



Western Australia

# **Trustee Companies Act 1987**

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Western Australia

## Trustee Companies Act 1987

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Western Australia

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## **Trustee Companies Act 1987**

**An Act to provide for the powers, duties, privileges and restrictions of trustee companies, to repeal the Acts relating to certain trustee companies and for connected purposes.**

## Part I — Preliminary

### 1. Short title

This Act may be cited as the *Trustee Companies Act 1987*<sup>1</sup>.

### 2. Commencement

This Act shall come into operation on such day as is fixed by proclamation<sup>1</sup>.

### 3. Terms used in this Act

(1) In this Act unless the contrary intention appears —

**accounting records** includes invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes, vouchers and other documents of prime entry and also includes such working papers and other documents as are necessary to explain the methods and calculations by which accounts are made up;

**board of directors**, in relation to a trustee company, includes committee of management, council or other governing body of the trustee company;

**books** includes any register or other record of information, any document and any accounts or accounting records, however compiled, recorded or stored;

**Commissioner** means the Commissioner for Corporate Affairs;

**Corporations Act** means the *Corporations Act 2001* of the Commonwealth;

**Court** means the Supreme Court of Western Australia;

**estate** includes all real or personal property of any kind committed to the management or administration of a trustee company;

**Estate Common Trust Fund** means an Estate Common Trust Fund established and maintained by a trustee company under section 19;



**Investment Common Trust Fund** means an Investment Common Trust Fund established and maintained by a trustee company under section 20;

**publish**, in relation to a statement, means —

- (a) insert the statement in a newspaper or periodical or cause it to be so inserted;
- (b) publicly exhibit the statement or cause it to be publicly exhibited;
- (c) include the statement, or cause it to be included, in a document that, whether or not in response to a request, is sent or delivered to a person, or thrown or left upon premises in the occupation of a person; or
- (d) broadcast the statement by wireless transmission or television or cause it to be so broadcast;

**published**, in relation to a scale of charges, means published in such form and manner and at such time as are prescribed by regulations;

**registered company auditor** has the same meaning as it has in the Corporations Act;

**related body corporate** has the same meaning as it has in the Corporations Act;

**Treasurer** means the Treasurer of the State;

**trustee company** means a body corporate listed in Schedule 1;

**voting share** has the same meaning as it has in the Corporations Act;

**will** includes a codicil and any other testamentary instrument or disposition.

- (2) In this Act, a reference to entering into a transaction in relation to shares includes —
  - (a) a reference to entering into or becoming a party to an agreement, arrangement, understanding or undertaking, whether formal or informal and whether express or implied, in relation to shares; and

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- (b) a reference to exercising an option to have shares allotted.
- (3) A person is an associate of another person for the purposes of this Act if, by reason of Division 2 of Part 1.2 of the Corporations Act, the person is an associate of the other person for the purposes of that Act.
- (4) For the purposes of this Act, a person shall be taken to acquire shares in a trustee company (in this subsection referred to as the *shares concerned*) if, and only if —
  - (a) the person acquires a relevant interest in the shares concerned as a direct or indirect result of a transaction entered into by or on behalf of the person in relation to those shares, in relation to other securities of that company or in relation to securities of any other corporation; or
  - (b) the person acquires any legal or equitable interest in securities of that company or in securities of any other corporation and, as a direct or indirect result of the acquisition, another person acquires a relevant interest in the shares concerned.
- (5) For the purposes of this Act, a person shall be taken to dispose of shares in a trustee company if, and only if, having a relevant interest in those shares, the person ceases to have a relevant interest in those shares as a result of the doing of any act, the entering into of any transaction or the occurrence of any circumstance.
- (6) For the purposes of this Act —
  - (a) the shares in a trustee company to which a person is entitled include —
    - (i) shares in which the person has a relevant interest; and
    - (ii) except where the person is a nominee corporation in respect of which a certificate of the Minister is

in force under subsection (7) — shares in which  
an associate of the person has a relevant interest;

and

- (b) a person has a relevant interest in a share in a trustee company if, by reason of sections 608 and 609 of the Corporations Act, the person has a relevant interest in that share for the purposes of that Act.
- (7) The Minister may issue to a nominee corporation a certificate declaring the nominee corporation to be an approved nominee corporation for the purposes of this Act and may at any time, by notice in writing to the nominee corporation, revoke the certificate.
- (8) Unless the contrary intention appears, words and expressions used in this section have the same meanings as they have in the Corporations Act.

*[Section 3 amended by No. 42 of 1994 s. 4; No. 10 of 2001 s. 198; No. 27 of 2007 s. 25.]*

#### **4. Application**

- (1) This Act applies to the trustee companies listed in Schedule 1.
- (2) The Governor may by regulation amend Schedule 1.
- (3) If Schedule 1 is amended so as to remove the name of a body corporate from the list of trustee companies in that Schedule, Schedule 2 shall apply with respect to that body corporate.

## **Part II — Powers and duties of trustee companies**

### **5. Trustee company may act as executor and obtain probate**

- (1) Where a trustee company is named, either alone or jointly with any other person, as executor in the last will of a testator, that trustee company may —
  - (a) act as executor and may apply to the Court for and obtain probate of the will of the testator; and
  - (b) may perform and discharge all the acts and duties of an executor as fully and effectually as any other executor.
- (2) The Court may grant probate to a trustee company on an application under subsection (1).
- (3) This section applies to wills made before or after the commencement of this Act.

### **6. Person entitled to probate may authorise trustee company to obtain administration with will annexed**

- (1) Where a person may apply for and obtain probate of the will of a testator without reserving leave to any other person to apply for probate, the first-mentioned person may instead of applying for probate —
  - (a) join with a trustee company in an application for a grant of letters of administration with the will annexed to himself and the trustee company jointly; or
  - (b) authorise a trustee company to apply to the Court for a grant of letters of administration with the will annexed.
- (2) Where a trustee company applies to the Court as authorised under subsection (1), the Court may grant letters of administration with the will annexed to the trustee company, either alone or jointly as the case may require, unless the testator by his will expressed his desire that the office of executor should not be delegated or should not be delegated to a trustee company.

- (3) This section applies to wills made before or after the commencement of this Act.

**7. Person entitled to administration with will annexed may authorise trustee company to obtain administration with will annexed**

- (1) Where a person may apply for and obtain letters of administration with the will annexed of the estate of a testator, the person may —
- (a) join with a trustee company in an application for a grant of letters of administration with the will annexed to himself and the trustee company jointly; or
  - (b) instead of applying to the Court for a grant, authorise a trustee company to apply to the Court for a grant of letters of administration with the will annexed.
- (2) Where a trustee company applies to the Court as authorised under subsection (1), the Court may grant letters of administration with the will annexed to the trustee company, either alone or jointly as the case may require, unless the testator by his will expressed his desire that the office of administrator should not be held by a trustee company or by that trustee company.
- (3) This section applies to wills made before or after the commencement of this Act.

**8. Person entitled to administration on intestacy may authorise trustee company to obtain administration**

- (1) A person who is entitled to obtain administration of the estate of a person who died intestate may —
- (a) join with a trustee company in an application for a grant of letters of administration of the estate to himself and the trustee company jointly; or

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(b) instead of applying to the Court for a grant, authorise a trustee company to apply to the Court for a grant of letters of administration of the estate.

(2) Where —

(a) a person joins with a trustee company in an application under subsection (1)(a); or

(b) a trustee company makes an application as authorised under subsection (1)(b),

the Court may grant letters of administration of the estate in accordance with the application.

**9. Trustee company may act as administrator**

Where the administration of an estate, with or without the will annexed, is granted to a trustee company, the trustee company may perform and discharge all the acts and duties that belong to the office of administrator or administrator with the will annexed, as the case may require.

**10. Trustee company may elect to administer small estates without order**

(1) Where a person, before or after the commencement of this Act, dies testate or intestate, in or out of Western Australia, leaving property in Western Australia the gross value of which as estimated by a trustee company does not at the time of election exceed the amount prescribed by regulation for the purposes of this section and no person has taken out probate or administration in Western Australia, the trustee company may, in all cases where it is entitled to apply for a grant of administration or a grant of probate, instead of obtaining such a grant, file in the office of the Court an election in writing setting out the name, residence, and occupation (so far as then known to it) of the deceased person, and the estimated value of the property of the deceased person in Western Australia, as then known, and electing to administer.

- (2) On such an election being filed, the trustee company shall be deemed to be the executor of the will or the administrator of the whole of the estate of the deceased person in all respects as if a grant of probate or letters of administration, as the case may be, had been granted to it.
- (3) Where after the filing of an election under this section the gross value of the property to be administered is found to exceed the amount prescribed for the purposes of this section, or the property to which the election relates is found to include property outside the State, the trustee company shall, as soon as practicable, file in the Court an affidavit made pursuant to section 16 as to the facts, and when that is done such election shall cease to have effect and the trustee company shall proceed in the manner provided by the *Administration Act 1903* to seek an order to administer the estate.
- (4) Where after the filing of an election under this section the trustee company finds that the person named in the notice who had been believed to have died intestate had died testate, the trustee company shall, as soon as practicable, file in the Court an affidavit made under section 16 as to the facts, and when that is done such election shall cease to have effect accordingly, and the Company shall file with the Master of the Court its accounts of all transactions in the matter of the estate of the deceased person.

**11. Rights of interested persons not prejudiced by grant to trustee company**

Nothing in this Part and no grant of probate or letters of administration with or without the will annexed to a trustee company or election to administer filed under section 10 by a trustee company shall prejudice or affect the right of any person interested in the estate of a deceased person, other than a person who authorised the trustee company to apply to the Court for a grant of probate or letters of administration or to file an election to administer, to apply for and obtain from the Court a grant of

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probate or letters of administration with or without the will annexed.

**12. Trustee company may be appointed trustee, receiver etc.**

- (1) Where any court, judge or other person has power to appoint a person as —
- (a) trustee;
  - (b) receiver or receiver and manager;
  - (c) guardian of the estate of a minor; or
  - (d) surety or guarantor,

a trustee company may be so appointed.

- (2) Subject to this section, a trustee company may be appointed or may act or continue to act as sole trustee in all cases notwithstanding that it is provided by the terms of any instrument creating the trust or of any power or otherwise that there shall be more than one trustee to perform the trust.
- (3) A trustee company shall not be appointed in any case in which the instrument creating the trust or power forbids the appointment of a trustee company.
- (4) A trustee company shall not be appointed or be entitled to act as sole trustee in any case in which the instrument creating the trust or power expressly provides that there shall be another trustee in addition to a trustee company or that a trustee company shall not be appointed or act as sole trustee.
- (5) No bond, recognizance or other security for the proper discharge of any of the duties referred to in subsection (1) shall be required to be given by or on behalf of a trustee company.

**13. Trustee company may act under power of attorney**

- (1) A trustee company may act, either alone or jointly with any other person, under a power of attorney by which the trustee



company is appointed attorney by any person or by any company or other corporation.

- (2) Nothing in this section authorises any person, company or other corporation to confer any power upon a trustee company that cannot by law be delegated to or performed by an attorney.

**14. Trustee company may be appointed attorney to act as temporary executor, administrator or trustee**

Any executor, administrator or trustee may appoint a trustee company to act as executor, administrator or trustee in his stead, and a trustee company if so appointed by power of attorney may act within the scope of the authority conferred upon it as effectually as the executor, administrator or trustee could have acted and may exercise all discretionary and other powers delegated by the principal as fully as the principal could have exercised them.

**15. Holder of certain offices may appoint trustee company to discharge duties**

- (1) Subject to this section, an executor or administrator acting under a probate or letters of administration, a trustee, receiver, receiver and manager, guardian of the estate of a minor, or committee or manager of the estate of a person of unsound mind or an incapable person may, with the consent of the Court, appoint a trustee company to perform and discharge all the acts and duties of the executor, administrator, trustee, receiver, receiver and manager, guardian, committee or manager, as the case may be, and upon such an appointment the trustee company shall have power to perform and discharge all those acts and duties.
- (2) Subsection (1) applies in relation to a probate or letters of administration granted before or after the commencement of this Act and in relation to a trustee, receiver, receiver and manager, guardian, committee or manager appointed before or after the commencement of this Act.

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- (3) No appointment may be made under this section if the testator in his will or the settlor of the trust, as the case may be, expressed the desire in the will or trust instrument that a trustee company should not be appointed to perform and discharge acts and duties instead of the executor, administrator or trustee.
- (4) Where a trustee company is appointed under this section to perform and discharge the acts and duties of an office, the executor, administrator, trustee, receiver, receiver and manager, guardian, committee or manager so appointing the trustee company shall be released from liability in respect of all acts done or omitted to be done by the trustee company acting under the appointment.

**16. Directors and others may represent trustee company**

- (1) Where a trustee company applies for a grant of probate or letters of administration or acts as executor, administrator, trustee, receiver, receiver and manager, guardian, committee, manager, surety, guarantor or in any other fiduciary capacity, the trustee company may be represented in any court or elsewhere by a director, secretary or other officer of the trustee company authorised for that purpose by the board of directors.
- (2) Where in any of the circumstances referred to in subsection (1) a declaration, affidavit or statement is required to be made by a trustee company, whether on oath or otherwise, the declaration, affidavit or statement may be made on behalf of the trustee company by a director, secretary or other officer of the trustee company authorised for that purpose by the board of directors.
- (3) In each of the circumstances referred to in subsection (1), the members of the board of directors shall be jointly and severally responsible to the Court and liable to be proceeded against by process in any court having jurisdiction for the proper discharge of the duties of the trustee company as if such members of the board had jointly and severally applied for appointment or been appointed as executor, administrator, trustee, receiver, receiver

and manager, guardian, committee, manager, surety or guarantor instead of the trustee company.

- (4) Notwithstanding the personal liability of any director or other officer of a trustee company, the trustee company remains liable for any pecuniary loss occasioned through any breach or neglect of trust or duty committed by the trustee company or any of its officers, whether such trust or duty is implied by the law or expressly conferred or imposed by the instrument under which the trustee company acts.

**17. Removal from office of executor or administrator**

A trustee company that has been appointed executor or administrator, with or without a will annexed and whether by appointment, assignment, power of attorney, election or otherwise, shall be subject in all respects to the same control and to removal or restraint from acting and generally to the jurisdiction of the courts in the same manner as any other executor or administrator.

### **Part III — Commissions and other charges**

#### **18. Commissions and other charges**

- (1) This section applies only to remuneration that may be charged by a trustee company for its services in respect of the administration or management of an estate —
  - (a) as executor;
  - (b) as administrator, with or without a will annexed and whether by appointment, assignment, power of attorney, election or otherwise;
  - (c) as trustee; or
  - (d) in any other capacity prescribed by regulations,that commences after the commencement of this Act.
- (2) A trustee company is entitled to charge as remuneration for its services in respect of the administration of an estate in a capacity referred to in subsection (1) commissions and other charges not exceeding those fixed from time to time by the board of directors and set out in the latest scale of charges of that trustee company published before the administration of the estate commences.
- (3) The board of directors of a trustee company may fix and set out in the published scale of charges different rates of commissions and other charges that may be charged as remuneration in respect of different classes of estate and the time and manner of making such charges.
- (4) Nothing in this section prevents —
  - (a) the payment of any commissions or other charges that a testator in his will has directed to be paid;
  - (b) the payment of any commissions or other charges that have been agreed on between a trustee company and the interested parties,

either in addition to or instead of the commissions or other charges provided for by this section.

- (5) Nothing in this section prevents the reimbursement to a trustee company of all disbursements properly made by the trustee company in the administration or management of an estate.
- (6) Any commissions or other charges charged by a trustee company in accordance with this section are payable out of the capital or income of the estate.
- (7) Any commissions and charges which a trustee company is entitled to receive in respect of an estate may be paid or deducted out of the estate at any time after the commencement of the administration or management of the estate that is in accordance with the time and manner provided for in the latest scale of charges of that trustee company published before the commencement of the administration or management of the estate.
- (8) In addition to the commissions and other charges chargeable under this section, a trustee company may, in respect of any estate, charge and receive a reasonable fee or remuneration for work involved in the preparation and lodging of returns for the purpose of or in connection with assessments of any duties or taxes (other than probate, death, succession or estate duties).
- (9) The published scale of charges of a trustee company must include a statement to the effect that the trustee company may in addition to commissions and other charges chargeable under this section charge a fee for work involved in the preparation and lodging of returns for the purpose of or in connection with assessments of any duties or taxes (other than probate, death, succession or estate duties).
- (10) If—
  - (a) a trustee company provides a service in respect of the administration or management of an estate in a capacity referred to in subsection (1);
  - (b) the administration or management of the estate commenced before the transition date;

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(c) the company charges, after the commencement time, a commission or other charge for the service that was set before the transition date;

(d) the company is prevented from increasing the commission or charge by subsection (2); and

(e) GST is payable by the company on the service,

the company may increase the commission or charge —

(f) during that part of the New Tax System transition period that occurs after the commencement time — to the extent necessary to offset the consequences to the company of the New Tax System changes in relation to the service, that arise during that period; and

(g) after that period — by 10%.

(11) In this section —

**commencement time** means the time at which the *Trustee Legislation (GST Consequential Amendments) Act 2000* comes into operation;

**GST** has the meaning given by section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* of the Commonwealth;

**input tax credit** has the meaning given by section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* of the Commonwealth;

**New Tax System changes** has the meaning given by the New Tax System Price Exploitation Code text applying as a law of this State under the *New Tax System Price Exploitation Code (Western Australia) Act 1999*;

**New Tax System transition period** has the meaning given by the New Tax System Price Exploitation Code text applying as a law of this State under the *New Tax System Price Exploitation Code (Western Australia) Act 1999*;

**transition date**, for an estate, means —

- (a) if, at the commencement time, the estate is entitled to a full input tax credit for the company's services — 8 July 1999; or
- (b) if, at the commencement time, the estate is not so entitled — 2 December 1998.

*[Section 18 amended by No. 67 of 2000 s. 7.]*

**18A. Fees for preparation of wills and enduring powers of attorney**

- (1) Despite anything to the contrary in the *Legal Practice Act 2003*, a trustee company may charge a fee and recover disbursements for the preparation of a will or an enduring power of attorney.
- (2) Subsection (1) applies only if the will or enduring power of attorney is prepared under the direction and control of a certificated practitioner as defined in section 3 of the *Legal Practice Act 2003*.

*[Section 18A inserted by No. 9 of 2008 s. 34.]*

## **Part IV — Estate Common Trust Funds and Investment Common Trust Funds**

### **19. Estate Common Trust Funds**

- (1) A trustee company may establish and maintain separately in its accounts one or more funds to be known as Estate Common Trust Funds and, if there are more than one, the name of each fund shall include an appropriate distinguishing number or description.
- (2) A trustee company may invest as part of an Estate Common Trust Fund any trust funds held by it and properly available for investment which it is holding in the course of administering or managing an estate —
  - (a) as executor;
  - (b) as administrator, with or without a will annexed and whether by appointment, assignment, power of attorney, election or otherwise;
  - (c) as trustee; or
  - (d) in any other capacity prescribed by the regulations,but nothing in this section authorises the investment in an Estate Common Trust Fund of any funds the investment of which in an Estate Common Trust Fund or other common trust fund is forbidden by the instrument creating the trust or by the conditions subject to which the funds are held by the trustee company.
- (3) A trustee company may not invest any funds as part of an Estate Common Trust Fund, other than funds of a kind described in subsection (2).
- (4) The funds held by an Estate Common Trust Fund may be invested only as trust funds may be invested under Part III of the *Trustees Act 1962*.



- (4a) Subject to subsections (4b) and (4c), a trustee company may, in the conduct and administration of an Estate Common Trust Fund, enter into an agreement or arrangement to effect any of the following transactions —
- (a) a forward interest rate agreement;
  - (b) an interest rate swap;
  - (c) a forward interest rate swap;
  - (d) an interest rate cap, an interest rate collar or an interest rate floor;
  - (e) an option for interest rate management purposes;
  - (f) any transaction which is a combination of 2 or more transactions permitted under this subsection.
- (4b) A trustee company may only exercise the powers conferred on it by subsection (4a) (in subsection (4c) called *derivative powers*) under subsection (4) or —
- (a) for the purpose of hedging or managing exposure arising out of the risk of adverse variations —
    - (i) in the costs of the borrowing or raising of money by the trustee company; or
    - (ii) in the revenue obtainable by the trustee company from investments made or financial accommodation provided by the trustee company,and not for any speculative purpose; and
  - (b) if the powers are exercised under paragraph (a), in compliance with —
    - (i) its equitable and other duties as a trustee under the law of Western Australia; and
    - (ii) a credit policy formulated and, if applicable, varied by it under subsection (4c).

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- (4c) A trustee company —
- (a) shall formulate a prudent credit policy setting out the manner in which, and the controls subject to which, it will exercise its derivative powers and comply with that credit policy;
  - (b) shall ensure that the exercise of its derivative powers, and compliance by it with the credit policy formulated by it under this subsection, are monitored on a daily basis; and
  - (c) may from time to time vary a credit policy formulated by it under this subsection.
- (5) Investments forming part of an Estate Common Trust Fund shall not be made in the name or on account of any particular estate and shall not belong to any particular estate, but shall be held by the trustee company on behalf of all the participating estates proportionately having regard to the proportion which the amount invested by each estate bears to the total amount invested in the fund by all participating estates.
- (6) A trustee company shall maintain for each estate participating in an Estate Common Trust Fund a separate account containing a record of the amount and date of each investment made in the Fund by the estate, the total of such amounts and the value of the interest of the estate calculated in accordance with this section and having regard to distributions made under subsection (8).
- (7) A trustee company shall maintain a register of investments in respect of each Estate Common Trust Fund and shall record in that register —
- (a) a description sufficient to identify every investment made by the Fund and details of moneys held to the credit of the Fund; and
  - (b) the value, determined either by independent valuation or estimated by the trustee company at least once in every 3 months, of every investment held by the Fund.

- (8) At least once in every 3 months, the trustee company shall distribute to the separate account of each estate participating in an Estate Common Trust Fund, in accordance with their proportional interests determined under subsection (5), the amount of any increase or decrease in the value of the investments held by the Fund as determined or estimated in accordance with subsection (7)(b) at those times.
- (9) Income earned by a trustee company in respect of the investment of an Estate Common Trust Fund shall be dealt with by the trustee company in the same manner as an investment in the Fund and appropriate records shall be made in the register of investments and the separate account maintained under subsection (6) for each participating estate.
- (10) The entitlement of each participating estate to income earned by a trustee company in respect of the investment of an Estate Common Trust Fund shall be calculated on a daily basis from the date of participation to the date of withdrawal.
- (11) A trustee company may at any time withdraw from an Estate Common Trust Fund any amount standing to the credit of an estate in that Fund and shall debit the separate account maintained by the trustee company under subsection (6) accordingly.
- (12) The amount standing to the credit of an estate in an Estate Common Trust Fund shall be determined for the purposes of withdrawal having regard to distributions made under subsection (8) and to that estate's entitlement to income calculated on a daily basis.
- (13) Where a trustee company is appointed and acts jointly with any other person in relation to the management or administration of an estate in a capacity described in subsection (2), the trustee company may, with the written consent of such other person, invest and otherwise deal in accordance with this section with moneys held for that estate in the same manner as the trustee

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company may invest and deal with moneys held by the trustee company in such a capacity alone.

- (14) A trustee company may charge an estate participating in an Estate Common Trust Fund a fee or commission for the trustee company's services in relation to the establishment, conduct and administration of the Fund, but an estate shall not be charged a fee or commission in respect of an investment calculated at a rate or in a manner in excess of that set out in the scale of charges published by the trustee company at the time when the investment was made.

*[Section 19 amended by No. 42 of 1994 s. 5; No. 1 of 1997 s. 16.]*

**20. Investment Common Trust Funds**

- (1) A trustee company may establish and maintain separately in its accounts one or more funds to be called Investment Common Trust Funds and, if there are more than one, the name of each fund shall include an appropriate distinguishing number or description.
- (2) A trustee company may invest as part of an Investment Common Trust Fund any trust funds held by it and properly available for investment, except that funds of a kind that might properly be invested as part of an Estate Common Trust Fund may not be invested as part of an Investment Common Trust Fund.
- (3) Nothing in this section authorises the investment in an Investment Common Trust Fund of any funds the investment of which in an Investment Common Trust Fund or other common trust fund is forbidden by the instrument creating the trust or by the conditions subject to which the funds are held by the trustee company.

- (4) The funds held by an Investment Common Trust Fund may be invested only —
- (a) in such class or classes of investments as are determined and published by the trustee company before the Fund is established; and
  - (b) as trust funds may be invested under Part III of the *Trustees Act 1962*.
- (4aa) A trustee company may vary a class or classes of investments under subsection (4) if —
- (a) prior to the coming into operation of the *Trustees Amendment Act 1997*<sup>1</sup>, the trustee company —
    - (i) established an Investment Common Trust Fund under this section; and
    - (ii) determined to invest or invested the Investment Common Trust Fund in a class or classes of investments authorised under the *Trustees Act 1962* as in force immediately before the coming into operation of the *Trustees Amendment Act 1997*<sup>1</sup>;and
  - (b) the trustee company makes the variation within 12 months of the coming into operation of the *Trustees Amendment Act 1997*<sup>1</sup>.
- (4a) Subject to subsections (4b) and (4c), a trustee company may, in the conduct and administration of an Investment Common Trust Fund, enter into an agreement or arrangement to effect any of the following transactions —
- (a) a forward interest rate agreement;
  - (b) an interest rate swap;
  - (c) a forward interest rate swap;
  - (d) an interest rate cap, an interest rate collar or an interest rate floor;

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- (e) an option for interest rate management purposes;
  - (f) any transaction which is a combination of 2 or more transactions permitted under this subsection.
- (4b) A trustee company may only exercise the powers conferred on it by subsection (4a) (in subsection (4c) called *derivative powers*) under subsection (4) or —
- (a) for the purpose of hedging or managing exposure arising out of the risk of adverse variations —
    - (i) in the costs of the borrowing or raising of money by the trustee company; or
    - (ii) in the revenue obtainable by the trustee company from investments made or financial accommodation provided by the trustee company,and not for any speculative purpose; and
  - (b) if the powers are exercised under paragraph (a), in compliance with —
    - (i) its equitable and other duties as a trustee under the law of Western Australia; and
    - (ii) a credit policy formulated and, if applicable, varied by it under subsection (4c).
- (4c) A trustee company —
- (a) shall formulate a prudent credit policy setting out the manner in which, and the controls subject to which, it will exercise its derivative powers and comply with that credit policy;
  - (b) shall ensure that the exercise of its derivative powers, and compliance by it with the credit policy formulated by it under this subsection, are monitored on a daily basis; and
  - (c) may from time to time vary a credit policy formulated by it under this subsection.

- (5) Investments forming part of an Investment Common Trust Fund shall not be made in the name nor on account of any particular investor and shall not belong to any particular investor, but shall be held by the trustee company on behalf of all the participating investors proportionately having regard to the proportion which the amount invested by each investor bears to the total amount invested in the Fund by all participating investors.
- (6) A trustee company shall maintain for each investor participating in an Investment Common Trust Fund a separate account containing a record of the amount and date of each investment made in the Fund by the investor, the total of such amounts and the value of the interest of the investor calculated in accordance with this section and having regard to any distribution made under subsection (8).
- (7) A trustee company shall maintain a register of investments in respect of each Investment Common Trust Fund and shall record in that register —
  - (a) a description sufficient to identify every investment made by the Fund and details of moneys held by the Fund; and
  - (b) the value, determined either by independent valuation or estimated by the trustee company, of every investment held by the Fund at the times provided for on the establishment of the Fund.
- (8) At the times provided for on the establishment of the Fund, the trustee company shall distribute to the account of each investor participating in an Investment Common Trust Fund in accordance with their proportional interests determined under subsection (5) the amount of any increase or decrease in the value of the investments held by the Fund as determined or estimated in accordance with subsection (7)(b) at those times.
- (9) Income earned by a trustee company in respect of the investment of an Investment Common Trust Fund shall be dealt with by the trustee company in the same manner as an

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investment in the Fund and appropriate records shall be made in the register of investments and the separate account maintained under subsection (6) for each participating investor.

- (10) A trustee company may at any time withdraw from an Investment Common Trust Fund any amount standing to the credit of an investor in that Fund and shall debit the separate account maintained by the trustee company under subsection (6) accordingly.
- (11) Where a trustee company is appointed and acts jointly with any other person in relation to the management or administration of a trust, the trustee company may, with the written consent of such other person, invest and otherwise deal in accordance with this section with moneys held for that trust in the same manner as the trustee company may invest and deal with moneys held by the trustee company in such a capacity alone.
- (12) A trustee company may charge investors in an Investment Common Trust Fund a fee or commission for the trustee company's services in relation to the establishment, conduct and administration of the Fund, but an investor shall not be charged a fee or commission in respect of an investment calculated at a rate or in a manner in excess of that set out in the scale of charges published by the trustee company at the time when that investment was made.
- (13) Subsection (12) does not prevent the payment of any fee or commission that has been agreed on in writing between a trustee company and an investor either in addition to or instead of the fee or commission provided for by that subsection.

*[Section 20 amended by No. 42 of 1994 s. 6; No. 1 of 1997 s. 17.]*

**20A. Fees and commissions — effect of GST etc.**

- (1) If —
  - (a) a trustee company provides a service for an estate or an investor in relation to particular funds invested as part of



an Estate Common Trust Fund or an Investment Common Trust Fund;

- (b) those funds were invested before the transition date;
- (c) the company charges, after the commencement time, a fee or commission for the service that was set before the transition date;
- (d) the company is prevented from increasing the fee or commission by section 19(14) or 20(12) (whichever is relevant); and
- (e) GST is payable by the company on the service,

the company may increase the fee or commission —

- (f) during that part of the New Tax System transition period that occurs after the commencement time — to the extent necessary to offset the consequences to the company of the New Tax System changes in relation to the service, that arise during that period; and
- (g) after the period — by 10%.

(2) In this section —

**commencement time** means the time at which the *Trustee Legislation (GST Consequential Amendments) Act 2000* comes into operation;

**GST** has the meaning given by section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* of the Commonwealth;

**input tax credit** has the meaning given by section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* of the Commonwealth;

**New Tax System changes** has the meaning given by the New Tax System Price Exploitation Code text applying as a law of this State under the *New Tax System Price Exploitation Code (Western Australia) Act 1999*;

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*New Tax System transition period* has the meaning given by the New Tax System Price Exploitation Code text applying as a law of this State under the *New Tax System Price Exploitation Code (Western Australia) Act 1999*;

*transition date*, for an estate or an investor, means —

- (a) if, at the commencement time, the estate or investor is entitled to a full input tax credit for the company's services — 8 July 1999; or
- (b) if, at the commencement time, the estate or investor is not so entitled — 2 December 1998.

*[Section 20A inserted by No. 67 of 2000 s. 8.]*

**21. Application of Corporations Act to Common Trust Funds**

- (1) Chapter 5C of the Corporations Act does not apply with respect to an Estate Common Trust Fund or an Investment Common Trust Fund or any interest in an Estate Common Trust Fund or an Investment Common Trust Fund.
- (2) Nothing in this Part shall be construed so as to prohibit a trustee company from establishing, administering or conducting a fund or trust for the pooling of investments other than an Estate Common Trust Fund or an Investment Common Trust Fund, but —
  - (a) the disapplication in subsection (1) shall not extend or apply to such a fund or trust; and
  - (b) the fund or trust shall not be called an Estate Common Trust Fund or an Investment Common Trust Fund or by a name that might reasonably be taken to be that of an Estate Common Trust Fund or an Investment Common Trust Fund.

*[Section 21 amended by No. 42 of 1994 s. 7; No. 10 of 2001 s. 199.]*

**22. Misleading statements as to Investment Common Trust Funds**

- (1) A trustee company must not publish or cause to be published an advertisement or notice concerning an Investment Common Trust Fund conducted or intended to be conducted by that trustee company containing a statement that is false or misleading in a material particular.
- (2) If a trustee company publishes or causes to be published an advertisement or notice concerning an Investment Common Trust Fund conducted or intended to be conducted by that trustee company containing a statement that is false or misleading in a material particular and a person suffers loss or damage by reason of that statement, the trustee company is liable to compensate the person for the loss or damage and the person may recover compensation by action against the trustee company in a court of competent jurisdiction.

**23. Orders prohibiting publication of statements concerning Investment Common Trust Funds**

- (1) Where the Commissioner considers that it is in the public interest, having regard to conduct that a trustee company has engaged in or proposes to engage in, the Commissioner may, by order in writing served on the trustee company, prohibit the trustee company from publishing statements relating to Investment Common Trust Funds or a particular Investment Common Trust Fund unless the form and content of the statements have first been approved by the Commissioner.
- (2) An order under subsection (1) shall not be made unless the Commissioner has first given the trustee company to which the order is to be directed an opportunity to make representations in writing to the Commissioner in relation to the matter.
- (3) A trustee company on which an order is served under subsection (1) shall comply with the order.

Penalty: \$10 000 or imprisonment for 2 years, or both.

## **Part V — Financial duties of trustee companies**

### **24. Separate accounts of each estate to be kept**

A trustee company shall keep an account of the moneys paid or received and of investments made and moneys advanced by it on account of each estate of which it has the management or administration separate and distinct from that of any other estate under its management or administration.

### **25. Accounts to be provided**

- (1) This section applies where a trustee company is an executor or administrator or is otherwise administering the estate of a deceased person in accordance with a power conferred on trustee companies under Part II.
- (2) In this section, in relation to the estate of a deceased person, *interested person* means —
  - (a) a co-executor or co-administrator of the trustee company;
  - (b) a beneficiary under the estate;
  - (c) a creditor of the estate; and
  - (d) any other person who has a claim in relation to the estate or to any asset of the estate, whether the claim is contingent upon the happening of an event or otherwise.
- (3) On receiving a written request made by an interested person for an account of property of which the estate consists and of the disposal of and expenditure from the estate, a trustee company shall provide the interested person with a sufficient account of such matters within a reasonable period after receiving the request, unless the trustee company considers that the request is frivolous or vexatious or that it is otherwise just that the trustee company be excused from providing an account, and if a request under this subsection is refused, the trustee company shall inform the interested person within a reasonable period of the reasons for the refusal.

- (4) Where a trustee company receives a request under this section that an account be provided and the trustee company considers that the request is frivolous or vexatious or that it is otherwise just that the trustee company be excused from providing an account, the trustee company may, and if the interested person so requests shall, apply to the Court for an order that the trustee company need not provide an account in response to the request.
- (5) If an interested person who has under subsection (3) made a written request to a trustee company for an account considers that a sufficient account has not been provided or has not been provided within a reasonable period, the interested person may apply to the Court for an order that a sufficient account be provided.
- (6) Where an application is made to the Court under this section, the Court shall —
  - (a) dismiss the application or make such order in respect of the application as the Court considers just; and
  - (b) if the Court considers that a trustee company has failed without reasonable excuse to provide an account or to provide the reasons for refusing to provide an account, order the trustee company to pay the costs of the interested person unless the Court considers such an order would be unjust.

**26. Court may order examination**

- (1) On any application made under section 25, the Court, in addition to or instead of an order that an account be provided by the trustee company under that section, may —
  - (a) order that a named person who is a registered company auditor shall examine the books of the trustee company relating to the estate in respect of which the order is made and report to the Court; and

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- (b) make such ancillary orders as the Court considers necessary or desirable to facilitate the examination and in relation to the costs of the examination.
- (2) Where an order is made under subsection (1), the trustee company shall make available to the named person, at its office at all reasonable times when required, all books and accounts relating to the estate and shall afford such person all necessary information, explanation and facilities to enable the examination directed by the Court to be made.

**27. Unclaimed money and property**

- (1) This section applies only to moneys and property that form part of an estate of which a trustee company is —
  - (a) executor; or
  - (b) administrator, with or without a will annexed and whether by appointment, assignment, power of attorney, election or otherwise.
- (2) All moneys that remain unclaimed by the person entitled to them for 2 years after the time when those moneys became payable to that person shall, except where payment is restrained by injunction of a court of competent jurisdiction, be paid by the trustee company to the Treasurer.
- (3) All property, other than moneys, that remains unclaimed by the person entitled to it for 2 years after the time when that property became available to that person shall, except where action by the trustee company under this subsection is restrained by injunction of a court of competent jurisdiction or the approval of the Treasurer is obtained, be sold without delay by the trustee company and the net proceeds paid to the Treasurer after deducting and retaining the reasonable costs of and incidental to the sale.
- (4) On paying moneys to the Treasurer in accordance with this section a trustee company shall be relieved from all further liability in respect of the moneys so paid.

- (5) The Treasurer shall deal with moneys received under this section in the same manner as prescribed retained money is dealt with under the *Unclaimed Money Act 1990* and that Act shall apply accordingly.
- (6) A trustee company shall, not later than 2 months after the end of each financial year of the company, deliver to the Treasurer a statement of all unclaimed moneys to which subsection (1) applies that during that financial year have been held by it and setting out particulars of the estates for which the money has been received, the dates and amounts of payments to the Treasurer under this section and, if any moneys have not been paid to the Treasurer as required by subsection (2) or (3), the reason for the delay.
- (7) A trustee company that, without reasonable excuse, refuses or fails to comply with subsection (2), (3) or (6) commits an offence and is liable to a fine not exceeding \$500 and \$50 for each day during which the offence continues.

*[Section 27 amended by No. 42 of 1994 s. 8.]*

**28. Treasurer may obtain order for account**

- (1) If the Treasurer is of opinion that no sufficient account has been delivered after demand in writing made to a trustee company for a sufficient account of the property and assets of any estate included in or which ought to have been included in the statement of unclaimed moneys required to be delivered to the Treasurer under section 27(6), and of the disposal and expenditure of such property and assets, the Treasurer may apply to the Court for an order that the trustee company deliver such an account.
- (2) If the Court is of opinion that no sufficient account has been rendered by the trustee company, the Court shall order such account to be delivered by the trustee company as the Court thinks fit, or if the Court is of opinion that in the circumstances the trustee company was not bound to furnish any account, or

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that any account furnished by the trustee company was sufficient, the Court may dismiss the application.

**29. Borrowing by trustee companies**

- (1) Notwithstanding anything in the memorandum or articles of association of a trustee company, a trustee company shall not —
- (a) accept a deposit of money with or a loan of money to the trustee company from any estate under its administration or management; or
  - (b) except as provided by this Act, accept a deposit of money with or a loan of money to the trustee company in its own behalf from any other person.

Penalty: \$5 000.

- (2) Notwithstanding subsection (1), a trustee company may borrow money if the total of all borrowings and liabilities of the trustee company (other than contingent liabilities) and the amount of the proposed loan together do not exceed an amount equal to 3 times the total amount of the net tangible assets of the trustee company specified in the last statement made by the trustee company and lodged with the Commissioner under section 33.
- (3) Nothing in this section shall affect or limit the investment of moneys of any estate by a trustee company in an Estate Common Trust Fund or an Investment Common Trust Fund constituted under this Act.
- (4) The acceptance of deposits of money with, or loans of money to, trustee companies as described in subsection (1) is declared to be an excluded matter for the purposes of section 5F of the Corporations Act in relation to the whole of that Act.

*[Section 29 amended by No. 42 of 1994 s. 9; No. 10 of 2001 s. 200.]*



**30. Loans from estates to related bodies prohibited**

A trustee company shall not make any deposit or loan to any related body corporate, other than a bank, from an estate administered or managed by the trustee company under this Act or from an Estate Common Trust Fund or an Investment Common Trust Fund maintained by the trustee company.

Penalty: \$5 000.

*[Section 30 amended by No. 42 of 1994 s. 10.]*

**31. No estate to be liable under guarantee from trustee company except as given on behalf of estate**

No estate administered or managed by a trustee company shall be held liable for the payment of money under a guarantee from the trustee company, otherwise than under a guarantee lawfully given by the trustee company on behalf of an estate.

**32. Trustee company to give information to Minister where directed**

- (1) A trustee company shall furnish to the Minister in writing within such time as is specified by the Minister such information or statements in respect of its business as the Minister directs.  
Penalty: \$2 000.
- (2) The Minister may, where it appears to him to be necessary or advisable, cause to be carried out —
  - (a) a review of the operations of a trustee company;
  - (b) an audit of the books and accounts of a trustee company (including the books and accounts of any of the estates and of any Estate Common Trust Fund or Investment Common Trust Fund managed or administered by the trustee company); or
  - (c) both a review and an audit.

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- (3) For the purpose of any review or audit under subsection (2) a trustee company shall —
- (a) deliver to any person authorised by the Minister to that effect a list of all books kept by it;
  - (b) produce to that person at all reasonable times when required the books kept by it and all accounts, vouchers, papers and other documents of the trustee company; and
  - (c) afford that person all necessary information and all other necessary facilities for enabling him to carry out that review or audit.

Penalty: \$2 000.

- (4) Unless the Minister otherwise directs, the costs of any review or audit under this section shall be borne by the trustee company and may be recovered by the Minister in any court of competent jurisdiction as a debt due to the Crown.

**33. Returns to be made by trustee company**

- (1) Subject to this section, a trustee company shall lodge with the Commissioner —
- (a) within 2 months after the end of the first half of each financial year of the trustee company, a statement in the form prescribed by regulations, together with such documents as may be prescribed by regulations, relating to the preceding first half of the financial year of the trustee company; and
  - (b) within 3 months after the end of the second half of each financial year —
    - (i) a statement in the form prescribed by regulations together with such documents as may be prescribed by regulations, relating to the preceding second half of the financial year of the trustee company; and

- (ii) the audited accounts and report as required by section 34 relating to the preceding financial year of the trustee company.
- (2) The Commissioner may in a particular case agree to an extension of the period for compliance by a trustee company with an obligation imposed by subsection (1).
- (3) For the purposes of subsection (1), a statement is made by a trustee company if (and only if) it is made on behalf of the trustee company by the managing director of the trustee company, or if there is no managing director by the principal executive officer, the chief financial officer and 2 directors of the trustee company.  
Penalty: \$500 and \$50 for each day during which the contravention continues.
- (4) A person may inspect any statement or other document lodged with the Commissioner under this section.

**34. Audit requirements**

- (1) In addition to the obligations imposed with respect to audit by the Corporations Act, a trustee company shall —
    - (a) in respect of each financial year cause to be audited by a registered company auditor the accounts and registers of investments of every Estate Common Trust Fund and Investment Common Trust Fund conducted by the trustee company, and the registered company auditor shall report to the board of directors of the trustee company whether or not —
      - (i) there has been any contravention of any of the provisions of this Act; and
      - (ii) that audit has disclosed any defects or irregularities in those accounts and registers;
- and

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- (b) forthwith after formulating or varying a credit policy under section 19(4c) or 20(4c) furnish to its registered company auditor a copy of the credit policy or variation.
- (2) A registered company auditor who, having been furnished under subsection (1)(b) with a copy of a credit policy or variation, detects any defect or irregularity in complying with that credit policy or the relevant credit policy as varied, as the case requires, shall forthwith report that defect or irregularity to the board of directors of the trustee company concerned.

*[Section 34 inserted by No. 42 of 1994 s. 11; amended by No. 10 of 2001 s. 201.]*

## **Part VI — Acquisition of shares in trustee companies**

### **35. Restriction on acquisition of shares**

- (1) Except as provided by this Act, a person shall not, either alone or together with another person or persons, acquire shares in a trustee company if any person who is not entitled to any voting shares in the trustee company or is entitled to less than 10% of the voting shares in the trustee company would, immediately after the acquisition, be entitled to more than 10% of the voting shares in the trustee company.
- (2) Except as provided by this Act, a person shall not, either alone or together with another person or other persons, acquire shares in a trustee company if any person (in this subsection referred to as a *relevant person*) who is entitled to not less than 10% of the voting shares in the trustee company would, immediately after the acquisition, be entitled to a greater percentage of the voting shares in the trustee company than the percentage to which that relevant person was entitled immediately before the acquisition.
- (3) A person shall not offer to acquire, or issue an invitation in relation to, shares in a trustee company if the person is prohibited by subsection (1) or (2) from acquiring those shares.
- (4) A person who contravenes subsection (1), (2) or (3), is guilty of an offence and liable to a penalty not exceeding \$5 000.
- (5) It is a defence to a prosecution for a contravention of this section if the accused establishes that the contravention was due to a mistake of fact on the part of the accused or to the accused's not being aware of a relevant fact or occurrence.
- (6) An acquisition of shares is not invalid by reason of a contravention of this section.

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- (7) A reference in this section to a trustee company is a reference to a trustee company that is a company within the meaning of the Corporations Act.

*[Section 35 amended by No. 42 of 1994 s. 12; No. 10 of 2001 s. 202; No. 84 of 2004 s. 82.]*

**36. Acquisitions to which section 35 does not apply**

Section 35 does not apply to or in relation to an acquisition of shares in accordance with the Corporations Act —

- (a) that is an acquisition of shares to or in relation to which section 606 of that Act does not apply by reason of item 4, 6, 8, 12, 13, 14, 15, 16, 17 or 18 of the table in section 611 of that Act;
- (b) that is an acquisition of any other kind and is made in a prescribed manner or in prescribed circumstances; or
- (c) that is an acquisition approved by the Minister in writing.

*[Section 36 amended by No. 42 of 1994 s. 13; No. 10 of 2001 s. 203.]*

**37. Orders where prohibited acquisitions take place**

- (1) Where a person has acquired shares in a trustee company in contravention of section 35, the Court may, on the application of the Commissioner, the trustee company, a member of the trustee company or the person from whom the voting shares were acquired, make such order or orders as it thinks fit, including, but without limiting the generality of the foregoing, one or more of the following orders —

- (a) an order restraining the person who acquired the shares from disposing of, or of any interest in, the shares or such of the shares as are specified in the order;
- (b) an order restraining the exercise of any voting or other rights attached to the shares or such of the shares as are specified in the order;

- (c) an order directing the trustee company not to make payment, or to defer making payment, of any sum or sums due from the trustee company in respect of the shares or such of the shares as are specified in the order;
  - (d) an order directing the disposal of, or of any interest in, the shares or such of the shares as are specified in the order;
  - (e) an order vesting in the Commissioner —
    - (i) the shares, or such of the shares as are specified in the order; or
    - (ii) any interest in the shares, or in such of the shares as are specified in the order;
  - (f) an order cancelling a contract, arrangement or offer for or in connection with the acquisition of the shares or of such of the shares as are specified in the order;
  - (g) an order declaring a contract, arrangement or offer for or in connection with the acquisition of the shares, or of such of the shares as are specified in the order, to be voidable;
  - (h) an order directing the trustee company not to register the transfer or transmission of the shares or such of the shares as are specified in the order;
  - (i) an order that any exercise of the voting or other rights attached to the shares, or such of the shares as are specified in the order, be disregarded;
  - (j) for the purpose of securing compliance with any order referred to in any of the preceding paragraphs, an order directing the trustee company or any other person to do or refrain from doing a specified act.
- (2) Where, at the hearing of an application under subsection (1), it is proved to the satisfaction of the Court that —
- (a) a person is entitled to shares in a trustee company by reason that another person who is an associate of the

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first-mentioned person has a relevant interest in those shares; and

- (b) that other person became entitled to that relevant interest by reason of an acquisition of shares (whether in that trustee company or in another corporation) that took place within 6 months immediately preceding the filing of that application with the Court,

then, in determining for the purposes of the application whether the acquisition referred to in paragraph (b) was made in contravention of section 35, the proof to the satisfaction of the Court of the matters mentioned in paragraphs (a) and (b) constitutes evidence that the other person was an associate of the first-mentioned person immediately after the acquisition took place.

- (3) The Court shall not make an order under this section, other than an order referred to in subsection (1)(a), (b) or (i), if it is satisfied —
  - (a) that the contravention of section 35 by the person who acquired the shares was due to a mistake of fact on the part of the person or to the person's not being aware of a relevant fact or occurrence; and
  - (b) that, in all the circumstances, the contravention ought to be excused.



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## Part VII — Miscellaneous

### 38. Contributory investments

- (1) Where a trustee company holds moneys belonging to more than one estate upon trusts which require or permit the investment of those moneys, the trustee company may invest such moneys as one fund and distribute the income arising rateably among the estates to which the moneys so invested belong; and any loss arising from any such investment shall likewise be borne rateably by those estates.
- (2) Any such investment shall be made either in investments for the time being authorised by the *Trustees Act 1962* for the investment of trust funds or in investments authorised by each of the trust instruments.

### 39. Property vested in trustee company and another to be held jointly

Where any property is vested in a trustee company and an individual or in a trustee company and another body corporate with the intention that they should hold the property jointly in a fiduciary capacity or as mortgagees, they shall be joint tenants of the property and not tenants in common unless it is otherwise expressly provided.

### 40. Restriction on voluntary winding up of trustee company

So long as any estate in respect of which a trustee company is executor, administrator, trustee, guardian, receiver, receiver and manager, committee or manager remains in whole or in part unadministered, it shall not be lawful to proceed to wind up the trustee company voluntarily unless the approval of the Court is first obtained.

### 41. Orders as to costs

The Court may order the costs and expenses of and incidental to any application under this Act to the Court to be paid or raised

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out of the estate in respect of which the application is made, or out of the income of the estate, or to be borne and paid in such a manner and by such person as the Court considers just.

**42. Trustee company entitled to recover moneys paid under the *Financial Institutions Duty Act 1983***

A trustee company is entitled to recover from any estate, trust or fund committed to the administration or management of the company as executor, administrator or trustee, financial institutions duty paid by the company under the *Financial Institutions Duty Act 1983*<sup>2</sup> in respect of any money received by the company for the credit of that estate, trust or fund.

**43. False or misleading statements**

- (1) A person who, in a document required by or for the purposes of this Act or lodged with the Commissioner, makes or authorises the making of a statement that to his knowledge is false or misleading in a material particular, or omits or authorises the omission of any matter or thing without which the document is to his knowledge misleading in a material respect, is guilty of an offence.

Penalty: \$10 000 or imprisonment for 2 years, or both.

- (2) A person who makes or authorises the making of a statement that is based on information that to his knowledge —
- (a) is false or misleading in a material particular; or
  - (b) has omitted from it a matter or thing the omission of which renders the information misleading in a material respect,

shall, for the purposes of subsection (1), be deemed to have made or authorised the making of a statement that to his knowledge was false or misleading in a material particular.

- (3) A person who, in a document required by or for the purposes of this Act or lodged with the Commissioner —
- (a) makes or authorises the making of a statement that is false or misleading in a material particular; or
  - (b) omits or authorises the omission of any matter or thing without which the document is misleading in a material respect,

without having taken reasonable steps to ensure that the statement was not false or misleading or to ensure that the statement did not omit any matter or thing without which the document would be misleading, as the case may be, is guilty of an offence.

Penalty: \$5 000 or imprisonment for 1 year, or both.

- (4) A person who makes or authorises the making of a statement without having taken reasonable steps to ensure that the information on which the statement was based —
- (a) was not false or misleading in a material particular; and
  - (b) did not have omitted from it a matter or thing the omission of which would render the information misleading in a material respect,

shall, for the purposes of subsection (3), be deemed to have made or authorised the making of a statement without having taken reasonable steps to ensure that the statement was not false or misleading.

- (5) For the purposes of subsections (1) and (3), where —
- (a) at a meeting, a person votes in favour of a resolution approving, or otherwise approves, a document required by or for the purposes of his Act or required to be lodged with the Commissioner; and
  - (b) the document contains a statement that, to the person's knowledge, is false or misleading in a material particular, or omits any matter or thing without which

**s. 44**

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the document is, to the person's knowledge, misleading in a material respect,

the person shall be deemed to have authorised the making of the statement or the omission of the matter or thing.

**44. Offences by officers**

- (1) Where a trustee company is guilty of an offence against this Act —
  - (a) every officer of the trustee company (including a person who has subsequently ceased to be an officer of the trustee company) who was in any way, by act or omission, directly or indirectly knowingly concerned in or party to the commission of the offence is guilty of an offence; and
  - (b) the penalty applicable to an offence committed by an officer under paragraph (a), is the penalty applicable to the offence of which the trustee company is guilty.
- (2) For the purposes of this section, *officer* in relation to a trustee company includes a member of the board of directors, a principal executive officer and a secretary.

**45. Regulations**

The Governor may make regulations prescribing all matters and things that by this Act are required or permitted to be prescribed or that are necessary or convenient to be prescribed for giving effect to this Act and in particular for and with respect to —

- (a) the form and content of statements and documents required to be lodged with the Commissioner;
- (b) fees to be paid for the lodgment of statements or documents with the Commissioner.

**46. Repeals**

- (1) The *West Australian Trustees Limited Act 1893* is repealed.
- (2) The *Perpetual Trustees W.A. Ltd., Act 1922* is repealed.

**47. Transitional provisions and savings**

- (1) Schedule 3 has effect.
- (2) Except as otherwise provided in Schedule 3, nothing in that Schedule affects any saving provided for by the *Interpretation Act 1984*.

[48. *Omitted under the Reprints Act 1984 s. 7(4)(e).*]

**Schedule 1 — Trustee companies**

[s. 4(1)]

*[Heading inserted in Gazette 21 Mar 2006 p. 1083.]*

ANZ Executors & Trustee Company Limited (ACN 006 132 333).

Australian Executor Trustees Limited (ACN 007 869 794).

Australian Executor Trustees (SA) Limited (ACN 007 870 644).

National Australia Trustees Ltd. (ACN 007 350 405).

Perpetual Limited (ACN 000 431 827).

Perpetual Trustees Consolidated Limited (ACN 004 029 841).

Perpetual Trustees W.A. Ltd (ACN 008 666 886).

Plan B Trustees Limited (ACN 054 737 156).

*[Schedule 1 inserted in Gazette 21 Mar 2006 p. 1083.]*

## Schedule 2

[Section 4(3)]

### Provisions of application if body corporate removed from Schedule 1

1. On the removal of a body corporate from Schedule 1 —
  - (a) the body shall continue to have such legal capacities and powers as are conferred on and available to trustee companies under this Act in respect of every estate then subject to the management or administration of the body; and
  - (b) the body shall continue to be subject to and obliged to comply with all the duties and obligations imposed on trustee companies under this Act in respect of every estate then subject to the management or administration of the body and the body and every officer of the body (as defined in section 44(2)) shall continue to be responsible for their actions and omissions as if the body had not been removed from Schedule 1.
  
2. Clause 1 is in addition to and in no way derogates from other powers and duties affecting the body and the estates subject to its management or administration at the time the body is removed from Schedule 1.
  
3. Without prejudice to other powers that may be available, the Court may, on the application of the Minister —
  - (a) revoke the appointment of a body removed from Schedule 1 as executor, administrator, trustee, receiver, receiver and manager, guardian of the estate of a minor, committee of the estate of a person of unsound mind or manager of the estate of an incapable person or any like office held by the body and appoint a trustee company or the Public Trustee instead;
  - (b) make such ancillary orders as the Court considers necessary or desirable to facilitate the administration of any estate previously subject to the management or administration of the body.

### **Schedule 3**

[Section 47]

#### **Transitional and savings provisions**

1. (1) In this Schedule, West Australian Trustees Limited and Perpetual Trustees W.A. Ltd. are each referred to as *an existing company*.
- (2) In this Schedule *repealed Acts* means the Acts repealed by section 46.
2. Subject to this Schedule, no power or right possessed by an existing company, or duty or obligation to which an existing company is subject, immediately before the commencement of this Act in relation to an estate then under its management or administration shall be affected by this Act.
3. The provisions of the repealed Acts authorising the charging, retention and receipt of commissions and fees by the existing companies shall, notwithstanding the repeal of those Acts by section 46, continue to apply and have effect in relation to the administration of estates where the administration or management commenced before the commencement of this Act and the existing companies shall be entitled to commissions and fees accordingly.
- 3A. If —
  - (a) an existing company provides a service for an estate referred to in clause 2 (other than a service to which Part IV applies because of clause 4);
  - (b) the company charges, after the commencement time, a commission or fee that it is entitled to under clause 3;
  - (c) the company is prevented from increasing the fee or commission because of the continued application of a provision of the relevant repealed Act; and
  - (d) GST is payable by the company on the service,the company may increase the commission or fee —
  - (e) during that part of the New Tax System transition period that occurs after the commencement time — to the extent necessary to offset the consequences to the company of the



New Tax System changes in relation to the service, that arise during that period; and

(f) after the period — by 10%.

3B. In clause 3A —

*commencement time* means the time at which the *Trustee Legislation (GST Consequential Amendments) Act 2000* comes into operation;

*GST* has the meaning given by section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* of the Commonwealth;

*New Tax System changes* has the meaning given by the New Tax System Price Exploitation Code text applying as a law of this State under the *New Tax System Price Exploitation Code (Western Australia) Act 1999*;

*New Tax System transition period* has the meaning given by the New Tax System Price Exploitation Code text applying as a law of this State under the *New Tax System Price Exploitation Code (Western Australia) Act 1999*.

4. (1) Part IV shall apply to the existing companies on the day on which section 5 of the *West Australian Trustees Limited (Merger) Act 1989* comes into operation, and the provisions of the repealed Acts relating to Common Trust Funds shall, notwithstanding the repeal of those Acts by section 46, continue to apply and have effect until that day.
- (2) On and after the day on which Part IV applies to Perpetual Trustees W.A. Ltd. all contracts, choses in action, engagements, mortgages and assets and liabilities of Perpetual Trustees W.A. Ltd. in its capacity as trustee of the Common Trust Fund established by it under section 21A of the *Perpetual Trustees W.A. Ltd., Act 1922* shall be held by Perpetual Trustees W.A. Ltd. under Part IV upon the same terms, covenants and conditions as those upon which they were held by Perpetual Trustees W.A. Ltd. immediately before that day.
5. In the case of moneys and property of the kind referred to in section 27(1) that on the day of commencement of this Act have been held by one of the existing companies for not less than 18 months, section 27 shall apply and have effect to and with respect to those moneys and that property and to the powers and duties of the existing companies and the Treasurer as if the 2 year period referred to in that

section expired on a day 6 months after the commencement of this Act.

6. On the commencement of this Act moneys and property forming part of the testamentary and trust funds administered by the Treasurer under the repealed Acts shall from that time be held by the Treasurer in the same manner as moneys received by the Treasurer from trustee companies after the commencement of this Act under section 27 and the *Unclaimed Moneys Act 1912*<sup>3</sup> shall apply accordingly.
7. On a day 6 months after the commencement of this Act the Treasurer shall do what is necessary without delay to release, return, transfer or surrender, to the existing companies as the case may require, all title deeds, documents, and securities then held by the Treasurer by reason of sections 7 and 29 of the *Perpetual Trustees W.A. Ltd., Act 1922* or section 8 of the *West Australian Trustees Limited Act 1893*.
8. Section 29 shall not apply to the existing companies until 6 months after the day of commencement of this Act or until such later day as the Minister may in the case of a particular existing company approve in writing.
9. In relation to the existing companies, the references in section 33 to the first half and the second half of the financial year of a trustee company shall be construed so as to refer to periods of time beginning after the commencement of this Act.

*[Schedule 3 amended by No. 38 of 1989 s. 16; No. 67 of 2000 s. 9.]*

## Notes

- <sup>1</sup> This reprint is a compilation as at 10 October 2008 of the *Trustee Companies Act 1987* and includes the amendments made by the other written laws referred to in the following table. The table also contains information about any reprint.

### Compilation table

Short title	Number and year	Assent	Commencement
<i>Trustee Companies Act 1987</i>	111 of 1987	19 Dec 1987	s. 1 and 2: 19 Dec 1987; Act other than s. 1 and 2: 1 Sep 1988 (see s. 2 and <i>Gazette</i> 26 Aug 1988 p. 3271)
<i>Trustee Companies (Designation of Trustee Companies — No. 1) Regulations 1988</i> published in <i>Gazette</i> 14 Oct 1988 p. 4156			14 Oct 1988
<i>Trustee Companies (Designation of Trustee Companies) Regulations 1989</i> published in <i>Gazette</i> 15 Dec 1989 p. 4521			15 Dec 1989
<i>West Australian Trustees Limited (Merger) Act 1989</i> s. 16	38 of 1989	22 Dec 1989	s. 16(2): 22 Dec 1989 (see s. 2(2)); s. 16(1): 31 Jan 1990 (see s. 2(1) and <i>Gazette</i> 19 Jan 1990 p. 203)
<i>Trustee Companies (Designation of Trustee Companies) Regulations 1990</i> published in <i>Gazette</i> 9 Nov 1990 p. 5525			9 Nov 1990
<i>Trustee Companies (Designation of Trustee Companies) Regulations (No. 2) 1990</i> published in <i>Gazette</i> 8 Feb 1991 p. 581			8 Feb 1991
<i>Trustee Companies (Designation of Trustee Companies) Regulations 1993</i> published in <i>Gazette</i> 24 Sep 1993 p. 5251-2			24 Sep 1993
<i>Trustee Companies (Designation of Trustee Companies) Regulations 1994</i> published in <i>Gazette</i> 20 May 1994 p. 2115			20 May 1994
<i>Trustee Companies Amendment Act 1994</i>	42 of 1994	31 Aug 1994	31 Aug 1994 (see s. 2)
<i>Trustees Amendment Act 1997</i> Pt. 3	1 of 1997	6 May 1997	16 Jun 1997 (see s. 2 and <i>Gazette</i> 10 Jun 1997 p. 2661)
<b>Reprint of the <i>Trustee Companies Act 1987</i> as at 1 Nov 1999</b> (includes amendments listed above) (correction in <i>Gazette</i> 21 Jan 2000 p. 343)			

## Trustee Companies Act 1987

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Short title	Number and year	Assent	Commencement
<i>Trustee Companies (Designation of Trustee Companies) Regulations 2000</i> published in <i>Gazette</i> 7 Nov 2000 p. 6146			7 Nov 2000
<i>Trustee Legislation (GST Consequential Amendments) Act 2000</i> Pt. 3	67 of 2000	4 Dec 2000	4 Dec 2000 (see s. 2)
<i>Corporations (Consequential Amendments) Act 2001</i> Pt. 53	10 of 2001	28 Jun 2001	15 Jul 2001 (see s. 2 and <i>Gazette</i> 29 Jun 2001 p. 3257 and <i>Cwlth Gazette</i> 13 Jul 2001 No. S285)
<i>Trustee Companies (Designation of Trustee Companies) Regulations 2002</i> published in <i>Gazette</i> 20 Dec 2002 p. 6025-6			20 Dec 2002
<i>Trustees of Western Australia Limited (Transfer of Business) Act 2003</i> s. 15	18 of 2003	17 Apr 2003	1 Jul 2003 (see s. 2 and <i>Gazette</i> 17 Jun 2003 p. 2201)
<b>Reprint 2: The Trustee Companies Act 1987 as at 6 Feb 2004</b> (includes amendments listed above)			
<i>Criminal Procedure and Appeals (Consequential and Other Provisions) Act 2004</i> s. 82	84 of 2004	16 Dec 2004	2 May 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7129 (correction in <i>Gazette</i> 7 Jan 2005 p. 53))
<i>Trustee Companies (Designation of Trustee Companies) Regulations 2006</i> published in <i>Gazette</i> 21 Mar 2006 p. 1082-3			21 Mar 2006
<i>Wills Amendment Act 2007</i> s. 25	27 of 2007	26 Oct 2007	9 Feb 2008 (see s. 2 and <i>Gazette</i> 8 Feb 2008 p. 313)
<i>Public Trustee and Trustee Companies Legislation Amendment Act 2008</i> Pt. 3	9 of 2008	31 Mar 2008	1 Jul 2008 (see s. 2(2) and <i>Gazette</i> 24 Jun 2008 p. 2885)
<b>Reprint 3: The Trustee Companies Act 1987 as at 10 Oct 2008</b> (includes amendments listed above)			

<sup>2</sup> Repealed by the *Revenue Laws Amendment and Repeal Act 2004*.

<sup>3</sup> Repealed by the *Unclaimed Money Act 1990*.

## Defined Terms

*[This is a list of terms defined and the provisions where they are defined.*

*The list is not part of the law.]*

<b>Defined Term</b>	<b>Provision(s)</b>
accounting records .....	3(1)
an existing company .....	Sch. 3 cl. 1(1)
board of directors .....	3(1)
books.....	3(1)
commencement time .....	18(11), 20A(2), Sch. 3 cl. 3B
Commissioner .....	3(1)
Corporations Act.....	3(1)
Court .....	3(1)
derivative powers .....	19(4b), 20(4b)
estate .....	3(1)
Estate Common Trust Fund .....	3(1)
GST.....	18(11), 20A(2), Sch. 3 cl. 3B
input tax credit .....	18(11), 20A(2)
interested person .....	25(2)
Investment Common Trust Fund .....	3(1)
New Tax System changes .....	18(11), 20A(2), Sch. 3 cl. 3B
New Tax System transition period.....	18(11), 20A(2), Sch. 3 cl. 3B
officer.....	44(2)
publish.....	3(1)
published.....	3(1)
registered company auditor .....	3(1)
related body corporate.....	3(1)
relevant person .....	35(2)
repealed Acts.....	Sch. 3 cl. 1(2)
shares concerned .....	3(4)
transition date.....	18(11), 20A(2)
Treasurer.....	3(1)
trustee company .....	3(1)
voting share.....	3(1)
will .....	3(1)