

1989
THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

Presented, 28 September 1989

(Attorney-General)

**Trustee Companies (Amendment) Bill
1989**

A BILL

FOR

An Act to amend the *Trustee Companies Act 1947*

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

Short title

5 1. This Act may be cited as the *Trustee Companies (Amendment) Act 1989*.

Principal Act

2. In this Act, "Principal Act" means the *Trustee Companies Act 1947*.¹

Substitution

3. Sections 5 to 8 (inclusive) of the Principal Act are repealed and the following sections substituted:

Authorisation given to trustee company to act by person entitled to probate

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“5. (1) Where a person is named expressly or by implication as executor of the will of a deceased person and is entitled to apply for and obtain probate of the will without reserving leave to any other person to apply for probate, that first-mentioned person may—

- (a) join with a trustee company in an application for a grant of letters of administration with the will annexed to the person and the trustee company jointly; or 10
- (b) instead of applying personally, authorise a trustee company to apply for a grant of letters of administration with the will annexed.

“(2) Where an application is made pursuant to subsection (1), the Court may grant letters of administration with the will annexed in accordance with the application unless the testator by his or her will has expressed the desire that— 15

- (a) the office of executor should not be delegated; or
- (b) a trustee company or that particular trustee company should not act in the trusts of the will. 20

Authorisation given to trustee company to act by one of several executors

“6. (1) Where a person is named expressly or by implication as executor of the will of a deceased person and is entitled to apply for and obtain probate of the will jointly with any other person, that first-mentioned person may— 25

- (a) join with a trustee company and any other person entitled to apply for probate in an application for a grant of probate of the will to that person, the trustee company and any other such person jointly; or 30
- (b) instead of applying personally, authorise a trustee company to apply for a grant of probate of the will, either—
 - (i) alone, with leave reserved for any person to come in and prove; or
 - (ii) jointly with any other person entitled to apply for probate; 35

in the same manner as if the trustee company had been originally named as an executor of the will in addition to or in the place of that first-mentioned person.

“(2) Where an application is made pursuant to subsection (1), the Court may grant probate of the will in accordance with the application unless the testator by his or her will has expressed the desire that— 40

- (a) the office of executor should not be delegated; or

- (b) a trustee company or that particular trustee company should not act in the trusts of the will.

Authorisation given to trustee company to act by person entitled to administration with will annexed

5 "7. (1) Where a person is entitled to apply for and obtain a grant of letters of administration with the will annexed of the estate of a deceased person, the person may—

- (a) join with a trustee company in an application for a grant of letters of administration with the will annexed to the person and the trustee company jointly; or
- 10 (b) instead of applying personally, authorise a trustee company to apply for a grant of letters of administration with the will annexed.

15 "(2) Where an application is made pursuant to subsection (1), the Court may grant letters of administration with the will annexed in accordance with the application unless the testator by his or her will has expressed the desire that the office of administrator should not be held by a trustee company or that particular trustee company.

Authorisation given to trustee company to act by person entitled to administration on intestacy

20 "8. (1) Where a person is entitled to obtain administration of the estate of a person who died intestate, the person may—

- (a) join with a trustee company in an application for a grant of letters of administration of the estate to the person and the trustee company jointly; or
- 25 (b) instead of applying personally, authorise a trustee company to apply for a grant of letters of administration of the estate.

"(2) Where an application is made pursuant to subsection (1), the Court may grant letters of administration of the estate in accordance with the application.

30 **Capacity of trustee company to act**

"8A. Where—

- (a) administration of an estate with or without the will annexed; or
- (b) probate of a will;

35 is granted to a trustee company, either alone or jointly with another person, the trustee company may perform and discharge all the acts and duties of administrator, administrator with the will annexed or executor, as the case may be."

Commission

4. Section 18 of the Principal Act is amended—

- 40 (a) by omitting from subsection (2) "exceed" and substituting "exceed an amount equal to";

- (b) by omitting from paragraph (2) (a) "\$8 for every \$200 of the capital value (without deduction of debts or liabilities secured or unsecured)" and substituting "4.5 per cent of the capital value";
- (c) by omitting from paragraph (2) (b) "\$10 for every \$200" and substituting "5.5 per cent"; 5
- (d) by omitting from paragraph (2) (c) "\$10 for every \$200" and substituting "5 per cent";
- (e) by inserting in subsection (3) ", subject to this Act," after "the company and"; and
- (f) by omitting from subsection (3) all the words after "attorney". 10

Insertion

5. After section 18 of the Principal Act the following sections are inserted:

Capital value

"18A. (1) For the purposes of subsection 18 (2), the capital value of an estate committed to the management of a trustee company is— 15

- (a) where the estate was so committed before the commencement date and the company's management of the estate is not completed before that date—
 - (i) in the case of any assets (whether real or personal) of the estate realised before that date—the gross value of those assets as at the date on which the estate was so committed; and 20
 - (ii) in the case of any assets (whether real or personal) of the estate realised on or after that date—the gross amount realised for those assets; 25

without any deduction for any debts or liabilities (whether secured or unsecured); and

- (b) where the estate is so committed on or after the commencement date—the gross amount realised for the assets (whether real or personal) of the estate without any deduction for any debts or liabilities (whether secured or unsecured). 30

"(2) For the purposes of subsection (1)—

- (a) where an asset of an estate consists of money (other than the proceeds of the realisation of an asset)— 35
 - (i) that asset shall be taken to have been realised when it was collected on behalf of the estate; and
 - (ii) the amount of money so collected shall be taken to be the amount for which that asset was realised; and
- (b) where an asset of an estate is distributed, transferred, appropriated or released, without being realised, to beneficiaries— 40
 - (i) that asset shall be taken to have been realised when it was so distributed, transferred, appropriated or released; and

(ii) the value of the asset as at the date of the distribution, transfer, appropriation or release shall be taken to be the amount for which that asset was realised.

5 “(3) For the purpose of determining the gross amount realised for an asset of an estate where proceeds of the realisation are applied in acquiring another asset, the amount of the proceeds so applied shall be disregarded.

“(4) In this section—

‘commencement date’ means the date of commencement of the *Trustee Companies (Amendment) Act 1989*.

10 **Payment of commission**

“18B. (1) Any commission that a trustee company is entitled to receive in respect of the capital value of an estate may be paid out of the estate at any time after the estate has been committed to the administration or management of the company.

15 “(2) The commission that may be paid by virtue of subsection (1) while any of the assets of the estate remain to be realised shall not exceed the commission that would be payable if those assets had been realised for an amount equal to their value at the time the estate was committed to the administration or management of the company.

20 “(3) Where subsection (2) operates in relation to the payment of commission to a trustee company, an appropriate adjustment shall be made in respect of the commission so paid when the respective assets are realised.

Restrictions affecting payment of commission

“18C. (1) A person associated with—

25 (a) a trustee company; or

(b) an executive officer of a trustee company;

is not entitled to receive any commission in respect of the performance of a function in relation to any property of an estate committed to the administration or management of the company.

30 “(2) Subsection (1) does not apply in relation to the payment of commission where—

(a) in the case of an estate that is subject to a trust—the instrument creating the trust expressly provides for that payment; or

35 (b) in the case of an estate that is not subject to a trust—the person by whom the estate was committed to the trustee company expressly authorises that payment.

“(3) Subsection (1) does not apply in relation to the payment of the allowable commission to—

40 (a) a bank; or

(b) an approved person if each beneficiary of the estate who has an interest in the property in relation to which the function is performed

by the person has consented in writing to the performance of that function by that person.

“(4) For the purpose of subsection (1)—

(a) a person shall be taken to be associated with a trustee company if the person is—

- (i) a director or secretary of the trustee company;
- (ii) a corporation that is related to the trustee company; or
- (iii) a director or secretary of such a related corporation; and

(b) a person shall be taken to be associated with an executive officer of a trustee company if the person is—

- (i) a corporation controlled, whether directly or indirectly, by the executive officer; or
- (ii) a trustee of a trust under which the executive officer has a beneficial interest, whether direct or indirect.

“(5) For the purposes of subsection (3), the allowable commission payable to a bank or approved person in respect of the performance of a function in relation to property of an estate is such amount of commission, or commission paid at such a rate, as does not exceed the amount, or rate, generally applicable in relation to the payment of commissions in respect of the performance of functions of that kind.

“(6) Where the commission received by a bank or approved person exceeds the amount of commission that the bank or person is entitled to receive under this section, the bank or person is liable to pay to the estate, in respect of the amount of the excess for the time being remaining to be repaid, interest—

- (a) at the rate of 20 per cent per annum; or
- (b) at such other rate as is prescribed.

“(7) In this section—

‘approved person’ means—

- (a) a person who is a barrister and solicitor within the meaning of the *Legal Practitioners Ordinance 1970*;
- (b) a person who is a licenced agent within the meaning of the *Agents Act 1968*;
- (c) a person who is a member of a stock exchange; and
- (d) a prescribed person or a person included in a prescribed class of persons;

‘beneficiary’ does not include a beneficiary—

- (a) who is not sui juris;
- (b) whom the trustee company is unable to find; or
- (c) who cannot be ascertained;

'commission' means an amount paid or payable (whether directly or indirectly and whether or not pursuant to an agreement or undertaking) by way of—

(a) a fee, reward or commission; or

5 (b) a payment in the nature of a commission (however described);

'executive officer', in relation to a trustee company, means a person who is concerned, or takes part, in the management of the company;

'member' has the same meaning as in the *Securities Industry Act 1980* of the Commonwealth;

10 'stock exchange' has the same meaning as in the *Securities Industry Act 1980* of the Commonwealth.

Trust fees

"18D. (1) Where a trustee company administers or manages an estate for a period of not less than 2 years, the company is entitled to receive a trust fee in accordance with this section.

"(2) The trust fee is payable—

(a) where administration or management of the estate by the trustee company is completed before the expiration of the period of 3 years after the estate was committed to it—upon completion of the administration or management; or

(b) where administration or management of the estate by the trustee company is not completed before the expiration of that period—

(i) at the expiration of that period;

25 (ii) at the expiration of each subsequent period of 12 months if, at that time, the administration or management has not been completed; and

(iii) upon completion of the administration or management.

"(3) The trust fee payable to a trustee company is—

(a) where the fee is payable at a time referred to in subparagraph (2) (b) (i) or (ii)—

(i) an amount equal to 0-25 per cent of the capital value of the estate at that time; or

(ii) \$500;

whichever is the lesser amount; and

35 (b) where the fee is payable at a time referred to in paragraph (2) (a) or subparagraph (2) (b) (iii)—

(i) an amount equal to the prescribed proportion of 0-25 per cent of the capital value of the estate immediately before that time; or

40 (ii) an amount equal to the prescribed proportion of \$500;

whichever is the lesser amount.

“(4) For the purposes of subsection (3), the capital value of an estate committed to the administration or management of a trustee company is the gross value of the assets (whether real or personal) of the estate without any deduction for any debts or liabilities (whether secured or unsecured).

“(5) For the purposes of paragraph (3) (b), the prescribed proportion is— 5

$$\frac{M}{12}$$

where *M* is the number of complete months that elapsed after—

- (a) the first 2 years of the company’s administration or management of the estate; or 10
- (b) the time the trust fee was last payable to the company; as the case may be.

Fees for preparation of returns

“18E. A trustee company is entitled to receive in respect of an estate committed to the administration or management of the company a reasonable fee for work performed by it involving the preparation and lodging of returns in connection with assessments of any duties or taxes, other than probate, death, succession or estate duties. 15

Directors’ fees

“18F. (1) Where— 20

- (a) an estate committed to the administration or management of a trustee company has an interest in a corporation; and
- (b) an officer of the trustee company, in his or her capacity as such an officer, acts as a director of the corporation for purposes connected with the administration or management of the estate; 25

the trustee company is entitled to receive from the corporation any director’s fees that would be payable to the officer had the officer acted as a director of the corporation otherwise than in his capacity as such an officer.

“(2) The fee payable to a trustee company under subsection (1) shall not exceed such amount as is reasonable having regard to the work done and services rendered by the officer while acting as a director of the corporation for purposes connected with the administration or management of the estate. 30

Fees generally

“18G. (1) The fees payable under sections 18D, 18E and 18F to a trustee company in respect of an estate committed to the administration or management of the company are in addition to— 35

- (a) the commission payable to the company under section 18; and
- (b) any other moneys the company is entitled to receive under that section. 40

"(2) A trustee company is not entitled to receive any fees or remuneration or make any charges, in respect of an estate committed to the administration or management of the company, other than—

- (a) the commission referred to in section 18;
- 5 (b) the fees referred to in sections 18D, 18E and 18F; and
- (c) charges for moneys properly expended by the company and chargeable against the estate.

"(3) The fees payable under sections 18D and 18E in respect of an estate are payable out of moneys of the estate.

10 "(4) Nothing in section 18D, 18E or 18F prevents the payment of a fee that a testator or other person has, in a will or other instrument, directed to be paid—

- (a) in addition to the fees payable under those sections; or
- (b) instead of the fee payable under any of those sections.

15 "(5) Where, in relation to a fee payable in respect of an estate, the Court—

- (a) upon an application made to it—
 - (i) by a person interested in the estate; or
 - 20 (ii) in the case of the fee payable under section 18F by a person interested in the corporation; or
- (b) of its own motion;

is satisfied that the fee is excessive, the Court may direct that the fee be reduced by such amount as it thinks fit."

Application—fees

25 6. The fees referred to in sections 18D, 18E and 18F of the Principal Act as amended by this Act are payable only in respect of estates committed to the administration or management of a trustee company on or after the date of commencement of this Act.

NOTE

- 1. Ordinance No. 15, 1947 as amended by Nos. 14 and 16, 1954; No. 7, 1960; No. 19, 1961; Nos. 7 and 11, 1962; No. 4, 1965; Nos. 12 and 19, 1966; No. 8, 1968; Nos. 38 and 93, 1982; No. 6, 1984; No. 34, 1985; No. 17, 1988; No. 38, 1989.