

1999
THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Attorney-General)

Trustee (Amendment) Bill 1999

A BILL

FOR

**An Act to amend the *Trustee Act 1925* of the State of
New South Wales in its application in the Territory,
and for other related purposes**

The Legislative Assembly for the Australian Capital Territory enacts as follows:

1. **Short title**
This Act may be cited as the *Trustee (Amendment) Act 1999*.
- 5 2. **Commencement**
This Act commences on the day on which it is notified in the *Gazette*.
3. **Principal Act**
In this Act, "Principal Act" means the *Trustee Act 1925* of the State of New South Wales in its application in the Territory.¹

4. Repeal

Section 2 of the Principal Act is repealed.

5. Insertion

5 After section 5 of the Principal Act the following section is inserted in Part 1:

“5A. Notes

A note in the text of this Act is explanatory and is not part of the Act.”.

6. Substitution

10 Sections 14, 15 and 16 of the Principal Act are repealed and the following sections substituted:

“14. Powers of investment

A trustee may, unless expressly forbidden by the instrument (if any) creating the trust—

- 15 (a) invest trust funds in any form of investment; and
(b) vary an investment at any time.

“14A. Duties of trustee in relation to powers of investment

“(1) This section has effect subject to the instrument (if any) creating the trust.

20 “(2) A trustee shall, in exercising a power of investment—

- (a) if the trustee’s profession, business or employment is or includes acting as a trustee or investing money on behalf of other persons— exercise the care, diligence and skill that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons; or
25 (b) if the trustee is not engaged in such a profession, business or employment—exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons.

30 “(3) A trustee shall exercise a power of investment in accordance with any provision of the instrument (if any) creating the trust that is binding on the trustee and requires the trustee to obtain a consent or approval in relation to trust investments.

“(4) A trustee shall, at least once a year, review the performance (individually and as a whole) of trust investments.

“14B. Law and equity preserved

5 “(1) Any rule or principle of law or equity that imposes a duty on a trustee exercising a power of investment continues to apply except to the extent that it is inconsistent with this or any other Act or with the instrument (if any) creating the trust.

“(2) A duty mentioned in subsection (1) includes the following:

- (a) a duty to exercise the powers of a trustee in the best interests of all present and future beneficiaries of the trust;
- 10 (b) a duty to invest trust funds in investments that are not speculative or hazardous;
- (c) a duty to act impartially towards beneficiaries and different classes of beneficiaries;
- (d) a duty to take advice.

15 “(3) If a provision in an instrument creating a trust purports to exempt, indemnify or limit the liability of a trustee in relation to a breach of trust, any rule or principle of law or equity that relates to the provision continues to apply.

“(4) If a trustee is under a duty to take advice, the reasonable costs of obtaining the advice are payable out of trust funds.

20 **“14C. Exercise of power of investment**

“(1) Without limiting the matters that a trustee may take into account when exercising a power of investment, a trustee shall, so far as they are appropriate to the circumstances of the trust (if any), have regard to the following matters:

- 25 (a) the purposes of the trust and the needs and circumstances of the beneficiaries;
- (b) the desirability of diversifying trust investments;
- (c) the nature of, and the risk associated with, existing trust investments and other trust property;
- 30 (d) the need to maintain the real value of the capital or income of the trust;
- (e) the risk of capital or income loss or depreciation;
- (f) the potential for capital appreciation;
- (g) the likely income return and the timing of income return;
- 35 (h) the length of the term of the proposed investment;
- (i) the probable duration of the trust;
- (j) the liquidity and marketability of the proposed investment during, and at the end of, the term of the proposed investment;

- (k) the aggregate value of the trust estate;
- (l) the effect of the proposed investment in relation to the tax liability of the trust;
- 5 (m) the likelihood of inflation affecting the value of the proposed investment or other trust property;
- (n) the costs (including commissions, fees, charges and duties payable) of making the proposed investment;
- (o) the results of a review of existing trust investments.

“(2) A trustee may, having regard to the size and nature of the trust—

- 10 (a) obtain and consider independent and impartial advice reasonably required for the investment of trust funds or the management of the investment from a person whom the trustee reasonably believes to be competent to give the advice; and
- (b) pay out of trust funds the reasonable costs of obtaining the advice.

15 “(3) A trustee shall comply with this section unless expressly forbidden by the instrument (if any) creating the trust.

“14D. Powers of trustee in relation to securities

20 “(1) If securities of a body corporate are subject to a trust, the trustee may concur, in the same way as if the trustee were beneficially entitled to the securities, in any scheme or arrangement—

- (a) for arising out of the reconstruction, reduction of capital or liquidation of, or the issue of shares by, the body corporate;
- (b) for the sale of all or part of the property and undertaking of the body corporate to another body corporate;
- 25 (c) for the acquisition of securities of the body corporate, or of control of the body corporate, by another body corporate;
- (d) for the amalgamation of the body corporate with another body corporate; or
- 30 (e) for the release, modification or variation of rights, privileges or liabilities attached to all or any of the securities.

“(2) The trustee may accept instead of, or in exchange for, the securities subject to the trust securities of any denomination or description of another body corporate party to the scheme or arrangement.

35 “(3) If a conditional or preferential right to subscribe for securities in a body corporate is offered to a trustee in relation to a holding in the body corporate or another body corporate, the trustee may, for all or any of the securities—

- (a) exercise the right and apply capital money subject to the trust in payment of the consideration;

(b) assign to any person, including a beneficiary under the trust, the benefit of the right, or the title to the right, for the best consideration that can be reasonably obtained; or

(c) renounce the right.

5 “(4) A trustee accepting or subscribing for securities under this section is, for the purposes of any provision of this Division, exercising a power of investment.

10 “(5) A trustee may keep securities accepted or subscribed for under this section for any period for which the trustee could properly have kept the original securities.

“(6) The consideration for an assignment made under paragraph (3) (b) is to be held as capital of the trust.

“(7) This section applies in relation to securities subject to the instrument (if any) creating the trust.

15 “14E. **Power to buy house as residence for beneficiary**

“(1) Without limiting section 14C and subject to the instrument (if any) creating the trust, a trustee may—

(a) buy a house for a beneficiary to use as a residence; or

20 (b) enter into any other agreement or arrangement to secure for a beneficiary a right to use a house as a residence.

“(2) Despite the terms of the instrument (if any) creating the trust, a trustee may keep, as part of the trust property, a house for a beneficiary to use as a residence if to do so would not unfairly prejudice the interests of other beneficiaries.

25 “(3) If a house is bought, kept or otherwise secured for use by a beneficiary as a residence, the house may be made available to the beneficiary on the terms, consistent with the trust and the beneficiary’s interest in the trust, that the trustee considers appropriate.

30 “(4) The trustee may keep a house, or any interest or rights in relation to a house, secured for use by a beneficiary under this section after the beneficiary’s use of the house as a residence has finished.

“(5) In this section—

‘house’ includes—

35 (a) any building or part of a building designed, or converted or capable of being converted, for use as a residence; and

(b) any amenities or facilities for use in association with the use of a house.

“14F. Investment in securities under RITS system

“1) A chose in action arising under the RITS system that entitles its holder to a security of a particular description (the ‘underlying security’) is, for this Act and the instrument creating a trust, taken to be the same in all respects as the underlying security.

Note A chose in action is an intangible personal property right recognised and protected by the law. Examples include debts, money held at a bank, shares, rights under a trust, copyright, and the right to sue for breach of contract.

“2) Accordingly, the holding or acquisition by a trustee of such a chose in action is to be regarded as an investment by the trustee in the underlying security.

“3) It does not matter that the right conferred by the chose in action is a right in relation to securities of a particular description and not in relation to particular securities.

“4) This section applies only to the extent that the instrument creating the trust does not expressly forbid its application.

“5) In this section—

‘RITS system’ means the Reserve Bank Information and Transfer System operated by the Reserve Bank of Australia, as operating from time to time.”.

7. Loss on authorised security

Section 19 of the Principal Act is amended—

(a) by omitting subsection (1) and substituting the following subsection:

“1) If a trustee improperly advances an amount of trust money on a mortgage security that would, at the time of investment, be a proper investment for a smaller amount, the trustee is liable to make good only the difference between the amounts with interest.”; and

(b) by omitting from subsection (2) “securities” (wherever occurring) and substituting “mortgages”.

8. Accrued interest on debentures or stock sold or purchased

Section 24 of the Principal Act is amended by omitting subsections (3) and (4).

9. Distribution after notice

Section 60 of the Principal Act is amended by omitting from subsection (2) “the *Gazette* and in”.

10. Sale or mortgage of land

Section 76 of the Principal Act is amended by omitting from subsection (2) "suit of other".

11. Specific performance and other matters

5 Section 77 of the Principal Act is amended by omitting from paragraphs (2) (a) and (b) "suit or other".

12. Trustees of charities

Section 80 of the Principal Act is amended by omitting "upon suit or other" and substituting "in a".

10 **13. Repeal**

Section 83 of the Principal Act is repealed.

14. Decree in absence of a trustee

Section 88 of the Principal Act is amended by omitting "suit" (wherever occurring) and substituting "proceeding".

15 **15. Insertion**

After section 88 of the Principal Act the following sections are inserted:

"89. Court considerations in action for breach of trust

20 In a proceeding against a trustee for a breach of trust in relation to a duty under Division 2 of Part 2 relating to the trustee's power of investment, the court may, when considering the question of the trustee's liability, take into account the following:

- (a) the nature and purpose of the trust;
- 25 (b) whether the trustee had regard to the matters mentioned in section 14C so far as is appropriate to the circumstances of the trust;
- (c) whether the trust investments were made in accordance with an investment strategy formulated in accordance with the duty of a trustee under Division 2 of Part 2;
- 30 (d) the extent the trustee acted on the independent and impartial advice of a person competent (or apparently competent) to give the advice.

"89A. Power of court to set off investment gains and losses

35 "(1) In considering an action for breach of trust arising out of or in relation to an investment by a trustee where a loss has been or is expected to be made by the trust, the court may set off all or part of the loss resulting from the investment against all or part of the gain resulting from any other investment whether in breach of trust or not.

“(2) The power of set off under subsection (1) is in addition to any other power or entitlement to set off all or part of any loss against any property.”.

16. Postponement of order

5 Section 90 of the Principal Act is amended by omitting “suit” and substituting “proceeding”.

17. Summons

Section 91 of the Principal Act is amended by omitting from subsection (5) “suit or”.

18. Costs

10 Section 93 of the Principal Act is amended by omitting from subsection (3) “suit or” (wherever occurring).

19. Addition

The Principal Act is amended by adding at the end the following Part:

“PART 6—TRANSITIONAL PROVISIONS

15 **“104. Investments**

“(1) A trustee, or a person permitted or required by a provision (however expressed) of any other Act or any instrument to invest money in investments authorised by this Act, may invest, or keep an investment, in any security authorised by section 14 as in force immediately before the commencement of this section for a period of up to 2 years after that commencement.

“(2) Subsection (1) applies to a trustee if the trustee is not expressly forbidden from investing in such a security by the instrument (if any) creating the trust or any law of the Territory.

25 “(3) This section expires 2 years after it commences.

“105. Application of certain sections to existing and new trusts

“(1) To remove any doubt, it is declared that the following sections apply to a trust created before or after the commencement of this section:

- section 14 (Powers of investment)
- 30 • section 14A (Duties of trustee)
- section 14B (Law and equity preserved)
- section 14C (Exercise of power of investment)
- section 14D (Powers of trustee in relation to securities)
- section 14E (Power to buy house as residence for beneficiary)

- section 14F (Investment in securities under RITS system).

“(2) This section expires 2 years after it commences.

“106. Securities

5 “(1) To remove any doubt, it is declared that section 14D applies in relation to securities acquired before or after the commencement of this section, subject to the instrument (if any) creating the trust.

“(2) This section expires 2 years after it commences.”.

20. Consequential amendments

10 The Acts specified in the Schedule are amended as set out in the Schedule.

SCHEDULE

Section 20

CONSEQUENTIAL AMENDMENTS

Financial Management Act 1996

Section 53—

- 5 Omit “in any investment specified in section 14 of”, substitute “as if the Treasurer were a trustee under”.

Public Trustee Act 1985

Subsection 4 (1) (definition of “common fund”)—

Omit “the common”, substitute “a common”.

10 **Subsection 47 (1)—**

Omit “the common”, substitute “a common”.

Heading to Division 2 of Part 6—

Omit “*Fund*”, substitute “*funds*”.

Subsection 55 (1)—

- 15 Omit “a common fund”, substitute “1 or more common funds”.

Subsection 55 (2)—

Omit “the common fund”, substitute “1 or more of the common funds”.

Subsection 55 (3)—

- 20 Omit “the common” (wherever occurring), substitute “a common”.

Subsection 55 (4)—

Omit “the common” (first occurring), substitute “a common”.

Subsections 56 (1) and (2)—

Omit “the common”, substitute “a common”.

25 **Section 57—**

Omit “the common”, substitute “a common”.

Paragraph 57 (c)—

Omit “interest”, substitute “capital or income”.

SCHEDULE—continued

Subsections 58 (1) and (2)—

Omit “the common”, substitute “a common”.

Subsection 58 (3)—

Omit the subsection, substitute the following subsection:

- 5 “(3) An amount withdrawn from a common fund under this section shall, from the date of withdrawal, cease to have a claim for any benefit from the common fund.”.

Section 59—

Repeal the section, substitute the following section:

10 “59. **Distribution of capital and income**

Subject to any general direction of the Board about the distribution of capital or income paid into an income account, the capital or income is to be distributed to the estates, trusts or persons having an interest in the common fund at times decided by the Public Trustee.”.

15 **Subsections 59A (2) and (3)—**

Omit “the common”, substitute “a common”.

Section 60—

Repeal the section, substitute the following section:

“60. **Income accounts**

- 20 “(1) The Public Trustee shall establish and maintain for each common fund an account called an income account.

“(2) The income account forms part of the common fund.

“(3) The Public Trustee shall pay any capital or income received in relation to the common fund into that income account.

- 25 “(4) If an amount to the credit of the income account is not for the time being required—

(a) to be distributed under section 59;

(b) to be transferred to the Common Fund Guarantee and Reserve Account under section 61; or

- 30 (c) to be applied in accordance with section 63 (Application of surplus funds);

the amount, or the part of the amount decided by the Board, shall be invested by the Public Trustee in accordance with the Board’s directions.

SCHEDULE—continued

“(5) Capital or income received on investments made under subsection (4) is to be paid into the income account.”.

Subsection 61 (2)—

Omit “of the common”, substitute “of a common”.

5 **Subsection 61 (3)—**

(a) Omit “payment of interest”, substitute “distribution of capital and income”.

(b) Omit “the Common Fund Interest Account”, substitute “an income account”.

10 **Paragraph 61 (5) (a)—**

Omit “the common” (first occurring), substitute “a common”.

Paragraphs 61 (5) (b), (c) and (d)—

Omit “the common” (wherever occurring), substitute “a common”.

Subsection 61 (7)—

15 Omit “Interest”, substitute “Capital or income”.

Section 63—

Omit “the Common Fund Interest Account”, substitute “an income account”.

Section 64—

20 Omit “the common”, substitute “a common”.

Subsection 65 (1)—

Omit “the common fund”, substitute “a common fund containing money received by the Public Trustee on behalf of the estate, trust or person”.

NOTES

Principal Act

1. Reprinted as at 1 June 1998.

Section headings

On the day on which the *Public Trustee Act 1985* is amended by this Act, in addition to any alteration of section headings indicated in the text of this Act, headings to sections of that Act are altered as set out in the following table:

Section	Alteration
55	Omit the heading, substitute the following heading: Establishment of common funds etc
56	Omit "fund", substitute "funds".
57	Omit "required to be held in common fund", substitute "held in common funds".
58	Omit "fund", substitute "funds".
64	Omit "fund", substitute "funds".