

1992

AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY

TRUSTEE COMPANIES (AMENDMENT) BILL 1992

EXPLANATORY MEMORANDUM

**Circulated by authority of
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Attorney General**

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Outline:

The law relating to the operation of trustee companies in the Territory is contained in the *Trustee Companies Act 1957*. That Act is referred to in the Explanatory Memorandum as the "Trustee Companies Act".

The Trustee Companies Act regulates which companies may operate as trustees for deceased estates, sets out certain requirements for the operation of such companies and provides for the basis on which trustee companies may be remunerated for their services.

The Trustee Companies (Amendment) Bill 1992 ("the Bill") amends the Trustee Companies Act to allow trustee companies to establish and maintain common funds, to allow a deceased estate to be administered jointly by an individual and a trustee company and to provide that trustee companies are to be remunerated on the basis of fees for services performed in the administration of an estate rather than a percentage of the value of the estate.

Financial considerations:

The amendments will have no effect on Government finances.

Main amendments:

Clause 5 - Substitution

Clause 5 repeals sections 5 to 8 of the Trustee Companies Act and replaces them with new sections 5, 6, 7, 8 and 8A. The new sections all relate to the joint administration of a deceased estate by an individual and a trustee company. Under the current provisions a person entitled to obtain a grant of probate or administration may authorise a trustee company to obtain the grant in his or her place but cannot administer the estate jointly with the trustee company. The new provisions will give such people an opportunity to join with a trustee company in the administration of a deceased estate and retain personal involvement while obtaining professional guidance.

New section 5 allows a person who is named as the executor of a will and is entitled to apply for and obtain probate alone may join with a trustee company in obtaining probate or may authorise a trustee company to obtain letters of administration with the will attached, provided that the testator did not indicate a contrary intention.

New section 6 makes similar provisions in relation to a situation where a person is entitled to apply for and obtain probate jointly with one or more other people. In that case the person may either join with a trustee company (as well as those others entitled to apply for probate) or authorise a trustee company to apply for probate in his or her place, unless the testator has indicated a contrary intention.

New section 7 allows a person who is entitled to apply for and obtain a grant of letters of administration with the will attached of a deceased estate to either join

paid an amount per unit for each unit which that client held in the common fund. The amount to be paid per unit is calculated in accordance with the formula set out in the section.

Subsection 25D(5) contains the formula for calculating the value of each unit in a common trust fund. If an investment is made prior to the first valuation day the value of each unit is \$1. Withdrawals cannot be made prior to the first valuation day. If the investment or withdrawal is made after that time the value of each unit is the total value of monies invested in and held to the credit of the fund divided by the number of units held in the fund.

New section 25E says that a client who is beneficially entitled to money invested in a common trust fund does not have a beneficial interest in any particular money in the fund or any investment made with money from the fund but does have a beneficial interest in the fund as a whole. That interest is the same as the proportion which the units held by that client bears to the total number of units issued by the fund. Subsection 25E(2) provides that a beneficial interest in a common trust fund cannot be assigned, transferred, disposed of or otherwise dealt with by the person who has that interest.

New section 25F sets out the way in which a common trust fund is to be valued. This valuation is important for the valuation of the units held by clients in the fund. This section requires that a trustee company regularly value the capital and accrued income of each common trust fund maintained by it. A valuation is to be carried out on the first valuation day set by the trustee company under section 25B and then on the first business day of each month. A valuation may also be made by the company on any other day.

The capital of the common trust fund for the purposes of the valuation includes the investments held by the common fund and the monies held to the credit of the common fund. The valuation is not to include income accrued but not paid or allocated to a client. In making the valuation the trustee company is to take account of costs and expenses incurred by the company in making investments, protecting investments, disposing of assets of the fund and maintaining and administering the fund.

New section 25G requires a trustee company to pay or allocate the income of a common trust fund to those clients who hold units in that fund. The amount of income to be paid is to be calculated on a daily basis according to the number of units held by the client and the number of days during the period that the client held the units. If a client withdraws from the fund before the end of the period in respect of which interest has been accrued the trustee company may pay the interest either at the time of withdrawal or at the end of the period in question.

New section 25H allows a trustee company to buy and sell investments with the money in a common trust fund. The resulting profit or loss is to be credited or debited to the fund.

with a trustee company in making the application or to authorise a trustee company to make it in his or her place, unless the testator has expressed a contrary intention.

New section 8 allows a person who is entitled to obtain a grant of administration of the estate of a person who died intestate to join with a trustee company in making that application or to authorise a trustee company to make the application in his or her place.

New section 8A is a technical provision which allows a trustee company to carry out the normal duties associated with a grant of administration of a deceased estate or a grant of probate.

Clause 6 - Substitution

Clause 6 repeals section 18 of the Trustee Companies Act and replaces it with new sections 18, 18A and 18B. These provisions deal with remuneration of trustee companies for the work done in the administration of deceased estates. The present provisions provide for payment on the basis of a percentage of the value of the estate. The new provisions allow a trustee company to charge fees in accordance with the services actually provided during the administration of an estate.

New section 18 allows trustee companies to set scales of fees for services in respect of the administration of deceased estates and to charge in accordance with those scales. The scale of fees for each trustee company is to be set by the directors and published. The fees charged for the administration of a particular estate must be those set in the scale of fees which was current at the time when the estate was committed to the trustee company for administration.

New section 18A allows trustee companies to charge, in addition to the fees for the administration of a deceased estate, reasonable fees for the preparation and lodgement of tax returns other than for probate, death, succession or estate duties where those are applicable.

New section 18B clarifies some matters regarding the payment of fees generally. It provides that, in addition to fees for services performed, trustee companies may be reimbursed for proper outgoing expenses paid by the company on behalf of the estate.

It also provides in subclause 18B(2) that fees payable to a trustee company under sections 18 and 18A are payable out of the estate at any time after the company takes over the administration of the estate. This allows the trustee company to be paid fees due to it from time to time during the course of the administration.

Subclause 18B(3) allows for the payment of other fees as specified by a testator or other person in a will or other instrument, so that people are able to make private arrangements with trustee companies regarding the payment of fees if they so wish.

Subsection 18B(4) allows the Supreme Court, either of its own motion or on an application by a person interested in the estate to reduce the fees payable in respect of the administration of an estate by a trustee company if it considers them excessive.

Clause 8 - Application

Clause 8 provides that the new fees only apply to estates committed to a trustee company for administration or management on or after the date of commencement of new sections 18 and 18B.

Clause 7 - Insertion

Clause 7 inserts several new sections into the Trustee Companies Act after section 25A. The sections inserted are new sections 25B, 25C, 25D, 25E, 25F, 25G, 25H, 25I and 25J, all of which deal with the establishment and maintenance of common funds by trustee companies. Without these new provisions the Trustee Companies Act does not allow trustee companies to run common trust funds. Common trust funds are a method by which trustee companies in other jurisdictions pool monies held on trust by them in respect of a number of different trusts or deceased estates in order to invest those monies as a whole large amount and gain for the beneficiaries of those trusts the benefits associated with large scale investment.

New section 25B allows a trustee company to establish and maintain one or more common trust funds. If there is more than one fund each fund is to be given a number or descriptive name. On the establishment of each common fund the trustee company is to determine in writing the kind of investments which are to be made with monies in that fund and the money in the fund is not to be invested in any other kinds of investments. Each common trust fund is to consist of units and is to be valued regularly. The first valuation is to be made on a date fixed in writing by the trustee company but not later than the first business day of the next month after the establishment of the common fund.

New section 25C sets out the monies held by a trustee company which may be placed in a common trust fund. These include monies held by the company as an executor or administrator, a trustee, a receiver, a guardian of the estate of an infant, an agent or attorney and any other capacity. Subsection 25C(2) sets out the circumstances in which monies may not be placed in a common trust fund. These include situations in which the investment of the money in such a fund is expressly forbidden by the will or trust instrument or conditions subject to which the money is held by the company. Also money may not be invested in a common trust fund unless the kinds of investment which the trustee company has determined may be made by that fund are the same kinds of investments which could be made with that money if it was separately invested.

New section 25D deals with investments in and withdrawals from common trust funds. Investments may be made on any business day up to the first valuation day, but withdrawals may only be made on the first and subsequent valuation days. A valuation day is a day on which the fund is valued. The requirements for valuing the fund are set out in new section 25F. That section sets out that a fund is to be valued, after the first valuation day, on the first business day of each month.

Where money is invested in a common trust fund on account of a client of the trustee company, the company is to issue units in the fund to that client. The value of each unit is calculated in accordance with the formula provided in this section. When an investment is withdrawn from a common trust fund the client is to be

New section 25I deals with situations in which a trustee company is appointed to act jointly with one or more other people as executor or administrator, trustee, receiver or guardian of the estate of an infant for any purpose connected with the establishment, maintenance or administration of a common trust fund. If the trustee company obtains the consent of the other people involved, it may deal with the property and money concerned in the same way as if acting alone. A person who gives the necessary consent obtains exemption from liability in relation to the dealings by the trustee company with that property and money.

New section 25J entitles a trustee company to receive out of the income of a common trust fund a fee for the operation of the fund. The fee is to be determined by the trustee company but is not to exceed an amount equivalent to 1% per annum of the sums invested in the fund during the period in respect of which the income was earned. This fee is in addition to any other fees or commission to which the trustee company may be entitled.

Subsection 25J(3), however, prevents a trustee company from receiving any fee or commission in relation to the establishment, maintenance, administration or winding up of a common fund other than the 1% fee provided for by this section.

Formal and technical matters:

Clauses 1, 2, 3 and 4

Clauses 1, 2 and 3 contain the formal citation and commencement provisions for the Bill.

Clause 4 inserts definitions of "first valuation day" and "valuation day" into section 3 of the Trustee Companies Act. Those terms are used in the new provisions relating to the running of common trust funds.