

# **TRUSTEE (AMENDMENT) ACT 1987 No. 139**

NEW SOUTH WALES



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**SCHEDULE 1—AMENDMENTS TO THE TRUSTEE ACT 1925**

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**TRUSTEE (AMENDMENT) ACT 1987 No. 139**

NEW SOUTH WALES



**Act No. 139, 1987**

An Act to amend the Trustee Act 1925 with respect to the securities in which a trustee may invest trust funds, and in other respects. [Assented to 16 June 1987]

*Trustee (Amendment) 1987*

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**BE** it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:

**Short title**

1. This Act may be cited as the "Trustee (Amendment) Act 1987".

**Commencement**

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor and notified by proclamation published in the Gazette.

**Amendment of Act No. 14, 1925**

3. The Trustee Act 1925 is amended in the manner set forth in Schedule 1.

**Savings**

4. (1) An investment in a security referred to in section 14 (2) (a) or (d) of the Trustee Act 1925 (as in force immediately before the commencement of this Act) made by a trustee before that commencement shall be deemed to be authorised under that Act, as amended by this Act.

(2) A nomination and appointment under section 14A (2) (b) of the Trustee Act 1925 (as in force immediately before the commencement of this Act) shall be deemed to be a nomination under section 14E (2) (b) of that Act, as amended by this Act.

(3) A nomination and appointment under section 14A (2) (c) of the Trustee Act 1925 (as in force immediately before the commencement of this Act) shall be deemed to be a nomination under section 14E (2) (c) of that Act, as amended by this Act.

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*Trustee (Amendment) 1987*

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## SCHEDULE 1

(Sec. 3)

## AMENDMENTS TO THE TRUSTEE ACT 1925

## (1) Sections 14–14E—

Omit sections 14 and 14A, insert instead:

**General equitable duties preserved**

14. (1) Except as may be expressly provided by this Act, 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 Act.

(2) In this section, “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.

**Authorised investments**

14A. (1) A trustee, unless expressly forbidden by the instrument (if any) creating the trust, may invest any funds in the trustee’s hands, whether at the time in a state of investment or not, in any of the securities authorised by this Act.

(2) The securities authorised by this Act are the following:

- (a) any public funds or Government stock or Government securities of the Commonwealth or any State of the Commonwealth;
- (b) any debentures or securities guaranteed by the Government of New South Wales;
- (c) any debentures or securities—
  - (i) issued by a public or local authority, or a statutory body representing the Crown, constituted by or under any law of the Commonwealth, of any State of the Commonwealth, of the Northern Territory or of the Australian Capital Territory; and
  - (ii) guaranteed by the Commonwealth, any State of the Commonwealth or the Northern Territory;

SCHEDULE 1—*continued*AMENDMENTS TO THE TRUSTEE ACT 1925—*continued*

- (d) any debentures or securities issued by the Northern Territory and guaranteed by the Commonwealth;
- (e) any debentures or securities issued by the Council of the City of Sydney or any city, municipal or shire council in New South Wales;
- (f) mortgage of land in any State or Territory of the Commonwealth;
- (g) purchase of land (including any lot within the meaning of the Strata Titles Act 1973) in any State or Territory of the Commonwealth in accordance with section 14D;
- (h) interest bearing deposits in a bank authorised to carry on the business of banking under any law of the Commonwealth or of a State or Territory of the Commonwealth;
- (i) certificates of deposit issued by a bank referred to in paragraph (h) whether negotiable or convertible or not and whether or not obtained directly from the bank;
- (j) deposit with a prescribed corporation;
- (k) investment with any dealer in the short term money market, approved by the Reserve Bank of Australia as an authorised dealer, that has established lines of credit with that bank as a lender of last resort;
- (l) any bill of exchange which—
  - (i) at the time of acquisition has a maturity date of not more than 200 days; and
  - (ii) 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 for an amount equal to the face value of the bill;
- (m) any debentures, promissory notes or other prescribed securities of a company or body which is given a prescribed credit rating by a prescribed credit rating organisation;

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- (n) a common trust fund established by a trustee company referred to in the First Part of the Third Schedule to the Trustee Companies Act 1964 (the investment of which is restricted to a class or classes of securities authorised by this Act) or the common fund established under section 36A of the Public Trustee Act 1913;
  - (o) any of the stocks, funds or securities for the time being authorised for the investment of cash under the control or subject to the order of the Court;
  - (p) subscription of share capital in, deposit with, or loan of money to, a building society specified in Schedule 2 to the Permanent Building Societies Act 1967;
  - (q) subscription of share capital in, deposit with, or loan of money to, a prescribed building society specified in the Second Schedule to the Co-operation Act 1923.
- (3) Regulations for the purposes of subsection (2) (j) and (q) shall be made on the recommendation of the Attorney General.
- (4) Regulations for the purposes of subsection (2) (m) shall be made on the recommendation of the Attorney General and with the concurrence of the Treasurer.
- (5) This section applies to trusts created before or after the commencement of the Trustee (Amendment) Act 1987.

**General provisions relating to investment**

14B. (1) A trustee, unless expressly forbidden by the instrument (if any) creating the trust, may from time to time vary any investment.

(2) The powers conferred by sections 14A–14D shall be exercised according to the discretion of the trustee with due regard to the circumstances of the trust, but subject to any consent required by the instrument (if any) creating the trust with respect to the investment of the trust funds.

SCHEDULE 1—*continued*AMENDMENTS TO THE TRUSTEE ACT 1925—*continued*

(3) The powers conferred by sections 14A–14D are in addition to the powers conferred by any Act or by the instrument (if any) creating the trust.

**Investment in authorised securities other than land**

14C. (1) A trustee may invest in any of the securities authorised by this Act—

- (a) even though the security may be redeemable and the price paid for the security by the trustee exceeds the redemption value; or
- (b) if the security is not redeemable, even though the price paid for the security by the trustee exceeds the value of the security at par.

(2) If any redeemable security has been purchased in accordance with the powers conferred by this Act or the instrument (if any) creating the trust, the trustee may retain the security until redemption.

(3) If any security has been so purchased, the trustee may at any time sell and dispose of the security whether or not at a price equal to or greater than its redemption value, or equal to or greater than its value at par in the case of a security that is not redeemable.

(4) A trustee, unless expressly forbidden by the instrument (if any) creating the trust, may, even though the security is payable to bearer, retain or invest in any of the securities authorised by this Act, and if any security is payable to bearer the following provisions apply:

- (a) unless the trustee is the Public Trustee or a trustee company, the trustee shall, until the security is sold, deposit it for safe custody and collection of income with a bank or with a prescribed person or a person of a prescribed class;
- (b) the trustee is not responsible for any loss incurred because of the deposit;

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- (c) any sum payable in respect of the deposit and collection may be paid out of the income of the trust property;
- (d) the trustee shall not be regarded as expressly forbidden to retain or invest in the security because of a direction that investments shall be retained or made in the name of the trustee.

(5) In the case of a deposit in a bank, with a corporation referred to in section 14A (2) (j) or with a building society referred to in section 14A (2) (p) or (q), a trustee may invest for a fixed period or otherwise.

(6) If the trustee invests in a bill of exchange referred to in section 14A (2) (l) or a promissory note referred to in section 14A (2) (m), any difference between the purchase price of the bill or promissory note and the amount realised on the bill or promissory note shall be treated as income of the trust and not capital.

(7) In this section, a reference to the price of a security is, if the purchase of the security confers on the trustee the right to interest accrued from the security (even though the interest may not then be due), a reference to the purchase price of the security less the amount of the accrued interest.

**Investment in land**

14D. (1) Subject to subsections (2), (3) and (4), a trustee may not, under the powers conferred by section 14A—

- (a) invest on mortgage of land except by way of first legal mortgage of the fee simple; or
- (b) purchase land except an estate in fee simple.

(2) A trustee may, under the powers conferred by section 14A, purchase, or invest on mortgage of, a conditional purchase under the Crown Lands Acts if—

- (a) the Minister for Lands; or



SCHEDULE 1—*continued*AMENDMENTS TO THE TRUSTEE ACT 1925—*continued*

- (b) a person authorised by the Minister for the purposes of this subsection,

has certified that all conditions attaching to the conditional purchase (except payment of the balance of purchase money) have been duly complied with.

(3) A trustee may purchase, or invest on mortgage of, land of any tenure under the Crown Lands Acts (other than a tenure the purchase or mortgage of which is otherwise authorised under this section) or under the Closer Settlement Acts—

- (a) which is, or may be, converted into freehold, whether subject to a rent to the Crown or not; or  
(b) which is a lease in perpetuity.

(4) A trustee may not purchase land unless the trustee first obtains and considers proper advice in writing—

- (a) as to the suitability, having regard to the terms of the trust, of the investment; and  
(b) given by a person (whether or not employed by the trustee) whom the trustee reasonably believes to be qualified by the person's ability and practical experience of financial matters.

(5) Subsection (4) does not apply to the purchase of a dwelling-house by a trustee for the purpose of providing a home for a beneficiary under the trust.

(6) A trustee purchasing land is not liable for any breach of trust only because of the relation borne by the purchase price to the value of the land at the time when the purchase was made if—

- (a) the trustee first obtains a report in writing from a valuer of land, registered under the Valuers Registration Act 1975, instructed and employed by the trustee independently of any owner of the land;  
(b) the valuer has stated in the report the actual or potential income from the land and the outgoings to be paid in respect of the land by the owner of the land; and

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(c) the purchase price did not exceed by more than 5 per cent the value of the land as stated in the report.

(7) A trustee may lease, mortgage or sell any land purchased under the powers conferred by section 14A.

(8) A trustee has such powers as appear necessary or proper for the purpose, including power to purchase chattels, whether on terms of deferred payment or otherwise, to erect, reconstruct, enlarge, improve and repair buildings, and to join with any other person in doing any of those things.

**Advisory committee**

14E. (1) In this section, "Committee" means the committee constituted by subsection (2).

(2) There is constituted by this subsection a committee consisting of—

- (a) the Public Trustee;
- (b) a master of the Court nominated by the Chief Justice of the Court and appointed by the Attorney General; and
- (c) an officer of the Treasury nominated by the Secretary of the Treasury and appointed by the Attorney General.

(3) The function of the Committee is to advise the Attorney General on matters relating to the investment of trust funds.

(4) The Attorney General shall not be bound by the advice of the Committee.

(5) The Committee may regulate its own procedure.

(2) Section 15 (**Interim investment**)—

Section 15 (1)—

Omit "or prescribed under section 14 (2) (f)", insert instead "section 14A (2) (h) or (j)".

*Trustee (Amendment) 1987*SCHEDULE 1—*continued*AMENDMENTS TO THE TRUSTEE ACT 1925—*continued*(3) Section 18 (**Ratio of loan to value**)—

## (a) Section 18 (2), (3)—

Omit the subsections, insert instead:

(2) In making the loan the trustee must have acted upon a report as to the value of the property made by a valuer of land, registered under the Valuers Registration Act 1975, instructed and employed by the trustee independently of any owner of the property.

## (3) The amount of the loan must not exceed—

(a) two-thirds of the value of the property as stated in the report; or

(b) 95 per cent of the value of the property as stated in the report if—

(i) the repayment of the loan is insured under a contract of insurance issued by a prescribed insurer; and

(ii) the mortgagee is the assignee of the benefit of that contract of insurance.

## (b) Section 18 (4)—

Omit “In the case of a report the”, insert instead “The”.

(4) Section 21A (**Building societies—transfers of engagements and amalgamations**)—

## Section 21A (1)—

Omit “section 14 (2) (h)” wherever occurring, insert instead “section 14A (2) (p)”.

(5) Section 24 (**Accrued interest on debentures or stock sold or purchased**)—

## Section 24 (3)—

Omit “section 14 (2) (a), (b), (b1), (c) and (d)”, insert instead “section 14A (2) (a), (b), (c), (d) and (e)”.

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SCHEDULE 1—*continued*AMENDMENTS TO THE TRUSTEE ACT 1925—*continued***(6) Section 83 (Purchase of home)—**

Omit the section.