



Western Australia

## **Trustees Act 1962**



Western Australia

## Trustees Act 1962

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Western Australia

## **Trustees Act 1962**

**An Act to consolidate and amend the law relating to trustees.**

## **Part I — Preliminary**

**1. Short title**

This Act may be cited as the *Trustees Act 1962*<sup>1</sup>.

**2. Commencement**

This Act shall come into operation on 1 January 1963.

[3. *Repealed by No. 1 of 1997 s. 4.*]

**4. Repeals**

- (1) The Acts specified in the First Schedule are hereby repealed to the extent mentioned in that Schedule.
- (2) Without limiting the provisions of the *Interpretation Act 1918*<sup>2</sup>, the repeal of any enactment by this Act does not affect any document made or any thing whatsoever done under the enactment so repealed or under any corresponding former enactment, and every such document or thing, so far as it is subsisting or in force at the time of the repeal and could have been made or done under this Act, shall continue and have effect as if it had been made or done under the corresponding provision of this Act and as if that provision had been in force when the document was made or the thing was done.

**5. Application**

- (1) Except where otherwise expressly provided, this Act applies to every trust, as defined in section 6, whether constituted or created before or after the commencement of this Act.
- (1a) Except where otherwise expressly provided, this Act as amended by the *Trustees Amendment Act 1987* applies to every trust, as defined in section 6, whether constituted or created before or after the commencement of the *Trustees Amendment Act 1987*<sup>1</sup>.

- (2) The powers conferred by or under this Act on a trustee who is not a corporation are in addition to the powers given by any other Act and by the instrument (if any) creating the trust; but the powers conferred on the trustee by this Act, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument (if any) creating the trust, and have effect subject to the terms of that instrument.
- (3) The powers conferred by or under this Act on a trustee that is a corporation are in addition to the powers given by the instrument (if any) creating the trust and to the powers given by or under the Act or any instrument by or under which the corporation is constituted and any other Act; but the powers conferred on the trustee by this Act, unless otherwise stated —
  - (a) apply if and so far only as a contrary intention is not expressed in the instrument (if any) creating the trust and have effect subject to the terms of that instrument; and
  - (b) apply if and so far only as a contrary intention is not expressed in the Act or any instrument by or under which the corporation is constituted or any other Act, and have effect subject to the terms of every such Act and instrument; but nothing in this paragraph affects any Act that applies to every trustee, whether a corporation or not.
- (4) This Act does not affect the legality or validity of anything done before the commencement of this Act, except as in this Act expressly provided.
- (5) This Act binds the Crown.

*[Section 5 amended by No. 84 of 1987 s. 4.]*

**6. Terms used in this Act**

- (1) In this Act, unless the context otherwise requires, —

**bank** means —

- (a) an ADI (authorised deposit-taking institution) as defined in section 5 of the *Banking Act 1959* of the Commonwealth; or
- (b) a bank constituted by a law of a State, a Territory or the Commonwealth;

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

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

**bankrupt** includes “insolvent”;

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

**Court** means the Supreme Court of Western Australia or a judge thereof;

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

**income** includes rents and profits other than profits that under any rule of law are in the nature of capital;

**instrument** includes an Act of Parliament;

**land** includes —

- (a) land of any tenure;

- (b) mines and minerals, whether or not severed from the surface;
- (c) buildings or parts of buildings, whether the division is horizontal, vertical or made in any other way;
- (d) any other corporeal hereditament;
- (e) a rent and other incorporeal hereditaments; and
- (f) an easement, right, privilege, share, interest or benefit in, over or derived from land;

and, in this definition, **mines and minerals** includes any strata or seams or minerals or substances in or under any land, and powers of working or getting them and **hereditament** means real property that under an intestacy might at common law have devolved on an heir;

**lease** includes a bailment;

**mortgagee** includes every person having an estate or interest regarded at law or in equity as merely a security for money and every person deriving title to the mortgage under the original mortgagee; and **mortgage** has a corresponding meaning;

**payment**, in relation to stocks and securities, includes the deposit or transfer of them; and **to pay** has a corresponding meaning;

**person** includes a trustee corporation and a corporation sole, and also a body of persons, whether corporate or unincorporate;

**personal representative** means the executor, original or by representation, or an administrator for the time being of the estate of a deceased person;

**possession** includes receipt of income or the right to receive the income, if any; and **possessed** applies to receipt of income of and to any vested estate less than a life interest, at law or in equity, in possession or in expectancy in any land;

**property** includes real and personal property and any estate, share, and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not;

**rent** includes a rent service or a rent charge, or other rent, toll, duty, royalty or annual or periodic payment in money or money's worth reserved or issuing out of or charged upon land, but does not include mortgage interest;

**right** includes an estate or interest;

**sale** includes an exchange; and **to sell** has a corresponding meaning;

**securities** includes stock, funds, shares and promissory notes; and "securities payable to bearer" includes securities transferable by delivery or by delivery and endorsement;

**stock** includes shares, and, so far as relates to vesting orders made by the Court under this Act, includes any fund, annuity or security transferable in books kept by any corporation or society, or by instrument of transfer, either alone or accompanied by other formalities, and any share or interest therein;

**transfer**, in relation to stock or securities, includes the performance and execution of every deed, power of attorney, act, and thing on the part of the transferor to effect and complete the title in the transferee;

**trust** does not include the duties incidental to an estate conveyed by way of mortgage, but with that exception "trust" extends to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incidental to the office of a personal representative; and **trustee** has a corresponding meaning and includes a trustee corporation and every other corporation in which property subject to a trust is vested and every person who immediately before the commencement of this Act was a trustee of the settlement or in any way a trustee under the *Settled Land Act of 1892*<sup>3</sup> and, where the context admits, includes a personal representative; and **new trustee** includes an additional trustee;

**trustee corporation** means the Public Trustee in and for Western Australia or any corporation authorised by any Act of

the Parliament of a State to administer the estates of deceased persons and other trust estates;

***trust for sale***, in relation to land, means an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without power at discretion to postpone the sale; and ***trustee for sale*** means the person (including a personal representative) holding land on trust for sale.

- (2) Any reference to the investment, loan or advance of trust money by a trustee on the security of property shall be construed to include a reference to such investment, loan or advance on the transfer of an existing security as well as on a new security.
- (3) For the purposes of this Act, a person shall be deemed to be under a disability while he is not of full age or of full mental capacity.

*[Section 6 amended by No. 84 of 1987 s. 5; No. 1 of 1997 s. 5; No. 26 of 1999 s. 108.]*

## **Part II — Appointment and discharge of trustees**

### **7. New trustees, appointment of**

- (1) Where a trustee, whether original or substituted, and whether appointed by the Court or otherwise, —
- (a) is dead; or
  - (b) remains out of the State for more than one year without having properly delegated the execution of the trust; or
  - (c) seeks to be discharged from all or any of the trusts or powers reposed in or conferred on him; or
  - (d) refuses to act therein; or
  - (e) is unfit to act therein; or
  - (f) is incapable of acting therein; or
  - (g) is an infant; or
  - (h) being a corporation, has ceased to carry on business, is in liquidation or is dissolved,

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

- (2) On the appointment of a trustee or trustees for the whole or any part of the trust property —
- (a) where the number of trustees originally appointed was less than 4, 2 or more trustees may be appointed in place of a trustee being replaced under this section, but so that after any appointment the number of trustees shall not exceed 4;



- (b) a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part, and whether or not new trustees are or are to be appointed for any other part of the trust property; and any existing trustee may be appointed or remain one of the separate set of trustees; or if only one trustee were originally appointed, then one separate trustee may be so appointed for the part of the trust first in this paragraph mentioned;
  - (c) it shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than 2 trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section unless there will remain either a trustee corporation or at least 2 individuals to act as trustees to perform the trust; and
  - (d) any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees shall be executed or done.
- (3) Where a trustee has been removed under a power contained in the instrument creating the trust, a new trustee or new trustees may be appointed in the place of the trustee who is removed, as if he were dead, or, in the case of a corporation, as if the corporation had been dissolved, and the provisions of this section shall apply accordingly.
- (4) The power of appointment given by subsection (1) or any similar previous enactment to the personal representative of the last surviving or continuing trustee is and shall be deemed always to have been exercisable by the executor for the time being, whether original or by representation, of that surviving or continuing trustee who has proved the will of his testator or by the administrator for the time being of that trustee without the concurrence of any executor who has renounced or has not proved; but a sole or last surviving executor intending to

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renounce has, or all the executors where they all intend to renounce have, and shall be deemed always to have had power, at any time before renouncing probate, to exercise the power of appointment given by this section or by any similar previous enactment if willing to act for that purpose and without thereby accepting the office of executor.

- (5) Where, in the case of any trust, there are not more than 3 trustees (none of them being a trustee corporation), then —
- (a) the person or persons nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust; or
  - (b) where there is no person nominated for the purpose of appointing new trustees by the instrument creating the trust, or no such person able and willing to act, then the trustee or trustees for the time being,

may, by writing, appoint a person or persons (whether or not being the person or persons exercising the power) to be an additional trustee or additional trustees, but it shall not be obligatory to appoint any additional trustee unless the instrument (if any) creating the trust, or any statutory enactment, provides to the contrary; but on any appointment of additional trustees under this subsection the number of trustees shall not be increased beyond 4, where 4 or fewer trustees were originally appointed, or beyond the original number of trustees, where more than 4 were originally appointed.

- (6) Every new trustee appointed under this section has the same powers, authorities, and discretions and may in every respect act, as if he had originally been appointed a trustee by the instrument (if any) creating the trust, both before and after all the trust property becomes by law or by assurance or otherwise vested in him.
- (7) The provisions of this section that are brought into effect by the circumstance that a person nominated trustee (whether sole or otherwise) in a will is dead are brought into effect whether the

death of that person occurred before or after the death of the testator; and the provisions relative to a continuing trustee relate also to a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

- (8) The provisions of this section relating to a person nominated for the purpose of appointing new trustees apply whether the appointment is made in a case specified in this section or in a case specified in the instrument (if any) creating the trust, but where a new trustee is appointed under this section in a case specified in that instrument, the appointment shall be subject to the terms applicable to an appointment in that case under the provisions of that instrument.
- (9) In this section, the term *trustee* does not include a personal representative as such.

**8. New trustee, protection for people dealing with in good faith**

- (1) Where any instrument appointing a new trustee contains a statement as to how a vacancy in the office of trustee occurred, that statement is conclusive evidence, in favour of a subsequent purchaser in good faith, or the circumstances under which the vacancy occurred.
- (2) Any appointment of a new trustee depending on such a statement as is mentioned in subsection (1) and any vesting declaration, express or implied, consequent on that appointment, in favour of any subsequent purchaser in good faith, is valid.
- (3) The protection afforded to a purchaser by this section extends to the Commissioner of Titles, Registrar of Titles or other person registering or certifying title.
- (4) This section applies to instruments of appointment signed either before or after the commencement of this Act.

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**9. Trustee may retire without replacement in some cases**

- (1) This section applies where a trustee declares by writing that he is desirous of being discharged from all or any of the trusts reposed in him, and after his discharge there will be a trustee corporation or at least 2 individuals to act as trustees to perform the trust from which that trustee desires to be discharged.
- (2) In any case to which this section applies, if the co-trustees and such other person, if any, as is empowered to appoint trustees consent by writing to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, the trustee desirous of being discharged —
  - (a) shall be deemed to have retired from the trusts from which he has declared he desires to be discharged; and
  - (b) subject to subsection (3), shall, by the writing by which consent is given to his discharge, be discharged from the trusts under this Act,

without any new trustee being appointed in his place.

- (3) Any conveyance requisite for vesting in the continuing trustees alone the property subject to the trusts from which the retiring trustee is to be discharged shall be executed or done; and in respect of any part of the trust property for the vesting of which in the continuing trustees a conveyance is necessary, the retiring trustee shall not be discharged until that part is duly conveyed.
- (4) This section applies only if, and as far as, a contrary intention is not expressed in the instrument (if any) creating the trust and has effect subject to the provisions of that instrument.

**10. Trust property, vesting of in new or continuing trustees**

- (1) Where a new trustee is appointed, the execution of the instrument of appointment vests, subject to the provisions of this section, the trust property for which the new trustee is appointed in the persons who become and are the trustees, as

joint tenants for the purposes of the trust, without any conveyance.

- (2) In any case to which section 9 applies, the execution of the instrument of discharge vests, subject to the provisions of this section, all the property subject to the trusts from which the retiring trustee has declared that he is desirous of being discharged in the continuing trustees alone, as joint tenants for the purposes of the trust, without any conveyance.
- (3) Subsections (1) and (2) do not apply —
  - (a) to land conveyed by way of mortgage for securing money subject to the trust, except land conveyed on trust for securing debentures or debenture stock; or
  - (b) to any property, including property subject to the operation of the *Transfer of Land Act 1893*, which is transferable only in books kept by a company or other body or in manner directed by or under an Act of Parliament.
- (4) In the case of any property referred to in subsection (3), the execution of the instrument of appointment of a new trustee or of the instrument of discharge, as the case may be, for the purposes of the trust vests in the persons who become and are the trustees or in the continuing trustee, as the case may be, the right to call for a conveyance of the property and to sue for and recover the property.
- (5) For purposes of registration —
  - (a) in the case of an instrument of appointment of a new trustee, the appointor shall be deemed the conveying party and the conveyance shall be deemed to be made by him under a power conferred by this Act; and
  - (b) in the case of an instrument of discharge, the retiring trustee and any person consenting in such instrument to his discharge shall be deemed the conveying parties and the conveyance shall be deemed to be made by them under a power conferred by this Act.

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- (6) In this section —

*continuing trustees* and *retiring trustees* have the same meaning as in section 9(3); and

*instrument of discharge* means an instrument containing the consent or consents referred to in section 9(2) and executed in a case to which section 9 applies.

- (7) For the purposes of a covenant against assignments, or against assignment without licence or consent, contained in any lease, underlease or agreement for a lease or underlease, a vesting under this section shall be deemed not to be an assignment.

**11. Corporation may act as trustee in some cases**

- (1) Any trustee corporation may be appointed and may lawfully act as the sole trustee in respect of any trust, notwithstanding that the instrument creating the trust may provide for or direct the appointment of 2 or more trustees; and nothing in this subsection prevents any other corporation from acting as a trustee in accordance with any authority vested in it in that behalf, whether by its memorandum of association or otherwise, but a corporation shall not administer the estate of any deceased person unless expressly authorised to do so by any Act.
- (2) This section does not permit the appointment of a corporation as trustee if the instrument creating the trust forbids the appointment of the corporation.
- (3) This section extends to any trust or instrument and to any appointment of trustees, whether created or made before or after the commencement of this Act.

**12. Renouncing probate etc., effect of**

- (1) Where a person appointed by will both executor and trustee thereof renounces probate, or after being duly cited or summoned fails to apply for probate, the renunciation or failure shall be deemed to be disclaimer of the trust contained in the will.

- (2) Where any person appointed by will both executor and trustee thereof —
- (a) renounces probate;
  - (b) after being duly cited or summoned fails to apply for probate; or
  - (c) dies before probate is granted to him,

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

**13. Trustee corporation obtaining probate etc., effect of**

- (1) Where a trustee corporation has, pursuant to the provisions of any Act, obtained a grant of probate of a will or letters of administration with the will annexed, upon the authority of any person or the majority of persons appointed by the will of any deceased person to be both executor and trustee thereof, then, by virtue of the grant and without further appointment, the trustee corporation shall be deemed to be appointed trustee of the will in the place of the person or persons by whose authority the trustee corporation applied for the grant.
- (2) Where the Court appoints a trustee corporation administrator in the place of a person who, by the will, was appointed both executor and trustee thereof, or in the place of a person who has obtained letters of administration with the will annexed and who is both administrator and trustee of that will, then the trustee corporation shall, by virtue of such appointment and without further appointment, be deemed to be appointed trustee of the will in the place of that executor or administrator.
- (3) Where, pursuant to section 12(4) of the *Public Trustee Act 1941*, the Court, upon the application of any executor or administrator being also trustee of the will of the person whose estate he is administering, by order transfers to the Public

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Trustee the estate of the deceased person for administration, then the Public Trustee shall, by virtue of that order and without further appointment, be deemed to be appointed trustee of the will in the place of that executor or administrator.

**14. Advisory trustees, appointment and functions of**

- (1) In the administration of any trust property any trustee may act, to the extent in this section provided, with an advisory trustee or advisory trustees.
- (2) An advisory trustee or advisory trustees may be appointed in respect of all or any part of the trust property —
  - (a) by the testator, settlor or other creator of the trust, in the instrument creating the trust;
  - (b) by order of the Court made on the application of any beneficiary or trustee or of any person on whose application the Court would have power to appoint a new trustee; or
  - (c) by any person having power to appoint a new trustee.
- (3) Where a trustee acts with an advisory trustee or advisory trustees, the trust property shall be vested in the firstmentioned trustee (in this section referred to as *the responsible trustee*), who shall have the sole management and administration of the estate and its trusts as fully and effectually as if he were the sole trustee, and in any such case —
  - (a) the responsible trustee may consult the advisory trustees on any matter relating to the trusts or the estate;
  - (b) the advisory trustees may advise the responsible trustee on any matter relating to the trusts or the estate, but shall not be trustees in respect of the trust;
  - (c) where any advice or direction is tendered or given by the advisory trustees, the responsible trustee may follow and act on that advice or direction without being liable for anything done or omitted by him by reason of his following that advice or direction;



- (d) where the responsible trustee is of opinion that any advice or direction of an advisory trustee conflicts with the trusts or any rule of law, or exposes him to any liability, or is otherwise objectionable, he may apply to the Court for directions in the matter, and any decision and order therein shall be final and shall bind the responsible trustee and the advisory trustee, and the Court may make such order as to costs as appears proper; but nothing in this section makes it necessary for the responsible trustee to apply to the Court for any such directions; and
  - (e) where advisory trustees are not unanimous, and tender to the responsible trustee conflicting advice or directions, the responsible trustee may apply to the Court for directions in like manner and with like effect as provided by paragraph (d).
- (4) A person dealing with the responsible trustee in relation to any trust property shall not be concerned to inquire as to the concurrence or otherwise of the advisory trustees or be affected by notice of the fact that the advisory trustees have not concurred.
- (5) Subject to the provisions of the instrument (if any) creating the trust and to any order made by the Court, where remuneration is payable to the trustee of any trust property, remuneration or commission may be paid to both the responsible trustee and the advisory trustees, and subject as aforesaid the amount thereof shall be —
  - (a) as regards the responsible trustee, where the responsible trustee is the Public Trustee, as prescribed under the *Public Trustee Act 1941*; and
  - (b) in any other case, as may be determined by the responsible trustee if he is entitled to fix his own remuneration or by the Court.

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**15. Custodian trustees, appointment and functions of**

- (1) Subject to the provisions of this section and to the instrument (if any) creating the trust, any corporation may be appointed to be custodian trustee of any trust in any case where, and in the same manner as, it could be appointed to be trustee.
- (2) Subject to the provisions of the instrument (if any) creating the trust, where a custodian trustee is appointed of any trust —
  - (a) the trust property shall be vested in the custodian trustee as if the custodian trustee were the sole trustee, and for that purpose vesting orders may, where necessary, be made under this Act;
  - (b) the management of the trust property and the exercise of all powers and discretions exercisable by the trustee under the trust shall be and remain vested in managing trustees other than the custodian trustee (in this Act called *the managing trustees*) as fully and effectually as if there were no custodian trustee;
  - (c) the sole function of the custodian trustee shall be to get in and hold the trust property and invest its funds and dispose of the assets as the managing trustees in writing direct, for which purpose the custodian trustee shall execute all such documents and perform all such acts as the managing trustees in writing direct;
  - (d) for the purposes of paragraph (c), a direction given by the majority of the managing trustees, where there are more than one, shall be deemed to be given by all the managing trustees;
  - (e) the custodian trustee shall not be liable for acting on any direction to which paragraph (c) refers; but if the custodian trustee is of opinion that any such direction conflicts with the trusts or the law, or exposes the custodian trustee to any liability, or is otherwise objectionable, the custodian trustee may apply to the Court for directions in the matter; and any order giving

directions shall bind both the custodian trustee and the managing trustees; and the Court may make such order as to costs as it thinks proper;

- (f) the custodian trustee shall not be liable for any act or default on the part of any of the managing trustees;
  - (g) all actions and proceedings touching or concerning the trust property shall be brought or defended in the name of the custodian trustee at the written direction of the managing trustees, and the custodian trustee shall not be liable for the costs thereof apart from any payable out of the trust property;
  - (h) a person dealing with the custodian trustee shall not be concerned to inquire as to the concurrence or otherwise of the managing trustees or be affected by notice of the fact that the managing trustees have not concurred; and
  - (i) the power of appointing new trustees, when exercisable by the trustee, shall be exercisable by the managing trustees alone, but the custodian trustee shall have the same power as any other trustee of applying to the Court for the appointment of a new trustee.
- (3) On the application of the custodian trustee or of any of the managing trustees or of any beneficiary and on satisfactory proof that it is the general wish of the beneficiaries or that on other grounds it is expedient to terminate the custodian trusteeship, the Court may make an order for that purpose and may also make such vesting orders and give such directions as in the circumstances seem to the Court to be necessary or expedient.
- (4) Subject to the provisions of the instrument (if any) creating the trust and to any order made by the Court, where remuneration or commission is payable to the trustee of any trust property, remuneration may be paid to both the custodian trustee and the managing trustees, and subject as aforesaid the amount thereof shall be —

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- (a) as regards the custodian trustee, where the custodian trustee is the Public Trustee, as prescribed under the *Public Trustee Act 1941*; and
- (b) in any other case, as may be determined by the managing trustees if they are entitled to fix their own remuneration, or by the Court.

### **Part III — Investments**

*[Heading inserted by No. 1 of 1997 s. 6.]*

*[15A. Repealed by No. 1 of 1997 s. 6.]*

#### **16. Application of Part**

This Part applies to trusts created before or after the coming into operation of the *Trustees Amendment Act 1997*<sup>1</sup>.

*[Section 16 inserted by No. 1 of 1997 s. 6.]*

*[16A-16D. Repealed by No. 1 of 1997 s. 6.]*

#### **17. Trust funds, investment of**

A trustee may, unless expressly prohibited by the instrument creating the trust —

- (a) invest trust funds in any form of investment; and
- (b) at any time, vary an investment or realize an investment of trust funds and reinvest money resulting from the realization in any form of investment.

*[Section 17 inserted by No. 1 of 1997 s. 6.]*

#### **18. Investment power of trustees, exercise of**

- (1) Subject to the instrument creating the trust, a trustee shall, in exercising a power of investment —
  - (a) if the trustee's profession, business or employment is or includes acting as a trustee or investing money on behalf of other persons, exercise the care, diligence and skill that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons; or
  - (b) if the trustee is not engaged in such a profession, business or employment, exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons.

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- (2) A trustee shall exercise a power of investment in accordance with any provision of the instrument creating the trust that is binding on the trustee and requires the obtaining of any consent or approval or compliance with any direction with respect to trust investments.
- (3) Subject to the instrument creating the trust, a trustee must, at least once in each year, review the performance (individually and as a whole) of trust investments.

*[Section 18 inserted by No. 1 of 1997 s. 6.]*

**19. Investment power of trustees, rules of law and equity apply**

- (1) Any rules and principles of law or equity that impose a duty on a trustee exercising a power of investment including, without limiting the generality of those duties, rules and principles that impose —
  - (a) a duty to exercise the power of a trust in the best interests of all present and future beneficiaries of the trust;
  - (b) a duty to invest trust funds in investments that are not speculative or hazardous;
  - (c) a duty to act impartially towards beneficiaries and between different classes of beneficiaries; or
  - (d) a duty to take advice,continue to apply except to the extent that they are inconsistent with this or any other Act or the instrument creating the trust.
- (2) Any rules and principles of law or equity that relate to a provision in an instrument creating a trust that purports to exempt, limit the liability of, or indemnify a trustee in respect of a breach of trust, continue to apply.
- (3) If a trustee is under a duty to take advice, the reasonable costs of obtaining the advice are payable out of trust funds.

*[Section 19 inserted by No. 1 of 1997 s. 6.]*

**20. Investment by trustee, matters to be considered**

- (1) Without limiting the matters that a trustee may take into account when exercising a power of investment, a trustee shall, so far as they are appropriate to the circumstances of the trust, have regard to —
- (a) the purposes of the trust and the needs and circumstances of the beneficiaries;
  - (b) the desirability of diversifying trust investments;
  - (c) the nature of and risk associated with existing trust investments and other trust property;
  - (d) the need to maintain the real value of the capital or income of the trust;
  - (e) the risk of capital or income loss or depreciation;
  - (f) the potential for capital appreciation;
  - (g) the likely income return and the timing of income return;
  - (h) the length of the term of the proposed investment;
  - (i) the probable duration of the trust;
  - (j) the liquidity and marketability of the proposed investment during, and on the determination of, the term of the proposed investment;
  - (k) the aggregate value of the trust estate;
  - (l) the effect of the proposed investment in relation to the tax liability of the trust;
  - (m) the likelihood of inflation affecting the value of the proposed investment or other trust property;
  - (n) the costs (including commissions, fees, charges and duties payable) of making the proposed investment; and
  - (o) the results of a review of existing trust investments.
- (2) A trustee may —
- (a) obtain and consider independent and impartial advice reasonably required for the investment of trust funds or

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the management of the investment from a person whom the trustee reasonably believes to be competent to give the advice; and

- (b) pay out of trust funds the reasonable costs of obtaining the advice.

*[Section 20 inserted by No. 1 of 1997 s. 6.]*

**21.      Company shares etc. held in trust, trustees' powers as to**

- (1) If securities of a body corporate are subject to a trust, the trustee may concur in any scheme or arrangement —
  - (a) for or arising out of the reconstruction, reduction of capital or liquidation of, or the issue of shares by, the body corporate;
  - (b) for the sale of all or any part of the property and undertaking of the body corporate to another body corporate;
  - (c) for the acquisition of securities of the body corporate, or of control of the body corporate, by another body corporate;
  - (d) for the amalgamation of the body corporate with another body corporate; or
  - (e) for the release, modification or variation of rights, privileges or liabilities attached to the securities, or any of them,

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

- (2) The trustee may accept instead of, or in exchange for, or in addition to, the securities subject to the trust any securities of any denomination or description of another body corporate party to the scheme or arrangement.
- (3) If a conditional or preferential right to subscribe for securities in a body corporate is offered to a trustee in respect of a holding in



that body corporate or another body corporate, the trustee may, as to all or any of the securities —

- (a) exercise the right and apply capital money subject to the trust in payment of the consideration;
  - (b) assign the benefit of the right, or the title to the right, to a person, including a beneficiary under the trust, for the best consideration that can be reasonably obtained; or
  - (c) renounce the right.
- (4) A trustee accepting or subscribing for securities under this section is, for the purposes of any provision of this Part, exercising a power of investment.
- (5) A trustee may retain securities accepted or subscribed for under this section for any period for which the trustee could properly have retained the original securities.
- (6) The consideration for an assignment made under subsection (3)(b) shall be held as capital of the trust.
- (7) This section applies in relation to securities acquired before or after the coming into operation of the *Trustees Amendment Act 1997*<sup>1</sup> but subject to the instrument creating the trust.

*[Section 21 inserted by No. 1 of 1997 s. 6.]*

**22. Choses in action under RITS system, presumptions as to**

- (1) A chose in action arising under the RITS system and which entitles its holder to a security of a particular description (*the underlying security*) is, for the purposes of this Act and the instrument creating a trust, taken to be the same in all respects as the underlying security.
- (2) The holding or acquisition by a trustee of a chose in action referred to in subsection (1) shall be regarded as an investment by the trustee in the underlying security.

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- (3) It does not matter that the right conferred by the chose in action referred to in subsection (1) is a right in respect of securities of a particular description and not in respect of particular securities.
- (4) This section applies to a trust created before or after the coming into operation of the *Trustees Amendment Act 1997*<sup>1</sup> but applies only to the extent that the trust instrument creating the trust does not expressly prohibit its application.

- (5) In this section —

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

*[Section 22 inserted by No. 1 of 1997 s. 6.]*

**23. Calls on shares, trustees' powers as to**

Subject to the instrument creating the trust —

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

*[Section 23 inserted by No. 1 of 1997 s. 6.]*

**24. Residence for beneficiary, power to invest in etc.**

- (1) Subject to the instrument creating the trust, a trustee may —
  - (a) invest any trust funds in the purchase of a dwelling-house for a beneficiary to use as a residence; or
  - (b) enter into any other agreement or arrangement to secure for a beneficiary a right to use a dwelling-house as a residence.
- (2) Despite the terms of the instrument creating the trust, a trustee may, if to do so would not unfairly prejudice the interests of the

other beneficiaries, retain as part of the trust property a dwelling-house for a beneficiary to use as a residence.

- (3) A dwelling-house purchased, retained or otherwise secured for use by the beneficiary as a residence may be made available to the beneficiary for that purpose on such terms and conditions consistent with the trust and the extent of the interest of the beneficiary as the trustee thinks fit.
- (4) The trustee may retain a dwelling-house or any interest or rights in respect of a dwelling-house acquired under this section after the use of the dwelling-house by the beneficiary has ceased.
- (5) In this section —  
***dwelling-house*** includes —
  - (a) any building or part of a building designed, or converted or capable of being converted, for use as a residence; and
  - (b) any amenities or facilities for use in connection with the use of a dwelling-house.

*[Section 24 inserted by No. 1 of 1997 s. 6.]*

**25. Retained authorised investments, no liability for**

A trustee is not liable for breach of trust by reason only of retaining an investment that has ceased to be —

- (a) an investment authorised by the instrument creating the trust;
- (b) an investment properly made by the trustee exercising a power of investment;
- (c) an investment made under this Act or a corresponding previous enactment; or
- (d) an investment authorised by any other Act or the general law.

*[Section 25 inserted by No. 1 of 1997 s. 6.]*

**26.        Loans secured against property, trustees' liability for**

- (1) If a trustee lends money on the security of a property, the trustee is not liable for breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made if it appears to the Court —
  - (a) that, in making the loan, the trustee was acting on a report as to the value of the property made by a person whom the trustee reasonably believed to be competent to give such a report and whom the trustee instructed and employed independently of any owner of the property;
  - (b) that the amount of the loan did not exceed two-thirds of the value of the property as stated in the report; and
  - (c) that the loan was made in reliance on the report.
- (2) This section applies to transfers of existing securities as well as to new securities and to investments made before or after the coming into operation of the *Trustees Amendment Act 1997*<sup>1</sup>.

*[Section 26 inserted by No. 1 of 1997 s. 6.]*

**26A.     Improper loans, trustees' limited liability for**

- (1) If a trustee improperly advances trust money on a security that would at the time of the investment have been a proper investment if the sum advanced had been smaller than the actual sum advanced, the security shall be taken to be a proper investment in respect of the smaller sum, and the trustee is only liable to make good the difference between the sum advanced and the smaller sum, with interest.
- (2) This section applies to investments made before or after the coming into operation of the *Trustees Amendment Act 1997*<sup>1</sup>.

*[Section 26A inserted by No. 1 of 1997 s. 6.]*

**26B. Breach of trust as to investments, factors to be considered by Court**

In proceedings against a trustee for breach of trust in respect of a duty under this Part relating to the trustee's power of investment, the Court may, when considering the question of the trustee's liability, take into account —

- (a) the nature and purpose of the trust;
- (b) whether the trustee had regard to the matters set out in section 20 so far as is appropriate to the circumstances of the trust;
- (c) whether the trust investments have been made pursuant to an investment strategy formulated in accordance with the duty of a trustee under this Part; and
- (d) the extent the trustee acted on the independent and impartial advice of a person competent (or apparently competent) to give the advice.

*[Section 26B inserted by No. 1 of 1997 s. 6.]*

**26C. Breach of trust as to investments, Court may set off losses against gains**

- (1) The Court may, when considering an action for breach of trust arising out of or in respect of an investment by a trustee where a loss has been, or is expected to be, sustained by the trust, set off all or part of the loss resulting from that investment against all or part of the gain resulting from any other investment whether in breach of trust or not.
- (2) The power of set off conferred by subsection (1) is in addition to any other power or entitlement to set off all or part of any loss against any property.

*[Section 26C inserted by No. 1 of 1997 s. 6.]*

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**26D.     Housing loans, trustees' liability for**

- (1) If a trustee lends money on a real security in accordance with the provisions of this Act, or had made such a loan in accordance with the provisions of this Act as in force immediately before the coming into operation of the *Trustees Amendment Act 1997*<sup>1</sup>, the trustee is not chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property on which the loan is secured if —
- (a) the trustee was not expressly forbidden by the instrument (if any) creating the trust to lend money on a real security;
  - (b) the loan was a housing loan; and
  - (c) the loan is secured by a contract of insurance in the prescribed form entered into with an authorised insurer.
- (2) The Minister may by notice published in the *Gazette* —
- (a) declare a corporation that is lawfully carrying on the business of insuring mortgages in Western Australia to be an authorised insurer for the purposes of this section; and
  - (b) revoke a declaration made under paragraph (a).
- (3) The Minister may by notice published in the *Gazette* —
- (a) specify terms and conditions subject to which an authorised insurer is authorised to enter into contracts of insurance for the purpose of this section; and
  - (b) vary or revoke any such terms and conditions.
- (4) An authorised insurer who fails to comply with any terms or conditions subject to which it is authorised to enter into contracts of insurance for the purpose of this section shall be guilty of an offence.

Penalty: \$5 000.

(5) In this section —

***authorised insurer*** means a corporation that has been declared to be an authorised insurer under subsection (2);

***dwelling-house*** includes —

- (a) any building that consists, or any buildings that consist, in whole or in substantial part, of residential accommodation, whether constituting a single unit of accommodation or 2 or more such units;
- (b) any residential accommodation of a kind commonly known as a flat or home unit; and
- (c) appurtenances, outbuildings, fences and permanent provision for lighting, water supply, drainage and sewerage provided in connection with the dwelling-house;

***housing loan*** means a loan —

- (a) made for any one or more of the following purposes, that is to say, of enabling the borrower —
  - (i) to acquire a prescribed interest in land and construct, or complete the construction of, a dwelling-house on the land;
  - (ii) to construct a dwelling-house, or complete the construction of a dwelling-house, on land in which the borrower has a prescribed interest;
  - (iii) to acquire a prescribed interest in land on which there is a dwelling-house;
  - (iv) to alter, improve or extend a dwelling-house constructed on land in which the borrower has a prescribed interest;
  - (v) to meet expenses in respect of the provision of improvement of roads, kerbing, guttering or footpaths in connection with land in which the borrower has a prescribed interest; or

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- (vi) to discharge a mortgage, charge or other encumbrance over land in which the borrower has a prescribed interest, being land on which a dwelling-house is being constructed;

and

- (b) the repayment of which is secured by a security over the interest of the borrower in the land,

and, where the lender requires the borrower to meet the cost of the premium in respect of a contract of insurance entered into in respect of the loan, includes moneys advanced by the lender to enable the borrower to meet that cost, being moneys the repayment of which is secured by a security over the interest of the borrower in the land;

***prescribed interest in land*** means —

- (a) an estate in fee simple;
- (b) an interest as lessee under a lease in perpetuity from the Crown in right of the Commonwealth or the State of Western Australia; or
- (c) an interest as lessee under a lease for a term of years from the Crown in right of the Commonwealth or the State of Western Australia or from the owner of an estate in fee simple if the authorised insurer is satisfied that the term, covenants and conditions of the lease give reasonable security of tenure to the lessee for a substantial period.

*[Section 26D inserted by No. 1 of 1997 s. 6.]*

**26E.      Authorised trustee investments, meaning of**

Any provision in an instrument (whether or not creating a trust) that empowers or requires a person to invest money in investments authorised for the investment of trust funds or moneys is to be read as if it empowered or required that person to invest that money according to the provisions of this Part relating to the investment of trust funds.



*[Section 26E inserted by No. 1 of 1997 s. 6.]*

## **Part IV — General powers of trustees**

### **27.      Property, powers to sell, lease, exchange, etc.**

(1) Subject to the provisions of this section, every trustee, in respect of any property for the time being vested in him, may —

- (a) sell the property;
- (b) dispose of the property by way of exchange for other property in the State of a like nature and a like or better tenure, or, where the property vested in him consists of an undivided share, concur in the partition of the property in which the share is held, and give or take any property by way of equality of exchange or partition;
- (c) postpone the sale, calling in, and conversion of any property that he has a duty to sell, whether or not it is of a wasting, speculative or reversionary nature; but, in the case of property of a wasting or speculative nature, for no longer than is reasonably necessary to permit its prudent realisation;
- (d) let or sublet the property at a reasonable rent for any term not exceeding one year, or from year to year, or for a weekly, monthly or other like tenancy or at will;
- (e) grant a lease or sublease of the property for any term not exceeding —
  - (i) in the case of a building lease, 30 years; or
  - (ii) in the case of any other lease (including a mining lease), 10 years;

to take effect in possession within one year next after the date of the grant of the lease or sublease at a reasonable rent, with or without a fine, premium or foregift, any of which if taken shall be deemed to be part of and an accretion to the rental, and shall, as between the persons beneficially entitled to the rental, be considered as accruing from day to day and be apportioned over the term of the lease or sublease; or

- (f) at any time during the currency of a lease of the property, reduce the rent or otherwise vary or modify the terms thereof, or accept, or concur or join with any other person in accepting, the surrender of any lease.
- (2) Any trustee may, on such conditions as he thinks proper, rescind, cancel, modify or vary any contract or agreement for the sale and purchase of any land, or agree to do so, or compromise with or make allowances to any person with whom such a contract or agreement has been made, or who is the assignee thereof in respect of any unpaid purchase money secured on mortgage or otherwise; and without prejudice to the generality of this subsection, a trustee may, by writing, waive or vary any right exercisable by him that arises from a failure to comply at or within the proper time with any term of any agreement for sale, mortgage, lease, or other contract.
- (3) In exercising any power of leasing or subleasing conferred by this section or by the instrument (if any) creating the trust, a trustee may —
  - (a) grant to the lessee or sublessee a right of renewal for one or more terms, at a rent to be fixed or made ascertainable in a manner specified in the original lease or the original sublease, but so that the aggregate duration of the original and of the renewal terms shall not exceed the maximum single term that could be granted in the exercise of the power;
  - (b) grant a lease with an optional or compulsory purchasing clause; or
  - (c) grant to the lessee or sublessee a right to claim compensation for improvements made or to be made by him in, upon or about the property which is leased or subleased.
- (4) Where the property subject to a trust includes land, the trustee shall exercise the power conferred by this section to sell the land, if so required in writing by the person or all the persons at

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that time beneficially entitled to an interest in possession under the trust of the land.

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

*[Section 27 amended by No. 1 of 1997 s. 7.]*

**28. Trust or power to sell property, duration of**

- (1) Where the instrument creating a trust to sell property or a power to sell property does not expressly limit the duration of the trust or power, then, notwithstanding any lapse of time or that all the beneficiaries are absolutely entitled to the property in fee simple or full ownership in possession and are not under any disability the trustee may sell the property; but in all other respects the authority conferred by this section is subject to any restrictions to which the trust or power created by the instrument is subject.
- (2) A purchaser of any property sold under a trust for sale or a power to sell, or the Registrar of Titles or other person registering or certifying title, shall not be concerned to enquire whether the property was sold under the authority conferred by this section.

- (3) Nothing in this section affects a trust for sale or a power to sell that is for the time being in existence under the instrument creating the trust or power.

**28A. Option to purchase land, trustees' liability for grant of**

- (1) Where there is statutory or other power to sell land that is subject to a trust, a trustee who grants to a person an option to purchase that land within a period not exceeding 6 months for a price fixed at the time the option is granted shall not be chargeable with breach of trust by reason only that the trustee granted that option if before so doing the trustee received advice from an independent valuer to the effect that —
- (a) the purchase price fixed for the land is reasonable; and
  - (b) the fee payable for the option is reasonable.
- (2) In subsection (1), *independent valuer* means —
- (a) a person who is instructed and employed independently of the person to whom the option is granted; and
  - (b) in the case of land in the State, a person who is licensed under the *Land Valuers Licensing Act 1978*; or
  - (c) in the case of land in another State or a Territory, a person who is licensed as a valuer under the law of that State or Territory or, if there is no such law, a person who is a Fellow or Associate of the Australian Property Institute (Inc.).

*[Section 28A inserted by No. 84 of 1987 s. 13; amended by No. 74 of 2003 s. 122.]*

**29. Rule against perpetuities, application of**

- (1) The rule of law known as the rule against perpetuities does not apply and shall be deemed never to have applied so as to render void —
- (a) a trust or power to sell property, where a trust of the proceeds of sale is valid;

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- (b) a trust or power to lease or exchange property, where the lease or exchange directed or authorised by the trust or power is ancillary to the carrying out of a valid trust;
  - (c) any other power that is ancillary to the carrying out of a valid trust or the giving effect to a valid disposition of property; or
  - (d) any provision for the remuneration of trustees.
- (2) This section does not —
  - (a) render any trustee liable for any acts done prior to the commencement of this Act for which that trustee would not have been liable had this section not been enacted; or
  - (b) enable any person to recover any money distributed or paid under any trust, if he could not have recovered that money had this section not been enacted.

**30. Property, miscellaneous powers as to**

- (1) Every trustee, in respect of any property for the time being vested in him, may —
  - (a) expend money subject to the same trusts for the repair, maintenance, upkeep or renovation of the property, whether or not the work is necessary for the purpose of the salvage of the property;
  - (b) subject to the rules of law applicable in such cases and to any direction of the Court to the contrary, apportion the cost of the work mentioned in paragraph (a) between capital and income or otherwise among the persons entitled thereto in such manner as he considers equitable, with power, where the whole or part of the cost of the work is charged to capital, to recoup capital from subsequent income, if that course would be equitable having regard to all the circumstances of the case;

- (c) expend money, subject to the same trusts, in the improvement or development of the property, but not, without the consent of the Court, in excess of —
  - (i) \$20 000, or such other amount as the Governor may by regulation provide, for any one purpose; or
  - (ii) \$50 000, or such other amount as the Governor may by regulation provide, for any one purpose if the expenditure is made upon the advice of a person whom the trustee reasonably believes to be competent to give prudent advice concerning the proposed improvement or development;
- (d) where the property is land and the land may be sold or let or leased or otherwise disposed of under any power or trust vested in the trustee, subdivide the land into blocks and for that purpose construct and dedicate all such roads, streets, access ways, service lanes, and footpaths and make all such reserves, and do all such other things, and pay all such money, as he thinks necessary or as are required by, or under, any Act relating to subdivisions;
- (e) contribute out of money subject to the same trusts such sum as he thinks reasonable towards the construction and maintenance of such roads, streets, access ways, service lanes, and footpaths, and such sewerage, water, electricity, drainage and other works as are in the opinion of the trustee likely to be beneficial to the property, notwithstanding that they are intended to be constructed wholly or in part on land not subject to the same trusts;
- (f) grant easements and *profits à prendre* and enter into party wall agreements and agreements that relate to fencing, and execute all necessary documents to give effect thereto;

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- (g) pay rates, taxes, assessments, insurance premiums, and other outgoings in respect of the property out of money subject to the same trusts;
- (h) as mortgagor or mortgagee, agree to the renewal, extension or variation of the mortgage for such period and on such terms and conditions as he thinks fit; but —
  - (i) the powers conferred by this paragraph may be exercised by a trustee as mortgagor for the purpose of raising additional money on the security of a mortgage of any property, where the trustee would have power under section 43 to raise money by a mortgage of the property, and not otherwise; and
  - (ii) nothing in this paragraph authorises a trustee to advance money other than in accordance with Part III;
- (i) make such inquiries, by way of advertisement or otherwise, as he thinks necessary for the purpose of ascertaining the next-of-kin or beneficiaries entitled to the property, and charge the cost of the inquiries and advertisements against the property;
- (j) where the property includes a life policy and there is no money or insufficient money available for the payment of premiums on the policy, surrender the policy for money or accept instead of the policy a fully paid up policy or vary the terms of the policy in such manner as the trustee thinks fit;
- (k) appropriate any part of the property in or towards satisfaction of any legacy payable thereout, or in or towards satisfaction of any share of the trust property, (whether settled, contingent or absolute) to which any person is entitled, and for that purpose value the whole



or any part of the property in accordance with section 50; but —

- (i) the appropriation shall not be made so as to affect adversely any specific gift; and
  - (ii) before any such appropriation is effectual, notice thereof shall be given to all persons of full age and full mental capacity who are interested in the appropriation, and to the parent or guardian of any infant who is interested in the appropriation, and to the person having the care and management of the estate of any person who is not of full mental capacity, and any such person may, within one calendar month after receipt of the notice, or, where the person to whom notice has been given is out of the jurisdiction, within such extended period as the Court may, on the application of the trustee or of any person interested, allow, apply to the Court to vary the appropriation, and the appropriation shall be conclusive save as otherwise directed by the Court;
- (l) where provision is made in any instrument creating a trust for payment of an annuity or other periodic payment, and notwithstanding that the annuity or payment may by the instrument be charged upon the trust property or upon any part thereof, set aside and appropriate out of property available for payment of the annuity and invest a sum sufficient in the opinion of the trustee at the time of appropriation to provide out of the income thereof the amount required to pay the annuity or periodic payment, and so that after the appropriation shall have been made, —
- (i) the annuitant shall have the same right of recourse to the capital and income of the appropriated sum as he would have had against the trust property if no appropriation had been made; and

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- (ii) the trustee may forthwith distribute the residue of the trust property and the income thereof (which residue and income shall no longer be liable for the annuity) in accordance with the trusts declared of and concerning the same;

or

- (m) do or omit all acts and things, and execute all instruments necessary to carry into effect the powers and authorities given by this Act or by or under the instrument creating the trust.
- (2) Where in the administration of any property employed in the production of income or from which income is derived a trustee considers that, in the interests of the persons entitled or who may become entitled to the capital of the property, it is equitable to set up a depreciation or replacement fund in respect of the property or in respect of any asset comprised therein then, notwithstanding any rule of law to the contrary, it shall be lawful for, but not obligatory upon, him to do so and to credit from time to time and accumulate by way of compound interest such part of the income so produced or derived as he considers equitable, and also the resulting income therefrom; and in any such case the fund shall follow the destination of the capital of the property and shall be subject to all the trusts, powers, and provisions applicable thereto; with further power to the trustee to apply as he thinks fit the fund and accumulations of income in or towards the replacement, repair, maintenance, upkeep or renovation of the property or asset or in or towards the acquisition by purchase or otherwise of property or assets of a like nature or property or assets that otherwise may advantageously be employed in conjunction with the property in producing or deriving the income as aforesaid.
- (3) Nothing in subsection (1)(k) shall be read as requiring a trustee to give to himself, in some other capacity, notice of an appropriation; but, where a trustee would, but for this subsection, be obliged to give to himself such a notice, the

appropriation is not effectual until it has been approved by the Court, on the *ex parte* application of the trustee or otherwise.

*[Section 30 amended by No. 113 of 1965 s. 8; No. 18 of 1968 s. 3; No. 84 of 1987 s. 14; No. 1 of 1997 s. 8.]*

**31. Trust or power to sell, ancillary powers to**

- (1) Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior encumbrances or not, and either together or in lots, by public auction, by public tender or by private contract, subject to any such conditions respecting title or evidence of title or other matters as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to resell, without being answerable for any loss.
- (2) A trust or power to sell or dispose of land includes a trust or power to sell or dispose of part thereof, whether the division is horizontal, vertical or made in any other way; and also includes a trust or power to sell or dispose of any building, fixture, timber or other thing affixed to the soil apart and separately from the land itself.
- (3) If a trustee joins with any other person in selling trust property and other property, the purchase money shall be apportioned in or before the contract of sale, and a separate receipt shall be given by the trustee for the apportioned share; but a contravention of this subsection does not invalidate and shall not be deemed to have invalidated any instrument intended to affect or evidence the title to the trust property, and no person being a purchaser, lessee, mortgagee, or other person who, in good faith and for valuable consideration, acquires the trust property or an interest in it or a charge over it, and neither the Registrar of Titles nor any other person registering or certifying title, shall be affected by notice of, or be concerned to inquire whether there has been, a contravention of this subsection.

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**32. Depreciatory conditions of sale, effect of**

- (1) A sale by a trustee shall not be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.
- (2) A sale by a trustee shall not, after the execution of the conveyance or transfer, be impeached as against the purchaser, upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.
- (3) A purchaser, upon any sale by a trustee, shall not be at liberty to make any objection against the title upon any of the grounds in this section mentioned.

**33. Land may be sold and proceeds secured by mortgage**

- (1) Where a trustee sells land for an estate in fee simple, the trustee may, where the proceeds are liable to be invested, contract that the payment of any part, not exceeding two-thirds, of the purchase money shall be secured by a mortgage of the land sold, with or without the security of any other property, and the mortgage shall, if any buildings or other improvements are comprised in the mortgage, contain a covenant by the mortgagor to keep them insured against loss or damage by fire to their full insurable value.
- (2) The trustee shall not be bound to obtain any report as to the value of the land or other property to be comprised in such a mortgage as is mentioned in subsection (1), or any advice as to the making of the loan, and shall not be liable for any loss that may be incurred by reason only of the security being insufficient at the date of the mortgage.

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

**34. Property may be sold on terms of deferred payment**

- (1) A sale of property by a trustee, in exercise of any power vested in him in that behalf by the instrument creating the trust or by or under this Act or any other enactment, may be on terms of deferred payment.
- (2) The terms of deferred payment may provide that the purchase money shall be paid by instalments.
- (3) The terms upon which property is sold shall, in addition to such other provisions as the trustee may think proper, include provisions giving effect to the following, namely that —
- (a) the part of the purchase money to be paid by deposit shall not be less than the sum which a person acting with prudence would, if the property were his own, have accepted in the circumstances in order to sell the property to the best advantage, and in any case shall not be less than one-tenth of the purchase money;
  - (b) the balance of the purchase money shall be payable by such instalments and shall bear interest payable half-yearly or oftener on the amount from time to time unpaid at such rate as a person acting with prudence would, if the property were his own, have accepted in the circumstances in order to sell the property to the best advantage, and in any case the whole purchase money shall be payable within a period not exceeding 10 years from the date of sale;
  - (c) if any instalment or interest or part thereof is in arrear and unpaid for 6 months, or for such less period as may be specified, the whole of the purchase money shall become due and payable; and

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- (d) the purchaser shall maintain and protect the property, and, in the case of land, keep all buildings (if any) thereon insured against loss or damage by fire to their full insurable value.
- (4) Notwithstanding that the property has been sold on terms of deferred payment, the trustee may, at any time after one-third of the purchase money has been paid, convey the property and take a mortgage back to secure payment of the balance of the purchase money and interest, with or without the security of any other property.
- (5) Whether the sale is made under the order of the Court or otherwise, the Court may make such order as it thinks fit as to the terms of deferred payment.
- [(6) repealed]*
- (7) For the purposes of any consent or direction required by the instrument (if any) creating the trust or by statute, a trustee selling property on terms of deferred payment shall be deemed not to be lending money or investing trust funds.

*[Section 34 amended by No. 1 of 1997 s. 9.]*

**35. Onerous leases or property may be surrendered**

- (1) Where a leasehold is vested in a trustee and the property is subject to onerous covenants of such a nature that it would not be in the interests of the beneficiaries to retain the property, the trustee may surrender, or concur in surrendering, the lease; and the trustee shall not be chargeable with breach of trust nor shall the surrender be impeached by any beneficiary upon the ground only that the covenants were not of such a nature, if the trustee has acted *bona fide* and on the advice of a person whom he reasonably believed to be a competent valuer instructed and employed independently of the lessor, whether the valuer carried on business in the locality where the property is situate or elsewhere.

- (2) Where a freehold is vested in a trustee and the property is of so onerous a nature that it would not be in the interests of the beneficiaries to retain the property, if the Crown agrees to accept the surrender of the freehold, the trustee may surrender, or concur in surrendering, it to the Crown; and the trustee shall not be chargeable with breach of trust nor shall the surrender be impeached by any beneficiary upon the ground only that the property was not of such a nature, if the trustee has acted *bona fide* and on the advice of a person whom he reasonably believed to be a competent valuer, whether that valuer carried on business in the locality where the property is situate or elsewhere.
- (3) A subsequent purchaser or the Registrar of Titles or other person registering or certifying title shall not be concerned to inquire whether a surrender was authorised by this section.

**36. Leases may be renewed**

- (1) A trustee of any leaseholds for lives or years that are renewable under any covenant or contract or by custom or usual practice may, if he thinks fit, and shall, if thereto required by any person having any beneficial interest, present or future or contingent, in the leaseholds, use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the agreed or reasonable terms, and for that purpose may from time to time make or concur in making a surrender of the lease for the time being subsisting, and do all such other acts as are requisite; but where, by the terms of the instrument (if any) creating the trust, the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew, or to contribute to the expense of renewal, this section does not apply unless the consent in writing of that person is obtained to the renewal.
- (2) A trustee obtaining a renewal of a lease under the powers conferred by this section or otherwise may pay or apply capital money subject to the trust, for the purpose of obtaining the renewal.

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**37. Equity of redemption may be purchased instead of foreclosing**

A trustee may, in lieu of proceeding to foreclosure, purchase the equity of redemption of land in the State the subject of a mortgage held by the trustee under which default has been made where the moneys expended in that purchase are subject to the same trusts as the mortgage debt; but in no case shall the moneys paid by way of consideration for such purchase exceed 5% of the amount due under the mortgage.

**38. Property may be sold after right of redemption barred**

- (1) Where any property is vested in a trustee by way of security, and the property becomes discharged from the right of redemption whether by virtue of the *Limitation Act 2005* or of any order for foreclosure or purchase of the equity of redemption or otherwise, the trustee shall hold the property on trust for sale.
- (2) The net proceeds of sale of any property to which this section relates shall, after payment of costs and expenses, be applied in like manner as the mortgage debt, if received, would have been applicable, and the income of the property until sale shall be applied in like manner as the interest, if received, would have been applicable.
- (3) This section does not affect the right of any person to require that, instead of a sale, the property shall be conveyed to him or in accordance with his directions.

*[Section 38 amended by No. 20 of 2005 s. 23.]*

**39. Equity of redemption may be released in discharge of mortgage debt**

- (1) Where an equity of redemption is vested in a trustee and the mortgaged property is not of greater value than the amount of the mortgage debt, the trustee may release the equity of redemption to the mortgagee in discharge of the mortgage debt



or part thereof; and the trustee shall not be chargeable with breach of trust nor shall the release be impeached by any beneficiary upon the ground only that the mortgaged property was of greater value than the amount of the mortgage debt or the part thereof discharged, if the trustee has acted *bona fide* and on the advice of a person whom he reasonably believed to be a competent valuer instructed and employed independently of the mortgagee, whether the valuer carried on business in the locality where the property is situate or elsewhere.

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

**40. Trustee as mortgagee in possession, application of income by**

- (1) Where a trustee is entitled, whether severally or as a co-mortgagee, to a debt secured by a mortgage of land in trust as to the whole or part of that debt for persons by way of succession, and the trustee is at the date of commencement of this Act, or at any time after that date becomes, mortgagee in possession of the mortgaged land, the trustee shall apply the net income of the mortgaged land received by him after that date or after he becomes mortgagee in possession —
- (a) in discharge of all rents, taxes, rates, and outgoings affecting the mortgaged land;
  - (b) in payment of the premiums on any insurances properly payable on the mortgaged property; and
  - (c) in keeping down all annual sums or other payments and the interest on all principal sums having priority to the mortgage in right whereof he is in possession;

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

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- (2) The rents, taxes, outgoing, premiums, costs, annual sums, payments and interest to be discharged, kept down and paid, pursuant to subsection (1), shall be those accruing due —
- (a) after the date of the commencement of this Act, where the trustee is in possession of the mortgaged land at that date; and
  - (b) after the date of possession by the trustee, where the entry into possession is after the date of commencement of this Act;

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

- (3) On the recovery of the moneys secured by the mortgage, whether in whole or in part, and whether by repayment or on realisation of the security or otherwise, such part of the income applied by the trustee in the payments specified in subsection (1)(a), (b) and (c) as would otherwise have been payable as interest to the person entitled to the interest of the mortgage debt shall, as between the persons respectively entitled to the income and corpus of the mortgage debt, be deemed to be arrears of interest and the amount received by the trustee shall be apportioned accordingly.
- (4) Notwithstanding anything in this section contained, the trustee may, if in the administration of the trust he thinks it necessary so to do, apply income of the mortgaged property received by him after the date of commencement of this Act in payment of

any rents, taxes, rates, outgoings, premiums, costs, annual sums, payments, and interest affecting the mortgaged land other than those specified in subsection (2); but the person entitled to the interest on the mortgage debt shall be entitled to recoupment out of the capital of the mortgage debt of all payments made by the trustee under the authority conferred by this subsection.

**41. Receipts may be given**

- (1) The receipt in writing of a trustee for any money, securities or other personal property or effects payable, transferable or deliverable to him under any trust or power is a sufficient discharge to the person paying, transferring or delivering it or them, and effectually exonerates that person from seeing to the application, or being answerable for any loss or misapplication, of the money, securities or other personal property or effects.
- (2) This section applies notwithstanding anything to the contrary contained in the instrument (if any) creating the trust.

**42. Property, debts, etc., miscellaneous powers as to**

A trustee may, if and as he thinks fit —

- (a) accept any property, real or personal, before the time at which it is made transferable or payable; or
- (b) sever and apportion any blended trust funds or property; or
- (c) pay or allow any debt or claim on any evidence that he thinks sufficient; or
- (d) accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed; or
- (e) allow any time for payment of any debt; or
- (f) compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the trust or to the trust property;

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

**43. Capital money may be raised by sale, mortgage, etc. of trust property**

- (1) Where a trustee is authorised by the instrument (if any) creating the trust or by or under this Act or any other Act or by law to pay or apply capital money subject to the trust for any purpose or in any manner, he has and shall be deemed always to have had power to raise the money required by sale, conversion, calling in or mortgage of all or any part of the trust property for the time being in possession; and where a trustee, in the exercise of his powers in that behalf, purchases any property for the trust, he has and shall be deemed always to have had power to make the purchase on terms of deferred payment or on mortgage of that property.
- (2) This section applies notwithstanding anything to the contrary contained in the instrument (if any) creating the trust.

**44. Purchasers etc. dealing with trustees, protection for**

A purchaser or mortgagee, paying or advancing money on a sale or mortgage purporting to be made under any trust or power (statutory or otherwise) vested in a trustee, shall not be concerned to see that the money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof.

**45. Trustees dying, devolution of powers or trusts**

- (1) Where a power or trust is given to, or imposed on, 2 or more trustees jointly, then, unless the contrary is expressed in the instrument (if any) creating the power or trust, the power or trust may be exercised or performed for the time being by the survivors or survivor of them.

- (2) Until the appointment of a new trustee, the personal representative for the time being of a sole trustee or (where there were 2 or more trustees) of the last surviving or continuing trustee shall be capable of exercising or performing any power or trust that was given to, or capable of being exercised by, the sole or last surviving or continuing trustee, or other trustees for the time being of the trust; but for the purposes of this subsection the term *trustee* does not include a personal representative as such.
- (3) This section does not authorise the exercise or performance of any power or trust by an executor who has renounced or has not proved.

**46. Insuring trust property**

- (1) A trustee may insure against loss or damage, whether by fire or otherwise, any insurable property to any amount, including the amount of any insurance already on foot, not exceeding the full replacement value of the property; and may also insure against any risk or liability against which it would be prudent for a person to insure, if he were acting for himself; and may pay the premiums for the insurance out of the income of the property concerned or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to that income.
- (2) A trustee may recover the amounts of any premiums paid in respect of any insurance properly effected from the life tenant or other person entitled to or in receipt of the rents and profits of the property concerned.
- (3) Nothing in this section imposes any obligation on a trustee to insure or to insure for any particular value or sum.

**47. Insurance money, application of**

- (1) Money receivable by a trustee or any beneficiary under a policy of insurance against the loss of, or damage to, any property subject to a trust, whether by fire or otherwise, (in this section

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called *insurance money*) shall, where the policy has been kept up under any trust in that behalf or under any power (statutory or otherwise) or in performance of any covenant or of any obligation (statutory or otherwise) or by a tenant for life impeachable for waste, be capital for the purposes of the trust, except so far as it would be regarded as income under any rule of law.

- (2) If any insurance money is receivable by any person other than the trustee of the trust, that person shall use his best endeavours to recover and receive the money, and shall pay the net residue thereof, after discharging any costs of recovering and receiving it, to the trustee of the trust, or, if there is no trustee capable of giving a discharge therefor, into Court.
- (3) Any insurance money, receivable in respect of property held upon trust for sale, shall be held upon the trusts and subject to the powers and provisions applicable to money arising by a sale under the trust; and, in any other case, shall be held upon trusts corresponding as nearly as may be with the trusts affecting the property in respect of which it was payable.
- (4) Any insurance money, or any part thereof, may be applied by the trustee, or, if in Court, under the direction of the Court, in rebuilding, reinstating, replacing or repairing the property lost or damaged; but any such application by the trustee shall be subject to the consent of any person whose consent is required by the instrument (if any) creating the trust to the investment of money subject to the trust.
- (5) Nothing in this section affects the right of any person to require any insurance money or any part thereof to be applied in rebuilding, reinstating or repairing the property lost or damaged, or the rights of any mortgagee, lessor or lessee, whether under any statute or otherwise.
- (6) This section applies to policies effected either before or after the commencement of this Act, but only to money received after that commencement.

**48. Trust's documents may be put in safe custody**

A trustee may deposit any document held by him relating to the trust, or to the trust property, with any bank or corporation whose business includes the undertaking of the safe custody of documents, and any sum payable in respect of any such deposit shall be paid out of the income of the trust property, and so far as there is no available income out of the capital of the trust property.

*[Section 48 amended by No. 1 of 1997 s. 10.]*

**49. Reversionary interests, powers as to**

- (1) Where trust property includes any share or interest in property not vested in the trustee, or the proceeds of sale of any such property, or any other thing in action, the trustee, on its or their falling into possession or becoming payable or transferable, may —
- (a) agree or ascertain the amount or value thereof or any part thereof in such manner as he thinks fit;
  - (b) accept in or towards satisfaction thereof, at the market or current value, or upon any valuation or estimate of value that he may think fit, any investments in which trust funds may be invested under this Act;
  - (c) allow any deductions for duties, costs, charges, and expenses that he thinks proper or reasonable; and
  - (d) execute any release in respect thereof, so as effectually to discharge all accountable parties from all liability in respect of any matter coming within the scope of the release,

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

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- (2) The trustee shall not be under any obligation and shall not be chargeable with any breach of trust by reason of any omission —
- (a) to give any notice in respect of, or apply for any charging or other like order upon, any securities or other property out of or in which the share or interest or other thing in action mentioned in subsection (1) is derived, payable or charged; or
  - (b) to take any proceedings on account of any act, default or neglect on the part of the persons in whom the securities or other property mentioned in paragraph (a) or any of them or any part of them are for the time being, or had at any time been, vested,

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

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

*[Section 49 amended by No. 1 of 1997 s. 11.]*

**50. Valuation of trust property, powers as to**

- (1) A trustee may, for the purpose of giving effect to the trust, or any of the provisions of the instrument (if any) creating the trust or of this Act or any other Act, from time to time ascertain and fix the value of any trust property, or of any property that he is authorised to purchase or otherwise acquire, in such manner as he thinks proper; and where the trustee is not personally qualified to ascertain the value of any property he shall consult a duly qualified person (whether employed by him or not) as to that value; but the trustee shall not be bound to accept any valuation made by any person whom the trustee may consult.



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

**51. Trust's accounts, audit of**

- (1) A trustee may, in his absolute discretion, from time to time, cause the accounts of the trust property to be examined or audited by a person who publicly carries on the business of an accountant, and shall for that purpose produce such vouchers and give such information to that person as he may require.
- (2) The costs of the examination or audit, including the fee of the person making the examination or audit, shall be charged against the capital or income of the trust property, or partly in one way and partly in the other, as the trustee may in his absolute discretion think fit, but, in default of any direction by the trustee to the contrary in any special case, costs attributable to capital shall be borne by capital and those attributable to income by income.
- (3) Where the trustee, or one of the trustees, is the Public Trustee or an incorporated company, nothing in this section authorises, except in the case of a business forming part of the trust property, any costs or fee to be paid out of, or borne by, the capital or income of the trust property, unless the Court approves of the costs or fee being so paid out or borne.

**52. Co-owners, power to act in conjunction with**

Where an undivided share in any property is subject to a trust, the trustee may (without prejudice to any trust or power in relation to the entirety of the property) execute or exercise any trust or power vested in him in relation to that share in conjunction with the persons entitled to, or having power in that behalf over, the other share or shares, and notwithstanding that the trustee or any one or more of several trustees may be entitled to or interested in any such share, either in his or their own right or in a fiduciary capacity.

**53. Agents, attorneys, etc., power to employ**

- (1) A trustee may, instead of acting personally, employ and pay an agent, whether a solicitor, accountant, bank, trustee corporation, stockbroker or other person, to transact any business or do any act required to be transacted or done in the execution of the trust or the administration of the trust property, including the receipt and payment of money, and the keeping and audit of trust accounts, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent employed in good faith and without negligence.
- (2) A trustee may appoint any person to act as his agent or attorney for the purpose of selling, converting, collecting, getting in, and executing and perfecting assurances of, or managing or cultivating, or otherwise administering any property real or personal, movable or immovable, subject to the trust in any place outside the State, or executing or exercising any discretion or trust or power vested in him in relation to any such property, with such ancillary powers, and with and subject to such provisions and restrictions, as he may think fit, including a power to appoint substitutes, and shall not, by reason only of his having made any such appointment, be responsible for any loss arising thereby.
- (3) Without limiting the generality of the powers conferred by subsections (1) and (2), a trustee may —
  - (a) appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed or instrument having in the body thereof or endorsed thereon a receipt for the money or valuable consideration or property, the deed or instrument being executed, or the endorsed receipt being signed, by the person entitled to give a receipt for that consideration; or

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

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

- (4) A trustee shall not be chargeable with a breach of trust, by reason only of his having made, or concurred in making, any appointment such as is mentioned in subsection (3); but nothing in that subsection exempts a trustee from any liability that he would have incurred if this Act and any enactment replaced by this Act had not been passed, where he permits any money, valuable consideration or property therein mentioned to remain in the hands or under the control of the bank or solicitor for a longer period than is reasonably necessary to enable the bank or solicitor, as the case may be, to pay or transfer it to the trustee.
- (5) Subsections (3) and (4) apply whether the money or valuable consideration or property was or is received before or after the commencement of this Act.

**54. Delegation of trustees' powers during absence from State or incapacity**

- (1) A trustee who for the time being is out of the State or is about to depart therefrom, or is a member of Her Majesty's forces, or who is, or may be about to become, by reason of physical infirmity, temporarily incapable of performing all his duties as a trustee may, subject to the provisions of this section, but notwithstanding any rule of law or equity to the contrary, by power of attorney executed as a deed, delegate to any person the execution or exercise during his absence from the State or during his incapacity, as the case may be, of all or any trusts,

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

- (2) Notwithstanding the power to delegate conferred by subsection (1), a trustee may not so delegate unless his co-trustees or co-trustee (if any) and such other person as is empowered by the instrument (if any) creating the trust to appoint trustees, consent by the same or other deed to the delegation.
- (3) Where any delegation has under this section been duly made to and accepted by any person and is for the time being in operation, that person has, within the scope of the delegation, the same trusts, powers, authorities, discretions, liabilities, and responsibilities (except the power of delegation conferred by this section) as he would have if he were then the trustee.
- (4) In any proceedings brought by any person beneficially interested under the trust against the donor of a power of attorney given under this section, in respect of any act or default of the donee of the power, it is a defence for the donor to prove that the donee was appointed by him in good faith and without negligence.
- (5) All jurisdictions and powers of any Court apply to the donee of a power of attorney given under this section in the same manner, so far as respects the execution of the trust or the administration of the estate to which the power of attorney relates, as if the donee were acting in relation to the trust or estate in the same capacity as the donor of the power.
- (6) A power of attorney given under this section does not come into operation unless and until the donor is out of the State or is incapable of performing all his duties as a trustee, and is revoked by his return or by his recovery of that capacity, as the case may be.

- (7) In favour of any person dealing with the donee of a power of attorney given under this section, any act done or instrument executed by the donee is, notwithstanding that the power has never come into operation or has been revoked, whether by the act of the donor of the power or by operation of law, as valid and effectual as if the power had come into operation and remained unrevoked at the time when the act was done or the instrument executed, unless that person had at that time actual notice that the power had never come into operation or of the revocation of the power.
- (8) In favour of any person dealing with the donee of a power of attorney given under this section, any act done or instrument executed by the donee is, notwithstanding that any consents to the delegation that are required by subsection (2) have not been given, as valid and effectual as if those consents had been properly given, unless that person had at the time when the act was done or the instrument was executed actual notice that those consents had not been given.
- (9) A statutory declaration by the donee of a power of attorney given under this section relating to any trust or estate that the power has come into operation, or that in any transaction the donee is acting in the execution of the trust or the administration of the estate, is, in favour of a person dealing with the donee of the power, conclusive evidence of that fact.
- (10) The fact that it appears from any power of attorney given under this section, or from any evidence required for the purposes of any power of attorney or otherwise, that in any transaction the donee of the power is acting in the execution of a trust shall not affect with notice of the trust any person dealing in good faith with the donee.
- (11) Where it is intended that the donee of a power of attorney given under this section shall be entitled to transfer, or otherwise deal with, land under the operation of the *Transfer of Land Act 1893*, the power of attorney shall be in the form, and executed and attested in the manner, prescribed by Part VI of that Act.

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**55. Business, trade, etc. of deceased, power to carry on**

- (1) Subject to the provisions of any other Act, if at the time of his death any person is engaged (whether alone or in partnership) in carrying on a business, trade or occupation, it shall be lawful for his trustee to continue to carry on that business, trade or occupation, in the same manner, for any one or more of the following periods, namely —
  - (a) 2 years from the death of that person;
  - (b) such period as may be necessary or desirable for the winding up of the business; or
  - (c) such further period or periods as the Court may approve.
- (2) In exercise of the powers conferred by this section or by the instrument creating the trust, a trustee may —
  - (a) employ any part of the deceased's estate that is subject to the same trusts;
  - (b) from time to time increase or diminish the part of the estate employed as provided by paragraph (a);
  - (c) purchase stock, machinery, implements, and chattels for the purpose of the business mentioned in subsection (1);
  - (d) employ such managers, agents, servants, clerks, workmen and others as he thinks fit;
  - (e) at any time enter into a partnership agreement to take the place of any partnership agreement subsisting immediately before the death of the deceased or at any time thereafter and notwithstanding that the trustee was a partner of the deceased in his own right; and
  - (f) enter into share-farming agreements.
- (3) Application to the Court for leave to carry on a business may be made by the trustee or any person beneficially interested in the estate at any time, whether or not any previous authority to carry on the business has expired; and the Court may make such an order, or may order that the business be not carried on, or be

carried on subject to conditions, or may make such other order as, in the circumstances, it thinks fit.

- (4) Nothing in this section affects any other authority to do the acts thereby authorised to be done.
- (5) Where a trustee is in any manner interested or concerned in a trade or business, he may make such subscriptions as it would be prudent for him to make, if he were acting for himself, out of the income of the assets affected, to any fund created for objects or purposes in support of any trade or business of a like nature and subscribed to by other persons engaged in a like trade or business.

**56. Business, power to convert into, or sell to, a company**

- (1) A trustee may at any time, at the expense of the trust property, convert or join in converting any business into a company limited by shares in such manner as he thinks fit; and may, at the like expense, promote and assist in promoting a company for taking over the business; and may sell or transfer the business and the capital and assets and goodwill thereof, or any part thereof, to the company, or to any company having for its objects the purchase of such a business, in consideration, in either case, wholly or in part of ordinary or preference shares wholly or partially paid up of any such company, or wholly or in part of debentures, debenture stock, or bonds of any such company, and as to the balance (if any) in cash payable immediately, or by any instalments with or without security.
- (2) A trustee may retain as an investment of the trust any shares, debentures, debenture stock or bonds received by him in consequence of the exercise by him of any power conferred by subsection (1).

*[Section 56 amended by No. 1 of 1997 s. 12.]*

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**57.        Trustee may sue himself in a different capacity**

Notwithstanding any rule of law or practice to the contrary, a trustee of any property in that capacity may sue, and be sued by, himself in any other capacity whatsoever, including his personal capacity; but in every such case the trustee shall obtain the directions of the Court in which the proceedings are taken, as to the manner in which the opposing interests are to be represented.



## **Part V — Maintenance, advancement and protective trusts**

### **58. Infant beneficiary, application of income until 18**

- (1) Where any property is held by a trustee in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property —
- (a) during the infancy of that person, if his interest so long continues, the trustee may, at his sole discretion, pay to his parent or guardian (if any) or otherwise apply for or towards his maintenance, education (including past maintenance or education) or his advancement or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is —
    - (i) any other fund applicable to the same purpose; or
    - (ii) any person bound by law to provide for his maintenance, education, advancement or benefit;
  - and
  - (b) if the person on attaining the age of 18 years has not a vested interest in that income, the trustee shall thenceforth pay the income of that property and of any accretion thereto, under subsection (2), to him until he either attains a vested interest therein or dies, or until failure of his interest;

but, in deciding whether the whole or any part of the income of the property is during a minority to be paid or applied for the purposes in this subsection mentioned, the trustee shall have regard to the age of the infant and his requirements and, generally, to the circumstances of the case, and in particular to what other income (if any) is applicable for the same purposes; and where the trustee has notice that the income of more than one fund is applicable for those purposes, then, so far as

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practicable, unless the entire income of the funds is paid or applied for those purposes or the Court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied.

- (2) During the infancy of any such person as is mentioned in subsection (1), if his interest so long continues, the trustee shall accumulate all the residue of that income in the way of compound interest by investing it and the resulting income thereof from time to time in investments in which trust funds may be invested under this Act, and shall hold those accumulations —

(a) if the person —

- (i) attains the age of 18 years, or marries under that age, and his interest in the income during his infancy or until his marriage is a vested interest; or
- (ii) on attaining the age of 18 years or on marriage under that age becomes entitled to the property from which the income arose in fee simple, absolute or determinable, or absolutely, or for an entailed interest,

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

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

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

- (3) This section applies in the case of a contingent interest, only if the limitation or trust carries the intermediate income of the property held in trust, but it applies to a future or contingent legacy by the parent of, or a person standing *in loco parentis* to, the legatee, if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee, and in the latter case the rate of interest shall (if the income available is sufficient and subject to any rules of Court to the contrary) be 5% per annum; and where in the case of a contingent interest the limitation or trust would, but for the operation of a protective trust (whether created or statutory) carry the intermediate income of the property, that limitation or trust shall for the purposes of this subsection be deemed, notwithstanding the protective trust, to carry the intermediate income.
- (4) This section applies to a vested annuity in like manner as if the annuity were the income of property held by a trustee in trust to pay the income thereof to the annuitant for the same period for which the annuity is payable, save that in any case accumulations made during the infancy of the annuitant shall be held in trust for the annuitant or his personal representative absolutely.

*[Section 58 amended by No. 113 of 1965 s. 8; No. 46 of 1972 s. 6(2); No. 1 of 1997 s. 13.]*

**59. Capital may be applied for maintenance, education, etc.**

A trustee may at any time or times pay or apply any capital money or other capital asset subject to a trust, for the maintenance, education (including past maintenance or education), or the advancement or benefit, in such manner as he may in his absolute discretion think fit, of any person entitled to the capital of the trust property or any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and any such payment or application may be made

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notwithstanding that the interest of that person is liable to be defeated by the exercise of a power of appointment or revocation or by the operation of the rule against perpetuities or to be diminished by the increase of the class to which he belongs; but —

- (a) the money or asset so paid or applied for the maintenance, education, advancement or benefit of any person shall not exceed altogether \$2 000 or half of the presumptive or vested share or interest of that person in the trust property, whichever is the greater;
- (b) where that person or any other person is or becomes absolutely and indefeasibly entitled to the share of the trust property in which that person had a presumptive or vested interest when the money or asset was so paid or applied, that money or asset shall be brought into account as part of that share of the trust property; and
- (c) that payment or application shall not be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money or asset paid or applied, unless that person is in existence and of full age and consents in writing to the payment or application, or unless the Court, on the application of the trustee, so orders.

*[Section 59 amended by No. 113 of 1965 s. 8.]*

**60. Advances for maintenance etc. may be made conditionally**

- (1) Where a power to pay or apply any property for the maintenance, education, advancement or benefit of any person or for any one or more of those purposes is vested in a trustee, the trustee when exercising the power shall have, and be deemed always to have had, authority to impose on the person any condition, whether as to repayment, payment of interest, giving security, or otherwise; and at any time after imposing any such condition, the trustee may, either wholly or in part, waive

the condition or release any obligation undertaken or any security given by reason of the condition.

- (2) In determining the amount or value of the property that a trustee, who has imposed a condition pursuant to subsection (1), may pay or apply in exercise of his powers in that regard, any money repaid to the trustee or recovered by him shall be deemed not to have been so paid or applied by the trustee.
- (3) Nothing in this section imposes upon a trustee any obligation to impose any condition pursuant to subsection (1); and a trustee, when imposing any condition as to giving security, shall not be affected by any restrictions upon the investment of trust funds, whether imposed by this Act or by any rule of law or by the trust instrument (if any).
- (4) A trustee is not liable for any loss which may be incurred in respect of any money that is paid or applied under this section, whether the loss arises through failure to take security, through the security being insufficient, through failure to take action for its protection, through the release or abandonment of the security without payment, or from any other cause.

**61. Protective trusts, rules as to**

- (1) Where any income, including an annuity or other periodic income payment, is directed to be held on protective trusts for the benefit of any person (in this section called *the principal beneficiary*) for the period of his life or any less period, then during that period (in this section called *the trust period*) that income shall, without prejudice to any prior interest, be held on trust as by this section provided.
- (2) The income to which this section refers shall be held on trust for the principal beneficiary during the trust period or until, whether before or after the termination of any prior interest —
  - (a) the principal beneficiary does, or attempts to do, or suffers, any act or thing; or

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- (b) any event, other than an advance under any statutory or express power, happens,

whereby, if the income were payable during the trust period to the principal beneficiary absolutely during that period, he would be deprived of the right to receive it or any part of it; and, in any of those cases, as well as on the termination of the trust period, whichever first happens, this trust of the income shall fail and determine.

- (3) Where the trust, to which subsection (2) refers, fails or determines during the subsistence of the trust period, then, during the remainder of that period, the income to which that subsection refers shall be held upon trust for the application thereof for the maintenance, education, advancement or benefit of all, or any one or more exclusively of the other or others, of —
- (a) the principal beneficiary and his, or her, spouse or de facto partner (if any) and his, or her, children or more remote issue (if any); or
- (b) where there is no spouse or de facto partner or issue of the principal beneficiary in existence, the principal beneficiary and the persons who would, if he were dead, be entitled to the trust property or the income thereof or the annuity fund (if any) or arrears of the annuity,

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

- (4) This section does not apply to trusts coming into operation before the commencement of this Act, and has effect subject to any variation, contained in the instrument creating the trust, of the trusts declared by subsections (2) and (3).
- (5) Nothing in this section operates to validate any trust that would, if contained in the instrument creating the trust, be liable to be set aside.

*[Section 61 amended by No. 28 of 2003 s. 202.]*

## **Part VI — Indemnities and protection of trustees, etc.**

### **62. Leases etc., trustees' liability under**

- (1) Where a trustee liable as such for —
- (a) any rent, covenant or agreement reserved by, or contained in, any lease; or
  - (b) any rent, covenant or agreement payable under, or contained in, any grant made in consideration of a rent charge; or
  - (c) any indemnity given in respect of any rent, covenant or agreement referred to in either paragraph (a) or (b),

satisfies all liabilities under the lease or grant that may have accrued and been claimed up to the date of the conveyance hereinafter in this subsection mentioned, and, where necessary, sets apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum that the lessee or grantee agreed to lay out on the property demised or granted, although the period for laying out that sum may not have arrived, then, and in any such case, the trustee may convey the property demised or granted to a purchaser, legatee, devisee or other person entitled to call for a conveyance thereof; and may thereafter distribute the trust estate, other than the fund (if any) set apart under this subsection, to or amongst the persons entitled thereto, without appropriating any part, or any further part, as the case may be, of the trust estate to meet any future liability under the said lease or grant; and notwithstanding that distribution, the trustee shall not be personally liable in respect of any subsequent claim under the lease or grant.

- (2) For the purposes of this section a trustee shall be deemed to be liable as such for any liabilities arising from privity of estate that he may incur under the obligations contained in a lease or grant, if he is entitled to reimburse himself out of the trust property for all expenses he may incur in respect of the liabilities.

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- (3) This section operates without prejudice to the right of the lessor or grantor, or the persons deriving title under the lessor or grantor, to follow the trust property or any part thereof or any property representing that property into the hands of the persons amongst whom it may have been distributed, and applies notwithstanding anything to the contrary in the instrument (if any) creating the trust.
- (4) In this section *lease* includes a sublease and an agreement for a lease or sublease and any instrument giving any such indemnity as is mentioned in subsection (1) or varying the liabilities under the lease; *grant* applies to a grant whether the rent is created by limitation, grant, reservation or otherwise, and includes an agreement for a grant and any instrument giving any such mentioned indemnity or varying the liabilities under the grant; and *lessee* and *grantee* include persons respectively deriving title under a lessee or grantee.

**63. Deceased estate, advertising for claims against, trustees' protection**

- (1) Where a trustee has given notice by advertisement published at least once in the *Government Gazette* and in a newspaper circulating in each locality in which, in the opinion of the trustee, claims are likely to arise, requiring persons having claims to which this section applies to send to the trustee, within the time fixed in the notice, particulars of their claims and warning them of the consequences of their failure to do so, then, at the expiration of that time or at any time thereafter, the trustee may administer or distribute the property or any part thereof to which the notice relates to or among the persons entitled thereto having regard only to the claims, whether formal or not, of which the trustee then has notice; and he shall not, as respects the property so administered or distributed, be liable to any person of whose claim he has not had notice at the time of the administration or distribution.
- (2) Nothing in this section affects any remedy that a person may have under section 65 or any other right or remedy available to



him against any person other than the trustee, including any right that he may have to follow the property and any money or property into which it is converted.

- (3) The time to be fixed by any notice, published in accordance with subsection (1), for the sending in of claims, shall be not less than one month from the date on which the notice is given.
- (4) Where the personal representative of a deceased person gives notice by advertisement in accordance with subsection (1), the localities specified in that subsection shall include each locality in which the deceased resided or carried on business at any time during the year immediately preceding his death.
- (5) Notice by advertisement for the purposes of this section shall, so far as regards the contents of the advertisement, be sufficient if given in the form in the Second Schedule or in a form to the like effect.
- (6) Where the trustee is in doubt as to what advertisements should be published under this section, he may apply to the Court for directions.
- (7) Any advertisement published under this section may relate to more than one estate or trust property.
- (8) This section applies notwithstanding anything to the contrary in the instrument (if any) creating the trust.
- (9) Except as provided in subsection (10), this section applies to claims, whether present or future, certain or contingent, against a trustee, being claims —
  - (a) against or in respect of the estate of the deceased person or the trust property, including (without limiting the generality of the foregoing) claims that survive or lie against or in respect of the estate or property under section 4 of the *Law Reform (Miscellaneous Provisions) Act 1941*; or

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- (b) against the trustee personally, by reason of his being under any liability in respect of which he is entitled to reimburse himself out of the estate or property that he is administering.
- (10) This section does not apply to —
  - (a) any claim under the *Inheritance (Family and Dependants Provision) Act 1972*; or
  - (b) any claim by a person to be a beneficiary under the will, or to be entitled on the intestacy, of the deceased person, or to be beneficially interested under the trust.

*[Section 63 amended by No. 57 of 1972 s. 3.]*

**64. Claims etc., procedure for barring**

- (1) Where a trustee wishes to reject a claim that has been made, or that he has reason to believe may be made —
  - (a) to or against the estate or property that he is administering; or
  - (b) against the trustee personally, by reason of his being under any liability in respect of which he is entitled to reimburse himself out of the estate or property that he is administering,

the trustee may serve upon the claimant or the person who may become a claimant a notice calling upon him, within a period of 3 months from the date of service of the notice, to take legal proceedings to enforce the claim and also to prosecute the proceedings with all due diligence.

- (2) At the expiration of the period stipulated in a notice served under subsection (1), the trustee may apply to the Court for an order under subsection (3), and shall serve a copy of the application on the person concerned.
- (3) Where, on the hearing of an application made under subsection (2), the person concerned does not satisfy the Court

that he has commenced proceedings and is prosecuting them with all due diligence, the Court may make an order —

- (a) extending the period, or barring the claim, or enabling the trust property to be dealt with without regard to the claim; and
  - (b) imposing such conditions and giving such directions, including a direction as to the payment of the costs of or incidental to the application, as the Court thinks fit.
- (4) Where a trustee has served any notices under this section in respect of claims on 2 or more persons, and the period specified in each of those notices has expired, he may, if he thinks fit, apply for an order in respect of the claims of those persons by a single application, and the Court may, on that application, make an order accordingly.
- (5) This section applies to every claim therein mentioned, whether the claim is or may be made as creditor or next-of-kin or beneficiary under the trust or otherwise; but it does not apply to any claim under the *Inheritance (Family and Dependents Provision) Act 1972*, and no order made under this section shall affect any application for revocation of any grant of Probate or of Letters of Administration, whether that application is made before or after the order.
- (6) On an application by a trustee under this section, the persons beneficially entitled to the estate or property need not be made parties to the proceedings, and an order made by the Court on the application shall not affect their right to contest the claim of the trustee to be entitled to indemnify himself out of the estate or property that he is administering where they were not parties to the proceedings in which the order was made.

*[Section 64 amended by No. 57 of 1972 s. 3.]*

**65. Deceased estate, claims made after distribution of, tracing, following assets**

- (1) This section applies where a trustee has distributed any assets forming part of the estate of a deceased person or subject to a trust, and there is nothing in any Act to prevent the distribution from being disturbed.
- (2) Where this section applies, the Court may make an order on a claim, being —
  - (a) an application under the *Inheritance (Family and Dependants Provision) Act 1972*;
  - (b) a claim to which section 63 applies; or
  - (c) a claim by a person to be a beneficiary under the will, or to be entitled on the intestacy, of the deceased person, or to be beneficially interested under the trust;

any of which application or claims are, hereinafter in this section, called *the claim*.

- (3) An order under subsection (2) may provide that —
  - (a) any person to whom any assets, to which the section applies, were distributed, or his personal representative, shall pay to the person making the claim or to the trustee a sum not exceeding the value of those assets; or
  - (b) any person, who has received, otherwise than in good faith and for valuable consideration, any interest in any assets, to which this section applies, from the person to whom they were distributed or his personal representative, shall pay to the person making the claim or to the trustee a sum not exceeding the value of that interest;

and for the purpose of giving effect to that order the Court may make such further order as it thinks fit.

- (4) The remedies given to any person by this section are in addition to all other rights and remedies (if any) available to that person, and nothing, other than the provisions of subsection (7) and (8), restricts those other rights and remedies.
- (5) Subject to the provisions of subsection (6), an order under this section shall not be made by the Court —
- (a) where the claim is an application for an order under the *Inheritance (Family and Dependants Provision) Act 1972*, unless that application is made within the time permitted by that Act; or
  - (b) in the case of any other claim, unless the application for that order is made within the time within which the applicant could have enforced his claim in respect of the estate, without special leave of the Court, if the assets had not been distributed;

but, notwithstanding the foregoing provisions of this subsection, the order may be made, with the special leave of the Court, on application made within the time within which the applicant could have enforced his claim, in respect of the estate, with special leave of the Court, if the assets had not been distributed.

- (6) Notwithstanding anything to the contrary in subsection (5), where a trustee has made a distribution of any assets forming part of the estate of a deceased person or subject to a trust, and any person who is entitled to apply for an order under this section has, within the time specified in that subsection, applied to the Court for an order on the claim and that person was not aware of the distribution at the time when he made that application, the Court may hear an application by that person under this section after the expiration of the period prescribed by subsection (5), if it is made within 6 months after the date on which the person first became aware of the distribution, and may make an order accordingly.

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- (7) Notwithstanding any rule of law to the contrary, where a trustee has made a distribution of any assets forming part of the estate of a deceased person or subject to a trust —
- (a) a person may exercise the remedies (if any) given to him by this section and all other rights and remedies available to him (including all rights that he may have to follow assets and any money or property into which they have been converted) without first exercising the rights and remedies (if any) available to him against the trustee in consequence of the making of the distribution; and
  - (b) a person shall not exercise any remedy that may be available to him against the trustee in consequence of the making of the distribution, until he has exhausted all other remedies available to him, whether under this section or in equity or otherwise.
- (8) Where a trustee has made a distribution of any assets forming part of the estate of a deceased person or subject to a trust, relief (whether under this section or in equity or otherwise) against any person other than the trustee or in respect of any interest of any such person in any assets so distributed and in any money or property into which they have been converted, shall be denied, wholly or in part, if the person from whom relief is sought received the assets or interest in good faith and has so altered his position in reliance on his having an indefeasible interest in the assets or interest, that, in the opinion of the Court, having regard to all possible implications in respect of the trustee and other persons, it is inequitable to grant relief or to grant relief in full.
- (9) Without prejudice to the provisions of subsection (8), an order under this section may provide that any payment directed to be made by that order shall be made by periodic payments or by instalments, and the Court may fix the amount or rate thereof in the order, and may from time to time vary, suspend or discharge the order for cause shown, as the Court thinks fit.

*[Section 65 amended by No. 57 of 1972 s. 3.]*

**66. Unknown beneficiaries, advertising for, distribution of shares of**

- (1) Where any property is held by a trustee and the property or any part thereof cannot be distributed because the trustee does not know —
- (a) whether any person who is, or may be, entitled thereto is, or at any material date was, in existence; or
  - (b) whether all or any of the persons who are members of any class that is or may be entitled thereto are, or at any material date were, in existence; or
  - (c) whether any such person as is mentioned in paragraph (a) or (b) is alive or dead or where he is to be found,

the trustee may publish such advertisements (whether in the State or elsewhere) as are appropriate in the circumstances calling upon every such person and every person claiming through any such person to send in his claim within a time to be specified in the advertisements, being, in any case, not less than 2 months from the date on which the advertisement is published.

- (2) Where the trustee is in doubt as to what advertisements should be published under this section, he may apply to the Court for directions in that regard.
- (3) Where the trustee has received (whether as a result of advertisements or not) a claim that any person is a person to whom any advertisement made under this section relates, or any notice that any person may claim to be such a person, and the trustee is not satisfied that the claim is or would be valid, the trustee may serve upon the claimant or the person of whom the trustee has notice as aforesaid, a notice calling upon him, within a period of 3 months from the date of service of the notice, to take legal proceedings to enforce the claim, if he wishes to pursue it, and to prosecute the proceedings with all due diligence; and advising him that, if he fails to do so, his claim may be disregarded and application may be made to the Court

without further notice for an order authorising the distribution of the property.

- (4) Nothing in subsection (3) makes it necessary for the trustee to serve a notice therein mentioned on any person; and the Court may make an order under this section, whether or not such a notice has been served on any person, if it is satisfied that the information supplied to the trustee by that person or otherwise in the possession of the trustee indicates that the person is not one of the persons specified in the advertisements or is not likely to be one of those persons.
- (5) Upon proof by affidavit of the circumstances, and of the inquiries that have been made, and of the results of the inquiries and advertisements, and of the claims of which the trustee has received notice, and of the notices that the trustee has given to claimants under subsection (3), and of the action (if any) that the claimants have taken to enforce their claims, the Court may order that the trustee be at liberty to distribute the property or part thereof, subject to such conditions as the Court may impose —
  - (a) as if every person and every member of any class of person specified in the order (being all or any of the persons specified in the advertisements) is not in existence or never existed or has died before a date or event specified in the order; and
  - (b) where as a consequence of the order it is not possible or practicable to determine whether or not any condition or requirement affecting a beneficial interest in the property or any part thereof has been complied with or fulfilled, as if that condition or requirement had or had not been complied with or fulfilled, as the Court may determine.
- (6) In making any order under subsection (5), the Court may —
  - (a) disregard (without express reference thereto in the order) the claims of any persons who do not appear to the



- Court to be, or likely to be, any of the persons specified in the advertisements;
- (b) disregard (without express reference thereto in the order) the claim of any person to whom the trustee has given notice under subsection (3) and who has failed to take legal proceedings to enforce the claim or to prosecute any such proceedings with all due diligence;
  - (c) exclude from the operation of the order any person to whom the trustee has not given notice under subsection (3) and who, in the opinion of the Court, may be one of the persons specified in the advertisements, or any person whom the Court considers should, for any reason, be excluded from the operation of the order;
  - (d) provide that the order shall not be acted on for such period or except on such conditions as may be specified in the order or that the effect of the order shall during a period so specified be advertised in such manner and form as may be specified in the order, or that the order be served upon such person or persons as are specified therein; and in the event of the Court exercising the jurisdiction conferred by this paragraph it may in the order direct that the order shall be of no effect in respect of any person specified therein in the event of that person instituting proceedings in the State to enforce his claim and serving the proceedings upon the trustee within such period as is specified in the order.
- (7) The Court may make an order under this section notwithstanding that there has not been strict compliance with any directions as to advertisements previously given by the Court, or that an error has been made in any advertisement (whether or not any directions have previously been given by the Court) if the Court considers that the error would not be likely to have prejudiced or misled the persons to whom the advertisement relates.

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- (8) Where the Court makes an order under this section that the trustee may distribute any property or part thereof as if every person and every member of any class of persons specified in the order (not being a person expressly excluded from the operation of the order) is not in existence or never existed or has died before a date or event specified in the order, and the trustee distributes in accordance with the order, the trustee shall be exonerated from any further liability to any such person or to any member of any such class; but nothing in this section affects any remedy that any person may have against any person other than the trustee, including any right that he may have to follow the property and any money or property into which it is converted.
- (9) The Court may make one or more orders under this section in respect of the same property.
- (10) Any order made under this section may direct how the costs of the order and of advertising under or for the purposes of the order shall be borne.
- (11) It shall not be necessary to serve notice of an application for an order under this section upon any person, unless the Court otherwise orders.
- (12) Nothing in this section affects the right of the trustee (if he so wishes) to distribute under any other law or statutory provision or affects the protection thereby afforded when he makes distribution pursuant to any such law or provision.

**67. Service of notices etc. under s. 30(1)(k), 64 and 66**

- (1) Any notice, application or order that is to be served in accordance with section 64 or section 66, or in accordance with any order made pursuant to the latter section, or any notice that is to be served under section 30(1)(k), may be served —
  - (a) by delivering it to the person for whom it is intended or by sending it by prepaid registered letter addressed to

that person at his usual or last known place of abode or business; or

- (b) in such other manner as may be directed by an order of the Court.

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

**68. Trustee of more than one trust, protection as to notice**

A trustee acting for the purposes of more than one trust shall not, in the absence of fraud, be affected by notice of any instrument, matter, fact or thing in relation to any particular trust, if he has obtained notice thereof merely by reason of his acting or having acted for the purposes of another trust.

**69. Powers of attorney, protection for trustees relying on**

- (1) A trustee acting or paying money in good of faith in reliance on any power of attorney and on a statutory declaration or other sufficient evidence that the power of attorney had not been revoked shall not be liable for that act or payment by reason of the fact that at the time of the act or payment the person who gave the power of attorney was subject to any disability or bankrupt or dead, or had done or suffered some act or thing to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying.
- (2) Nothing in this section affects the right of any person entitled to money paid by a trustee, in circumstances mentioned in subsection (1), against the person to whom the payment is made; and the person so entitled shall have the same remedy against the person to whom payment is made as he would have had against the trustee.

**70. Trustees liable for own defaults etc. only**

A trustee shall be chargeable only for money and securities actually received by him, notwithstanding his signing any

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receipt for the sake of conformity; and shall be answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, nor those of any bank, broker or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the insufficiency, deficiency or loss occurs through his own wilful default.

**71. Trustees' expenses, reimbursement out of trust property**

A trustee may reimburse himself for or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers.

**72. Chattels, bequest of life etc. interest in, trustees' protection**

- (1) Where any chattels are, under the provisions of a will, bequeathed to any person, including an infant, for life or for any limited interest, the trustee may cause an inventory to be made of the chattels, of which inventory a copy shall be signed by that person and retained by the trustee, and another copy shall be delivered to that person.
- (2) The trustee may, upon obtaining a signed copy of an inventory thereof, deliver any chattels to a person such as is mentioned in subsection (1) on such terms and conditions as the trustee thinks fit, and shall not thereafter be bound to see to the repair or insurance of the chattels, and shall not be subject to any liability whatsoever by reason of the loss or destruction of the chattels or the neglect of that person to effect any necessary repairs or insurance.
- (3) Any inventory made under this section and signed by the person to whom chattels are to be delivered and by the trustee shall be deemed to be a bill of sale within the meaning of the *Bills of Sale Act 1899*, shall comply with the provisions of sections 6 and 8 of that Act, and shall be registered and be kept registered accordingly.

- (4) Where chattels bequeathed to a person for life or some other limited interest consist wholly of articles of household furniture, the trustee may deliver those articles to that person and shall be entitled to the protection provided by subsection (2) without any obligation to register an inventory under subsection (3).

**73. Chattels bequeathed to infant, dealing with**

- (1) A trustee may in his discretion deliver to an infant, or to the guardian or any of the guardians of an infant, any chattels absolutely vested in the infant, and the receipt of the infant or guardian shall be a complete discharge to the trustee for any chattels so delivered.
- (2) The powers conferred by this section are in addition to the powers conferred by section 59 and, for the purposes of paragraph (a) of that section, the value of the chattels delivered pursuant to this section shall not be taken into account in any way.

**74. Shares, trustees' liability for calls on after transfer of**

A personal representative of a deceased person who was registered as the holder of shares not fully paid up in any incorporated company may distribute the assets of the estate of that deceased person as soon as the personal representative has procured the registration of some other person as the holder of the shares, without reserving any portion of the estate for the payment of any calls made after the date of that registration, whether made by the company or its directors or by its liquidators in a winding up, but nothing in this section affects any right that the company or its liquidator may have to follow the assets of the deceased person into the hands of any persons to or amongst whom they have been transferred or distributed.

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**75. Breach of trust, Court may relieve trustee from personal liability for**

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

**76. Breach of trust, Court may order beneficiary to give indemnity for**

- (1) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may, if it thinks fit, make such order as to the Court seems just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or persons claiming through him.
- (2) This section applies to breaches of trust committed as well before as after the commencement of this Act.

## **Part VII — Further powers of the Court**

### **Division 1 — Appointment of new trustees**

#### **77. New trustees, Court may appoint**

- (1) The Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is inexpedient, difficult or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees, either in substitution for, or in addition to, any existing trustee or trustees, or although there is no existing trustee.
- (2) In particular, and without limiting the generality of the provisions of subsection (1), the Court may make an order appointing a new trustee in substitution for a trustee who —
  - (a) desires to be discharged;
  - (b) has been held by the Court to have misconducted himself in the administration of the trust;
  - (c) is convicted of an indictable offence;
  - (d) is a person of unsound mind;
  - (e) is bankrupt; or
  - (f) is a corporation that has ceased to carry on business, or is in liquidation, or has been dissolved.
- (3) An order under this section, and any consequential vesting order or conveyance, does not operate further or otherwise as a discharge to any discharged, former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.
- (4) Nothing in this section confers power to appoint an executor or administrator.
- (5) Every trustee appointed by the Court has, as well before as after the trust property becomes by law or by assurance or otherwise vested in him, the same powers, authorities, and discretions, and

may in all respects act, as if he had been originally appointed a trustee by the instrument (if any) creating the trust.

*[Section 77 amended by No. 70 of 2004 s. 82.]*

### **Division 2 — Vesting orders**

#### **78. Vesting orders, when Court may make**

- (1) The Court may make an order, in this Act called a ***vesting order***, that has effect as provided in section 85.
- (2) A vesting order may be made in any of the following cases, namely —
  - (a) where the Court appoints or has appointed a new trustee;
  - (b) where a new trustee has been appointed out of Court under any statutory or express power;
  - (c) where a trustee retires or has retired;
  - (d) where a trustee is under a disability;
  - (e) where a trustee is out of the jurisdiction of the Court;
  - (f) where a trustee cannot be found;
  - (g) where a trustee, being a corporation, has ceased to carry on business or is in liquidation or has been dissolved;
  - (h) where a trustee neglects or refuses to convey any property, or to receive the dividends or income of any property, or to sue for or recover any property according to the direction of the person absolutely entitled to the same for 28 days next after a request in writing has been made to him by that person;
  - (i) where it is uncertain who was the survivor of 2 or more trustees jointly entitled to or possessed of any property;
  - (j) where it is uncertain whether the last trustee known to have been entitled to or possessed of any property is alive or dead;
  - (k) where there is no personal representative of the last trustee who was entitled to or possessed of any property



or where it is uncertain who is the personal representative of that trustee or where the personal representative of that trustee cannot be found;

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

**79. Vesting orders, terms of etc.**

- (1) A vesting order may vest the property in such person, in such manner and for such estate or interest as the Court may direct, or may release or dispose of any contingent right to such person as the Court may direct.
- (2) The fact that a vesting order is founded or purports to be founded on an allegation of the existence of any of the matters mentioned or referred to in section 78 is conclusive evidence of the matter so alleged, in any Court, upon any question as to the validity of the order.
- (3) Nothing in this Act prevents the Court from directing a reconveyance or the payment of costs occasioned by any vesting order if improperly obtained, or from making a further vesting order.
- (4) Where, by reason of the dissolution of a corporation either before or after the commencement of this Act, a legal estate in any property has determined, the Court may by order create a

corresponding estate and vest it in the person who would have been entitled to the estate that determined, had it remained a subsisting estate.

**80. Contingent rights of unborn persons, orders as to**

Where any property is subject to a contingent right in an unborn person or class of unborn persons who on coming into existence would become entitled to or possessed of the property on any trust, the Court may make an order releasing the property from the contingent right or may make an order vesting in any person the estate or interest to, or of, which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the property.

**81. Mortgagee under a disability, orders as to**

Where any person entitled to or possessed of any property by way of mortgage is under a disability the Court may make an order vesting or releasing or disposing of the property in like manner as in the case of a trustee under like disability.

**82. Infant's beneficial interest, orders as to**

Where an infant is beneficially entitled to any property, the Court may, where it considers it necessary or desirable in the interest of the infant or of the infant and some other person, make an order —

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

**83. Order for sale or mortgage of land, effect of etc.**

Where the Court gives a judgment or makes an order directing the sale or mortgage of any land, every person who is entitled to, or possessed of, any interest in the land, or entitled to a contingent right therein, and is a party to the action or proceeding in which the judgment or order is given or made or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed as a trustee for the purposes of this Act, and the Court may, if it thinks expedient, make an order vesting the land, or any part thereof, for such estate or interest as the Court thinks fit in the purchaser or mortgagee or in any other person.

**84. Orders for conveyance of land etc., consequential declarations and orders as to**

Where a judgment is given for the specific performance of a contract concerning any interest in land, or for partition, or sale in lieu of partition, or exchange of any land, or generally where any judgment is given for the conveyance of any interest in land (either in cases arising out of the doctrine of election or otherwise), the Court may declare —

- (a) that any of the parties to the action are trustees of any interest in the land, or any part thereof, within the meaning of this Act; or
- (b) that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any deceased person who was, during his lifetime, a party to the contract or transaction concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of this Act;

and thereupon the Court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees.

**85. Vesting orders, effect of**

- (1) In the case of a vesting order consequential on the appointment of a new trustee or the retirement of a trustee, the vesting order has the same effect —
  - (a) as if the persons (if any) who, before the appointment or retirement, were the trustees had duly executed all proper conveyances of the property for such estate or interest as the Court directs; or
  - (b) if there is no such person as is mentioned in paragraph (a), or no such person of full capacity, as if such person had existed and been of full capacity, and had duly executed all proper conveyances of the property for such estate or interest as the Court directs.
- (2) In every case, other than those hereinbefore in this section mentioned, the vesting order has the same effect as if the trustee or other person or description or class of persons to whose rights, or supposed rights, the provisions of this Division respectively relate, had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order.
- (3) In the case of land subject to the operation of the *Transfer of Land Act 1893*, the land does not vest until the appropriate entries are made in accordance with the provisions of that Act.
- (4) In the case of —
  - (a) any property that does not come within subsection (3), but a transfer of which is required to be registered by or under any Act, whether of this State or otherwise; or
  - (b) any security that is transferable only in books kept by a corporation, company or other body, or in manner directed by or under any Act, whether of this State or otherwise,a vesting order vests in the person named in the order the right to transfer or call for a transfer of the property or security.

- (5) In the case of any security or chose in action, the vesting order vests in the person named in the order the right to receive the dividends or income thereof, and to sue for or recover the chose in action.
- (6) The person, in whom the right to transfer or call for the transfer of any property or security is vested by an order of the Court under this Act, may transfer the property or security to himself or to any other person in accordance with the order; and all banks, corporations, companies, societies, associations and persons shall give effect to the transfer or comply with any direction or request to transfer the property or security given or made in accordance with the order.
- (7) After notice in writing of an order made under this section, it shall not be lawful for any bank, corporation, company, society, association or person to transfer any property or security to which the order relates, or to pay any dividends thereon, except in accordance with the order.
- (8) An order shall not be made under this section vesting in any person shares that are not fully paid up, unless that person applies for the order or consents to the making of the order.

**86. Vested stock etc., directions as to transfer of etc.**

The Court may make declarations and give directions concerning the manner in which the right to transfer any stock or thing in action vested under the provisions of this Act is to be exercised.

**87. Person may be appointed to convey instead of vesting order**

Where a vesting order can be made under any of the foregoing provisions, the Court may, if it is more convenient, appoint a person to convey the property or release any right, and a conveyance or release by that person in conformity with the order has the same effect as an order under the appropriate provision.

**88. Charities etc., vesting property in**

The powers conferred by this Act as to vesting orders may be exercised for vesting any property in any trustee of a charity or society over which the Court would have jurisdiction upon action duly instituted, whether the appointment of the trustee was made by instrument under a power or by the Court under its general or statutory jurisdiction.

**Division 3 — Jurisdiction to make other orders**

**89. Additional powers, Court may confer on trustee etc.**

- (1) Where in the opinion of the Court any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, retention, expenditure or other transaction is expedient in the management or administration of any property vested in a trustee, or would be in the best interests of the persons, or the majority of the persons, beneficially interested under the trust, but it is inexpedient or difficult or impracticable to effect the disposition or transaction without the assistance of the Court, or it or they cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the trust instrument (if any) or by law, the Court may by order confer upon the trustee, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions (if any) as the Court may think fit, and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne, and as to the incidence thereof between capital and income.
- (2) The Court may from time to time rescind or vary any order made under this section, or may make any new or further order; but such a rescission or variation of any order shall not affect any act or thing done in reliance on the order before the person doing the act or thing became aware of the application to the Court to rescind or vary the order.

- (3) An order may be made under this section, notwithstanding anything to the contrary contained or expressed in the instrument creating the trust.
- (4) An application to the Court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

**90. Varying or revoking certain trusts, Court's powers as to**

- (1) Without limiting any other powers of the Court, it is hereby declared that, where any property is held on trusts arising under any will, settlement or other disposition, or on the intestacy or partial intestacy of any person, or under any order of the Court, the Court may, if it thinks fit, by order approve on behalf of —
  - (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who, by reason of infancy or other incapacity, is incapable of assenting; or
  - (b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being, at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons; but this paragraph does not include any person who would be of that description or a member of that class, if that date had fallen or that event had happened at the date of the application to the Court; or
  - (c) any unborn or unknown person; or
  - (d) any person, in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined,

any arrangement (by whomever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts,

or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts.

- (2) Except where the Court approves an arrangement on behalf of a person referred to in subsection (1)(d), the Court shall not approve an arrangement on behalf of any person if the arrangement is to his detriment; and, in determining whether any such arrangement is to the detriment of a person, the Court may have regard to all the benefits that may accrue to him directly or indirectly in consequence of the arrangement, including the welfare and honour of the family to which he belongs.
- (3) This section does not apply to any trust affecting property settled by any Act, other than the *Administration Act 1903*.
- (4) Any rearrangement approved by the Court under subsection (1) is binding on all persons on whose behalf it was so approved, and thereafter the trusts as so rearranged shall take effect accordingly.
- (5) In this section —  
*discretionary interest* means an interest arising under the trust specified in section 61(3) or any like trust;  
*principal beneficiary* has the same meaning as in section 61(1);  
*protective trusts* means the trusts specified in section 61(2) and (3) or any like trusts.

**91. Periodic payments, Court may vary amount of**

Without limiting any other powers of the Court, it is hereby declared that the Court may, on the application of any trustee or of any person beneficially interested under the trust, by order, vary from time to time the amount of any payment (whether by way of annuity or otherwise) being made periodically to any beneficiary, if the Court is of opinion, having regard to all the circumstances of the case, that it is just and equitable that the amount be varied.



**92. Directions, trustee may ask Court for**

- (1) Any trustee may apply to the Court for directions concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee.
- (2) Every application made under this section shall be served upon, and the hearing thereof may be attended by, all persons interested in the application or such of them as the Court thinks expedient.

**93. Applications to Court, who may make**

- (1) An order under this Act for the appointment of a new trustee, or concerning any property subject to a trust, may be made on the application of any person beneficially interested in the property, whether under a disability or not, or on the application of any person duly appointed trustee of the property or intended to be so appointed.
- (2) An order under this Act concerning any interest in any property subject to a mortgage may be made on the application of any person beneficially interested in the property, whether under a disability or not, or of any person interested in the money secured by the mortgage.

**94. Review of trustee's acts by Court etc.**

- (1) Any person who has, directly or indirectly, an interest, whether vested or contingent, in any trust property, and who is aggrieved by any act, omission or decision of a trustee in the exercise of any power conferred by this Act, or who has reasonable grounds to apprehend any such act, omission or decision of a trustee by which he will be aggrieved, may apply to the Court to review the act, omission or decision, or to give directions in respect of the apprehended act, omission or decision; and the Court may require the trustee to appear before it, and to substantiate and uphold the grounds of the act, omission or decision that is being

reviewed, and may make such order in the premises as the circumstances of the case may require.

- (2) An order of the Court under subsection (1) shall not —
  - (a) disturb any distribution of the trust property, made without breach of trust, before the trustee became aware of the making of the application to the Court; or
  - (b) affect any right acquired by any person in good faith and for valuable consideration.
- (3) Where any application is made under this section, the Court may —
  - (a) if any question of fact is involved, direct how the question shall be determined; and
  - (b) if the Court is being asked to make an order that may adversely affect the rights of any person who is not a party to the proceedings, direct that that person shall be made a party to the proceedings.

**95. Trustee acting under Court's direction, protection of**

- (1) Any trustee acting under any direction of the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as trustee in the subject-matter of the direction, notwithstanding that the order giving the direction is subsequently invalidated, overruled, set aside or otherwise rendered of no effect, or varied.
- (2) This section does not indemnify any trustee in respect of any act done in accordance with any direction of the Court if he has been guilty of any fraud or wilful concealment or misrepresentation in obtaining the direction or in acquiescing in the Court making the order giving the direction.

**96. Absence etc. of parties, Court may proceed in**

- (1) Where in any proceedings the Court is satisfied that diligent search has been made for any person, who, in the character of

trustee, is made a defendant in any action, to serve him with a process of the Court, and that he cannot be found, the Court may hear and determine the proceedings and give judgment therein against that person, in his character of a trustee, as if he had been duly served or had entered an appearance in the action, and had also appeared by his counsel or solicitor at the hearing, but (except as provided in subsection (2)) without prejudice to any interest he may have in the matters in question in the proceedings in any other character.

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

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

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

**97. Costs of court proceedings, orders as to**

The Court may order the costs and expenses of and incidental to any application for any order under this Act, or of and incidental to the order, or any conveyance or assignment in pursuance thereof, to be raised and paid out of the property in respect of which any of them is made, or out of the income of the property, or to be borne and paid in such manner and by such persons as the Court thinks fit.

**98. Trustees' remuneration**

- (1) The Court may, out of the property subject to any trust, allow to any person who is, or has been, a trustee thereof or to that person's personal representative such commission or percentage for that person's services as is just and reasonable.
- (2) The aggregate commission or percentage allowed under subsection (1) shall not exceed 5% of the gross value of the trust property.
- (3) The Court may, from time to time, allow such portion of the aggregate commission or percentage allowable under this section as it thinks fit.
- (4) Where the Court allows a commission or percentage under this section, in any case in which 2 or more persons are or have been trustees, whether acting at the same time or at different times, the Court may, in its discretion, apportion the total amount allowed among the trustees in such manner as it thinks fit, and, in particular, may divide the amount in unequal shares or may make the allowance to one or more of the trustees to the exclusion of the other or others.
- (5) In the absence of a direction to the contrary in the trust instrument, a trustee being a person engaged in any profession or business for whom no benefit or remuneration is provided in the trust instrument is entitled to charge and be paid out of the trust property all usual professional or business charges for business transacted, time expended, and acts done by him or his firm in connection with the trust, including acts that a trustee not being in any profession or business could have done personally; and, on any application to the Court for commission or percentage under subsection (1), the Court may take into account any charges that have been paid out of the trust property under this subsection.

*[Section 98 amended by No. 18 of 1968 s. 4.]*

**99. Payment into Court by trustees**

- (1) Trustees or the majority of trustees having in their hands or under their control money or securities subject to a trust may pay them into Court; and they shall be dealt with according to the orders, and subject to the rules, of the Court.
- (2) The receipt or certificate of the proper officer is a sufficient discharge to trustees for any money or securities paid into Court.
- (3) Where money or securities are vested in any persons as trustees and the majority are desirous of paying them into Court, but the concurrence of the other or others cannot be obtained, the Court may order the payment into Court to be made by the majority without the concurrence of the other or others.
- (4) Where any money or securities ordered to be paid into Court under subsection (3) are deposited with a banker, broker or other depositary, the Court may order payment or delivery of the money or securities to the majority of the trustees, for the purpose of payment into Court.
- (5) Every transfer, payment, and delivery of money or securities made in pursuance of any order under this section is valid and takes effect as if it had been made on the authority or by the act of all the persons entitled to the money and securities.

## **Part VIII — Miscellaneous**

### **100. Indemnity to people acting under this Act etc.**

This Act, and every order purporting to be made under this Act, is a complete indemnity to every bank, company, society, association or person for any acts done pursuant thereto, and it is not necessary for any bank, company, society, association or person to inquire concerning the propriety of the order, or whether the Court had jurisdiction to make it.

### **101. Bankers acting on trustees' authority, protection of**

- (1) Where there are 2 or more trustees of a trust and the trustees by writing under their hands authorise a banker —
  - (a) to pay bills of exchange drawn upon the banking account of the trustees by the trustee or trustees named in that behalf in the authority; or
  - (b) to recognise as a valid endorsement upon any bill of exchange payable to the order of the trustees the endorsement thereon by the trustee or trustees named in that behalf in the authority; or
  - (c) to pay money out of any account of the trust in a savings bank, on presentation of withdrawal forms signed in the manner specified in the authority,

the banker acting in pursuance of that authority shall not be deemed privy to a breach of trust on the ground only of notice that the persons giving the authority were trustees, or that the instrument (if any) by which the trust was created did not contain any express power to give such an authority.

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

- (3) This section does not affect any question of the liability of any trustee for breach of trust in authorising a banker as provided by subsection (1) thereof.
- (4) Nothing in this section or in any rule of law prevents trustees opening a bank account named as an imprest account and authorising any one or more of their number or any other person or persons to operate upon the imprest account.
- (5) In this section,  
***bill of exchange*** has the same meaning as in the *Bills of Exchange Act 1903*<sup>4</sup> of the Commonwealth and its amendments.

**102. Non-charitable and invalid purposes, inclusion does not invalidate a trust**

- (1) In this section the term ***imperfect trust provision*** means any trust under which some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be included in any of the purposes to or for which an application of the trust property, or any part thereof, is by the trust directed or allowed.
- (2) A trust shall not be held to be invalid by reason that the trust property is to be held or applied in accordance with an imperfect trust provision.
- (3) Every trust under which property is to be held or applied in accordance with an imperfect trust provision shall be construed and given effect in the same manner in all respects as if no holding or application of the trust property or any part thereof to or for any non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed.
- (4) This section applies to every trust under which property is to be held or applied in accordance with an imperfect trust provision, whether the trust is declared before or after the commencement of this Act; but it does not apply to any trust declared by the will of any testator dying before, or to any other trust declared

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before, the commencement of this Act, if before the commencement of this Act —

- (a) the trust has been declared to be invalid by any order or judgment made or given in legal proceedings; or
- (b) property subject to the imperfect trust provision or income therefrom has been paid or conveyed to, or applied for the benefit of, or set apart for, the persons entitled by reason of the invalidity of the trust.

**103. Interest bearing securities, apportionment of interest on sale etc.**

- (1) Whenever any payment received by a trustee in respect of a sale of trust property, being securities bearing interest at a fixed rate, is, or includes, payment for the right to receive any interest accrued from those securities at the time of the sale, though that interest may not then be due, the amount of that accrued interest shall for the purposes of the trust be deemed to have been received by the trustee as interest in respect of the period during which the interest so accrued.
- (2) Whenever any payment made by a trustee out of trust money in respect of a purchase of any securities bearing interest at a fixed rate is, or includes, payment for the right to receive any interest accrued from those securities at the time of the purchase, though that interest may not then be due, the amount of that accrued interest when received on account of the trust shall, for the purposes of the trust, be deemed to have been so received as purchase money repaid.
- (3) Anything done by a trustee before the passing of this Act that would have been authorised by this section, if this section had then been in force, shall be deemed to have been authorised by this section.
- (4) The provisions of this section apply if and so far only as a contrary intention is not expressed in the instrument (if any)



creating the trust, and have effect subject to the terms of that instrument.

**104.      Residuary estate of deceased, application of income from**

- (1)      Where, under the provisions of the will of a person (in this section called *the deceased*) who dies after the commencement of this Act, any real or personal property included either by specific or general description in a residuary gift is settled by way of succession, no part of the income of that property (which property is hereinafter in this section called *the settled property*) is applicable in or towards the payment of the funeral, testamentary, and administration expenses, or the debts, legacies, and liabilities, or of the interest (if any) thereon, up to the date of the death of the deceased.
- (2)      Subsection (1) does not apply to any commission that is payable to the trustee in respect of any such income as is mentioned in that subsection or to any testamentary or administration expenses that, apart from that subsection, would be payable wholly out of income.
- (3)      The income of the settled property is applicable in priority to any other assets in payment of the interest (if any) accruing due on the funeral, testamentary, and administration expenses, and the debts, legacies, and liabilities after the date of death of the deceased and up to the payment thereof, and the balance of that income is payable to the person for the time being entitled to the income of the settled property.
- (4)      Where, after the death of the deceased, income of assets comprised in the settled property that are ultimately applied in or towards payment of the funeral, testamentary, and administration expenses, and the debts, legacies, and liabilities arises pending that application, that income shall, for the purposes of this section, be deemed to be income of the residuary estate of the deceased.

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- (5) In this section *administration expenses* includes duty payable under the *Administration Act 1903*, and estate duty payable under any Commonwealth Act and any other duty payable in any state or country outside this State on, or consequent on, or arising out of, the death of the deceased to the extent to which such duties are payable out of residue.
- (6) Nothing in this section applies to any annuity that is payable out of the estate of the deceased.
- (7) This section affects only the rights of beneficiaries under the will as between themselves, and does not affect the rights of creditors of the deceased or limit any other powers of the trustee.
- (8) The provisions of this section apply if and so far only as a contrary intention is not expressed in the will, and have effect subjects to the terms of the will and of any Act as to charges on property of the deceased.

**105. Residuary estate of deceased, application of income pending sale etc.**

- (1) Where, under the will of any person any real or personal property, included (either by specific or general description) in a residuary gift is settled by way of succession, then, notwithstanding that the property may be of a wasting, speculative or reversionary nature —
  - (a) pending any sale, calling in, or conversion of the settled property, the whole of the net income of the property actually producing income shall be applied as income and no part thereof shall be apportioned to capital; and
  - (b) on any sale, calling in, or conversion of the settled property, or on the falling in of any reversionary property, no part of the proceeds of the sale, calling in, conversion or falling in shall be applied as past income.
- (2) This section applies only in respect of the wills of persons who die after the commencement of this Act.

- (3) The provisions of this section apply if and so far only as a contrary intention is not expressed in the will of the deceased, and have effect subject to the terms of that will.

**106. Annuities etc., to be applied as income in some cases**

- (1) This section applies to —
- (a) every payment of an annuity contributed for or purchased by, for, or on behalf of, a deceased person who dies after the commencement of this Act; and
  - (b) every periodic payment, however described, paid in terms of, or pursuant to, a policy of insurance on the life of a deceased person, who dies after the commencement of this Act, and providing for payments to be made thereunder for a period of years or until a specified date or on the occurrence of a specified event or for the life of any person,

that is received as part of the estate of the deceased person by the trustee of his estate.

- (2) Every payment to which this section applies shall be paid or applied as if it were income of the estate of the deceased person received on the date on which that payment is received, and so that the dispositions, trusts, and powers applicable in the administration of the estate with respect to income received on that date apply with respect to that payment.
- (3) The provisions of this section apply if, and so far only as, a contrary intention is not expressed in the will of the deceased person, and have effect subject to the terms of that will.

**107. Trustees' remuneration deemed testamentary expenses**

The fees, commission, remuneration, and other charges payable to a trustee in respect of the administration of the estate of a deceased person shall be deemed to be testamentary expenses.

**s. 108**

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**108. Missing beneficiaries etc., costs of inquiries as to**

The costs, expenses, and charges of the trustee of any property in respect of any inquiries made by him to ascertain the existence or identity of any person or persons entitled to any legacy, money or distributive share in the property, or otherwise incurred in relation thereto, shall be borne by and paid out of the legacy, money or distributive share of the person or persons in respect of whom the inquiries were made, unless a contrary intention appears in the instrument (if any) creating the trust.

**109. Life tenant etc. to have powers of a trustee in certain cases**

- (1) Where there is no trustee of any land, but the land is for the time being lawfully vested in any person entitled to the possession thereof, or to the receipt of the rents and profits therefrom, for an estate for life, or for a term of years determinable with his life, or for any greater estate not being a fee simple absolute, that person may exercise all the powers conferred on a trustee by this Act, and the Court may confer on that person all the powers that it could confer on a trustee under this Act; and anything done by that person in exercise of any power by or under this section conferred has the same force and effect as if it had been done by a trustee.
- (2) Nothing in this section authorises any person mentioned in subsection (1) to sell any land therein mentioned, or to raise any capital money by a mortgage thereof or other dealing therewith, unless the money paid on the sale or the capital money so raised is paid to a trustee who is duly appointed and entitled to receive it.

**110. Regulations**

The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.

*[Section 110 inserted by No. 1 of 1997 s. 14.]*

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**First Schedule**

[s. 4.]

No. of Act.	Short Title.	Extent of Repeal.
23 and 24 Victoria c. 145 (Imp.). (Adopted by 31 Victoria No. 8 <sup>5</sup> .)	An Act to give trustees, mortgagees, and others certain powers now commonly inserted in Settlements, Mortgages, and Wills	Part I and Part III.
55 Victoria No. 10	<i>The Settled Land Act of 1892</i>	The whole.
No. 49 of 1909	<i>Settled Land Act Amendment Act 1909</i>	The whole.
64 Victoria No. 17	<i>Trustees Act 1900</i>	The whole.
No. 7 of 1927	<i>Trustees Act Amendment Act 1927</i>	The whole.
No. 38 of 1951	<i>Trustees Act Amendment Act 1951</i>	The whole.
No. 35 of 1955	<i>Trustees Act Amendment Act 1955</i>	The whole.
No. 54 of 1955	<i>Trustees Act Amendment Act (No. 2) 1955</i>	The whole.
No. 39 of 1956	<i>Trustees Act Amendment Act 1956</i>	The whole.
No. 15 of 1957	<i>Trustees Act Amendment Act 1957</i>	The whole.

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## **Second Schedule**

[s. 63.]

A.B., late of (*set out the usual residence and addition or other description of the deceased*).

Creditors and other persons having claims (to which section 63 of the *Trustees Act 1962* relates) in respect of the estate of the deceased, who died (set out the date of death with such accuracy as the information of the trustee, personal representative, or applicant for grant of representation permits), are required by the trustee (or personal representative or applicant for grant of representation) , of

(*set out name and address of trustee or personal representative or applicant for grant of representation*) to send particulars of their claims to him by the day of 20 , \* after which date the trustee (*or personal representative or applicant for grant of representation*) may convey or distribute the assets, having regard only to the claims of which he then has notice.

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(Date) \* A date not less than one month from date of advertisement.

## Notes

- <sup>1</sup> This reprint is a compilation as at 19 January 2007 of the *Trustees Act 1962* and includes the amendments made by the other written laws referred to in the following table<sup>6</sup>. The table also contains information about any reprint.

### Compilation table

Short title	Number and year	Assent	Commencement
<i>Trustees Act 1962</i>	78 of 1962 (11 Eliz. II No. 78)	6 Dec 1962	1 Jan 1963 (see s. 2)
<i>Decimal Currency Act 1965</i>	113 of 1965	21 Dec 1965	Act other than s. 4-9: 21 Dec 1965 (see s. 2(1)); s. 4-9: 14 Feb 1966 (see s. 2(2))
<i>Trustees Act Amendment Act 1968</i>	18 of 1968	16 Oct 1968	16 Oct 1968
<b>Reprint of the <i>Trustees Act 1962</i> approved 2 Jul 1971</b> (includes amendments listed above)			
<i>Age of Majority Act 1972</i> s. 6(2)	46 of 1972	18 Sep 1972	1 Nov 1972 (see s. 2 and <i>Gazette</i> 13 Oct 1972 p. 4069)
<i>Inheritance (Family and Dependants Provision) Act 1972</i> s. 3(2)	57 of 1972	31 Oct 1972	1 Jan 1973 (see s. 2 and <i>Gazette</i> 17 Nov 1972 p. 4379)
<i>Acts Amendment (Land Valuers) Act 1978</i> Pt. II	56 of 1978	6 Sep 1978	1 Jul 1979 (see s. 2 and <i>Gazette</i> 22 Jun 1979 p. 1677)
<b>Reprint of the <i>Trustees Act 1962</i> approved 14 Sep 1981</b> (includes amendments listed above)			
<i>Trustees Amendment Act 1987</i>	84 of 1987	9 Dec 1987	1 Sep 1988 (see s. 2 and <i>Gazette</i> 26 Aug 1988 p. 3271)
<i>Local Government (Consequential Amendments) Act 1996</i> s. 4	14 of 1996	28 Jun 1996	1 Jul 1996 (see s. 2)
<i>Trustees Amendment Act 1997</i>	1 of 1997	6 May 1997	16 Jun 1997 (see s. 2 and <i>Gazette</i> 10 Jun 1997 p. 2661)
<i>Acts Amendment and Repeal (Financial Sector Reform) Act 1999</i> s. 108	26 of 1999	29 Jun 1999	1 Jul 1999 (see s. 2(1) and <i>Gazette</i> 30 Jun 1999 p. 2905)
<b>Reprint of the <i>Trustees Act 1962</i> as at 11 Jan 2002</b> (includes amendments listed above)			

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Short title	Number and year	Assent	Commencement
<i>Acts Amendment (Equality of Status) Act 2003 Pt. 58</i>	28 of 2003	22 May 2003	1 Jul 2003 (see s. 2 and <i>Gazette</i> 30 Jun 2003 p. 2579)
<i>Statutes (Repeals and Minor Amendments) Act 2003 s. 122</i>	74 of 2003	15 Dec 2003	15 Dec 2003 (see s. 2)
<i>Criminal Law Amendment (Simple Offences) Act 2004 s. 82</i>	70 of 2004	8 Dec 2004	31 May 2005 (see s. 2 and <i>Gazette</i> 14 Jan 2005 p. 163)
<i>Limitation Legislation Amendment and Repeal Act 2005 s. 23</i>	20 of 2005	15 Nov 2005	15 Nov 2005 (see s. 2)

**Reprint 4: The *Trustees Act 1962* as at 19 Jan 2007** (includes amendments listed above)

- <sup>2</sup> *Interpretation Act 1918* repealed by the *Interpretation Act 1984*.
- <sup>3</sup> Repealed by this Act; see Sch. 1.
- <sup>4</sup> There is no *Bills of Exchange Act 1903* (Cwlth). See *Bills of Exchange Act 1909* (Cwlth).
- <sup>5</sup> *Imperial Acts Adopting Ordinance 1867* (31 Vict. No. 8).
- <sup>6</sup> Marginal notes in the *Trustees Act 1962* referring to legislation of other jurisdictions have been omitted from this reprint.