



Corporations Amendment Regulations 2010 (No. 3)¹

Select Legislative Instrument 2010 No. 88

I, QUENTIN BRYCE, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following Regulations under the *Corporations Act 2001*.

Dated 6 May 2010

QUENTIN BRYCE
Governor-General

By Her Excellency's Command

CHRIS BOWEN
Minister for Financial Services, Superannuation and Corporate
Law

Contents

1	Name of Regulations	2
2	Commencement	2
3	Amendment of <i>Corporations Regulations 2001</i>	2
4	Transitional arrangements for charging of fees	3
5	Transitional arrangements for unlicensed trustee companies	3
6	Transitional arrangements about dispute resolution and compensation	5
7	Application to established common funds	5
Schedule 1	Amendments commencing on commencement of Schedule 2 to <i>Corporations Legislation Amendment (Financial Services Modernisation) Act 2009</i>	6
Schedule 2	Amendments commencing on 1 July 2010	23

1 Name of Regulations

These Regulations are the Corporations Amendment Regulations 2010 (No. 3).

2 Commencement

These Regulations commence as follows:

- (a) on the commencement of Schedule 2 to the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* — regulations 1 to 6 and Schedule 1;
- (b) on 1 July 2010 — regulation 7 and Schedule 2.

3 Amendment of *Corporations Regulations 2001*

Schedules 1 and 2 amend the *Corporations Regulations 2001*.

4 Transitional arrangements for charging of fees

- (1) For section 1496 of the Act, Part 5D.3 (other than Division 4) of the Act applies to a licensed trustee company as set out in this regulation.
- (2) If a licensed trustee company had an existing client at the commencement of Schedule 1 to these Regulations, the fee the company was entitled to charge under the relevant State law for traditional trustee company services to the client continues to apply to those services whether or not the relevant State law has since been repealed.
- (3) In this regulation, a *relevant State law* is a law of a State or Territory in force immediately before the commencement of Schedule 2 to the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* that regulates the fees that may be charged by companies for the provision of traditional trustee company services.

5 Transitional arrangements for unlicensed trustee companies

- (1) For section 1496 of the Act, this provision applies to a trustee company listed in Schedule 8AA to these Regulations that does not hold an Australian financial services licence.
- (2) On the commencement of these Regulations until the end of 30 April 2011:
 - (a) the trustee company is taken to have a licence covering the provision by the company of traditional trustee company services provided by the company; and
 - (b) section 601TAB of the Act does not apply to the company; and
 - (c) Part 7.7 does not apply to the traditional trustee company services provided by the company.

Note If the company wants to continue to provide traditional trustee company services after 30 April 2011, it will need to apply (before the end of that period) to ASIC to obtain a licence covering those services.

- (3) To avoid doubt, subregulation (2) does not limit ASIC's powers under Part 7.6 in relation to the licence the trustee company is taken to have.

Note ASIC has power to vary, cancel or suspend the licence under Subdivision C of Division 4 of Part 7.6 of the Act.

- (4) A trustee company that is taken to have an Australian financial services licence under subregulation (2) is, for paragraph 912A (1) (d) of the Act, taken to have available adequate resources to provide traditional trustee company services if the company maintains the amount of net tangible assets it held at the commencement of these Regulations for the period it is taken to have the licence.

- (5) In subregulation (4) *net tangible assets* means the total assets of a trustee company:

- (a) less total liabilities of the company; and
- (b) less any intangible assets reported in the company's books of account;

calculated on the basis of assets and liabilities as they would appear if, at the time of calculation, a balance sheet were made up for lodgement as part of a financial report under Chapter 2M of the Act on the basis that the company is a reporting entity.

- (6) For subregulation (5), a trustee company must:

- (a) work out its total assets by excluding:
 - (i) all receivables to be received from a related party as defined in AASB 124 and Part 2E.2 of Chapter 2E of the Act; and
 - (ii) any assets that are subject to any charge that secures the liability of a person other than the company, to the extent of the value of that charge; and
 - (iii) any assets to which the company is not legally and beneficially entitled or that are not held in the name of the company; and
 - (iv) any assets that are not capable of being converted into cash in the short term; and

(b) include in its total liabilities all payables payable to a related party as defined in AASB 124 and Part 2E.2 of Chapter 2E of the Act.

(7) In this regulation:

AASB 124 means AASB 124, *Related Party Disclosures*, published by the Australian Accounting Standards Board.

6 Transitional arrangements about dispute resolution and compensation

(1) For section 926B of the Act, this provision applies, on commencement of these Regulations until the end of 30 April 2011, to a trustee company listed in Schedule 8AA to these Regulations.

(2) In relation to traditional trustee company services provided by the trustee company, the company is exempt from the obligations in paragraph 912A (1) (g) and subsection 912B (1) of the Act.

7 Application to established common funds

A licensed trustee company that has established a common fund before 1 July 2010 and the fund continues after that day, commits an offence if the company does not:

- (a) make a decision, in writing, about the matters set out in paragraphs 5D.2.05 (1) (a) to (g); and
 - (b) comply with subregulation 5D.2.05 (2);
- before 1 July 2011.

Penalty: 50 penalty units.

Schedule 1 Amendments commencing on commencement of Schedule 2 to Corporations Legislation Amendment (Financial Services Modernisation) Act 2009

(regulation 3)

[1] After Chapter 5C

insert

Chapter 5D Licensed trustee companies

Part 5D.1 Preliminary

5D.1.01 Meaning of *trustee company*

- (1) For paragraph 601RAB (1) (b) of the Act, a company that is listed in Schedule 8AA is prescribed as a trustee company for the purpose of the Act.
- (2) A company that performs the function of the Public Trustee of a State or Territory may only be listed in Schedule 8AA if:
 - (a) the State or Territory requests the Minister to prescribe the company as a trustee company; and
 - (b) the Minister agrees to the request.

5D.1.02 Meaning of *traditional trustee company services and estate management functions*

- (1) For paragraph 601RAC (3) (f) of the Act, acting in any of the following capacities is prescribed:
- (a) as trustee for the holders of debt securities of a body;
 - (b) as trustee of a trust established for purposes that include issuing debt securities (including loan-backed securities and mortgage-backed securities) or managing or servicing the assets of the trust;
 - (c) as trustee for the benefit of present or future creditors of another person when holding:
 - (i) mortgages, charges, guarantees, indemnities or other rights or benefits that have been given to secure debts owing to the creditors; and
 - (ii) the proceeds from the enforcement of any of the securities mentioned in subparagraph (i);

Note **Securities** is defined in section 92 of the Act.

- (d) as custodian for another trustee or for the responsible entity of a registered scheme or other commercial entity;
- (e) as trustee of a managed investment scheme the main assets of which consist of land and improvements on the land where the trustee is not responsible for the daily management of the land or any business conducted on the land;

Note **Managed investment scheme** is defined in section 9 of the Act.

- (f) as trustee for employee share or benefit schemes;
- (g) as trustee for trusts the main activities of which consist of making loans to, or otherwise investing in, companies or other commercial entities;
- (h) as an escrow agent;
- (i) as a person named in a will as an executor when not actively providing a service or function;
- (j) as a person named in a power of attorney as an attorney when not actively providing a service or function;
- (k) preparing a power of attorney for a person's medical treatment or for guardianship of a person's affairs;

(l) preparing a living will or advance health directive of any kind.

(2) In this regulation:

custodian does not include a trustee establishing and operating a common fund.

debt security means:

- (a) any debenture, debenture stock, bond, note or other security of a corporation or body; or
- (b) any convertible note issued by a company or any convertible note in a unit trust scheme issued by the trustee of a unit trust scheme; or
- (c) any right to a security mentioned in paragraph (a) or (b); whether or not it is a charge on the assets of the corporation, company, society or unit trust scheme.

employee share or benefit scheme means a scheme under which a company offers for issue or sale shares (or options over issued shares) in the company, or some other benefit in the company, only to a director or employee of the company, or of an associated body corporate, when the offer is made.

escrow agent means a person with whom is deposited a contract, deed, bond or other written agreement or property for delivery to the grantee, promisee or some other person on resolution of a dispute or fulfilment of some condition.

loan-backed security means:

- (a) an instrument or property:
 - (i) creating a right or interest (whether described as a unit, bond or otherwise) for a beneficiary; or
 - (ii) conferring a right or interest (whether described as a unit, bond or otherwise) on a beneficiary; or
 - (iii) consisting of a right or interest (whether described as a unit, bond or otherwise) of a beneficiary;in a scheme under which the profits, distributions of capital or income in which beneficiaries share arise or arises from the acquisition, holding, management or disposal of a loan or pool of loans; or

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- (b) an instrument which evidences a right or interest mentioned in paragraph (a); or
 - (c) a debt security:
 - (i) the payments under which by the person that issues or makes the instrument are derived mainly from the acquisition, holding, management or disposal of a loan or pool of loans; and
 - (ii) that is secured by a mortgage or charge over a loan or pool of loans.

mortgage-backed security has the meaning given in regulation 5D.1.03.

5D.1.03 Meaning of *mortgage-backed security*

- (1) A ***mortgage-backed security*** is:
 - (a) an interest in a trust that entitles the holder of, or beneficial owner under, the interest to:
 - (i) the whole, or any part, of the rights or entitlements of a mortgagee and any other rights or entitlements in respect of a mortgage or pool of mortgages; or
 - (ii) any amount payable by the mortgagor or mortgagors under a mortgage or mortgages (whether or not the amount is payable to the holder of, or beneficial owner under, the interest on the same terms as under the mortgage or mortgages); or
 - (iii) payments that are derived mainly from the income or receipts of a mortgage or pool of mortgages;
and that may, in addition, entitle the holder, or beneficial owner, to a transfer or assignment of the mortgage or mortgages; or
 - (b) a debt security (whether or not in writing) the payments under which by the person who issues or makes the debt security are derived mainly from the income or receipts of a mortgage or pool of mortgages; or

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- (c) any of the following:
- (i) an interest in a trust:
 - (A) creating a right or interest (whether described as a unit, bond or otherwise) for a beneficiary; or
 - (B) conferring a right or interest (whether described as a unit, bond or otherwise) on a beneficiary; or
 - (C) consisting of a right or interest (whether described as a unit, bond or otherwise) of a beneficiary;
in a scheme under which any profit or income in which the beneficiaries share arises from the acquisition, holding, management or disposal of a mortgage, pool of mortgages or the income or receipts of a mortgage or pool of mortgages;
 - (ii) any instrument that evidences a right or interest mentioned in subparagraph (i);
 - (iii) a security (whether or not in writing) the payments under which by the person who issues or makes the security are derived mainly from the income or receipts of a mortgage or pool of mortgages;
 - (iv) an interest in a trust or a debt security (whether or not in writing);
 - (v) an instrument or property that creates an interest in, or charge over an interest in, a trust;
 - (vi) a debt security (whether or not in writing);
 - (vii) any other property to which paragraph (a) or (b) or subparagraph (i), (ii) or (iii) applies.
- (2) However, a mortgage-backed security does not include an instrument or property consisting of any of the following:
- (a) a mortgage;
 - (b) the transfer of a mortgage;
 - (c) a declaration of trust.

5D.1.04 Interaction between trustee company provisions and State and Territory laws

- (1) For paragraph 601RAE (4) (a) of the Act, the trustee company provisions are intended to apply to the exclusion of the provisions of State or Territory laws prescribed in Schedule 8AB.
- (2) For paragraph 601RAE (4) (b) of the Act, the trustee company provisions are intended not to apply to the exclusion of the State or Territory laws, or the provisions of State or Territory laws, prescribed in Schedule 8AC, so far as those laws relate to an administrator of a person's estate.
- (3) For paragraph 601RAE (4) (b) of the Act, the trustee company provisions are intended not to apply to the exclusion of the State or Territory laws, or the provisions of State or Territory laws, prescribed in Schedule 8AD.

Part 5D.2 Powers etc of licensed trustee companies

Division 2.1 Annual Information Returns

5D.2.01 Obligation on licensed trustee company to provide an annual information return if requested

- (1) For section 601SAB of the Act, this regulation prescribes the obligation of a licensed trustee company to provide an annual information return.
- (2) The licensed trustee company commits an offence if:
 - (a) a person mentioned in subregulation (3) requests an annual information return; and
 - (b) the company does not provide the return to the person in accordance with the requirements in subregulations (5), (6) and (8) and regulation 5D.2.02.

Penalty: 50 penalty units.

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- (3) A person may request an annual information return if the person is one of the following:
- (a) in the case of the estate of a deceased person:
 - (i) if the person died testate — a beneficiary under the deceased person’s will; or
 - (ii) if the person died intestate — a person who, under a law of a State or Territory, has, is entitled to, or claims to be entitled to, an interest in the deceased person’s estate; or
 - (iii) a person who has commenced a proceeding in a court, under a law of a State or Territory, to seek to be included as a beneficiary of the deceased person’s estate;
 - (b) in relation to a charitable trust:
 - (i) the settlor, or one of the settlors, of the trust; or
 - (ii) a person who, under the terms of the trust, has power to appoint or remove a trustee of the trust or to vary (or cause to be varied) any of the terms of the trust; or
 - (iii) a person, or a person’s appointed successor, who is named in the instrument establishing the trust as a person who must, or may, be consulted by the trustee or trustees before distributing or applying money or other property for the purposes of the trust;
 - (c) in the case of any other trust:
 - (i) the settlor, or one of the settlors, of the trust; or
 - (ii) a person who, under the terms of the trust, has power to appoint or remove a trustee of the trust or to vary (or cause to be varied) any of the terms of the trust; or
 - (iii) a beneficiary of the trust.
- (4) The person must make the request for an annual information return in writing to the licensed trustee company and may indicate in the request which one of the following forms of return is required:
- (a) by sending it to the person’s postal address;

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- (b) by emailing it to a nominated email address.
 - (5) The annual information return must be provided within 30 days after the request from the person is received by the licensed trustee company, and then annually.
 - (6) The annual information return must be for the last financial year that the licensed trustee company has provided a service to the person who has requested the return.
 - (7) However, the licensed trustee company is not required to provide an annual information return covering a period:
 - (a) before 1 July 2010; or
 - (b) before it provided a service to the person.
 - (8) The annual information return must be provided as follows:
 - (a) if requested in a particular form — in the form requested;
 - (b) in all other cases — by sending it to the person's postal address.

5D.2.02 Information to be included in annual information return

The annual information return provided by a licensed trustee company must include the following:

- (a) for a person mentioned in subparagraphs 5D.2.01 (3) (a) (i) and (ii) and (c) (iii):
 - (i) details of income earned on the person's interest in the trust or estate; and
 - (ii) details of expenses in operating the trust or estate in relation to the person's interest in the trust or estate; and
 - (iii) the net value of the person's interest in the trust or estate;
- (b) for any other person mentioned in subregulation 5D.2.01 (3):
 - (i) details of income earned on the trust's assets; and

- (ii) details of expenses in operating the trust's assets, including remuneration, commission or other benefits received by the trustee company; and
- (iii) the net value of the trust's assets;
- (c) if required under the terms of the trust — a copy of the trust's audit report and financial statements for the year.

Part 5D.3 Regulation of fees charged by licensed trustee companies

5D.3.01 Modification of section 601TAB of the Act: disclosure to clients of changed fees

For paragraph 601YAB (1) (b) of the Act, Chapter 5D of the Act applies as if section 601TAB of the Act were modified by inserting after subsection (3) the following subsections:

- (4) A licensed trustee company is not required to comply with paragraph (1) (a) or (b) or (3) (a) in relation to a client who is a lost client, or an agent who is a lost agent.

- (5) In subsection (4):

lost client means a client who, at a particular time, is uncontactable.

lost agent means an agent who, at a particular time, is uncontactable.

- (6) In subsection (5):

uncontactable, in relation to a person who is a client or an agent of a licensed trustee company, means:

- (a) the licensed trustee company:
 - (i) never had an address for the person; or
 - (ii) sent at least 1 written communication to the person's last known address which was returned unclaimed and the person has not, since the communication, given the company a contact address; and

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- (b) if the person is an agent, the licensed trustee company made a reasonable attempt to get the agent's address from the agent's client or the client's carers.'

[2] After regulation 7.1.17B

insert

7.1.17C Retail clients: traditional trustee company services

For subsection 761G (6A) of the Act, a traditional trustee company service is not provided to a person as a retail client if:

- (a) the service is provided to the person for use in relation to a business that is not a small business; or
- (b) the person to whom the service is provided is a professional investor.

Note **Small business** is defined in subsection 761G (12) of the Act and **professional investor** is defined in section 9 of the Act.

[3] Before regulation 7.1.29

insert in Division 3

7.1.28A Circumstances in which a person is taken to be provided a traditional trustee company service

For subsection 766A (1B) of the Act, a person who is one of the following:

- (a) a person who may request an annual information return under subregulation 5D.2.01 (3);
 - (b) a person who requests the preparation of a will, a trust instrument, a power of attorney or an agency arrangement;
- is, in relation to an estate management function, prescribed as the person to whom the service is taken to be provided.

[4] After subregulation 7.6.02 (5)

insert

- (6) For paragraph 926B (1) (a) of the Act, a financial services licensee who provides a financial service in the capacity as administrator of the estate of an individual does not have to comply with paragraph 912A (1) (g) of the Act in relation to the provision of the service if complaints about the service provided by the licensee may be made under a State or Territory law listed in Schedule 8AC.

[5] Subregulation 7.7.04 (3), except the heading

substitute

- (3) The following information is required if the remuneration, commission or other benefits are able to be worked out at the time the Financial Services Guide is given to the client:
- (a) in a case where the remuneration, commission or other benefits are to be received by a person who is a licensed trustee company, either:
- (i) the remuneration, commission or other benefits; or
 - (ii) the remuneration, commission or other benefits stated as a percentage of the income from the estate or as a percentage of the capital value of the estate;
- (b) in any other case — the remuneration, commission or other benefits.

[6] Subregulation 7.7.04 (4)

omit

the following information:

insert

the following information is required:

[7] Subregulation 7.7.04 (5)

omit

the following information:

insert

the following information is required:

[8] Subregulation 7.7.07 (3), except the heading

substitute

- (3) The following information is required if the remuneration, commission or other benefits are able to be worked out at the time the Financial Services Guide is given to the client:
- (a) in a case where the remuneration, commission or other benefits are to be received by a person who is a licensed trustee company, either:
- (i) the remuneration, commission or other benefits; or
 - (ii) the remuneration, commission or other benefits stated as a percentage of the income from the estate or as a percentage of the capital value of the estate;
- (b) in any other case — the remuneration, commission or other benefits.

[9] Subregulation 7.7.07 (4)

omit

the following information:

insert

the following information is required:

[10] Subregulation 7.7.07 (5)

omit

the following information:

insert

the following information is required:

[11] After Schedule 8A

insert

Schedule 8AA Trustee companies

(regulation 5D.1.01)

Item Trustee companies

- 1 ANZ Trustees (Canberra) Limited
- 2 ANZ Trustees Limited
- 3 Australian Executor Trustees Limited
- 4 Australian Executor Trustees (Canberra) Limited
- 5 Australian Executor Trustees (NSW) Limited
- 6 Australian Executor Trustees (SA) Limited
- 7 Bagot's Executor and Trustee Company Limited
- 8 Elders Trustees Limited
- 9 Equity Trustees Limited
- 10 Executor Trustee Australia Limited
- 11 Mutual Trust Proprietary Limited
- 12 National Australia Trustees Limited
- 13 Permanent Trustee Company (Canberra) Limited
- 14 Perpetual Limited
- 15 Perpetual Trustee Company (Canberra) Limited
- 16 Perpetual Trustee Company Limited
- 17 Perpetual Trustees Consolidated Limited
- 18 Perpetual Trustees Queensland Limited
- 19 Perpetual Trustees S.A. Limited
- 20 Perpetual Trustees Victoria Limited
- 21 Perpetual Trustees W.A. Limited
- 22 Plan B Trustees Limited
- 23 Sandhurst Trustees Limited

Item	Trustee companies
24	Tasmanian Perpetual Trustees Limited
25	The Myer Family Office Ltd
26	Trust Company Limited
27	Trust Company Fiduciary Services Limited
28	Union Trustee Company (Canberra) Limited

Schedule 8AB Prescribed State and Territory provisions for paragraph 601RAE (4) (a) of the Act

(subregulation 5D.1.04 (1))

Item	State or Territory law and provisions
1	Trustee Companies Act 1984 (Vic), sections 40–42
2	<i>Trustee Companies Act 1987</i> (WA), Part IV and section 34
3	<i>Trustee Companies Act 1988</i> (SA), sections 15–15B and 19–21
4	<i>Trustee Companies Act 1953</i> (Tas), subsections 18C (1), (3)–(13)
5	<i>Companies (Trustees and Personal Representatives) Act</i> (NT), section 25

Schedule 8AC Prescribed State and Territory laws and provisions for paragraph 601RAE (4) (b) of the Act — estate administration

(subregulation 5D.1.04 (2) and subregulation 7.6.02 (6))

Item	State or Territory law and provisions
1	<i>Children and Young Persons (Care and Protection) Act 1998</i> (NSW)
2	<i>Guardianship Act 1987</i> (NSW)

Item	State or Territory law and provisions
3	<i>NSW Trustee and Guardian Act 2009</i> (NSW)
4	Victorian Civil and Administrative Tribunal Act 1998 (Vic), Part 9 of Schedule 1
5	Guardianship and Administration Act 1986 (Vic)
6	<i>Guardianship and Administration Act 2000</i> (Qld)
7	<i>Guardianship and Administration Act 1990</i> (WA)
8	<i>Guardianship and Administration Act 1993</i> (SA)
9	<i>Guardianship of Infants Act 1940</i> (SA)
10	<i>Guardianship and Administration Act 1995</i> (Tas)
11	<i>Guardianship and Custody of Infants Act 1934</i> (Tas)
12	<i>Guardianship and Management of Property Act 1991</i> (ACT)
13	<i>Testamentary Guardianship Act 1984</i> (ACT)
14	<i>Adult Guardianship Act</i> (NT)
15	<i>Guardianship of Infants Act</i> (NT)

Schedule 8AD Prescribed State and Territory laws and provisions for paragraph 601RAE (4) (b) of the Act

(subregulation 5D.1.04 (3))

Item	State or Territory law and provisions
	NEW SOUTH WALES
1	<i>Probate and Administration Act 1898</i> and any regulations made under that Act
2	<i>NSW Trustee and Guardian Act 2009</i> and any regulations made under that Act
3	<i>Trustee Act 1925</i> and any regulations made under that Act
4	<i>Trustee Companies Act 1964</i> and any regulations made under that Act

Item	State or Territory law and provisions
	VICTORIA
5	Administration and Probate Act 1958 and any regulations made under that Act
6	Guardianship and Administration Act 1986 and any regulations made under that Act
7	Instruments Act 1958 and any regulations made under that Act
8	Medical Treatment Act 1988 and any regulations made under that Act
9	State Trustees (State Owned Company) Act 1994 and any regulations made under that Act
10	Trustee Act 1958 and any regulations made under that Act
	QUEENSLAND
11	<i>Guardianship and Administration Act 2000</i> and any regulations made under that Act
12	<i>Legal Profession Act 2007</i> and any regulations made under that Act
13	<i>Public Trustee Act 1978</i> and any regulations made under that Act
14	<i>Succession Act 1981</i> and any regulations made under that Act
15	<i>Trustee Companies Act 1968</i> and any regulations made under that Act
16	<i>Trusts Act 1973</i> and any regulations made under that Act
17	<i>Uniform Civil Procedure Rules 1999</i> , Chapter 15 and rule 94
	WESTERN AUSTRALIA
18	<i>Guardianship and Administration Act 1990</i> and any regulations made under that Act
19	<i>Trustees Act 1962</i> and any regulations made under that Act
	SOUTH AUSTRALIA
20	<i>Administration and Probate Act 1919</i> and any regulations made under that Act
21	<i>Aged and Inform Persons' Property Act 1940</i> and any regulations made under that Act
22	<i>Guardianship and Administration Act 1993</i> and any regulations made under that Act

Item	State or Territory law and provisions
23	<i>Legal Practitioners Act 1981</i> , sections 35 and 77
24	<i>Public Trustee Act 1995</i> and any regulations made under that Act
25	<i>Trustee Act 1936</i> and any regulations made under that Act
	TASMANIA
26	<i>Administration and Probate Act 1935</i> and any regulations made under that Act
27	<i>Supreme Court Civil Procedure Act 1932</i> and any regulations made under that Act
28	<i>Trustee Act 1898</i> and any regulations made under that Act
	AUSTRALIAN CAPITAL TERRITORY
29	<i>Administration and Probate Act 1929</i> and any regulations made under that Act
30	<i>Court Procedures Act 2004</i> and any regulations made under that Act
31	<i>Guardianship and Management of Property Act 1991</i> and any regulations made under that Act
32	<i>Legal Profession Act 2006</i> and any regulations made under that Act
33	<i>Trustee Act 1925</i> and any regulations made under that Act
34	<i>Trustee Companies Act 1947</i> and any regulations made under that Act
	NORTHERN TERRITORY
35	<i>Aged and Infirm Persons' Property Act</i> and any regulations made under that Act
36	<i>Public Trustee Act</i> and any regulations made under that Act

Schedule 2 Amendments commencing on 1 July 2010

(regulation 3)

[1] After regulation 5D.2.02

insert

Division 2.2 Common funds

5D.2.03 Common funds

This Division is made for section 601SCC of the Act.

5D.2.04 Establishment of common funds

- (1) A licensed trustee company may:
 - (a) establish accounts within a common fund; and
 - (b) establish a common fund on the basis of units or another suitable basis.
- (2) If the common fund includes money that is not estate money and that is not otherwise held in trust, the licensed trustee company is taken to hold the money in trust for the person on whose behalf the money is invested in the common fund.

5D.2.05 Deciding details about common funds

- (1) A licensed trustee company that is establishing a common fund commits an offence if, at the time of establishing the fund, it does not ensure that its Board makes a decision, in writing, about the following:
 - (a) any limitation on the amount of money that will form the common fund;

- (b) the investment strategy for the common fund, including the following:
 - (i) the class of investments in which the common fund may be invested;
 - (ii) the procedure for valuing the investments;
 - (iii) if the trustee company is to seek expert advice about proposed investments — the type of expert advice to be sought;
- (c) the amount of fees that are to be paid by:
 - (i) the common fund for the provision of traditional trustee company services; and
 - (ii) each account in the common fund;
- (d) the manner in which a withdrawal can be made from the common fund;
- (e) the procedure for auditing the common fund;
- (f) if the common fund is to have a limited life — the duration of the common fund;
- (g) if the common fund is to have a minimum amount that may be invested in the fund on account of each estate — the minimum amount.

Penalty: 50 penalty units.

- (2) The licensed trustee company commits an offence if it does not:
 - (a) within 14 days of making the decision:
 - (i) send a copy of the decision to ASIC; and
 - (ii) publish a copy of the decision on its website; and
 - (b) if requested by a person entitled to request an annual information return under subregulation 5D.2.01 (3), make a copy of the decision available to the person within 30 days of the request being received.

Penalty: 50 penalty units.

5D.2.06 Operation of common funds

Compliance with the Act and regulations

- (1) A licensed trustee company may, from time to time and without liability for breach of trust, pay into or withdraw an amount from a common fund in accordance with the Act and these Regulations.

Note Payments into a common fund may be prohibited where this is contrary to the conditions on which the company holds the money: see subsection 601SCB (3) of the Act.

Withdrawals

- (2) A licensed trustee company may do the following:
- (a) withdraw an amount from a common fund for a purpose relating to a trust or estate that is part of the fund and is managed or administered by the company;
 - (b) withdraw from a common fund an amount at credit in the 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) A licensed trustee company commits an offence if it pays interest from the common fund on withdrawn amounts on or after the day of the withdrawal.

Penalty: 50 penalty units.

Derivatives

- (4) A licensed trustee company commits an offence if:
- (a) when managing and administering a common fund, the trustee company enters into a derivative; and
 - (b) at the time of entering into the derivative:
 - (i) the trustee company did not do so for the purpose of managing a financial risk arising from:
 - (A) variations in the expenses of the common fund; or
 - (B) variations in the revenue obtainable from investments made by the common fund; and

- (ii) the arrangement was not in accordance with the trustee company's equitable and other duties as a trustee under the relevant State or Territory provisions set out in Schedule 8AE.

Penalty: 50 penalty units.

Applying income from investment

- (5) A licensed trustee company commits an offence if it applies income from investment of a common fund other than for:
 - (a) payment of the company's fee for the proper administration and management of the fund under the Act, regulations and terms of the common fund, proportionate to the value of the work done or the services rendered; and
 - (b) allocation in accordance with subregulation (6) in relation to the accounts from which the fund is derived.

Penalty: 50 penalty units.

- (6) For paragraph (5) (b), the allocation must:
 - (a) be made at intervals not exceeding 6 months; and
 - (b) be divided between each account in the common fund in proportion to the amounts invested from those accounts and the period of investment.

Investments

- (7) A licensed trustee company commits an offence if:
 - (a) the trustee company invests money committed to its administration or management; and
 - (b) the investment is:
 - (i) not in accordance with a decision of the Board made for the purpose of regulation 5D.2.05; and
 - (ii) not made in a manner in which trust funds may be invested by a trustee under the relevant State or Territory provisions set out in Schedule 8AE.

Penalty: 50 penalty units.

Valuation of investments

- (8) A licensed trustee company commits an offence if it does not comply with the following requirements about the valuation of investments of common funds:
- (a) by the third business day of each month, the trustee company must decide the value of the investments in each common fund as at the first business day of the month;
 - (b) subject to subregulation (9), in deciding the value of securities listed on a financial market for a month, the trustee company must take the last sale price of the first business day of the month published by the market operator as the value of the listed securities;
 - (c) the trustee company must make withdrawals from the common fund and further investments on the basis of the last valuation of investments made by the company.

Penalty: 50 penalty units.

- (9) The requirement in paragraph 8 (b) does not apply if, in a particular month, the licensed trustee company decides it is in the best interests of each account in the common fund that a sale price used for the valuation be one taken later in that month.

Realising investments

- (10) A licensed trustee company may sell investments belonging to a common fund.
- (11) A licensed trustee company that has realised an investment in a common fund commits an offence if it does not, within 14 days of the realisation, credit or debit any profit or loss between each account in the common fund in proportion to the amounts invested from those accounts at the time of the realisation.

Penalty: 50 penalty units.

5D.2.07 Register of investments

- (1) A licensed trustee company commits an offence if it does not maintain a register of investments for each common fund in accordance with subregulation (2).

Penalty: 50 penalty units.

- (2) The register must contain:
- (a) a record identifying each investment made by the common fund; and
 - (b) details of amounts held to the credit of the common fund.

Note For other obligations relating to common funds: see section 601SCB of the Act.

5D.2.08 Financial reports

- (1) A licensed trustee company must comply with this regulation in relation to each common fund established by the company that is not a registered scheme.

Account keeping

- (2) The licensed trustee company commits an offence if it does not keep accounts that:
- (a) correctly record and explain its transactions for the common fund and the fund's financial position and performance; and
 - (b) would enable true and fair financial statements to be prepared and audited.

Penalty: 50 penalty units.

Auditing

- (3) The licensed trustee company commits an offence if it does not:
- (a) have the financial statements for a financial year for the common fund audited by a registered company auditor; and

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- (b) obtain an auditor's report for the financial statements.

Penalty: 50 penalty units.

Lodging financial statements with ASIC

- (4) The licensed trustee company commits an offence if it does not lodge the audited financial statements for the fund with ASIC within 3 months of the end of the financial year.

Penalty: 50 penalty units.

Request for financial information

- (5) A person who is entitled to request an annual information return under subregulation 5D.2.01 (3) may request, in writing, that the licensed trustee company provide the information mentioned in subregulation (7).
- (6) The licensed trustee company commits an offence if it does not provide the information mentioned in subregulation (7) to the person within 30 days of receiving the request under subregulation (5).

Penalty: 50 penalty units.

- (7) The information that must be provided is:
- (a) a copy of the common fund's financial statements and audit report; and
 - (b) the classes of investments in which the common fund is invested and how the investment is divided between each class; and
 - (c) the trustee company's investment strategy for the common fund.

5D.2.09 Arm's length transactions

- (1) This regulation applies to a licensed trustee company of a common fund if the fund is not a registered scheme to which Part 5C.7 of the Act applies.

- (2) The licensed trustee company commits an offence if it gives a financial benefit in relation to the common fund to a related party.

Penalty: 50 penalty units.

- (3) Subregulation (2) does not apply if the financial benefit is given on terms that:
- (a) would be reasonable in the circumstances if the company and the related party were dealing at arm's length; or
 - (b) are less favourable to the related party than the terms referred to in paragraph (a).
- (4) In this regulation, *related party* has the meaning given by section 228 of the Act, as if the references in that section to 'public company' were references to 'licensed trustee company'.

[2] After Schedule 8AD

insert

Schedule 8AE Relevant State and Territory provisions

(regulation 5D.2.06)

Item	State or Territory provisions
1	<i>Trustee Act 1925</i> (NSW), Part 2, Division 2
2	Trustee Act 1958 (Vic), Part I
3	<i>Trusts Act 1973</i> (Qld), Part 3
4	<i>Trustees Act 1962</i> (WA), Part III
5	<i>Trustee Act 1936</i> (SA), Part 1
6	<i>Trustee Act 1898</i> (Tas), Part II
7	<i>Trustee Act 1925</i> (ACT), Part 2, Subdivision 2.2.1
8	Trustee Act (NT), Part I

Note

1. All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.