

Trustee and Trustee Companies (Amendment) Bill

EXPLANATORY MEMORANDUM

BACKGROUND

This Bill amends the **Trustee Act 1958** and the **Trustee Companies Act 1984**. The most significant amendments are to the Trustee Act.

The **Trustee Act 1958** is amended by repealing the list of “authorised trustee investments” and replacing it with a general “prudent person” power of investment. This is a substantial alteration to the law relating to the investment of trust funds. The amendments are based on recent amendments to the South Australian legislation, which were modelled on legislation enacted in New Zealand approximately six years ago.

An important feature of the provisions is the codification of factors which should be considered by trustees in making investment decisions. The purposes of the trust and the needs and circumstances of the beneficiaries are important factors. Other matters include diversification, the value of the trust estate, duration of the trust, risks of capital losses/gains, costs, tax and marketability, which can all be critical depending on the circumstances of each individual trust.

Additionally, the Bill clarifies the ability of trustees to utilise the electronic processes of RITS (the Reserve Bank Information Transfer System), a system which provides a means of transferring and settling transactions in securities.

Amendments to the **Trustee Companies Act 1984** make provision for trustee companies to charge an administration fee with respect to perpetual trusts, and clarify that money committed to trustee companies is to be invested in accordance with the provisions of the **Trustee Act 1958**.

PART 1—PRELIMINARY

Clause 1 states the purposes of the Act.

Clause 2 provides that the amendments will come into operation on 1 January 1996.

PART 2—AMENDMENTS TO THE TRUSTEE ACT 1958

Clause 3 amends the definition section of the Act.

Clause 4 substitutes a new Part I (Investments) for Part I of the **Trustee Act 1958**. Parts Ib to Id of the Act are retained.

New section 4 provides that the new Part I applies to trusts created before or after the commencement of clause 4.

New section 5 provides that a trustee may (unless expressly forbidden by the instrument creating the trust) invest trust funds in any form of investment and vary any investment of trust funds.

New section 6 defines the duties of professional and non-professional trustees in respect of their powers of investment. These duties are subject to the instrument creating the trust.

New section 7 preserves any rules and principles of law or equity that impose a duty on a trustee, except so far as they are inconsistent with this or any other Act or the instrument creating the trust. Any rules and principles of law or equity that relate to a provision in an instrument creating a trust that purports to exempt, limit the liability of, or indemnify a trustee in respect of a breach of trust, continue to apply.

New section 8 lists various factors to which a trustee must have regard in exercising the powers of investment. These factors must be considered so far as they are appropriate to the circumstances of the individual trust.

New section 9 sets out powers of trustees in relation to securities.

New section 9A clarifies the ability of trustees to utilise the Reserve Bank Information Transfer System.

New section 10 sets out powers of trustees in relation to calls on shares.

New section 11 provides trustees with power to purchase a dwelling house for use by a beneficiary as a residence, or to enter into another agreement or arrangement to secure for a beneficiary a right to use a dwelling house as a residence.

New section 12 provides that a trustee is not liable for breach of trust by reason only of continuing to hold an investment in certain circumstances.

New section 12A provides that a trustee is not liable for breach of trust by reason only of the amount of a loan in comparison to the value of the property at the time the loan was made if the court is satisfied of certain matters.

New section 12B limits the liability of trustees for losses on certain improper investments.

New section 12C prescribes a number of factors which the court may take into account in considering a trustee's liability for breach of trust in respect of a duty under this Part relating to the power of investment.

New section 12D provides that when considering an action for breach of trust in respect of an investment by a trustee where a loss has been or is expected to be sustained by the trust, a court may set off all or part of the loss resulting against all or part of the gain resulting from any other investment whether in breach of trust or not. The power of set off conferred by this section is in addition to any other power or entitlement to set off all or part of any loss against any property.

New section 12E re-enacts section 8A of the **Trustee Act 1958** as in force prior to the commencement of this Act.

New section 12F is a transitional provision which provides that any provisions in an Act or any other instrument (whether or not creating a trust) that empowers or requires a person to invest money in the investments authorised by the **Trustee Act 1958**, is to be read as if it empowered or required that person to invest that money according to the provisions of this new Part as to the investment of trust funds.

Clause 5 makes a consequential amendment to section 3A (6) (b) (ii) of Part 1B.

Clause 6 inserts Schedule 1 to make consequential amendments to other Acts.

PART 3—AMENDMENTS TO THE TRUSTEE COMPANIES ACT 1984

Clause 7 inserts a new section 21A which enables trustee companies to charge an administration fee with respect to perpetual trusts.

Clause 8 makes consequential amendments to section 36 of the Act.

Clause 9 makes consequential amendments to section 38 of the Act.

Clause 10 amends the heading to Part VII of the Act.

Clause 11 inserts a transitional provision with respect to the common fund provisions in section 40 and makes other consequential amendments to that section.

Clause 12 inserts a new section 41A dealing with investment of money in trust funds.

Clause 13 substitutes for Schedule 2 of the Act an updated list of authorised trustee companies.

