

SIR NINIAN STEPHEN LECTURE

Paper by Anthony Southall QC

THE STATUS AND ROLE OF THE MODERN TRUSTEE COMPANY THE EQUITY TRUSTEES EXAMPLE

A. INTRODUCTION

1. Against the background of the 130th Anniversary of Equity Trustees¹, the topic of this paper addresses certain unique contextual features applying to the corporate trustee industry at a national level, more particularly within the State of Victoria - being the "cradle" of that industry - and at an individual level in the context of Equity Trustees²: being the sponsor of this Lecture series, named in honour of one of its most esteemed and gifted directors, Sir Ninian Stephen.
2. These particular contextual features are identified as follows:

Equity Trustees' Birthday

- (i) **First**, at an individual corporate level, on 10 December of this year Equity Trustees celebrates the 130th anniversary of its foundation under the formal name of –

"Equity Trustees Executors and Agency Company Limited,"

created pursuant to private Act of the Victorian Parliament.³ Such method of creation and the corporate status is not of itself unique: all other Victorian Trustee Companies founded during the "golden age" of the 1870's/80's also enjoy the status of private statutory formation.⁴ What is unique in the case of Equity Trustees is that it is, and remains, the only trustee company to have continued uninterrupted operation into the 21st Century under its existing Trustee business name: that of *"Equity Trustees"*.⁵

Against the background of the anniversary, this paper addresses Equity Trustees' evolution and development over 130 years, to its current status as a leading financial institution in the nation and, I would contend, the pre-eminent trustee company in Victoria; but more importantly, it has achieved that current status without losing its core focus as the promoter and protector of *basic fiduciary principles*, to the benefit of the wider community, as opposed to the single minded pursuit of profit: in particular, for the benefit for certain dependant persons and community groups otherwise in need of financial protection.

¹ December 1, 1888

² Formal name as incorporated by statute: "Equity Trustees Executors & Agency Company Limited."

³ Statute No. DCCCCLXXV111 (978)

⁴ See *infra* at para. 6

⁵ Note that Permanent Trustees (1887) and Perpetual Trustees (1885) commenced their statutory lives under different corporate names.



Equity Trustees in the Fiduciary role

- (ii) **Secondly**, the unwavering commitment by Equity Trustees to its *traditional fiduciary role* as a Trustee consistent with the founding principles and values instilled by its legendary founding manager Joel Fox (manager 1888-1933, director 1933-1936), in the conduct its core traditional business as a *trustee for clients and beneficiaries*: put simply, for the receipt, collection, retention, management and investment of assets from clients, deceased estates and inter vivos trusts, to the benefit and at the direction of the client, and ultimately to the welfare of those intended to enjoy the benefit.

In effect, operating - often through perpetual charitable trusts - as the traditional "*Guardian*" of clients' funds in its fiduciary *role*, for the administration and accretion of those assets in accordance with the directions contained in the testamentary instrument, deed of trust or other trust document, as the case may be.

Recent volatility within the industry

- (iii) The third background feature underlying the rationale of this paper lies in the unprecedented movement, indeed volatility, within the trustee industry in recent times - in particular over the last 30 years - and the significant legislative changes implemented to respond to that volatility; or, conversely changes rendered necessary as a consequence of those legislative changes: in particular, I refer to:
- the *Trustee Companies Act* of 1984 (Vic) ("the 1984 Act"),⁶ and
 - subsequent amendments to that Act through *Corporations Act* (Cth) 2001, as amended in 2010 by insertion of Chapter 5D.⁷

In particular the 1984 Victorian amendments were largely in response to the disastrous failure of the nation's oldest Trustee Company, the Trustees Executors & Agency Co. Ltd. ("TEA"), founded under Victorian private statute in 1879: this failure occurred in the early 1980's - almost precisely in the centenary year of its foundation - in an unprecedented "blaze" of publicity, and resulted in (*inter alia*) the conviction and sentencing of its managing director to a period of imprisonment for fraudulent conduct.

Financial Services Royal Commission

- (iv) The fourth unique background feature is the equally unprecedented, but more far reaching implications of the Financial Services Royal Commission (2018), established by the Commonwealth Parliament in December 2017 and still proceeding under the Commission of K M Hayne QC. The first interim report of that Commission has very recently been published and has made critical, if not damning, observations as to the conduct of various sectors of the financial industry including banks, insurance companies, life insurance companies, health insurers and superannuation funds: that is, most companies involved in the daily provision of financial services throughout Australia.

Significantly however, although statutory trustee companies fall within the genus and (statutory) definition of the "financial services" (providing services and products of a financial nature) their conduct was not the subject of the Commission hearing, nor consequently thus far the subject of findings by that Commission. Nevertheless, the general findings of serious (mis)conduct against other sectors of the financial services industry are of critical relevance - indeed serve as a timely reminder - for the future operation of trustee companies generally in the 21st Century, in accordance with their unique founding principles of utmost integrity, honesty and trust.

⁶ *Trustee Companies Act* 1984 - Act No. 10168 [20 November 1984]
⁷ Commonwealth Statute No. 50 of 2001.



B. HISTORICAL BACKGROUND

3. Although this presentation is focussed on the status and role of the “modern” statutory trustee company, the issue cannot be regarded in isolation to the significant historical background underlying their establishment and subsequent evolution in the latter part of the 19th Century.

The Golden Age of Trustee Companies

4. It cannot be gainsaid that the period of the late 19th Century in this state was the Golden Age for statutory trustee companies, both in a real and philosophical sense. This Age was very much centred on the staggering wealth created by the gold industry concentrated in central Victoria, and its consequent “knock on” effect in the major metropolitan cities - in particular Melbourne - and on the rural wealth generated, especially in western Victoria.
5. In the wake of these boom times, it became necessary for groups of influential citizens and families around the State to establish legal mechanisms, in particular companies or co-operatives, to manage and increase the wealth assets thereby created.
6. With this in mind, it was decided to establish individual statutory “trustee companies” by private Act(s) of the Victorian Parliament, which I list in chronological order:
 - (i) **The Trustees Executors & Agency Co. (TEA)** – 8 December 1879;
 - (ii) **Perpetual Trustees**, created under the name Australian Executors & Trustees Association Ltd. (AET) – 8 December 1885;
 - (iii) **Union Trustees Executors & Administrators Company Limited** – 8 December 1885;
 - (iv) **National Trustees Executors & Agency Company of Australasia Limited** – 16 December 1887;
 - (v) **Colonial Permanent Trustee Executor & Agency Co. Ltd.** – 17 December 1887;
 - (vi) **Equity Trustees** – 10 December 1888;
 - (vii) **Sandhurst & Northern Trustees** – 10 December 1888.
7. Much has occurred in the development of these Victorian statutory companies since the date(s) of their inception, particularly by the process of merger and acquisition, and the consequent name change(s). These changes in status and identity have been extensive and it is not practical here to individually analyse them⁸

The Equity Trustees example

8. This paper does not attempt to engage in an historical treatise of Equity Trustees’ development since its foundation, as it is readily available elsewhere on Equity Trustees’ website. However, as it is of particular relevance to:
 - (i) the quality of trustee and fiduciary service provided by Equity Trustees to the community since 1888, and

⁸ Refer to an excellent paper delivered by my colleague Lachlan Wraith of the Victorian Bar, but formerly an officer with Equity, delivered 30 August 2013, entitled “Dealing with Licensed Trustee Companies and Chapter 5D of the Corporations Act (2001)”.



- (ii) it remains the only original statutory trustee company under its original corporate name operating in the State of Victoria,

I make particular reference to the quality of its personnel - both legal and non-legal - at Board level, since foundation:

- five former High Court Judges, including (H.B) Higgins J., Sir John Latham CJ, Wilfrid Fullagar J. and, of course, Sir Ninian Stephen.
- three former Chief Justices of Victoria;
- five puisne Victorian Supreme Court Justices;
- two former Prime Ministers of Australia, including arguably its greatest, Robert Gordon Menzies K.C.;
- the current Chairman of the Board, a prominent former Premier of this State, Jeffrey Gibb Kennett.

This level of quality and distinction at Board level for the one company over such an extended period, is unprecedented. It is certainly unequalled by any other statutory trustee company, and in all probability unparalleled by any other financial institution in the nation, irrespective of size and asset value. Together, then, with the renowned quality, integrity and skill levels of its staff and management over the years – including of course at the present time – it is little wonder that Equity Trustees has achieved pre-eminence in its field.

C. CURRENT STATUS OF STATUTORY TRUSTEE COMPANIES

9. In the 21st Century statutory trustee companies continue to enjoy an elevated, if not indeed unique, status within the framework of the financial services industry, derived principally from two key historical elements:

- (i) First, the core capabilities and skills developed by their Human Resources over the years, derived from their unique skills and knowledge base at all levels, but in particular through:
- the Board of Directors;
 - Senior Executive Management;
 - Executive Officers (for example, Trust Officers and the like); and
 - the specialised staff who carry on the core professional functions vested in them by the Board.
- (ii) Second, the established and longstanding reputational features of trustee corporations, being quite different to other financial institutions which provide commercial and financial services to the marketplace for no other reason than a profit motive. For the most part, these companies are not required to exercise, and do not understand, the concept of a fiduciary duty, as has been so powerfully underlined in the interim findings of the Financial Services Royal Commission released in September 2018.

These reputational features enjoyed by statutory trustee companies have evolved as part of their development since the late 19th Century: they are based upon qualities of integrity, security and the strict implementation of *fiduciary duties* to clients and beneficiaries alike, indeed to all those who are otherwise reliant upon their financial care.

Equity Trustees is exemplifies of these qualities, at the highest level: there is no better illustration of this proposition than the unique success it has enjoyed - and continues to enjoy - not only in the marketplace, but within the financial services sector and the broad community.

10. These functions have been developed in accordance with the statutory mandate of the trustee companies and, if relevant necessary – which is rare – at the direction and supervision of the Equity Courts.



11. It is uniquely through the skill and integrity devoted by the individual trustee company to their roles as both trustees and fiduciaries, that they have acquired formidable reputations centred on their core functions, that is to say:

- at the initial stage of the trustee/client relationship in the drafting of wills, trust deeds and estate planning policy;
- subsequently carrying out the role of executor of a client's probate documents, including wills, deeds, codicils and as trustee of their estates upon death; this includes carrying out all functions relating to the preparation of probate documentation or letters of administration as the case may be;
- in all these cases acting as executor of the will and trustee of the estate assets in accordance with the direction and instruction of the trust document, being the will or other trust instrument; and
- creation and administration of personal trusts contained in the trust document or will;
- likewise, drawing, drafting and implementing powers of attorney for clients *inter vivos* (during the client's life).

12. A particularly apt, but powerful, description of the status and role of statutory trustee company officers – in particular directors – is enunciated in a dictum of the Full High Court (including Sir Owen Dixon CJ) in *Elders Trustee & Executors Co. Limited v Higgins*⁹:

"The directors of a trustee company are not concerned merely with the interest of shareholders in a business. They are concerned with the interest of the beneficiaries on whose behalf the company is administering trusts. The legislature empowered the company to be a trustee. It holds itself out to the public ready and able to perform properly the duties of a trustee. But that does not mean that the directors must themselves supervise all aspects of the administration of all its trusts. A trustee company, like any other company, acts by its officers. It discharges its duty if its officers are competent to perform, and to properly perform the trusts it undertakes. If they fail to do so, it is responsible."

There could be no more succinct or learned guide, it is submitted to the role and responsibilities of a trustee company director.

D. THE FINANCIAL SERVICES ROYAL COMMISSION

13. Reference has already been made by way of introduction (at para. iv on page 4, *supra*) to the relevance of the current Financial Services Royal Commission to the immediate topic. I need not here repeat the observations there made, but do make specific reference to an issue before that Enquiry of particular relevance to the Statutory Trustee Company: that of managed superannuation and investment Funds
14. The fifth round of public hearings before the Commission (6 August 2018) considered the issue of superannuation, and involved the conduct of 10 prominent superannuation funds; they were the subject of considerable criticism by the Commission in the way and manner of their conduct of their duties.
15. Unlike a number of its contemporary trustee companies, Equity Trustees does not manage superannuation funds, one might suggest for the very good reason that this does not constitute a core trustee business; rather, its practice is to outsource the management of these superannuation funds,

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(1963) 113 CLR 426 at 452-453



confining its role to that of their trustee of the funds. This underlies Equity Trustees' (correct, it is submitted) perception of the importance of fiduciary principles in its role as a trustee.

16. Further, it is of note that many of the Commissioner Hayne's findings in the (September 2018) Interim Report on superannuation fund management, demonstrate the difficulties which those funds, and indeed the banking and insurance sectors of the financial industry generally, experience in understanding the primacy and implementation of the fiduciary concept, in the management of Funds under their care, on behalf of others
17. In this context, it is essential that the critical importance of the fiduciary concept is never disregarded by statutory trustee companies, and is indeed to be reinforced through company policy, and by example at Board level and management level.

E. THE SOCIAL AND COMMUNITY ROLE

18. By way of final observation on Equity Trustees' place in the corporate trustee sphere, mention must be made of its community trustee and social roles at a national level, being part of its philanthropic division of trustee responsibility.
19. This role is demonstrated in three particular ways:
 - (i) the creation and management of indigenous community trusts, primarily sourced from funds derived from mining royalties and land entitlements as a consequence of successful national indigenous title claims;
 - (ii) its involvement in, and commitment to the Federal Reconciliation Action Plan (RAP) through which Equity Trustees is involved in the financial management (Plans) for individual indigenous communities throughout Australia. This is an ongoing indigenous reconciliation process at Federal Government level, in which Equity Trustees is an active participant;
 - (iii) involvement in compensation trusts, primarily focussed in Queensland, in which Equity Trustees acts as trustee of individual compensation trusts established for the benefit of dependent persons in receipt of compensation as a consequence of serious injury claims: it is analogous to the role of the Senior Master of the Victorian Supreme Court, but because Queensland does not have an official office of that form, Equity Trustees carries out the role. In this capacity it acts as trustee of the various individual funds, and provides independent financial advice as to how the beneficiaries should invest their compensation.
20. In addition to these more recent trustee roles – all based on the exercise of the fiduciary principle – Equity Trustees retains (in common with other statutory trustee companies) its traditional role as trustee of Perpetual Charitable Trusts, involving dispersal at its discretion and subject to the trust deed, very substantial funds to the benefit of charitable objects, primarily health and education objects, including necessitous community groups.
21. There could be no more fitting way to conclude this presentation on the company's role and function as a leading member of the corporate trustee community.