



Australian Capital Territory

# **Trustee Act 1925    No 14**

## **Republication No 4**

Republication date: 23 November 2001

Last amendment made by Act 2001 No 56

Amendments incorporated to 12 September 2001

Authorised by the ACT Parliamentary Counsel

## About this republication

### The republished law

This is a republication of the *Trustee Act 1925* as in force on 23 November 2001. It includes any amendment, repeal or expiry affecting the republished law to 12 September 2001 and any amendment made under the *Legislation Act 2001*, part 11.3 (Editorial changes).

The legislation history and amendment history of the republished law are set out in endnotes 3 and 4.

### Kinds of republications

The Parliamentary Counsel's Office prepares 2 kinds of republications of ACT laws (see the ACT legislation register at [www.legislation.act.gov.au](http://www.legislation.act.gov.au)):

- authorised republications to which the *Legislation Act 2001* applies
- unauthorised republications.

The status of this republication appears on the bottom of each page.

### Editorial changes

The *Legislation Act 2001*, part 11.3 authorises the Parliamentary Counsel to make editorial amendments and other changes of a formal nature when preparing a law for republication. Editorial changes do not change the effect of the law, but have effect as if they had been made by an Act commencing on the republication date (see *Legislation Act 2001*, s 115 and s 117). The changes are made if the Parliamentary Counsel considers they are desirable to bring the law into line, or more closely into line, with current legislative drafting practice.

This republication includes amendments made under part 11.3 (see endnote 1).

### Uncommenced provisions and amendments

If a provision of the republished law has not commenced or is affected by an uncommenced amendment, the symbol **U** appears immediately before the provision heading. The text of the uncommenced provision or amendment appears only in the last endnote.

### Modifications

If a provision of the republished law is affected by a current modification, the symbol **M** appears immediately before the provision heading. The text of the modifying provision appears in the endnotes. For the legal status of modifications, see *Legislation Act 2001*, section 95.

### Penalties

The value of a penalty unit for an offence against this republished law at the republication date—

- (a) if the person charged is an individual—\$100; or
- (b) if the person charged is a corporation—\$500.

Amendments incorporated to  
12 September 2001



Australian Capital Territory

# Trustee Act 1925

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Australian Capital Territory

# Trustee Act 1925

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An Act relating to trustees and trust property, and for related purposes

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## Part 1 Preliminary

### 1 Name of Act

This Act is the *Trustee Act 1925*.

### 2 Dictionary

The dictionary at the end of this Act is part of this Act.

*Note 1* The dictionary at the end of this Act defines certain words and expressions used in this Act, and includes references (*signpost definitions*) to other words and expressions defined elsewhere in this Act or in other legislation.

For example, the signpost definition '*trust*—see section 4 (Meaning of *trust*).' means that the expression 'trust' is defined in that section.

*Note 2* A definition in the dictionary (including a signpost definition) applies to the entire Act unless the definition, or another provision of the Act, provides otherwise or the contrary intention otherwise appears (see *Legislation Act 2001*, s 155 and s 156 (1)).

### 3 Notes

A note included in this Act is explanatory and is not part of this Act.

*Note* See *Legislation Act 2001*, s 127 (1), (4) and (5) for the legal status of notes.

### 4 Meaning of *trust*

- (1) In this Act, *trust* includes—
  - (a) an implied or constructive trust (including a trust where the trustee has a beneficial interest in the trust property); and
  - (b) the duties of a legal representative of a dead person.
- (2) However, *trust* does not include the duties incidental to an estate conveyed by way of mortgage.

## **Part 2**                      **Trustees**

### **Division 2.1**                **Appointment, retirement, disclaimer and ceasing to be executor**

#### **6**        **Appointment of new trustees**

- (1) A new trustee may by registered deed be appointed in place of a trustee, either original or substituted, and whether appointed by the Supreme Court or otherwise.
- (2) A new trustee may be appointed in the following cases:
  - (a) if a trustee is dead;
  - (b) if a trustee remains out of the ACT for more than 1 year without having properly delegated the execution of the trust;
  - (c) if a trustee remains out of the ACT for more than 2 years;
  - (d) if a trustee desires to be discharged from all or any of the trusts or powers reposed in or conferred on him or her;
  - (e) if a trustee refuses to act, is unfit to act, or cannot act, as trustee;
  - (f) if a trustee is a child;
  - (g) if a trustee is removed under the trust instrument;
  - (h) if a trustee that is a corporation is dissolved.
- (3) The person to be appointed a trustee shall not be the person, or 1 of the persons, by whom or with whose consent the appointment is or may be made, unless the appointment is made with the consent of the Supreme Court or of a majority of the beneficiaries.
- (4) The appointment may be made by—

- (a) the person (the *nominated person*) nominated by the trust instrument to appoint new trustees; or
  - (b) if there is no nominated person, or the nominated person cannot or is unwilling to act—the surviving or continuing trustee for the time being; or
  - (c) if there is no surviving or continuing trustee—by the legal representative of the last surviving or continuing trustee.
- (5) The appointment may be made for all or any part of the trust property.
- (6) The following provisions apply to appointments under subsection (1):
- (a) 2 or more trustees may be appointed concurrently;
  - (b) the number of trustees may be increased up to 4;
  - (c) a separate set of up to 4 trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property even if a new trustee is not to be appointed for other parts of the property;
  - (d) any existing trustee may be appointed or remain a trustee of the separate set of trustees;
  - (e) if only 1 trustee was originally appointed—a separate trustee may be appointed for the distinct part;
  - (f) it is not necessary to appoint more than 1 new trustee if only 1 trustee was originally appointed or to fill up the original number of trustees if more than 2 trustees were originally appointed.
- (7) By the appointment a trustee in place of whom the new trustee is appointed shall be discharged from the trust, provided that, except where only 1 trustee was originally appointed, a trustee shall not be so discharged unless there will be left after the discharge at least 2 trustees, the public trustee, or a trustee company, to perform the trust.

- (8) Any conveyance or thing requisite for vesting the trust property, or any part of the trust property, jointly in the persons who are the trustees, shall be executed or done.
- (9) Every new trustee appointed under this section, as well before as after all the trust property becomes by law or by conveyance or otherwise vested in him or her, shall have the same powers and discretions, and may in all respects act as if he or she had been originally appointed a trustee by the trust instrument.
- (10) The provisions of this section about a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator.
- (11) The provisions of this section about a person nominated for the purpose of appointing new trustees apply, whether the appointment is to be made in a case specified in this section or in a case specified in the trust instrument, but where a new trustee is appointed under this section in a case specified in that instrument, the appointment shall be subject to the terms applicable to an appointment in that case under the provisions of that instrument.
- (12) The provisions of this section about a continuing trustee apply to a refusing or retiring trustee if the trustee is willing to act in the execution of this section.
- (13) However—
  - (a) if there is a continuing trustee—this section does not authorise a refusing or retiring trustee to act separately from the continuing trustee; or
  - (b) if a refusing or retiring trustee does not act in the execution of this section—the fact that the trustee was willing to act does not affect the validity of an appointment made by anyone else.
- (14) Nothing in this section shall give power to appoint any person as an executor or administrator.
- (15) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

## 7 Additional trustee

- (1) A new trustee may by registered deed be appointed in addition to any existing trustee or trustees.
- (2) A new trustee may be appointed in the following cases:
  - (a) where a sole trustee other than the public trustee or a trustee company is or has been originally appointed to act in a trust;
  - (b) where, in the case of any trust, there are not more than 3 trustees, either original or substituted, and whether appointed by the Supreme Court or otherwise, and none of the trustees is the public trustee or a trustee company.
- (3) The person to be appointed a trustee shall not be the person, or 1 of the persons, by whom the appointment is or may be made, unless the appointment is made with the consent of the Supreme Court or of a majority of the beneficiaries.
- (4) The appointment may be made by—
  - (a) the person (the *nominated person*) nominated by the trust instrument to appoint new trustees; or
  - (b) if there is no nominated person, or the nominated person cannot or is unwilling to act—the trustee for the time being.
- (5) The appointment may be made for all or any part of the trust property.
- (6) The following provisions apply to appointments under subsection (1):
  - (a) 2 or more trustees may be appointed concurrently;
  - (b) the number of trustees may be increased up to 4.
- (7) Except as provided by the trust instrument or another Territory law, it is not necessary to appoint any additional trustee.
- (8) Section 6 (8), (9), (11) and (14) apply to the appointment of an additional trustee.

## **8 Retirement**

- (1) A trustee may by registered deed retire from the trust without any new trustee being appointed in his or her place.
- (2) A trustee may not so retire, unless his or her co-trustees and such other person (if any) as is empowered to appoint trustees, consent by the same or other registered deed to the retirement, and there will be left after the retirement at least 2 continuing trustees, or the public trustee, or a trustee company, to perform the trust.
- (3) Trustees may retire concurrently.
- (4) By the retirement the trustee shall be discharged from the trust, provided that, if in order to vest any part of the trust property in the continuing trustees alone, it is necessary that it should be duly transferred, the retiring trustee shall not be discharged in respect of that part until it is duly transferred.
- (5) At any time after the registration of the deed or deeds of consent and retirement the continuing trustees shall have the same powers and discretions, and may in all respects act as if the retiring trustee were wholly discharged from the trust.
- (6) Any conveyance or thing required for vesting the trust property in the continuing trustees alone shall be executed or done.
- (7) Nothing in this section shall authorise any retirement from the office of an executor or administrator.
- (8) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

## **9 Vesting on appointment and retirement**

- (1) Where a new trustee is appointed, the execution and registration of the deed of appointment shall without any conveyance, except as otherwise provided in this section, vest in the persons who become and are the trustees for performing the trust, as joint tenants and for the purposes of the trust, the trust property for which the new trustee is appointed.

- (2) Where a trustee retires, the execution and registration of the deed or deeds of consent and retirement shall without any conveyance, except as otherwise provided in this section, vest in the continuing trustees alone as joint tenants and for the purposes of the trust, all the trust property which is jointly vested in the continuing trustees and the retiring trustee.
- (3) Land under the *Land Titles Act 1925* does not vest until—
- (a) the appropriate transfer is registered; or
  - (b) an entry of the vesting is made in the register kept under that Act.
- (4) For subsection (3), an entry of the vesting of land has the same effect as the registration of a transfer of the land.
- (5) The following property does not vest until the appropriate transfer is registered:
- (a) a mortgage for securing money subject to the trust (other than land under the *Land Titles Act 1925* or land conveyed on trust for securing debentures or debenture stock);
  - (b) other property for which a conveyance is required to be registered under the law of the place where the property is located.
- (6) Property that is only transferable—
- (a) in books kept by a corporation, company or other body; or
  - (b) in the manner directed by or under a law in force in the place where the property is located;
- does not, under this section, vest until it is duly transferred.
- (7) In the case of land held under a lease which contains any covenant condition or agreement against assignment or disposing of the land without license or consent, the land shall not vest until it is duly transferred, unless—



- (a) before the execution of the deed of appointment, or the deed or deeds of consent and retirement, as the case may be, the requisite license or consent to the assignment or disposition has been obtained; or
  - (b) by virtue of any statute or rule of law the vesting would not operate as a breach of covenant or give rise to a forfeiture.
- (8) In subsection (7):
- lease* includes an underlease and an agreement for a lease or underlease.
- (9) If any property does not vest under this section until transfer or registration, the execution and registration of the deed of appointment, or of the deed or deeds of consent and retirement, as the case may be, shall nevertheless vest the right to call for a transfer of the property, and to sue for or recover the property.
- (10) This section extends to an appointment by deed, or a retirement by deed, under the provisions of the trust instrument.

## **10 Renunciation of probate**

- (1) If a person who is appointed by will both executor and trustee of the will renounces probate, or after being duly cited fails to apply for probate, the renunciation or failure shall be deemed to be a disclaimer of the trust contained in the will.
- (2) Where—
- (a) such a person renounces probate or fails, after being duly cited, to apply for probate; or
  - (b) such a person dies before probate is granted to him or her; or
  - (c) such a person, instead of applying for probate—
    - (i) requests the public trustee in writing to apply for an order under the *Administration and Probate Act 1929*, section 88; or

- (ii) authorises a trustee company to apply for administration with the will annexed;

and where the Supreme Court grants to the public trustee an order under that section to collect and administer the estate of the person or administration with the will of the person annexed is granted to a trustee company, the public trustee or the trustee company, as the case may be, shall, by virtue of the order or grant and without further appointment be deemed to be appointed trustee of the will in the place of the person appointed trustee by the will.

- (3) Where—

(a) under the *Trustee Companies Act 1947*, section 7, a trustee company is authorised to apply for probate of a will in place of a person who was, by the will, appointed both executor and trustee of the will; and

(b) probate of that will is granted to the trustee company;

the trustee company shall, by virtue of the grant and without further appointment, be deemed to be appointed trustee of the will in place of that person.

- (4) Where—

(a) the Supreme Court grants administration with the will annexed to a trustee company instead of granting probate of the will to a person who was, by the will, appointed both executor and trustee of the will; or

(b) under the *Trustee Companies Act 1947*, section 14, an executor who was, by a will, appointed both executor and trustee of the will, with the consent of the Supreme Court, appoints a trustee company to perform and discharge the acts and duties of that executor;

the trustee company shall, by virtue of the appointment, be deemed to be appointed trustee or 1 of the trustees, as the case may be, of the will.

## **11 Ceasing to be executor**

- (1) If any property is vested in any person as executor of a will under which he or she is the trustee of the property or is beneficially entitled to it, the person may, at any time after all the executorial duties with respect to the property have been duly performed, declare by registered instrument in writing that he or she has ceased to hold the property as executor and that he or she holds the same as trustee or as beneficiary, as the case may be.
- (2) Where a declaration is so made, the property shall, except as otherwise provided in this section, be deemed to be held in accordance with the declaration.
- (3) For land under the *Land Titles Act 1925*—
  - (a) if the declaration is that the executor holds the land as trustee—the land is not taken to be so held until the registrar-general enters for the land a caveat forbidding the registration of any instrument not in accordance with the trusts and provisions of the will; or
  - (b) if the declaration is that the executor holds the land as beneficiary—the land is not taken to be so held until the registrar-general withdraws any inconsistent caveat.

## **12 Registration**

- (1) Any instrument by which a new trustee is appointed, or by which a trustee retires or disclaims, or by which the executor declares that he or she holds as trustee or as beneficiary, as the case may be, shall be deemed not to be registered for this Act unless it has been registered under the *Registration of Deeds Act 1957*.
- (2) This section extends to an appointment or retirement, whether under this part or under the provisions of the trust instrument or otherwise, and to a consent to an appointment or retirement.
- (3) This section applies whether or not the land is under the *Land Titles Act 1925*.

- (4) For land under the *Land Titles Act 1925*, if an appointment or retirement or an instrument by which an executor declares that the executor holds as trustee or as beneficiary is registered, the registrar-general must make an entry of the vesting of the trust property or enter, vary or withdraw caveats, as the case requires.
- (5) However, the registrar-general shall not be bound so to do until a written request is made to him or her by the persons in whom the property is to be vested, such evidence is given as he or she may reasonably require, and such notice (if any) is given to any other person as he or she may direct.

### **13 Protection of purchasers**

- (1) A statement in a registered deed by which a new trustee is appointed to the effect of any of the following matters, is, in favour of a subsequent honest purchaser, conclusive evidence of the appointment and any vesting resulting from the appointment:
  - (a) that a trustee has remained outside the ACT for longer than 1 year without having properly delegated the execution of the trust;
  - (b) that a trustee has remained outside the ACT for longer than 2 years;
  - (c) that a trustee refuses to act, is unfit to act, or cannot act, as trustee.
- (2) A statement contained in any registered instrument by which an executor declares that he or she holds any property as trustee or as beneficiary, as the case may be, to the effect that all the executorial duties with respect to the property have been duly performed, shall in favour of a subsequent honest purchaser be conclusive evidence of the matter so stated upon any question as to the capacity in which the property was held.
- (3) The protection afforded by this section to an honest purchaser extends to the registrar-general when registering or certifying title.

## **Division 2.2 Powers and duties**

### **Subdivision 2.2.1 Investment**

#### **14 Powers of investment**

A trustee may, unless expressly forbidden by the trust instrument—

- (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 trust instrument.
- (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
  - (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.
- (3) A trustee shall exercise a power of investment in accordance with any provision of the trust instrument 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**

- (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 trust instrument.

- (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;
  - (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.
- (3) If a provision in a trust instrument 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.

#### **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:
- (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;
  - (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;
  - (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;
  - (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—
- (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.
- (3) A trustee shall comply with this section unless expressly forbidden by the trust instrument.

#### **14D Powers of trustee in relation to securities**

- (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 or arising out of the reconstruction, reduction of capital or liquidation of, or the issue of shares by, the body corporate; or
  - (b) for the sale of all or part of the property and undertaking of the body corporate to another body corporate; or
  - (c) for the acquisition of securities of the body corporate, or of control of the body corporate, by another body corporate; or
  - (d) for the amalgamation of the body corporate with another body corporate; or
  - (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.
- (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; or
  - (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.
- (4) A trustee accepting or subscribing for securities under this section is, for any provision of this division, exercising a power of investment.
- (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 subsection (3) (b) is to be held as capital of the trust.



- (7) This section applies in relation to securities subject to the trust instrument.

#### **14E Power to buy house as residence for beneficiary**

- (1) Without limiting section 14C and subject to the trust instrument, a trustee may—
- (a) buy a house for a beneficiary to use as a residence; or
  - (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 trust instrument, 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.
- (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.
- (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—
- (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 thing 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 *thing* 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 thing 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 thing 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.

## 17     **Accepting a short title**

A trustee shall not be chargeable with breach of trust upon the ground only that in effecting the purchase of or in lending money upon the security of any property he or she has accepted a shorter title than the title which a purchaser is, in the absence of a special condition, entitled to require, if in the opinion of the Supreme Court the title accepted be such as a person acting with prudence and caution would have accepted.

## 18     **Ratio of loan to value**

- (1) A trustee lending money on the security of any property on which he or she can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to

the value of the property at the time when the loan was made, provided that the loan was made in accordance with this section.

- (2) A loan shall be deemed not to have been made by a trustee in accordance with this section—
- (a) unless the trustee acts upon a report of the value of the property made by a person reasonably believed by the trustee to be a competent valuer and instructed and employed by the trustee independently of any owner of the property, whether the valuer carries on business in the locality where the property is situated or elsewhere; and
  - (b) unless the loan is made upon the advice, expressed in the report, of the valuer; and
  - (c) unless the amount of the loan is not more than  $\frac{2}{3}$  of the value of the property as stated in the report.

## **19 Loss on authorised security**

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.

## **20 Release of part of security**

- (1) Where any property is held by a trustee by way of security and the trustee has power under this Act or otherwise to invest on mortgage and to vary investments, the trustee—
- (a) may release part of the property from the mortgage, whether any part of the mortgage debt is repaid or not, provided that the unreleased part of the property would, at the time, be a proper investment in all respects for the amount remaining unpaid; and
  - (b) may, on a sale by the mortgagor of part of the mortgaged property and on the receipt by the trustee of the whole of the

purchase money for the part after deduction of the expenses of the sale, release such part from the mortgage.

- (2) A subsequent purchaser of the released part of the property, or the registrar-general, shall not be concerned to inquire whether the release was authorised by this section.

## **21 Arrangement with company**

- (1) Where any security of a company is held by a trustee, and the trustee can lawfully hold or retain the same, the trustee may, in like manner as if he or she were beneficially entitled to the security, concur in any scheme or arrangement—
- (a) for the reconstruction of the company; or
  - (b) for the amalgamation of the company with any other company; or
  - (c) for the sale of all or any part of the property and undertaking of the company to any other company; or
  - (d) for the release, modification or variation of any rights, privileges or liabilities attached to the security.
- (2) Instead of or exchange for the security the trustee may accept any security of any denomination or description of the reconstructed or new or purchasing company.
- (3) The trustee shall not be responsible for any loss occasioned by anything done honestly, and may hold and retain any security so accepted in like manner as he or she could have done if the same had been an investment authorised by the trust instrument or by law.
- (4) The powers conferred by this section shall be exercisable subject to the consent of any person whose consent to a change of investment is required by the trust instrument or by law.
- (5) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

## **22 New shares in company**

- (1) Where a preferential right to subscribe for a security in a company is offered to a trustee in respect of any holding in the company, he or she may—
  - (a) exercise the right and apply capital money subject to the trust in payment of the consideration; or
  - (b) renounce the right; or
  - (c) assign the benefit of the right for the best consideration that can reasonably be obtained to any person, including a beneficiary under the trust.
- (2) Where a trustee assigns the benefit of the right, the consideration received by him or her for the assignment shall be held as capital money of the trust.
- (3) In any case in which the preferential right in subsection (1) referred to is offered to him or her the trustee may, in any case in which the shares the subject matter of the right are subject to a special or reserve liability, in the event of the winding-up of the company exercise the right and hold the shares as if they were part of his or her original holding in the company.
- (4) The trustee shall not be responsible for any loss occasioned by anything done honestly.
- (5) The powers conferred by this section shall be exercisable subject to the consent of any person whose consent to a change of investment is required by law or by the trust instrument.
- (6) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

## **23 Calls on shares**

- (1) A trustee may apply capital money subject to a trust in payment of the calls on any shares subject to the trust.

- (2) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

**24 Accrued interest on debentures or stock sold or purchased**

- (1) Where any payment received by a trustee in respect of a sale of debentures or inscribed stock bearing interest at a fixed rate shall be or include payment for the right to receive any interest accrued from the debentures or stock at the time of the sale, though the interest may not then be due, the amount of the accrued interest shall for the purposes of the trust be deemed to have been received as interest in respect of the period during which the interest so accrued.
- (2) Where any payment made by a trustee in respect of a purchase of any debentures or inscribed stock bearing interest at a fixed rate shall be or include payment for the right to receive any interest accrued from the debentures or stock at the time of the purchase, though the interest may not then be due, the amount of the accrued interest when received shall for the purposes of the trust be deemed to have been received as purchase money repaid.
- (3) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

**25 Continued holding**

A trustee shall not be liable for breach of trust by reason only of his or her continuing to hold an investment which has ceased to be an investment authorised by the instrument (if any) creating the trust or by law.

**Subdivision 2.2.2 Sale and other dealings**

**26 Powers incidental to sale**

- (1) A trustee for sale may—
- (a) sell all or any part of the trust property; or

- (b) sever and sell fixtures apart from the balance of the property; or
  - (c) grant and sell any easement right or privilege of any kind over or in relation to the property; or
  - (d) impose, reserve or make binding, as far as the law permits, by covenant, condition or other means, on the whole or any part of the trust property that remains unsold, or on any property sold and on the purchaser of that property, a restriction or reservation in relation to building on, or other use of, land; or
  - (e) sell the whole or part of the trust property, either with or without—
    - (i) a grant or reservation of rights of way, rights of water, easements, rights, and privileges for or connected with building or other purposes in relation to the whole or any part of the trust property that remains unsold or to any property sold; and
    - (ii) a covenant by the purchaser of land to expend money on the land; or
  - (f) lay out and make such roads, streets and ways, to be dedicated to the public or not, and grant such easements, rights of way or rights of drainage over those roads, streets and ways, as the circumstances of the case require and the trustee thinks fit; or
  - (g) join with any other person in doing anything under paragraphs (a) to (f); or
  - (h) pay or apply capital money subject to the trust for any of the purposes mentioned in this subsection.
- (2) The sale may be subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, and may be—
- (a) either subject to prior charges or not; or
  - (b) either together or in lots, in subdivision or otherwise; or

- (c) by public auction or by private contract.
- (3) The trustee may vary any contract for sale, buy in at any auction, rescind any contract for sale and resell, without being answerable for any loss.
- (4) If the trustee joins with any other person in selling, the purchase money shall be apportioned in or before the contract of sale, and a separate receipt shall be given by the trustee for the apportioned share.
- (5) A contravention of subsection (4) shall not invalidate or be deemed to have invalidated any instrument intended to affect or evidence the title to any land.
- (6) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

## **27 Duration of trust or power to sell**

- (1) Where the instrument creating a trust or power to sell property does not expressly limit the duration of the trust or power, the trustee may, if so requested in writing by any beneficiary, sell the property under the authority conferred by this section and shall be deemed to be a trustee for sale accordingly, notwithstanding any lapse of time or that all the beneficiaries are absolutely entitled to the property or full ownership in possession and are free of any incapacity, but in all other respects the authority conferred by this section shall be subject to any restrictions to which the power or trust created by the instrument is subject.
- (2) Nothing in this section shall affect any trust or power to sell which is for the time being in existence under the instrument creating the trust or power.
- (3) This section applies to a trust except so far as the contrary intention appears in the trust instrument.



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### **27B Postponement of sale**

- (1) A power to postpone sale shall be implied in every trust for sale, unless a contrary intention appears.
- (2) Subject to any express direction to the contrary in the trust instrument, if there is power to postpone sale—
  - (a) the trustee for sale is not liable for postponing the sale, in the exercise of his or her discretion, for any indefinite period; and
  - (b) a buyer need not investigate any directions about the postponement of sale.
- (3) Where a disposition or settlement coming into operation after 1 December 1957 contains a trust either to retain or sell any property, the disposition or settlement is taken to be a trust to sell the property with power to postpone the sale.

### **27C Purchaser under trust for sale**

- (1) A trust for sale shall, so far as regards the safety and protection of any purchaser, be deemed to subsist notwithstanding any lapse of time until the property is conveyed to or under the direction of the persons interested in the proceeds of sale, and in the case of land until the conveyance is duly registered.
- (2) Nothing in this section shall prevent any court from making an order restraining a sale.

### **27D Application of rule in *Howe v Earl of Dartmouth* to leases**

- (1) The rule in *Howe v Earl of Dartmouth* (1802) (7 Ves 137) does not apply in relation to property consisting of a lease of land granted under the *Land (Planning and Environment) Act 1991*.
- (2) This section applies to a trust so far as the contrary intention appears in the trust instrument.

## **28     Deferred payment on sale of land**

- (1) A trustee for sale may sell land on terms of deferred payment or otherwise.
- (2) The terms of deferred payment may provide either for the purchase money being paid by instalments, or for the unpaid purchase money being secured by mortgage.
- (3) If the purchase money is to be paid by instalments, the terms upon which the land is sold shall, in addition to such other provisions as the trustee may deem proper, include provisions for giving effect to the following:
  - (a) that part of the purchase money shall be paid on the execution of the contract of sale;
  - (b) that the balance of the purchase money shall be payable in instalments, the first not later than 3 years from the date of the contract of sale and the others at intervals of not more than a year beginning from the date on which the first instalment is payable, and shall bear interest payable half-yearly or oftener on the amount from time to time unpaid;
  - (c) that the whole of the purchase money and interest shall be payable within a period not exceeding 10 years from the date of the contract of sale;
  - (d) that, if an instalment (or a part of an instalment) or interest is in arrears for 6 months (or any shorter period provided in the contract), all of the purchase money is payable immediately.
- (4) For subsection (3) (b), an instalment must not be payable during the first 3 years from the date of the contract of sale that is less than 5% of the purchase money, and all instalments payable after then must be equal in amount.
- (5) If the unpaid purchase money is to be secured by mortgage, the terms upon which the land is sold shall, in addition to such other provisions as the trustee may deem proper, include provisions for giving effect to the following:

- (a) that part of the purchase money shall be paid on the execution of the contract of sale;
  - (b) that the unpaid purchase money shall be secured by a registered mortgage of the land sold, with or without the security of any other property, and shall bear interest payable half-yearly or oftener on the amount from time to time unpaid;
  - (c) that the mortgage must contain covenants by the mortgagor to pay the principal and interest, to maintain and protect the property, and insure all buildings (if any) on the land against loss or damage by fire to their full insurable value;
  - (d) that the mortgagor shall not have power to make any lease of the property, unless the trustee consents in writing.
- (6) Whether the purchase money is to be paid by instalments or the unpaid purchase money is to be secured by mortgage, the trustee shall not be deemed to be lending money within the meaning of section 18 so as to be bound to act in accordance with that section, and shall not be liable for any loss which may be incurred by reason only of the security being insufficient at the date of the mortgage.
- (7) The part of the purchase money to be paid on the execution of the contract of sale shall not be less than the sum which a person acting with prudence would, if the land were his or her own, have accepted in the circumstances in order to sell the land to the best advantage.
- (8) The trustee shall not be bound to require payment of any greater part of the purchase money before letting the purchaser into possession, or before conveying the land and taking a mortgage back, than a person acting with prudence would, if the land were his or her own, have considered as sufficient, provided that the trustee shall not convey the land and take a mortgage back until at least  $\frac{1}{10}$  of the purchase money has been paid.
- (9) Notwithstanding that the purchase money is to be paid by instalments, the trustee may at any time after  $\frac{1}{10}$  of the purchase money has been paid convey the land and take a mortgage back in any case where a person acting with prudence would, if the land

were his or her own, have been willing in the circumstances so to do, and in any such case the mortgage shall be in accordance with subsection (5) (b), (c) and (d), and subsection (6) applies.

- (10) Any mortgage under this section may be for any period not exceeding 10 years from the date of the contract of sale.
- (11) The trustee may, on such terms (if any) as he or she deems proper, by writing waive or vary any right arising from failure to comply with any term of the contract of sale or of any mortgage under this section within the proper time.
- (12) Where the sale is made under the order of the Supreme Court, the provisions of this section shall apply, unless the court shall otherwise direct.
- (13) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

### **30 Depreciatory conditions**

- (1) The sale of land by a trustee subject to a condition that may have been unnecessarily depreciatory is not a ground for—
  - (a) the buyer objecting to the title to the land; or
  - (b) a beneficiary challenging the sale; or
  - (c) if the land has been conveyed to the buyer—the buyer’s title to the land being challenged.
- (2) However—
  - (a) a beneficiary may challenge the sale of the land on the ground that a condition may have been unnecessarily depreciatory if the consideration for the sale was made inadequate because of the condition; and
  - (b) a buyer’s title may be challenged on the ground that a condition may have been unnecessarily depreciatory if the buyer was acting in collusion with the trustee when the contract for the sale was made.

### **31 Sale of part of land**

- (1) A trust or power to sell or dispose of land includes a trust or power to sell or dispose of part of the land, whether the division is horizontal, vertical, or otherwise.
- (2) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

### **32 Sale, exchange and partition**

- (1) If a trustee is authorised by the trust instrument or by law to dispose of land by sale, exchange or partition, the trustee may dispose of all or any part of the land in that way.
- (2) The exchange or partition may be made upon terms of giving or receiving any money for equality of exchange or partition.
- (3) For the purpose of completing the disposition, the trustee may convey or otherwise dispose of the land either by way of revocation and appointment of the use or otherwise as may be necessary.
- (4) This section extends to any other person authorised to dispose of land by way of sale, exchange or partition.

### **32A Power to purchase equity of redemption instead of foreclosure**

- (1) This section applies if default is made in a mortgage held by a trustee over land in Australia.
- (2) Unless expressly prevented by the trust instrument, the trustee may, instead of foreclosing, buy the equity of redemption if the amount spent on the purchase—
  - (a) is subject to the same trusts as the mortgage debt; and
  - (b) is not more than 5% of the amount owing under the mortgage.

### **33     Sale after right of redemption barred**

- (1) Where any property is vested in a trustee by way of security, and the property becomes discharged from the right of redemption, the trustee shall hold the property on trust for sale, with power to postpone the sale for such a period as he or she may think proper.
- (2) The net proceeds of sale, after payment of costs and expenses, shall be applied in like manner as the mortgage debt, if received, would have been applicable, and the income of the property until sale shall be applied in like manner as the interest, if received, would have been applicable.
- (3) This section does not affect any rule of law relating to the apportionment of capital and income between a life tenant of land and a person entitled to the remainder of the interest in the land.
- (4) This section shall not affect the right of any person to require that, instead of a sale, the property shall be conveyed to him or her or in accordance with his or her directions.
- (5) This section applies whether the property is discharged from the right of redemption by virtue of the statutes of limitation or of an order for foreclosure or purchase of the equity of redemption or otherwise.
- (6) This section extends to land secured by a mortgage under the *Land Titles Act 1925* and, in relation to such security, an order for foreclosure includes an order for foreclosure under that Act.

### **34     Release of equity of redemption in discharge of mortgage debt**

- (1) Where an equity of a redemption is vested in a trustee and the mortgaged property is not of greater value than the amount of the mortgage debt, the trustee may release the equity of redemption to the mortgagee in discharge of the mortgage debt or part of it.
- (2) The trustee shall not be chargeable with breach of trust nor shall the release be impeached by any beneficiary upon the ground only that the mortgaged property was of greater value than the amount of the

mortgage debt or of the part of it discharged if the trustee acted honestly and on the advice of a person whom he or she reasonably believed to be a competent valuer instructed and employed independently of the mortgagee, whether the valuer carried on business in the locality where the property is situated or elsewhere.

- (3) A subsequent purchaser or the registrar-general shall not be concerned to inquire whether the release was authorised by this section.

### **35 Surrender of onerous lease**

- (1) Where a leasehold is vested in a trustee and the property is subject to onerous covenants of such a nature that it would not be in the interests of the beneficiaries to retain the property, the trustee may surrender or concur in surrendering the lease.
- (2) The trustee shall not be chargeable with breach of trust nor shall the surrender be impeached by any beneficiary upon the ground only that the covenants were not of such a nature if the trustee acted honestly and on the advice of a person whom he or she reasonably believed to be a competent valuer instructed and employed independently of the lessor, whether the valuer carried on business in the locality where the property is situated or elsewhere.
- (3) A subsequent purchaser or the registrar-general shall not be concerned to inquire whether the surrender was authorised by this section.

### **36 Leasing**

- (1) A trustee may make a lease of land in possession in any of the following cases:
  - (a) where he or she holds the land with power to manage the land, or on trust for sale with an express power to postpone the sale—the lease may be for any term not exceeding 5 years;

- (b) where he or she holds the land without power to manage the land, or on trust for sale without an express power to postpone the sale—the lease may be for any term not exceeding 3 years.
- (2) A trustee shall not be deemed to hold land with power to manage the land within the meaning of this section by reason only of the fact that it is proper to postpone sale in order to sell to the best advantage and in the meantime to manage the land.
- (3) Any lease which a trustee is authorised to make under this section or under the instrument (if any) creating the trust or power may—
  - (a) provide for a rent increasing at such times as may be specified in the lease; or
  - (b) give an option for renewal that will not extend the lease beyond the term for which the trustee is authorised to make the lease.
- (4) If the land is the subject of a settlement within the meaning of the *Conveyancing and Law of Property Act 1898*, part 4, and there is any other person authorised by the settlement or by that Act to lease all or part of the land, this section shall not apply unless that person in writing authorises the trustee to make the lease.
- (5) A trustee making a lease under this section may execute such assurances and do such things as are necessary or proper to make the lease.
- (6) A lease shall be deemed not to have been made under this section unless—
  - (a) it is made to take effect in possession not later than 3 months after its date; and
  - (b) it reserves the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but, subject to subsection (7), without a fine being taken or the rent being made payable in advance except that the last payment of rent may be made payable on a day not more than 1 month before the expiration of the term of the lease; and



- (c) it contains a condition of re-entry if the rent is not paid within a period (not longer than 30 days) provided in the lease; and
  - (d) in the case of a lease of land subject to the provisions of the *Land Titles Act 1925* that would not, unless registered under that Act, be valid as against a person claiming an interest in the land by virtue of a dealing registered subsequent to the execution of the lease—it is registered under that Act; and
  - (e) in the case of a lease other than a lease referred to in paragraph (d)—it is registered under the *Registration of Deeds Act 1957*; and
  - (f) the lease is executed by the lessee.
- (7) Where a trustee makes a lease of land on which are erected premises that are licensed under the *Liquor Act 1929*—
- (a) a bonus or fine may be taken in respect of the lease; and
  - (b) if a bonus or fine is taken—the bonus or fine shall be dealt with by the trustee as though an amount ascertained by dividing the amount of the bonus or fine by the number of days contained in the term of the lease were rent received by the trustee under the lease in respect of each day of the term of the lease.
- (8) The execution of a lease by the lessor is, in favour of the lessee and all persons deriving title under the lessee, evidence of the execution and delivery by the lessee of a duplicate or counterpart of the lease under subsection (6) (f).
- (9) A contract to make or accept a lease under this section may, if registered, be enforced by or against every person on whom the lease, if granted, would be binding.
- (10) This section shall not apply to a bare trustee for persons all of whom are entitled in possession and are free of any incapacity.
- (11) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

### **37    Renewal of renewable leasehold**

- (1) Where a leasehold for lives or for years is vested in a trustee and the lease is renewable from time to time, either under any covenant or contract, or by custom or usual practice, the trustee may obtain from time to time the renewal on the accustomed and reasonable terms.
- (2) If required in writing by any person having any beneficial interest present, future or contingent in the leasehold, the trustee shall use his or her best endeavours to obtain from time to time the renewal on such terms.
- (3) The trustee may from time to time make or concur in making a surrender of the lease for the time being subsisting, and may do all such other acts as are requisite for the renewal.
- (4) If by the terms of the trust instrument the person in possession for his or her life or other limited interest is entitled to enjoy the same without any obligation to renew or to contribute to the expense of renewal, this section shall not apply unless the consent in writing of that person is obtained to the renewal.
- (5) The trustee may pay or apply capital money subject to the trust for the purpose of obtaining the renewal.
- (6) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

### **38    Raising money**

- (1) Where a trustee is authorised by the trust instrument or by law to pay or apply capital money for any purpose or in any manner, the trustee has power to raise the money required by sale, conversion, calling in, or mortgage of all or any part of the trust property for the time being in possession held upon the same trusts as the capital money.
- (2) If—
  - (a) a trustee holds land in relation to which an amount is owing for rates or taxes, or in relation to which the trustee is under a statutory obligation to spend an amount; and

- (b) the trustee does not have money subject to the same trusts as the land from which the amount can be paid;

the trustee has power to raise the money necessary to pay or spend the amount by sale or mortgage of all or part of the land or by sale, conversion, calling in or mortgage of all or part of the trust property held on the same trusts as the land.

- (3) This section shall not apply to a trustee of property held for charitable purposes.

### **39 Protection of purchasers or mortgagees**

No purchaser or mortgagee, paying or advancing money on a sale or mortgage purporting to be made under any trust or power vested in a trustee, shall be concerned to see that the money is wanted, or that no more than is wanted is raised, or to see to its application.

### **39A Application of income by trustee as mortgagee in possession**

- (1) If a trustee is entitled, whether separately or as a co-mortgagee, to a debt secured by mortgage of land in trust for all or part of the debt for people by way of succession, and the trustee is in possession of the mortgaged land, the trustee must apply the net income of the land in making payments as follows:
- (a) in discharge of all rents, taxes, rates and outgoings affecting the mortgaged land;
  - (b) in payment of the premiums on any insurances properly payable under the mortgage instrument or under any law in force in the Territory and the costs of executing necessary repairs;
  - (c) in keeping down all annual sums or other payments and the interest on all principal sums having priority to the mortgage in right he or she is in possession.

- (2) Subject to the mortgagor's rights, the trustee holds the balance of the income received by the trustee on the trusts to which the mortgage debt is subject.
- (3) The payments to be made by the trustee under subsection (1) are those that became payable after the trustee enters into possession.
- (4) However, if on the day the trustee enters into possession the amount of a periodical payment is owing, and the amount relates in whole or part to a period after the trustee enters into possession, the amount is taken, for this section, to accrue from day-to-day and is apportionable accordingly.
- (5) On the recovery of the amount secured by the mortgage whether in whole or in part, and whether by repayment or on realisation of the security or otherwise, such part of the income applied by the trustee in making payments under subsection (1) as would otherwise have been payable as interest to the person entitled to the interest of the mortgage debt shall as between the persons respectively entitled to the income and corpus of the mortgage debt be deemed to be arrears of interest and the amount received by the trustee shall be apportioned accordingly.
- (6) Despite anything in this section, the trustee may apply income of the mortgaged property received by the trustee in making payments under subsection (1) that are not authorised by subsections (3) and (4), but the person entitled to the interest on the mortgage debt is entitled to recover out of the capital of the mortgage debt all payments made by the trustee under this subsection.

### **Subdivision 2.2.3 Property not in possession**

#### **40 Powers**

- (1) If trust property consists of or includes a share or interest in property (or the proceeds of the sale of property) not vested in the trustee, or any other thing in action, then, when it comes into possession or becomes payable or transferable, the trustee may—

- (a) agree on or work out the amount or value of it, or any part of it, in any way the trustee considers appropriate; and
  - (b) accept in or towards satisfaction of it, at market or current value, or on any valuation or estimate of value that the trustee considers appropriate, any securities authorised by the trust instrument or by law for the investment of money subject to the trust; and
  - (c) allow any deductions for duties, costs or charges that the trustee considers proper or reasonable; and
  - (d) execute a release in relation to it.
- (2) The trustee is not responsible for loss caused by anything done honestly under subsection (1).
- (3) Unless and until required in writing so to do by some person beneficially interested under the trust or by the guardian of his or her person or estate, and unless also due provision is made to his or her satisfaction for payment of the costs of any proceedings required to be taken, the trustee shall not be under any obligation—
- (a) to apply for any stop or other like order upon any securities or other property out of or on which such share or interest or other thing in action is derived payable or charged; or
  - (b) bring proceedings for any act or omission by anyone in whom the securities or other property (or any part) is or has been vested.
- (4) The trustee may if he or she thinks fit refer any of the matters mentioned in subsection (3) to the person beneficially entitled or to the guardian of his or her person or estate.
- (5) The trustee shall not be chargeable with breach of trust by reason of any omission in any of the matters mentioned in subsection (3), except when required and upon due provision made as mentioned in the subsection.

- (6) Nothing in this section shall relieve a trustee of the obligation to get in and obtain payment or transfer of any such share or interest or other thing in action on the same falling into possession.
- (7) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

#### **Subdivision 2.2.4 Insurance**

##### **41 Insurance**

- (1) A trustee may insure against loss or damage, whether by fire or otherwise, any insurable property, and against any risk or liability against which it would be prudent for a person to insure if he or she were acting for himself or herself.
- (2) The insurance may be for any amount, provided that, together with the amount of any insurance already on foot, the total shall not exceed the insurable value or liability.
- (3) The premiums may be paid by the trustee out of the income of the property concerned or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to the income.
- (4) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

##### **42 Application of insurance money**

- (1) Where a policy of insurance against the loss or damage of any property subject to a trust, whether by fire or otherwise, has been kept up under any trust in that behalf, or under any power (statutory or otherwise), or in performance of any obligation (statutory or otherwise), the money receivable by a trustee under the policy shall be capital money for the purposes of the trust.
- (2) If the money is receivable in respect of property held upon trust for sale, the money is to be held on the trusts and subject to the powers and provisions applicable to money arising by a sale under the trust.

- (3) In any other case the money shall be held upon trusts corresponding as nearly as may be with the trusts affecting the property in respect of which it was payable.
- (4) The money or any part of it may also be applied by the trustee or, if in court, under the direction of the Supreme Court, in rebuilding, reinstating, replacing, or repairing the property lost or damaged.
- (5) An application to the Supreme Court for a direction under subsection (4) is subject to the consent of anyone whose consent is required by the trust instrument to the investment of money subject to the trust.
- (6) Nothing in this section shall prejudice or affect the right of any person to require the money or any part of it to be applied in rebuilding, reinstating or repairing the property lost or damaged.
- (7) Nothing in this section shall prejudice or affect the rights of any mortgagee lessor or lessee, whether under any statute or otherwise.
- (8) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

### **Subdivision 2.2.5 Maintenance, advancement and protective trusts**

#### **43 Maintenance and accumulation**

- (1) Where any property is held in trust for a person who is for the time being a child for any interest whatsoever, whether vested or contingent, and whether absolute or liable to be divested, the trustee may at his or her sole discretion pay to the parent or guardian (if any) of the child, or to the person with whom the child is for the time being residing, or otherwise apply the whole or any part of the income of the property, for or towards the maintenance, education or benefit of the child.
- (2) The power conferred by subsection (1) may be exercised whether there is any other fund applicable to the same purpose, or any person

bound by law to provide for the maintenance or education of the child, or not.

- (3) The power conferred by subsection (1) shall not prejudice or affect any prior interest in or charge over the property.
- (4) Where the interest for which the property is held in trust for the child is future or contingent, and the trust for the child would not, apart from this section, carry the intermediate income, and the intermediate income is not expressly or specifically disposed of but would pass to some other person in virtue only of an interest to which he or she is entitled under a residuary or a general gift in the trust instrument, or in the absence of such a gift then as upon intestacy or as upon a resulting trust, the trust for the child shall, during the childhood, if the interest of the child so long continues, be deemed to carry the intermediate income, and the interest of such person shall not be deemed to be a prior interest within the meaning of this section.
- (5) During the childhood, if the interest of the child so long continues, the trustee shall accumulate all the residue of the income in the way of compound interest by investing the same, and the resulting income from time to time on securities on which he or she is by the trust instrument or by law authorised to invest the trust money.
- (6) During the childhood, if the interest of the child so long continues, the trustee may at any time, if he or she thinks fit, apply the accumulations or any part of them as if the same were income arising in the then current year.
- (7) In the following cases the trustee shall hold the accumulations absolutely for the child:
  - (a) if otherwise than by virtue of this section the child is entitled to the income which has been accumulated;
  - (b) if, under the provisions of the trust instrument, the child is entitled on reaching 18 years old or on the happening of an earlier event to a vested interest, whether absolute or liable to be divested, or in full ownership in the property from which the



income arose, and the child in fact becomes entitled to such vested interest.

- (8) Any accumulations held in trust in accordance with subsection (7) do not affect the provisions of any settlement made by the child under a Territory law during his or her childhood.
- (9) Except in the cases mentioned in subsection (7), and notwithstanding that the person for whom the property is held in trust had a vested interest in the income by virtue of this section, the trustee shall hold the accumulations as an accretion to the capital of the property from which the accumulations arose, and as a single fund with such capital for all purposes, and so that if such property is a settled estate within the meaning of the *Conveyancing and Law of Property Act 1898*, part 4, the accumulations shall be held on the same trusts as if the same were capital money arising.
- (10) This section extends to a vested annuity in like manner as if the annuity were the income of property held by a trustee in trust to pay the income of it to the annuitant for the same period for which the annuity is payable, save that in any case accumulations made during the childhood of the annuitant shall be held in trust for the annuitant absolutely.
- (11) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

#### **44 Advancement**

- (1) If, under a trust, a person is entitled to the capital of the trust property or to a share in it, the trustee may pay or apply any capital money subject to the trust, not more than  $\frac{1}{2}$  of the value of the property or share, for the advancement or benefit of the person or, if the person is a child, for the maintenance, education, advancement or benefit of the person in any way the trustee considers appropriate (in his or her absolute discretion).
- (2) The power conferred by this section may be exercised whether the person is entitled absolutely or contingently on his or her attaining any specified age or on the occurrence of any other event, or subject

to a gift over on his or her death under any specified age or on the occurrence of any other event, and, notwithstanding that the interest of the person so entitled is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he or she belongs.

- (3) The power conferred by this section may be exercised whether the person is so entitled in possession or in remainder or reversion.
- (4) If the person is or becomes absolutely and indefeasibly entitled to a share in the trust property, the money so paid or applied shall be brought into account as part of such share.
- (5) No such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and an adult and consents in writing to the payment or application.
- (6) This section applies only where the trust property consists of money or securities or property held upon trust for sale calling in and conversion, and the money or securities or the proceeds of the sale calling in and conversion are not by a law in force in the Territory, or in equity, considered as land, or applicable as capital money for the *Conveyancing and Law of Property Act 1898*, part 4.
- (7) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

#### **45 Protective trusts**

- (1) Income may be directed to be held ‘on protective trusts’ for the benefit of any person (the *principal beneficiary*) for the period of his or her life or for any less period, and where there is such a direction the income shall during the period (the *trust period*), and without prejudice to any prior interest, be held upon trust as provided in this section.

- (2) During the trust period, or until the trust of the income fails or determines during the subsistence of the trust period, the income shall be held upon trust for the principal beneficiary.
- (3) The income of the trust fails or determines during the trust period if the principal beneficiary does something or an event happens that, if the income were payable to the principal beneficiary absolutely, the principal beneficiary would lose the right to receive the income or any part of it.
- (4) The income of the trust fails or determines whether the principal beneficiary does the thing, or the event happens, before or after the termination of any prior interest.
- (5) The trust of the income does not fail or determine because of an advance under any statutory or express power.
- (6) If the trust of the income fails or determines during the trust period, income during the rest of the trust period is to be held on trust for application—
  - (a) for the maintenance, support, or otherwise for the benefit of all or any 1 or more exclusively of the other or others of the principal beneficiary and his or her spouse (if any) and his or her children or more remote issue (if any) as the trustee in his or her absolute discretion thinks fit; or
  - (b) if there is no spouse or issue of the principal beneficiary in existence, then for the maintenance, support, or otherwise for the benefit of all or any 1 or more exclusively of the other or others of the principal beneficiary and the persons who would, if he or she were actually dead, be entitled to the trust property or the income of it or of the annuity fund (if any) or arrears of the annuity, as the case may be, as the trustee in his or her absolute discretion thinks fit.
- (7) This section extends to an annuity or other periodical income payment directed to be held on protective trusts.

- (8) Any trust implied by this section may be set aside in any case where an express trust to the same effect might be set aside.
- (9) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

### **Subdivision 2.2.6 Appropriation and payment to public trustee**

#### **46 Appropriation**

- (1) A trustee may appropriate any part of the property subject to the trust or of the real or personal estate of a testator or intestate in its actual condition or state of investment in or towards satisfaction of a legacy or of any share or interest in the property or estate, whether settled or not, as to the trustee may seem just and reasonable, according to the respective rights of the persons interested in the property or estate, but—
  - (a) the appropriation shall not be made so as to affect prejudicially any specific gift, devise or bequest; and
  - (b) the appropriation shall be made with the consent (if any) required by this section; and
  - (c) in making the appropriation the trustee shall have regard to the rights of any person who may afterwards come into existence or who cannot be found or ascertained at the time of the appropriation or as to whom it is uncertain at that time whether he or she is living or dead, and of any other person whose consent is not required by this section.
- (2) The power of appropriation conferred by this section applies to—
  - (a) property over which a testator exercises a general power of appointment; and
  - (b) setting apart a fund to answer an annuity by means of an income of the fund or otherwise, provided that at the time of appropriation the fund would be sufficient, if it were invested

in government securities of the Commonwealth at par, to provide an income exceeding the annuity by at least 15%; and

- (c) setting apart a sum of money in or towards the satisfaction of a legacy share or interest.
- (3) For the purpose of an appropriation under this section, the trustee may ascertain and fix the value of the respective parts of the property or estate and the liabilities to which the property or estate is subject as the trustee may think fit, and shall for that purpose employ a duly qualified valuer in any case where such employment may be necessary.
- (4) An appropriation made under this section shall bind all persons interested in the property or estate, including the persons whose consent is not required, and to the extent to which the appropriation is made in or towards satisfaction of the legacy, share or interest, the rights to which any person is entitled in virtue of the legacy, share or interest shall be restricted to the part of the property or estate so appropriated and shall not extend to any other part of it that may be dealt with or disposed of freed from any such rights.
- (5) An appropriation of property whether it is or is not an investment authorised by law or by the trust instrument for the investment of money subject to it, shall not, except as otherwise provided by this section, be made for the benefit of a person absolutely and beneficially entitled in possession, unless the person is not a person with a legal disability and consents in writing.
- (6) An appropriation shall not, except as otherwise provided in this section, be made in respect of any settled legacy, share or interest, unless either the trustee thereof (if any) not being also the trustee making the appropriation, or the person who may for the time being be entitled to the income, consents in writing.
- (7) If the person whose consent is required under subsection (5) or (6), not being the trustee of a settled legacy share or interest—
- (a) is a child—the consent may be given on his or her behalf by his or her parents or parent with whom he or she resides or in

whose custody he or she is, as the case may be, or by his or her testamentary or other guardian, or if there is no such parent or guardian, by the Supreme Court; or

- (b) is a person with a mental disability—the consent may be given on his or her behalf—
    - (i) by the guardian of the person, or the manager of the person’s property, under the *Guardianship and Management of Property Act 1991*; or
    - (ii) if there is no such guardian or manager—by the Supreme Court; or
  - (c) is a person who cannot be found or ascertained, or as to whom it is uncertain whether he or she is living or dead—the consent may be given on his or her behalf by the Supreme Court.
- (8) If the appropriation is of an investment authorised by law or by the trust instrument, no consent save of the trustee (if any) of a settled legacy share or interest shall be required on behalf of—
- (a) a child if there is no parent or guardian; or
  - (b) a person with a mental disability if there is neither a guardian of the person nor a manager of the person’s property under the *Guardianship and Management of Property Act 1991*; or
  - (c) a person who may come into existence after the time of appropriation, or who cannot be found or ascertained at that time, or as to whom it is uncertain at that time whether he or she is living or dead.
- (9) Notwithstanding subsection (1) (b), (5) or (7), the consent of the annuitant shall not be necessary in any case in which the trustee, after having set apart a fund to answer the annuity, which fund at the time of appropriation would be sufficient, if it were invested in government securities of the Commonwealth at par, to provide an income exceeding the annuity by at least 20%, has actually invested the fund in such securities.

- (10) Where an appropriation is made under this section in respect of a settled legacy, share or interest, the property appropriated shall be subject to all trusts for sale and powers of leasing, disposition, management and varying investment that would have applied to the property or to the legacy, share or interest in respect of which the appropriation is made, if no such appropriation had been made, provided that nothing in this section shall relieve the trustee of the settled legacy, share or interest, where he or she is not the trustee making the appropriation, from the obligation to obtain payment or transfer of the property appropriated, if the same is so payable or transferable.
- (11) Where the exercise of any power of sale conferred on a legal representative by the *Administration and Probate Act 1929*, section 50 is subject to any condition or to the leave of the Supreme Court being obtained, the legal representative shall not be entitled to appropriate any part of the real estate under the powers conferred by this section, except with the leave of the court.
- (12) The trustee may make any conveyance or assent which may be necessary for giving effect to an appropriation under this section.
- (13) Any appropriation or disposition of property made in purported exercise of the powers conferred by this section shall, in favour of an honest purchaser or the registrar-general, be taken to have been made in accordance with the requirements of this section, and after all requisite consents (if any) have been given.
- (14) In this section:  
*settled*, in relation to a legacy, share or interest, means a legacy, share or interest settled by the trust instrument or another instrument, and includes a legacy, share or interest to which a person is not absolutely entitled in possession on the day the appropriation is made.
- (15) This section shall not prejudice any other power of appropriation conferred by law or by the trust instrument, and the powers conferred by this section shall be in addition to any such power.

- (16) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

#### **47 Payment to public trustee**

- (1) Where an amount is held in trust for a child, or for a person who is unable to give a good discharge or cannot be found, the trustee may pay the amount to the public trustee, and on such payment shall furnish the public trustee with a copy of the trust instrument, or where there is no such instrument, then with a statutory declaration setting out the trusts on which the amount is held and shall also furnish such information as to the disability or identity of the person for whom the amount is held in trust as the public trustee may require.
- (2) The public trustee shall hold the amount in trust for the child or for such other person in accordance with the trusts affecting the amount, and may exercise, in addition to the powers conferred on him or her by this section, such other powers as would be conferred on him or her by this Act if he or she had duly appointed the sole trustee of the amount by a person having the power so to appoint him or her.
- (3) If the amount is held in trust for a person with a legal disability, the public trustee may—
- (a) for an amount of not more than \$500—at the public trustee’s discretion; or
  - (b) for an amount of money more than \$500 but not more than \$2 000—with the Supreme Court’s consent;
- apply all or part of the amount for the maintenance, education or benefit of the person or pay it to someone else to be so applied by that person.
- (4) Where an amount has been paid to the public trustee under subsection (1) and the public trustee has, during a period of 6 years after the amount was paid to him or her, had no knowledge of the existence or address of a person who is, or claims to be, entitled to the amount or a share in the distribution of the amount, the public



trustee shall pay an amount equal to that amount or that share, as the case may be, to the Minister, and furnish the Minister with particulars of the amount.

- (5) A receipt given by the chief executive for amounts paid to the Minister under subsection (4) is an effective discharge to the public trustee for the amounts.
- (6) A person claiming to be entitled to an amount, or a share in the distribution of an amount, paid to the Minister under subsection (4) may apply to the Supreme Court for an order for payment to him or her of the amount due to him or her, and the court, if satisfied that the person is entitled to the amount or to a share in the distribution of the amount, shall make an order for payment accordingly.
- (7) Upon the making of an order under subsection (6) for payment of an amount to a person, or where the Minister is otherwise satisfied that a person is entitled to the amount, or a share in the distribution of the amount, paid to the Minister under this section, the Minister shall pay an amount equal to that amount or to that share, to that person.
- (8) The provisions of this section do not, except as expressly declared in this section—
  - (a) deprive a person of any other right or remedy to which he or she is entitled against a trustee or any other person; or
  - (b) impose on the public trustee an obligation to make or continue to make any inquiries or investigations as to the person entitled to amounts paid to him or her under subsection (1) after those amounts have been paid to the Minister under subsection (4).

### **Subdivision 2.2.7 Receipts and compounding**

#### **48 Receipts**

The receipt in writing of trustees or of a sole trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to them or him or her under any trust or power shall

be a sufficient discharge for them, and exonerates the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication of them.

#### **49 Compounding**

- (1) The trustees or a majority acting together, or a sole trustee if the trust instrument or a Territory law authorises a sole trustee to act, may—
  - (a) accept any property before the time at which it is made transferable or payable; and
  - (b) sever and apportion any blended trust funds or property; and
  - (c) accept any composition or any security, real or personal, for any debt or for any property claimed; and
  - (d) allow any time for payment for any debt; and
  - (e) compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim or thing whatever relating to the estate or trust; and
  - (f) for any of those purposes enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things, as to them or him or her seem expedient.
- (3) A trustee is not responsible for loss resulting from anything done honestly under this section.
- (4) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

#### **Subdivision 2.2.8 Safe custody, audit and valuation**

#### **50 Deposit for safe custody**

- (1) A trustee may deposit any documents held by him or her relating to the trust, or the trust property, with any bank or with any

incorporated company whose business it is to undertake the safe custody of documents.

- (2) Any sum payable in respect of the deposit may be paid out of the income of the trust property.
- (3) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

## **51 Audit**

- (1) A trustee may, in his or her absolute discretion, from time to time cause the accounts of the trust property to be examined or audited by a person who publicly carries on the business of an accountant, and shall for that purpose produce such vouchers and give such information to him or her as he or she shall require.
- (2) The costs of the examination or audit, including the fee of the person making the examination or audit, shall be paid out of the capital or income of the trust property, or partly in one way and partly in the other, as the trustee shall in his or her absolute discretion think fit.
- (3) In default of any direction, in any special case, by the trustee to the contrary, cost attributable to capital shall be borne by capital and those attributable to income by income.
- (4) Where the trustee is the public trustee or an incorporated company, nothing in this section shall authorise any costs or fee to be paid out of or borne by the capital or income of the trust property unless the Supreme Court approves the costs or fee being so paid or borne or unless the costs are, or the fee is, incurred in respect of the examination or audit of the accounts of a business forming part of the trust property.
- (5) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

## **52 Valuation**

- (1) A trustee may, for the purpose of giving effect to the trust or any of the provisions of the trust instrument or of any statute, from time to time, by duly qualified agents, ascertain and fix the value of any trust property in such manner as he or she thinks proper.
- (2) A valuation made honestly under this section is binding on everyone interested under the trust.
- (3) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

### **Subdivision 2.2.9 Agents, banks and others**

## **53 Employment of agents**

- (1) A trustee may, instead of acting personally, employ and pay an agent, whether a bank, lawyer, stockbroker or any other person, to transact any business or do any act required to be transacted or done in the execution of the trust or in the administration of the estate.
- (2) The trustee shall be entitled to be allowed and paid all charges and expenses so incurred.
- (3) The trustee shall not be responsible for the default of any such agent if employed honestly.
- (4) This section extends, in the case of a bank but not in any other case, to the receipt and payment of money.
- (5) Nothing in this section shall authorise a trustee to employ an agent in any case where a person acting with prudence would not employ the agent to transact the business or do the act, if the business or act was required to be transacted or done in such person's own affairs.
- (6) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

## 54 Banks

- (1) Where there are more than 2 trustees or where there are 2 trustees 1 of whom is the public trustee or a trustee company, and the trustees by writing under their hands authorise a bank—
  - (a) to pay bills of exchange drawn upon the banking account of the trustees by 2 or more trustees named in that behalf in the authority or by the public trustee or a trustee company if 1 of the trustees and so named in that behalf in the authority; or
  - (b) to recognise as a valid endorsement upon any bill of exchange or promissory note payable to the order of the trustees the endorsement by 2 or more trustees named in that behalf in the authority or by the public trustee or a trustee company if 1 of the trustees and so named in that behalf in the authority, or where the endorsement is for collection and credit of any account of the trustees with a bank, the endorsement by any 1 or more of the trustees named in that behalf in the authority;

the bank acting under the authority shall not be deemed privy to a breach of trust on the ground only of notice that the persons giving the authority were trustees, or that the trust instrument did not contain any express power to give the authority.
- (2) The duration of any such authority shall be limited to a period not exceeding 3 months on any 1 occasion, except where—
  - (a) the trustee or 1 of the trustees named in the authority is the public trustee or a trustee company; or
  - (b) the authority is to indorse for collection and credit of any account of the trustees with a bank.
- (3) This section shall not affect any question of the liability of any trustee for breach of trust in giving the authority.
- (4) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

#### **54A Bank may recognise certain signatures and endorsements**

- (1) Where 2 or more persons in a fiduciary position (other than trustees under a will, settlement or like instrument) have deposited with a bank money received by them as such fiduciaries, it shall be lawful for the bank, when so authorised by such persons—
  - (a) to pay cheques drawn on the bank by any 1 or more of them or any agent authorised by them; and
  - (b) to recognise as a valid endorsement upon any bill of exchange or promissory note payable to the order of such persons an endorsement by any 1 or more of them or any agent authorised by them.
- (2) Where any person in a fiduciary position (other than a trustee under a will, settlement or like instrument) has deposited with a bank money received by him or her as such fiduciary, it shall be lawful for the bank when so authorised by such person—
  - (a) to pay cheques drawn on the bank by an agent authorised by him or her; and
  - (b) to recognise as a valid endorsement on any bill of exchange or promissory note payable to the order of such person an endorsement by any agent authorised by him or her.
- (3) This section does not affect the liability of a person to anyone in relation to whom the person is in a fiduciary position.

#### **55 Property outside ACT**

- (1) Where any property subject to a trust or forming part of the estate of a testator or intestate is in any place outside the ACT, the trustee may appoint any person to act as his or her agent or attorney for any of the following purposes:
  - (a) selling, converting, collecting, getting in, and executing and perfecting assurances of, or managing, or cultivating, or otherwise administering the property;

- (b) executing or exercising any discretion trust or power vested in the trustee in relation to the property.
- (2) The agent or attorney may be so appointed with such ancillary powers, and with and subject to such provisions and restrictions as the trustee may think fit, including a power to appoint substitutes.
- (3) The trustee is not liable for any loss arising from an appointment under this section only because the trustee made the appointment.
- (4) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

## **56 Undivided interests**

- (1) Where an undivided share in the proceeds of sale of land directed to be sold, or in any other property, is subject to a trust or forms part of the estate of a testator or intestate, the trustee may, without prejudice to the trust for sale affecting the entirety of the land and the powers of the trustees for sale, execute or exercise any trust or power vested in him or her in relation to such share, in conjunction with the person entitled to or having power in that behalf over the other share or shares.
- (2) This section applies notwithstanding that the trustee may be entitled to or interested in any such other share, either in his or her own right or in a fiduciary capacity.
- (3) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

### **Subdivision 2.2.10 Surviving trustees**

## **57 Two or more trustees**

- (1) If a power or trust is given to or vested in 2 or more trustees jointly, the power or trust may be exercised by the survivor or survivors of them for the time being.
- (2) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

### **Subdivision 2.2.11    Protection of trustees**

#### **58    Powers of attorney**

- (1) A trustee acting or paying money honestly under any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the payment or act the person who gave the power of attorney was dead or had done some act to avoid the power, if this fact was not known to the trustee at the time of his or her so acting or paying.
- (2) Nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made.
- (3) The person so entitled shall have the same remedy against the person to whom the payment is made as he or she would have had against the trustee.

#### **59    Implied indemnity**

- (1) A trustee shall be chargeable only for money and securities actually received by him or her, notwithstanding his or her signing any receipt for the sake of conformity.
- (2) A trustee shall be answerable and accountable only for his or her own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any bank, broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his or her own wilful neglect or default.
- (3) Nothing in subsections (1) and (2) shall prejudice the provisions of the trust instrument.
- (4) A trustee may reimburse himself or herself, or pay or discharge out of the trust property all expenses incurred in or about the execution of his or her trusts or powers.



## 60 Distribution after notice

- (1) Where a trustee intends to convey or distribute any property to or among the persons entitled to it, he or she may give the requisite notice of his or her intention so to convey or distribute the property.
- (2) For subsection (1), the requisite notice is a notice published in a newspaper printed and circulating in the ACT and such other notice or notices (if any) published within or outside the ACT as would, in a special case, be necessary, in order to comply with the *Administration and Probate Act 1929*, section 64 in the case of an intended distribution of assets by an executor or administrator.
- (3) The notice shall require any person interested to send particulars of his or her claim in respect of the property or any part of it to which the notice relates to the trustee within the time, not being less than 2 months, fixed in the notice or when more than 1 notice is given in the last of the notices.
- (4) At the expiration of the time fixed by the notice the trustee may convey or distribute the property or any part of it to or among the persons entitled to it, having regard only to the claims, formal or otherwise, of which he or she then had notice.
- (5) If the requisite notice has been given, the trustee shall not, as respects the property conveyed or distributed, be liable to any person of whose claim the trustee has not had notice at the time of the conveyance or distribution.
- (6) Nothing in this section shall prejudice the right of any person to follow the property, or any property representing the same, into the hands of any person who may have received the same.

## 61 Distribution where estate comprises leaseholds, and in certain other cases

- (1) The *Administration and Probate Act 1929*, section 66 applies to an assignment or a conveyance executed by a trustee and to a distribution of trust property in like manner as that section applies to

an assignment by a legal representative and to a distribution of the estate of a testator or an intestate person.

- (2) Nothing in this section shall prejudice the right of the lessor or grantor and the persons deriving title under him or her to follow the trust property into the hands of the person amongst whom the same may have been distributed.

### **61A Personal liability of legal representative or trustee**

The legal representative or trustee of the will of the deceased person who was registered as the holder of shares not fully paid up in any incorporated company may distribute the assets of the estate of the deceased person as soon as the legal representative or trustee has procured the registration of some other person as the holder of the shares without reserving any portion of the estate for the payment of any calls made after the date of the registration whether made by the company or its directors or by its liquidators in a winding-up, but this section does not affect any right which the company or its liquidator may have to follow the assets of the deceased person into the hands of any persons amongst whom the same have been distributed or who have received the same.

### **62 Notice**

A trustee acting for the purposes of more than 1 trust or estate shall not in the absence of fraud, be affected by notice of any instrument, matter, fact or thing in relation to any particular trust or estate if he or she has obtained notice thereof merely by reason of his or her acting or having acted for the purposes of another trust or estate.

### **63 Advice**

- (1) A trustee may apply to the Supreme Court for an opinion, advice or direction on any question respecting the management or administration of the trust property, or respecting the interpretation of the trust instrument.

- (2) If the trustee acts in accordance with the opinion, advice or direction, he or she shall be deemed, so far as regards his or her own responsibility, to have discharged his or her duty as trustee in the subject matter of the application, provided that he or she has not been guilty of any fraud or wilful concealment or misrepresentation in obtaining the opinion, advice or direction.
- (3) Unless otherwise prescribed by rules of court, the application may be made by summons or appointment upon a written statement signed by the trustee or his or her lawyer.
- (4) Unless the Supreme Court otherwise directs, it shall not be necessary to serve notice of the application on any person, or to adduce evidence by affidavit or otherwise in support of the application.
- (5) Where the question is who are the beneficiaries or what are their rights as between themselves, the trustee before conveying or distributing any property in accordance with the opinion, advice or direction shall, unless the Supreme Court otherwise directs, give notice to any person whose rights as beneficiary may be prejudiced by the conveyance or distribution.
- (6) The notice shall state shortly the opinion, advice or direction, and the intention of the trustee to convey or distribute in accordance with it.
- (7) Any person who claims that his or her rights as beneficiary will be prejudiced by the conveyance or distribution may within such time as may be prescribed by rules of court, or as may be fixed by the Supreme Court, apply to the court for such order or directions as the circumstances may require, and during such time and while the application is pending, the trustee shall abstain from making the conveyance or distribution.
- (8) Subject to subsection (7), anyone on whom notice of any application under this section is served or to whom notice is given in accordance with subsection (5) shall be bound by the opinion, advice or direction of the Supreme Court, or by the order and directions of the

court, as the case may be, as if the opinion, advice or direction, or the order and directions, had been given or made upon the hearing of an application to which such person was a party.

## **Division 2.3                    Delegation**

### **64            Execution of trust**

- (1) Where a trustee is absent from the ACT or is about to depart from the ACT, he or she may by registered deed delegate the execution of the trust.
- (2) A trustee may not so delegate, unless his or her co-trustees or co-trustee, and such other person (if any) as is empowered to appoint trustees, consent by the same or other registered deed to the delegation, and the delegation is to the public trustee or to a trustee company or to a person residing in the ACT who is either a co-trustee or is capable of being appointed a trustee of the trust.
- (3) The delegation may be made in respect of the whole or any part of the trust.
- (4) A delegation given under the authority of this section by a trustee who is the legal representative of a deceased person shall, unless the contrary is expressed in the deed of delegation, operate to delegate not only the execution of the duties incidental to the office of legal representative of such deceased person (including the exercise of all the functions of the trustee as such legal representative) but also the execution of the trusts which devolve upon such trustee when the administration of the estate of such deceased person is completed.
- (5) The delegation shall not operate beyond 2 years from the date of the deed and shall be made on 1 occasion only, unless after the delegation the trustee has returned to the ACT and is again absent or about to depart from the ACT, provided that in the event of the delegate dying or the delegation being revoked, another delegation may be made for the balance of the period of 2 years.
- (6) The delegation shall not be made, whether to a co-trustee or to any other person, unless there will be remaining in the ACT to perform

the trust, the public trustee or a trustee company or 2 persons whether as trustee or as delegate.

- (7) Trustees may delegate concurrently.
- (8) A trustee who delegates his or her trust shall remain answerable for all acts and omissions of the delegate within the scope of the delegation as if they were the acts and omissions of the trustee, and the delegate shall be subject to the jurisdiction and powers of any court so far as respects the execution of the trust in the same manner as if he or she were the trustee.
- (9) This section applies to a trust except so far as the contrary intention appears in the trust instrument.
- (10) However, subsection (9) does not affect the jurisdiction or powers of a court.

## **65 Consent to exercise of trust or power**

- (1) Where a person whose consent is required by any instrument to the exercise of a trust or power is absent from the ACT or is about to depart from the ACT, he or she may by registered deed delegate the right to consent to the public trustee, or a trustee company.
- (2) Persons may delegate concurrently.
- (3) The person who delegates and the delegate shall be severally liable for any improper exercise of the right to consent.
- (4) This section applies to a trust except so far as the contrary intention appears in the trust instrument.

## **66 Person dealing with delegate**

No person dealing honestly with the delegate under any deed of delegation authorised by this part shall, by reason only that by the delegation or any evidence or document in connection with the delegation it appears that the delegate is acting in the execution of any trust, be affected for any purpose with notice of the trust.

## **67    Power of attorney**

A delegation under this part shall be deemed to be a power of attorney within the meaning of the *Powers of Attorney Act 1956*, and that Act, except sections 6, 7 and 8, applies to such a delegation.

## **68    Registration**

- (1) An instrument by which a trust or the right to consent to the exercise of a trust or power is delegated shall be deemed not to be registered for this Act unless it has been registered under the *Registration of Deeds Act 1957*.
- (2) This section extends to a delegation, whether under this part or under the provisions of the instrument creating the trust or power or otherwise, and whether the trust or power does or does not relate to land under the *Land Titles Act 1925*.
- (3) This section extends to a consent to a delegation.

## **Part 3 Powers of Supreme Court**

### **Division 3.1 New trustees and vesting orders**

#### **70 New trustees**

- (1) The Supreme Court may make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.
- (2) The appointment may be made whenever it is expedient to appoint a new trustee or new trustees, and it is inexpedient difficult or impracticable so to do without the assistance of the Supreme Court.
- (3) Without limiting any other provision of this section, the Supreme Court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of an indictable offence, or is a bankrupt, or being a corporation is in liquidation or is dissolved.
- (4) In the case of any trust for a charity the Supreme Court may make an order for the appointment of a new trustee on such evidence of the trust as the court deems sufficient.
- (5) This section shall be deemed to authorise the Supreme Court to make an order for the reappointment of the continuing trustees alone as new trustees.
- (6) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.
- (7) Every trustee appointed under this section shall, as well before as after the trust property becomes vested in him or her, have the same

powers and discretions, and may in all respects act as if he or she had been originally appointed a trustee by the trust instrument.

- (8) Nothing in this section shall give power to appoint an executor or administrator.

## **71 Vesting orders**

- (1) The Supreme Court may make an order under this section (a *vesting order*).

*Note* Section 78 deals with the effect of vesting orders.

- (2) The Supreme Court may make a vesting order in the following cases:
- (a) if the court appoints or has appointed a new trustee;
  - (b) if a new trustee has been appointed out of court under any statutory or express power;
  - (c) if a trustee retires or has retired;
  - (d) if the trustee is a child;
  - (e) if the trustee is a person with a mental disability;
  - (f) if a trustee is out of the jurisdiction of the court;
  - (g) if a trustee cannot be found;
  - (h) if a trustee being a corporation is dissolved;
  - (i) if a trustee neglects or refuses to convey any property, or to receive the dividends or income of any property, or to sue for or recover any property according to the direction of the person absolutely entitled to the same for 28 days next after a request in writing has been made to him or her by the person so entitled;
  - (j) if it is uncertain who was the survivor of 2 or more trustees jointly entitled to or possessed of any property;



- (k) if, as to the last trustee known to have been entitled to or possessed of any property, it is uncertain whether he or she is living or dead;
  - (l) if there is no legal representative of a trustee who was entitled to or possessed of any property or where it is uncertain who is the legal representative of a trustee who was entitled to or possessed of any property;
  - (m) if any person neglects or refuses to convey any property, or to receive the dividends or income of any property, or to sue for or recover any property in accordance with the terms of an order of the court;
  - (n) if the court might have made a vesting order if this Act had not been passed;
  - (o) if property is vested in a trustee, whether by way of mortgage or otherwise, either solely or jointly with any other person, and it appears to the court to be expedient to make a vesting order.
- (3) Subsection (2) (d), (e), (f), (g), (h) and (i) extend to a trustee entitled to or possessed of any property either solely or jointly with any other person.
- (4) Where the order is consequential on the appointment of a new trustee, the property shall be vested in the persons who, on the appointment are the trustees.
- (5) Where the vesting order is consequential on the retirement of 1 or more of a number of trustees, the property may be vested in the continuing trustees alone.
- (6) Subject to subsection (4), the vesting order may vest the property in any such person in any such manner and for any such estate or interest as the Supreme Court may direct, or may release or dispose of any contingent right to such person as the court may direct.
- (7) The fact that the order is founded or purports to be founded on an allegation of the existence of any of the matters mentioned in

subsection (2) shall be conclusive evidence of the matter so alleged in any court upon any question as to the validity of the order.

- (8) This section shall not prevent the Supreme Court from directing a reconveyance or the payment of costs occasioned by any such order if improperly obtained, or from making a further vesting order.
- (9) Where by reason of the dissolution of a corporation a legal estate in any property has determined, the Supreme Court may by order create a corresponding estate and vest the same in the person who would have been entitled to the estate which determined, had it remained a subsisting estate.

## **72 Contingent rights of unborn person**

Where any property is subject to a contingent right in an unborn person or class of unborn persons, who, on coming into existence, would become entitled to or possessed of the property on any trust, the Supreme Court may make a vesting order releasing the property from the contingent right, or vesting in any person the estate or interest to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the property.

## **73 Child beneficiary**

Where a child is beneficially entitled to any property the Supreme Court may, with a view to the application of the capital or income of the property for the maintenance, education, or benefit of the child, make an order upon such terms as the court may think fit appointing a person to convey the property, or in the case of stock, or a thing in action, vesting in any person the right to transfer or call for a transfer of the stock, or to receive the dividends or income, or to sue for and recover the thing in action.

## **74 Mortgagee under disability**

Where any person entitled to or possessed of property by way of mortgage is a person with a legal disability, the Supreme Court may

make a vesting order vesting, releasing or disposing of the property, with the right to transfer or call for a transfer of property, or to receive the dividends or income, or to sue for or recover property or any interest in property, in like manner as in the case of a trustee with a legal disability.

## **75 Deceased mortgagee**

- (1) Subject to this section, where a mortgagee of land has died—
  - (a) if the land is under the *Land Titles Act 1925*—the Supreme Court may make an order discharging the mortgage; and
  - (b) in any other case—the Supreme Court may make an order vesting the land in such person or persons, in such manner and for such estate as the court directs.
- (2) The order may only be made if the mortgagee did not enter into possession, and the money due in respect of the mortgage has been paid to a person entitled to receive the same, or that lastmentioned person consents to any order for the reconveyance of the land.
- (3) The order may be made in any of the following cases:
  - (a) if the legal representative of the mortgagee is out of the jurisdiction of the Supreme Court or cannot be found;
  - (b) if the legal representative of the mortgagee, on demand made by or on behalf of a person entitled to require a conveyance of the land has stated in writing that he or she will not convey the same or does not convey the same for the space of 28 days next after a proper deed for conveying the land has been tendered to him or her by or on behalf of the person so entitled;
  - (c) if it is uncertain as to the legal representative of the mortgagee whether he or she is living or dead;
  - (d) if there is no legal representative of a mortgagee who has died intestate as to the land, or where the mortgagee has died and it is uncertain who is his or her legal representative;

- (e) if the court might have made a vesting order if this Act had not been passed.
- (4) The fact that the order is founded or purports to be founded on an allegation of the existence of any of the matters mentioned in subsection (3) shall be conclusive evidence of the matter in any court upon any question as to the validity of the order.
- (5) This section shall not prevent the Supreme Court from directing a reconveyance or the payment of costs occasioned by any such order if improperly obtained, or from making a further vesting order.

## **76 Sale or mortgage of land**

- (1) Where an order is made by the Supreme Court directing the sale or mortgage of any land, the court may make an order vesting the land or any part of it for such estate as the court thinks fit in the purchaser or mortgagee or in any other person.
- (2) For this section, every person who is entitled to or possessed of the land, or entitled to a contingent right in the land, and is a party to the proceeding in which the order is made or is otherwise bound by the order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee within the meaning of this Act.

## **77 Specific performance etc**

- (1) The Supreme Court may make a vesting order where an order is made by the court for the specific performance of a contract concerning any land, or for the partition or sale instead of partition of any land, or for the exchange of any land, or for the conveyance of any land, either in cases arising out of the doctrine of election or otherwise.
- (2) For this section, the Supreme Court may declare—
  - (a) that any of the parties to the proceeding are trustees of the land or any part of it within the meaning of this Act; or
  - (b) that the interests of unborn persons who might claim under any party to the proceeding, or under the will or voluntary

settlement of any person deceased, who was during his or her lifetime a party to the contract or transactions concerning which the order is made, are the interests of persons who on coming into existence would be trustees within the meaning of this Act.

- (3) The vesting order may be made with respect to the rights of those persons born and unborn as if they had been trustees.

## **78 Effect of vesting order**

- (1) In the case of a vesting order consequential on the appointment of a new trustee, or the retirement of a trustee, the vesting order shall have the same effect as if the persons who before the appointment or retirement were the trustees (if any) had duly executed all proper conveyances of the property for such estate or interest as the Supreme Court directs or if there is no such person, or no such person who is not a person with a legal disability, then as if such person had existed and not been a person with a legal disability, and had duly executed all proper conveyances of the property for such estate or interest as the court directs.
- (2) In every other case the vesting order shall have the same effect as if the trustee or other person or description or class of persons to whose rights, or supposed rights, the provisions of this part respectively relate, had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order.
- (3) Land does not vest because of a vesting order made under this part until—
  - (a) if the land is under the *Land Titles Act 1925*—an entry of the vesting is made in the register kept under that Act; or
  - (b) in any other case—the order is registered under the *Registration of Deeds Act 1957*.

- (4) In the following cases the vesting order shall vest in the person named in the order the right to transfer or call for a transfer of a property or security:
- (a) any property that does not come within subsection (3), but a transfer of which is required to be registered by or under a law in force in the ACT or otherwise;
  - (b) any security that is only transferable in books kept by a corporation, company or other body, or in manner directed by or under a law in force in the ACT or otherwise.
- (5) In the case of any security or thing in action the vesting order shall vest in the person named in the order the right to receive the dividends or income of it, and to sue for or recover the thing in action.
- (6) The person in whom the right to transfer or call for the transfer of any property or security is so vested may transfer the property or security to himself or herself or any other person according to the order and everyone must obey the order.
- (7) After notice in writing of the vesting order it shall not be lawful for anyone to transfer any property or security to which the order relates, or to pay any dividends on it except in accordance with the order.

## **79 Appointment of person to convey**

In all cases where a vesting order can be made the Supreme Court may, if it is more convenient, appoint a person to convey the property or release any contingent right, and a conveyance or release by that person in conformity with the order shall have the same effect as an order under the appropriate provision.

## **80 Trustees of charities**

The powers conferred by this Act as to vesting orders may be exercised for vesting any property in any trustee of a charity or society over which the Supreme Court would have jurisdiction in a proceeding duly instituted, whether the appointment of the trustee

was made by instrument under a power or by the court under its general or statutory jurisdiction.

## **Division 3.2 Dealings and improvements**

### **81 Advantageous dealings**

- (1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction, is in the opinion of the Supreme Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, or by law, the court—
  - (a) may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, including adjustment of the respective rights of the beneficiaries, as the court may think fit; and
  - (b) may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.
- (2) Subsection (1) shall be deemed to empower the Supreme Court, where it is satisfied that an alteration whether by extension or otherwise of the trusts or powers conferred on the trustees by the trust instrument, or by law is expedient, to authorise the trustees to do or abstain from doing any act or thing which if done or omitted by them without the authorisation of the court or the consent of the beneficiaries would be a breach of trust, and in particular the court may authorise the trustees—
  - (a) to sell trust property, notwithstanding that the terms or consideration for the sale may not be within any statutory powers of the trustees, or within the terms of the trust instrument, or may be forbidden by that instrument; or
  - (b) to postpone the sale of trust property; or

- (c) to carry on any business forming part of the trust property during any period for which a sale may be postponed; or
  - (d) to employ capital money subject to the trust in any business which the trustees are authorised by the trust instrument or by law to carry on.
- (3) The Supreme Court may from time to time rescind or vary any order made under this section, or may make any new or further order.
- (4) The powers of the Supreme Court under this section shall be in addition to the powers of the court under its general administrative jurisdiction, under this Act or another Act.

## **82 Improvements and repairs**

- (1) Where any leasehold is vested in a trustee for a child, or in trust for any persons in succession, the Supreme Court may authorise the trustee to pay or apply capital money subject to the trust for any 1 or more of the following purposes:
- (a) to effect repairs to any existing buildings, dams, fences or other erections upon the land;
  - (b) to effect improvements of or upon the land, or to reconstruct enlarge or improve any existing buildings, dams, fences or other erections on the land;
  - (c) to erect any new buildings, dams, fences or other erections upon the land;
  - (d) to erect or join in erecting any give and take fence, that is to say, a fence part of which is on the land and part on adjoining land;
  - (e) to restock the land with sheep, cattle, or horses;
  - (f) to replace machinery or implements required for the land.
- (2) The trustee may be so authorised where the Supreme Court, having due regard to the interest of all persons beneficially interested in the



land, thinks that the proposed expenditure is expedient, although it may not be necessary for the purpose of the salvage of the property.

- (3) The amount of capital money that may be so expended shall be stated in the order authorising the proposed expenditure.
- (4) The Supreme Court may authorise the trustee—
  - (a) to raise the amount by mortgage of the land, or by sale of a part of the land; or
  - (b) to raise the amount by mortgage or sale of any other real or personal property held upon the same trusts; or
  - (c) to pay the amount out of any money under the control of the trustee and held by him or her upon the same trusts; or
  - (d) to provide the amount partly in one and partly in another of those modes; or
  - (e) to provide a sinking fund out of income.
- (5) Where the amount is authorised to be raised by mortgage, the Supreme Court may give directions to the trustee how the principal and interest are to be paid.
- (6) The Supreme Court may require such provision for a sinking fund as the court thinks proper.
- (7) The Supreme Court shall give such directions as appear necessary and proper, so as to throw upon the respective interests of the persons beneficially interested their proper proportion of the money to be expended.
- (8) No purchaser or mortgagee paying or advancing money upon any sale or mortgage authorised by the Supreme Court under this section shall be required to see to the application of the purchase money or mortgage money, and the protection given by this subsection shall extend to the registrar-general.

### **83 Improvements and repairs without Supreme Court's approval**

- (1) Where any leasehold is vested in a trustee for a child or in trust for any person in succession and in the opinion of the trustee it is expedient in the interest of all persons beneficially interested in the land to expend capital money subject to the trust for any 1 or more of the purposes specified in section 82 (1) (a) to (f) the trustee may, without the authority of the Supreme Court, expend on all or any of such purposes capital money subject to the trust not exceeding in all \$2 000 or  $\frac{1}{3}$  of the value of the land whichever is the less.
- (2) Where in the opinion of the trustee it is expedient to exercise the power conferred by subsection (1), he or she may without the authority of the Supreme Court exercise any of the powers specified in section 82 (4), and he or she shall throw upon the respective interests of the persons beneficially interested a proper proportion of the money so expended.
- (3) A purchaser paying money upon a sale, or a mortgagee advancing money upon a mortgage, authorised by this section is not required to see to the application of the purchase money or mortgage money and the protection given by this subsection extends to the registrar-general.

### **84 Sale of child's property**

- (1) Where any property is held in trust for a child, the Supreme Court may authorise the trustee to sell the whole or any part of the property.
- (2) The authority shall be given on such terms and subject to such provisions and conditions as the Supreme Court may think fit.
- (3) The Supreme Court may confer upon the trustee such powers as appear necessary or proper for the purpose, including power to concur with any other person.

- (4) This section applies whether the trust is for the child solely or together with any other person, and whether the interest of the child is or is not in possession.

### **Division 3.3 Relief and indemnity**

#### **85 Excusable breaches of trust**

- (1) Where a trustee is or may be personally liable for any breach of trust, the Supreme Court may relieve the trustee either wholly or partly from personal liability for the breach.
- (2) The relief may not be given unless it appears to the Supreme Court that the trustee has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the direction of the court in the matter in which he or she committed the breach.
- (3) In the case of a legal representative the powers of the Supreme Court may be exercised in its probate as well as in its equity jurisdiction.

#### **86 Indemnity for breach of trust**

- (1) Where a trustee commits a breach of trust at the instigation or request or with the written consent of a beneficiary, the Supreme Court may, if it thinks fit, make such order as to the court seems just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him or her.
- (2) Subsection (1) authorises the Supreme Court to impound all or any part of the interest of any beneficiary who receives any pecuniary benefit from the breach of trust.

### **Division 3.4 Miscellaneous powers**

#### **87 Division of chattels**

- (1) Where any chattels are vested in a trustee for persons in undivided shares, any person interested in a moiety or upwards may apply to

the Supreme Court for an order for division of the chattels or any of them, according to a valuation or otherwise.

- (2) The Supreme Court may make such order and give any consequential directions as it thinks fit.

### **88 Order in absence of trustee**

Where in any proceeding the Supreme Court is satisfied that diligent search has been made for any person who, in the character of trustee, is made a defendant to the proceeding to serve him or her with a process of the court and that he or she cannot be found, the court may hear and determine the proceeding and make an order against that person in his or her character of a trustee as if he or she had been duly served or had entered an appearance in the proceeding, and had also appeared by his or her lawyer at the hearing, but without prejudice to any interest he or she may have in the matters in question in the proceeding in any other character.

### **89 Supreme Court considerations in action for breach of trust**

In a proceeding against a trustee for a breach of trust in relation to a duty under division 2.2 relating to the trustee's power of investment, the Supreme Court may, when considering the question of the trustee's liability, take into account the following:

- (a) the nature and purpose of the trust;
- (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 2.2;
- (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 Supreme Court to set off investment gains and losses**

- (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 Supreme 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.

**90 Postponement of order**

Where any application is made under this part, the Supreme Court may postpone making any order upon the application until the right of the applicant has been declared in a proceeding duly instituted for that purpose.

**Division 3.5 Applications and orders**

**91 Orders in other proceedings**

- (1) If in any proceeding in the Supreme Court the facts proved would entitle the court to make an order on an application under this Act, the court may make the order without requiring a separate proceeding to be begun.
- (2) The order is taken to be made on an application under this Act.

**92 People entitled to apply**

- (1) An order under this Act for the appointment of a new trustee or concerning any property subject to a trust may be made on the application of any person interested in the property, whether under disability or not, or of any person duly appointed trustee of the property.

- (2) An order under this Act concerning any property subject to a mortgage may be made on the application of any person interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage.

## **Division 3.6                      Charitable trusts**

*Note to div 3.6:* The provisions of this division were relocated from the *Imperial Acts (Substituted Provisions) Act 1986*, sch 2, pt 18. (For the effect of a relocation, see *Legislation Act 2001*, s 96) The 1986 Act substituted provisions for certain UK Acts that applied (or may have applied) in the ACT and repealed those Acts. The provisions of sch 2, pt 18 were substituted for 52 Geo. 3 c 101 (1812). The 1986 Act, s 4 (1) provided, in effect, that the rules of law about the interpretation of consolidating Acts apply to the interpretation of the provisions of a law set out in sch 2. These rules of law continue to apply to this division (see *Legislation Act 2001*, s 96 (3)).

### **94A    Applications to Supreme Court**

Application may be made to the Supreme Court by any person for such relief, in relation to the administration of a trust for charitable purposes, as the circumstances require.

### **94B    Orders of Supreme Court**

If application is made to the Supreme Court under section 94A, the court may make any order that it considers just.

### **94C    Notice to Minister**

- (1) Notice of an application under section 94A shall be served on the Minister.
- (2) The Minister may be represented in the hearing of an application.

### **94E    Action under Supreme Court order lawful**

Action taken by trustees of a trust for charitable purposes in accordance with an order made by the Supreme Court under section 94B shall, for all purposes, be deemed to have been duly and lawfully taken.

## Part 4                      Payment into court

### 94F    Definitions for pt 4

In this part:

*payment into court*, in relation to stocks and securities, includes the deposit with, or the transfer to, the Supreme Court of the stocks or securities.

*trustee* includes every implied or constructive trustee.

### 95    Trustees

- (1) Where trustees, or the majority of trustees, have in their hands or under their control money or securities belonging to a trust, they may pay them into court.
- (2) Where any money or securities are vested in any persons as trustees, and the majority wish to pay them into court, but the agreement of the other or others cannot be obtained, the Supreme Court may order the payment into court to be made by the majority without the agreement of the other or others.
- (3) Where any such money or securities are deposited with any bank, broker or other depositary, the Supreme Court may order transfer, payment or delivery of the money or securities to the majority of the trustees for the purpose of payment into court.
- (4) Every transfer, payment and delivery made under any such order shall be valid and take effect as if it had been made on the authority or by the act of all the persons entitled to the money or securities so transferred, paid or delivered.

### 96    Person liable to person with legal disability

If a person with a legal disability is entitled to an amount payable in discharge of land, stock, or a thing in action, conveyed under this

Act, the person by whom the amount is payable may pay the amount into court.

**98 Money or securities**

- (1) The payment of money or securities into court shall be subject to rules of court.
- (2) The receipt or certificate of the registrar of the Supreme Court or other proper officer shall be a sufficient discharge to anyone for money or securities paid into court.
- (3) Money or securities paid into court shall, subject to rules of court, be dealt with according to the orders of the Supreme Court.
- (4) The Supreme Court may make such order as it thinks fit as to the investment, payment or distribution of money or securities paid into court, or the dividends or income of them.



## Part 5                      Miscellaneous

### 102    Compulsion to account

- (1) Where a guardian, committee, receiver or other trustee appointed by the Supreme Court has been or is, by order in a particular cause or matter or by rules of court, directed to account from time to time or to file a report or account in the office of the registrar of the court, the court may, in order to enforce compliance with the order or the rules of court, cause the guardian, committee, receiver or other trustee to be summoned before the court to show cause why he or she should not be ordered to account or to file the report or account.
- (2) If the guardian, committee, receiver or other trustee does not, within the prescribed time or within such further time as is allowed by the Supreme Court, account or file the report or account in the prescribed manner he or she is liable to attachment in accordance with the practice of the court.
- (3) Under this section, the Supreme Court may cause a guardian, committee, receiver or other trustee to be summoned before the court on its own initiative or on the application of—
  - (a) the parties to the cause or matter or any of those parties; or
  - (b) the registrar of the court on behalf of those parties or any of those parties.

### 103    Indemnity for anything done under Act etc

- (1) This Act, and every order purporting to be made under this Act, is a complete indemnity to anyone for anything done under this Act or the order.
- (2) It is not necessary for anyone to inquire whether an order purporting to be made under this Act was properly made.

**104 Preamble to Charitable Uses Act 1601**

For the law of the Territory, the text set out in schedule 1 is taken to be the text of the preamble to the former United Kingdom Act 43 Eliz. c 4 (also known as the *Charitable Uses Act 1601*).

**105 Illusory etc share valid in law and equity**

- (1) The exercise of a power of appointment under a trust is valid at law and in equity even if a beneficiary or object is given an insubstantial, nominal or illusory share or an insubstantial, nominal, or illusory share is left unappointed to devolve on a beneficiary or object.
- (2) This section does not apply to a trust instrument that states the amount of the share or shares from which no beneficiary or object may be excluded.

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## **Schedule 1      Preamble to Charitable Uses Act 1601**

(see s 104)

Whereas lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks money have been heretofore given, limited, appointed and assigned, as well by the Queen's most excellent Majesty and her most noble progenitors, as by sundry other well disposed persons, some for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, sea banks and highways, some for education and proferment of orphans, some for or towards relief, stock or maintenance for houses of correction, some for marriages of poor maids, some for support, aid and help of young tradesmen, handicraftsmen, and decayed persons, and others for relief or redemption of prisoners or captives and for aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes; which lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money nevertheless have not been employed according to the charitable intent of the givers and founders thereof by reason of the frauds, breaches of trusts and negligence in those that should pay, deliver and employ the same.

## Dictionary

(see s 2)

**administrator** includes anyone to whom administration of the estate of a dead person is granted, and includes the public trustee acting under the *Administration and Probate Act 1929*, part 6.

**contingent right**, in relation to land, includes—

- (a) a contingent or executory interest or a possibility coupled with an interest, whether or not the object of the gift or limitation of the interest or possibility is known; and
- (b) a right of entry, whether immediate or future and vested or contingent.

**conveyance**, in relation to a person, includes the execution or doing by the person of everything necessary to convey, assign, appoint, surrender, or otherwise transfer or dispose of, property.

**executor** means the executor to whom probate has been granted, and includes an executor by right of representation.

**government securities** include government stocks, funds, bonds, debentures and Treasury bills.

**instrument** includes a deed, a will, an agreement for settlement and a law of the Territory, the Commonwealth or a State.

**joint tenant** includes joint owner.

**legal representative** includes executor and administrator.

**mortgage**—

- (a) for land under the *Land Titles Act 1925*—see that Act, section 6 (1); and
- (b) for other property—includes any estate or interest regarded in equity as only a security for money.

**mortgagee**—

- (a) for land under the *Land Titles Act 1925*—see that Act, section 6 (1); and
- (b) for other property—includes a person taking title to the mortgage under the original mortgagee.

***mortgagor***—

- (a) for land under the *Land Titles Act 1925*—see that Act, section 6 (1); and
- (b) for other property—includes any of the following:
  - (i) a person taking title to the equity of redemption under the original mortgagor;
  - (ii) a person entitled to redeem a mortgage, according to his or her interest in the mortgaged property.

***payment into court***, for part 4—see section 94F.

***person with a legal disability*** means—

- (a) a child; or
- (b) a person with a mental disability.

***person with a mental disability*** means—

- (a) in relation to a proceeding—a person (other than a child) who is not legally competent to be a party to the proceeding; and
- (b) in relation to the doing of something—a person (other than a child) who is not legally competent to do the thing;

and includes such a person even if a guardian or manager has not been appointed for the person under the *Guardianship and Management of Property Act 1991*.

***possessed*** includes—

- (a) a vested estate less than a life estate, legal or equitable, in possession or expectancy, in property; and
- (b) the receipt of income from such an estate.

***purchaser*** includes—

- (a) a lessee or mortgagee; and
- (b) anyone who acquires an interest in property for valuable consideration.

***right*** includes estate and interest.

***securities*** includes stocks, funds and shares.

***stock*** includes—

- (a) paid-up shares; and
- (b) in relation to a vesting order—a fund, annuity or security (including a share or interest in such a fund, annuity or security) transferable in books kept by a corporation or by instrument of transfer (including a transfer subject to other requirements).

***transfer***, of stock, includes the execution of a deed or power of attorney, and anything else done by the transferor, to give title to the transferee.

***trust***—see section 4 (Meaning of *trust*).

***trustee***—

- (a) includes a legal representative, the public trustee and a trustee company; and
- (b) for part 4 (Payment into court)—see section 94F.

***trustee company***—see the *Trustee Companies Act 1947*, section 3.

***trust instrument*** means the instrument (if any) creating the trust.

***vesting order*** means an order under section 71.

## Endnotes

### 1 About the endnotes

Amending and modifying laws are annotated in the legislation history and the amendment history. Current modifications are not included in the republished law but are set out in the endnotes.

Not all editorial amendments made under the *Legislation Act 2001*, part 11.3 are annotated in the amendment history. Full details of any amendments can be obtained from the Parliamentary Counsel's Office.

Uncommenced amending laws are listed in the legislation history and the amendment history. These details are underlined. Uncommenced provisions and amendments are not included in the republished law but are set out in the last endnotes.

If all the provisions of the law have been renumbered, a table of renumbered provisions gives details of previous and current numbering.

The endnotes also include a table of earlier republications.

If the republished law includes penalties, current information about penalty unit values appears on the republication inside front cover.

### 2 Abbreviation key

am = amended	ord = ordinance
amdt = amendment	orig = original
ch = chapter	p = page
cl = clause	par = paragraph
def = definition	pres = present
dict = dictionary	prev = previous
disallowed = disallowed by the Legislative Assembly	(prev...) = previously
div = division	prov = provision
exp = expires/expired	pt = part
Gaz = Gazette	r = rule/subrule
hdg = heading	reg = regulation/subregulation
ins = inserted/added	renum = renumbered
LA = Legislation Act 2001	reloc = relocated
LR = legislation register	R[X] = Republication No
LRA = Legislation (Republication) Act 1996	s = section/subsection
mod = modified / modification	sch = schedule
No = number	sdiv = subdivision
o = order	sub = substituted
om = omitted/repealed	SL = Subordinate Law
	<u>underlining</u> = whole or part not commenced

## Endnotes

3 Legislation history

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### 3 Legislation history

The *Trustee Act 1925* (NSW), as in force in NSW immediately before 1 December 1957, was formerly applied in the ACT in a modified form by the *Trustee Act 1957*.

After its application in the ACT, the *Trustee Act 1925* (as it applied in the ACT) was amended (directly or indirectly) by Commonwealth laws made before self-government and ACT laws made after self-government.

The *Interpretation Act 1967*, section 63 converted all former New South Wales acts in force in the ACT immediately before 10 November 1999 into laws made by the Legislative Assembly.

The *Trustee Act 1957* was repealed by the *Statute Law Amendment Act 2001* (No 2) and the remaining provisions affecting the operation of the *Trustee Act 1925* were incorporated into that Act by amendment.

Before 11 May 1989, ordinances commenced on notification day unless otherwise stated (see *Seat of Government (Administration) Act 1910* (Cwlth), s 12).

After 11 May and before 10 November 1999, Acts commenced on notification day unless otherwise stated (see *Australian Capital Territory (Self-Government Act 1988* (Cwlth), s 25).

### New South Wales legislation

#### **Trustee Act 1925 No 14 (NSW)**

assented to 8 December 1925

commenced 1 March 1926 (s 1 (2))

as amended by

#### **Trustee (Amendment) Act 1929 No 60 (NSW)**

assented to 24 December 1929

commenced 24 December 1929

#### **Statute Law Revision Act 1937 No 35 (NSW)**

assented to 23 December 1937

commenced 23 December 1937



**Conveyancing, Trustee and Probate (Amendment) Act 1938 No 30 (NSW)**

assented to 14 December 1938  
commenced 1 January 1939 (s 1 (2) and NSW Gaz 1938 No 188 p 4951)

**Trustee and Wills (Emergency Provisions) Act 1940 No 32 (NSW)**

assented to 11 November 1940  
commenced 11 November 1940

**Public Trustee (Amendment) Act 1942 No 26 (NSW)**

assented to 14 December 1942  
commenced 14 December 1942

**Commonwealth legislation before self-government**

as applied and modified by

**Trustee Act 1957 No 14 (previously Trustee Ordinance 1957)**

notified 21 November 1957 (Cwlth Gaz 1957 No 63 p 3538)  
commenced 1 December 1957 (s 2)

as amended by

**Trustee Ordinance 1968 No 18 s 2**

notified 26 September 1968 (Cwlth Gaz 1968 No 78)  
commenced 26 September 1968

**Trustee Ordinance 1975 No 28 s 3**

notified 10 September 1975 (Cwlth Gaz 1975 No S179)  
commenced 10 September 1975

**Ordinance Revision Ordinance 1978 No 46 sch 2**

notified 28 December 1978 (Cwlth Gaz 1978 No S292)  
commenced 28 December 1978

**Trustee (Amendment) Ordinance 1982 No 27 s 2**

notified 25 June 1982 (Cwlth Gaz 1982 No S133)  
commenced 25 June 1982

**Ordinance Revision (Companies Amendments) Ordinance 1982 No 38 sch 4**

notified 30 June 1982 (Cwlth Gaz 1982 No S139)  
commenced 1 July 1982 (s 2)

## Endnotes

3 Legislation history

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**Public Trustee (Miscellaneous Amendments) Ordinance 1985 No 9 sch 2**

notified 8 March 1985 (Cwlth Gaz 1985 No S69)  
commenced 28 October 1985 (s 2 and Cwlth Gaz 1985 No G42 p 3902)

**Perpetuities and Accumulations Ordinance 1985 No 65 s 22**

notified 19 December 1985 (Cwlth Gaz 1985 No S542)  
commenced 19 December 1985

**Limitation Ordinance 1985 No 66 sch**

notified 19 December 1985 (Cwlth Gaz 1985 No S542)  
commenced 19 December 1985

**Administrative Arrangements (Consequential Amendments) Ordinance 1988 No 17 sch 2**

notified 22 April 1988 (Cwlth Gaz 1988 No S114)  
commenced 22 April 1988

**Trustee (Amendment) Ordinance 1988 No 78 s 2**

notified 7 December 1988 (Cwlth Gaz 1988 No 46)  
commenced 7 December 1988

**Self-Government (Consequential Amendments) Ordinance 1989 No 38 sch 1**

notified 10 May 1989 (Cwlth Gaz 1989 No S160)  
s 1, s 2 commenced 10 May 1989 (s 2 (1))  
sch 1 commenced 11 May 1989 (s 2 (2) and Cwlth Gaz 1989 No S164)

## ACT legislation after self-government

**Trustee (Amendment) Act 1990 No 1**

notified 2 March 1990 (Gaz 1990 No S8)  
commenced 2 March 1990

**Financial Institutions (Consequential Amendments) Act 1992 No 30 sch 1**

notified 1 July 1992 (Gaz 1992 No S92)  
commenced 1 July 1992 (s 2)

**Trustee (Amendment) Act 1992 No 50**

notified 1 September 1992 (Gaz 1992 No S148)  
commenced 1 September 1992

**Registrar-General (Consequential Provisions) Act 1993 No 64 sch 1**

notified 6 September 1993 (Gaz 1993 No S172)  
s 1, s 2 commenced 6 September 1993 (s 2 (1))  
sch 1 commenced 1 October 1993 (s 2 (2) and Gaz 1993 No S207)

**Public Sector Management (Consequential and Transitional Provisions) Act 1994 No 38 sch pt 78**

notified 30 June 1994 (Gaz 1994 No S121)  
s 1, s 2 commenced 30 June 1994 (s 2 (1))  
sch commenced 1 July 1994 (s 2 (2) and Gaz 1994 No S142)

**Mental Health (Consequential Provisions) Act 1994 No 45 sch**

notified 7 September 1994 (Gaz 1994 No S177)  
s 1, s 2 commenced 7 September 1994 (s 2 (1))  
sch commenced 6 February 1995 (s 2 (2) and see Gaz 1995 No S33)

**Trustee (Amendment) Act 1995 No 26**

notified 5 September 1995 (Gaz 1995 No S212)  
commenced 5 September 1995 (s 2)

**Statute Law Revision Act 1995 No 46 sch**

notified 18 December 1995 (Gaz 1995 No S306)  
commenced 18 December 1995 (s 2)

**Land Titles (Consequential Amendments) Act 1995 No 54 sch pt 1**

notified 20 December 1995 (Gaz 1995 No S313)  
commenced 20 June 1996 (s 2)

**Legal Practitioners (Consequential Amendments) Act 1997 No 96 sch 1**

notified 1 December 1997 (Gaz 1997 No S380)  
s 1, s 2 commenced 1 December 1997 (s 2 (1))  
sch 1 commenced 1 June 1998 (s 2 (2))

**Trustee (Amendment) Act 1999 No 28**

notified 21 May 1999 (Gaz 1999 No S24)  
commenced 21 May 1999 (s 2)

**Law Reform (Miscellaneous Provisions) Act 1999 No 66 sch 3**

notified 10 November 1999 (Gaz 1999 No 24)  
commenced 10 November 1999 (s 2)

## Endnotes

4 Amendment history

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### **Legislation (Consequential Amendments) Act 2001 No 44 pt 395**

notified 26 July 2001 (Gaz 2001 No 30)

s 1, s 2 commenced 26 July 2001 (IA s 10B)

pt 395 commenced 12 September 2001 (s 2 and Gaz 2001 No S65)

### **Statute Law Amendment Act 2001 (No 2) 2001 No 56 pt 3.49**

notified 5 September 2001 (Gaz 2001 No S65)

s 1, s 2 commenced 5 September 2001 (IA s 10B)

amdt 3.828 commenced 12 September 2001 (s 2 (2))

pt 3.49 remainder commenced 5 September 2001 (s 2 (1))

## 4 Amendment history

### **Title**

sub 2001 No 56 amdt 3.488

### **Preliminary**

pt 1 hdg

(prev pt 1 hdg) om 2001 No 56 amdt 3.490

ins 2001 No 56 amdt 3.489

### **Name of Act**

s 1

am 1957 No 14 sch 2

sub 2001 No 56 amdt 3.489

### **Dictionary**

s 2

(prev s 2) om 1999 No 28 s 4

ins 2001 No 56 amdt 3.491

### **Notes**

s 3

(prev s 3) om 1957 sch 2

ins 2001 No 56 amdt 3.491

### **Meaning of *trust***

s 4

(prev s 4) om 1957 sch 2

ins 2001 No 56 amdt 3.491

### **Interpretation**

s 5

(prev s 5) am 1957 No 14 sch 2 (as am by 1985 No 9 sch 2);

1992 No 50; 1993 No 64; 1994 No 45

om 2001 No 56 amdt 3.491

### **Notes**

s 5A

ins 1999 No 28 s 5

om 2001 No 56 amdt 3.491

### **Appointment, retirement, disclaimer and ceasing to be executor**

div 2.1 hdg

(prev pt 2 div 1 hdg) renum R4 LA (see 2001 No 56 amdt

3.857)

### **Appointment**

hdg before s 6

om 2001 No 56 amdt 3.492

**Appointment of new trustees**

s 6 hdg sub 2001 No 56 amdt 3.493  
s 6 am NSW 1940 No 32 s 11; 1957 No 14 sch 2; am 2001 No 56  
amds 3.494-508, amds 3.852-3.854

**Additional trustee**

s 7 am 2001 No 56 amdt 3.509, amdt 3.510, amdt 3.854

**Retirement**

hdg before s 8 om 2001 No 56 amdt 3.511

**Retirement**

s 8 am 2001 No 56 amdt 3.512, amdt 3.513, amdt 3.852

**Vesting on appointment and retirement**

hdg before s 9 om 2001 No 56 amdt 3.514

**Vesting on appointment and retirement**

s 9 hdg sub 2001 No 56 amdt 3.515  
s 9 am NSW 1938 No 30 s 5; 1957 No 14 sch 2; 1993 No 64; 1995  
No 54; 2001 No 56 amdt 3.516-3.524, amdt 3.852

**Disclaimer, and ceasing to be executor**

hdg before s 10 om 2001 No 56 amdt 3.525

**Renunciation of probate**

s 10 am NSW 1938 No 30 s 5; 1957 No 14 sch 2 (as am by 1985  
No 9); 2001 No 56 amdt 3.526, amdt 3.852, amdt 3.854

**Ceasing to be executor**

s 11 am 1957 No 14 sch 2; 1993 No 64; 1995 No 54; 2001 No 56  
amdt 3.527, amdt 3.528, amdt 3.852

**Registration**

hdg before s 12 om 2001 No 56 amdt 3.529

**Registration**

s 12 am 1957 No 14 sch 2; 1993 No 64; 1995 No 54; 2001 No 56  
amdt 3.530-3.533, amdt 3.852, amdt 3.855

**Protection of purchasers**

s 13 am 1957 No 14 sch 2; 1993 No 64; 2001 No 56 amds 3.534-  
3.536, amdt 3.852, amdt 3.855

**Powers and duties**

div 2.2 hdg (prev pt 2 div 2 hadg) renum R4 LA (see 2001 No 56 amdt  
3.857)

**Investment**

sdiv 2.2.1 hdg (prev hdg before s 14) sub 2001 No 56 amdt 3.537

## Endnotes

### 4 Amendment history

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#### **Powers of investment**

s 14 am NSW 1938 No 30 s 5; 1957 No 14 sch 2 (as am by 1968 No 18; 1975 No 28 s 3; 1978 No 46 sch 2; 1982 No 27 s 2; 1982 No 38 sch 4; 1988 No 17 sch 2; 1988 No 78 s 2; 1989 No 38 sch 1; 1990 No 1 s 3); 1992 No 30; 1992 No 50; 1995 No 26  
sub 1999 No 28 s 6  
am 2001 No 56 amdts 3.538

#### **Duties of trustee in relation to powers of investment**

s 14A ins 1999 No 28 s 6  
am 2001 No 56 amdts 3.538

#### **Law and equity preserved**

s 14B ins 1999 No 28 s 6  
am 2001 No 56 amdt 3.538, amdt 3.539

#### **Exercise of power of investment**

s 14C ins 1999 No 28 s 6  
am 2001 No 56 amdts 3.540

#### **Powers of trustee in relation to securities**

s 14D ins 1999 No 28 s 6  
am 2001 No 56 amdts 3.540

#### **Powers to buy house as residence for beneficiary**

s 14E ins 1999 No 28 s 6  
am 2001 No 56 amdts 3.540

#### **Investment in securities under RITS system**

s 14F ins 1999 No 28 s 6

#### **Interim investment**

s 15 am 1957 No 14 sch 2; 1992 No 50  
om 1999 No 28 s 6

#### **Loan for fixed period**

s 16 am 1957 No 14 sch 2  
om 1999 No 28 s 6

#### **Accepting a short title**

s 17 am 2001 No 56 amdt 3.541, amdt 3.852, amdt 3.854

#### **Ratio of loan to value**

s 18 am 1957 No 14 sch 2 (as am by 1989 No 38 sch 1); 2001 No 56 amdt 3.542, amdt 3.852

#### **Loss on authorised security**

s 19 am 1999 No 28 s 7; 2001 No 56 amdt 3.543 ,amdt 3.852

#### **Release of part of security**

s 20 am 1957 No 14 sch 2; 1993 No 64; 2001 No 56 amdt 3.544, amdt 3.545, amdt 3.852, amdt 3.855

**Arrangement with company**

s 21 am 2001 No 56 amdts 3.546-3.549, amdt 3.852, amdt 3.853

**New shares in company**

s 22 am NSW 1938 No 30 s 5; 1995 No 46; 2001 No 56 amdts 3.550-3.554, amdt 3.852

**Calls on shares**

s 23 am 2001 No 56 amdt 3.555, amdt 3.852

**Accrued interest on debentures or stock sold or purchased**

s 24 am 1957 No 14 sch 2; 1999 No 28 s 8; 2001 No 56 amdt 3.556, amdt 3.852

**Continued holding**

s 25 am 2001 No 56 amdt 3.557, amdt 3.852

**Sale and other dealings**

sdiv 2.2.2 hdg (prev hdg before s 26) sub 2001 No 56 amdt 3.558

**Powers incidental to sale**

s 26 am NSW 1938 No 30 s 5; 1957 No 14 sch 2; 2001 No 56 amdts 3.559-3.566, amdt 3.852, amdt 3.856

**Duration of trust or power to sell**

s 27 am NSW 1929 No 60 s 2; 2001 No 56 amdt 3.567, amdt 3.568, amdt 3.852

s 27A ins NSW 1929 No 60 s 3  
om 1957 No 14 sch 2 (as am by 1985 No 65 s 22)

**Postponement of sale**

s 27B ins NSW 1929 No 60 s 3  
am 1957 No 14 sch 2; 2001 No 56 amdt 3.569-3.572, amdt 3.852

**Purchaser under trust for sale**

s 27C ins NSW 1929 No 60 s 3  
am 2001 No 56 amdt 3.852

**Application of rule in *Howe v Earl of Dartmouth* to leases**

s 27D ins 2001 No 56 amdt 3.573

**Deferred payment on sale of land**

s 28 am NSW 1938 No 30 s 5; 1957 No 14 sch 2; 2001 No 56 amdts 3.574-3.582, amdt 3.852, amdt 3.854; R4 LA

**Sale or purchase under Conveyancing Act 1919**

s 29 om 1957 No 14 sch 2

**Depreciatory conditions**

s 30 sub 2001 No 56 amdt 3.583

**Sale of part of land**

s 31 am 2001 No 56 amdt 3.584, amdt 3.585, amdt 3.852

## Endnotes

4 Amendment history

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### **Sale, exchange and partition**

s 32 hdg sub 2001 No 56 amdt 3.586  
s 32 am 2001 No 56 amdts 3.587-3.589, amdt 3.852

### **Power to purchase equity of redemption instead of foreclosure**

s 32A ins NSW 1930 No 30 s 5  
am 1957 No 14 sch 2  
sub 2001 No 56 amdt 3.590

### **Sale after right of redemption barred**

s 33 am NSW 1938 No 30 s 5; 1957 No 14 sch 2; 1993 No 64; 1995  
No 54; 2001 No 56 amdt 3.591, amdt 3.592, amdt 3.852

### **Release of equity of redemption in discharge of mortgage debt**

s 34 am 1957 No 14 sch 2; 1993 No 64; 2001 No 56 amdt 3.593,  
amdt 3.594, amdt 3.852, amdt 3.855

### **Surrender of onerous lease**

s 35 am 1957 No 14 sch 2; 1993 No 64; 2001 No 56 amdt 3.852,  
amdt 3.855

### **Leasing**

s 36 am 1957 No 14 sch 2; 1993 No 64; 1995 No 54; 2001 No 56  
amdts 3.595-3.605, amdt 3.852, amdt 3.856

### **Renewal of leasehold**

s 37 am 2001 No 56 amdts 3.606-3.608, amdt 3.852

### **Raising money**

s 38 am NSW 1930 No 30 s 5; 2001 No 56 amdts 3.609-3.612

### **Protection of purchasers or mortgagees**

s 39 am 2001 No 56 amdt 3.613

### **Application of income by trustee as mortgagee in possession**

s 39A ins NSW 1930 No 30 s 5  
am 1957 No 14 sch 2; 2001 No 56 amdts 3.614-3.618

### **Validation of certain payments by trustee—mortgagee in possession**

s 39B ins NSW 1930 No 30 s 5  
am 1957 No 14 sch 2  
om 2001 No 56 amdt 3.619

### **Property not in possession**

sdiv 2.2.3 hdg (prev hdg before s 40) sub 2001 No 56 amdt 3.620

### **Powers**

s 40 am 2001 No 56 amdts 3.621-3.626, amdt 3.852

### **Insurance**

sdiv 2.2.4 hdg (prev hdg before s 41) sub 2001 No 56 amdt 3.627

### **Insurance**

s 41 am 2001 No 56 amdt 3.628, amdt 3.852



**Application of insurance money**

s 42 am 2001 No 56 amdts 3.629-3.633, amdt 3.852, amdt 3.853

**Maintenance, advancement and protective trusts**

sdiv 2.2.5 hdg (prev hdg before s 43) sub 2001 No 56 amdt 3.634

**Maintenance and accumulation**

s 43 am 1957 No 14 sch 2; 2001 No 56 amdts 3.635-3.650, amdt 3.852, amdt 3.853

**Advancement**

s 44 am NSW 1938 No 30 s 5; 1957 No 14 sch 2 (as am by 1989 No 38 sch 1); 1992 No 50; 2001 No 56 amdts 3.651-3.653, amdt 3.852

**Protective trusts**

s 45 am NSW 1937 No 35 sch 2; 2001 No 56 amdts 3.654-3.659, amdt 3.853

**Appropriation and payment to public trustee**

sdiv 2.2.6 hdg (prev hdg before s 46) sub 2001 No 56 amdt 3.660

**Appropriation**

s 46 am NSW 1938 No 30 s 5; 1957 No 14 sch 2; 1993 No 64; 1994 No 45; 2001 No 56 amdts 3.661-3.685, amdt 3.852, amdt 3.854; R4 LA

**Payment to public trustee**

s 47 am NSW 1942 No 26 s 8; 1957 No 14 sch 2 (as am by 1989 No 38 sch 1); 1994 No 38; 1994 No 45; 2001 No 56 amdts 3.686-3.695, amdt 3.852, amdt 3.854

**Receipts and compounding**

sdiv 2.2.7 hdg (prev hdg before s 48) sub 2001 No 56 amdt 3.696

**Receipts**

s 48 am 2001 No 56 amdts 3.697-3.699, amdt 3.852

**Compounding**

s 49 am NSW 1938 No 30 s 5; 2001 No 56 amdts 3.700-3.702, amdt 3.852

**Safe custody, audit and valuation**

sdiv 2.2.8 hdg (prev hdg before s 50) sub 2001 No 56 amdt 3.703

**Deposit for safe custody**

s 50 am 2001 No 56 amdt 3.704, amdt 3.852

**Audit**

s 51 am 1957 No 14 sch 2; 2001 No 56 amdt 3.705, amdt 3.852, amdt 3.854

**Valuation**

s 52 am 2001 No 56 amdt 3.706, amdt 3.707, amdt 3.852

## Endnotes

### 4 Amendment history

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#### **Agents, banks and others**

sdiv 2.2.9 hdg (prev hdg before s 53) sub 2001 No 56 amdt 3.708

#### **Employment of agents**

s 53 am 1997 No 96; 2001 No 56 amdts 3.709-3.711, amdt 3.852

#### **Banks**

s 54 am NSW 1938 No 30 s 5; 2001 No 56 amdts 3.712-3.716, amdt 3.852

#### **Bank may recognise certain signatures and endorsements**

s 54A hdg sub 2001 No 56 amdt 3.717

s 54A ins NSW 1938 No 30 s 5  
am 2001 No 56 amdts 3.718-3.720

#### **Property outside ACT**

s 55 hdg sub 2001 No 56 amdt 3.721

s 55 am 2001 No 56 amdt 3.722, amdt 3.723, amdt 3.852

#### **Undivided interests**

s 56 am 2001 No 56 amdt 3.724, amdt 3.725, amdt 3.852

#### **Surviving trustees**

sdiv 2.2.10 hdg (prev hdg before s 57) sub 2001 No 56 amdt 3.726

#### **Two or more trustees**

s 57 am 2001 No 56 amdt 3.727, amdt 3.852

#### **Protection of trustees**

sdiv 2.2.11 hdg (prev hdg before s 58) sub 2001 No 56 amdt 3.728

#### **Powers of attorney**

s 58 am 2001 No 56 amdt 3.729, amdt 3.852

#### **Implied indemnity**

s 59 am 2001 No 56 amdt 3.730, amdt 3.731, amdt 3.852

#### **Distribution after notice**

s 60 am 1957 No 14 sch 2 (as am by 1989 No 38 sch 1); 1999 No 28 s 9; 2001 No 56 amdts 3.732-3.734

#### **Distribution if estate comprises leaseholds etc**

s 61 am 1957 No 14 sch 2; 2001 No 56 amdt 3.853

#### **Personal liability of legal representative or trustee**

s 61A ins NSW 1938 No 30 s 5  
am 2001 No 56 amdt 3.735, amdt 3.736

#### **Advice**

s 63 am 1957 No 14 sch 2; 1997 No 96; 2001 No 56 amdts 3.737-3.745

#### **Delegation**

div 2.3 hdg (prev pt 2 div 3 hdg) renum R4 LA (see 2001 No 56 amdt 3.857)

**Execution of trust**

s 64 am NSW 1938 No 30 s 5; 1957 No 14 sch 2 (as am by 1989 No 38 sch 1); 2001 No 56 amdts 3.746-3.748, amdt 3.852

**Consent to exercise of trust or power**

s 65 am 1957 No 14 sch 2 (as am by 1989 No 38 sch 1); 2001 No 56 amdt 3.749, amdt 3.852

**Person dealing with delegate**

s 66 am 2001 No 56 amdts 3.750-3.752, amdt 3.852

**Power of attorney**

s 67 sub 1957 No 14 sch 2

**Registration**

s 68 am 1957 No 14 sch 2; 1993 No 64; 1995 No. 54; 2001 No 56 amdt 3.753, amdt 3.852

**Statute of limitations**

pt 2 div 4 hdg om R3 LRA

**Statute of limitations**

s 69 om 1957 No 14 sch 2 (as am by 1985 No 66 sch)

**Powers of Supreme Court**

pt 3 hdg sub 2001 No 56 amdt 3.754

**New trustees and vesting orders**

div 3.1 hdg (prev pt 3 div 1 hdg) renum R4 LA (see 2001 No 56 amdt 3.857)

**Appointment of new trustees**

hdg before s 70 om 2001 No 56 amdt 3.755

**New trustees**

s 70 am 1957 No 14 sch 2; 2001 No 56 amdts 3.756- 3.760, amdt 3.854

**Vesting orders**

hdg before s 71 om 2001 No 56 amdt 3.761

**Vesting orders**

s 71 am 1994 No 45; 2001 No 56 amdts 3.762-3.767, amdt 3.854

**Contingent rights of unborn person**

s 72 am 2001 No 56 amdt 3.768, amdt 3.854

**Child beneficiary**

s 73 hdg am 2001 No 56 amdt 3.769

s 73 am 2001 No 56 amdts 3.770-3.773, amdt 3.854

**Mortgagee under disability**

s 74 am 1994 No 45; 2001 No 56 amdts 3.774-3.777, amdt 3.854

**Deceased mortgagee**

## Endnotes

### 4 Amendment history

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s 75 am 1957 No 14 sch 2; 1993 No 64; 1995 No 54; 2001 No 56  
amds 3.778-3.781, amdt 3.854

#### **Sale of mortgage of land**

s 76 am 1999 No 28 s 10; 2001 No 56 amds 3.782-3.786, amdt  
3.854

#### **Specific performance etc**

s 77 am 1999 No 28 s 11; 2001 No 56 amds 3.787-3.790, amdt  
3.854, amdt 3.856

#### **Effect of vesting order**

s 78 am 1957 No 14 sch 2; 1993 No 64; 1995 No 54; 2001 No 56  
amds 3.791-3.799, amdt 3.854

#### **Appointment of person to convey**

s 79 am 2001 No 56 amdt 3.854

#### **Trustees of charities**

s 80 am 1999 No 28 s 12; 2001 No 56 amdt 3.854

#### **Dealings and improvements**

div 3.2 hdg (prev pt 3 div 2 hdg) renum R4 LA (see 2001 No 56 amdt  
3.857)

#### **Advantageous dealings**

s 81 am 1957 No 14 sch 2; 2001 No 56 amdt 3.800, amdt 3.801,  
amdt 3.852, amdt 3.854

#### **Improvements and repairs**

s 82 am 1957 No 14 sch 2; 1993 No 64; 2001 No 56 amds 3.802-  
3.808, amdt 3.852, amds 3.854-3.856

#### **Improvements and repairs without Supreme Court's approval**

s 83 hdg (prev s 82A hdg) sub 2001 No 56 amdt 3.809  
s 83 orig s 83 am 1957 No 14 sch 2  
om 1999 No 28 s 13  
(prev s 82A) ins NSW 1938 No 30 s 5  
am 1957 No 14 sch 2 (as am by 1989 No 38 sch 1); 1993 No  
64; 2001 No 56 amds 3.810-3.812, amdt 3.852, amdt 3.854,  
amdt 3.855

#### **Sale of child's property**

s 84 hdg sub 2001 No 56 amdt 3.813  
s 84 am 1957 No 14 sch 2; 2001 No 56 amds 3.814-3.816, amdt  
3.852

#### **Relief and indemnity**

div 3.3 hdg (prev pt 3 div 3 hdg) renum R4 LA (see 2001 No 56 amdt  
3.857)

#### **Excusable breaches of trust**

s 85 am 2001 No 56 amdt 3.817, amdt 3.852, amdt 3.854

#### **Division of chattels**

s 86 am 2001 No 56 amdt 3.818, amdt 3.819, amdt 3.853, amdt 3.854

**Miscellaneous powers**

div 3.4 hdg (prev pt 3 div 4 hdg) renum R4 LA (see 2001 No 56 amdt 3.857)

**Division of chattels**

s 87 am 2001 No 56 amdt 3.820, amdt 3.854

**Order in absence of trustee**

s 88 hdg sub 2001 No 56 amdt 3.821

s 88 am 1997 No 96, 1999 No 28 s 14; 2001 No 56 amdts 3.822-3.824, amdt 3.854

**Supreme Court considerations in action for breach of trust**

s 89 am 1957 No 14 sch 2  
om 1994 No 45  
ins 1999 No 28 s 15  
am 2001 No 56 amdt 3.854

**Power of Supreme Court to set off investment gains and losses**

s 89A ins 1999 No 28 s 15  
am 2001 No 56 amdt 3.854

**Postponement of order**

s 90 am 1999 No 28 s 16; 2001 No 56 amdt 3.854

**Applications and orders**

div 3.5 hdg (prev pt 3 div 5 hdg) renum R4 LA (see 2001 No 56 amdt 3.857)

**Orders in other proceedings**

s 91 am 1957 No 14 sch 2 (as am by 1989 No 38 sch 1); 1999 No 28 s 17; 1999 No 66 sch 3  
sub 2001 No 56 amdt 3.825

**People entitled to apply**

s 92 am 2001 No 56 amdt 3.826

**Costs**

s 93 am 1999 No 28 s 18  
om 2001 No 56 amdt 3.827

**Charitable trusts**

div 3.6 hdg (prev pt 3 div 6 hdg) ins 1999 No 66 sch 3  
am 2001 No 44 amdts 1.4103-1.4105  
renum R4 LA (see 2001 No 56 amdt 3.857)

**Reference to order made under s 94B**

s 94 om 1957 No 14 sch 2  
ins 1999 No 66 sch 3  
sub 2001 No 44 amdt 1.4106  
om 2001 No 56 amdt 3.828

## Endnotes

4 Amendment history

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### **Applications to Supreme Court**

s 94A ins 1999 No 66 sch 3

### **Orders of Supreme Court**

s 94B ins 1999 No 66 sch 3  
sub 2001 No 56 amdt 3.829

### **Notice to Minister**

s 94C ins 1999 No 66 sch 3

### **Jurisdiction of Supreme Court**

s 94D ins 1999 No 66 sch 3  
om 2001 No 44 amdt 1.4107

### **Action under Supreme Court order lawful**

s 94E ins 1999 No 66 sch 3

### **Definitions for pt 4**

s 94F ins 2001 No 56 amdt 3.830

### **Trustees**

s 95 ins 2001 No 56 amdts 3.831-3.837, amdt 3.854

### **Person liable to person with legal disability**

s 96 sub 2001 No 56 amdt 3.838

### **Life assurance companies**

s 97 om 1957 No 14 sch 2

### **Money or securities**

s 98 am 1957 No 14 sch 2; 2001 No 56 amdts 3.839-3.841,  
amdt 3.854

### **Trustee**

s 99 om 2001 No 56 amdt 3.842

### **Miscellaneous**

pt 5 hdg sub 2001 No 56 amdt 3.843

### **Escheat**

s 100 om 2001 No 56 amdt 3.844

### **Property vested in the Chief Justice**

s 101 am NSW 1937 No 35 sch 2  
om 1957 No 14 sch 2

### **Compulsion to account**

s 102 sub 1957 No 14 sch 2  
am 2001 No 56 amdt 3.845, amdt 3.854

### **Indemnity for anything done under Act etc**

s 103 sub 2001 No 56 amdt 3.846

### **Preamble to Charitable Uses Act 1601**

s 104 orig s 104 om 1957 No 14 sch 2  
ins 1999 No 28 s 19

exp 21 May 2001 (s 104 (3))  
 (prev s 103A) ins 1999 No 66 sch 3  
 am 2001 No 56 amdt 3.848  
 renum 2001 No 56 amdt 3.847

#### Transitional provisions

pt 6 hdg om R4 LA

#### Amendment of other Acts

hdg before s 105 om 1957 No 14 sch 2

#### Illusory etc share valid in law and equity

s 105 orig s 105 om 1957 No 14 sch 2  
 (prev s 105) ins 1999 No 28 s 19  
 exp 21 May 2001 (s 105 (2))  
 ins 2001 No 56 amdt 3.849

#### Securities

s 106 orig s 106 om 1957 No 14 sch 2  
 ins 1999 No 28 s 19  
 exp 21 May 2001 (s 105 (2))

#### Preamble to Charitable Uses Act 1601

sch 1 hdg (prev sch hdg) sub 2001 No 56 amdt 3.850  
 sch 1 (prev sch) om 1957 No 14 sch 2  
 ins 1999 No 66 sch 3

#### Dictionary

ins 2001 No 56 amdt 3.851  
 def **administrator** ins 2001 No 56 amdt 3.851  
 def **contingent right** ins 2001 No 56 amdt 3.851  
 def **conveyance** ins 2001 No 56 amdt 3.851  
 def **executor** ins 2001 No 56 amdt 3.851  
 def **government securities** ins 2001 No 56 amdt 3.851  
 def **instrument** ins 2001 No 56 amdt 3.851  
 def **joint tenant** ins 2001 No 56 amdt 3.851  
 def **legal representative** ins 2001 No 56 amdt 3.851  
 def **mortgage** ins 2001 No 56 amdt 3.851  
 def **mortgagee** ins 2001 No 56 amdt 3.851  
 def **mortgagor** ins 2001 No 56 amdt 3.851  
 def **payment into court** ins 2001 No 56 amdt 3.851  
 def **person with a legal disability** ins 2001 No 56 amdt 3.851  
 def **person with a mental disability** ins 2001 No 56 amdt  
 3.851  
 def **possessed** ins 2001 No 56 amdt 3.851  
 def **purchaser** ins 2001 No 56 amdt 3.851  
 def **right** ins 2001 No 56 amdt 3.851  
 def **securities** ins 2001 No 56 amdt 3.851  
 def **stock** ins 2001 No 56 amdt 3.851  
 def **transfer** ins 2001 No 56 amdt 3.851  
 def **trust** ins 2001 No 56 amdt 3.851  
 def **trustee** ins 2001 No 56 amdt 3.851

## Endnotes

### 5 Earlier republications

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def *trustee company* ins 2001 No 56 amdt 3.851  
def *trust instrument* ins 2001 No 56 amdt 3.851  
def *vesting order* ins 2001 No 56 amdt 3.851

## 5 Earlier republications

Some earlier republications were not numbered. The number in column 1 refers to the publication order.

Republication No	Amendments to	Republication date
1	Act 1992 No 50	1 September 1992
2	Act 1997 No 96	1 June 1998
3	Act 1999 No 28	31 July 1999



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