



Legislation Note

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TRUSTS (INVESTMENTS) AMENDMENT BILL 1999

Queensland's *Trusts Act 1973* contains an extensive list (the statutory list) of the kinds of investments which are authorised as trustee investments ("authorised investments"). On 23 April 1998, the Trusts (Investments) Amendment Bill 1998 was introduced into the Legislative Assembly, its main purpose being to replace the "statutory list" approach with what is known as the "prudent person" rule. The proposed changes were intended to equip trustees with "modern powers of investment".¹ In introducing the Bill to Parliament, the then Attorney-General and Minister for Justice, Hon DE Beanland MLA, described it as involving "... the most significant amendments made to the *Trusts Act 1973* since its enactment many years ago".²

However, before the Bill could be debated, it was announced that a General Election for the Legislative Assembly would be held on 13 June 1998.

On 8 June 1999, the Trusts (Investments) Amendment Bill 1999 was introduced into the Legislative Assembly by the Attorney-General and Minister for Justice and Minister for The Arts, Hon MJ Foley MLA. The Bill is substantially similar to the Coalition Bill which lapsed in 1998.

BACKGROUND

The trust concept

Where a person holds property on another's behalf, or for the accomplishment of a particular purpose, he or she is said to hold that property in

trust, and is called a trustee. The person for, or on whose behalf, the property is held is known as the beneficiary.³

In 1747, the English Lord Chancellor, Lord Hardwicke, described a trust as "... an office necessary in the concerns between man and man and ... if faithfully discharged, attended with no small degree of trouble and anxiety".⁴

History of trustees' investment powers

As commentators on the law of trusts explain, modern legislatures have adopted two different approaches to ensuring that trustees invest trust funds in appropriate securities. In many of the northern-eastern American states, a trustee may choose any prudent investment for the trust under his administration. This approach, known as the "prudent person" approach, emphasises a trustee's duties of care, prudence and caution, but does not fetter his discretion by telling him whether a given investment is or is not allowable. By contrast, the approach adopted until recently in Australia specifies a statutory list of permissible investments for trustees.⁵ The common feature of these statutory lists, which are derived from English legislation of 1925,⁶ has been their conservatism.⁷

Problems with the statutory list approach

A number of shortcomings with the statutory list approach to trustees' powers of investment have been identified.

For instance, the state and territory legislation which has until recently prescribed a statutory list has not been uniform. For example, under the statutory list provisions of the Western Australian

trustee legislation prior to its amendment in 1997, shares in Australian companies were authorised investments, subject to prescribed safeguards. However, company shares are not contained in the statutory list in Part 3 of Queensland's Trust Act. The lack of uniformity between jurisdictions has meant that an investment authorised in one jurisdiction might constitute a breach of trust in another state or territory.⁸

Apart from the lack of uniformity, another difficulty has been that trustees may assume that because an investment is contained in a statutory list, it is safe to invest in it (perhaps with disastrous consequences). For example, in Victoria where a deposit with a permanent building society was an authorised trustee investment, the Pyramid Building Society failed. In Western Australia, the shell of Rothwells Ltd was used to launch Rothwells merchant bank, which subsequently collapsed. Rothwells had originally been a menswear retailer in Queensland, returning dividends for an uninterrupted period over 15 years, making it an authorised trustee investment under the former s 16B of the WA *Trustees Act 1962*.⁹

On the other hand, many new investment products, although not contained in a statutory list, are "... *likely to be just as sound by objective criteria*".¹⁰

Trustee investment law reform

In the Northern Territory, South Australia and Victoria, statutory lists of authorised trustee investments were replaced in 1995 by a general entitlement on the part of trustees to invest trust funds in any form of investment. In place of the statutory lists, the amending legislation introduced the prudent person rule. New South Wales and Western Australia similarly amended their legislation in 1997. Tasmania amended its legislation in 1998. Most recently, the Australian Capital Territory passed the *Trustee (Amendment) Act* in early May of 1999.

The impetus for the above changes had its origins in a Special Premiers Conference at which agreement was reached to reform the supervision of non-bank financial institutions, including developing a uniform approach to authorised trustee investments.¹¹ The legislation which the states and territories informally agreed to enact is modelled on that enacted in New Zealand¹² (*Trustee Amendment Act 1988* (NZ)).

WHAT THE BILL DOES

Queensland's Trustee (Investment) Amendment Bill 1999 abolishes the statutory list approach for Queensland and replaces it with the prudent person approach to trustee investments. This is effected by omitting the current Part 3 of the Trusts Act and replacing it with the **proposed new Part 3 (proposed new ss 20 to 30C)**.

The proposed changes will bring Queensland into line with all of the other Australian states and territories.

Key provisions of the Queensland Bill (cited in bold font) are discussed below, together with the corresponding provisions from other Australian jurisdictions.

The statutory list

In Queensland, Part 3 of the Trusts Act lists the types of investments which are currently authorised as trustee investments. These include:

- government stocks and securities: s 21(1)(a),
- debts or securities guaranteed by the state or federal government: s 21(1)(g),
- municipal bonds: s 21(1)(d),
- mortgages over land:
- s 21(1)(b)
- deposits with banks and building societies: s 21(1)(e) & (k),
- land in fee simple:
- s 21(1)(c)(i), and
- investments in common trust funds established by a trustee company: s 21(1)(ka).

Discretion as to investment of trust funds

Under the proposed changes, trustees will be given the power to invest trust funds in any form of investment, and vary the investment, unless expressly prohibited by the instrument creating the trust: **Qld, proposed new s 21**; NSW, s 14; SA, s 6; Vic, s 5; WA, s 17; Tas, s 6; NT, s 5; ACT, s 14.

As Ford and Lee, authors of *Principles of the Law of Trusts*, explain, commenting on equivalent provisions already enacted in other jurisdictions:

“Nothing can be gleaned from the breadth of the wording of this provision as to the propriety of any particular investment. Investment decisions are now the exclusive responsibility of the trustees, observing the strictures of the prudent person rule”.¹³

According to Davis and Shaw, in their text, *Trustee Investment The Prudent Person Approach*:

“Prudence is a test of conduct and not of performance. Neither the overall performance of the portfolio, nor the performance of individual investments should be viewed as central to the inquiry. Prudence should be measured primarily by the process through which investment strategies and tactics are developed, adopted, implemented and monitored. Prudence is demonstrated by the process through which risk is managed, rather than by the labelling of specific investments as either prudent or imprudent”.¹⁴

Standard of Care: Duties of trustees in respect of investment - the “prudent person” rule

At common law, the courts have not been content for trustees to deal with trust property only as carefully as if it were their own. Rather, the standard of care required has been described by Lindley LJ (and reiterated in modern times by

Megarry V-C) as follows: *“The duty of the trustee is not to take such care only as a prudent man would take if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide”*.¹⁵

This principle is statutorily recognised in **proposed new s 22(1)(b)** which provides that, in exercising their powers of investment, trustees must exercise the care, diligence and skill **a prudent businessperson would exercise in managing the affairs of other people**: NSW, s 14A(2)(b); SA, s 7(1)(b); Vic, s 6(1)(b); WA, s 18(1)(b); Tas, s 7(1)(b); NT, s 6(1)(b); ACT, s 14A(2)(b).

If the trustee’s profession, business or employment is to act as a trustee or to invest money on behalf of other people, then the trustee 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 people**: **Qld, proposed new s 22(1)(a)**; NSW, s 14A(2)(a); SA, s 7(1)(a); Vic, s 6(1)(a); WA, s 18(1)(a); Tas, s 7(1)(a); NT, s 6(1)(a); ACT, s 14A(2)(a). This provision likewise reflects the common law approach, according to which a higher duty of care is expected from a professional trustee such as a trustee company which holds itself out as having special knowledge, skill or experience.¹⁶

The prudent person test applies subject to the instrument creating the trust: **Qld, proposed new s 22(2)**; NSW, s 14A(1); SA, s 7(1); Vic, s 6(1); WA, s 18(1); Tas, s 7(1); NT, s 6(1); ACT, s 14(A)(1).

Annual Review of Investments

Under **proposed new s 22(3)**, it is mandatory for a trustee to, at least once yearly, review the performance, individually and as a whole, of trust investments. Ford and Lee have suggested that,

in practice, where the trust is a large one, the review should take place more often.¹⁷

Law and equity preserved

The Trust (Investments) Amendment Bill 1999 preserves any rules of law and equity which impose a duty on a trustee exercising a

power of investment, including:

- a duty to exercise the powers of a trustee in the best interests of all present and future beneficiaries of a 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,

except insofar as they are inconsistent with the proposed legislation or any other Act, or the instrument affecting the trust: **Qld, proposed new s 23**; SA, s 8(1); NSW, s 14B; Vic, s 7(1)&(2); WA, s 19; Tas, s 9; NT, s 7(1); ACT, s 14B.

Matters to which trustee must have regard in exercising powers of investment

The Bill codifies factors to be considered by trustees when making investment decisions.¹⁸ To this end, it provides that, without limiting the matters a trustee may take into account when exercising a power of investment, a trustee must, insofar as they are appropriate to the circumstances of the trust, have regard to:

- the trust's purposes and the needs and circumstances of the beneficiaries
- the desirability of diversifying trust investments
- the nature of and risk associated with existing trust investments and other trust property
- the need to maintain the real value of the trust's capital or income
- the risk of capital or income loss or depreciation
- the potential for capital appreciation
- the likely income return and the timing of income return
- the length of the term of the proposed investment
- 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
- the cost (including commissions, fees, charges and duties payable) of making the proposed investment
- the results of a review of existing trust investments: **Qld, proposed new s 24(1)**; NSW, s 14C; SA, s 9(1); Vic, s 8(1); WA, s 20; Tas, s 8; NT, s 8(1); ACT, s 14C.

Trustee may obtain advice

Under proposed new s 24(2)(a), a trustee **may** obtain independent and impartial advice reasonably required for the investment of trust funds, or to manage the investment, from someone the trustee reasonably believes to be competent to give the advice.

As Ford and Lee explain:

*“The trustee’s duty to seek advice is part of the duty of prudence. The duty of prudence sometimes requires the trustee to seek advice, for instance where a particular decision is difficult and the trustee lacks the qualifications or experience to deal with it unassisted”.*¹⁹

Where a trustee does choose to seek advice, the Queensland Bill requires that he or she **must consider** the advice obtained: **proposed new s 24(2)(a)**.²⁰ Ford and Lee say:

*“A trustee who does seek and obtain advice is under a duty to consider the advice received; but is not under a duty to ‘take it’ if that means that the trustee must act in accordance with the advice received. The trustee must decide what is the prudent course of action to take, in the light of the advice received. If the trustee were under a duty to act in accordance with the advice received, the trustee’s discretion would be made subordinate to the adviser’s and that would be contrary to principle”.*²¹

Finally, under the proposed legislation, a trustee will be entitled to pay out of trust funds the reasonable costs of obtaining advice: **proposed new s 24(2)(b)**.

Commenting on equivalent provisions, Ford and Lee have said:

*“It may be feared that the unlimited investment powers given to trustees, coupled with the many factors that they are required to take into account in investing, could add significantly to the cost of managing trusts. It is submitted that this is not necessarily the case. Common sense and integrity rather than an expert knowledge of investment markets and smart strategies, is the standard required of trustees who do not claim expertise”.*²²

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

If proceedings are brought against a trustee for a breach of trust relating to the trustee’s power of investment, the court may, when considering the question of the trustee’s liability, take into account:

- the nature and purpose of the trust
- whether the trustee had regard to the matters set out in **proposed s 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 a trustee’s duty under **proposed new Part 3**
- the extent to which a trustee acted on the independent and impartial advice of a person competent, or appearing to be competent, to give the advice: **Qld, proposed new s 30B**; NSW, s 90; Vic, s 12C; SA, s 13C; WA, s 26B; Tas, s 12D; NT, s 10E; ACT, s 89.

Investment in Securities under RITS system

Proposed new s 26 of the Trusts

(Investments) Amendment Bill 1999 clarifies the ability of trustees to make use of the Reserve Bank Information and Transfer System (RITS), an electronic system owned and operated by the Reserve Bank of Australia, under which Commonwealth Government securities can be transferred and settled simultaneously on a trade for trade assured payments basis.²³

Apart from the proposed Queensland provision, of the other Australian jurisdictions, only Victoria (s 9A), Western Australia (s 22) and the ACT (s 14F) appear to have made specific provision to ensure trustees can utilise the RITS system.

When the Legislation is to commence

Clause 2 of the Trust (Investments) Amendment Bill 1999 provides that the legislation is to commence on a date to be fixed by proclamation. In his Second Reading Speech, Hon MJ Foley explained that:

*“... in order that trustees have enough time to become acquainted with their new duties, it is proposed to delay the commencement of this Bill for a period of six months for this to occur”.*²⁴

Key Legislation

- *Trustee Act* (NT), as amended by the *Trustee Amendment Act (No 2) 1995* (NT).
- *Trustee Act 1936* (SA), as amended by the *Trustee (Investment Powers) Amendment Act 1995* (SA).
- *Trustee Act 1958* (Vic), as amended by the *Trustee and Trustee Companies (Amendment) Act 1995* (Vic).
- *Trustee Act 1925* (NSW), as amended by the *Trustee Amendment (Discretionary Investments) Act 1997* (NSW).
- *Trustees Act 1962* (WA), as amended by the *Trustees Amendment Act 1997* (WA).
- *Trustee Amendment (Investment Powers) Act 1998* (Tas).
- *Trustee Act 1925* of the State of New South Wales in its application in the Australian

Capital Territory, as amended by the *Trustee (Amendment) Act 1999* (ACT).

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- ¹ Trust (Investments) Amendment Bill 1998 (Qld), *Explanatory Notes*, p 1.
- ² Hon DE Beanland MLA, Trusts (Investments) Amendment Bill 1998 (Qld), Second Reading Speech, *Queensland Parliamentary Debates*, 23 April 1998, pp 888-9, p 888.
- ³ *Words and Phrases Legally Defined*, 3rd edn, Butterworths, London, 1990, Volume 4, p 334.
- ⁴ *Knight v Earl of Plymouth* (1747) Dick 120 at 126, quoted in Lord Nicholls of Birkenhead, 'Trustees and their broader community: Where duty, morality and ethics converge', *The Australian Law Journal*, vol 70, March 1996, pp 205-216 at p 205.
- ⁵ See HAJ Ford and WA Lee, *Principles of the Law of Trusts*, Law Book Company, 1983, pp 450-451; HAJ Ford and IJ Hardingham, *Trusts: Commentary and Materials*, 6th edn, Law Book Company, 1990, pp 366-370.
- ⁶ Ford & Lee, p 450.
- ⁷ *Halsbury's Laws of Australia*, para 430-4540.
- ⁸ Peter M McDermott, 'Equity and trusts', *The Australian Law Journal*, vol 70, October 1996, pp 801-804 at p 801.
- ⁹ McDermott, pp 801-802.
- ¹⁰ Hon MJ Foley MLA, 'Attorney-General and Minister for Justice and Minister for The Arts, Trusts (Investments) Amendment Bill 1999, Second Reading Speech, *Queensland Parliamentary Debates*, 8 June 1999, pp 2178-9, p 2179.
- ¹¹ Hon DE Beanland MLA, Second Reading Speech, p 888. See the Special Premiers' Conference Working Group on Non-Bank Financial Institutions, *Proposals for Reform of the Supervisory Structure for Non-Bank Financial Institutions*, April 1991, para 7.6.
- ¹² Hon DE Beanland MLA, Second Reading Speech, p 888.
- ¹³ HAJ Ford and WA Lee, *Principles of the Law of Trusts*, 3rd edn, LBC Information Services, 1996, para [10070].

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- ¹⁴ Davis and Shaw, *Trustee Investment The Prudent Person Approach*, Butterworths, 1997, p 37, quoted in Ford and Lee, 3rd edn, para [10070].
- ¹⁵ *Re Whiteley, Whiteley v Learoyd* (1886) 3 Ch D 347 per Lindley LJ at 355; *Cowan v Scargill* [1985] Ch 270 per Sir Robert Megarry VC at p 289.
- ¹⁶ *Bartlett v Barclays Bank Trust Co Ltd* (No 1) [1980] Ch 515 at 534; *Australian Securities Commission v AS Nominees Ltd* (1995) 133 ALR 1 per Finn J at p 14.
- ¹⁷ Ford and Lee, 3rd edn, para [10110].
- ¹⁸ Hon MJ Foley MLA, Second Reading Speech, p 2179.
- ¹⁹ Ford and Lee, 3rd edn, para [10100].
- ²⁰ In the other states and territories, the wording used is that "a trustee may ... obtain and consider independent and impartial advice": (NSW), s 14C(2)(a); Vic, s 8(2); SA, s 9(2); WA, s20(2)(a); Tas, s 8(2)(a); NT, s 8(2); ACT, s 14C(2)(a).
- ²¹ Ford and Lee, 3rd edn, para [10100].
- ²² Ford and Lee, 3rd edn, para [10110].
- ²³ Trusts (Investments) Amendment Bill 1999, *Explanatory Notes*, p 5.
- ²⁴ Hon MJ Foley MLA, Second Reading Speech, p 2179.
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