

WESTERN AUSTRALIA

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# TRUSTEES AMENDMENT ACT

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No. 84 of 1987

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**AN ACT to amend the *Trustees Act 1962* and to repeal the *Trust Funds Investment Act 1924*.**

[Assented to 9 December 1987]

**BE** it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and the Legislative Assembly of Western Australia, in this present Parliament assembled, and by the authority of the same, as follows:—

## Short title

1. This Act may be cited as the *Trustees Amendment Act 1987*.

**Commencement**

2. This Act shall come into operation on such day as is fixed by proclamation.

**Principal Act**

3. In this Act the *Trustees Act 1962*\* is referred to as the principal Act.

[\*Reprinted as approved 14 September 1981.]

**Section 5 amended**

4. Section 5 of the principal Act is amended by inserting after subsection (1) the following subsection—

“ (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*. ”.

**Section 6 amended**

5. Section 6 of the principal Act is amended in subsection (1)—

(a) by inserting after the definition of “authorized investments” the following definition—

“ “bank” means a bank or savings bank authorized to carry on banking business under an Act of the Commonwealth or a State; ”;

(b) in the definition of “securities” by deleting “and shares” and substituting the following—

“ shares and promissory notes ”;

(c) by inserting after the definition of “securities” the following definition—

“ “shareholder’s equity” in relation to a company, means the total assets of the company less the total liabilities of the company as disclosed in the last audited accounts of the company laid before a general meeting of the

company in accordance with section 275 of the *Companies (Western Australia) Code* (or the equivalent provision of the law of another State or Territory) or, if a prospectus has subsequently been registered by the company in accordance with the requirements of law, the accounts contained in that prospectus; ”;

- (d) in the definition of “trustee corporation”, by deleting “the State” and substituting the following—

“ a State ”; and

- (e) by deleting the full stop at the end of the definition of “trust for sale”, substituting a semi-colon and inserting after that definition the following definition—

“ “unitholder’s equity” in relation to an undertaking, scheme or enterprise to which an approved deed relates, means the total assets of the undertaking, scheme or enterprise less the total liabilities incurred in relation to that undertaking, scheme or enterprise as disclosed in the most recent accounts of the trust dispatched to unitholders in accordance with a covenant in the approved deed pursuant to section 168 (1) (c) (iv) of the *Companies (Western Australia) Code* (or the equivalent provision of the law of another State or Territory) or, if a prospectus has subsequently been registered in relation to the undertaking, scheme or enterprise in accordance with the requirements of law, the accounts contained in that prospectus. ”.

## Section 15A inserted

6. Before section 16 in Part III of the principal Act, the following section is inserted—

### General discretion and equitable duties

“ 15A. (1) Every power conferred on trustees by this Part shall be exercised according to the discretion of the trustee but subject to any consent or direction that may be required by the instrument creating the trust (if any) or by statute relating to the investment of trust funds.

(2) Any investments made under the powers conferred by this Part may be varied from time to time.

(3) Except as may be expressly provided in this Part, the general equitable duties of a trustee in relation to investments of trust funds and the retention of those investments are not limited or otherwise affected by this Part.

(4) In subsection (3), “general equitable duties of a trustee” includes—

- (a) the duty of a trustee to exercise ordinary business prudence; and
- (b) the duty of a trustee to act impartially. ”.

### **Section 16 repealed and sections substituted**

**7.** Section 16 of the principal Act is repealed and the following sections are substituted—

#### **Authorized investments**

“ 16. (1) A trustee may invest any trust funds in the following manner—

- (a) in any of the public funds or government securities of the Commonwealth or any State;
- (b) in any security in respect of which repayment of the amount secured and payment of interest on that amount is guaranteed by the Commonwealth or a State;
- (c) in debentures or other securities charged on the funds or property of any municipality in the State;
- (d) in any of the stocks, bonds, funds or securities for the time being authorized for the investment of cash under the control or subject to the order of the Court;
- (e) with any dealer in the short term money market, approved by the Reserve Bank of Australia as an authorized dealer, that has established lines of credit with that bank as a lender of last resort;
- (f) in a bill of exchange which at the time of acquisition has a maturity date of not more than 200 days and which if purchased for value confers on the holder in due course a right of recourse against a bank as the acceptor or indorser of the bill so long as the acceptance by the bank is a general acceptance or the indorsement is not restrictive, as the case may be;

- (g) in any security or in any manner authorized by or under any Act;
- (h) on first legal mortgage of an estate in fee simple in land in the State;
- (i) in an Investment Common Trust Fund of a trustee company established and conducted under the *Trustee Companies Act 1987* or in any common trust fund established and conducted by a trustee corporation under the corresponding law of another State;
- (j) subject to subsections (2) to (4), in any other investment or class or classes of investment that the Court may authorize in a particular case.

(2) An application to the Court under subsection (1) (j) may be made by the trustees, or any of them, or by any person beneficially interested under the trust.

(3) In determining an application under subsection (1) (j), the Court shall have regard to the experience and skill of the trustee, the circumstances of the trust and such other matters as the Court considers to be relevant and in granting such an application the Court may impose any conditions that the Court thinks fit.

(4) The Court may from time to time rescind or vary any order made under subsection (1) (j), 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.

Authorized investments in banks, building societies and credit unions

16A. (1) A trustee may invest any trust funds in any one or more of the following—

- (a) on any interest bearing deposit in a bank; or
- (b) in certificates of deposit issued by a bank, whether negotiable, convertible or otherwise.

(2) The Governor may make regulations authorizing the investment by trustees of trust funds in the shares of or on deposit in a building society carrying on business in the State and regulating the terms, restrictions and conditions of such authorization.

(3) The Governor may make regulations containing savings and transitional provisions with respect to investments of trust funds made by trustees under section 16 (1) (e) of this Act, as in force prior to the commencement of the *Trustees Amendment Act 1987*, and held immediately prior to such commencement.

(4) The Governor may make regulations authorizing the investment by trustees of trust funds on deposit in a body incorporated under the *Credit Unions Act 1979* carrying on business in the State and regulating the terms, restrictions and conditions of such authorization.

#### Authorized investments in company securities

16B. (1) Subject to subsections (5), (6) and (8) to (11), a trustee may invest any trust funds in the purchase of ordinary or preference shares issued by a company incorporated in a State or Territory, being shares registered in a State or Territory.

(2) Subject to subsections (5) to (11), a trustee may invest any trust funds in debentures or debenture stock or on deposit with or in notes issued by a company in which at the time of investment it would have been proper to invest in the purchase of ordinary shares.

(3) Subject to subsections (6) and (8) to (11), a trustee may invest any trust funds in debentures or debenture stock issued by a company that is a wholly owned subsidiary of a bank.

(4) Subject to subsections (8) to (11), a trustee may invest any trust funds in purchasing or subscribing for rights to shares or notes that are convertible to shares issued by a company in which at the time of investment it would have been proper to invest in the purchase of ordinary shares.

(5) An investment under subsection (1) or (2) shall not be made in any company unless the company—

- (a) has shareholder's equity of not less than 5 000 000 dollars or such other amount as the Governor may by regulation prescribe; and
- (b) has paid a dividend in each of the 7 years immediately preceding the calendar year in which the investment is made on all the ordinary shares issued by the company, excluding any shares issued after the dividend was declared; but for the purposes of this subsection a company formed to take over the business of another company or other companies is deemed to have paid the

requisite dividend in any year in which such a dividend was paid by the other company or all the other companies, as the case may be.

(6) The shares, debentures and debenture stock mentioned in subsections (1), (2) and (3) do not include—

- (a) any shares that are not listed for quotation on a stock exchange in the Commonwealth;
- (b) shares, debentures or debenture stock not fully paid up or required by the terms of the issue to be fully paid up within 9 months of the date of issue;
- (c) debentures or debenture stock unless—
  - (i) an invitation to the public to subscribe for or purchase the debentures or debenture stock has been issued or an offer to the public for subscription or purchase of the debentures or debenture stock has been made;
  - (ii) the loan is secured in accordance with the requirements specified for “mortgage debentures” or “debentures” in section 97 of the *Companies (Western Australia) Code* or the equivalent provision in the law of any other State or Territory; and
  - (iii) the loan is for a fixed term that matures not later than 5 years after the acquisition of the debentures or debenture stock by the trustee.

(7) The power to invest trust funds on deposit or in notes mentioned in subsection (2) does not include a deposit or note unless—

- (a) an invitation to the public to make the deposit or subscribe for or purchase the note or an offer to the public for acceptance of the deposit or subscription or purchase of the notes has been made;
- (b) the loan is on call or for a fixed term that matures not later than 6 months after issue or 5 years in the case of a note that is convertible to shares that the trustee is authorized to acquire.

(8) A trustee who proposes to make any investment under the power conferred by subsection (1), (2), (3) or (4) shall first obtain and consider proper advice in writing on the question whether the investment is satisfactory having regard—

- (a) to the need for ensuring that investments of the trust are, so far as circumstances allow, sufficiently diversified in respect of the description of investment and, where diversification within a particular description would be prudent, in respect of the investments within that description; and
- (b) to the suitability to the trust of investments of the description of investments proposed and of the investment proposed as an investment of that description.

(9) A trustee who retains any investment made under the power conferred by subsection (1), (2), (3) or (4) shall determine at what intervals the circumstances and in particular the nature of the investment make it desirable to obtain the advice mentioned in subsection (8), and shall obtain and consider that advice accordingly.

(10) For the purposes of subsections (8) and (9), proper advice is the advice of a person who is reasonably believed by the trustee to be qualified by his ability in and practical experience of financial matters; and that advice may be given notwithstanding that the person gives it in the course of his employment as an officer or servant.

(11) Subsections (8) and (9) do not apply to one of two or more trustees where he is the person giving the advice required by this section to his co-trustee or co-trustees, and do not apply where powers of a trustee are lawfully exercised by an officer or servant of the trustee competent under subsection (10) to give proper advice.

#### Authorized investments in unit trusts

16C. (1) Subject to subsections (2) and (3), a trustee may invest any trust funds in the units, or other interests subject to the trust, of a unit trust scheme in respect of which there is in existence at the time of investment an approved deed under Division 6 of Part IV of the *Companies (Western Australia) Code* or the equivalent provisions in the law of any other State or Territory.



(2) Subject to subsection (4), a trustee may invest in a fund managed by a trustee company to which fund Division 6 of Part IV of the *Companies (Western Australia) Code* applies and in relation to which an exemption from the requirements for an approval deed has been given by the National Companies and Securities Commission under that Code.

(3) An investment shall not be made under subsection (1) unless—

- (a) the scheme, undertaking or enterprise to which the approved deed relates has unitholder's equity of not less than 5 000 000 dollars or such other amount as the Governor may by regulation prescribe;
- (b) the holders of prescribed interests in the scheme, undertaking or enterprise to which the approved deed relates have received a return in the nature of income in each of the 7 years immediately preceding the calendar year in which the investment is made; and
- (c) either the prescribed interests in the scheme, undertaking or enterprise to which the approved deed relates are listed for quotation on a stock exchange in the Commonwealth or the approved deed contains a covenant that confers on holders of prescribed interests the right to require the management company to purchase, or cause to be purchased, their prescribed interests in the manner and within the time provided for in the approved deed.

(4) Subsections (8), (9), (10) and (11) of section 16B apply to a trustee who makes or retains any investment under this section in the same manner as those subsections apply to a trustee who makes or retains an investment under subsection (1), (2), (3) or (4) of section 16B.

#### Authorized investments in land

16D. (1) Subject to subsections (2) to (4), a trustee may invest any trust funds in the purchase of land in fee simple in the State.

(2) A trustee who purchases land under the power conferred by subsection (1) shall not be chargeable with breach of trust by reason only of the relation borne by the purchase price to the value of the land at the time when the purchase was made if it appears to the Court that—

- (a) in making the purchase the trustee was acting upon a report as to the value of the land made by a person who is licensed as a valuer under the *Land Valuers Licensing Act 1978* and whom the trustee has reasonable grounds to believe is a person who is experienced in valuing the kind of land purchased in the locality in which it is situated;

- (b) the purchase price did not exceed the value of the land as stated in the report by an amount greater than 5% of the value as so stated; and
- (c) the report was made in writing not more than 3 months before the offer to purchase was made and contained a statement as to—
  - (i) the value of the land, including buildings and any other improvements;
  - (ii) the actual or potential income of the land at the time of valuation; and
  - (iii) the outgoings associated with ownership of the land.

(3) A trustee who proposes to make any investment under the power conferred by subsection (1) shall first obtain and consider proper advice in writing on the question whether the investment is satisfactory having regard—

- (a) to the need for ensuring that investments of the trust are, so far as circumstances allow, sufficiently diversified in respect of the descriptions of investment and, where diversification within a particular description would be prudent, in respect of the investments within that description; and
- (b) to the suitability to the trust of investments of the description of investments proposed and of the investment proposed as an investment of that description.

(4) For the purposes of subsection (3), proper advice is the advice of a person who is reasonably believed by the trustee to be qualified by his ability in and practical experience of financial matters; and that advice may be given notwithstanding that the person gives it in the course of his employment as an officer or servant. ”.

### **Section 17 amended**

8. Section 17 of the principal Act is amended—

- (a) in subsection (1) by deleting “State” and substituting the following—

“ Commonwealth ”;

- (b) in subsection (2) by inserting after “land made” in paragraph (a) the following—

“ in writing not more than 3 months before the offer to purchase was made ”;

- (c) in subsection (2) by deleting “under” in paragraph (d) and substituting the following—

“ in accordance with ”;

- (d) by repealing subsection (2a) and substituting the following subsection—

“ (2a) For the purposes of subsection (2) (a), “qualified valuer” means—

(a) in the case of land in the State, a person who is licensed under the *Land Valuers Licensing Act 1978*;

(b) 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 Institute of Valuers (Inc.). ”; and

- (e) by inserting after subsection (5) the following subsection—

“ (6) In this section “dwelling house” includes a lot on a registered strata plan being a lot that is used for residential purposes. ”.

## Section 18 amended

9. Section 18 of the principal Act is amended in subsection (1) by deleting “sixteen of this Act” and substituting the following—

“ 16, 16B or 16C ”.

## Section 19 repealed and a section substituted

10. Section 19 of the principal Act is repealed and the following section is substituted—

Apportionment and bills of exchange

“ 19. Where any security to which section 16 (1) (f) applies is purchased by a trustee at a price less than its value on maturity, and in terms of the trust the beneficial interest in the income from

the security is not vested in the same person as is the beneficial interest in the capital, then subject to section 103, the amount of the difference between the purchase price and the amount received on maturity shall be distributable as if it were income accruing from day to day between the day of the purchase and the day of maturity. ”.

## Section 22 amended

### 11. Section 22 of the principal Act is amended—

- (a) in subsection (1) by deleting paragraphs (b) and (c) and substituting the following paragraphs—

“ (b) the amount of the loan does not exceed—

(i) 66.6% of the value of the property as stated in the report; or

(ii) where repayment of the loan and payment of every other amount payable under the mortgage is fully insured by an authorized insurer, 90% of the value of the property as stated in the report;

and

(c) the loan was made in accordance with the advice of the valuer expressed in the report. ”; and

- (b) by inserting after subsection (4) the following subsection—

“ (5) In subsection (1) “authorized insurer” means the Housing Loans Insurance Corporation established under the *Housing Loans Insurance Act 1965* of the Commonwealth or any body corporate authorized under the *Insurance Act 1973* of the Commonwealth to carry on insurance business. ”.

## Section 25 amended

12. Section 25 of the principal Act is amended in subsection (2) by deleting paragraph (b) and substituting the following paragraph—

- “ (b) the borrower shall maintain and protect the property and, unless the trustee is satisfied that his security would not be diminished by a failure to insure, shall keep all buildings (if any) insured to their replacement value against damage by fire, storm and tempest, lightning, explosion, earthquake, damage by vehicles and aircraft, and malicious damage; and ”.

### Section 28A inserted

13. After section 28 of the principal Act the following section is inserted—

#### Grant of option to purchase trust property

- “ 28A. (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 Institute of Valuers (Inc.). ”.

### Section 30 amended

14. Section 30 of the principal Act is amended in subsection (1) by deleting paragraph (c) and substituting the following paragraph—

- “ (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; ”.

**Section 110 amended**

**15.** Section 110 of the principal Act is amended by deleting “sixteen” and substituting the following—

“ 16, 16A, 16B, 16C and 16D ”.

**Repeal of *Trust Funds Investment Act 1924***

**16.** The *Trust Funds Investment Act 1924*\* is repealed.

[\*Act No. 10 of 1924 as amended by Act No. 4 of 1926.]

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