

TRUSTS (INVESTMENTS) AMENDMENT BILL 1999

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the Legislation

The primary objective of this Bill is to change the policy relating to “authorised trustee investments”, currently located in Part 3 of the *Trusts Act 1973*, by removing the designated/statutory list approach and adopting the “prudent person rule”.

Minor and consequential amendments are made to many other statutes such as the *Trustee Companies Act 1968* which authorise certain organisations to invest surplus funds according to law.

Reasons for the objectives and how they will be achieved

Adopting the “prudent person rule” shall bring Queensland in line with all of the other States and the Northern Territory and will therefore equip trustees with all the modern powers of investment.

The Bill gives trustees power to invest in any property, unless the instrument creating the trust otherwise provides.

The prudent person rule requires the trustee to act prudently both in determining the suitability of a particular category of investment as well as when considering actual proposals for investment.

Administrative cost to Government of implementation

The proposed amendments to the *Trusts Act 1973* do not entail any significant cost to the State Government in terms of implementation.

Fundamental legislative principles

This Bill does not breach any fundamental legislative principles.

Consultation

The following bodies and persons have been consulted in relation to the content of the Bill:

- Trustee Corporations Association of Australia (Queensland Council),
- Queensland Treasury,
- Office of the Adult Guardian,
- Public Trustee,
- Queensland Association of Permanent Building Societies Limited,
- National Credit Union Association Inc.,
- Queensland Law Society Inc.,
- Royal Geographical Society of Queensland Inc.

The parties consulted agreed to the content of the proposed Bill and its underlying policy thrust; that is, a change in the authorised trustee investments by removing the designated/statutory list approach and adopting the “prudent person rule”.

NOTES ON PROVISIONS

The format to this statute follows the following format:

- There is a long and short title; and
- The Act is divided into Parts, each Part containing within it all the matters relevant to the purpose of implementing the objectives of the Bill.

Part 1—Preliminary

Short Title

Clause 1 sets out the short title of the Act.

Clause 2 provides that the Act commences on a day to be fixed by proclamation.

Part 2—Amendment of *Trusts Act 1973*

Clause 3 provides for the amendment of the *Trusts Act 1973* (“the Act”).

Clause 4 amends the definition of the fundamental term “authorised investments” in view of the insertion of an entire new Part 3 in the Act which provides for, amongst other things, the application of the “Prudent Person Rule”.

Clause 5 omits Part 3 of the Act and inserts a new Part 3 which is entitled “Part 3—Investments”.

[In view of the insertion of this new part, it should be noted that the following references to clause shall now coincide with the numbering in the Act.]

Clause 20 provides that sections 29 to 30C apply despite anything contained in the instrument creating the trust.

Clause 21 provides that a trustee may (unless expressly forbidden by the instrument creating the trust) invest trust funds in any form of investment and vary or realise an investment of trust funds and reinvest an amount resulting from the realisation in any form of investment.

Clause 22 sets out the duties of trustee in relation to the power of investment. In particular, a trustee whose profession, business or employment is (or includes) acting as a trustee or investing money on behalf of other persons must exercise the care, diligence and skill a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons.

All other trustees must exercise the care, diligence and skill a prudent person of business would exercise in managing the affairs of other persons.

A trustee must comply with any provisions of the instrument creating the trust that is binding on the trustee and requires the obtaining of a consent or approval or compliance with a direction for trust investments.

Moreover, a trustee must, at least once in each year, review the performance, individually and as a whole, of trust investments.

Clause 23 is concerned with the preservation of law and equity. A rule or principle of law or equity imposing a duty on a trustee exercising a power of investment including a rule or principle imposing—

- a duty to exercise the powers of a trustee in the best interests of all present and future beneficiaries of the trust;
- a duty to invest trust funds in investments that are not speculative or hazardous;
- a duty to act impartially towards beneficiaries and between different classes of beneficiaries;
- a duty to obtain advice.

continues to apply except so far as they are inconsistent with this or any other Act, or the instrument creating the trust.

Furthermore, any rule or principle of law or equity relating to a provision in an instrument creating a trust that purports to exempt, limit the liability of, or indemnify a trustee in respect of a breach of trust, continues to apply. If a trustee is under a duty to obtain advice, the reasonable cost of obtaining the advice is payable out of trust funds.

Clause 24 provides for the matters to which a trustee must have regard in exercising the power of investment. When investing, a trustee must, so far as they are appropriate to the circumstances of the trust, have regard to a number of factors; among them, the following:

- the purposes of the trust and the needs and circumstances of the beneficiaries;
- the desirability of diversifying trust investments;
- the nature of existing trust investments and other trust property;
- the likely income return and the timing of income return;

- the probable duration of the trust;
- the liquidity and marketability of the proposed investment during, and at the end of, the term of the proposed investment;
- the total value of the trust estate;
- the effect of the proposed investment for the tax liability of the trust;
- the likelihood of inflation affecting the value of the proposed investment or other trust property.

A trustee may obtain and, if obtained must consider, independent and impartial advice reasonably required for the investment of trust funds or the management of the investment from a person whom the trustee reasonably believes to be competent to give the advice. Furthermore, the clause provides that the trustee may pay out of the trust funds the reasonable cost of obtaining such advice.

Clause 25 provides for the powers of trustee in relation to securities. If securities of a corporation are subject to a trust, the trustee may concur in various schemes or arrangements in the same manner as if the trustee were beneficially entitled to the securities. If a conditional or preferential right to subscribe for securities in a corporation is offered to a trustee in respect of a holding in that corporation or another corporation, the trustee may (as to all or any of the securities)—

- exercise the right; or
- assign the benefit of the right, or the title to the right, to another person (including a beneficiary); or
- renounce the right.

A trustee accepting or subscribing for securities under this proposed section is, for the purposes of any provisions of this new Part, exercising a power of investment.

This new provision applies to securities whether acquired before or after the commencement of the section.

Clause 26 clarifies the ability of trustees to utilise the electronic processes of the Reserve Bank Information and Transfer System (RITS). RITS is the electronic system owned and operated by the Reserve Bank of Australia. It allows Commonwealth Government securities to be transferred and settled

simultaneously on a trade for trade assured payments basis. “Assured payments” means that neither the member selling securities nor the member paying the cash can recall the transaction once it is settled, and both members receive good title to the cash and securities exchanged at the moment of settlement. This is achieved by members appointing banks in the system to undertake payment obligations on their behalf.

Accordingly, this provision provides that a chose in action arising under RITS that entitles its holder to a security of a particular description [the “underlying security”] is, for this Act and the instrument creating a trust, taken to be the same in all respects as the underlying security.

Clause 27 deals with the power of trustee to pay calls on shares. The clause provides that—

- a trustee may apply capital money subject to a trust in payment of calls on shares subject to the same trust;
- if the trustee is a trustee company—it may exercise the powers conferred by this proposed section despite the shares on which the calls are made being shares in the trustee company.

Clause 28 deals with the power to purchase a dwelling house as residence for beneficiary. A trustee may purchase a dwelling house for use by a beneficiary as a residence or enter into another agreement or arrangement to secure for a beneficiary a right to use a dwelling house as a residence.

A trustee may permit a beneficiary to use as a residence a dwelling house that forms part of the trust property and may for that purpose retain the dwelling house as part of the trust property despite the terms of the instrument creating the trust. A dwelling house purchased, retained or otherwise secured for use by the beneficiary as a residence may be made available to the beneficiary for that purpose on such terms and conditions consistent with the trust and the extent of the beneficiary’s interest that the trustee considers appropriate.

The trustee may retain a dwelling house or any interest or rights in a dwelling house acquired under this new section after the use of the dwelling house by the beneficiary has ended.

Clause 29 provides for the power of trustee to retain investments. A trustee is not liable for breach of trust by reason only of continuing to hold an investment that has ceased to be an investment—

- authorised by the instrument creating the trust; or
- properly made by the trustee exercising a power of investment; or
- made under this part as previously in force from time to time; or
- authorised by another Act or the general law.

Clause 30 deals with loans and investments by trustees, which are not breaches of trust in certain circumstances. If a trustee lends money on the security of property, the trustee is not in breach of trust only because of the amount of the loan in comparison to the value of the property at the time when the loan was made—

- (a) if it appears to the court—
 - that, in making the loan, the trustee was acting on a report as to the value of the property made by a person reasonably believed to be competent to give such a report and whom the trustee instructed and employed independently of any owner of the property; and
 - that the amount of the loan was not more than two-thirds of the value of the property as stated in the report; and
 - that the loan was made in reliance on the report; or
- (b) if the trustee is insured by an entity prescribed under a regulation carrying on the business of insurance against all loss that may arise because of the default of the borrower.

A trustee who lends money on the security of leasehold property is not in breach of trust merely because the trustee dispensed, either completely or in part, with the production or investigation of the lessee's title when making the loan.

This new provision applies to transfers of existing securities as well as to new securities and to investments whether made before or after the commencement of this section.

Clause 30A is concerned with limitation of liability of trustee for loss on improper investments. If a trustee improperly lends trust money on a security that would have been a proper investment if the sum lent had been smaller than the actual sum lent, the security is to be taken to be a proper investment in respect of the small sum, and the trustee is only liable to make

good the difference between the sum advanced and the smaller sum, with interest. This new provision applies to investments whether made before or after the commencement of this provision.

Clause 30B enables a court to take into account the investment strategy in action for breach of trust. If a trustee has been charged with a breach of trust in respect of a duty under this new part relating to the power of investment, when considering the question of the trustee's liability, the court may take into account—

- the nature and purpose of the trust;
- whether the trustee had regard to the matters set out in new section 24 so far as is appropriate to the circumstances of the trust;
- whether the trust investments have been made under an investment strategy formulated in accordance with the duty of a trustee under this part;
- the extent the trustee acted on the independent and impartial advice of a person competent, or apparently competent, to give advice.

Clause 30C provides for the power of a court to set off gains and losses arising from investment. When considering an action for breach of trust in respect of an investment by a trustee where a loss has been or is expected to be sustained by the trust, a court may set off all or part of the loss resulting against all or part of the gain resulting from any other investment whether in breach of trust or not. The power of set off conferred by this section is in addition to any other power or entitlement to set off all or part of any loss against any property.

Insertion of a new Part 10

Clause 6 inserts a new transitional provision. A provision in an Act or document, whether or not the document creates a trust, that empowers or requires a person to invest an amount in the investments authorised by the Act as in force immediately before the commencement of this provision, is to be read as if it empowered or required the person to invest the amount according to the provisions of this new part as to the investment of trust funds.

It also deals with the reference to the fundamental term “authorised investment” in any statute or document.

Part 3—Consequential Amendments

Clause 7 provides for the Schedule which amends various statutes to give effect to the objectives of this Bill.

SCHEDULE

In the Schedule, consequential amendments are made to the following statutes:

- *Court Funds Act 1973*
- *Funeral Benefit Business Act 1982*
- *Queensland Investment Corporation Act 1991*
- *Queensland Treasury Corporation Act 1988*
- *State Development and Public Works Organization Act 1971*
- *State Housing Act 1945*
- *Statutory Bodies Financial Arrangements Act 1982*
- *Trustee Companies Act 1968*
- *Trusts Act 1973*
- *Valuation of Land Act 1944*