

[Act 1997 No 102]



New South Wales

Trustee Amendment (Discretionary Investments) Bill 1997

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Trustee Act 1925* so as:

- (a) to enable trustees to invest trust funds in any kind of investment (instead of requiring them to invest in the authorised trustee investments currently specified in the Act) so long as the investment is prudent having regard to the circumstances of the trust, and
 - (b) to enable persons in certain circumstances to invest or maintain an investment in an authorised trustee investment currently specified in the Act for a period of 2 years after the commencement of the proposed Act, and
 - (c) to enable regulations to be made under the Act setting out guidelines regarding investment of trust funds by trustees.
-

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Trustee Act 1925* set out in Schedule 1.

Clause 4 is a formal provision giving effect to the consequential amendments to certain other Acts and Regulations set out in Schedule 2.

Schedule 1 Amendment of Trustee Act 1925

Schedule 1 contains various amendments to the *Trustee Act 1925*.

Prudent person test

Currently section 14A of the Principal Act sets out a list of securities (generally known as authorised trustee investments) in which a trustee may invest trust funds subject to the instrument creating the trust and the duty of a trustee to exercise ordinary business prudence.

Schedule 1 [2] repeals section 14A and some associated sections and replaces them with new sections 14–14DB.

Proposed sections 14 and 14A will give a trustee greater discretion in choosing investments in which the trustee invests funds by allowing a trustee to invest (subject to the instrument, if any, creating the trust) in any kind of investment, so long as the trustee satisfies the prudent person test. This test states that:

- (a) if a trustee's profession, business or employment is or includes acting as a trustee or investing money on behalf of other persons, the trustee is to 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 a trustee is not engaged in such a profession, business or employment, the trustee is to exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons.

Proposed section 14A (4) requires a trustee to review the performance of trust investments at least once each year.

Proposed section 14B preserves any rules and principles of law or equity that impose a duty on a trustee, except so far as they are inconsistent with the Principal Act or any other Act or the instrument creating the trust. Duties preserved include the duty of the trustee to invest trust funds in investments that are not speculative or hazardous and the duty to take advice. 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.

Proposed section 14C lists the matters (such as diversification and capital appreciation) that a trustee must have regard to when exercising a power of investment as far as they are relevant to the circumstances of the trust, if any. It provides that a trustee may obtain independent advice in relation to the investment of trust funds as well as pay out of the trust funds the reasonable costs of obtaining such advice. Proposed section 14C only applies to a trustee who is not expressly forbidden from complying with the section by any trust instrument.

Proposed section 14D sets out the powers of trustees in relation to securities. This includes concurring in any scheme or arrangement for the acquisition of securities of a body corporate or the amalgamation of a body corporate with another body corporate.

Proposed section 14DA provides trustees with power to purchase a dwelling-house for use by a beneficiary as a residence, or enter into an agreement or arrangement to secure for a beneficiary a right to use a dwelling-house as a residence.

Proposed section 14DB provides that the regulations may make provision for or with respect to guidelines for investment by trustees of trust funds.

Powers of the Supreme Court

Proposed sections 90 and 90A (Schedule 1 [12]) deal with additional powers of the Court arising from the insertion of proposed sections 14–14DB in the Principal Act. Proposed section 90 sets out a number of factors which the Court may take into account in considering a trustee's liability for breach of trust in respect of a duty under Division 2 of Part 2 of the Principal Act relating to the power of investment. Proposed section 90A provides that when considering an action for a breach of trust in respect of an investment by a trustee where a loss has been or is expected to be sustained by the trust, the Court may set off all or part of the loss resulting against all or part of any gain resulting from any other investment, whether in breach of trust or not. The power to set off conferred by the proposed section is in addition to any other power or entitlement to set off all or part of any loss against any property.

Transitional provisions

Proposed Schedule 2 (Schedule 1 [15]) contains savings and transitional provisions consequent on the enactment of Schedule 1 [2] to the proposed Act.

Part 2 of Schedule 2 enables a trustee, or a person empowered or required by a provision of an Act or instrument to invest money in investments authorised by the Principal Act, to invest, or maintain an investment, in any security authorised by section 14A (2) as in force immediately before the commencement of Schedule 1 [2] to the proposed Act for a period of up to 2 years (or such other period prescribed by the regulations) after that commencement.

Other amendments

The proposed amendments to section 19 (which deals with loss on mortgages) are consequential amendments that replace the concept of “authorised security” with “mortgage” (Schedule 1 [5]-[7]).

Section 21A (which deals with transfer of engagements and amalgamations) is amended to refer to credit unions as well as building societies which is consistent with the amendments to various other Acts made by the *Financial Institutions (Miscellaneous Amendments) Act 1996* (Schedule 1 [8]-[10]).

Schedule 1 [1], [3], [4], [11], [13] and [14] make minor and consequential amendments.

Schedule 2 Amendment of other Acts and Regulations

Schedule 2 makes various minor and consequential amendments to various Acts and Regulations. The Schedule also amends certain Acts and Regulations by removing references to authorised investments and requiring those entities to invest trust funds in accordance with the *Trustee Act 1925* as amended (for example, section 36 of the *Public Trustee Act 1913*).