



New South Wales

NSW Trustee and Guardian Regulation 2017

under the

NSW Trustee and Guardian Act 2009

[*The following enacting formula will be included if this Regulation is made.*]

His Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *NSW Trustee and Guardian Act 2009*.

Attorney General

Explanatory note

The object of this Regulation is to remake the *NSW Trustee and Guardian Regulation 2008* which is due to be repealed on 1 September 2017 by section 10 (2) of the *Subordinate Legislation Act 1989*.

This Regulation makes provision with respect to the following matters:

- (a) the fees (and other costs) payable to NSW Trustee in connection with NSW Trustee acting in a trust or protective capacity or preparing wills or carrying out professional services in connection with wills probate and administration,
- (b) matters relating to deceased estates, including, the index of wills, small estates, notices and reciprocal arrangements,
- (c) matters relating to managed estates including, the giving of information, the form of an interim order, requirements to notify NSW Trustee of certain matters, reviews of decisions, certification of wills, determining whether a managed missing person is alive, maximum payments to beneficiaries and reciprocal arrangements.

This Regulation makes it clear that NSW Trustee may charge fees (and other costs) for providing legal advice or conducting legal proceedings calculated on a for profit basis as if NSW Trustee were a private law practice and not a NSW Government agency.

This Regulation is made under the *NSW Trustee and Guardian Act 2009*, including sections 18 (1) (a), 26 (1) (a), 27 (1) (c), 28 (1), 30 (1) and (2), 31 (1) (a) and (c), 35 (1) (definition of **reciprocating State**), 43 (a) and (b), 62 (1) (b), 80 (1), 81 (1) (definition of **reciprocating State**), 91 (3), 95 (1) (a), 111 (1) and (2) and 128 (the general regulation-making power).

public consultation draft

NSW Trustee and Guardian Regulation 2017 [NSW]
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Part 1 Preliminary

1 Name of Regulation

This Regulation is the *NSW Trustee and Guardian Regulation 2017*.

2 Commencement

This Regulation commences on 1 September 2017 and is required to be published on the NSW legislation website.

Note. This Regulation replaces the *NSW Trustee and Guardian Regulation 2008* which is repealed on 1 September 2017 by section 10 (2) of the *Subordinate Legislation Act 1989*.

3 Definition

(1) In this Regulation:

the Act means the *NSW Trustee and Guardian Act 2009*.

Note. The Act and the *Interpretation Act 1987* contain definitions and other provisions that affect the interpretation and application of this Regulation.

(2) Notes included in this Regulation do not form part of this Regulation.

Part 2 Costs

Division 1 Interpretation

4 Definitions

In this Part:

estate includes trust or fund.

GST has the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999* of the Commonwealth.

trustee includes an administrator or executor or any other person acting in a similar fiduciary capacity.

value means:

- (a) in relation to a managed person's estate (other than a managed missing person), the gross amount of the value of the assets (whether real or personal) of the estate without deduction of debts or liabilities secured or unsecured, but does not include the value of the person's principal place of residence, or
- (b) in relation to a managed missing person's estate, the gross amount of the value of the assets (whether real or personal) of the estate without deduction of debts or liabilities secured or unsecured, but does not include the value of the person's last known principal place of residence.

Note. *Costs* is defined in the Act to include fees, charges, commission, disbursements, expenses and remuneration.

Division 2 Costs—trustee matters and managed estates

5 Application of Division

This Division applies when NSW Trustee has been appointed to and acts in any capacity referred to in section 11 (1) or (2) of the Act.

Note. Section 11 (1) of the Act refers to NSW Trustee acting as trustee, executor or administrator, collector of estates, agent or attorney, guardian or receiver of the estate of a minor or receiver of any other property. Section 11 (2) of the Act refers to NSW Trustee acting in the capacity of a financial manager of the estate of a managed person.

6 Administration account and audit fee

NSW Trustee may, on a monthly basis, charge to an estate an administration account and audit fee (not exceeding \$10) on each account kept by NSW Trustee in respect of the estate.

7 Fee for investment planning

NSW Trustee may charge to an estate a reasonable fee (not exceeding \$150 per hour) for preparing, managing and reviewing an investment plan.

8 Taxation returns

NSW Trustee may charge to an estate the following fees (being fees that NSW Trustee determines to be appropriate) if returns are required in respect of the estate by any authority of the Commonwealth or of this or any other State or Territory for the purpose of assessment of any tax or duty:

- (a) an investigation fee,
- (b) an additional fee for each return lodged.

9 Real estate inspections and valuations

NSW Trustee may charge to an estate the following fees in respect of an asset of the estate that is real estate:

- (a) a reasonable fee (not exceeding \$150 per hour) for any inspection, valuation or report,
- (b) a reasonable fee (not exceeding \$150 per hour) for preparation of specifications for repairs or renovations to any building or work,
- (c) a reasonable fee (not exceeding \$116 per hour) for a second or subsequent inspection (including a report arising from the inspection) on the progress of any such repairs or renovations.

10 Costs for legal advice and proceedings

- (1) NSW Trustee may charge to an estate a fee (or any other cost) for legal advice provided, or legal proceedings conducted, by NSW Trustee in connection with that estate.
- (2) The costs may be charged on a for profit basis as if NSW Trustee were a private law practice and not a NSW Government agency.

11 Fee for management of common fund

- (1) NSW Trustee may charge to an estate a fee:
 - (a) for managing an investment for a managed person in a common fund, or
 - (b) in any other case—for the work done and services rendered in establishing, keeping (including the keeping of books of account) and conduct of a common fund in respect of matters to which this Part applies.
- (2) The fee is to be calculated at a rate not exceeding:
 - (a) in respect of the management of estates of managed persons—0.1% per annum of the value of the investment, or
 - (b) in any other case—0.1% per annum on the capital sums invested in the common fund in respect of matters to which this Part applies during the period in which the work is done or the services rendered.

12 General power to charge for services

NSW Trustee may charge to an estate a fee (or any other cost) for any service or matter not otherwise mentioned in this Regulation, being such amount as is agreed on or (in the absence of an agreement) as NSW Trustee determines to be just and reasonable.

Division 3 Costs—trustee matters only

13 Application of Division

This Division applies when NSW Trustee has been appointed to and acts in any capacity referred to in section 11 (1) of the Act.

Note. Section 11 (1) of the Act refers to NSW Trustee acting as trustee, executor or administrator, collector of estates, agent or attorney, guardian or receiver of the estate of a minor or receiver of any other property.

14 Dealings affecting shares in an estate

- (1) NSW Trustee may charge a fee (not exceeding \$68) for the notation and recording of the assignment or mortgage of, or of any dealing affecting, a beneficiary's share in an estate.

- (2) Any such fee is payable from the share of the beneficiary concerned.

15 Work done if representation not subsequently obtained

NSW Trustee may charge to an estate a fee (not exceeding \$450) for the work involved in taking steps incidental to NSW Trustee's duties for the purpose of obtaining representation in the estate if NSW Trustee does not subsequently obtain representation.

16 Attempted realisation of assets

NSW Trustee may charge to an estate a fee (not exceeding \$300) for the work involved in attempting to realise an asset in the estate if:

- (a) NSW Trustee made the attempt at the request of a beneficiary, and
- (b) the asset is subsequently transferred or delivered unconverted into money to the beneficiary.

17 Fees incidental to exercise of power of sale

- (1) NSW Trustee may charge to an estate a fee if NSW Trustee is authorised by an order of a court to sell land forming part of the estate (unless the court directs otherwise).
- (2) If the land is sold, the fee is not to exceed:
 - (a) 4% on the first \$100,000, and
 - (b) 3% on the next \$100,000, and
 - (c) 2% on the next \$100,000, and
 - (d) 1% on any amount exceeding \$300,000.
- (3) If the land is not sold, the fee is not to exceed \$450.

18 Carrying on business

NSW Trustee may charge to an estate, for carrying on a business, a fee that NSW Trustee considers just and reasonable having regard to the work involved if NSW Trustee finds it necessary to carry on the business in connection with NSW Trustee's administration of the estate.

19 Remuneration of registrars of Local Court

NSW Trustee may charge to an estate a fee that NSW Trustee considers just and reasonable to cover the remuneration payable to a Local Court registrar who has been appointed by NSW Trustee to act as agent of NSW Trustee in respect of the administration of the estate.

20 Fees for trust establishment and administration of trust

- (1) NSW Trustee may charge a fee to a trust 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, 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.
- (2) NSW Trustee may charge to a trust, of which NSW Trustee is appointed or acts as trustee (either solely or jointly with any other person or persons), an annual fee for

the administration of the trust calculated at the rate of 0.7% of the value of the assets held on trust and that fee may be paid:

- (a) wholly from the corpus or capital of the trust property, or
- (b) wholly from the income of the trust property, or
- (c) partly from the corpus or capital and partly from the income of the trust property.

21 Fees for estate establishment and administration of estate

- (1) NSW Trustee may charge a fee to an estate on the appointment of NSW Trustee as executor or administrator of the estate, payable once only 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.
- (2) NSW Trustee may impose a minimum charge under subclause (1) of \$200.
- (3) NSW Trustee may charge to an estate, to which NSW Trustee is appointed executor or administrator, an annual fee for the administration of the estate calculated at the rate of 0.7% of the value of the assets in the estate and that fee may be paid:
 - (a) wholly from the corpus or capital of the estate property, or
 - (b) wholly from the income of the estate property, or
 - (c) partly from the corpus or capital and partly from the income of the estate property.

22 Locating beneficiaries

- (1) NSW Trustee may charge to an estate, or to the share of an estate in respect of which it is necessary to make inquiries or advertise, a fee that NSW Trustee considers just and reasonable if:
 - (a) the existence or identity of any or all of the persons beneficially entitled to share in an estate or of the next of kin is unknown or is not definitely established, and
 - (b) it is necessary for NSW Trustee to make inquiries or to advertise for the purpose of locating any persons or next of kin.
- (2) The amount of the fee is not to exceed 5% of the net value of the estate after payment of original claims.

23 Execution of documents

NSW Trustee may (except in respect of an estate administered by NSW Trustee) charge the following fees in respect of the execution of documents:

- (a) a fee (not exceeding \$68) for executing any assurance of property by direction,
- (b) a fee (not exceeding \$68) for executing any assurance by way of confirmation,
- (c) a fee (not exceeding \$68) for executing any necessary consent for a mortgagee to exercise powers in respect of a mortgage.

24 Production of documents

NSW Trustee may charge a fee (not exceeding \$40) for producing any deeds or documents of title.

25 Search of records

- (1) NSW Trustee may charge a fee for making a search of records held by NSW Trustee in any case in which, in the opinion of NSW Trustee, a fee should be charged because of the time involved or of the nature or volume of the information sought.
- (2) The fee is not to exceed \$150 per hour.

Division 4 Costs—managed estates only

26 Fees payable to NSW Trustee—direct management

- (1) This clause applies to the estates of managed persons where NSW Trustee is the manager of the estate or part of the estate.
- (2) The fees payable to NSW Trustee in respect of the management of estates of managed persons are as follows:
 - (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.

27 Fees payable to NSW Trustee—private management

- (1) This clause applies to the estates of managed persons where a person other than NSW Trustee has been appointed as the manager of the estate.
- (2) The fees payable to NSW Trustee in respect of the management of estates of managed persons are as follows:
 - (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 NSW Trustee may fix.
- (3) NSW Trustee must certify to the manager of an estate of a managed person:
 - (a) the amount of the fee payable under subclause (2) (b), and
 - (b) the name of the person who is required to pay the fees payable under subclause (2), and
 - (c) the time within which the fee is to be paid.

Division 5 Other costs

28 Fees for drafting wills and powers of attorney

NSW Trustee may charge to a person seeking the following services a fee as follows:

- (a) for drafting a new will—\$300,
- (b) for revising an existing will—\$200,
- (c) for drafting a new power of attorney—\$200,
- (d) for revising an existing power of attorney—\$150,
- (e) for drafting both a new will and a new power of attorney in respect of one estate—\$400,
- (f) for revising both an existing will and an existing power of attorney in respect of one estate—\$300.

29 Attendance fees

NSW Trustee may charge to an estate or person requiring any of the following a fee not exceeding:

- (a) for attending at the Office of State Revenue for the purpose of search, or of marking or stamping documents, or at Land and Property Information New South Wales for the purpose of search, or of lodging or uplifting documents—\$40,
- (b) for obtaining an exemplification of grant of probate or administration and preparation of a power of attorney for the purpose of collecting assets situated outside New South Wales—\$75,
- (c) for any other attendances outside the offices used by members of staff—\$150 per hour.

30 Fee where NSW Trustee acts as attorney or agent

The fees that are payable to NSW Trustee in any matter in which NSW Trustee is acting as attorney or agent are, in respect of both capital and income, to be as arranged between the principals and NSW Trustee.

Division 6 Miscellaneous

31 Costs cumulative

Any cost payable from an estate under a provision of this Part is additional to any other cost under a provision of this Part, and to any other cost, that is payable from the estate.

32 Amount of costs to be determined by NSW Trustee

The amount of any cost payable in any particular case is, subject to this Part, to be determined by NSW Trustee.

33 Deduction of costs etc from fund

NSW Trustee may deduct any cost that is payable under this Part in connection with an estate from any money that belongs to the estate and that is held by NSW Trustee or is under NSW Trustee's control.

34 GST may be added to costs

- (1) NSW Trustee may, in addition to any costs payable under this Part, charge the amount of any GST payable in respect of the service for which the cost is payable.
- (2) Subclause (1) does not permit NSW Trustee to charge an amount that is greater than 10% of the maximum amount payable to NSW Trustee apart from that subclause.
- (3) This clause has effect despite any other provision of this Part limiting an amount that may be charged by NSW Trustee.

Part 3 Other matters relating to deceased estates

35 Index of wills

NSW Trustee is to maintain an index of all wills lodged with NSW Trustee for safe custody.

36 Small estates etc

- (1) For the purposes of sections 26 (1) (a) and 27 (1) (c) of the Act, NSW Trustee may administer property or an estate (as referred to in the subsection concerned) by election if the gross value of the property or estate does not exceed \$100,000.
- (2) For the purposes of section 28 (1) of the Act, NSW Trustee must file a memorandum and obtain probate or letters of administration as referred to in that subsection if the gross value of the property to be administered exceeds \$120,000.
- (3) For the purposes of section 31 (1) (a) of the Act, NSW Trustee may deal with an estate without probate or administration if the net value of the estate does not exceed \$20,000.
- (4) For the purposes of section 18 (1) (a) of the Act, NSW Trustee may deal with money payable by NSW Trustee in the manner referred to in that subsection if the amount of the money does not exceed \$20,000.

37 Notices and elections to administer small estates

- (1) A notice of an election under Division 1 of Part 3.2 of the Act must state that the election has been made and may contain any other particulars of the election that NSW Trustee thinks fit.
- (2) The notice must be published in the same way as notices are published under rule 93 in Part 78 of the *Supreme Court Rules 1970*.

38 Notice of administration of certain small estates

NSW Trustee is to give such notice, by advertisement or otherwise as it thinks fit, of its intention to act under section 31 of the Act.

39 Reciprocal arrangement for intestacy

New Zealand is prescribed as a reciprocating State for the purposes of section 35 of the Act.

Part 4 Other matters relating to managed estates

40 Interpretation

Words and expressions used in this Part have the same meaning as they have in the *Mental Health Act 2007*.

41 Information relating to mental health inquiry

- (1) For the purposes of section 43 (a) of the Act, the prescribed information to be given is that specified in Part 1 of Schedule 1.
- (2) For the purposes of section 43 (b) of the Act, the prescribed information to be given is that specified in Part 2 of Schedule 1.

42 Form of order or interim order that estate be managed under the Act

- (1) The Magistrate or MHRT is to complete a notice of an order or interim order made by the Magistrate or MHRT that the estate of a person be subject to management under the Act.
- (2) The notice is to be in the form specified in Schedule 2.

43 Medical superintendent to notify NSW Trustee of certain orders

- (1) The medical superintendent of a mental health facility must give written notice to NSW Trustee of the making of an order or interim order by a Magistrate or the MHRT to the effect that the estate of a patient be subject to management under the Act.
- (2) The medical superintendent must give the written notice within 7 days of the making of any such order and must attach a copy of the order to the notice.

44 Medical superintendent to notify NSW Trustee of certain events

The medical superintendent of a mental health facility must, as soon as practicable, give written notice to NSW Trustee of the occurrence of any of the following events in respect of a patient who is or was a managed person:

- (a) the patient's discharge from the mental health facility,
- (b) the patient's transfer from the mental health facility,
- (c) the patient's absence with or without leave from the mental health facility,
- (d) the patient's return to the mental health facility from leave,
- (e) the patient's death at the mental health facility.

45 Review by ADT of estate management decisions of NSW Trustee

All decisions made by NSW Trustee in connection with the exercise of NSW Trustee's functions under Division 1 of Part 4.5 of the Act are prescribed for the purposes of section 62 (1) (b) of the Act.

46 Copies of wills

For the purposes of section 80 (1) of the Act, a copy of a will may be certified as a true copy of the will by any person of or over the age of 18 years.

47 Information that managed missing person is alive

For the purposes of section 91 (3) of the Act, NSW Trustee may take into account any relevant information provided by the Commissioner of Police for the purposes of being satisfied that a managed missing person is alive.

48 Maximum amount to be paid to beneficiary or other person

For the purposes of section 95 (1) (a) of the Act, the prescribed amount is \$10,000.

49 Reciprocal arrangement for interstate protected person

New Zealand is prescribed as a reciprocating State for the purposes of section 81 of the Act.

Schedule 1 Information required to be given

(Clause 41)

Part 1 Information to be given to person detained

If the Magistrate directs that you are to be detained in a mental health facility, the Magistrate will then decide if you are able to manage your property and affairs.

You have the right to have a barrister or solicitor represent you before the Magistrate. If you do not want a barrister or solicitor, you can have another person of your choice represent you, but you can only do this if the Magistrate agrees.

If the Magistrate thinks that you are able to manage your property and affairs, you can continue to do so. However, if you wish, you can have NSW Trustee and Guardian manage your property and affairs. You can ask the medical superintendent to arrange for NSW Trustee and Guardian to do this.

If the Magistrate decides that you are not able to manage your property and affairs, the Magistrate will order that your property and affairs be managed by NSW Trustee and Guardian.

If you do not agree with the Magistrate's decision that your property and affairs should be managed by NSW Trustee and Guardian, you have the right to appeal to the Supreme Court.

Part 2 Information to be given to nearest relative, guardian and friends of person detained

If the Magistrate considers the patient should be further detained, the Magistrate will also consider whether or not the patient is able to manage his or her property and affairs.

If the Magistrate considers that the patient is able to manage his or her property and affairs, then the patient can continue to do so. The patient can ask that his or her property and affairs be managed by NSW Trustee and Guardian.

If the Magistrate is not satisfied that the patient can manage his or her property and affairs, then the Magistrate will make an order that NSW Trustee and Guardian manage the patient's property and affairs.

If the patient does not agree with the Magistrate's decision that his or her property and affairs should be managed by NSW Trustee and Guardian, the patient has a right to appeal to the Supreme Court.

NSW Trustee and Guardian Regulation 2017 [NSW]
Schedule 2 Notice of order or interim order for management

Schedule 2 Notice of order or interim order for management

(Clause 42 (2))

An order*/interim order* has been made today that the estate of [*name*] be subject to management under the *NSW Trustee and Guardian Act 2009*.

Date

[*Signature and name of Magistrate*]*

[*Signatures and names of Members of Mental Health Review Tribunal*]*

[* *Delete if inapplicable*]