



Justice

# Regulatory Impact Statement

## NSW Trustee and Guardian Regulation 2017



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## Regulatory Impact Statement **NSW Trustee and Guardian Regulation 2017**

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**Attachment:** Proposed NSW Trustee and Guardian Regulation 2017

## Introduction

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This document is a Regulatory Impact Statement (**RIS**) for the proposed NSW Trustee and Guardian Regulation 2017 (**the proposed Regulation**). The proposed Regulation relates to the *NSW Trustee and Guardian Act 2009* and if approved will replace the *NSW Trustee and Guardian Regulation 2008* (**the existing Regulation**).

Before a Regulation is made, the responsible Minister must ensure (as far as is reasonably practicable) that a RIS is prepared covering the substantive matters to be dealt with by the proposed Regulation and that a formal process of review is undertaken before the proposed Regulation is made.

The purpose of a RIS is to ensure that the economic and social costs of any Regulation are considered and that the option which produces the greatest net benefit to the community is chosen.

The current stage of the review and consultation process involves seeking comments from the community and key stakeholders on the Public Exhibition Draft of the proposed Regulation and this RIS.

Consultation must be undertaken with appropriate community representatives, relevant interest groups and interested members of the public likely to be affected by the proposed Regulation.

## How to make a submission

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Submissions about the proposed Regulation can be made to:

By mail:       Executive Director, Justice Strategy & Policy  
                  NSW Department of Justice  
                  GPO Box 31  
                  SYDNEY NSW 2001

By email:       policy@justice.nsw.gov.au

If you would like to provide comments in an alternative format, please call Diversity Services on (02) 8688 8460 or 8688 7507. If you are hearing or speech impaired, please contact us via the National Relay Service on 133 677.

All submissions will be treated as public and may be published, unless the submission indicates that it is to be treated as confidential.

Copies of the NSW Trustee and Guardian Regulation 2017 and this RIS are available on the Department of Justice website at [www.justice.nsw.gov.au](http://www.justice.nsw.gov.au).

Closing date for submissions: **27 June 2017**



# Background

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## NSWTG's services and client base

- 1.1 NSW Trustee and Guardian (**NSWTG**) was formed through the merging of the organisations previously known as the Public Trustee and the Office of the Protective Commissioner. This was effected by the *NSW Trustee and Guardian Act 2009 (the Act)*, which came into effect on 1 July 2009. NSWTG provides the same services to clients as its predecessor organisations and is administratively responsible for the Public Guardian, an independent statutory office under the *Guardianship Act 1987*.<sup>1</sup>
- 1.2 NSWTG's role is to act as an independent and impartial provider of trustee, estate administration, Power of Attorney (**PoA**) and executor services, to provide direct financial management services for people unable to make their own financial decisions, and to provide authorisation and direction to private financial managers.
- 1.3 NSWTG has two core business areas:
  - Financial management services, including:
    - direct financial management services for people with decision-making disabilities subject to a Court or Tribunal order; and
    - authorising and directing the performance of private financial managers appointed by the Supreme Court or Guardianship Division of the NSW Civil and Administrative Tribunal; and
  - Trustee services, including:
    - instrument drafting: wills, PoAs and enduring guardianship appointment;
    - estate administration;
    - trust services for individuals and corporations; and
    - PoA administration services.
- 1.4 NSWTG operates under the Act and charges fees for its services in accordance with the existing Regulation. NSWTG's revenue is derived from fees levied against individual estates, trusts, agency matters, financially managed clients' estates and assets, community service obligation funding from NSW Treasury and income from corporate investment.

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1. The Public Guardian operates independently but reports administratively to the Chief Executive Officer of NSWTG. For the purposes of this RIS, NSWTG refers to all operations of NSWTG, excluding the Public Guardian

## Regulation making power

1.5 The Act authorises the making of Regulations under the following sections:

Section 111	Allows NSWTG to charge fees, whether by percentage or otherwise, in respect of its functions. These fees are to be prescribed by the Regulation
Section 128	Enables the Governor to make regulations for fixing scales of commission and other charges to be made by NSWTG under the Act

## Existing Regulation

1.6 The provisions of the existing Regulation relate primarily to the charging of fees for the exercise of NSWTG's functions as defined in the Act.

1.7 NSWTG's fee structure was reviewed by the Independent Pricing and Regulatory Tribunal (**IPART**) in 2014. The recommendations made by IPART were endorsed in full by the Cabinet Expenditure Review Committee in October 2015. Amendments to the Regulation recommended by IPART were implemented in 2016 through the *NSW Trustee and Guardian Amendment (Fees) Regulation 2016*, with new fee structures coming into effect on 1 July 2016.

1.8 The existing Regulation is structured as follows:

- Part 1 deals with preliminary matters such as definitions;
- Part 2 prescribes fees in relation to matters where NSWTG acts as executor, administrator, attorney or agent in relation to deceased estates, trusts or PoAs and ancillary matters;
- Part 3 relates to miscellaneous matters in relation to deceased estates, for example, NSWTG retaining an index of wills lodged with it for safe keeping;
- Part 4 prescribes fees and regulates information sharing in relation to NSWTG's direct management of client's estates and assets and NSWTG's direction and authorising of other managers; and
- Part 5 refers to transitional provisions allowing for the distribution of interest from the former Public Trustee's common fund and allocation of funds from the former Public Trustee's interest suspense account.

1.9 The existing Regulation prescribes fees in relation to NSWTG's services as follows:

### *(a) Direct Financial Management services*

1.10 NSWTG is appointed as the direct financial manager of a client by means of a financial management order by a Court or Tribunal. These orders are issued for persons with diminished capacity to manage their own financial affairs, such as individuals with mental health issues, dementia and other disabilities that impact the ability to make financial decisions.

1.11 The fees prescribed for this service are:



- a) for the establishment of the account of the managed person, payable once only—1% of the value of the estate, subject to a minimum fee of \$500 being payable, up to a maximum of \$3,000,
- b) for the management of an estate—1.4% of the value of the estate, up to a maximum of \$15,000, per annum.

*(b) Private Financial Management services*

1.12 The Supreme Court or the Guardianship Division of the NSW Civil and Administrative Tribunal can appoint a private entity, such as a family member of a managed person or a private trustee company, as the financial manager of a managed person. NSW TG provides these private financial managers with directions they must comply with and the authority to act as a financial manager, based on information supplied outlining the individual's financial needs.

1.13 The fees prescribed in relation to this service are:

- a) for the establishment of the account of the managed person, payable once only—\$500,
- b) for filing, examination and passing of accounts—such fee (not exceeding \$300) as the NSW Trustee may fix.

*(c) Trust services*

1.14 Subject to agreement, NSW TG may act as trustee in a testamentary trust, inter vivos trust, court ordered trust or trust of sale. As trustee, NSW TG manages all aspects of trust administration, including investment, managing distributions from the trust to beneficiaries and tax returns.

1.15 The fees prescribed in relation to these services are:

- a) on the appointment of NSW Trustee as trustee or to act as trustee (either solely or jointly with any other person or persons) of the trust, a fee payable once only and calculated as a percentage of the value of the assets held on trust at the rate of:
  - a. 3.5% on the first \$100,000, and
  - b. 2.5% on the next \$100,000, and
  - c. 1.5% on the next \$100,000, and
  - d. 0.5% on any amount exceeding \$300,000
- b) for the management of a trust of which the NSW Trustee is appointed or acts as trustee (either solely or jointly with any other person or persons), an annual fee calculated at the rate of 0.7% of the value of the assets held on trust.

*(d) Estate Administration services*

1.16 NSW TG administers both testate and intestate estates. The fees prescribed in relation to these services are:

- a) on the appointment of NSW Trustee as executor or administrator of the estate, a fee payable once only (with a minimum charge of \$200) and calculated as a percentage of the value of the assets in the estate at the rate of:
- a. 4% on the first \$100,000, and
  - b. 3.5% on the next \$100,000, and
  - c. 2.5% on the next \$100,000, and
  - d. 1.5% on any amount exceeding \$300,000.
- b) for the management of an estate of which the NSW trustee has been appointed executor or administrator, an annual fee calculated at the rate of 0.7% of the value of the assets in the estate.

*(e) Will drafting services*

1.17 NSW TG drafts wills for members of the public. The fees prescribed in relation to this service are:

- a) for drafting a new will - \$300,
- b) for revising an existing will - \$200.

*(f) Power of Attorney (PoA) drafting*

1.18 PoA drafting is a similar service to will drafting. The fees prescribed in relation to this service are:

- a) for drafting a new power of attorney - \$200,
- b) for revising an existing power of attorney - \$150.

**New fee structure recommended by IPART**

1.19 As noted above, NSW TG's fee structure was reviewed by IPART in 2014. IPART considered that NSW TG's financial position was unsustainable, but by restructuring its operations and changing services, NSW TG could control its costs, become financially sustainable and deliver better value for money to its clients.

1.20 IPART's final report, *Review of fees of the NSW Trustee and Guardian*, was released in November 2014 and recommended new fee structures in relation to the following services provided by NSW TG:

<b>Service</b>	<b>Fee change/s recommended by IPART</b>
Investment fee (which NSW TG charges on funds invested in the Common Fund)	Lower the annual investment fee from the current levels of 0.5% and 0.75% of assets per annum to a harmonised fee of 0.1% of assets per annum across all Common Fund investments
Private Financial Management Services	<ul style="list-style-type: none"> <li>• Introduce a one-off \$500 establishment fee.</li> <li>• Remove the income fee</li> <li>• Introduce a monthly account keeping fee of \$10, charged monthly or annually, as appropriate</li> <li>• Retain the existing account checking fees of \$100, \$200</li> </ul>

	and \$300 depending on complexity
Direct Financial Management Services	<ul style="list-style-type: none"> <li>• 1% establishment fee, with a minimum fee of \$500 and a maximum of \$3,000</li> <li>• Introduce a monthly account keeping fee of \$10, charged monthly or annually, as appropriate</li> <li>• Charge a management fee of 1.4% per annum with a cap of \$15,000, charged monthly</li> <li>• Introduce specialist services fees at the current level charged for Trust, PoA Administration and Estate Administration.</li> </ul>
Trust services	<ul style="list-style-type: none"> <li>• Keep the existing fee structure for the one-off establishment fee, but revise the fee level for each asset band as follows; <ul style="list-style-type: none"> <li>○ asset values up to \$100,000: 3.5% per annum</li> <li>○ from \$100,001 to \$200,000: 2.5% per annum</li> <li>○ from \$200,001 to \$300,000: 1.5% per annum</li> <li>○ over \$300,000: 0.5% per annum.</li> </ul> </li> <li>• Replace the short term and long term trust fees with a single trust fee of 0.7% per annum</li> <li>• Maintain the account keeping fee of \$10 per month</li> <li>• Maintain the current fee level for its specialist services fees</li> </ul>
Estate administration services	<ul style="list-style-type: none"> <li>• Keep the existing fee structure for the one-off establishment fee, but revise the fee level for each asset band as follows: <ul style="list-style-type: none"> <li>○ asset values up to \$100,000: 4% per annum</li> <li>○ from \$100,001 to \$200,000: 3.5% per annum</li> <li>○ from \$200,001 to \$300,000: 2.5% per annum</li> <li>○ over \$300,000: 1.5% per annum.</li> </ul> </li> <li>• Replace the short term and long term trust fees with a single trust fee of 0.7% per annum</li> <li>• Maintain the account keeping fee of \$10 per month</li> <li>• Maintain the current fee level for its specialist services fees</li> </ul>
Will and PoA drafting services	<ul style="list-style-type: none"> <li>• Charge a fee of \$300 for eligible clients for drafting a Will and \$200 for updates to that Will</li> <li>• Charge \$400 for eligible clients for drafting a Will and Power of Attorney as a package and \$300 for updates to that package</li> </ul>

#### *Further review of fee structure recommended by IPART*

- 1.21 In its 2014 Report, IPART recommended that NSWTG's fees be reviewed again three years after the initial review. IPART noted that NSWTG's existing systems at the time of the 2014 Report did not provide the data required to develop a fee structure based on a client's complexity/cost to serve. A review of fees was proposed for three years following the original review as this would allow sufficient time for NSWTG to provide more detailed information to allow IPART to continue to move NSWTG's fees towards more efficient, fair and cost-reflective fees. Under IPART's recommendation, it would be appropriate for IPART to review fees again in 2019.

#### *NSWTG fee waiver policy*

- 1.22 Section 111 of the Act provides that NSWTG may waive, remit or reduce any fee where it appears just and reasonable to do so.

- 1.23 In considering whether to waive, remit or reduce a fee under its fee waiver policy, NSWTG must take into consideration the following factors:
- the size of the estate;
  - the client's needs;
  - the estate's commitments and liabilities;
  - whether the payment can be deferred;
  - whether the estate could pay for the fees over time;
  - whether the estate can make a part payment;
  - whether the client would suffer any financial or other hardship in paying the fees; and
  - the impact of any decision on the NSWTG's funding should it be applied to similar estates.

### Why is the existing Regulation being remade?

- 1.24 The *Subordinate Legislation Act 1989* provides for regulations to have a limited life. In most cases, regulations are automatically repealed after 5 years. When a regulation is due for repeal, the responsible agency must consider the objectives of the regulation, review alternative options for achieving those objectives and evaluate the costs and benefits expected to arise from each such option.
- 1.25 The existing Regulation was due for staged repeal on 1 September 2015, under the terms of the *Subordinate Legislation Act 1989*. The staged repeal of the existing Regulation was postponed three times, awaiting outcomes of IPART's review of NSWTG's fee structure. Now that the fee structure recommended by IPART has been implemented, this RIS proposes to remake the existing Regulation with NSWTG's new fee structure in place. As noted above, a review of this fee structure has been recommended by IPART to take place three years after the initial review.
- 1.26 This RIS proposes that the existing Regulation be remade under the regulation making power set out in section 128 of the Act. The proposed Regulation has been drafted for commencement on 1 September 2017

## Objectives of the proposed Regulation

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The objective of the proposed Regulation is to repeal and remake the existing Regulation.

## Options to achieve objectives

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1.27 This RIS explores three options as follows:

1. Allow the Regulation to lapse;
2. Remake the Regulation with minor changes; and
3. Remake the existing Regulation without change.

### Option 1 – Allow the Regulation to lapse

1.28 If the existing Regulation is permitted to lapse without replacement, there will be no legislative basis for prescribing the level or structure of fees that are levied by NSW TG. If no fees are prescribed under the Act, most of this revenue would be lost.

1.29 Since its establishment in 2009, NSW TG's costs have increased while total revenue has remained relatively flat. This has led to a widening gap between revenue and expenses over time. If the Regulation was allowed to lapse, this shortfall would immediately worsen as NSW TG would lose the ability to charge any fees at all. Government would be required to divert resources from other services and make up the shortfall through budget allocation. Alternatively, services to the NSW community would need to be cut. Neither alternative is desirable. This would result in an inability of NSW TG to function at all.

1.30 The costs of option 1 (allowing the Regulation to lapse) outweigh the benefits. Option 1 is not recommended.

### Option 2 – Remake the existing Regulation with minor changes

1.31 The remake process represents an opportunity to improve the efficacy of the existing Regulation. The proposed Regulation will implement a number of technical and drafting related amendments to the existing Regulation in order to ensure that:

- NSW TG can continue its existing practice of charging profit costs for legal services;
- the wording used in certain clauses is accurate; and
- the general structure of the Regulation is logical.

#### *(a) NSW TG charging profit costs for legal services*

1.32 As noted above, NSW TG was formed in 2009 after the merger of the Public Trustee and the Protective Commissioner. Legal staff of the former Public Trustee charged profit costs for their legal services and this practice has continued in NSW TG since its formation.

- 1.33 In its 2014 Report, IPART recommended that NSW TG continue charging legal costs at the current level. The Regulation should be amended to clarify that NSW TG can charge profit costs for legal services. This amendment will formalise existing practice and will therefore not result in any increased costs to NSW TG clients.

*(b) Other minor amendments*

- 1.34 The proposed Regulation will implement a number of drafting related amendments including:
- replacing reference to the ‘management’ of trusts and estates with ‘administration’, as this is a more accurate term in the context of NSW TG’s work;
  - restructuring the Regulation in order to group similar costs and fees; and
  - rectifying minor typographical errors.
- 1.35 Remaking the Regulation with the proposed changes will provide certainty to NSW TG with regards to their ability to charge fees for legal services and will make the Regulation generally easier to utilise and interpret.
- 1.36 Option 2 is recommended.

**Option 3 – Remake the existing Regulation without change**

- 1.37 If the existing Regulation is remade without change, the ability of NSW TG to charge profit costs for legal services will not be explicitly clarified in the Regulation.
- 1.38 Remaking the existing Regulation without change will also mean that there will continue to be inaccuracies in the wording used in certain clauses and the general structure of the Regulation will continue to be illogical.
- 1.39 Option 3 is not recommended.

## **Recommendation**

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- 1.40 The Department of Justice recommends the remaking of the Regulation with the proposed changes (Option 2).

## Consultation

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Comments and submissions are now sought on the proposed Regulation and RIS. Targeted stakeholders will be invited to provide comments. Information about the proposed Regulation and how to make a submission will be published in the Government Gazette, in the Government Notices section of the Sydney Morning Herald and the Daily Telegraph and on the Department of Justice website. Copies of the material will be supplied to any person on request.

Copies of this statement will be forwarded directly to the following key stakeholders:

Aged and Community Services (NSW)

Alzheimer's Australia

Australian Lawyers Alliance

Brain Injury Association

Carers NSW

Community Relations Commission of NSW

Council for Intellectual Disability

Council on the Ageing (COTA NSW)

DeafBlind Association NSW

Disability Council NSW

Financial Services Council

Independent Living Centre NSW

Intellectual Disability Rights Service

Law Society of NSW

Leading Aged Services Australia (NSW-ACT)

Legal Aid NSW

Mental Health Coordinating Council (MHCC)

Multicultural Disability Advocacy Association of NSW

NSW Council for Intellectual Disability

NSW Ministerial Advisory Committee on the Ageing (MACA)

NSW Department of Family and Community Services- Ageing Disability & Home Care

NSW Public Guardian

NSW Trustee & Guardian

Office for Ageing (NSW)

People With Disability Australia Inc

The Aged-Care Rights Service (TARS)