



Statement of Issues

1 August 2013

Perpetual Limited - proposed acquisition of The Trust Company Limited

Introduction

1. Outlined below is the Statement of Issues released by the Australian Competition and Consumer Commission (**ACCC**) on the proposed acquisition of The Trust Company Limited (**The Trust Company**) by Perpetual Limited (**Perpetual**) (**proposed acquisition**).
2. A Statement of Issues published by the ACCC is not a final decision about a proposed acquisition, but provides the ACCC's preliminary views, drawing attention to particular issues of varying degrees of competition concern, as well as identifying the lines of further inquiry that the ACCC wishes to undertake.
3. In line with the ACCC's Merger Review Process Guidelines (at www.accc.gov.au/processguidelines) the ACCC has established a secondary timeline for further consideration of the issues. The ACCC anticipates completing further market inquiries by 15 August 2013 and anticipates making a final decision on 19 September 2013. However, the anticipated timeline can change in line with the Merger Review Process Guidelines. To keep abreast of possible changes in relation to timing and to find relevant documents, market participants should visit the Mergers Register on the ACCC's website at www.accc.gov.au/mergersregister.
4. A Statement of Issues provides an opportunity for all interested parties (including customers, competitors, shareholders and other stakeholders) to ascertain and consider the primary issues identified by the ACCC. It is also intended to provide the merger parties and other interested parties with the basis for making further submissions should they consider it necessary.

Background

5. On 16 May 2013, the ACCC commenced a public review of the proposed acquisition after receiving a submission on 9 May 2013 from Perpetual seeking informal clearance from the ACCC.¹
6. A glossary of terms used in this Statement of Issues is provided below.

GLOSSARY OF TERMS

Term	Explanation
Australian Financial Service Licence or AFSL	Unless they are covered by an exemption, the <i>Corporations Act 2001</i> requires people who carry on a business of providing financial services (including 'advising' and 'dealing') to hold an Australian Financial Service Licence (AFSL). Applications for an AFSL must be lodged with Australian Securities and Investments Commission (ASIC). AFSL licensees have general obligations under the <i>Corporations Act 2001</i> , including in relation to providing services efficiently, honestly and fairly, risk management systems and ensuring representatives of the licensee are adequately trained and competent. ²
Debt capital markets	Australian debt capital markets include: <ul style="list-style-type: none"> • direct loans from banks (e.g. syndicated loans) • debt issuance by corporates into retail (regulated bonds/debentures) and wholesale markets (unregulated bonds/debentures); • debt issuance by foreign corporates (kangaroo bonds); • debt finance of project deals; and • structured debt finance (including securitisation and covered bonds).
Funds under management or FUM	The total amount of money investors have mandated to a fund manager to invest on their behalf.
Managed funds	A managed fund is a professionally managed investment vehicle that collects money from investors to form an aggregated pool of funds to be managed by a fund manager. Investors do not

¹ The informal merger review process provides the merger parties with the ACCC's informal view on whether a merger proposal is likely to substantially lessen competition in any market in Australia.

² Australian Securities and Investments Commission, [Applying for an AFS Licence](#), viewed 30 July 2013.

	<p>have day-to-day control of the operation of the fund.</p> <p>Managed funds can be broadly characterised into two types: registered managed investment schemes and unregistered managed funds.</p>
Managed Investment Scheme	See registered funds .
Net tangible assets	Calculated as the total assets of a company, minus any intangible assets such as goodwill. ³
Registered funds or managed investment schemes	Managed investment schemes are also known as 'pooled investments' or 'collective investments'. Generally, in a managed investment scheme, investors (often many hundreds or thousands of investors) pool money together or use it in a common enterprise. A 'responsible entity' operates the scheme. Investors do not have day to day control over the operation of the scheme. ⁴ A managed fund or investment scheme must be registered with ASIC where (among other things) the scheme is being offered to retail clients or has more than 20 participants. ⁵
Responsible entity or RE	A licensed entity or body that operates a managed investment scheme. See paragraphs 49 - 52.
Unregistered funds or unregistered managed funds	These funds are directed at wholesale and institutional clients and do not require ASIC registration.

The parties

Perpetual Limited

7. Perpetual provides specialised investment management, wealth advice and corporate fiduciary services to individuals, families, financial advisors and institutions.
8. Perpetual is listed on the Australian Securities Exchange (ASX: PPT), with a market capitalisation of approximately \$961 million.⁶
9. Perpetual was founded in 1886 and employs approximately 1050 staff.
10. For the purposes of this competition assessment, Perpetual's relevant activities include the following:

³ Australian Securities Exchange, <http://www.asx.com.au/glossary/#N>, viewed 30 July 2013.

⁴ Australian Securities and Investments Commission, [What are managed investment schemes?](#), viewed 30 July 2013.

⁵ Section 601ED, *Corporations Act 2001* (Cth).

⁶ Perpetual Limited, *Annual Report 2012*, page 10.

- **Corporate Trust Services** to the financial services industry. These services include responsible entity services, custodial services for a range of assets, trustee services for unregistered funds, and trustee services for debt capital market products. Key customers of these services include fund managers, ASX listed corporations engaged in market transactions, banks and finance companies.
 - **Private Trust Services (and related services)** to individuals and families, particularly those with 'high net worth'. These services include acting as a trustee for personal and charitable/philanthropic trusts of various descriptions, or as an executor for estates.
11. Perpetual offers other services to corporate and private clients. These other activities account for the majority of its revenues but are largely irrelevant to the competition analysis of the proposed transaction due to the lack of overlap with The Trust Company, strong and ongoing competition from other parties, or both. These activities include operating as a fund manager offering a range of products and services for personal investment, superannuation and retirement for individuals, advisors and institutions (including financial planning and wealth management).
12. Perpetual's offices are located in Sydney (head office), Canberra, Melbourne, Brisbane, Adelaide and Perth.

The Trust Company Limited

13. The Trust Company provides a range of financial services across the personal wealth management, corporate and philanthropic sectors.
14. The Trust Company is listed on the Australian Securities Exchange (ASX: TRU), with a market capitalisation of approximately \$167 million.⁷
15. The Trust Company was founded in 1885 and employs approximately 440 staff.⁸
16. For the purposes of this competition assessment, The Trust Company's relevant activities include a similar, although reduced, range of corporate and private trust services (and related services) to those offered by Perpetual, as outlined at paragraphs 10 to 11 above.
17. The Trust Company's other operations (which are not relevant for the purposes of a competition assessment of the proposed transaction) are less significant than those of Perpetual. They include financial planning, wealth management, and financial services related to health and personal injury.
18. The Trust Company has a 13.4% interest in Equity Trustees Limited, a competitor, making it the largest shareholder in Equity Trustees Limited.

Other industry participants

19. **Equity Trustees Limited (Equity Trustees)** was founded in 1888. It is listed on the Australian Securities Exchange (ASX: EQT) and has a market capitalisation of approximately \$144 million. Equity Trustees provides a range of corporate and private trustee services. Equity Trustees has offices in Victoria (Melbourne and Kew), New South Wales, and Queensland. As noted above, Equity

⁷ The Trust Company. *Annual Report 2012*, page 6.

⁸ The Trust Company, *Annual Report 2012*.

Trustees' largest shareholder is The Trust Company (13.4%), with the second largest shareholder holding 8.86%.

20. **IOOF Holdings Limited (IOOF)** was founded in 1846. It is listed on the Australian Securities Exchange company (ASX: IFL) and has a market capitalisation of approximately \$1.4 billion.⁹ IOOF's wholly owned subsidiary, **Australian Executor Trustees Limited (AET)**, provides a range of corporate and private trustee services. IOOF has offices in Victoria, New South Wales, Queensland, Western Australia, Tasmania, and South Australia. AET's office is located in Adelaide.
21. **BNY Mellon** is the Australian arm of a US bank founded in 1784. BNY Mellon entered Australia in 1975 and expanded into the provision of some corporate (but not private) trustee services through a joint venture between BNY Mellon and The Trust Company (BNY Trust Australia) in the mid-2000s. In 2008, BNY Mellon purchased The Trust Company's 50% stake in BNY Trust Australia to become the sole owner. BNY Mellon identifies itself as the only global provider of corporate trust services in Australia¹⁰ and has offices in Melbourne and Sydney.
22. **One Investment Group** is a new and relatively small provider of corporate (but not private) trust services, having commenced offering these services over the last four years and expanding its offer in 2013. It is based in Sydney.
23. In addition to the above competitors, there are a number of other providers of trust services. These companies are either smaller trust corporations, bank-owned trust companies that provide services mainly to the parent (bank) and its clients, or financial services companies with a limited trust service offering. They are not listed individually in this section but are referred to below under 'Areas of overlap and market definition' where relevant.

The transaction

24. On 7 May 2013, Perpetual announced a proposal to acquire the entire share capital of The Trust Company through a scheme of arrangement.¹¹ The proposed acquisition is subject to a condition precedent which requires informal merger clearance from the ACCC.
25. Perpetual is not the only bidder for The Trust Company; on 21 February 2013, Equity Trustees announced its offer to acquire the entire share capital of The Trust Company.¹² Equity Trustees has not sought informal clearance from the ACCC in relation to its bid, and the competition assessment outlined in this Statement of Issues relates only to Perpetual's proposed acquisition.

Market inquiries

26. On 20 May 2013 the ACCC commenced market inquiries regarding the proposed acquisition. A range of interested parties provided responses, including

⁹ IOOF, *Annual Report 2012*, page 2.

¹⁰ [BNY Mellon's website](#), viewed 29 July 2013.

¹¹ For example, see The Trust Company, [ASX Announcement – The Trust Company executes a scheme of implementation agreement with Perpetual Limited](#).

¹² For example, see Equity Trustees release, [Equity Trustees takeover offer for Trust Company to create a leading Australasian Company](#).

suppliers and acquirers of corporate trust services and/or private trust services, and relevant industry associations.

With/without test

27. Section 50 of the Act prohibits mergers or acquisitions that would have the effect or be likely to have the effect of substantially lessening competition in a market. In assessing a proposed acquisition pursuant to section 50 of the Act, the ACCC considers the effects of the acquisition by comparing the likely future competitive environment post-acquisition if the acquisition proceeds (the “with” position) to the likely future competitive environment if the acquisition does not proceed (the “without” position) to determine whether the proposed acquisition is likely to substantially lessen competition in any relevant market.
28. The ACCC’s preliminary view is that the likely competition effects of the proposed transaction are most appropriately assessed against a future in which competition remains broadly as it currently stands (the status quo).
29. There is no suggestion that The Trust Company is a failing firm or otherwise likely to exit the market in the absence of the proposed transaction. As noted above, it is possible that in the absence of the proposed acquisition by Perpetual, another buyer (such as Equity Trustees) would acquire The Trust Company. However, based on presently available information, the ACCC does not consider that any such alternative transaction is likely to alter its view as to the appropriate ‘future without’ against which to assess the proposed acquisition.

Industry Background

30. The primary function of a trust company is to administer trusts. A trust is a legal concept by which one person owns or holds property for the benefit of another person. In a trust, the property (whether real estate, shares or other types of property) is registered in the name of the trustee but is held by the trustee for the benefit of another person. A trust imposes a legal obligation upon the trustee to deal with the property correctly for the benefit of the other person (the beneficiary).
31. Trustees have certain duties in law including a fiduciary duty to the beneficiary, such as to carry out the express terms of the trust deed, to defend the trust, to administer the trust in the best interests of the beneficiaries, and not to profit from the trust other than in accordance with its terms.
32. Within the suite of services that can broadly be referred to as corporate trust services and private trust services, Perpetual and The Trust Company overlap in respect of some of the services that they currently provide.
33. Corporate trust services are provided to corporate clients (e.g. participants in the financial services industry, such as banks, fund managers, and asset managers). Private trust services are provided to private clients (such as individuals, families, small businesses, community groups, and charities). Both are explained in more detail in the remainder of this section.

Corporate trust services

34. The term ‘corporate trust services’ is used in this Statement of Issues to describe the provision of services to companies and financial institutions which largely

involve acting in a fiduciary capacity for investors with respect to an investment, transaction, and/or financial product. The ACCC's market inquiries have indicated that corporate trust services can broadly be categorised into three types of service:

- **trustee services;**
- **responsible entity (RE) services;** and
- **custodial services.**

35. These services are provided to different types of customers and in respect of different classes of assets. Generally, managed funds customers acquire trustee, RE and custodial services, while debt capital market customers acquire trustee and custodial services.¹³ These services are described further below.
36. Although not a "trust service", trustee companies may offer administrative services, agency services, and ancillary services in combination with the other corporate trust services. These services are described at paragraphs 44-48 below and may also be provided by non-trustee companies such as accounting firms, fund servicing companies, and back-office/administration service providers. The ACCC's preliminary view is that the proposed transaction raises no significant competition concerns in relation to the provision of these other services. Accordingly they are not discussed in detail in this Statement of Issues.

Trustee services

37. Trustee services involve acting in a fiduciary capacity for investors in a particular investment product or transaction. They are provided in relation to wholesale unregistered funds and debt capital market products. Only specific kinds of entities can provide trustee services. These include, the public trustee of any state or territory, a licensed trustee company, an Australian authorised deposit-taking institution, and a body corporate approved by ASIC, such as an Australian Financial Services Licence (**AFSL**) holder.

Trustee services for wholesale unregistered funds

38. The services provided by the trustee for an unregistered fund include:
- passive roles, acting on directions of the manager to make payments and acquire, dispose or transact on assets;
 - monitoring compliance with trust deed and relevant documents;
 - ensuring adherence to regulatory and legal requirements;
 - appointing and monitoring external service providers (where relevant); and
 - holding a bank account for receipt of collections.
39. The party which performs the trustee services in relation to a particular fund is often also the custodian for the assets of the fund.
40. Trustee services for unregistered funds are acquired by fund managers and investment companies. A list of providers is set out at paragraphs 84 - 86 below.

¹³ This may include trustee services in relation to syndicated bank loans, corporate bonds (retail), corporate bonds (wholesale), securitisation, covered bonds, and Public Private Partnership (**PPP**)-type deals.

It has been submitted to the ACCC that a large proportion of trustee services for wholesale unregistered funds are provided in-house by fund managers (about 90%, based on FUM). *Trustee services for debt capital market products*

41. For debt capital market products, the trustee role may include:
- security trustee (for syndicated bank loans, corporate bonds (wholesale or retail), securitisation, covered bonds, and in relation to the funding of some PPP type deals¹⁴);
 - note trustee (for corporate bonds, and in relation to the funding of some PPP type deals); and
 - note/issuer trustee (for securitisation).
42. The acquirers of trustee services for debt capital market products differ depending on the transaction or asset class. For example, domestic and international banks typically acquire trustee services for covered bonds and corporate debt, and domestic banks and non-banks typically acquire trustee services for securitisation transactions.
43. Providers of trustee services for debt capital market products vary depending on the service and the debt capital market product type, and are identified at 81 - 83 below.

Agency, ancillary and administrative services

44. Some debt capital market products require agency services and/or other ancillary services. For example, in a security issue an agent is required to accept payment from the issuer and to distribute the payments to the holders of the security.
45. Agency services include facility agent (for syndicated bank loans), paying agent (for corporate bonds (wholesale and retail), PPP type deals, securitisation, and covered bonds), escrow agent (for securitisation), and trust manager (for securitisation).
46. Ancillary services include note registry (for corporate bonds (wholesale and retail), PPP type deals, securitisation, and covered bonds), and standby servicer (for securitisation and covered bonds).
47. Administrative services in this context include accounting, unit registry and pricing services and are provided to managed funds. These services are acquired by the RE or trustee of the managed fund.
48. Following its market inquiries the ACCC understands that agency, ancillary and administrative services can be provided under contract from a third party supplier. The ACCC's preliminary view is that there is relatively strong competition in the provision of agency, ancillary and administrative services and this is unlikely to be altered by the proposed transaction.

Responsible entity services

49. An RE has the dual role of a trustee and manager of a managed investment scheme. An RE must be an Australian public company, with certain levels of net tangible assets (depending on the value of the scheme's assets), and hold an AFSL. RE services are provided for ASIC-registered managed investment

¹⁴ The ACCC understands that in recent years there has been little, if any, demand for corporate trust service in relation to the funding of PPP-type transactions.

schemes. An RE can either be owned by the same group as the fund manager (an internal RE) or be separate to the fund manager (an external RE). If the managed investment scheme has an external RE, there is typically a management agreement between the RE and fund manager.

50. The services provided by the RE for a managed investment scheme include:
- establishment of the scheme (e.g. preparation of scheme documents, appointment of an investment manager/fund manager, appointment of a custodian, and registration with ASIC);
 - regulatory compliance (e.g. ensuring the scheme has an appropriate compliance plan, compliance committee, constitution, disclosure documents, ensuring compliance with these documents and reporting to the RE board of directors); and
 - ongoing scheme management (e.g. liaison with ASIC, lodging ASIC documents, arranging necessary audits, maintaining RE licence requirements and monitoring all service providers).
51. In practice, RE services are acquired by fund managers, in that a fund manager will approach a trust company (or any other entity licensed to be an RE) to be the RE with respect to a proposed managed investment scheme. However, legally it is the RE that appoints the fund manager for the managed investment scheme (rather than the other way around).
52. Providers of RE services are identified at 87 - 89 below.

Registrable superannuation entity services

53. The trustee and investment management services provided in relation to superannuation funds can be distinguished from the trustee and investment management services provided for other managed investment schemes. All funds held in regulated superannuation entities require a registrable superannuation entity (**RSE**). RSEs must hold a Registrable Superannuation Entity licence issued by the Australian Prudential Regulatory Authority (**APRA**). RSE licensees may also need to apply for an AFSL issued by ASIC to operate a superannuation fund.
54. Providers of out-sourced RSE services include The Trust Company, Equity Trustees, Perpetual, Macquarie Investment Management, Sandhurst, BEST Superannuation, and AET (among others).
55. The ACCC's market inquiries indicate that the majority (estimated 99%) of superannuation funds do not out-source their RSE functions to external parties.
56. The ACCC's preliminary view is that the proposed transaction raises no substantive competition concerns in relation to the provision of RSE services. Accordingly these services are not discussed in detail in this Statement of Issues.

Custodial services

57. Custody involves being the legal owner of assets and acting on behalf of the trustees and RE who owe their duties to the beneficiaries of the assets. At law, a custodian is generally considered to be a "bare trustee" of assets that are held by the custodian in that the custodian will only act on the proper instructions of their client (or a party duly appointed by the client). The terms on which the custodian will act are established under a custody agreement between the custodian and the client.

58. Custodians do not make investment decisions in relation to the asset; they simply hold the asset securely for its beneficial owners. Custodial services relate to the safekeeping of assets (on trust, in accounts or in physical vaults) and may also involve:
- facilitating fund payments upon direction of the manager;
 - acting on direction to acquire, dispose or transact on assets;
 - holding a fund bank account; and
 - maintaining the asset/investment register.
59. Custodial services are provided for managed funds and some debt capital market products (e.g. securitisation, covered bonds, and PPP type deals).
60. The customers of custodial services generally comprise of trustees of registered superannuation funds, and REs and trustees of managed funds.
61. All custodians offering services to superannuation and managed funds in Australia must have an AFSL, hold minimum capital levels, and comply with the regulatory regimes of the markets in which they operate.
62. The ACCC's market inquiries indicate that providers of custodial services may be divided into '**master custodians**' (sometimes referred to as 'global custodians') and '**bare custodians**' (sometimes referred to as 'domestic custodians'). Both Perpetual and The Trust Company offer bare custodian services:
- **master custodians** generally serve large institutional clients, including industry superannuation funds and large managed investment schemes. Master custodians hold assets and also provide back office administration such as unit pricing, accounting and tax services, investor reporting and performance analytics. Master custodians act in accordance with their contract obligations and have no other duties or obligations to their customers. Providers of master custodian services include NAB Asset Servicing, JP Morgan, BNP Paribas, Citigroup, State Street, Northern Trust, HSBC Bank, RBC Dexia and Deutsche Bank (among others);
 - **bare custodians** provide more limited services, which are often transaction-specific, with clients more likely to include more small to medium sized enterprises. The bare custodian only holds the assets (and performs those services set out at 58 above) and provides no additional administrative services. Trustee companies (as opposed to banks or financial institutions) tend to provide bare custodial services rather than master custody services. Providers of bare custodial services are identified at 91 - 93 below.
63. The ACCC's market inquiries indicate that master custodians are generally not considered to be current close competitors for the provision of bare custodial services. Market participants are invited at question 16 below to provide submissions as to whether master custodians are likely to change their service offering to provide these services in the event that prices for these services were to increase.

Private trust services (and related services)

64. For the purposes of this Statement of Issues, private trust services are defined to include both **fiduciary services** (sometimes referred to in the industry as 'traditional trustee services') and private **wealth advisory services**.

Private fiduciary services

65. Private fiduciary services include acting as trustee for disability and testamentary trusts, native title trusts for mining rights, compensation trusts for assistance in the event of personal injury, and philanthropic trusts.
66. Private fiduciary services are largely acquired by individuals, families, or small and/or family businesses.
67. As in the case of corporate trust services, private fiduciary services may be provided by a number of different types of entities, including licensed trustee companies or public trustees of any state or territory. A natural person can also be a private fiduciary; typically persons undertaking this role would be family members of the person setting up the trust, or professionals such as solicitors, accountants, and financial advisors.
68. In addition to the public trustees,¹⁵ the trustee companies which provide private fiduciary services within each state or territory are listed at 93 - 99.

Wealth advisory services

69. Although not a “trust service”, trustee companies who provide private fiduciary services often also provide wealth advisory services to the same client. Wealth advisory services include provision of investment and strategic advice, superannuation and retirement planning, asset protection and insurance, debt and tax management and estate planning.
70. Private wealth advisory services are acquired by individuals and families (for example, high net-worth individuals).
71. Private wealth advisory services are also provided by non-trust company entities and/or individuals in each state, such as financial planners, accountants, and solicitors.
72. Following its market inquiries the ACCC’s preliminary view is that the proposed acquisition does not raise any substantive concerns in relation to the provision of wealth advisory services. Accordingly these services are not discussed in detail in this Statement of Issues.

Areas of overlap and relevant markets

73. The ACCC’s starting point for delineating relevant markets to assess the competition effects of the proposed acquisition involves identifying the services actually or potentially supplied by the merger parties. The ACCC then considers what other services constitute reasonably close substitutes and, hence, provide a significant source of constraint on the merged entity.
74. Following its inquiries the ACCC considers that the parties to the proposed acquisition currently overlap (compete with each other) in the provision of a number of corporate and private trust services. Specifically, these are:

¹⁵ A public trustee is a self-funding state or territory statutory authority, established to act as trustee. The public trustee primarily performs the role of trustee of deceased estates where no executor is appointed or the executor declines to act. Public trustees may also offer other trustee or related services, for example, trustee for philanthropic trusts, administering unclaimed money, management of investments and trusts, and administering deceased estates.

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- the supply of trustee services for debt capital market products including corporate bonds (wholesale and retail) and PPP-type deals;
 - the supply of trustee services for wholesale unregistered funds;
 - the supply of RE services to registered funds;
 - the supply of custodial services; and
 - the supply of private fiduciary services.
75. As part of its review of the proposed acquisition, the ACCC is also considering whether there are other corporate trust services in which Perpetual and The Trust Company are potential competitors despite not currently being active competitors. This may be the case for a number of corporate trust services which either party has either chosen not to provide, or has been until recently prevented from providing by contractual or other restrictions, but could expand to provide with relatively little delay or investment.
76. The ACCC's preliminary view is that the merger parties are potential competitors in the supply of trustee services for other types of debt capital market products – specifically syndicated loans, securitisation and covered bonds.
77. On current information, the ACCC considers that there is likely to be very limited opportunity for demand side substitution across the different types of corporate trust services listed above. For example, the ACCC's market inquiries to date suggest that:
- a customer seeking to acquire custodial services is unlikely to be willing to switch to a supplier of a trustee service in the event that the merged entity were to increase the price of its custodial services;
 - a managed fund seeking to acquire RE and/or trustee services is unlikely to be willing to switch to a supplier of a custodial services in the event that the merged entity were to increase the price of its RE and/or trustee services; and
 - a customer seeking to acquire a trustee service for one type of debt capital market product (e.g. securitisation) may not be willing to switch to a supplier of trustee services for another type of debt capital market product (e.g. corporate bonds).
78. The ACCC's market inquiries indicate while there is greater opportunity for supply side substitution, these are also somewhat limited in the sense that:
- an existing provider of custodial services cannot readily expand to provide RE and trustee services for managed funds;
 - an existing provider of RE and/or trustee services for managed funds cannot readily expand to provide trustee services for debt capital market products; and
 - an existing provider of trustee services for a particular debt capital market product (e.g. covered bonds) may not be able to readily expand to provide trustee services for another type of debt capital market product (e.g. securitisation).

Questions for customers and other market participants:

1. The ACCC invites customers of trustee services for debt capital market products to comment on the extent they would be likely to switch to an alternative provider of trustee services for debt capital market products if the merged entity were to

- raise price or reduce service. If so, would you consider switching to an alternative provider without experience in that type of debt capital market transaction, or only an established provider of that particular service?
2. The ACCC invites customers to explain in detail how they go about choosing a provider(s) of corporate trust services, including information about:
 - a. the process by which the provider(s) was chosen (e.g. appointment on recommendation by a third party, tender process, etc.);
 - b. the criteria applied in selecting the successful provider(s); and
 - c. the frequency with which the decision to appoint a provider(s) is reviewed (e.g. does competition occur only at the time of initially selecting a provider for a given transaction or role, or do customers actively consider switching even after selecting a provider, and if so at what intervals?);
 3. The ACCC invites submissions from interested parties on the ability of providers of one type of corporate trust service to expand into other types of corporate trust services. In particular:
 - a. can an existing provider of custodial services readily expand to providing RE and trustee services for managed funds (and if not, why?);
 - b. can an existing provider of RE services readily expand into the provision of trustee services for wholesale unregistered funds (and if not, why?);
 - c. can an existing provider of RE and/or trustee services for managed funds readily expand to provide trustee services for debt capital market products (and if not, why?);
 - d. can an existing provider of trustee services for a particular debt capital market product (e.g. covered bonds) readily expand to provide trustee services for another debt capital market product (e.g. securitisation) (and if not, why?)
79. Pending further information from interested parties, the ACCC's preliminary view is that the relevant markets for assessing the competition effects of the merger are:
- **Market C1:** the supply of trustee services for debt capital market products (although the ACCC does not rule out the possibility of separate markets for different types of debt capital market products);
 - **Market C2:** the supply of trustee services for wholesale unregistered funds;
 - **Market C3:** the supply of RE services to registered funds;
 - **Market C4:** the supply of custodial services (with a focus on bare custodial services); and
 - **Market P1:** the supply of private fiduciary services.
80. The paragraphs below set out, for each relevant market, the ACCC's understanding, based on its market inquiries, of:
- a. the merger parties' positions as competitors or potential competitors in the provision of the service;
 - b. other significant (or potentially significant) suppliers of these services; these are likely to be the closest competitive constraint on the merged entity in the supply of any given service; and

- c. lists a further group of alternative suppliers. These participants are likely to impose a weaker constraint on the merger parties due to having a more limited presence in the offer of this service. In some cases these are very small competitors and/or provide these services only as an adjunct to their main business. In other cases they are very large global organisations (e.g. banks), but their primary focus is on other activities (and global clients) such that they have only very limited involvement in the provision of these services.

Supply of trustee services for debt capital market products (Market C1)

81. Perpetual is a major competitor for the supply of trustee services for corporate bonds, syndicated loans and securitisation, and covered bonds (both wholesale and retail) and (historically) PPP-type deals. The Trust Company is also a major competitor for the supply of trustee services for corporate bonds (both wholesale and retail) and (historically) PPP-type deals, and a potential supplier of trustee services for syndicated loans and securitisation, and covered bonds.
82. Alternative significant suppliers of trustee services for debt capital market products: BNY Mellon, AET and Equity Trustees.
83. Other alternative suppliers of trustee services for debt capital market products include: One Investment Group, Sandhurst, BNP Paribas (wholesale only), Citigroup, Deutsche, HSBC Bank, Macquarie Bank/MIM, NAB Asset Servicing/NAB Invest/NAB, Northern Trust, Primary Securities.

Supply of trustee services for wholesale unregistered funds (Market C2)

84. Both Perpetual and The Trust Company are currently significant competitors for the supply of trustee services to wholesale unregistered funds.
85. Alternative significant suppliers include: AET, BNY Mellon, Equity Trustees.
86. Other alternative suppliers include: One Investment Group,¹⁶ Sandhurst,¹⁷ Columbus Investment Services (which is owned by One Investment Group), Deutsche Bank, FundHost, Ironbark, Macquarie Bank/MIM, NAB Asset servicing/NAB Invest/NAB, Primary Securities Ltd, The Huntley Group, Total/Select Fund Services, Trustees Australia, Valuestream Investment Management, Wilson HTM and Zurich.

¹⁶ One Investment Group is a new provider of corporate trust services, including RE, trustee, custody and administration services, having commenced offering these services over the last four years.

¹⁷ Sandhurst Trustees (Sandhurst) is a subsidiary of Bendigo and Adelaide Bank.

Supply of RE services for registered funds (Market C3)

87. Both Perpetual and The Trust Company are currently significant competitors for the supply of RE services.
88. Alternative significant suppliers include: AET, Equity Trustees and One Investment Group.
89. Other alternative suppliers include: Columbus Investment Services (owned by One Investment Group), Deutsche Bank, FundHost, Ironbark, Macquarie Bank/MIM, NAB Asset Servicing/NAB Invest/NAB, Primary Securities Ltd, Sandhurst, The Huntley Group, Total/Select Fund Services, Trustees Australia, Valuestream Investment Management, Wilson HTM, Zurich.

Supply of custodial services (with a focus on bare custodial services) (Market C4)

90. Perpetual and The Trust Company are both significant competitors for the supply of bare custodial services.
91. Alternative suppliers of bare custodial services include: AET, NAB/BNY Mellon (through a joint domestic/global arrangement), Equity Trustees, One Investment Group, Sandhurst, The Huntley Group, Trustees Australia, Primary Securities Ltd, FundHost, and Valuestream Investment Management.
92. Suppliers of global custodial services include: BNP Paribas, Citigroup, Deutsche Bank, HSBC Bank, JP Morgan, Macquarie Bank/MIM, Northern Trust, RBC Investor Services, State Street, and Zurich. As noted at paragraph 63 above, the ACCC's preliminary view is that these providers are unlikely to provide a close competitive constraint, and submissions are invited on the likelihood of these parties offering bare custody services to Australian clients in the event of a price increase following the merger.

Supply of private fiduciary services (Market P1)

93. Perpetual and The Trust Company are currently significant competitors for the supply of private fiduciary services, operating in each state and territory with the exception of Tasmania.
94. Alternative suppliers of private fiduciary services in each state and territory include: Public Trustees, banks, accounting and law firms (for native title trusts), Australian Philanthropic Services (for philanthropic trusts) and community foundation (for philanthropic trusts).
95. In NSW, private fiduciary services are also provided by AET and Myer Family Company.
96. In VIC, private fiduciary services are also provided by Equity Trustees, Sandhurst, JBWere/NAB, ANZ Trustees and Myer Family Company.
97. In QLD, private fiduciary services are also provided by AET (for compensatory trusts) and Myer Family Company.
98. In SA/NT, private fiduciary services are also provided by AET.
99. In WA private fiduciary services are also provided by Myer Family Company.

Questions for customers and other market participants:

4. The ACCC invites comments from interested parties, and in particular users of corporate trust services, on:
 - a. the identity of actual and potential competitors in the supply of each corporate trust service (C1-C4) listed above; and
 - b. whether and to what extent any of the alternative suppliers, including others that may not be listed here, are able to compete effectively with the merger parties.

Market concentration

Corporate trust services (Markets C1-C4)

100. The ACCC's inquiries indicate that Perpetual and The Trust Company are two of the largest suppliers of corporate trust services in Australia. Market participants consistently indicated that Perpetual has a market leading position and The Trust Company is one of its most important competitors, if not its most important competitor, although this varies across the range of corporate trust services supplied.
101. It is difficult to precisely quantify the positions of the various competitors since there are no agreed or published market share figures for the provision of various corporate trust services in Australia. The relative strengths of the merger parties also depend to a large extent on the precise boundaries of the market (since Perpetual and The Trust Company have differing areas of focus and revenue shares in different corporate trust services), and upon the treatment of in-house provision of certain services, since this is relatively common but is not possible for certain customers and services.
102. During the ACCC's market inquiries, market participants' submissions as to the market shares of the merger parties, as well as the extent to which they are constrained by competition and potential competition from other participants, have varied considerably.
103. Some market participants have submitted that Perpetual and The Trust Company presently account for 60% and 20% respectively of trustee services provided in Australia with respect to property, debt, infrastructure and securitisation, but Perpetual itself and some other market participants submit that its share is far lower, and it will continue to face effective competitive constraint from a number of significant players including BNY Mellon, AET, Equity Trustees, and others.

Question for customers and other market participants:

5. The ACCC invites market participants to provide further information and views as to the relative competitive positions (and market shares) of Perpetual, The Trust Company and their competitors in the provision of corporate trust services.

Private trust services

104. The ACCC's market inquiries also indicate that Perpetual and The Trust Company account for a large proportion of the private fiduciary services provided in Australia by trust corporations. However, this share (and the share of all

trustee corporations) is far lower if provision of these services by parties other than trust corporations is taken into account.

Statement of issues

105. For the purposes of this Statement of Issues, the issues in this matter are divided into two categories; 'issues that may raise concerns' and 'issues unlikely to raise concerns'.

Issues that may raise concerns

Unilateral effects: the acquisition may give the merged entity market power in the supply of corporate trust services, particularly trustee services for debt capital markets and custodial services

106. Based upon its inquiries, the ACCC's preliminary view is that the proposed acquisition has the potential to result in overall harm to competition by further strengthening the position of Perpetual in the supply of at least some corporate trust services and eliminating the actual or potential competitive constraint between the merger parties.
107. More specifically, the proposed acquisition has the potential to lessen competition by:
- enhancing the ability and incentive of the merged entity to raise prices (fees) and/or reduce service levels in respect of some corporate trust services;
 - increasing barriers to entry (to new entrants) and expansion (by existing rivals) in respect of some corporate trust services.
108. This section sets out, for the various types of corporate trust services, a number of factors relevant to the ACCC's assessment of whether these competition concerns are likely to arise from the proposed transaction. These factors include the present position of Perpetual, The Trust Company and their competitors in the supply of these services, barriers to entry and expansion by competitors, and the extent to which customers may have countervailing power due to the ability to credibly threaten to perform the services in-house or switch to an alternative provider in the event that the merged entity raises price or reduces the level of service.
109. The ACCC is further exploring the implications for competition of The Trust Company's 13.4% shareholding in Equity Trustees (as referred to in paragraph 18 above), which would be transferred to Perpetual if the proposed transaction proceeds. This may potentially increase Perpetual's ability and incentive to unilaterally raise prices post acquisition, since Perpetual, through this shareholding, is able to recoup at least some of the lost profit from any customer it loses to Equity Trustees through the dividends it receives as a shareholder.

Supply of trustee services for debt capital market products

110. Trustee services for debt capital market products include a variety of roles as set out at paragraphs 41 - 43.
111. The ACCC's market inquiries have indicated that Perpetual and The Trust Company are major providers of trustee services for debt capital market products. Perpetual has a strong position in relation to services for all transaction types and asset classes (e.g. syndicated bank loans, corporate bonds (retail and wholesale), securitisation, covered bonds and PPP type deals).

112. Similarly, The Trust Company has a strong position in relation to services for corporate bonds (retail and wholesale) and historically had a strong position in providing services for PPP type deals. However, it is not currently active in the provision of trustee services for securitisation, covered bonds, and syndicated loans, but based upon information received during its market inquiries the ACCC's preliminary view is that The Trust Company is a potential future competitor to provide these services.
113. The ACCC is concerned that the proposed transaction may reduce the level of competition for the provision of trustee services for debt capital market products, or at least certain types of debt capital market products, by removing the competitive constraint between the merger parties and creating a very large market leader with a degree of market power that may not be sufficiently constrained by its smaller existing competitors.
114. The ACCC is investigating whether the constraints on the merged entity, including the threat of customers switching to an alternative supplier and the potential for new entry or expansion by competitors, are likely to be sufficient to prevent a substantial lessening of competition arising from the proposed acquisition.
115. The ACCC's market inquiries suggest there are some factors which tend to make entry or expansion by potential providers of these services less likely. These include:
- The relatively small proportion of a customer's total costs made up by trustee service fees, which diminishes the incentive to seek a new provider in the event that the merged entity were to raise price or reduce the level of service.
 - The infrequent nature of new contracts for these services and the difficulties in obtaining the necessary approvals to change providers once a provider is chosen.
 - The importance of having an established reputation for stability, reliability and longevity, reflected in the long histories of the major competitors in the provision of these services. Further, a "proven track record" in dealing with particular asset types is valued by many customers, which makes it difficult for a provider or potential provider of trustee services to compete for asset classes it has not previously dealt with.
 - Economies of scale and/or scope, leading to the need to offer a range of services and win a significant number of customers in order to operate profitably at an efficient scale and cover all fixed costs (mainly labour, office space and IT), meaning that small scale entry may be unprofitable.
 - Possible strategic barriers due to the threat, whether real or perceived, that large incumbent providers may selectively undercut any new entrant on price to prevent profitable entry.
 - Specialist skills and knowledge required to deal with debt capital market products, which are generally more complex than unregistered funds. For example, providers of trustee services for debt capital market products require employees with experience in financial products (in addition to legal and/or trust experience).
116. However, there is some evidence of recent entry in the form of One Investment Group. Further, some market participants have indicated that in this field, reputations attach mainly to the staff involved rather than to the companies

providing the services. This may reduce barriers to entry and expansion, since staff are mobile and readily recruited by rivals seeking to expand their range of services.

117. The ACCC is seeking further information as to the likely competition effects of the proposed transaction in relation to the provision of trustee services for debt capital market products.

Questions for customers and other market participants:

The ACCC invites comments from market participants on the possible competition effects arising from the proposed acquisition in relation to corporate trust services (particularly trustee services for debt capital market products). In particular the ACCC seeks information on:

6. Whether reputation is a key criterion in selecting some or all corporate trust services.
7. If so, whether the reputation of Perpetual or The Trust Company is such that other providers will be unable to compete with the merged entity.
8. Whether scale will provide such a significant advantage to the merged entity that it would be difficult for other providers to compete on price.
9. The extent to which the merged entity is likely to be constrained in its provision of trustee services for debt capital market products by competition from other existing providers of these services.
10. Whether suppliers of other corporate trust services could readily expand to provide trustee services for debt capital markets products in the event that the merged entity sought to increase fees or reduce service levels.
11. Whether entry by a new firm (including a foreign firm) is likely in the event that the merged entity sought to increase fees or diminish its service levels.
12. The extent to which customers would be willing to switch to other existing or new providers in the event that the merged entity were to increase fees or reduce service levels.
13. The extent to which customers could provide these services in-house in the event that the merged entity sought to increase fees or reduce service levels.

Supply of custodial services (with a focus on bare custodial services)

118. As noted at 57 - 62 above, within the supply of custodial services there exist master custodial and bare custodial services. The key difference between the two lies in the offer of administrative services by the former.
119. Both Perpetual and The Trust Company are significant providers of bare custodial services, and the ACCC's inquiries indicate that the additional administrative services and higher fees of global master custodian companies mean that they do not impose a close competitive constraint upon the merger parties in the provision of these services.
120. The ACCC's inquiries indicate that current providers of bare custodial services include AET, NAB/BNY Mellon (through a joint domestic/global arrangement), Equity Trustees and One Investment Group, Sandhurst, The Huntley Group, Trustees Australia, Primary Securities Ltd, FundHost, and Valuestream Investment Management. The ACCC has received mixed feedback as to the size and significance of the bare custody operations of these parties, and their ability to provide a close competitive constraint on the merged entity.

121. The ACCC's inquiries also indicate that there are some barriers to entry and expansion in the provision of custody services, including the need to establish credibility in the provision of these services and regulatory requirements. However, the ACCC's market inquiries have also indicated that the provision of these services is less complex than the supply of trustee services for debt capital market products, and many customers have the ability to provide some custodial services in-house.
122. Given the conflicting submissions it has received to date on this issue, the ACCC is seeking further information to assist it in determining whether existing competitors, possible entry or expansion (including by global custodians), and/or the threat of customers providing their own custody services will impose a sufficient constraint on the merged entity to prevent a substantial lessening of competition as a result of the proposed transaction.

Questions for customers and other market participants:

The ACCC invites comments from market participants on the possible competition effects arising from the proposed acquisition in relation to (bare) custodial services. In particular the ACCC seeks information on:

14. The current positions of Perpetual or The Trust Company in the provision of bare custodial services.
15. The extent to which the merged entity is likely to be constrained in its provision of custodial services by competition from other existing providers of these services.
16. Whether global custodians are likely to expand into the provision of bare trustee services in the event that the merged entity sought to increase fees or diminish its service levels.
17. The extent to which customers would be willing to switch to other existing or new providers in the event that the merged entity were to increase fees or reduce service levels.
18. The extent to which customers could provide these services in-house in the event that the merged entity sought to increase fees or reduce service levels.

Coordinated effects: the merger may result in an increased risk of coordination between the remaining competitors in the supply of certain corporate trust services, particularly trustee services for debt capital markets

123. Mergers have ‘coordinated effects’ when they assist firms in the relevant markets in explicitly or implicitly coordinating their pricing, output or related commercial decisions. This may lessen competition in a number of ways, including by an increase in the prices of the relevant goods or services.

When assessing whether a merger is likely to increase the likelihood of coordinated effects the ACCC takes into account whether:

- the markets under consideration have characteristics that are conducive to coordinated conduct (e.g. small number of firms, high degree of price transparency and information sharing, firms have similar operations and cost structures, and firms interact repeatedly in a number of markets);
- there are market characteristics that are likely to disrupt or undermine coordinated conduct (e.g. whether there is a credible threat of new entry or if there is an aggressive ‘maverick’¹⁸ competitor in the market); and
- the merger weakens the constraints on market players successfully coordinating their pricing, output or related commercial decisions (e.g. by removing a maverick from the market).

124. The ACCC notes that many of the factors conducive to coordinated conduct are not present in the relevant markets; the degree of price transparency and information sharing appears low, and firms have quite different cost structures and service offerings. The ACCC has received no evidence that The Trust Company is presently acting as a maverick firm.
125. However, the relevant question is what would change as a result of the proposed acquisition, and would this make coordination more likely? The ACCC notes that in relation to some of the relevant services, post-merger there will be one less significant competitor in an already small field. Further, by removing the threat of expansion by The Trust Company into the provision of those corporate trust services it does not already provide, the merger may weaken a constraint on market players coordinating their commercial decisions.
126. The ACCC is considering whether the proposed acquisition would increase the likelihood of coordination by increasing the ability and incentive of providers to raise prices through acting in their mutual interest (e.g. by not competing aggressively and/or by competitors choosing to follow any increase in Perpetual’s pricing) rather than their individual interest (e.g. by competing aggressively).

Questions for customers and other market participants:

19. The ACCC invites comments from market participants on possible coordinated effects of the proposed acquisition in relation to corporate trust services, particularly trustee services for debt capital market products. In particular, the ACCC invites interested parties to comment on:

¹⁸ A ‘maverick’ firm acts in a manner likely to disrupt coordination (e.g. through pursuing an aggressive and independent pricing strategy).

- a. whether The Trust Company operates (or is likely without the proposed acquisition to operate) in a manner that disrupts the potential for coordination between the other providers of trustee services for debt capital market products, for example by competing aggressively;
- b. the extent of price transparency and information sharing between providers of trustee services for debt capital market products;
- c. factors that currently prevent or disrupt any attempts at coordination or (upwards) price leadership in the relevant markets, and how these might change (if at all) following the proposed acquisition.

Issues unlikely to raise concerns

Supply of RE services for registered managed funds

127. Both Perpetual and The Trust Company are significant providers of RE services. However, there are many others offering services to parties that wish to outsource the RE role. These include: Equity Trustees, Macquarie Professional Series, Zurich, Wilson HTM, Ironbark, One Investment Group, Huntley, FundHost, Primary Securities, Valuestream, and Trustees Australia. The ACCC's preliminary view is that these parties are in a position to constrain the merged entity.
128. The ACCC's market inquiries have indicated that there is a further competitive constraint on these providers due to the ability of many customers to provide RE services in-house.

Questions for customers and other market participants:

20. The ACCC's preliminary view is that the proposed acquisition is unlikely to result in a substantial lessening of competition in relation to the supply of RE services for registered managed funds. The ACCC invites any market participants with a contrary view to provide submissions and evidence to support their views. In particular, the ACCC invites submissions on the extent of competitive constraint on the merged entity provided by:
 - a. alternative significant suppliers of RE services for registered managed funds such as AET, Equity Trustees and One Investment; and
 - b. other alternative suppliers of RE services for registered managed funds such as Columbus Investment Services (which is owned by One Investment Group), Deutsche Bank, FundHost, Ironbark, Macquarie Bank/MIM, NAB Asset servicing/NAB Invest/NAB, Primary Securities Ltd, Sandhurst, The Huntley Group, Total/Select Fund Services, Trustees Australia, Valuestream Investment Management, Wilson HTM and Zurich.

Supply of trustee services for wholesale unregistered managed funds

129. Both Perpetual and The Trust Company are significant providers of trustee services for wholesale unregistered funds. However, many unregistered funds currently perform these services in-house or have sufficient scale to credibly threaten to do so in the event that the merged entity were to raise price.
130. While small customers and overseas based funds (e.g. a start-up fund manager) are less likely to have sufficient scale to credibly threaten to move service provision in-house, the ACCC understands that there are several other

companies offering trustee services for unregistered funds, including AET, Equity Trustees and BNY Mellon. There are also a number of other alternative providers as set out at 84 - 86 above.

131. The ACCC's preliminary view is that existing competitors and the threat of customers providing these services in-house are likely to be sufficient to constrain the merged entity in the provision of trustee services for wholesale unregistered managed funds.

Question for customers and other market participants:

21. The ACCC's preliminary view is that the proposed acquisition is unlikely to result in a substantial lessening of competition in relation to the supply of trustee services for wholesale unregistered managed funds. The ACCC invites any market participants with a contrary view to provide submissions and evidence to support their views. In particular, the ACCC invites submissions on the extent of competitive constraint provided by:
- a. alternative significant suppliers of trustee services for wholesale unregistered managed funds such as AET, BNY Mellon and Equity Trustees; and
 - b. other alternative suppliers of trustee services for wholesale unregistered managed funds such as One Investment Group, Sandhurst, Columbus Investment Services (which is owned by One Investment Group), Deutsche Bank, FundHost, Ironbark, Macquarie Bank/MIM, NAB Asset servicing/NAB Invest/NAB, Primary Securities Ltd, The Huntley Group, Total/Select Fund Services, Trustees Australia, Valuestream Investment Management, Wilson HTM and Zurich.

Supply of private fiduciary services

132. The ACCC's market inquiries indicate that although there are a number of trust corporations competing with Perpetual and The Trust Company to provide private fiduciary services (as set out above at 93 - 99), the merger parties account for a large proportion of those private fiduciary services provided in Australia by trust corporations.
133. Public trustees also account for a significant share of private fiduciary services provided in Australia, although their offer and focus differs from that of the trust corporations.
134. However, the ACCC's market inquiries indicate that an important factor constraining Perpetual and The Trust Company in the provision of private fiduciary services is the ability of parties other than trust corporations to provide these services. Their provision by family members, solicitors, financial advisors and accountants is very widespread and accounts for the majority of private trust appointments.
135. Taking into account these constraints, the ACCC's preliminary view is that the proposed transaction is unlikely to substantially lessen competition in relation to the provision of private fiduciary services.

Question for customers and other market participants:

22. The ACCC's preliminary view is that the proposed acquisition is unlikely to result in a substantial lessening of competition in relation to the supply of private fiduciary services. The ACCC invites any market participants with a contrary view to provide submissions and evidence to support their views. In particular, the ACCC invites submissions on the extent of competitive constraint provided by:

- a. Public Trustees
- b. banks, accounting and law firms, Australian Philanthropic Services and community foundations;
- c. AET, Equity Trustees, Sandhurst, ANZ Trustees, JB/Were/NAB, and Myer Family Company.

ACCC's future steps

- 136. The ACCC will finalise its view on this matter after it considers market responses invited by this Statement of Issues.
- 137. The ACCC now seeks submissions from market participants on each of the issues identified in this Statement of Issues and on any other issue that may be relevant to the ACCC's assessment of this matter.
- 138. Submissions are to be received by the ACCC no later than 15 August 2013. The ACCC will consider the submissions received from the market and the merger parties in light of the issues identified above and will, in conjunction with information and submissions already provided by the parties, come to a final view in light of the issues raised above.
- 139. The ACCC intends to publicly announce its final view by 19 September 2013. However the anticipated timeline may change in line with the Merger Review Process Guidelines. A Public Competition Assessment for the purpose of explaining the ACCC's final view may be published following the ACCC's public announcement.