the purposes of that Chapter; or
- a provision of Part 7.9 of Chapter 7 or a regulation or other instrument made for the purposes of that Chapter;

the registered scheme provision prevails to the extent of the inconsistency.

[Schedule 1, item 7, section 601SCAA]

Arm's length transactions

2.6 Regulation 5D.2.09 of the *Corporations Regulations 2001* (regulations) provides that licensed trustee companies are not able to give a financial benefit in relation to a common fund to a related party unless such benefit would be assessed as a reasonable arm's length transaction; or if such financial benefit was done on terms less favourable than an arm's length transaction.

2.7 This regulation is more appropriately located with other relevant provisions in the Corporations Act. Accordingly, a similar provision is inserted into Chapter 5D. ***[Schedule 1, item 8, section 601SCD]***

2.8 Failure to comply with subsection 601SCD(1) is an offence. The maximum penalty is 2000 penalty units or imprisonment for 5 years, or both. The penalty is commensurate with the seriousness of non-arm's length dealings with related parties under the Corporations Act generally. 'Penalty unit' is defined in section 4AA of the *Crimes Act 1914*. ***[Schedule 1, item 35, Schedule 3 to the Corporations Act, table item 173EA]***

Relationship between fee regulation provisions in the Act

2.9 Under section 601TAB of the Corporations Act, if a licensed trustee company continues to provide traditional trustee company services to a client and the fees that it will charge change, the company must within 21 days of the change in fees taking effect notify the client of the change. In practice, the operation of this provision may be unclear given that in most situations trustee company fees will be fixed and not able to be increased (at any rate unilaterally by the trustee company). A note is inserted into section 601TAB which states that there are other provisions in Chapter 5D and in the regulations which limit the ability of a licensed trustee company to increase fees. This amendment does not prevent a licensed trustee company from reducing fees for current clients below the statutory limit. ***[Schedule 1, item 9, subsection 601TAB]***

Example 1.1

Where a trustee company initially charges a fee that is below its published schedule of fees when the service commenced, it would have the ability to later increase the fee up to the level in that published schedule, but would be obliged to write to the client in terms of 601TAB(1).

Example 1.2

If, after commencing a service, a trustee company reduces its actual fee (which initially could not be more than its published fee when it commenced the service), it would need to write to the client advising of the reduction.

Amendment of drawing down of fees from income or capital

2.10 When a licensed trustee company charges an annual management fee under section 601TDD or a common fund administration fee under 601TDE or 601TDI, the fee should be able to be drawn from either income or capital.

2.11 At present, if a licensed trustee company charges an annual management fee or a common fund administration fee in respect of a charitable trust, under subsection 601TBE(3) such fees can only be drawn

from the income of the estate or the common fund. This provision was based on precedents in State legislation. The TCA has argued that, for such trusts, there should ideally be the ability to draw management fees and common fund administration fees (in appropriate proportions) from the income and/or capital of the fund, rather than from just the income.

2.12 An example is where the operation of a common fund by the licensed trustee is affected by a decrease of the return on investments because of factors beyond the control of the company such as a global financial crisis. This example does not limit the circumstances in which ASIC could exercise its discretion.

2.13 ASIC may, on application in writing by a licensed trustee company approve payment of a proposed fee out of the capital of the relevant estate, if ASIC is satisfied that two conditions have been met. The purpose of the conditions is to help ensure that the capital of the trust or estate is not eroded:

- The payment of the fee will not significantly affect the capital of the relevant estate or charitable trust; and
- The fee is a fair reflection of the work and expertise required to perform the estate management function

[Schedule 1, items 10 and 11, subsections 601TBE(3) and (4)]

Allowing trustee companies to charge a reasonable fee for tax returns

2.14 Licensed trustee companies should be permitted to charge a reasonable fee for tax return preparation on behalf of any trust or estate under its management.

2.15 The TCA is concerned that, under the legislation as passed, a trustee company would no longer be authorised to charge a fee for tax return preparation unless it was performing an estate management function as trustee or manager of a charitable trust. This is because the legislation allows a trustee company to charge a fee for tax return preparation when it is performing an estate management function as trustee or manager of a charitable trust (sections 601TDF and 601TDJ), but not under other circumstances. The TCA points out that, at common law, a trustee company cannot charge for preparing a tax return without the express consent of the client. However this position was generally reversed under the former State legislation.

2.16 This proposed amendment needs to have retrospective effect to link into the current financial year, so as to streamline business systems within licensed trustee companies. It is not expected to cause detriment to stakeholders of trustee companies, because it reinstates the former law, and will benefit the companies by providing certainty. ***[Schedule 1, item 12, section 601TCB]***

Chapter 3
Amendments to the payments system

Outline of chapter

3.1 Schedule 2 of the Bill contains amendments to the *Payment System Regulation Act 1998* (PSRA) to provide ongoing protection for payment system participants, from Part IV of the *Competition and Consumer Act 2010* (CCA), when complying with the ATM Access regime as determined by the Reserve Bank of Australia.

Context of amendments

3.2 The PSRA provides the Reserve Bank of Australia (RBA) with a mandate for promoting competition and efficiency in the payments system.

3.3 The networked nature of the payments system industry means there is potential for payment system participants to be in conflict with the competition provisions of Part IV of the CCA when they are complying with RBA regulations. This is because a degree of collaboration between payment system participants is required to meet the regulations.

3.4 The RBA has put in place reforms to promote competition and efficiency in the Australian ATM system. These reforms are part of a broader suite of reforms undertaken by the RBA since 2004 which are designed to promote competition and efficiency in the payments system by putting in place transparent pricing and improving ease of access into the ATM system.

3.5 On 23 February 2009, following extensive consultation and discussion, the RBA imposed an access regime on the ATM system that, among other things, prohibited the payment of interchange fees between participants in the ATM system. The networked nature of the payments system industry means that regulation, whether on the part of industry or the RBA, could require participants to undertake collaborative action that could result in a contravention of the CCA. These actions could include price setting, or making arrangements around access to the payments system concerned.

3.6 The *Payment Systems (Regulation) Regulations 2006* were amended on 13 March 2009 to protect participants in the ATM system from prosecution under the CCA with respect to activities they undertake in compliance with the ATM Access Regime. This protection sunsets in March 2011 as regulations made for the purposes of section 51(1)(a)(ii) of the CCA last for two years.

3.7 To allow ATM participants to continue to comply with the RBA's ATM reforms after the current regulations sunsets in March 2011, a legislative change to the PSRA is required.

Summary of new law

3.8 Schedule 2 of the Bill amends the *Payment System Regulation Act 1998 to:*

- provide protection for payment system participants, from Part IV of the CCA when complying with the ATM Access Regime as determined by the RBA.

Comparison of key features of new law and current law

New law	*Current law*
Payment system participants will be permanently exempt from Part IV of the CCA through an Act rather than regulation.	Regulation 6 of the *Payment Systems (Regulation) Regulations 2006.*

Detailed explanation of new law

3.9 The Bill amends the PSRA to provide that for the purposes of subparagraph 51(1)(a)(i) of the CCA, anything that is done by a payment system participant in accordance with an access regime as determined by the RBA is exempt from the application of Part IV of the CCA. ***[Schedule 2, item 1, subsection 15(A) of the Payment System Regulation Act 1998]***

Index

Schedule 1: Trustee companies

Bill reference	*Paragraph number*
Items 1 and 2, section 700-1	1.33
Items 3 and 4, section 9 and paragraph 53(b)	1.34
Item 5, subsection 601RAB(2)	1.27
Item 7, section 601SCAA	2.5
Item 8, section 601SCD	2.7
Item 9, subsection 601TAB	2.9
Items 10 and 11, subsections 601TBE(3) and (4)	2.13
Item 12, section 601TCB	2.16
Item 14, subsection 601WAA(1)	1.10
Item 15, subsection 601WAA(1)	1.10
Item 16, subsection 601WAA(1)	1.10
Item 17, subsection 601WBA(1)	1.13
Item 18, subsection 601WBA(2)	1.14
Item 19, paragraph 601WBA(2)(ab)	1.20
Item 19, subparagraph 601WBA(2)(ab); item 24, subparagraph 601WBA(3)(d); item 25, subsection 601WBE(1); item 26, section 601WBF; item 27, paragraph 601WBG(1)(a); item 29, paragraph 601WBG(2)(ca)	1.15
Item 19, paragraph 601WBA(2)(aa)	1.20
Item 20, subparagraph 601WBA(2)(b)(ii); item 21, subparagraph 601WBA(2)(b)(iv)	1.22
Item 22, subsection 601WBA(2A)	1.21
Item 28, subsection 601WDA(3)	1.17
Item 33, section 601XAB	1.30
Item 34, note to subsection 1364(2)	1.32
Item 34, Schedule 3 to the Corporations Act, table item 173U	1.18
Item 35, Schedule 3 to the Corporations Act, table item 173EA	2.8
Item 36, Schedule 3 to the Corporations Act, table item 173V	1.31

Schedule 2: Payment systems

Bill reference	***Paragraph number***
Item 1, subsection 15(A) of the Payment System Regulation Act 1998	3.9