

Queensland



TRUSTS (INVESTMENTS) AMENDMENT BILL 1998



TRUSTS (INVESTMENTS) AMENDMENT BILL 1998

TABLE OF PROVISIONS

Section	Page
PART 1—PRELIMINARY	
1 Short title	4
PART 2—AMENDMENT OF TRUSTS ACT 1973	
2 Act amended in pt 2	4
3 Amendment of s 5 (Definitions)	4
4 Replacement of pt 3 (Investments)	5
PART 3—INVESTMENTS	
20 Application of pt 3	5
21 Power of trustee to invest	5
22 Duties of trustee in relation to power of investment	5
23 Law and equity preserved	6
24 Matters to which trustee must have regard in exercising power of investment	6
25 Powers of trustee in relation to securities	8
26 Investment in securities under RITS system	9
27 Power of trustee as to calls on shares	9
28 Power to purchase dwelling house as residence for beneficiary ...	9
29 Power of trustee to retain investments	10
30 Loans and investments by trustees not breaches of trust in certain circumstances	11
30A Limitation of liability of trustee for loss on improper investments	11

30B	Court may take into account investment strategy etc. in action for breach of trust	12
30C	Power of court to set off gains and losses arising from investment	12
30D	Transitional—Trusts (Investments) Amendment Act 1998	13

PART 3—CONSEQUENTIAL AMENDMENTS

5	Amended legislation—sch	13
---	-------------------------------	----

PART 4—EXPIRY

6	Expiry	13
---	--------------	----

SCHEDULE	14
-----------------------	----

CONSEQUENTIAL AMENDMENTS

ABORIGINAL LAND REGULATION 1991	14
COLLECTIONS REGULATION 1975	14
COURT FUNDS ACT 1973	14
FUNERAL BENEFIT BUSINESS ACT 1982	15
QUEENSLAND INVESTMENT CORPORATION ACT 1991	15
QUEENSLAND TREASURY CORPORATION ACT 1988	16
STATE DEVELOPMENT AND PUBLIC WORKS ORGANIZATION ACT 1971	16
STATE HOUSING ACT 1945	16
STATUTORY BODIES FINANCIAL ARRANGEMENTS ACT 1982	16
TORRES STRAIT ISLANDER LAND REGULATION 1991	18
TRUSTEE COMPANIES ACT 1968	18
TRUSTS ACT 1973	18
VALUATION OF LAND ACT 1944	19

1998

A BILL

FOR

An Act to amend the *Trusts Act 1973* in relation to investment of trust funds, and to make consequential amendments

The Parliament of Queensland enacts—

1

PART 1—PRELIMINARY

2

Short title

3

Clause **1.** This Act may be cited as the *Trusts (Investments) Amendment Act 1998*.

4

5

PART 2—AMENDMENT OF TRUSTS ACT 1973

6

Act amended in pt 2

7

Clause **2.** This part amends the *Trusts Act 1973*.

8

Amendment of s 5 (Definitions)

9

Clause **3.** Section 5, definition “**authorised investments**”—
omit, insert—

10

11

‘ **“authorised investments”** means investments of trust funds that are—

12

(a) authorised by the instrument creating the trust; or

13

(b) properly made by the trustee exercising a power of investment;¹
or

14

15

(c) authorised by another Act or the general law.’.

16

¹ See part 3 (Investments).

	Replacement of pt 3 (Investments)	1
Clause	4. Part 3—	2
	<i>omit, insert—</i>	3
	‘PART 3—INVESTMENTS	4
	‘Application of pt 3	5
	‘20.(1) This part applies to a trust, whether or not the trust was created before or after the commencement of this section.	6 7
	‘(2) However, unless a provision of this part otherwise expressly provides, this part (other than sections 29 to 30D) applies subject to the instrument creating the trust.	8 9 10
	‘Power of trustee to invest	11
	‘21. A trustee may, unless expressly forbidden by the instrument creating the trust—	12 13
	(a) invest trust funds in any form of investment; and	14
	(b) at any time, vary an investment or realise an investment of trust funds and reinvest an amount resulting from the realisation in any form of investment.	15 16 17
	‘Duties of trustee in relation to power of investment	18
	‘22.(1) A trustee must, in exercising a power of investment—	19
	(a) if the trustee’s profession, business or employment is, or includes, acting as a trustee or investing money on behalf of other persons—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; or	20 21 22 23 24
	(b) if the trustee’s profession, business or employment is not, or does not include, acting as a trustee or investing money on behalf of other persons—exercise the care, diligence and skill a prudent person of business would exercise in managing the affairs of other persons.	25 26 27 28 29

Trusts (Investments) Amendment

‘(2) A trustee must, in exercising a power of investment, comply with a provision 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.

‘(3) A trustee must, at least once in each year, review the performance, individually and as a whole, of trust investments.

‘Law and equity preserved

‘23.(1) A rule or principle of law or equity imposing a duty on a trustee exercising a power of investment continues to apply except so far as it is inconsistent with this or another Act or the instrument creating the trust.

‘(2) Without limiting the rules or principles mentioned in subsection (1), they include a rule or principle imposing—

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

‘(3) A 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 relation to a breach of trust, continues to apply.

‘(4) If a trustee is under a duty to obtain advice, the reasonable cost of obtaining the advice is payable out of trust funds.

‘Matters to which trustee must have regard in exercising power of investment

‘24.(1) Without limiting the matters a trustee may take into account when exercising a power of investment, a trustee must, so far as they are appropriate to the circumstances of the trust, have regard to the following matters—

- (a) the purposes of the trust and the needs and circumstances of the

Trusts (Investments) Amendment

beneficiaries;	1
(b) the desirability of diversifying trust investments;	2
(c) the nature of and risk associated with existing trust investments and other trust property;	3 4
(d) the need to maintain the real value of the capital or income of the trust;	5 6
(e) the risk of capital or income loss or depreciation;	7
(f) the potential for capital appreciation;	8
(g) the likely income return and the timing of income return;	9
(h) the length of the term of the proposed investment;	10
(i) the probable duration of the trust;	11
(j) the liquidity and marketability of the proposed investment during, and at the end of, the term of the proposed investment;	12 13
(k) the total value of the trust estate;	14
(l) the effect of the proposed investment for the tax liability of the trust;	15 16
(m) the likelihood of inflation affecting the value of the proposed investment or other trust property;	17 18
(n) the cost (including commissions, fees, charges and duties payable) of making the proposed investment;	19 20
(o) the results of a review of existing trust investments.	21
‘(2) A trustee—	22
(a) 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; and	23 24 25 26 27
(b) may pay out of trust funds the reasonable costs of obtaining the advice.	28 29

‘Powers of trustee in relation to securities

‘25.(1) If securities of a corporation are subject to a trust, the trustee may agree to a scheme or arrangement—

- (a) for or arising out of the reconstruction, reduction of capital or liquidation of, or the issue of shares by, the corporation; or
- (b) for the sale of all or part of the property and undertaking of the corporation to another corporation; or
- (c) for the acquisition of securities of the corporation, or of control of the corporation, by another corporation; or
- (d) for the amalgamation of the corporation with another corporation; or
- (e) for the release, modification or variation of rights, privileges or liabilities attached to the securities, or any of them;

in the same way as if the trustee were beneficially entitled to the securities.

‘(2) The trustee may accept instead of, or in exchange for, the securities subject to the trust, securities of any denomination or description of another corporation party to the scheme or arrangement.

‘(3) If a conditional or preferential right to subscribe for securities in a corporation is offered to a trustee in relation to a holding in that corporation or another corporation, the trustee may, as to all or any of the securities—

- (a) exercise the right and apply capital money subject to the trust in payment of the consideration; or
- (b) assign to any person, including a beneficiary under the trust, the benefit of the right, or the title to the right, for the best consideration that can be reasonably obtained; or
- (c) renounce the right.

‘(4) A trustee accepting or subscribing for securities under this section is, for any provision of this part, exercising a power of investment.

‘(5) A trustee may retain securities accepted or subscribed for under this section for any period for which the trustee could properly have retained the original securities.

‘(6) The consideration for an assignment made under subsection (3)(b)

must be held as capital of the trust.

‘(7) This section applies in relation to securities whether acquired before or after the commencement of this section.

‘Investment in securities under RITS system

‘26.(1) A chose in action arising under the RITS system 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.

‘(2) The holding or acquisition by a trustee of a chose in action mentioned in subsection (1) is to be taken to be an investment by the trustee in the underlying security.

‘(3) It does not matter that the right conferred by the chose in action is a right in relation to securities of a particular description and not in relation to particular securities.

‘(4) This section applies to a trust to the extent that the instrument creating the trust does not expressly prohibit its application.

‘(5) In this section—

“RITS system” means the Reserve Bank Information and Transfer System operation by the Reserve Bank of Australia, as operating from time to time.

‘Power of trustee as to calls on shares

‘27. A trustee may—

- (a) apply capital money subject to a trust in payment of calls on shares subject to the same trust; and
- (b) if the trustee is a trustee corporation—exercise the powers conferred by paragraph (a) despite the shares on which the calls are made being shares in the trustee corporation.

‘Power to purchase dwelling house as residence for beneficiary

‘28.(1) A trustee may—

Trusts (Investments) Amendment

(a) purchase a dwelling house for a beneficiary to use as a residence; 1
or 2

(b) enter into an agreement or arrangement to secure for a beneficiary 3
a right to use a dwelling house as a residence. 4

‘(2) Despite the terms of the instrument creating the trust, a trustee may, 5
if to do so would not unfairly prejudice the interests of other beneficiaries, 6
retain as part of the trust property a dwelling house for a beneficiary to use 7
as a residence. 8

‘(3) A dwelling house purchased, retained or otherwise secured for use 9
by the beneficiary as a residence may be made available to the beneficiary 10
for that purpose on the conditions consistent with the trust and the extent of 11
the beneficiary’s interest that the trustee considers appropriate. 12

‘(4) The trustee may retain a dwelling house or an interest or rights in a 13
dwelling house acquired under this section after the use of the dwelling 14
house by the beneficiary has ended. 15

‘(5) In this section— 16

“dwelling house” includes— 17

(a) a building or part of a building designed, or converted or capable 18
of being converted, for use as a residence; and 19

(b) amenities or facilities for use in association with the use of a 20
dwelling house. 21

‘Power of trustee to retain investments 22

‘29. A trustee is not liable for breach of trust merely because the trustee 23
continues to hold an investment that has stopped being an investment— 24

(a) authorised by the instrument creating the trust; or 25

(b) properly made by the trustee exercising a power of investment; or 26

(c) made under this part as previously in force from time to time; or 27

(d) authorised by another Act or the general law. 28

‘Loans and investments by trustees not breaches of trust in certain circumstances

‘30.(1) If a trustee lends an amount on the security of property, the trustee is not in breach of trust merely 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—

(i) in making the loan, the trustee was acting on a report as to the value of the property made by a person whom the trustee reasonably believed to be competent to give the report and whom the trustee instructed and employed independently of any owner of the property; and

(ii) the amount of the loan was not more than two-thirds of the value of the property as stated in the report; and

(iii) the loan was made in reliance on the report; or

(b) if the trustee is insured by a body prescribed under a regulation carrying on the business of insurance against all loss that may arise because of the default of the borrower.

‘(2) If a trustee lends an amount on the security of leasehold property, the trustee 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.

‘(3) This section 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.

‘Limitation of liability of trustee for loss on improper investments

‘30A.(1) If a trustee improperly lends trust money on a security that would have been a proper investment if the amount lent had been smaller than the actual amount lent—

(a) the security is to be taken to be a proper investment in relation to the smaller sum; and

(b) the trustee is only liable to make good the difference between the

amount advanced and the smaller amount, with interest.

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

‘Court may take into account investment strategy etc. in action for breach of trust

‘30B. In proceedings against a trustee for a breach of trust in relation to a duty under this part relating to the trustee’s power of investment, the court may, when considering the question of the trustee’s liability, take into account the following matters—

- (a) the nature and purpose of the trust;
- (b) whether the trustee had regard to the matters set out in section 24² so far as is appropriate to the circumstances of the trust;
- (c) whether the trust investments have been made under an investment strategy formulated in accordance with the duty of a trustee under this part;
- (d) the extent the trustee acted on the independent and impartial advice of a person competent, or apparently competent, to give the advice.

‘Power of court to set off gains and losses arising from investment

‘30C.(1) The court may, when considering an action for breach of trust arising out of or in relation to an investment by a trustee where a loss has been or is expected to be sustained by the trust, set off all or part of the loss resulting from the investment against all or part of the gain resulting from any other investment whether in breach of trust or not.

‘(2) The power of set off conferred by subsection (1) is in addition to any other power or entitlement to set off all or part of any loss against any property.

² Section 24 (Matters to which trustee must have regard in exercising power of investment)

‘Transitional—Trusts (Investments) Amendment Act 1998

‘30D.(1) 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 this Act as in force immediately before the commencement of this section, is to be read as if it empowered or required the person to invest the amount according to the provisions of this part as to the investment of trust funds.

‘(2) In an Act or document, and if otherwise appropriate, the following references are taken to be references to an authorised investment under this Act as in force after the commencement of this section—

- (a) a reference to an authorised investment under the repealed Acts, section 4;
- (b) a reference to an authorised investment under this Act as in force immediately before the commencement of this section.’

PART 3—CONSEQUENTIAL AMENDMENTS**Amended legislation—sch**

Clause **5.(1)** The schedule amends the legislation mentioned in it.

(2) To remove doubt, it is declared that the amendment of a regulation by this Act does not affect the regulation-making powers the Governor in Council has under the Act under which the regulation is made and, in particular, the power of the Governor in Council to amend a provision of a regulation amended by this Act.

PART 4—EXPIRY**Expiry**

Clause **6.** This Act expires on the day after the last of its provisions commence.

SCHEDULE

1

CONSEQUENTIAL AMENDMENTS

2

section 5

3

ABORIGINAL LAND REGULATION 1991

4

1. Section 33(1), from ‘section 21’—

5

omit, insert—

6

‘the Trusts Act 1973, part 3.’

7

COLLECTIONS REGULATION 1975

8

1. Section 32(14), from ‘as follows’—

9

omit, insert—

10

‘in accordance with the Trusts Act 1973, part 3.’

11

COURT FUNDS ACT 1973

12

1. Section 11(2), from ‘in any investment’—

13

omit, insert—

14

‘other than under the Trusts Act 1973, part 3.’

15

SCHEDULE (continued)

FUNERAL BENEFIT BUSINESS ACT 1982**1. Section 31(2), from ‘pursuant’—***omit, insert—*‘under the *Trusts Act 1973*, part 3.’**2. Section 40(1)(a) and (b)—***omit, insert—*‘(a) under the *Trusts Act 1973*, part 3; or

(b) in an investment approved by the Governor in Council; or’.

3. Section 65(1), definition “the account”, from ‘, or a building’—*omit.***QUEENSLAND INVESTMENT CORPORATION ACT
1991****1. Section 41—***omit.*

SCHEDULE (continued)

QUEENSLAND TREASURY CORPORATION ACT 1
1988 2

1. Section 28— 3

omit. 4

STATE DEVELOPMENT AND PUBLIC WORKS 5
ORGANIZATION ACT 1971 6

1. Section 99(1)— 7

omit. 8**STATE HOUSING ACT 1945** 9

1. Section 17(4A)— 10

omit. 11

STATUTORY BODIES FINANCIAL 12
ARRANGEMENTS ACT 1982 13

1. Section 46— 14

omit, insert— 15

SCHEDULE (continued)

‘Category 3 investment power	1
‘46.(1) Category 3 investment power includes category 2 investment power and the power to invest in all or any of the following, regardless of the period of the investment—	2 3 4
(a) the first legal or first statutory mortgage of an estate in fee simple in land in any State;	5 6
(b) the purchase of—	7
(i) land in fee simple in any State; or	8
(ii) leasehold land in the State held for a term of 40 years or more unexpired at the time of the purchase; or	9 10
(iii) subject to the <i>Land Act 1994</i> , a freeholding lease of land held from the State under that Act;	11 12
(c) debentures or other securities charged on the funds or property of a local government;	13 14
(d) an investment arrangement prescribed under a regulation for this paragraph.	15 16
‘(2) In this section—	17
“freeholding lease” means—	18
(a) a pre-Wolfe freeholding lease, or post-Wolfe freeholding lease, that was an agricultural farm under the repealed <i>Land Act 1962</i> ; or	19 20 21
(b) a grazing homestead freeholding lease.	22
“grazing homestead freeholding lease” see <i>Land Act 1994</i> , schedule 6.	23
“post-Wolfe freeholding lease” see <i>Land Act 1994</i> , schedule 6.	24
“pre-Wolfe freeholding lease” see <i>Land Act 1994</i> , schedule 6.’.	25
 2. Section 65—	 26
omit.	27

SCHEDULE (continued)

**TORRES STRAIT ISLANDER LAND REGULATION
1991****1. Section 33(1), from ‘section 21’—***omit, insert—*‘the *Trusts Act 1973*, part 3.’.**TRUSTEE COMPANIES ACT 1968****1. Section 36A(1), from ‘is restricted’—***omit, insert—*‘is in accordance with the *Trusts Act 1973*, part 3.’.**2. Section 36A(2) and (3)—***omit.***TRUSTS ACT 1973****1. Section 33(1)(i)(iii) and (iv)—***omit.***2. Section 37(6), ‘21 or 27’—***omit, insert—*

‘30’.

SCHEDULE (continued)

3. Section 49, to ‘a trustee’—	1
<i>omit, insert—</i>	2
‘A trustee’.	3

VALUATION OF LAND ACT 1944	4
-----------------------------------	---

1. Section 78, ‘27(1)’—	5
<i>omit, insert—</i>	6
‘30(1)’.	7
	8