

Queensland



ANNO VICESIMO SECUNDO

ELIZABETHAE SECUNDAE REGINAE

No. 24 of 1973

**An Act to consolidate and amend the law relating to Trusts,  
Trustees, Settled Land and Charities**

[ASSENTED TO 19TH APRIL, 1973]

BE IT ENACTED by the Queen's Most Excellent Majesty, by 'and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same, as follows:—

PART I—PRELIMINARY

**1. Short title and commencement.** (1) This Act may be cited as the *Trusts Act 1973*.

(2) Except as provided by subsection (3), this Act shall come into operation on the first day of July one thousand nine hundred and seventy-three.

Abbreviations used in references to other Acts in notes to sections appearing at the beginning of sections have the following meanings:—W.A. Trustees Act 1962–1968 (Western Australia); U.K. Trustee Act 1925 (United Kingdom); Vic. Trustee Act 1958 (No. 6401 of 1958, Victoria); N.S.W. Trustee Act 1925–1942 (New South Wales); N.I. Trustee Act 1958 (Northern Ireland); N.Z. Trustee Act 1956 (No. 61 of 1956, as amended, New Zealand); Qld. *The Trustees and Executors Acts 1897 to 1964* (Queensland); T.C. *Trustee Companies Act 1968* (Queensland); S.L.A. *The Settled Land Act of 1886* (Queensland).

(3) Sections 94, 95, 98 and 99 shall come into operation on the day on which this Act receives the Royal Assent.

**2. Division of Act.** This Act is divided into Parts as follows:—

PART I—PRELIMINARY (ss. 1-9);

PART II—APPOINTMENT AND DISCHARGE OF TRUSTEES; DEVOLUTION OF TRUSTS (ss. 10-19);

PART III—INVESTMENTS—

*Division 1—Variable Investment Provisions* (ss. 20-26);

*Division 2—Invariable Investment Provisions* (ss. 27-30);

PART IV—GENERAL POWERS OF TRUSTEES (ss. 31-59);

PART V—MAINTENANCE, ADVANCEMENT AND PROTECTIVE TRUSTS (ss. 60-64);

PART VI—INDEMNITIES AND PROTECTION OF TRUSTEES, ETC. (ss. 65-78);

PART VII—FURTHER POWERS OF THE COURT—

*Division 1—Application of Part* (s. 79);

*Division 2—Appointment of New Trustees* (ss. 80-81);

*Division 3—Vesting Orders* (ss. 82-93);

*Division 4—Jurisdiction to make other Orders* (ss. 94-102);

PART VIII—CHARITIES (ss. 103-106);

PART IX—MISCELLANEOUS (ss. 107-111).

**3. Repeals and savings.** [W.A. s. 4; cf. N.Z. s. 89.] (1) The Acts specified in Part 1 of the First Schedule cease to apply in the State to the extent mentioned in that Part.

(2) The Acts specified in Part 2 of the First Schedule are repealed to the extent mentioned in that Part.

(3) Without limiting the provisions of the *Acts Interpretation Act* 1954-1971, the termination of application or repeal of any enactment by this Act does not affect any document made or anything whatsoever done under the enactment so ceasing to apply or repealed or under any corresponding former enactment, and every such document or thing, so far as it is subsisting or in force at the time of the ceasing to apply or repeal and could have been made or done under this Act, shall continue and have effect as if it had been made or done under the corresponding provision of this Act and as if that provision had been in force when the document was made or the thing was done.

**4. Application.** [W.A. s. 5; cf. S.L.A. s. 59; N.Z. s. 2 (4).] (1) Except where otherwise provided, this Act applies to every trust, as defined in section 5, whether constituted or created before or after the commencement of this Act.

(2) Nothing in this Act shall preclude a settlor from conferring on a trustee or other person exercising the powers of a trustee under this Act any powers additional to or larger than those conferred by this Act.

(3) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, and unless a contrary intention is expressed in the instrument (if any) creating the trust, operate and be exercisable in the like manner and with all the like incidents, effects and consequences as if conferred by this Act.

(4) The powers conferred by or under this Act on a trustee are in addition to the powers given by any other Act and by the instrument (if any) creating the trust; but the powers conferred on the trustee by this Act, unless otherwise provided, apply if and so far only as a contrary intention is not expressed in the instrument (if any) creating the trust, and have effect subject to the terms of that instrument.

(5) Except where otherwise provided by this Act, this Act does not affect the legality or validity of anything done before the commencement of this Act.

(6) This Act binds the Crown not only in right of the State of Queensland but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

**5. Interpretation.** [W.A. s. 6; cf. Qld. s. 3.] (1) In this Act, unless the context otherwise requires—

“authorized investments” means investments authorized for the investment of money subject to the trust by the instrument (if any) creating the trust or by this Act or any other Act;

“bank” and “savings bank” mean any bank or savings bank—

(a) authorized under Part II of the *Banking Act 1959–1967* of the Commonwealth (including any enactment in substitution or amendment thereof); to carry on banking business in Australia;

(b) authorized under the *Commonwealth Banks Act 1959–1968* of the Commonwealth (including any enactment in substitution or amendment thereof) to carry on banking business in Australia;

“bankrupt” includes “insolvent”;

“benefit”, in relation to any person, includes insurance on the life of that person;

“commencement of this Act” means the time when this Act (other than sections 94, 95, 98 and 99) came or comes into operation;

“contingent right”, in relation to land, includes a contingent or executory interest and a possibility coupled with an interest, whether the object of the gift or limitation of the interest or possibility is or is not ascertained; and also a right of entry, whether immediate or future, and whether vested or contingent;

“conveyance”, as applied to any person, includes the execution or doing by that person of every necessary or suitable assurance, act, and thing for conveying, transferring, assigning, appointing, surrendering or otherwise disposing of property; and “to convey” has a corresponding meaning;

“Court” means the Supreme Court or a Judge thereof;

“execute” includes the doing of all acts and things necessary for a conveyance, and with reference to an instrument not under seal means sign;

“instrument creating the trust” includes any deed, will, agreement for a settlement, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act;

“land” includes—

(a) land of any tenure, and any estate or interest, whether vested or contingent, in land;

- (b) mines and minerals, whether or not severed from the surface;
  - (c) buildings or parts of buildings, whether the division is horizontal, vertical or made in any other way;
  - (d) a unit comprised in a building units plan registered in the manner provided by or under the *Building Units Titles Act 1965-1972*;
  - (e) any other corporeal hereditaments;
  - (f) rent and any incorporeal hereditament; and
  - (g) an easement, right, privilege, share, interest or benefit in, over or derived from land,  
and, in this definition, "mines and minerals" includes any strata or seams or minerals or substances in or under any land, and powers of working or getting them and "hereditament" means real property which under an intestacy might at common law devolve on an heir;
- "lease" includes a bailment;
- "mortgagee" includes every person having an estate or interest regarded at law or in equity as merely a security for money and every person deriving title to the mortgage under the original mortgagee; and "mortgage" has a corresponding meaning;
- "payment", in relation to stocks and securities, includes the deposit or transfer of them; and "to pay" has a corresponding meaning;
- "person" includes a trustee corporation, a corporation sole and a corporation aggregate;
- "person not under a disability", and any like expression, means a person of full age and full mental capacity;
- "personal representative" means the executor, original or by representation, or the administrator for the time being of the estate of a deceased person;
- "possession" includes receipt of income or the right to receive the income, if any; and "possessed" applies to receipt of income of and to any vested estate less than a life interest, at law or in equity, in possession or in expectancy in any land;
- "property" includes real and personal property and any estate, share, and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not;
- "public accountant" means a public accountant registered under the *Public Accountants Registration Act 1946-1971*;
- "Public Curator" means the Public Curator of Queensland constituted by the *Public Curator Act 1915-1971*;
- "registered valuer" means a valuer registered under the *Valuers Registration Act 1965-1971*;
- "Registrar" means the Registrar of Titles appointed under *The Registrar of Titles Act of 1884*;
- "rent" includes a rent service or a rent charge, or other rent, toll, duty, royalty or annual or periodic payment in money or money's worth reserved or issuing out of or charged upon land, but does not include mortgage interest;

- “repealed Acts” means the Acts that pursuant to *The Trustees and Executors Acts Amendment Act of 1964* might have been cited as *The Trustees and Executors Acts 1897 to 1964*;
- “sale” includes an exchange; and “to sell” has a corresponding meaning;
- “securities” includes debentures, stock and shares; and “securities payable to bearer” includes securities transferable by delivery or by delivery and endorsement;
- “statutory trustee” means a person—
- (a) who, in respect of land referred to in section 6 may exercise the powers by this Act conferred or capable of being conferred on a trustee; but
  - (b) who, apart from this Act, is not a trustee of such land;
- “stock” includes shares, and, so far as relates to vesting orders made by the Court under this Act, includes any fund, annuity or security transferable in books kept by any corporation or society, or by instrument of transfer, either alone or accompanied by other formalities, and any share or interest therein;
- “transfer”, in relation to stock or securities, includes the performance and execution of every deed, power of attorney, act, and thing on the part of the transferor to effect and complete the title in the transferee;
- “trust” does not include the duties incidental to an estate conveyed by way of mortgage, but with that exception “trust” extends to implied, resulting, bare and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incidental to the office of a personal representative;
- “trust property” includes—
- (a) property settled on any trust, whether express, implied, resulting, bare, or constructive;
  - (b) property subject to a trust or direction for sale, however arising;
  - (c) land which is lawfully vested in any person for an estate for his own or any other life, or for a term of years determinable on life not being a mere lease at rent, or for any greater estate not being a fee simple absolute; and
  - (d) land in respect of which any person has, by virtue of any will, a personal licence to reside for his own life, or for the life of any other person or persons, or for any lesser period;
- “trustee” includes—
- (a) a trustee corporation;
  - (b) any other corporation in which property subject to a trust is vested;
  - (c) any person who immediately before the commencement of this Act was a trustee of the settlement or in any way a trustee under *The Settled Land Act of 1886* and who, if that Act had not been repealed, would be such a trustee;
  - (d) a personal representative; and
  - (e) a statutory trustee within the meaning of this Act;
- “trustee corporation” means the Public Curator or any corporation authorized by the *Trustee Companies Act 1968* to administer the estates of deceased persons and other trust estates.

(2) Any reference to the investment, loan or advance of trust money by a trustee on the security of property shall be construed to include a reference to such investment, loan or advance on the transfer of an existing security as well as on a new security.

**6. Exercise of powers.** [Cf. S.L.A. ss. 4, 5, 6, 27, 29, 42, 69; W.A. 30, 109 (1); N.Z. 88.] Subject to subsection (3) of section 31, the powers by this Act conferred on a trustee may be exercised by, and the powers by this Act capable of being conferred by the Court on a trustee may be conferred upon and, where conferred, may be exercised by, the following persons:—

- (a) in respect of land which immediately before the commencement of this Act was settled land within the meaning of *The Settled Land Act of 1886* (in this paragraph referred to as “the repealed Act”)—by the person being of full age and not insane who was, or, if more than one by the persons being of full age and not insane—
  - (i) who were, in respect of that land, the tenant for life within the meaning of the repealed Act, or who had the powers of the tenant for life under the repealed Act; and
  - (ii) who if that Act had not been repealed would be the tenant for life or have those powers, whether or not such powers were or any of such powers was exercisable only with the consent, approval or sanction of some other person or persons or of the Court:

Provided that where, under the repealed Act, a power was exercisable by any person or persons only upon the written request of the tenant for life, then such person or persons shall have, and shall and may exercise, the powers conferred by this section upon the written request of the person who was tenant for life and who if that Act had not been repealed would be the tenant for life, but not otherwise;

- (b) in respect of any other land which is trust property—
  - (i) if there is, apart from this Act, no trustee of the land—by the person or persons, not under a disability, for the time being beneficially entitled to possession thereof, or to the rents and profits therefrom; or
  - (ii) if there is, apart from this Act, a trustee of the land—by the trustee; but the trustee shall, unless otherwise directed by the Court, exercise the power conferred by section 32 to sell the land if so required in writing by the person (if not under a disability) or, if more than one, all of the persons (if not under a disability) at that time beneficially entitled to an interest in possession in the land or under the trust of the land;
- (c) in respect of any other trust property—by the trustee of that property;
- (d) in any case, or where the persons by whom, or at whose direction, the powers conferred by this section are exercisable do not agree—by such person or persons and in such manner as the Court may order or direct on application thereto of any person who has, directly or indirectly, an interest, whether vested or contingent, in that property.

**7. Exercise of powers by statutory trustee.** [Cf. S.L.A. ss. 31 (1), 38, 55; Eng. S.L.A. 1925, s. 107 (1).] (1) Subject to any order or direction of the Court, in exercising any power under this Act, a statutory trustee—

- (a) shall have regard to the interests of all parties beneficially interested in the property;
  - (b) shall be in the position of a trustee, and, in relation to the exercise of any power, have—
    - (i) all the duties and liabilities of a trustee for the parties beneficially interested in the property; and
    - (ii) all the rights of a trustee and be entitled to all the indemnities and protection of a trustee;
  - (c) shall, in order to its being invested or otherwise applied in accordance with this Act, pay or procure the payment of any capital money arising on any sale, mortgage, or other dealing with any land—
    - (i) into Court; or
    - (ii) to a trustee appointed by the Court under section 80; or
    - (iii) otherwise as the Court may direct;
  - (d) shall not, in relation to any such exercise of power, be liable to impeachment of waste.
- (2) The exercise of any power under this Act by a statutory trustee—
- (a) shall, in respect of any land, have the same force and effect as if it had been done by a trustee in whom that land was for the time being vested for an estate in fee simple absolute;
  - (b) shall not occasion any forfeiture; and
  - (c) shall not, except as provided by this Act, be capable of being restrained, prohibited, prevented or impaired by any provision of, or limitation in, any contract, covenant, settlement, will, assurance, or other instrument.

**8. Application to Court to review acts and decisions.** [W.A. s. 94; N.Z. s. 68; cf. S.L.A. s. 42.] (1) Any person who has, directly or indirectly, an interest, whether vested or contingent, in any trust property, and who is aggrieved by any act, omission or decision of a trustee or other person in the exercise of any power conferred by this Act or by the instrument (if any) creating the trust, or who has reasonable grounds to apprehend any such act, omission or decision by which he will be aggrieved, may apply to the Court to review the act, omission or decision, or to give directions in respect of the apprehended act, omission or decision; and the Court may require the trustee or other person to appear before it and to substantiate and uphold the grounds of the act, omission or decision which is being reviewed and may make such order in the premises (including such order as to costs) as the circumstances require.

- (2) An order of the Court under subsection (1) shall not—
- (a) disturb any distribution of the trust property, made without breach of trust, before the trustee became aware of the making of the application to the Court; or
  - (b) affect any right acquired by any person in good faith and for valuable consideration.

(3) Where any application is made under this section, the Court may—

- (a) if any question of fact is involved, determine that question or give directions as to the manner in which that question shall be determined; and
- (b) if the Court is being asked to make an order which may adversely affect the rights of any person who is not a party to the proceedings, direct that that person shall be made a party to the proceedings.

**9. Effect of conversion of property under statutory power.** [Cf. S.L.A. s. 31 (5).] Where in consequence of the exercise of any power under this Act realty is converted into personalty or personalty is converted into realty, such personalty or realty shall be held—

- (a) upon trusts corresponding as nearly as the law and circumstances permit with the trusts (if any) affecting the property prior to conversion; or
- (b) if there are no trusts, subject to limitations, conditions, powers, or directions corresponding as nearly as the law and circumstances permit with those affecting the property prior to conversion.

## PART II—APPOINTMENT AND DISCHARGE OF TRUSTEES; DEVOLUTION OF TRUSTS

**10. Application of Part.** Except where otherwise provided in this Part, the provisions of this Part shall apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust.

**11. Limitation of the number of trustees.** [U.K. s. 34; Vic. s. 40.]

(1) Where, at the commencement of this Act, there are more than four trustees of any property no new trustees shall (except where as a result of the appointment the number is reduced to four or less) be capable of being appointed until the number is reduced to less than four, and thereafter the number shall not be increased beyond four.

(2) In the case of trusts made or coming into operation after the commencement of this Act—

- (a) the number of trustees thereof shall not in any case exceed four, and where more than four persons are named as such trustees, the four first named (who are able and willing to act) shall alone be the trustees, and the other persons named shall not be trustees unless appointed on the occurrence of a vacancy;
- (b) the number of the trustees shall not be increased beyond four.

(3) Nothing in this section shall apply to property vested in trustees for charitable purposes.

(4) A custodian trustee shall not be counted as a trustee for the purpose of this section.

(5) The provisions of section 80 of the *Real Property Act* 1861–1972 shall have effect subject to this section.



**12. Power of appointing new trustees.** [W.A. s. 7; N.S.W. s. 6; Vic. s. 41; N.Z. s. 43; U.K. ss. 36, 37; cf. Qld. s. 10.] (1) Where a trustee, whether original or substituted, and whether appointed by the Court or otherwise—

- (a) is dead; or
- (b) remains out of the State for more than one year without having properly delegated the execution of the trust; or
- (c) seeks to be discharged from all or any of the trusts or powers reposed in or conferred on him; or
- (d) refuses to act therein; or
- (e) is unfit to act therein; or
- (f) is incapable of acting therein; or
- (g) is an infant; or
- (h) being a corporation, has ceased to carry on business, is under official management, is in liquidation or has been dissolved,

then the person nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust, or if there is no such person or no such person able and willing to act, then the surviving or continuing trustee or trustees for the time being, or the personal representative of the last surviving or continuing trustee, may by writing appoint a person or persons (whether or not being the person or persons exercising the power) to be a trustee or trustees in the place of the trustee first in this subsection mentioned.

(2) On the appointment of a trustee or trustees for the whole or any part of the trust property—

- (a) the number of trustees may, subject to the restriction imposed by this Act on the number of trustees, be increased; and
- (b) a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part, and whether or not new trustees are or are to be appointed for any other part of the trust property; and any existing trustee may be appointed or remain one of the separate set of trustees; or if only one trustee were originally appointed, then one separate trustee may be so appointed for the part of the trust first in this paragraph mentioned; and
- (c) it is not obligatory to fill up the original number of trustees where two or more trustees were originally appointed; but a trustee is not discharged under this section unless there will remain either a trustee corporation or at least two individuals to act as trustees of the trust; and
- (d) any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees shall be executed or done.

(3) Where a trustee has been removed under a power contained in the instrument creating the trust, a new trustee or new trustees may be appointed in the place of the trustee who is removed, as if he were dead, or, in the case of a corporation, as if the corporation had been dissolved, and the provisions of this section shall apply accordingly.

(4) The power of appointment given by subsection (1), or any similar previous enactment, to the personal representative of the last surviving or continuing trustee is and shall be deemed always to have been exercisable by the administrator for the time being of that trustee or the executor for the time being, whether original or by representation, of that surviving or continuing trustee who has proved the will of his testator without the concurrence of any executor who has renounced or has not proved.

(5) Where, in the case of any trust, there are not more than three trustees (none of them being a trustee corporation), then—

(a) the person or persons nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust; or

(b) where there is no person nominated for the purpose of appointing new trustees by the instrument creating the trust, or no such person able and willing to act, then the trustee or trustees for the time being,

may, by writing, appoint a person or persons (whether or not being the person or persons exercising the power) to be an additional trustee or additional trustees, but it shall not be obligatory to appoint any additional trustee unless the instrument (if any) creating the trust, or any statutory enactment, provides to the contrary; but on any appointment of additional trustees under this subsection the number of trustees shall not be increased beyond four.

(6) Every new trustee appointed under this section has the same powers, authorities, and discretions and may in every respect act, as if he had originally been appointed a trustee by the instrument (if any) creating the trust, both before and after all the trust property becomes by law or by assurance or otherwise vested in him.

(7) The provisions of this section which are brought into effect by the circumstance that a person nominated trustee (whether sole or otherwise) in a will is dead are brought into effect whether the death of that person occurred before or after the death of the testator; and the provisions relative to a continuing trustee relate also to a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

(8) The provisions of this section relating to a person nominated for the purpose of appointing new trustees apply whether the appointment is made in a case specified in this section or in a case specified in the instrument (if any) creating the trust, 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.

(9) In this section, the term "trustee" does not include a personal representative as such.

**13. Evidence as to a vacancy in a trust.** [Cf. W.A. s. 8; Vic. s. 43; N.Z. s. 44; N.S.W. s. 13; U.K. s. 38.] (1) Where any instrument appointing a new trustee contains a statement as to how a vacancy in the office of trustee occurred, that statement is conclusive evidence, in favour of a subsequent purchaser in good faith, of the circumstances under which the vacancy occurred.

(2) Any vesting of trust property consequent upon an appointment of a new trustee containing a statement as to how a vacancy in the office of trustee occurred is valid in favour of any subsequent purchaser in good faith.

(3) The protection afforded to a purchaser by this section extends to the Registrar or other person registering or certifying title.

(4) This section applies to instruments of appointment signed either before or after the commencement of this Act.

**14. Retirement of trustee without a new appointment.** [W.A. s. 9; Vic. s. 44; cf. Qld. s. 11.] (1) This section applies where a trustee declares by writing that he is desirous of being discharged from all or any or any part of the trusts reposed in him, and after his discharge there will be a trustee corporation or at least two individuals to act as trustees to perform the trust or part of the trust from which that trustee desires to be discharged.

(2) In any case to which this section applies, if the co-trustees and such other person, if any, as is empowered to appoint trustees consent by writing to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, the trustee desirous of being discharged—

- (a) shall be deemed to have retired from the trusts from which he has declared he desires to be discharged; and
- (b) shall, by the writing by which consent is given to his discharge, be discharged from the trusts under this Act,

without any new trustee being appointed in his place.

**15. Vesting of trust property in new and continuing trustees.** [Cf. W.A. s. 10; Vic. s. 45; Qld. s. 13.] (1) Where a new trustee is appointed the instrument of appointment vests, subject to the provisions of any other Act, the trust property in the persons who become and are the trustees as joint tenants without any conveyance, transfer or assignment.

(2) Where a trustee is discharged in accordance with the provisions of section 14 the instrument of discharge divests the trust property from the discharged trustee and, subject to the provisions of any other Act, vests it in the continuing trustees as joint tenants without any conveyance, transfer or assignment.

(3) Where, by reason of the provisions of any other Act or for the protection of any trust property, it is requisite that the vesting in a new trustee or divesting from a discharged trustee should be notified to or registered or recorded by the Registrar or other person having the duty or function of registering or recording any discharge or appointment of trustees or divesting or vesting or other dealings under that Act, the trustees shall—

- (a) execute and produce to the Registrar or such other person such instrument or instruments as may be necessary; and
- (b) do such other act or acts as may properly be required by the Registrar or such other person,

for the purpose of effecting such notification, registration or recording; and an instrument of appointment or discharge shall be deemed a conveyance from the persons in whom the trust property was previously vested to the persons in whom it vests by virtue of such instrument.

(4) Where trust property has vested in the Public Curator pursuant to subsection (2) of section 16 it shall not be necessary to notify, register or record such vesting if the Public Curator has not acted in regard to the trusts or if the only action taken by the Public Curator has been the appointment of a new trustee.

(5) Where the consent of any person is requisite to the conveyance, transfer or assignment of any trust property the vesting of that property in accordance with the provisions of this section is subject to that consent; but the consent may be obtained after the execution of the instrument of appointment or discharge by the persons who are then trustees.

(6) An instrument of appointment or discharge shall not operate as a breach of covenant or condition or occasion any forfeiture of any lease, underlease, agreement for lease, or other property.

**16. Devolution of trust assets and trust powers upon death.** [Cf. U.K. s. 18; Vic. s. 22; N.S.W. s. 57; W.A. s. 45; Qld. s. 12.] (1) Where a power or trust is given to or imposed on two or more trustees jointly, the same may be exercised or performed by the survivors or survivor of them for the time being.

(2) Upon the death of a sole trustee or, where there were two or more trustees, of the last surviving or continuing trustee, the trust property shall devolve to and vest in the Public Curator and shall remain vested in him until—

(a) an appointment of a new trustee is made and (unless the appointment is made by the Public Curator) notice in writing of the appointment is given to the Public Curator; whereupon the trust property shall devolve to and vest in the person so appointed subject to and in accordance with the provisions of section 15; or

(b) if no such appointment is made, a grant of probate or letters of administration of the estate of the deceased trustee is made and notice in writing of such grant and of his intention to assume the trust of the trust property is given to the Public Curator by the person to whom the grant was made, whereupon the trust property shall devolve to and vest in such person who shall be deemed to be the person appointed by the person nominated for the purpose of appointing new trustees.

(3) Trust property vested by virtue of this section in the Public Curator shall vest in him, notwithstanding the fact that no instrument has been executed appointing him as trustee, in the like manner and subject to the same provisions as trust property which vests in a new trustee by virtue of section 15.

(4) Trust property vested by virtue of this section in a person to whom a grant of probate or letters of administration of the estate of a deceased trustee has been made shall vest in him in like manner and subject to the same provisions as trust property which vests in a new trustee by virtue of section 15.

(5) While the trust property is vested in the Public Curator under this section the Public Curator shall have the same powers, authorities and discretions, and may in every respect act, as if he had originally been appointed a trustee by the instrument (if any) creating the trust; but

unless the Court, in special circumstances, otherwise directs it shall not be obligatory for the Public Curator to exercise any of such powers, authorities or discretions.

(6) Where the trust property vests by virtue of this section in the person to whom a grant of probate or letters of administration of the estate of the deceased trustee is made that person shall have all the powers, authorities and discretions and in every respect act as if he had originally been appointed a trustee by the instrument (if any) creating the trust.

(7) Where by virtue of this section trust property is divested from the Public Curator in consequence of an appointment of a new trustee or a grant of probate or letters of administration of the estate of the deceased trustee all liability on the part of the Public Curator (other than liability for which the Public Curator is not entitled to be indemnified out of the trust property) in respect of any action taken by him with regard to the trust property shall cease; but any person who, but for this provision, would have had a remedy against the Public Curator shall have the like remedy against the person in whom the trust property has vested pursuant to such appointment of new trustee or grant of probate or letters of administration.

(8) Nothing in this section shall deprive the Public Curator of any power which he has or may exercise under section 56A of the *Public Curator Act 1915-1971*.

(9) In this section the expression "trust property" includes any property vested in the trustee as mortgagee.

**17. Devolution of mortgage estates on death.** [Cf. Qld. s. 12.]

(1) An estate or interest in property vested solely in any person (not being a trustee) by way of mortgage shall upon his death devolve to and vest in the Public Curator until a grant of probate or letters of administration to the estate of the deceased mortgagee is made when the mortgaged property shall devolve to and vest in the person to whom the grant is made.

(2) While the property is vested in the Public Curator under this section the Public Curator shall have the same powers, authorities and discretions and may in every respect act, as if he were originally the mortgagee of the property.

(3) Nothing in this section shall deprive the Public Curator of any power which he has or may exercise under section 56 of the *Public Curator Act 1915-1971*.

**18. Disclaimer of trusts on renunciation of probate.** [W.A. s. 12; Vic. s. 45.] (1) Where a person appointed by will both executor and trustee thereof renounces probate, or after being duly cited or summoned 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 any person appointed by will both executor and trustee thereof—

(a) renounces probate; or

(b) after being duly cited or summoned fails to apply for probate;

or

(c) dies before probate is granted to him, and letters of administration with the will annexed are granted to any other person, the person who obtains the grant shall, by virtue of the grant and without further appointment, be deemed to be appointed trustee of the will in the place of the person who was appointed by the will.

**19. Custodian trustees.** [W.A. s. 15; N.Z. s. 50; cf. the Public Curator Act 1915-1971, s. 42.] (1) Subject to the provisions of this section and to the instrument (if any) creating the trust, any corporation may be appointed to be custodian trustee of any trust in any case where, and in the same manner as, it could be appointed to be trustee.

(2) Subject to the provisions of the instrument (if any) creating the trust, where a custodian trustee is appointed of any trust—

- (a) the trust property shall be vested in the custodian trustee as if the custodian trustee were the sole trustee, and for that purpose vesting orders may, where necessary, be made under this Act;
- (b) the management of the trust property and the exercise of all powers and discretions exercisable by the trustee under the trust shall be and remain vested in managing trustees other than the custodian trustee (in this section called "the managing trustees") as fully and effectually as if there were no custodian trustee;
- (c) the sole function of the custodian trustee shall be to get in and hold the trust property and invest its funds and dispose of the assets as the managing trustees in writing direct, for which purpose the custodian trustee shall execute all such documents and perform all such acts as the managing trustees in writing direct;
- (d) for the purposes of paragraph (c), a direction given by the majority of the managing trustees, where there are more than one, shall be deemed to be given by all the managing trustees;
- (e) the custodian trustee shall not be liable for acting on any direction to which paragraph (c) refers; but if the custodian trustee is of opinion that any such direction conflicts with the trusts or the law, or exposes the custodian trustee to any liability, or is otherwise objectionable, the custodian trustee may apply to the Court for directions in the matter; and any order giving directions shall bind both the custodian trustee and the managing trustees; and the Court may make such order as to costs as it thinks proper;
- (f) the custodian trustee shall not be liable for any act or default on the part of any of the managing trustees;
- (g) all actions and proceedings touching or concerning the trust property shall be brought or defended in the name of the custodian trustee at the written direction of the managing trustees, and the custodian trustee shall not be liable for the costs thereof apart from any payable out of the trust property;
- (h) a person dealing with the custodian trustee shall not be concerned to inquire as to any direction, concurrence or otherwise of the managing trustees or be affected by notice of the fact that the managing trustees have not concurred; and

- (i) the power of appointing new trustees, when exercisable by the trustee, shall be exercisable by the managing trustees alone, but the custodian trustee shall have the same power as any other trustee of applying to the Court for the appointment of a new trustee.

(3) On the application of the custodian trustee or of any of the managing trustees or of any beneficiary and on satisfactory proof that it is the general wish of the beneficiaries or that on other grounds it is expedient to terminate the custodian trusteeship, the Court may make an order for that purpose and may also make such vesting orders and give such directions as in the circumstances seem to the Court to be necessary or expedient.

### PART III—INVESTMENTS

#### *Division 1—Variable Investment Provisions*

**20. Application of Part.** [Cf. W.A. s. 19; U.K. s. 10 (5); Vic. s. 4 (2); Qld. s. 6.] (1) Subject to subsection (2) the provisions of Division 1 shall apply if and so far only as a contrary intention is not expressed in the instrument (if any) creating the trust; and every power conferred by the provisions of Division 1 shall be exercised according to the discretion of the trustee, but subject to any consent or direction required by the instrument (if any) creating the trust or by statute with respect to the investment of funds.

(2) The provisions of paragraph (a) (so far as relates to the parliamentary stocks or public funds or government securities of the Commonwealth or of the State of Queensland) and of paragraph (e) of subsection (1) of section 21 shall apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust.

(3) The provisions of Division 2 shall apply whether or not a contrary intention is expressed in any other Act or in the instrument (if any) creating the trust.

**21. Authorized investments.** [W.A. s. 16; cf. Qld. s. 4; S.L.A. s. 30; U.K. Trustee Investments Act 1961.] (1) A trustee may invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say—

- (a) in any of the parliamentary stocks, public funds or government securities of the United Kingdom, of the Commonwealth, of any of the States of the Commonwealth, or of the Dominion of New Zealand;
- (b) on first legal or first statutory mortgage of an estate in fee simple in land in any State or Territory of the Commonwealth; or first statutory mortgage of Crown land held on perpetual lease in the State;
- (c) in the purchase—
  - (i) of land in fee simple in any State or Territory of the Commonwealth;
  - (ii) of leasehold land in the State held for a term of forty years or more unexpired at the time of the purchase; or
  - (iii) subject to the provisions of the *Land Act* 1962–1971, of any agricultural farm or grazing homestead freeholding lease of land held from the Crown under that Act;

- (d) in debentures or other securities charged on the funds or property of the Brisbane City Council or of any Local Authority in the State;
- (e) in any one or more of the following, namely—
  - (i) on any interest bearing term deposit in any bank;
  - (ii) on the security of a certificate of deposit issued by any bank; and
  - (iii) on deposit in any savings bank;
- (f) with any dealer in the short term money market, approved by the Reserve Bank of Australia, as an authorized dealer, who has established lines of credit with that bank as a lender of last resort;
- (g) in any security in respect of which repayment of the amount secured and payment of interest thereon is guaranteed by the Parliament of the United Kingdom or the Commonwealth or any State of the Commonwealth or New Zealand;
- (h) in any of the stocks, funds or securities for the time being authorized for the investment of cash under the control or subject to the order of the Court;
- (i) in any security authorized by, or under, any Act as a security in which a trustee may invest trust funds;
- (j) in the common trust fund of a trustee corporation under the *Trustee Companies Act* 1968,

and may also from time to time vary any such investment.

(2) A reference in any Act to an authorized investment under the provisions of section 4 of the repealed Acts shall be deemed a reference to an authorized investment under the provisions of this section.

## 22. Power to purchase dwelling house. [W.A. s. 17; Vic. s. 4 (3).]

(1) Where a trustee is of opinion that it is desirable to purchase a dwelling house for the use of any beneficiary under the trust or for a person having a personal licence to reside (whether for life or for any lesser period) on land comprised in the trust property, the trustee may invest any trust funds in his hands, whether at the time in a state of investment or not, in the purchase of land in fee simple in the State used for the purpose of a dwelling house only, and may permit the beneficiary or that person to reside on the land upon such terms and conditions consistent with the trust and the extent of the interest of the beneficiary as the trustee thinks fit.

(2) A trustee purchasing land in exercise of the power conferred by this section or by paragraph (c) of subsection (1) of section 21 shall not be chargeable with breach of trust by reason only of the relation borne by the purchase price to the value of the land at the time when the purchase was made if it appears to the Court that—

- (a) in making the purchase the trustee was acting upon a report as to the value of the land made by a registered valuer whom he reasonably believed to be competent, instructed and employed independently of any owner of the land, whether that valuer carried on business in the locality where the land is situate or elsewhere;
- (b) the purchase price did not exceed the value of the land as stated in the report; and
- (c) that the purchase was made under the advice of the valuer expressed in the report.



(3) A trustee may retain as an asset of the trust any land purchased under this section, notwithstanding that no beneficiary under the trust is residing on the land.

(4) Where a trustee is of opinion that it is desirable that a dwelling house that forms part of the trust shall be retained for the use of any beneficiary he may, notwithstanding any trust for conversion contained in the instrument creating the trust, retain the dwelling house and permit the beneficiary to reside therein, upon such terms and conditions consistent with the trust and the extent of the interest of the beneficiary as the trustee thinks fit.

(5) A trustee purchasing a dwelling house in accordance with the provisions of this section may also purchase therefor such furnishings and fittings as he thinks fit.

**23. Powers in relation to housing loans.** [Qld. The Trustees (Housing Loans) Act of 1967.] (1) A trustee who is an approved lender may, unless expressly forbidden by the instrument (if any) creating the trust, for the purpose of making an insurable loan lend on an approved security such amount as the trustee thinks fit, but not exceeding in any case such amount as is the subject of a contract of insurance in respect of the loan entered into by the Corporation pursuant to the provisions of the *Housing Loans Insurance Act 1965-1966* of the Commonwealth (including that Act as amended from time to time and any Act passed in substitution for that Act.)

(2) Where a trustee lends money on an approved security in accordance with the provisions of subsection (1), the trustee is not chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property on which the loan is secured.

(3) In this section the expressions—

- (a) approved lender;
- (b) approved security;
- (c) contract of insurance;
- (d) insurable loan;
- (e) the Corporation,

have the meanings respectively assigned to them by the said Housing Loans Insurance Act.

**24. Purchase of redeemable stocks at a premium or discount.** [W.A. s. 18; cf. Qld. s. 5; N.Z. s. 5.] (1) A trustee having authority to invest in any of the securities mentioned in section 21 may invest in any of those securities notwithstanding that the securities may be redeemable, and that the price is greater or less than the redemption value.

(2) A trustee may retain until redemption any redeemable security that may have been purchased in accordance with the powers of this Act, or of any enactment repealed by this Act.

(3) Where any security to which subsection (1) applies is purchased by a trustee, after the commencement of this Act, at a price greater or less than its redemption value, and in terms of the trust the beneficial interest in the income from the security is not vested in the same persons as the beneficial interest in the capital thereof, then—

- (a) if the purchase price exceeds the redemption value, the trustee shall recoup to the capital out of which the purchase was made, by rateable instalments from the income derived from the security over the period between the date of purchase and the earliest date on which the security can be repaid or redeemed, the amount of the difference; and the amount so recouped to capital from time to time shall be deemed to be received as capital repaid;
- (b) if the redemption value exceeds the purchase price, the amount of the difference shall be distributable as if it were income accruing from day to day over the period between the date of the purchase and the latest date on which the security can be repaid or redeemed; and the trustee may, by rateable instalments over the period, appropriate or raise out of the capital of the security or out of the capital of other assets subject to the same trusts the amounts required from time to time to be distributed as income; and, if the security is repaid or redeemed before the latest date on which the same can be repaid or redeemed, any remaining balance of the difference shall, on the repayment or redemption, immediately become distributable as if it were income then due and payable.

(4) Where the amount to be recouped to or deducted from capital in any year in accordance with paragraph (a) or (b) of subsection (3) is less than twenty dollars, it shall not be necessary for the trustee to comply with the provisions of that subsection.

**25. Investment in bearer securities.** [W.A. s. 21; N.Z. s. 9; Vic. s. 7; U.K. s. 7.] (1) A trustee may invest in or retain securities payable to bearer which, if not so payable, would have been authorized investments; but any securities retained or taken as an investment by a trustee (not being a trustee corporation) shall, until sold, be deposited by him with a bank for safe custody and collection of income.

(2) A direction that investments shall be retained or made in the name of a trustee shall, for the purposes of subsection (1), be deemed not to be an expression of a contrary intention within the meaning of subsection (1) of section 20.

(3) A trustee shall not be responsible for any loss incurred by reason of any deposit made pursuant to subsection (1) and any sum payable in respect of any such deposit or the collection of income shall be paid out of the income of the trust property.

**26. Power to retain investment which has ceased to be authorized.** [W.A. s. 20; Vic. s. 6; U.K. s. 4; N.Z. s. 8; Qld. s. 8 (3).] A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorized by the trust instrument or by this or any other Act.

*Division 2—Invariable Investment Provisions*

**27. Loans and investments by trustees not chargeable as breaches of trust.** [W.A. s. 22; Vic. s. 8; N.Z. s. 10; cf. U.K. s. 8; Qld. s. 8.]

(1) A trustee lending money on the security of any property on which he may properly 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, if it appears to the Court that—

- (a) in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be competent to value the property, being a person instructed and employed independently of any owner of the property, whether that person resided or carried on business in the locality where the property is situate or elsewhere;
- (b) the amount of the loan does not exceed two-thirds of the value of the property as stated in the report; and
- (c) the loan was made under the advice of the valuer expressed in the report.

(2) A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that, in making the loan, he dispensed either wholly or partly with the production or investigation of the lessor's title.

(3) 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 has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted.

(4) This section applies to transfers of existing securities as well as to new securities and to investments made before or after the commencement of this Act.

**28. Liability for loss by reason of improper investment.** [W.A. s. 23; Vic. s. 9; N.Z. s. 11; U.K. s. 9; Qld. s. 9.] (1) Where a trustee improperly advances trust money on a mortgage security that would at the time of investment be a proper investment in all respects for a smaller sum than is actually advanced thereon, the security shall be deemed an authorized investment for the smaller sum, and the trustee shall be liable to make good only the sum advanced in excess of the smaller sum with interest.

(2) This section applies to investments made before or after the commencement of this Act.

**29. Release of part of security.** [W.A. s. 24; Vic. s. 10; N.S.W. s. 20.] (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 receipt by the trustee of the whole of the purchase money thereof after deduction of the expenses of the sale, release that part from the mortgage.

(2) A subsequent purchaser of the released part of any property, or the Registrar or other person registering or certifying title, shall not be concerned to inquire whether the release was authorized by this section.

**30. Powers supplementary to powers of investment.** [W.A. s. 25; Vic. s. 11 (amended 1959); N.Z. s. 12; cf. U.K. s. 10.] (1) A trustee lending money on the security of any property on which he may lawfully lend—

(a) may lend for any period not exceeding ten years from the time when the loan was made; or

(b) may contract that money so lent shall not be called in during any period, not exceeding ten years, from the time when the loan was made.

(2) The terms upon which a loan mentioned in subsection (1) is made shall, in addition to such other provisions as the trustee may think proper, include provisions giving effect to the following, namely, that—

(a) interest shall be paid within a specified time, not exceeding thirty days after every half-yearly or other day on which it becomes due;

(b) the borrower shall maintain and protect the property, and keep all buildings, if any, erected thereon insured against loss or damage by fire and by storm and tempest to the full insurable value thereof; and

(c) if the borrower fails to comply with any term of the mortgage, the whole of the moneys secured by the mortgage shall immediately become due and payable.

(3) Where any securities of a company are subject to a trust, the trustees may—

(a) concur in any scheme or arrangement—

(i) for, or arising out of, the reconstruction, reduction of capital or liquidation of, or the issue of shares by, the company;

(ii) for the sale of all or any part of the property and undertaking of the company to another company;

(iii) for the amalgamation of the company with another company; or

(iv) for the release, modification or variation of any rights, privileges or liabilities attached to the securities or any of them; and

(b) accept or carry out any proposal made in writing by or on behalf of another company for the purchase by that other company of any securities in the firstmentioned company, in consideration of the allotment of securities in that other company, whether with or without any other consideration, where—

(i) the proposal is conditional upon the holders of a proportion (being not less than seventy-five per centum in value) of such of the securities in the firstmentioned company as have not already been acquired by that other company agreeing to deal with those securities in accordance with the proposal; and

- (ii) a sufficient number of the holders of the securities in question (including the trustees) agree in writing to deal with the shares in accordance with the proposal,

in like manner as if they were entitled to such securities beneficially, with power to accept any securities or other property of any denomination or description in addition to, or in lieu of, or in exchange for, all or any of the firstmentioned securities; and the trustees shall not be responsible for any loss occasioned by any act or thing so done in good faith; and may retain any securities or other property accepted as in this subsection provided for any period for which they could have properly retained the original securities.

(4) If any conditional or preferential right to subscribe for any securities in any company is offered to trustees in respect of any holding in that company or any other company, the trustees may, as to all or any of those securities—

- (a) exercise the right and apply capital moneys subject to the trust in payment of the consideration, and retain the securities subscribed for during any period during which they could properly retain the holding in respect of which the right to subscribe was offered; or
- (b) renounce the right; or
- (c) assign for the best consideration that can reasonably be obtained (which consideration shall be held as capital money of the trust) the benefit of the right, or the title thereto, to any person, including any beneficiary under the trust,

without being responsible for any loss occasioned by any act or thing so done by them in good faith.

(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 instrument (if any) creating the trust.

(6) Where the loan referred to in subsections (1) and (2) is made under the order of the Court, the powers conferred by those subsections apply only if and as far as the Court may by order direct.

#### PART IV—GENERAL POWERS OF TRUSTEES

**31. Application of Part.** [Cf. S.L.A. s. 53; W.A. s. 28; Vic. s. 14; N.S.W. s. 27.] (1) Except where otherwise provided in this Part, the provisions of this Part shall apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust.

(2) The powers conferred on a trustee by this Part are exercisable by him notwithstanding any lapse of time, or that all the beneficiaries are absolutely entitled to the trust property and are not under a disability, except so far as such powers are expressly revoked by all such beneficiaries by notice in writing to the trustee.

(3) A statutory trustee shall not, except with the sanction of the Court, exercise any of the powers conferred by subsection (1) of section 32 or by section 45.

**32. Powers to sell, exchange, partition, postpone, lease, etc.** [W.A. s. 27; U.K. s. 25; Vic. ss. 14, 19; N.S.W. s. 27B; N.Z. s. 14; cf. S.L.A. ss. 10–26; T.C. s. 28 (1).] (1) Subject to the provisions of this section, every trustee, in respect of any trust property, may—

- (a) sell the property or any part of the property;
- (b) dispose of the property by way of exchange for other property in the State of a like nature and a like or better tenure, or, where the property consists of an undivided share, concur in the partition of the property in which the share is held, and give or take any property by way of equality of exchange or partition;
- (c) postpone the sale, calling in, and conversion of any property that he has a duty to sell, other than property that is of a wasting, speculative or reversionary nature;
- (d) let or sublet the property at a reasonable rent for any term not exceeding one year, or from year to year, or for a weekly, monthly, or other like tenancy or at will; or enter into any sharefarming agreement with respect to the property on reasonable terms for any period not exceeding one year; and renew any such lease or tenancy or sharefarming agreement;
- (e) grant a lease or sublease of the property for any term not exceeding—
  - (i) in the case of a building lease, thirty years; or
  - (ii) in the case of any other lease (including a mining lease), twenty-one years,
 to take effect in possession within one year next after the date of the grant of the lease or sublease at a reasonable rent, with or without a fine, premium or foregift, any of which if taken shall be deemed to be part of and an accretion to the rental, and shall, as between the persons beneficially entitled to the rental, be considered as accruing from day to day and be apportioned over the term of the lease or sublease;
- (f) at any time during the currency of a lease of the property, reduce the rent or otherwise vary or modify the terms thereof, or accept, or concur or join with any other person in accepting, the surrender of any lease.

(2) Any trustee may, on such conditions as he thinks proper, rescind, cancel, modify or vary any contract or agreement for the sale and purchase of any land, or agree to do so, or compromise with or make allowances to any person with whom such a contract or agreement has been made, or who is the assignee thereof in respect of any unpaid purchase money secured on mortgage or otherwise; and without prejudice to the generality of this subsection, a trustee may, by writing, waive or vary any right exercisable by him that arises from a failure to comply at or within the proper time with any term of any agreement for sale, mortgage, lease, or other contract.

(3) In exercising any power of leasing or subleasing conferred by this section or by the instrument (if any) creating the trust, a trustee may—

- (a) grant to the lessee or sublessee a right of renewal for one or more terms, at a rent to be fixed or made ascertainable in a manner specified in the original lease or the original

sublease, but so that the aggregate duration of the original and of the renewal terms shall not exceed the maximum single term that could be granted in the exercise of the power;

- (b) grant a lease with an optional or compulsory purchasing clause; or
- (c) grant to the lessee or sublessee a right to claim compensation for improvements made or to be made by him in, upon or about the property which is leased or subleased.

(4) Where there is a power (whether statutory or otherwise) to postpone the sale of any land or authorized investment that a trustee has a duty to sell by reason only of a trust or direction for sale, then, subject to any express direction to the contrary in the instrument (if any) creating the trust, the trustee shall not be in any way liable merely for postponing the sale in the exercise of his discretion for an indefinite and unlimited period, whether or not that period exceeds the period during which the trust or direction for sale remains valid; nor shall a purchaser of the land or authorized investment be in any case concerned with any directions respecting a sale; but nothing in this subsection applies to any property of a wasting or speculative nature.

**33. Miscellaneous powers in respect of property.** [W.A. ss. 26, 30 (as amended 1968); N.S.W. s. 23; N.Z. s. 15.] (1) Every trustee, in respect of any trust property, may—

- (a) expend money (including capital money) subject to the same trusts for the repair, maintenance, upkeep or renovation of the property, whether or not the work is necessary for the purpose of salvage of the property;
- (b) expend money (including capital money) subject to the same trusts, but not, except with the sanction of the Court, exceeding ten thousand dollars in the improvement or development of the property;
- (c) expend money (including capital money) subject to the same trusts, in payment of calls on shares subject to those trusts;
- (d) pay out of money (including capital money) subject to the same trusts any rates, premiums, taxes, assessments, insurance premiums and other outgoings in respect of the property;
- (e) where the property is land, subdivide or apply for approval to subdivide the land into blocks and for that purpose construct and dedicate all such roads, streets, access ways, service lanes and footpaths and make all such reserves, and do all such other things and pay all such money (including capital money), as he thinks necessary or as are required by, or under, any Act, ordinance or by-law relating to subdivisions;
- (f) pay out of money (including capital money) subject to the same trusts such sum as he thinks reasonable by way of expenditure upon or contribution toward the construction and maintenance of such roads, streets, access ways, service lanes, and footpaths, and such sewerage, water, electricity, drainage and other works as are in the opinion of the trustee likely to be beneficial to the property, notwithstanding that they are intended to be constructed wholly or partly on land not subject to the same trusts and dedicate land subject to the same trusts as roads, streets, accessways, service lanes and footpaths where in his opinion it is likely to be beneficial to the property;

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- (g) subject to this Act and to any direction of the Court, apportion any payment or expenditure made in pursuance of the preceding paragraphs of this subsection between capital and income or otherwise among the persons entitled thereto in such manner as he considers equitable, with power, where the whole or part of the payment or expenditure is made out of capital moneys, to recoup capital from subsequent income, if that course would be equitable in all the circumstances;
- (h) grant easements and *profits à prendre* and enter into party wall agreements and agreements that relate to fencing, and execute all necessary documents to give effect thereto;
- (i) as mortgagor or mortgagee, agree to the renewal, extension or variation of the mortgage for such period and on such terms and conditions as he thinks fit; but—
- (i) the powers conferred by this paragraph may be exercised by a trustee as mortgagor for the purpose of raising additional money on the security of a mortgage of any property, where the trustee would have power under section 45 to raise money by a mortgage of the property, and not otherwise;
  - (ii) nothing in this paragraph authorizes any trustee to advance money on the security of any mortgage that would not be an authorized investment in respect of the amount advanced;
  - (iii) any variation of a mortgage that would require the trustee to release part of the security shall comply with the requirements of section 29; and
  - (iv) the powers conferred by this paragraph shall not be exercised in relation to a mortgage made under the powers conferred by section 30, so as to exclude or vary any of the provisions inserted in the mortgage pursuant to subsection (2) of that section;
- (j) make such inquiries, by way of advertisement or otherwise, as he thinks necessary for the purpose of ascertaining the next-of-kin or beneficiaries;
- (k) where the property includes a life policy and there is no money or insufficient money available for the payment of premiums on the policy, surrender the policy for money or accept instead of the policy a fully paid up policy or vary the terms of the policy in such manner as the trustee thinks fit;
- (l) appropriate any part of the property in or towards satisfaction of any legacy payable thereout or in or towards satisfaction of any share of the trust property (whether settled, contingent or absolute) to which any person is entitled, and for that purpose value the whole or any part of the property in accordance with section 51; but—
- (i) the appropriation shall not be made so as to affect adversely any specific gift; and
  - (ii) before any such appropriation is effectual, notice thereof shall be given to all persons not under a disability who are interested in the appropriation, and to the parent or guardian of any infant who is interested in the appropriation,



and to the person having the care and management of the estate of any person who is not of full mental capacity, and any such person may within one month after receipt of the notice or, upon his application to the Court within that month, within such extended period as the Court may allow, apply to the Court to vary the appropriation, and the appropriation shall be conclusive save as varied by the Court;

- (m) where provision is made in any instrument creating a trust for payment of an annuity or other periodic payment, and notwithstanding that the annuity or payment may by the instrument be charged upon the trust property or upon any part thereof, set aside and appropriate out of property available for payment of the annuity and invest a sum sufficient in the opinion of the trustee at the time of appropriation to provide out of the income thereof the amount required to pay the annuity or periodic payment, and so that after the appropriation shall have been made—
  - (i) the annuitant shall have the same right of recourse to the capital and income of the appropriated sum as he would have had against the trust property if no appropriation had been made; and
  - (ii) the trustee may forthwith distribute the residue of the trust property and the income thereof (which residue and income shall no longer be liable for the annuity) in accordance with the trusts declared of and concerning the same; and
- (n) do or omit all acts and things, and execute all instruments necessary to carry into effect the powers and authorities given by this Act or by or under the instrument creating the trust.

(2) Nothing in paragraph (1) of subsection (1) shall be read as requiring a trustee to give to himself, in some other capacity, notice of an appropriation; but, where a trustee would, but for this subsection, be obliged to give to himself such a notice, the appropriation is not effectual until it has been approved by all the beneficiaries being persons not under a disability, or by the Court on the *ex parte* application of the trustee or otherwise.

(3) Any notice which is to be served in accordance with paragraph (1) of subsection (1) may be served—

- (a) by delivering it to the person for whom it is intended or by sending it by prepaid registered letter addressed to that person at his usual or last known place of abode or business; or
- (b) in such other manner as may be directed by the Court.

(4) Where a notice is sent by post as provided by this section, it shall be deemed to be served at the time at which the letter would have been delivered in the ordinary course of post.

(5) Where a trustee desires to distribute, under the provisions of subparagraph (ii) of paragraph (m) of subsection (1), any land subject to the provisions of the *Real Property Act* 1861–1972, or any other Act, he shall in writing notify the Registrar or other person (if any) having the duty or function of registering or recording dealings under such Act, that the land is, by reason of an appropriation made in pursuance of the

said sub-paragraph, distributable, and the Registrar or such other person shall not be concerned to make any inquiry as to the sufficiency of the appropriated sum.

**34. Power of trustee to sell by auction, etc.** [W.A. s. 31; N.Z. s. 16; Vic. s. 13; N.S.W. s. 26; U.K. s. 12; Qld. s. 14.] (1) A trustee may sell or concur with any other person in selling all or any part of the trust property, either subject to prior encumbrances or not, and either together or in lots, by public auction, by public tender or by private contract, subject to any such conditions respecting title or evidence of title or other matters as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to resell, without being answerable for any loss.

(2) A trust or power to sell or dispose of land includes a trust or power to sell or dispose of part thereof, whether the division is horizontal, vertical or made in any other way; and also includes a trust or power to sell or dispose of any building, fixture, timber or other thing affixed to the soil apart and separately from the land itself.

(3) If a trustee joins with any other person in selling trust property and other property, 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; but a contravention of this subsection does not invalidate and shall not be deemed to have invalidated any instrument intended to affect or evidence the title to the trust property, and no person being a purchaser, lessee, mortgagee, or other person who, in good faith and for valuable consideration, acquires the trust property or an interest in it or a charge over it, and neither the Registrar of Titles nor any other person registering or certifying title, shall be affected by notice of, or be concerned to inquire whether there has been, a contravention of this subsection.

**35. Power to sell subject to depreciatory conditions.** [W.A. s. 32; Vic. s. 15; N.Z. s. 18; U.K. s. 13; N.S.W. s. 30; Qld. s. 15.] (1) A sale by a trustee shall not be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

(2) A sale by a trustee shall not, after the execution of the conveyance or transfer, be impeached as against the purchaser, upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

(3) A purchaser, upon any sale by a trustee, shall not be at liberty to make any objection against the title upon any of the grounds in this section mentioned.

**36. Mortgage on sale of land.** [W.A. s. 33; cf. Vic. s. 16.] (1) Where a trustee sells land for an estate in fee simple, the trustee may, where the proceeds are liable to be invested, contract that the payment of any part, not exceeding two-thirds of the purchase money shall be secured by a first legal or first statutory mortgage of the land sold, with or without the security of any other property, and the mortgage shall,

if any buildings or other improvements are comprised in the mortgage, contain a covenant by the mortgagor to keep them insured against loss or damage by fire and by storm and tempest to their full insurable value.

(2) The trustee shall not be bound to obtain any report as to the value of the land or other property to be comprised in such a mortgage as is mentioned in subsection (1), or any advice as to the making of the loan, and shall not be liable for any loss that may be incurred by reason only of the security being insufficient at the date of the mortgage.

(3) Where the sale referred to in subsection (1) is made under the order of the Court, the powers conferred by that subsection shall apply only if and so far as the Court may by order direct.

**37. Deferred payment on sale of property.** [W.A. s. 34; Vic. s. 17; N.Z. s. 17; N.S.W. s. 28.] (1) A sale of property by a trustee, in exercise of any power vested in him in that behalf by the instrument creating the trust or by or under this Act or any other enactment, may be on terms of deferred payment.

(2) The terms of deferred payment may provide that the purchase money and interest (if any) shall be paid by instalments.

(3) The terms upon which property is sold shall, in addition to such other provisions as the trustee may think proper, include provisions giving effect to the following, namely that—

- (a) the part of the purchase money to be paid by deposit shall not be less than the sum which a person acting with prudence would, if the property were his own, have accepted in the circumstances in order to sell the property to the best advantage, and in any case shall not be less than one-tenth of the purchase money;
- (b) the balance of the purchase money shall be payable by such instalments and shall bear interest payable half-yearly or oftener on the amount from time to time unpaid at such rate as a person acting with prudence would, if the property were his own, have accepted in the circumstances in order to sell the property to the best advantage, and in any case the whole purchase money shall be payable within a period not exceeding ten years from the date of sale;
- (c) if any instalment or interest or part thereof is in arrear and unpaid for six months, or for such less period as may be specified, the whole of the purchase money shall become due and payable; and
- (d) the purchaser shall maintain and protect the property, and, in the case of land, keep all buildings (if any) thereon insured against loss or damage by fire and by storm and tempest to their full insurable value.

(4) Notwithstanding that the property has been sold on terms of deferred payment, the trustee may, at any time after one-third of the purchase money has been paid, convey the property and take a mortgage to secure payment of the balance of the purchase money and interest, with or without the security of any other property.

(5) Whether the sale is made under the order of the Court or otherwise, the Court may make such order as it thinks fit as to the terms of deferred payment.

(6) A trustee selling property on terms authorized by this section or by any order of the Court shall not be affected by section 21 or section 27 in respect of so much of the purchase money as is payable under an agreement for sale or is secured by a mortgage, and shall not be liable for any loss that may be incurred by reason only of the security being insufficient at the date of the agreement or mortgage.

(7) For the purposes of any consent or direction required by the instrument (if any) creating the trust or by statute, a trustee selling property on terms of deferred payment shall be deemed not to be lending money or investing trust funds.

**38. Surrender of onerous leases or property.** [W.A. s. 35; N.S.W. s. 35.] (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; and 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 has acted bona fide and on the advice of a registered valuer, whom he reasonably believed to be competent, instructed and employed independently of the lessor, whether the valuer carried on business in the locality where the property is situate or elsewhere.

(2) Where a freehold is vested in a trustee and the property is of so onerous a nature that it would not be in the interests of the beneficiaries to retain the property, if the Crown agrees to accept the surrender of the freehold, the trustee may surrender, or concur in surrendering, it to the Crown; and 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 property was not of such a nature, if the trustee has acted bona fide and on the advice of a registered valuer, whom he reasonably believed to be competent, whether that valuer carried on business in the locality where the property is situate or elsewhere.

(3) A subsequent purchaser or the Registrar or other person registering or certifying title shall not be concerned to inquire whether a surrender was authorized by this section.

**39. Power to renew leases.** [W.A. s. 36; cf. N.S.W. s. 37; Qld. s. 18.] (1) A trustee of any leasehold for life or lives or years which is renewable under any covenant or contract or by custom or usual practice may, if he thinks fit, and shall, if thereto required by any person having any beneficial interest, present or future or contingent, in the leasehold, use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the agreed or reasonable terms, and for that purpose may from time to time make or concur in making a surrender of the lease for the time being subsisting, and do all such other acts as are requisite; but where, by the terms of the instrument (if any) creating the trust, the person in possession for his 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 does not apply unless the consent in writing of that person is obtained to the renewal.

(2) A trustee obtaining a renewal of a lease under the powers conferred by this section or otherwise may pay or apply capital money subject to the trust, for the purpose of obtaining the renewal.

**40. Power to purchase equity of redemption in lieu of foreclosure.** [W.A. s. 37; cf. N.S.W. s. 32A.] A trustee may, in lieu of proceeding to foreclosure, purchase the equity of redemption of land the subject of a mortgage held by the trustee under which default has been made where the moneys expended in that purchase are subject to the same trusts as the mortgage debt; but in no case shall the moneys paid by way of consideration for such purchase exceed five per centum of the amount due under the mortgage.

**41. Release of equity of redemption in discharge of mortgage debt.** [W.A. s. 39; cf. N.S.W. s. 34.] (1) Where an equity of 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 thereof; and 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 thereof discharged, if the trustee has acted bona fide and on the advice of a registered valuer, whom he reasonably believed to be competent, instructed and employed independently of the mortgagee, whether the valuer carried on business in the locality where the property is situate or elsewhere.

(2) A subsequent purchaser or the Registrar or other person registering or certifying title shall not be concerned to inquire whether a release was authorized by this section.

**42. Application of income by trustee-mortgagee in possession.** [W.A. s. 40; cf. N.S.W. s. 39A.] (1) Where a trustee is entitled, whether severally or as a co-mortgagee, to a debt secured by a mortgage of land in trust as to the whole or part of that debt for persons by way of succession, and the trustee is at the date of commencement of this Act, or at any time after that date becomes, mortgagee in possession of the mortgaged land, the trustee shall apply the net income of the mortgaged land received by him after that date or after he becomes mortgagee in possession,—

- (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 on the mortgaged property; and
- (c) in keeping down all annual sums or other payments and the interest on all principal sums having priority to the mortgage in right whereof he is in possession,

and subject to the rights of the mortgagor, the trustee shall hold the residue of the income so received by him upon the trusts to which the mortgage debt is subject.

(2) The rents, taxes, outgoings, premiums, costs, annual sums, payments and interest to be discharged, kept down and paid, pursuant to subsection (1), shall be those accruing due—

- (a) after the date of the commencement of this Act, where the trustee is in possession of the mortgaged land at that date; and

- (b) after the date of possession by the trustee, where the entry into possession is after the date of commencement of this Act,

but if at the date of commencement of this Act, or on the date of possession by the trustee, as the case may be, any rents, taxes, rates, outgoing, annual sums, payments, interest or premiums mentioned in paragraph (a), (b) or (c) of subsection (1) were or are due and unpaid, and such of those rents, taxes, rates, outgoing, annual sums, payments, and premiums as are periodic payments were payable wholly or in part in respect of any period subsequent to the date of commencement or to the date of possession, as the case may be, then the lastmentioned rents, taxes, rates, outgoing, annual sums, payments, and premiums shall, for the purpose of this section, be considered as accruing from day to day and shall be apportionable in respect of time accordingly.

(3) On the recovery of the moneys 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 the payments specified in paragraph (a), (b) and (c) of 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 payable without interest thereon and the amount received by the trustee shall be apportioned accordingly.

(4) Notwithstanding anything in this section contained, the trustee may, if in the administration of the trust he thinks it necessary so to do, apply income of the mortgaged property received by him after the date of commencement of this Act in payment of any rents, taxes, rates, outgoing, premiums, costs, annual sums, payments and interest, affecting the mortgaged land other than those specified in subsection (2); but the person entitled to the interest on the mortgage debt shall be entitled to recoupment out of the capital of the mortgage debt of all payments made by the trustee under the authority conferred by this subsection.

**43. Power of trustee to give receipts.** [Qld. s. 19; cf. W.A. s. 41; U.K. s. 14; Vic. s. 18.] The receipt in writing of a trustee or of any person thereto authorized by him in writing, or, where there are several trustees, of any person or of any one or more of such trustees thereto respectively authorized by the trustees in writing, for any money, securities, or other personal property or effects, payable, transferable, or deliverable to him or them, as the case may be, under any trust or power is a sufficient discharge for the same, and effectually exonerates the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

**44. Power to compound liabilities.** [W.A. s. 42; cf. Vic. s. 19; N.Z. s. 20; U.K. s. 15; N.S.W. s. 40; Qld. s. 20.] A trustee may, if and as he thinks fit,—

- (a) accept any property, real or personal, before the time at which it is made transferable or payable; or
- (b) sever and apportion any blended trust funds or property; or
- (c) pay or allow any debt or claim on any evidence that he thinks sufficient; or

- (d) accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed; or
- (e) allow any time for payment of any debt; or
- (f) compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the trust or to the trust property,

and for any of those purposes may enter into, give, execute, and do such arrangements, instruments of composition or arrangement, releases, and other things as to him seem expedient, without being responsible for any loss occasioned by any act or thing so done by him in good faith.

**45. Power to raise money by sale or mortgage.** [W.A. s. 43; N.Z. s. 21; Vic. s. 20; U.K. s. 16; N.S.W. s. 38.] Where a trustee is authorized by the instrument (if any) creating the trust or by or under this Act or any other Act or by law to expend, pay or apply capital money subject to the trust for any purpose or in any manner, he has and shall be deemed always to have had 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; and where a trustee, in the exercise of his powers in that behalf, purchases any property for the trust, he has and shall be deemed always to have had power to make the purchase on terms of deferred payment or on mortgage of that property.

**46. Protection to purchasers and mortgagees dealing with trustees.** [Cf. W.A. s. 44; N.Z. s. 22; Vic. s. 21; U.K. s. 17; N.S.W. s. 39.] A purchaser or mortgagee paying or advancing money to the trustee on a sale or mortgage of trust property shall not be concerned to see that such money is wanted, or that no more than is wanted is raised or otherwise as to the application thereof, or that the trustee has power to effect such sale or mortgage.

**47. Insurance.** [Cf. N.S.W. s. 41; U.K. s. 19; Vic. s. 23; W.A. s. 46; Qld. s. 17.] (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 were acting for himself.

(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) Subject to any direction expressed in the instrument (if any) creating the trust or to any direction of the Court, the trustee may, as he thinks fit, pay the premiums out of—

- (a) the income of the property concerned; or
- (b) the income of any other property subject to the same trusts; or
- (c) any capital money subject to the same trusts; or
- (d) any one or more of (a), (b) or (c) in such proportions as the trustee considers equitable.

**48. Application of insurance money.** [Cf. N.S.W. s. 42; W.A. s. 47; Vic. s. 24; U.K. s. 20.] (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) The money receivable shall be held upon trusts corresponding as nearly as may be with the trusts affecting the property in respect of which it was payable.

(3) The money receivable or any part thereof may also be applied by the trustee or, if in Court, under the direction of the Court, in rebuilding, reinstating, replacing, or repairing the property lost or damaged.

(4) Any application by the trustees under subsection (3) shall be subject to the consent of any person whose consent is required by the instrument (if any) creating the trust to the investment of money subject to the trust.

(5) Nothing in this section shall prejudice or affect the right of any person to require the money or any part thereof to be applied in rebuilding, reinstating or repairing the property lost or damaged.

(6) Nothing in this section shall prejudice or affect the rights of any mortgagee lessor or lessee, whether under any statute or otherwise.

(7) This section applies only if and as far as a contrary intention is not expressed in the instrument (if any) creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(8) This section applies to trusts and to policies created or effected either before or after the commencement of this Act, but only to money received after the commencement of this Act.

**49. Deposit of documents for safe custody.** [W.A. s. 48; N.Z. s. 26; U.K. s. 21; Vic. s. 25 (1); N.S.W. s. 50.] Subject to the provisions of section 25, a trustee may deposit any document held by him relating to the trust, or to the trust property, with any bank or corporation whose business includes the undertaking of the safe custody of documents, and any sum payable in respect of any such deposit shall be paid out of the income of the trust property, and so far as there is no available income out of the capital of the trust property.

**50. Reversionary interests.** [W.A. s. 49; N.Z. s. 27; Vic. s. 26; N.S.W. s. 40; U.K. s. 22.] (1) Where trust property includes any share or interest in property not vested in the trustee, or the proceeds of sale of any such property, or any other thing in action, the trustee, on its or their falling into possession or becoming payable or transferable, may—

- (a) agree or ascertain the amount or value thereof or any part thereof in such manner as he thinks fit;
- (b) accept in or towards satisfaction thereof, at the market or current value, or upon any valuation or estimate of value that he may think fit, any authorized investments;
- (c) allow any deductions for duties, costs, charges, and expenses that he thinks proper or reasonable; and
- (d) execute any release in respect thereof, so as effectually to discharge all accountable parties from all liability in respect of any matter coming within the scope of the release,

without being responsible for any loss occasioned by any act or thing so done by him in good faith.



(2) The trustee shall not be under any obligation and shall not be chargeable with any breach of trust by reason of any omission—

- (a) to give any notice in respect of, or apply for any charging or other like order upon, any securities or other property out of or on which the share or interest or other thing in action mentioned in subsection (1) is derived, payable or charged; or
- (b) to take any proceedings on account of any act, default or neglect on the part of the persons in whom the securities or other property mentioned in paragraph (a) or any of them or any part of them are for the time being, or had at any time been, vested,

unless and until required in writing so to do by some person, or the guardian of some person, beneficially interested under the trust, and unless also due provision is made to his satisfaction for payment of the costs of any proceedings required to be taken.

(3) Nothing in subsection (2) relieves the trustee of the obligation to get in and obtain payment or transfer of the share or interest or other thing in action upon its falling into possession.

**51. Valuations.** [W.A. s. 50; N.Z. s. 28; Vic. s. 26; N.S.W. s. 52; U.K. s. 22.] (1) A trustee may, for the purpose of giving effect to the trust, or any of the provisions of the instrument (if any) creating the trust or of this Act or any other Act from time to time ascertain and fix the value of any trust property, or of any property which he is authorized to purchase or otherwise acquire, in such manner as he thinks proper; and where the trustee is not personally qualified to ascertain the value of any property he shall consult a duly qualified person (whether employed by him or not) as to that value; but the trustee shall not be bound to accept any valuation made by any person whom the trustee may consult.

(2) Any valuation made by the trustee in good faith under this section is binding on all persons beneficially interested under the trust.

**52. Audit.** [W.A. s. 51; Vic. s. 27; N.S.W. s. 51; U.K. s. 22 (4).] (1) A trustee may, in his absolute discretion, from time to time, cause the accounts of the trust property to be examined or audited by a public accountant, and shall for that purpose produce such vouchers and give such information to that person as he may require.

(2) The costs of the examination or audit, including the fee of the person making the examination or audit, shall be charged against the capital or income of the trust property, or partly in one way and partly in the other, as the trustee may in his absolute discretion think fit, but, in default of any direction by the trustee to the contrary in any special case, costs attributable to capital shall be borne by capital and those attributable to income by income.

(3) Where the trustee or one of the trustees is the Public Curator or a trustee corporation, nothing in this section authorizes, except in the case of a business forming part of the trust property, any costs or fee to be paid out of, or borne by, the capital or income of the trust property, unless the Court approves of the costs or fee being so paid out or borne.

**53. Power to concur with others.** [W.A. s. 52; N.Z. s. 30; U.K. s. 24; N.S.W. s. 56; Vic. s. 29.] Where trust property includes an undivided share in any property, the trustee may (without prejudice to any trust or power in relation to the entirety of the property) execute or exercise any trust or power vested in him in relation to that share in conjunction with the persons entitled to, or having power in that behalf over, the other share or shares, and notwithstanding that the trustee or any one or more of several trustees may be entitled to or interested in any such share, either in his or their own right or in a fiduciary capacity.

**54. Power to employ agents.** [W.A. s. 53; N.Z. s. 29; cf. Vic. s. 28; N.S.W. ss. 53 and 55; U.K. s. 23.] (1) A trustee may, instead of acting personally, employ and pay an agent, whether a solicitor, accountant, bank, trustee corporation, stockbroker or other person, to transact any business or do any act required to be transacted or done in the execution of the trust or the administration of the trust property, including the receipt and payment of money, and the keeping and audit of trust accounts, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent employed in good faith and without negligence.

(2) A trustee may appoint any person to act as his agent or attorney for the purpose of selling, converting, collecting, getting in, and executing and perfecting assurances of, or managing or cultivating, or otherwise administering any property real or personal, movable or immovable, subject to the trust in any place outside the State, or executing or exercising any discretion or trust or power vested in him in relation to any such property, with such ancillary powers, and with and subject to such provisions and restrictions, as he may think fit, including a power to appoint substitutes, and shall not, by reason only of his having made any such appointment, be responsible for any loss arising thereby.

(3) Without limiting the generality of the powers conferred by subsections (1) and (2), a trustee may—

(a) appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed or instrument having in the body thereof or endorsed thereon a receipt for the money or valuable consideration or property, the deed or instrument being executed, or the endorsed receipt being signed, by the person entitled to give a receipt for that consideration; or

(b) appoint a bank or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of insurance, by permitting the bank or solicitor to have the custody of and to produce the policy of insurance with a receipt signed by the trustee,

and the production, by the solicitor, of any such deed or instrument as is mentioned in paragraph (a) shall have the same validity and effect as if the person appointing the solicitor had not been a trustee.

(4) A trustee shall not be chargeable with a breach of trust, by reason only of his having made, or concurred in making, any appointment such as is mentioned in subsection (3); but nothing in that subsection

exempts a trustee from any liability that he would have incurred if this Act and any enactment replaced by this Act had not been passed, where he permits any money, valuable consideration or property therein mentioned to remain in the hands or under the control of the bank or solicitor for a longer period than is reasonably necessary to enable the bank or solicitor, as the case may be, to pay or transfer it to the trustee.

(5) Subsections (3) and (4) apply whether the money or valuable consideration or property was or is received before or after the commencement of this Act.

**55. Protection of bankers.** [W.A. s. 101; N.S.W. s. 54; Vic. s. 25 (2); cf. Qld. 1906, s. 6.] (1) Where there are two or more trustees of a trust and the trustees by writing under their hands authorize a banker—

- (a) to pay bills of exchange drawn upon the banking account of the trustees by the trustee or trustees named in that behalf in the authority; or
- (b) to recognize as a valid indorsement upon any bill of exchange payable to the order of the trustees the indorsement thereon by the trustee or trustees named in that behalf in the authority; or
- (c) to pay money out of any account of the trust in a savings bank, on presentation of withdrawal forms signed in the manner specified in the authority,

the banker acting in pursuance of that 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 instrument (if any) by which the trust was created did not contain any express power to give such an authority.

(2) The protection afforded to bankers by subsection (1) does not apply in the case of anything done by a banker, in pursuance of an authority given under that subsection, after the banker has received notice in writing of the revocation, by death or otherwise, of the authority.

(3) This section does not affect any question of the liability of any trustee for breach of trust in authorizing a banker as provided by subsection (1).

(4) Nothing in this section or in any rule of law prevents trustees opening a bank account named as an imprest account and authorizing any one or more of their number or any other person or persons to operate upon the imprest account.

(5) In this section “bill of exchange” has the same meaning as in the *Bills of Exchange Act 1909–1971* of the Commonwealth, and any Act passed in substitution for or amendment thereof.

**56. Power to delegate trusts.** [Cf. W.A. s. 54; N.Z. s. 31; Vic. s. 30; U.K. s. 25; N.S.W. s. 64; Qld. 1906, s. 4.] (1) A trustee who for the time being is out of the State or is about to depart therefrom, or who is, or may be about to become, by reason of physical infirmity, temporarily incapable of performing all his duties as a trustee may, subject to the provisions of this section, and notwithstanding any rule of law or equity to the contrary, by power of attorney executed as a deed, delegate to any person resident in the State the execution or exercise during his absence from the State or during his incapacity, as the case may be, of all or any trusts, powers, authorities, and discretions vested

in him as such trustee, whether alone or jointly with any other person or persons; but a person being the only other co-trustee and not being a trustee corporation shall not be appointed to be an attorney under this subsection.

(2) Where any delegation has under this section been duly made to and accepted by any person and is for the time being in operation, that person has, within the scope of the delegation, the same trusts, powers, authorities, discretions, liabilities, and responsibilities (except the power of delegation conferred by this section) as he would have if he were then the trustee.

(3) Every trustee shall be liable for the acts and defaults of every such delegate as if they were his own acts and defaults.

(4) All jurisdictions and powers of any Court apply to the donee of a power of attorney given under this section in the same manner, so far as respects the execution of the trust or the administration of the estate to which the power of attorney relates, as if the donee were acting in relation to the trust or estate in the same capacity as the donor of the power.

(5) A power of attorney given under this section does not come into operation unless and until the donor is out of the State or is incapable of performing all his duties as a trustee, and is revoked by his return or by his recovery of that capacity, as the case may be.

(6) In favour of any person dealing with the donee of a power of attorney given under this section, any act done or instrument executed by the donee, is, notwithstanding that the power has never come into operation or has been revoked, whether by the act of the donor of the power or by operation of law, as valid and effectual as if the power had come into operation and remained unrevoked at the time when the act was done or the instrument executed, unless that person had at that time actual notice that the power had never come into operation or of the revocation of the power.

(7) A statutory declaration by the donee of a power of attorney given under this section relating to any trust or estate that the power has come into operation, or that in any transaction the donee is acting in the execution of the trust or the administration of the estate, is, in favour of a person dealing with the donee of the power, conclusive evidence of that fact.

(8) The fact that it appears from any power of attorney given under this section, or from any evidence required for the purposes of any power of attorney or otherwise, that in any transaction the donee of the power is acting in the execution of a trust shall not affect with notice of the trust any person dealing in good faith with the donee.

(9) Where it is intended that the donee of a power of attorney given under this section shall be entitled to transfer, or otherwise deal with, land under the operation of the *Real Property Act* 1861-1972, the power of attorney shall be in the form, and executed and attested in the manner prescribed by that Act.

**57. Power to carry on business.** [Cf. W.A. s. 55; N.Z. s. 32.]

(1) Subject to the provisions of any other Act and of the instrument (if any) creating the trust, where at the commencement of the trust the

trust property or any part of it was being used by the settlor in carrying on any business, whether alone or in partnership, the trustee may continue to carry on that business for any one or more of the following periods, namely—

- (a) two years from the commencement of the trust;
- (b) such period as may be necessary for the winding up of the business; or
- (c) such further period or periods as the Court may approve.

(2) In the exercise of the powers conferred by this section or by the instrument (if any) creating the trust, a trustee may—

- (a) employ any part of the trust property which is subject to the same trusts;
- (b) from time to time increase or diminish the part of the trust property employed as provided by paragraph (a);
- (c) purchase stock, machinery, implements, and chattels for the purpose of the business referred to in subsection (1);
- (d) employ such managers, agents, servants, clerks, workmen and others as he thinks fit;
- (e) at any time enter into a partnership agreement to take the place of any partnership agreement subsisting immediately before the commencement of the trust or at any time thereafter and notwithstanding that the trustee was a partner of the settlor in his own right; and
- (f) enter into share-farming agreements.

(3) Application to the Court for leave to carry on a business may be made by the trustee or any person beneficially interested in the estate at any time, whether the business has been carried on before or after the commencement of this Act and whether or not any previous authority to carry on the business has expired; and the Court may make such an order, and may make such order retrospective to any particular date, or may order that the business be not carried on, or be carried on subject to conditions, or may make such other order as, in the circumstances, it thinks fit.

(4) Nothing in this section affects any other authority to do the acts thereby authorized to be done.

(5) Where a trustee is in any manner interested or concerned in a trade or business, he may make such subscriptions as it would be prudent for him to make, if he were acting for himself, out of the income of the assets affected, to any fund created for objects or purposes in support of any trade or business of a like nature and subscribed to by other persons engaged in a like trade or business.

**58. Power to convert business into a company.** [W.A. s. 56; cf. N.Z. s. 33.] (1) Subject to the provisions of the instrument (if any) creating the trust, a trustee may at any time, at the expense of the trust property, convert or join in converting any business into a company limited by shares in such manner, as he thinks fit; and may, at the like expense, promote and assist in promoting a company for taking over the business; and may sell or transfer the business and the capital and assets and goodwill thereof, or any part thereof to the company, or to any company having for its objects the purchase of such a business, in consideration, in either case, wholly or in part of ordinary or preference

shares wholly or partially paid up of any such company, or wholly or in part of debentures, debenture stock, or bonds of any such company, and as to the balance (if any) in cash payable immediately, or by any instalments with or without security.

(2) A trustee may retain as an authorized investment of the trust any shares, debentures, debenture stock or bonds received by him in consequence of the exercise by him of any power conferred by subsection (1).

**59. Trustee may sue himself in a different capacity.** [W.A. s. 57; N.Z. s. 33A (1960 Amendment).] Notwithstanding any rule of law or practice to the contrary, a trustee of any property in that capacity may sue, and be sued by, himself in any other capacity whatsoever, including his personal capacity; but in every such case the trustee shall obtain the directions of the Court in which the proceedings are taken as to the manner in which differing interests are to be represented.

#### PART V—MAINTENANCE, ADVANCEMENT AND PROTECTIVE TRUSTS

**60. Application of Part.** The provisions of this Part shall apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust.

**61. Power to apply income for maintenance, etc., and to accumulate surplus income during a minority.** [Cf. W.A. s. 58; Vic. s. 37; U.K. s. 31; N.S.W. s. 43; Qld. s. 50.] (1) When any property is held by trustees in trust, whether absolutely or contingently for a beneficiary who is an infant, the trustee may, at his absolute discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education (including past maintenance or education) advancement or benefit, the income of that property or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education or not.

(2) During the infancy of any such person, if his interest so long continues, the trustee shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income thereof from time to time in authorized investments, and shall hold those accumulations as follows:—

(a) if any such person—

- (i) attains full age, or marries under that age, and his interest in such income during his infancy or until his marriage is a vested interest; or
- (ii) on attaining full age or on marriage under that age becomes entitled to the property from which income arose in fee simple, absolute or determinable, or absolutely, or for an entailed interest,

the trustee shall hold the accumulations in trust for such person absolutely, but without prejudice to any provision with respect thereto contained in any settlement by him made under any statutory powers during his infancy, and so that the receipt of such person after marriage, and though still an infant, shall be a good discharge; and

- (b) in any other case the trustee shall, notwithstanding that such person had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accumulations arose, and as one fund with such capital for all purposes,

but the trustee may, at any time during the infancy of such person if his interest so long continues, apply those accumulations, or any part thereof, as if they were income arising in the then current year.

(3) Where any property is held by a trustee in trust for a beneficiary of full age who has a contingent interest in that property, the trustee may, at his sole discretion, pay to such beneficiary or otherwise apply for or towards his maintenance, education (including past maintenance or education) advancement or benefit, the income of that property or any part thereof.

(4) This section shall apply in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property, but it applies to a future or contingent legacy by the parent of, or a person standing in *loco parentis* to, the legatee, if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee, and in any such case as last aforesaid the rate of interest shall (if the income available is sufficient, and subject to any rules of Court to the contrary) be four per centum per annum; and where in the case of a contingent interest the limitation or trust would, but for the operation of a protective trust (whether created or statutory) carry the intermediate income of the property, that limitation or trust shall for the purposes of this subsection be deemed notwithstanding the protective trust to carry the intermediate income.

(5) This section applies 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 thereof to the annuitant for the same period for which the annuity is payable, save that in any case accumulations made during the infancy of the annuitant shall be held in trust for the annuitant or his personal representative absolutely.

(6) This section does not apply where the instrument, if any, under which the interest arises came into operation before the commencement of this Act.

**62. Power to apply capital for advancement, etc.** [W.A. s. 59; cf. Vic. s. 38; N.S.W. s. 44; U.K. s. 32; Qld. s. 49.] (1) Where under a trust a person is entitled to the capital of the trust property or any share thereof, the trustee, in such manner as he in his absolute discretion thinks fit, may from time to time out of that capital pay or apply for the maintenance, education (including past maintenance or education), advancement or benefit of that person, an amount not exceeding in all \$2,000 or half that capital (whichever is the greater) or with the consent of the Court an amount greater than that amount.

(2) The power conferred by this section may be exercised whether the person is entitled absolutely or contingently on his attaining 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 belongs.

(3) The power conferred by this section may be exercised whether the person is so entitled in possession or in remainder or in reversion.

(4) Any money so paid or applied shall be brought into account as part of the share in the trust property to which the person is or becomes absolutely or indefeasibly entitled.

(5) No payment or application pursuant to this section 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 that person is in existence and of full age and consents in writing to the payment or application, or unless the Court, on the application of the trustee, so orders.

(6) For the purposes of this section the trustee may raise money by sale, mortgage or exchange of the trust property.

**63. Conditional advances for maintenance, etc.** [W.A. s. 60; N.Z. Amending Act 1960, s. 7.] (1) Where a power to pay or apply any property for the maintenance, education, advancement, or benefit of any person, or for any one or more of those purposes, is vested in a trustee, the trustee when exercising the power shall have authority to impose on the person any condition, whether as to repayment, payment of interest, giving security, or otherwise; and at any time after imposing any such condition, the trustee may, either wholly or in part, waive the condition or release any obligation undertaken or any security given by reason of the condition.

(2) In determining the amount or value of the property that a trustee who has imposed a condition pursuant to subsection (1), may pay or apply in exercise of the power, any money repaid to the trustee or recovered by him shall be deemed not to have been so paid or applied by the trustee.

(3) Nothing in this section shall impose upon a trustee any obligation to impose any condition pursuant to subsection (1); and a trustee, when imposing any condition as to giving security, shall not be affected by any restrictions upon the investment of trust funds, whether imposed by this Act or by any rule of law or by the trust instrument (if any).

(4) A trustee shall not be liable for any loss which may be incurred in respect of any money that is paid or applied under this section, whether the loss arises through failure to take security, or through the security being insufficient, or through failure to take action for its protection, or through the release or abandonment of the security without payment, or from any other cause.

**64. Protective trusts.** [Cf. W.A. s. 61; Vic. s. 39; U.K. s. 33; N.S.W. s. 45; N.Z. s. 42.] (1) Where any income, including an annuity or other periodical income payment, is directed to be held on protective trusts for the benefit of any person (in this section called "the principal beneficiary") for the period of his life or for any less period, then, during that period (in this section called the "trust period") the income shall, without prejudice to any prior interest, be held on the following trusts, namely—

(a) upon trust for the principal beneficiary during the trust period or until he, whether before or after the termination of any prior interest, does or attempts to do or suffers any act or thing, or until any event happens, other than an advance



under any statutory or express power, whereby if the said income were payable during the trust period to the principal beneficiary absolutely during that period, he would be deprived of the right to receive the same or any part thereof, in any of which cases, as well as on the termination of the trust period, whichever first happens, this trust of the said income shall fail or determine;

- (b) if the trust to which paragraph (a) refers fails or determines during the subsistence of the trust period, then, during the residue of that period, upon trust for the application thereof for the maintenance, education (including past maintenance or education), advancement or benefit, of all of any one or more exclusively of the other or others of the following persons (that is to say)—
- (i) the principal beneficiary and his or her wife or husband (if any), and his or her issue (if any); or
  - (ii) if there is no wife or husband or issue of the principal beneficiary in existence, the principal beneficiary and the persons who would, if he were actually dead, be entitled to the trust property or the income thereof or to the annuity fund (if any), or arrears of the annuity, as the case may be—

as the trustee in his absolute discretion, without being liable to account for the exercise of such discretion, thinks fit.

(2) Nothing in this section operates to validate any trust which would, if contained in the instrument creating the trust, be liable to be set aside.

#### PART VI—INDEMNITIES AND PROTECTION OF TRUSTEES, ETC.

**65. Application of Part.** Except where otherwise provided in this Part, the provisions of this Part shall apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust.

**66. Protection against liability in respect of rents and covenants.** [Cf. N.I. s. 27; U.K. s. 26; Vic. s. 32; W.A. s. 62; N.Z. s. 34; Qld. s. 21.] (1) Where a personal representative or trustee who is for any reason liable for—

- (a) any rent, covenant or agreement reserved by or contained in any lease; or
- (b) any rent, covenant or agreement payable under or contained in any grant made in consideration of a rentcharge; or
- (c) any indemnity given in respect of any rent, covenant or agreement referred to in either of the foregoing paragraphs,

satisfies all liabilities under the lease or grant that may have accrued, and been claimed up to the date of the conveyance hereinafter mentioned, and, where necessary, sets apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum which the lessee or grantee agreed to lay out on the property demised or granted, although the period for laying out the same may not have arrived, then and in any such case the personal representative

or trustee may convey the property demised or granted to a purchaser, legatee, devisee or other person entitled to call for a conveyance thereof and thereafter—

- (i) he may distribute the residuary real and personal estate of the deceased testator or intestate, or as the case may be, the trust estate other than the fund (if any) set apart under this subsection to or amongst the persons entitled thereto without appropriating any part, or any further part (as the case may be) of the estate of the deceased or of the trust estate to meet any future liability under the said lease or grant;
- (ii) notwithstanding such distribution he shall not be personally liable in respect of any subsequent claim under the said lease or grant.

(2) This section shall operate without prejudice to the right of the lessor or grantor or the persons deriving title under the lessor or grantor, to follow the assets of the deceased or the trust property into the hands of the persons amongst whom the same may have been respectively distributed, and shall apply notwithstanding anything to the contrary in the will or other instrument (if any) creating the trust.

(3) In this section “lease” includes an under-lease and an agreement for a lease or under-lease and any instrument giving any such indemnity as is mentioned in subsection (1) or varying the liabilities under the lease; “grant” applies to a grant whether the rent is created by limitation, grant, reservation or otherwise, and includes an agreement for a grant and any instrument giving any such mentioned indemnity or varying the liabilities under the grant; “lessee” and “grantee” include persons respectively deriving title under them.

**67. Protection of trustees by means of advertisements.** [Cf. Vic. s. 33; U.K. s. 27; W.A. ss. 63, 66.] (1) With a view to the distribution of any trust property or estate a trustee or personal representative may give notice by advertisement in—

- (a) the Gazette; and
- (b) a newspaper published in Brisbane, Rockhampton or Townsville; and
- (c) a newspaper circulating in the district in which is situate any land to which the notices relates; and
- (d) in the case of the administration of the estate of a deceased person, a newspaper circulating in the district where the deceased resided and, if he carried on a business, in the district in which he carried on that business,

and such other notices as would be directed by the Court to be given in an action for administration, requiring any person having any claim, whether as creditor or beneficiary or otherwise, to send particulars of his claim not later than the date fixed in the notice, being a date at least six weeks after the date of publication of the notice.

(2) Notice by advertisement shall be sufficient if given in the form specified in the Second Schedule, or to the like effect.

(3) After the date fixed by the last of the notices to be published the trustee or personal representative may distribute the trust property or estate having regard only to the claims, whether formal or not, of which he has notice at the time of the distribution; and he shall not, as respects any trust property or estate so distributed, be liable to any person of whose claim he had no notice at the time of the distribution.

(4) Nothing in this section—

- (a) prejudices the right of any person to enforce (subject to the provisions of section 109) any remedy in respect of his claim against a person to whom a distribution of any trust property or estate has been made; or
- (b) relieves the trustee or personal representative of any obligation to make searches or obtain certificates of search similar to those which an intending purchaser would be advised to make or obtain.

**68. Barring of claims.** [W.A. ss. 64, 67; N.Z. s. 75 (amended 1960).]

(1) Where a trustee wishes to reject a claim (not being a claim in respect of which any insurance is on foot, being insurance required by any Act) which has been made, or which he has reason to believe may be made—

- (a) to or against the estate or property which he is administering; or
- (b) against the trustee personally, by reason of his being under any liability in respect of which he is entitled to reimburse himself out of the estate or property which he is administering,

the trustee may serve upon the claimant or the person who may become a claimant a notice calling upon him, within a period of six months from the date of service of the notice, to take legal proceedings to enforce the claim and also to prosecute the proceedings with all due diligence.

(2) At the expiration of the period stipulated in a notice served under subsection (1), the trustee may apply to the Court for an order under subsection (3), and shall serve a copy of the application on the person concerned.

(3) Where, on the hearing of an application made under subsection (2), the person concerned does not satisfy the Court that he has commenced proceedings and is prosecuting them with all due diligence, the Court may make an order—

- (a) extending the period, or barring the claim, or enabling the trust property to be dealt with without regard to the claim; and
- (b) imposing such conditions and giving such directions, including a direction as to the payment of the costs of or incidental to the application, as the Court thinks fit.

(4) Where a trustee has served any notices under this section in respect of claims on two or more persons, and the period specified in each of those notices has expired, he may, if he thinks fit, apply for an order in respect of the claims of those persons by a single application, and the Court may, on that application, make an order accordingly.

(5) This section applies to every claim therein mentioned, whether the claim is or may be made as creditor or next-of-kin or beneficiary under the trust or otherwise; but it does not apply to any claim under Part V of *The Succession Acts 1867 to 1968* and no order made under this section shall affect any application for revocation of any grant of probate or of letters of administration, whether that application is made before or after the order.

(6) Where any person beneficially entitled to the estate or property is not made a party to an application by a trustee under this section an order made by the Court on the application shall not affect the right of that person to contest the claim of the trustee to be entitled to indemnify himself out of the estate or property.

(7) Any notice or application which is to be served in accordance with the provisions of this section may be served—

- (a) by delivering it to the person for whom it is intended or by sending it by prepaid registered letter addressed to that person at his usual or last known place of abode or business; or
- (b) in such other manner as may be directed by an order of the Court.

(8) Where a notice is sent by post as provided by this section, it shall be deemed to be served at the time at which the letter would have been delivered in the ordinary course of post.

**69. Protection in regard to notice when a person is trustee, etc., of more than one estate or trust.** [W.A. s. 68; Vic. s. 35; N.S.W. s. 62; U.K. s. 28; N.Z. s. 36.] A trustee acting for the purposes of more than one 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 has obtained notice thereof merely by reason of his acting or having acted for the purposes of another trust or estate.

**70. Exoneration of trustees in respect of certain powers of attorney.** [W.A. s. 69; N.Z. s. 37; Vic. s. 35 (2); cf. U.K. s. 29; Qld. s. 24.] (1) A trustee acting or paying money in good faith in reliance on any power of attorney and on a statutory declaration or other sufficient evidence that the power of attorney had not been revoked shall not be liable for that act or payment by reason of the fact that at the time of the act or payment the person who gave the power of attorney was subject to any disability or bankrupt or dead, or had done or suffered some act or thing to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying.

(2) Nothing in this section affects the right of any person entitled to money paid by a trustee, in circumstances mentioned in subsection (1), against the person to whom the payment is made; and the person so entitled shall have the same remedy against the person to whom payment is made as he would have had against the trustee.

**71. Implied indemnity of trustees.** [W.A. s. 70; N.Z. s. 38; Vic. s. 36; N.S.W. s. 59; U.K. s. 30; cf. Qld. s. 25.] A trustee shall be chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity; and shall be answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, nor those of 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 insufficiency, deficiency or loss occurs through his own default.

**72. Reimbursement of trustee out of trust property.** [W.A. s. 71.] A trustee may reimburse himself for or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers.

**73. Delivery of chattels to life tenant.** [W.A. s. 72; N.Z. s. 39A.] Where any chattels are included in the trust property the trustee may, at the request of any beneficiary entitled to a life or other limited interest therein, deliver such chattels to that beneficiary upon the beneficiary signing and delivering to the trustee an inventory of all such chattels.

**74. Delivery of chattels to infant.** [W.A. s. 73; N.Z. s. 39B.]

(1) A trustee may in his discretion deliver to an infant, or to the guardian or any of the guardians of an infant, any chattels to which the infant is beneficially entitled, and the receipt of the infant or guardian shall be a complete discharge to the trustee for any chattels so delivered.

(2) The powers conferred by this section are in addition to the powers conferred by section 62 and, for the purposes of subsection (1) of that section, the value of the chattels delivered pursuant to this section shall not be taken into account in any way.

**75. Personal representatives relieved from personal liability in respect of calls made after transfer of shares.** [W.A. s. 74; Vic. s. 34; N.S.W. s. 61A.]

A personal representative of a 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 that deceased person as soon as the personal representative 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 that registration, whether made by the company or its directors or by its liquidators in a winding up, but nothing in this section affects any right which the company or its liquidator may have to follow the assets of the deceased person into the hands of any persons to or amongst whom they have been transferred or distributed.

**76. Power of Court to relieve trustee from personal liability.** [W.A. s. 75; N.Z. s. 73; N.S.W. s. 85; Vic. s. 67; U.K. s. 61; cf. Qld. s. 51.]

If it appears to the Court that a trustee, whether appointed by the Court or otherwise, is, or may be, personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed the breach, then the Court may relieve him either wholly or partly from personal liability for that breach.

**77. Power of Court to make beneficiary indemnify for breach of trust.**

[W.A. s. 76; N.Z. s. 74; Vic. s. 68; N.S.W. s. 86; U.K. s. 62; cf. Qld. s. 44.] (1) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the 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 persons claiming through him.

(2) This section applies to breaches of trust committed as well before as after the commencement of this Act.

**78. Abolition of Rule in *Allhusen v. Whittell*.** [W.A. s. 104; Vic. s. 74; N.Z. s. 84; N.S.W. Wills, Probate and Admin. Act, s. 46D.]

(1) Where, under the provisions of the will of a person, in this section called "the deceased", who dies on or after the first day of July One thousand nine hundred and seventy-three, any real or personal estate included (either by specific or general description) in a residuary gift is settled by way of succession, no part of the income of that property shall be applicable in or towards the payment of the debts and liabilities

which have accrued at the date of death or in payment of the funeral, testamentary and administration expenses, or of any legacies bequeathed by the will.

(2) Subsection (1) does not apply to any commission which is payable to the trustee in respect of any such income as is mentioned in that subsection or to any testamentary or administration expenses which, apart from that subsection, would be payable wholly out of income.

(3) The income of the settled property shall be applicable in priority to any other assets in payment of the interest (if any) accruing due on the debts, liabilities, funeral, testamentary and administration expenses, and legacies, after the date of the death of the deceased and up to the payment thereof, and the balance of the income shall be payable to the person for the time being entitled to the income of the property.

(4) Where, after the death of the deceased, income of assets which are ultimately applied in or towards payment of the debts, liabilities, funeral, testamentary and administration expenses, and legacies, arises pending such application, that income shall, for the purposes of this section, be deemed income of the residuary estate of the deceased.

(5) In this section "administration expenses" includes duty payable under the *Succession and Probate Duties Act 1892-1972* and estate duty payable under any Commonwealth Act and any duty payable in any State or country outside Queensland on or consequent on or arising out of the death of the deceased to the extent to which such duties are payable out of residue.

(6) This section shall only affect the rights of beneficiaries under the will as between themselves, and shall not affect the rights of creditors of the deceased.

(7) This section shall have effect subject to the provisions (if any) to the contrary contained in the will and to the provisions of any Act as to charges on the property of the deceased.

## PART VII—FURTHER POWERS OF THE COURT

### *Division 1—Application of Part*

**79. Application of Part.** Except where otherwise provided in this Part, the provisions of this Part shall apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust.

### *Division 2—Appointment of New Trustees*

**80. Power of Court to appoint new trustees.** [Cf. W.A. s. 77; Vic. s. 48; N.S.W. s. 70; U.K. s. 41; N.Z. s. 51; N.I. s. 40; Qld. s. 26.]  
 (1) The Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable to do so without the assistance of the Court, make an order appointing 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) In particular and without prejudice to the generality of subsection (1) the Court may make an order appointing a new trustee in substitution for a trustee who desires to be discharged, or who is

convicted of a crime or misdemeanour, or is a bankrupt, or is a corporation that is under official management or is in liquidation or has been dissolved, or who for any other reason whatsoever appears to the Court to be undesirable as a trustee.

(3) 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.

(4) Nothing in this section confers power to appoint an executor or administrator.

**81. Powers of new trustee.** [W.A. s. 77 (5); U.K. s. 43; Vic. s. 50; cf. Qld. s. 37.] Every trustee appointed by the Court has, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, the same powers, authorities and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument (if any) creating the trust.

#### *Division 3—Vesting Orders*

**82. Vesting Orders.** [W.A. s. 78; Vic. s. 51; N.Z. ss. 52, 59; U.K. ss. 44, 51; N.S.W. s. 71.] (1) The Court may make an order, in this Act called a “vesting order”, which has effect as provided in section 90.

(2) A vesting order may be made in any of the following cases, namely—

- (a) where the Court appoints or has appointed a new trustee;
- (b) where a new trustee has been appointed out of Court under any statutory or express power;
- (c) where a trustee retires or has retired;
- (d) where a trustee is under a disability;
- (e) where a trustee is out of the jurisdiction of the Court;
- (f) where a trustee cannot be found;
- (g) where a trustee, being a corporation, has ceased to carry on business or is under official management or is in liquidation or has been dissolved;
- (h) where a trustee neglects or refuses to convey any property, or to receive the dividends or income of any property, or to sue or recover any property according to the direction of the person absolutely entitled to the same for twenty-eight days next after a request in writing has been made to him by that person;
- (i) where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any property;
- (j) where it is uncertain whether the last trustee known to have been entitled to or possessed of any property is alive or dead;
- (k) where there is no personal representative of the last trustee who was entitled to or possessed of any property or where it is uncertain who is the personal representative of that trustee or where the personal representative of that trustee cannot be found;

- (l) where 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;
  - (m) where a deceased person was entitled to or possessed of any property and his personal representative is under a disability; or
  - (n) where property is vested in a trustee and it appears to the Court to be expedient to make a vesting order.
- (3) Where the provisions of subsection (2) are applicable, they extend to a trustee entitled to, or possessed of, any property either solely or jointly with any other person and whether by way of mortgage or otherwise.

**83. In whom property to be vested, etc.** [Cf. W.A. s. 79; Vic. s. 52; N.S.W. s. 71.] (1) Where the making of a vesting 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.

(2) Where the making of a vesting order is consequential on the retirement of one or more of a number of trustees, the property may be vested in the continuing trustees alone.

(3) Subject to the provisions of subsection (1), a vesting order may vest the property in any such person in any such manner and for any such estate or interest as the Court may direct, or may release or dispose of any contingent right to such person as the Court may direct.

(4) The fact that a vesting order is founded or purports to be founded on an allegation of the existence of any of the matters mentioned or referred to in section 82 shall be conclusive evidence of the matter so alleged in any court upon any question as to the validity of the order.

(5) Nothing in this Act shall prevent the 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.

(6) A vesting order shall not vest in any person shares which are not fully paid up unless that person applies for the order or consents to the order being made or unless the Court directs that his consent be dispensed with.

**84. Orders as to contingent rights of unborn persons.** [Cf. Vic. s. 53; N.S.W. s. 72; W.A. s. 80; U.K. s. 45; Qld. s. 28.] 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 Court may make an order releasing the property from the contingent right or may make an order 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.

**85. Vesting order in place of conveyance by mortgagee under disability.** [W.A. s. 81; cf. Vic. s. 54; N.S.W. s. 74; U.K. s. 28; Qld. s. 29.] Where any person entitled to or possessed of any property by way of mortgage is under a disability the Court may make an order vesting or releasing or disposing of the property in like manner as in the case of a trustee under like disability.



**86. Contracts by guardians on behalf of infants.** [Cf. Qld. Trustees and Incapacitated Persons Act of 1867, s. 53.] (1) The Court, where it considers it necessary or desirable in the interest of an infant or of an infant and some other person, may on the application of a guardian or next friend of the infant, make an order appointing the guardian of the infant, or some other fit and proper person, to enter into any agreement for or on behalf of such infant.

(2) An agreement entered into in accordance with this section shall be as effectual and binding as if the infant had been a person of full age and mental capacity and had himself entered into that agreement.

(3) In this section "Court" includes, where the amount or subject-matter is within the jurisdiction of a District Court, a District Court within the meaning of the *District Courts Act 1967-1972* or any Judge thereof.

**87. Vesting orders, etc. in relation to infant's beneficial interests.** [Cf. W.A. s. 82; cf. Vic. s. 55; N.S.W. s. 73; S.L.A. s. 27.] (1) Where an infant is beneficially entitled to any property of which there is no trustee, the Court, where it considers it necessary or desirable in the interest of the infant or of the infant and some other person, may on the application of a guardian or next friend of the infant make an order—

- (a) appointing the guardian of the infant, or some other fit and proper person, to sell and convey, lease, mortgage or charge the property, or otherwise to exercise such of the powers as are conferred by or under this Act on a trustee, as the Court may in the order specify; or
- (b) in the case of stock or a thing in action, vesting in the guardian of the infant, or some other fit and proper person, the right to transfer or call for a transfer of that stock, or to receive the dividends or income thereof, or to sue for and recover that thing in action, upon such terms as the Court thinks fit.

(2) An act done in accordance with this section shall be as effectual and binding as if the infant had been a person of full age and mental capacity and had himself done that act.

**88. Vesting order consequential on order for sale or mortgage of land.** [Cf. W.A. s. 83; Qld. s. 30; Vic. s. 56; N.Z. s. 55; N.S.W. s. 76; U.K. s. 47.] Where the Court gives a judgment or makes an order directing the sale or mortgage or the release of a mortgage of any land, every person who is entitled to or possessed of the land, or entitled to a contingent right therein, and is a party to the action or proceeding in which the judgment or order is given or made, or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee for the purposes of this Act; and the Court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate as the Court thinks fit in the purchaser or mortgagee or mortgagor or in any other person.

**89. Vesting order consequential on judgment for specific performance.** [Cf. W.A. s. 84; Qld. s. 32; Vic. s. 57; N.Z. s. 56; N.S.W. s. 77; U.K. s. 48.] Where a judgment is given for the specific performance of a contract concerning any land, or for the partition, or sale in lieu of partition, or exchange, of any land, and generally when a judgment is

given for the conveyance of any land either in cases arising out of the doctrine of election or otherwise, the Court may declare that any of the parties to the action are trustees of the land or any part thereof within the meaning of this Act, or may declare that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of this Act, and thereupon the Court may make a vesting order, relating to the rights of those persons, born and unborn, as if they had been trustees.

**90. Effect of vesting order.** [Cf. W.A. s. 85; Vic. s. 58; N.Z. ss. 57, 59; N.S.W. s. 78; U.K. ss. 49, 51; Qld. ss. 33, 35.] (1) Subject to the provisions of any other Act, a vesting order vests the property to which it relates in the persons named in the order as trustees without any conveyance, transfer or assignment.

(2) Where more than one person is named in the order, the order vests as aforesaid the property to which it relates in those persons as joint tenants.

(3) Where, by reason of the provisions of any other Act or for the protection of any trust property to which the order relates, it is requisite that the order should be notified to or registered or recorded by the Registrar or other person having the duty or function of registering or recording the order, the trustees shall—

- (a) produce the order to the Registrar or such other person; and
- (b) do such other act or acts as may properly be required by the Registrar or such other person,

for the purpose of effecting the notification, registration or recording of that order.

(4) Where the consent of any person is requisite to the conveyance, transfer or assignment of any trust property to which a vesting order relates the order shall, unless it otherwise specifies, be subject to such consent; but the consent may be obtained after the making of the order by the persons named in the order as trustees.

(5) The order, or the registration or recording thereof, shall not operate as a breach of covenant or condition or occasion any forfeiture of any lease, underlease, agreement for lease, or other property.

(6) The person in whose favour a vesting order is made has and may exercise in relation to the property the subject of the order all the powers by this Act conferred on or capable of being exercised by a trustee; but the Court may by the order limit or, under section 95, enlarge those powers as it thinks fit.

**91. Directions, etc., as to transferring stock, etc.** [W.A. s. 86; Qld. s. 35 (6); U.K. s. 51 (5); Vic. s. 59.] The Court may make declarations and give directions concerning the manner in which the right to transfer any stock or thing in action vested under the provisions of this Act is to be exercised.

**92. Power to appoint persons to convey.** [W.A. s. 87; Qld. s. 34; U.K. s. 50; N.S.W. s. 79; Vic. s. 60.] In all cases where a vesting order may be made under any of the foregoing provisions the Court

may, if it is more convenient, appoint a person to convey the land or release the 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

**93. Vesting orders of charity property.** [W.A. s. 88; cf. Qld. s. 39; N.S.W. s. 80; Vic. s. 61; U.K. s. 52.] 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 Court would have jurisdiction upon action 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 4—Jurisdiction to make other orders*

**94. Court's jurisdiction to make other orders.** [W.A. s. 89; cf. N.Z. s. 64; U.K. s. 57; W.A. s. 57; N.S.W. s. 81; Vic. s. 63.] (1) Where in the opinion of the Court any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, retention, expenditure or other transaction is expedient in the management or administration of any property vested in a trustee, or would be in the best interests of the persons, or the majority of the persons, beneficially interested under the trust, but it is inexpedient or difficult or impracticable to effect the disposition or transaction without the assistance of the Court, or it or they cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the trust instrument (if any) or by law, the Court may by order confer upon the trustee, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions (if any) as the Court may think fit, and may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne, and as to the incidence thereof between capital and income.

(2) The Court may from time to time rescind or vary any order made under this section, or may make any new or further order; but such a rescission or variation of any order shall not affect any act or thing done in reliance on the order before the person doing the act or thing became aware of the application to the Court to rescind or vary the order.

(3) An application to the Court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

**95. Power of Court to authorize variations of trust.** [Cf. U.K. Variation of Trusts Act, 1958; W.A. s. 90; Vic. s. 63A; N.Z. s. 64A.] (1) Where property, whether real or personal, is held on trusts arising, whether before or after the commencement of this Act, under any instrument creating the trust, the Court may if it thinks fit by order approve on behalf of—

- (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting; or
- (b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event

a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class (as the case may be) if the said date had fallen or the said event had happened at the date of the application to the Court; or

(c) any person unborn; or

(d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined,

any arrangement (by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts:

Provided that except—

(e) in the case of an unascertained person whose entitlement is dependent on a future event which the Court is satisfied is unlikely to occur; or

(f) where the Court approves of an arrangement on behalf of a person referred to in paragraph (d),

the Court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person.

(2) In subsection (1) “protective trusts” means the trusts specified in paragraphs (a) and (b) of subsection (1) of section 64 or any like trusts, “the principal beneficiary” has the same meaning as in the said subsection (1) and “discretionary interest” means an interest arising under the trust specified in paragraph (b) of the said subsection (1) or any like trust.

(3) Notice of an application to the Court for an order pursuant to subsection (1) shall be given to such persons as the Court may direct.

(4) Nothing in the foregoing provisions of this section shall apply to trusts affecting property settled by Act of Parliament.

(5) Nothing in this section shall limit the powers conferred by section 94.

**96. Right of trustee to apply to Court for directions.** [Cf. W.A. s. 92; N.Z. s. 66; Qld. s. 45; N.S.W. s. 63.] (1) Any trustee may apply upon a written statement of facts to the Court for directions concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee.

(2) Every application made under this section shall be served upon, and the hearing thereof may be attended by, all persons interested in the application or such of them as the Court thinks expedient.

**97. Protection of trustees while acting under direction of Court.** [W.A. s. 95; N.Z. s. 69; cf. Qld. s. 45.] (1) Any trustee acting under any direction of the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as trustee in the subject-matter

of the direction, notwithstanding that the order giving the direction is subsequently invalidated, overruled, set aside or otherwise rendered of no effect, or varied.

(2) This section does not indemnify any trustee in respect of any act done in accordance with any direction of the Court if he has been guilty of any fraud or wilful concealment or misrepresentation in obtaining the direction or in acquiescing in the Court making the order giving the direction.

**98. Persons entitled to apply to Court.** [Cf. Qld. s. 36; W.A. s. 93; U.K. s. 58; Vic. s. 54; N.Z. s. 67.] (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 beneficially interested in the property, whether under disability or not, or on the application of any person duly appointed trustee thereof or intended to be so appointed.

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

**99. Power of Court to make orders in absence of parties.** [W.A. s. 96 (1); U.K. s. 59; Vic. s. 65; N.S.W. s. 88; N.Z. s. 70.] (1) Where in any proceedings the Court is satisfied that diligent search has been made for any person, who, in the character of trustee, is made a defendant in any action, to serve him with a process of the Court, and that he cannot be found, the Court may hear and determine the proceedings and give judgment therein against that person, in his character of a trustee, as if he had been duly served or had entered an appearance in the action, and had also appeared by his counsel or solicitor at the hearing, but (except as provided in subsection (2)) without prejudice to any interest he may have in the matters in question in the proceedings in any other character.

(2) Where any party to any proceedings relating to a trust, or where any person or class of persons that the Court thinks should be made a party or parties to those proceedings or otherwise be given an opportunity to attend and be heard in those proceedings, at the time of the proceedings—

- (a) is not within the jurisdiction; or
- (b) is under disability; or
- (c) cannot be found; or
- (d) is unborn; or
- (e) is not capable of being identified or ascertained,

the Court may appoint some person to represent that party, person or class, or may proceed in his or their absence, and all orders made in the proceedings are as binding on that party, person or class as if personally present and of full capacity.

**100. Power of Court to charge costs on trust estate.** [Qld. s. 38; W.A. s. 97; cf. U.K. s. 60; N.S.W. s. 93; Vic. s. 66.] The Court may order the costs and expenses of and incident to any application for an order appointing a new trustee, or for a vesting order, or of and

incident to any such order, or any conveyance or transfer in pursuance thereof, or for the directions of the Court, to be paid or raised out of the land or personal estate in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the Court may seem just.

**101. Remuneration of trustee.** [Cf. N.I. s. 41; W.A. s. 98; Vic. s. 77; N.Z. s. 72.] (1) The Court may, in any case in which the circumstances appear to it so to justify, authorize any person to charge such remuneration for his services as trustee as the Court may think fit.

(2) In the absence of a direction to the contrary in the instrument creating the trust, a trustee, being a person engaged in any profession or business for whom no benefit or remuneration is provided in the instrument, is entitled to charge and be paid out of the trust property all usual professional or business charges for business transacted, time expended, and acts done by him or his firm in connexion with the trust, including acts which a trustee not being in any profession or business could have done personally; and, on any application to the Court for remuneration under subsection (1), the Court may take into account any charges that have been paid out of the trust property under this subsection.

(3) For the purpose of this section "trustee" includes a custodian trustee.

**102. Payment into Court by trustee.** [U.K. s. 63; cf. Qld. s. 41; W.A. s. 99; Vic. s. 95.] (1) A trustee or trustees, or the majority of trustees, having in his or their hands or under his or their control money or securities belonging to a trust, may pay the same into Court; and the same shall, subject to rules of Court, be dealt with according to the orders of the Court.

(2) The receipt or certificate of the proper officer shall be a sufficient discharge to the trustee or trustees for the money or securities so paid into Court.

(3) Where money or securities are vested in any persons as trustees, and the majority are desirous of paying the same into Court, but the concurrence of the other or others cannot be obtained, the Court may order the payment into Court to be made by the majority without the concurrence of the other or others.

(4) Where any money or securities ordered to be paid into Court under subsection (3), are deposited with any banker, broker, or other depositary, the Court may order payment or delivery of the money or securities to the majority of the trustees for the purpose of payment into Court.

(5) Every transfer payment and delivery made in pursuance of any order under this section shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the money and securities so transferred, paid, or delivered.

## PART VIII—CHARITIES

**103. Meaning of charity.** [Cf. N.S.W. No. 30 of 1969, s. 9 (2) (a); Cf. Eng. 6 & 7 Eliz. 2, s. 17 (Recreational Charities Act, 1958), s. 1.] (1) The repeal by this Act of the statute 43 Elizabeth chapter 4 (Charitable Uses Act, 1601), shall not affect the established rules of law relating to charity.

(2) Notwithstanding any rule of law to the contrary, it shall be and be deemed always to have been charitable to provide, or to assist in the provision of, facilities for recreation or other leisuretime occupation, if the facilities are provided in the interests of social welfare.

(3) The requirement of subsection (2) that the facilities are provided in the interests of social welfare shall not be satisfied unless—

- (a) the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended; and
- (b) either—
  - (i) those persons have need of such facilities by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances; or
  - (ii) the facilities are to be available to the members or to the male members or to the female members of the public at large.

(4) Nothing in this section shall be taken to derogate from the principle that, in order to be charitable, a gift, trust or institution must be for the public benefit.

**104. Inclusion of non-charitable purpose not to invalidate trust.** [Vic. Property Law Act 1958, s. 131; N.S.W. Conv. Act 1919–1969, s. 37D; cf. W.A. s. 102.] (1) No trust shall be held to be invalid by reason that some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be included in any of the purposes to or for which an application of the trust property or funds or any part thereof is by such trust directed or allowed.

(2) Any such trust shall be construed and given effect in the same manner in all respects as if no application of the trust property or funds or of any part thereof to or for any such non-charitable and invalid purpose had been or should be deemed to have been so directed or allowed.

(3) This section shall not apply to any trust declared before, or to the will of any testator dying before, the commencement of this Act.

**105. Occasions for applying property cy-près.** [Cf. 8 & 9 Eliz. 2, c. 58 (Charities Act, 1960), s. 13.] (1) Subject to subsection (2), the circumstances in which the original purposes of a charitable trust can be altered to allow the property given or part of it to be applied cy-près shall be as follows:—

- (a) where the original purposes, in whole or in part,—
  - (i) have been as far as may be fulfilled; or
  - (ii) cannot be carried out; or
  - (iii) cannot be carried out according to the directions given and to the spirit of the trust;

- (b) where the original purposes provide a use for part only of the property available by virtue of the trust; or
- (c) where the property available by virtue of the trust and other property applicable for similar purposes can be more effectively used in conjunction, and to that end can suitably, regard being had to the spirit of the trust, be made applicable to common purposes; or
- (d) where the original purposes were laid down by reference to an area which then was but has since ceased to be a unit for some other purpose, or by reference to a class of persons or to an area which has for any reason since ceased to be suitable, regard being had to the spirit of the trust, or to be practical in administering the trust; or
- (e) where the original purposes, in whole or in part, have, since they were laid down,—
  - (i) been adequately provided for by other means; or
  - (ii) ceased, as being useless or harmful to the community or for other reasons, to be in law charitable; or
  - (iii) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the trust, regard being had to the spirit of the trust.

(2) Subsection (1) shall not affect the conditions which must be satisfied in order that property given for charitable purposes may be applied *cy-près*, except in so far as those conditions require a failure of the original purposes.

(3) References in subsections (1) and (2) to the original purposes of a trust shall be construed, where the application of the property given has been altered or regulated by a scheme or otherwise, as referring to the purposes for which the property is for the time being applicable.

(4) It is hereby declared that a trust for charitable purposes places a trustee under a duty, where the case permits and requires the property or some part of it to be applied *cy-près*, to secure its effective use for charity by taking steps to enable it to be so applied.

(5) Nothing in this section shall affect the application of the provisions of:—

(a) *The Charitable Funds Acts 1958 to 1964*; or

(b) *The Patriotic Funds Acts 1942 to 1953*

to the funds to which those Acts respectively apply.

**106. Proceedings in case of breach of charitable trust.** [Cf. 52 Geo. 3, c. 101; N.S.W. No. 30 of 1969, s. 17; Vic. No. 3270, s. 32.] (1) In any case of a breach of any trust or supposed breach of any trust created for charitable purposes, or whenever the direction or order of a court is deemed necessary for the administration of any trust for charitable purposes, any two or more persons may present a petition to the Court stating such complaint and praying such relief as the nature of the case may require.

(2) The petition shall be heard in a summary way, and the Court shall upon affidavits and such other evidence as is produced upon such hearing determine the same, and make such other order therein and with respect to the costs of the application as may be just.



- (3) Every petition so to be presented shall be,—
- (a) signed by the persons presenting the same, in the presence of and shall be attested by the solicitor for such petitioners; and
  - (b) submitted to and allowed by the Attorney-General or Solicitor-General, and such allowance shall be certified by him before any such petition is presented.

PART IX—MISCELLANEOUS

**107. Application of Part.** Except where otherwise provided in this Part, the provisions of this Part shall apply whether or not a contrary intention is expressed in the instrument creating the trust.

**108. Indemnity.** [Qld. s. 58; cf. U.K. s. 66; W.A. s. 100; Vic. s. 78; N.S.W. s. 103.] This Act, and every order purporting to be made under this Act, shall be a complete indemnity to all persons for any acts done pursuant thereto; and it shall not be necessary for any person to inquire concerning the propriety of the order, or whether the Court had jurisdiction to make the same.

**109. Remedies for wrongful distribution of trust property.** [Cf. W.A. s. 65.] (1) In any case where a trustee has wrongfully distributed trust property any person who has suffered loss by that distribution may enforce the same remedies against the trustee and against any person to whom the distribution has been made as in the case where a personal representative has wrongfully distributed the estate of a deceased person.

(2) Except by leave of the Court, no person who has suffered loss by reason of the wrongful distribution of trust property or of the estate of a deceased person may enforce any remedy against any person to whom such property or estate has been wrongfully distributed until he has first exhausted all remedies which may be available to him against the trustee or personal representative.

(3) Where any remedy is sought to be enforced against a person to whom a wrongful distribution of trust property or the estate of a deceased person has been made and that person has received the distribution in good faith and has so altered his position in reliance on the propriety of the distribution that, in the opinion of the Court, it would be inequitable to enforce the remedy, the Court may make such order as it considers to be just in all the circumstances.

**110. Fees and commission deemed a testamentary expense.** [W.A. s. 107; N.Z. s. 86.] The fees, commission, remuneration, and other charges payable to a personal representative in respect of the administration of the estate of a deceased person shall be deemed to be testamentary expenses.

**111. Costs of inquiring regarding beneficiaries.** [W.A. s. 108; N.Z. s. 87.] The costs, expenses, and charges of the trustee of any property in respect of any inquiries made by him to ascertain the existence or whereabouts of any person or persons entitled to any legacy, money or distributive share in the property, or otherwise incurred in relation thereto, shall be borne by and paid out of the legacy, money or distributive share of the person or persons in respect of whom the inquiries were made, unless a contrary intention appears in the instrument (if any) creating the trust.

## FIRST SCHEDULE

[s. 3]

Number of Act	Short Title (if any)	Extent of Termination of Application or Repeal
<b>PART 1</b>		
43 Eliz. 1, cap. 4	<i>Charitable Uses Act 1601</i> .. ..	The whole
52 Geo. 3, cap. 101	<i>Charities Procedure Act 1812</i> ..	The whole
<b>PART 2</b>		
31 Vic. No. 19 ..	<i>The Trustees and Incapacitated Persons Act of 1867</i>	The whole
50 Vic. No. 13 ..	<i>The Settled Land Act of 1886</i> ..	The whole
61 Vic. No. 10 ..	<i>The Trustees and Executors Act of 1897</i>	The whole
62 Vic. No. 8 ..	<i>The Trustees and Executors Act of 1897 Amendment Act</i>	The whole
2 Edw. VII No. 7	<i>The Trustees and Executors Act Amendment Act of 1902</i>	The whole
6 Edw. VII No. 34	<i>The Trustees and Executors Acts Amendment Act of 1906</i>	The whole
6 Geo. V No. 11	<i>The Trustees and Executors Act Amendment Act of 1915</i>	The whole
6 Geo. V No. 14	<i>The Public Curator Act of 1915</i> ..	The Schedule so far as it amends Act No. 61 Vic. No. 10
15 Geo. V No. 3	<i>The Public Curator Act Amendment Act of 1924</i>	s. 19
15 Geo. V No. 17	<i>The Trustees and Executors Acts Amendment Act of 1924</i>	The whole
22 Geo. V No. 31	<i>The Trustees Protection Act of 1931</i>	The whole
1 Eliz. II No. 36	<i>The Married Women (Restraint upon Anticipation) Act of 1952</i>	s. 9
10 Eliz. II No. 46	<i>The Trustees and Executors Acts Amendment Act of 1961</i>	The whole
No. 42 of 1964 ..	<i>The Trustees and Executors Acts Amendment Act of 1964</i>	The whole
No. 25 of 1967 ..	<i>The Trustees (Housing Loans) Act of 1967</i>	The whole

## SECOND SCHEDULE

[s. 67]

## TRUSTS ACT 1973, SECTION 67

*The Estate of A.B. deceased* [or "*The Trusts of A.B.*"\*]

Any creditor, beneficiary or other person having any claim or claims in respect of the estate of A.B. deceased, late of [set out address and occupation of deceased] who died on [set out date of death of deceased], is required to send particulars of any such claim or claims to [set out names], the personal representative (or trustee)\* of the said A.B. at [set out address to which claims may be sent], not later than the day of , 19 .

NOTE.—By virtue of section 67 of the Trusts Act a personal representative or trustee may, after the date referred to in this notice, distribute the estate of the deceased having regard only to those claims of which he then has notice.

\* Omit if not applicable.