THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

TRUSTEE (AMENDMENT) BILL 1999

EXPLANATORY MEMORANDUM

Circulated by authority of
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Trustee (Amendment) Bill 1999

Outline

The Trustee Act 1925 of the State of New South Wales in its application in the Territory (the Principal Act) provides for the powers and duties of trustees. The Act was applied in the Territory in 1957, subject to a number of modifications. There have also been a few modifications since that time.

Section 14 of the Act lists investments which may be made by a trustee. The list is subject to an express intention to the contrary in the trust instrument. Most trusts are established by a well drafted instrument that gives the trustee wide powers of investment. The list may supplement, but will not supplant, these instruments.

The investments that are listed are, except in very exceptional circumstances, guaranteed to preserve the nominal (dollar) value of trust moneys. They include Commonwealth Government securities and fixed deposits with a bank.

This arrangement has been criticised and the States and Territories have progressively been moving to replace it with the prudent person rule. Under this arrangement a trustee may, subject to the trust instrument, invest in any form of investment. However, when making investment decisions the trustee is required to exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons. If the trustee is a professional trustee or a professional money manager a higher standard is imposed.

The factors that have led to this change are:

(a) that the listed investments are generally accepted as being unsuitable for many trusts;

(b) that the listed investments do not include assets from a wide spread of asset classes;

(c) over the last 5 or so years the level of Government debt in Australia has contracted quite markedly. This has had the effect that the pool of investments that are available, and that are listed, has contracted; and

(d) the list has been looked on as a recommendation from the Government that investments should be made in the listed assets and that these investments are safe and suitable for all trusts.

The legislation in the other States and the Northern Territory which applies the prudent person rule is:

(a) *Trustee (Amendment) Act (No2) 1995* (NT)

(b) *Trustee and Trustee Companies (Amendment) Act 1995* (Vic)

(c) *Trustees Amendment Act 1997* (WA)

(d) *Trustee Amendment (Investment Powers) Act 1997* (Tas)

(e) *Trustee (Investment Powers) Amendment Act 1995* (SA)

Queensland introduced a *Trusts (Investments) Amendment Bill 1998* which had not been passed prior to the 1998 election.

Revenue/Cost Implications

Nil.

NOTES ON CLAUSES

Formal Clauses

Clauses 1 Short title, 2 Commencement and 3 Principal Act These clauses are formal. They refer to the short title of the Bill; provide that the Bill will commence when it is notified in the Gazette; and provide a definition of "Principal Act".

Clause 4 Repeal

This clause repeals section 2 of the Principal Act. Section 2 provides a table of contents for the Principal Act, this is not is accordance with current drafting practice.

Clause 5 Insertion

This clause inserts a **new section 5A** in the Principal Act. The new section provides that a note in the text is explanatory and is not part of the Act. This is in accordance with current drafting practice. An example of the use of a note is in new section 14F(1).

Clause 6 Substitution

This clause repeals sections 14, 15 and 16 of the Principal Act and substitutes new sections 14 - 14F.

New section 14 - Powers of investment

This new section allows a trustee to invest trust funds in any form of investment and vary investments at any time. As at present the trustee's ability to invest is subject to the trust instrument. This means the trust instrument may limit the sorts of investments that may be made.

New section 14A - Duties of trustee in relation to powers of investment

This new section requires a trustee who is exercising the power of investment to exercise the care, diligence and skill that a prudent person who is managing the affairs of other persons would. However, if the trustee's profession, business or employment is or includes acting as a trustee or investing money on behalf of others then the trustee is to exercise the care, diligence and skill that a person engaged in that profession, business or employment would exercise.

If the trust instrument requires the trustee to obtain a consent or approval prior to making an investment the trustee is to comply with the requirement. Trust investments must be reviewed at least once each year.

These requirements are to be subject to the trust instrument. For example, the trust instrument could impose a higher or lower standard on the trustee.

New section 14B - Law and equity preserved

This new section preserves, so far as they are consistent with the Principal Act and the trust instrument, the rules and principles of law and equity which impose duties on a trustee. The preserved duties include:

(a) a duty to exercise powers in the best interests of all present and future beneficiaries;

(b) a duty not to invest in investments that are hazardous or speculative;

(c) a duty to act impartially towards beneficiaries and different classes of beneficiaries;

(d) a duty to take advice.

The rules and principles of law and equity that relate to a provision of a trust instrument that purports to exempt, limit the liability of or indemnify a trustee in respect of a breach of trust are to continue to apply.

If a trustee is under a duty to take advice the reasonable costs of obtaining the advice are to be payable out of trust funds.

New section 14C - Exercise of power of investment

This new section sets out a non-exhaustive list of matters a trustee may take into account in making investments. The matters are:

(a) the purposes of the trust and the needs and circumstances of beneficiaries;

(b) the desirability of diversifying investments;

(c) the nature of existing trust property and investments and the risks associated with that property and investments;

(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 and timing of income;

(h) 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 expiry of its term;

(k) the aggregate value of the trust estate;

(l) the effect of the proposed investment on 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 of making the investment;

(o) the results of a review of trust investments.

Having regard to the size and nature of the trust a trustee may obtain independent and impartial advice from a person the trustee reasonably considers competent to give the advice. The cost of the advice may be paid out of trust funds.

A trustee must comply with these provisions unless the trust instrument expressly forbids this.

New section 14D - Powers of trustee in relation to securities

This new section allows the trustee to concur in any scheme or arrangement relating to securities of a body corporate as if the trustee held the securities for his or her own benefit.

The trustee is to be able to take securities in another body corporate involved in the scheme.

If the trustee is offered a right to subscribe for further securities in a body corporate the trustee is to be able to:

(a) exercise the right our of the trust's capital;

(b) sell the right to any person, including a beneficiary (the proceeds being capital of the trust);

(c) renounce the right.

When acting under the section the trustee is exercising the power of investment. This means that the prudent person rule will apply to the trustee's decisions.

Any securities obtained as a result of the exercise of the abilities may be retained for as long as the original securities could have been.

The new section is subject to the trust instrument.

New section 14E - Power to buy house as residence for beneficiary

This new section allows a trustee to purchase a dwelling-house or make other arrangements for accommodation for a beneficiary. This power is subject to the trust instrument. However, regardless of the provisions of the trust instrument a trustee is to be able to retain a dwelling-house as part of the trust property and allow a beneficiary to use the property as a residence, but this must not be done if it would unfairly prejudice the interests of other beneficiaries.

A house may be retained after the beneficiary no longer uses it.

The section includes a wide definition of "house" so that the term includes any building or part of a building that is or can be used as a residence.

New section 14F - Investment in securities under RITS system

This new section permits a trustee to make investments using the Reserve Bank Information and Transfer System. This power is subject to the trust instrument.

Clause 7 - Loss on authorised security

This clause modernises the drafting of section 19 of the Principal Act.

Clause 8 - Accrued interest on debentures or stock sold or purchased

This clause deletes from section 24 of the Principal Act some spent provisions.

Clause 9 - Distribution after notice

This clause deletes from section 60 of the Principal Act a requirement that a trustee may not distribute trust property until he or she has placed a notice in the Gazette, the trustee will still be required to place a notice in an ACT newspaper.

Clauses 10, 11 and 12

These clauses modernise the drafting of sections 76, 77 and 80 of the Principal Act.

Clause 13 - Repeal

This clause repeals section 83 of the Principal Act. The section allows a trustee to obtain a house for an infant beneficiary. This section is no longer required in view of new section 14E.

Clause 14

This clause modernises the drafting of section 88 of the Principal Act.

Clause 15 Insertion

New section 89 - Court considerations in action for breach of trust

This new section sets out the matters the Court may take into account if a trustee is the subject of an action for breach of trust in relation to investments. The matters are:

(a) the nature and purpose of the trust;

(b) whether the trustee had regard to matters set out in new section 14C;

(c) whether the trustee acted in accordance with an investment strategy; and

(d) the extent the trustee acted in accordance with advice.

New section 89A - Power of Court to set off investment gains and losses

This new section gives the Court power to set off losses against gains when a trustee is being proceeded against for breach of trust.

Clauses 16, 17 and 18

These clauses modernise the drafting of sections 90, 91 and 93 of the Principal Act.

Clause 19 - Addition

This clause includes in the Principal Act a new Part 6.

New Part 6 - Transitional Provisions

The new Part 6 includes new sections 104, 105 and 106 which make transitional provisions as a result of the introduction of the prudent person rule.

Clause 20 - Consequential amendments

Financial Management Act 1996 - Section 53 is amended to enable the Treasurer to continue to exercise the power of investment that is conferred by that section.

Public Trustee Act 1985 - to enable the Public Trustee to administer trust funds in line with the prudent person rule the Public Trustee will need to be able to establish multiple common funds. At present the Public Trustee is required, by section 55 of the Act to establish a common fund. The amendments to the Act allow the Public Trustee to establish multiple common funds and make amendments that this necessitates.