

# Trustee Act 1925 No 14

[1925-14]



New South Wales

## Status Information

### Currency of version

Current version for 28 September 2020 to date (accessed 19 July 2024 at 17:04)

Legislation on this site is usually updated within 3 working days after a change to the legislation.

### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Authorisation

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File last modified 28 September 2020

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# Trustee Act 1925 No 14



New South Wales

An Act to amend and consolidate the law relating to trustees and trust property; to amend in certain respects the law relating to executors and administrators; to amend the *Wills, Probate and Administration Act 1898* and certain other Acts; and for purposes connected therewith.

## Part 1A Preliminary

### 1 Name of Act and commencement

- (1) This Act may be cited as the *Trustee Act 1925*.
- (2) This Act shall commence and come into operation on the first day of March, one thousand nine hundred and twenty-six.

### 2 (Repealed)

### 3 Repeals

- (1) The Acts mentioned in the Schedule to this Act are to the extent therein expressed hereby repealed.
- (2) All rules of court made under the authority of any Act hereby repealed and being in force at the commencement of this Act shall so far as applicable be deemed to have been made under the authority of this Act.

### 4 Notes

Notes in the text of this Act do not form part of this Act.

## Part 1 Interpretation

### 5 Definitions

In the interpretation of this Act, unless the context or subject-matter otherwise indicates or requires—

**Administrator** means administrator within the meaning of the *Probate and Administration Act 1898* and includes the NSW Trustee acting as collector of an estate under an order to collect.



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

**Convey** and **conveyance**, applied to any person, include the execution or doing by that person of every necessary or suitable assurance act and thing for conveying, assigning, appointing, surrendering, or otherwise transferring or disposing of property.

**Court** means the Supreme Court.

**Executor** means the executor to whom probate has been granted and includes an executor by right of representation.

**Government securities** include Government stocks, funds, bonds, debentures and Treasury bills.

**Incapable person** means a person not a minor who is incapable through mental infirmity, arising from disease or age, of managing his or her affairs, but who is not an insane person.

**Insane person** means a person who has been found or declared, whether by inquisition or under any Lunacy Act in force at the time, to be insane or of unsound mind and incapable of managing himself or herself or his or her affairs.

**Instrument** includes deed will and Act of Parliament.

**Joint tenant** includes joint owner.

**Land** includes tenements and hereditaments, corporeal and incorporeal, and every estate and interest therein, whether vested or contingent, freehold or leasehold, and whether at law or in equity, in severalty or otherwise.

**Legal representative** means executor or administrator.

**Minor** means a person under the age of eighteen years.

**Mortgage** includes and relates to every estate and interest regarded in equity as merely a security for money.

**Mortgagee** includes any person from time to time deriving title to the mortgage under the original mortgagee.

**Mortgagor** includes any person from time to time deriving title to the equity of redemption under the original mortgagor, or entitled to redeem a mortgage, according to the person's estate interest or right in the mortgaged property.

**NSW Trustee** means the NSW Trustee and Guardian constituted under the [NSW Trustee](#)

*and Guardian Act 2009.*

**Order** includes judgment.

**Pay into court** and **payment into court** in relation to stocks and securities, include the deposit or transfer of the same in or into court.

**Possessed** extends to receipt of income of, and to any vested estate less than a life estate, legal or equitable, in possession or in expectancy, in any property.

**Property** includes real and personal property, and any estate or interest in any property, real or personal, and any debt, and any thing in action, and any claim or demand, and any other right or interest, whether in possession or not.

**Purchaser** includes a lessee or mortgagee, or other person who for valuable consideration takes or deals for any property; and **purchase** has a meaning corresponding with that of purchaser; but **sale** means only a sale properly so-called.

**Regulation** means regulation made under this Act.

**Right** includes estate and interest.

**Security** includes stocks, funds, shares.

**Stock** includes paid-up 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 company 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 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 incident to an estate conveyed by way of mortgage; but, with this exception, includes implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property, and the duties incident to the office of legal representative of a deceased person.

**Trustee** has a meaning corresponding with that of trust; and includes legal representative and the NSW Trustee and a trustee company.

**Trustee company** means an incorporated company authorised by Act of Parliament of this State to act as trustee in New South Wales.

**Trustee for sale** means a trustee in whom a trust for sale or a power of sale of property is vested.

**Will** includes codicil.

**Note—**

The [Interpretation Act 1987](#) contains definitions and other provisions that affect the interpretation and application of this Act.

## **Part 2 Trustees**

### **Division 1 Appointment, retirement, disclaimer, and ceasing to be executor**

#### **6 New trustee**

- (1) A new trustee may by registered deed be appointed in place of a trustee, either original or substituted, and whether appointed by the Court or otherwise.
- (2) A new trustee may be so appointed in any of the following cases, namely—
  - (a) where a trustee is dead,
  - (b) where a trustee remains out of New South Wales for more than one year without having properly delegated the execution of the trust,
  - (c) where a trustee remains out of New South Wales for more than two years,
  - (d) where a trustee desires to be discharged from all or any of the trusts or powers reposed in or conferred on the trustee,
  - (e) where a trustee refuses or is unfit to act in such trusts or powers, or is incapable of acting therein, or is a minor,
  - (f) where a trustee is removed under a power contained in the instrument creating the trust,
  - (g) where a trustee being a corporation is dissolved.

Provided that a new trustee may not be appointed on the sole ground that a trustee remains out of New South Wales for more than two years if such trustee has delegated the execution of the trust pursuant to the [Trustee and Wills \(Emergency Provisions\) Act 1940](#) and such delegation remains in force.

- (3) The person to be appointed a trustee may be the person, or one of the persons, by whom or with whose consent the appointment is or may be made.
- (4) The appointment may be made by the following persons, namely—
  - (a) by the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or
  - (b) if there is no such person, or no such person able and willing to act, then by the surviving or continuing trustees or trustee for the time being, or by the legal

representative of the last surviving or continuing trustee.

- (5) The appointment may be made for the whole or any part of the trust property, and on the appointment—
  - (a) two or more trustees may be appointed concurrently,
  - (b) the number of trustees may be increased, but not beyond four,
  - (c) a separate set of trustees may be appointed for any distinct part of the trust property, that is to say, for any part for the time being held on trusts distinct from those relating to any other part or parts, notwithstanding that no new trustees or trustee are or is to be appointed for other parts, provided that the number of trustees in any separate set shall not exceed four,
  - (d) any existing trustee may be appointed or remain one of the separate set of trustees,
  - (e) if only one trustee was originally appointed, then one separate trustee may be appointed for the distinct part,
  - (f) 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 two trustees were originally appointed.
- (6) By the appointment a trustee in place of whom the new trustee is appointed shall be discharged from the trust, provided that, except where only one trustee was originally appointed, a trustee shall not be so discharged unless there will be left after the discharge at least two trustees, or the NSW Trustee, or a trustee company, to perform the trust.
- (7) Any conveyance 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.
- (8) Every new trustee appointed under this section, as well before as after all the trust property becomes by law or by conveyance or otherwise vested in the new trustee, shall have the same powers authorities and discretions, and may in all respects act as if the new trustee had been originally appointed a trustee by the instrument, if any, creating the trust.
- (9) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator.
- (10) The provisions of this section relative to a person nominated for the purpose of appointing new trustees apply, whether the appointment is to be 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.

- (11) The provisions of this section relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section, provided that—
- (a) where there is in fact a continuing trustee, nothing in this section shall authorise a refusing or retiring trustee to act apart from the continuing trustee,
  - (b) if a refusing or retiring trustee does not act in the execution of the provisions of this section, the fact that the refusing or retiring trustee was willing to act shall not affect the validity of an appointment made by any other person.
- (12) Nothing in this section shall give power to appoint any person as an executor or administrator.
- (13) Except as otherwise provided in subsection (12), this section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (14) This section applies to trusts created either before or after the commencement of this Act, and extends to the appointment of a new trustee where the case for the appointment arose before the commencement of this Act.
- (15) An appointment of a new trustee made before the commencement of this Act, under a power conferred by statute or by the instrument, if any, creating the trust, shall not be deemed to be invalid for the reason only that on the appointment the number of the trustees was increased or decreased, unless the increase or decrease was expressly forbidden by statute or by that instrument, but nothing in this subsection shall be deemed to invalidate any appointment of a new trustee made before the commencement of this Act.

## **7 Additional trustee**

- (1) A new trustee may by registered deed be appointed in addition to any existing trustee or trustees.
- (2) A new trustee may be so appointed in any of the following cases, namely—
- (a) where a sole trustee other than the NSW Trustee or a trustee company is or has been originally appointed to act in a trust, or
  - (b) where, in the case of any trust, there are not more than three trustees, either original or substituted, and whether appointed by the Court or otherwise, and none of the trustees is the NSW Trustee or a trustee company.

- (3) The person to be appointed a trustee may be the person, or one of the persons, by whom or with whose consent the appointment is or may be made.
- (4) The appointment may be made by the following persons, namely—
  - (a) by the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or
  - (b) if there is no such person, or no such person able and willing to act, then by the trustee or trustees for the time being.
- (5) The appointment may be made for the whole or any part of the trust property, and on the appointment—
  - (a) two or more trustees may be appointed concurrently,
  - (b) the number of trustees shall not be increased beyond four.
- (6) Except as provided by the instrument, if any, creating the trust, or by any statutory enactment to the contrary, it shall not be obligatory to appoint any additional trustee.
- (7) Subsections (7), (8), (10), (12), (13), and (14) of section 6 shall apply to the appointment of an additional trustee.

## **8 Retirement**

- (1) A trustee may by registered deed retire from the trust without any new trustee being appointed in the trustee's place.
- (2) A trustee may not so retire, unless the trustee's co-trustees and such other person, if any, as is empowered to appoint trustees, consent by the same or other registered deed to the retirement, and there will be left after the retirement at least two continuing trustees, or the NSW Trustee, or a trustee company, to perform the trust.
- (3) Two or more trustees may retire concurrently.
- (4) By the retirement the trustee shall be discharged from the trust, provided that, if in order to vest any part of the trust property in the continuing trustees alone, it is necessary that it should be duly transferred, the retiring trustee shall not be discharged in respect of that part until it is duly transferred.
- (5) At any time after the registration of the deed or deeds of consent and retirement the continuing trustees shall have the same powers authorities and discretions, and may in all respects act as if the retiring trustee were wholly discharged from the trust.
- (6) Any conveyance or thing required for vesting the trust property in the continuing trustees alone shall be executed or done.
- (7) Nothing in this section shall authorise any retirement from the office of an executor or

administrator.

- (8) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (9) This section applies to trusts created either before or after the commencement of this Act.

## 9 Vesting

- (1) Where a new trustee is appointed, the execution and registration of the deed of appointment shall without any conveyance, except as otherwise provided in this section, vest in the persons who become and are the trustees for performing the trust, as joint tenants and for the purposes of the trust, the trust property for which the new trustee is appointed.
- (2) Where a trustee retires, the execution and registration of the deed or deeds of consent and retirement shall without any conveyance, except as otherwise provided in this section, vest in the continuing trustees alone as joint tenants and for the purposes of the trust, all the trust property which is jointly vested in the continuing trustees and the retiring trustee.
- (3) In the case of land subject to the provisions of the *Real Property Act 1900*, the property shall not vest until either—
  - (a) the appropriate transfer is executed and registered, so that the property is duly transferred, or
  - (b) an entry of the vesting is made by the Registrar-General.

Any such entry shall have the same effect as if the property were duly transferred.

- (3A) In the case of any property subject to the provisions of the Closer Settlement Acts, the *Crown Land Management Act 2016*, the *Mining Act 1992* or the *Offshore Minerals Act 1999*, or any other Act relating to Crown lands, the property shall not vest until either—
  - (a) the appropriate transfer is executed and registered so that the property is duly transferred, or
  - (b) an entry of the vesting is made in the appropriate register kept under the provisions of the Act to which such property is subject.

Any such entry shall have the same effect as if the property were duly transferred.

- (4) In the following cases the property shall not vest until the appropriate transfer is executed and registered so that the property is duly transferred, that is to say, in the

case of—

- (a) any property comprised in a mortgage for securing money subject to the trust, where the property is not either land subject to the provisions of the *Real Property Act 1900* or land conveyed on trust for securing debentures or debenture stock,
  - (b) (Repealed)
  - (c) any property a conveyance of which is required to be registered by or under any Act, whether of this State or otherwise, other than the Acts mentioned in subsections (3) and (3A).
- (5) In the case of any property that is only transferable 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, the property shall not vest until it is duly transferred.
- (6) In the case of land held under a lease which contains any covenant condition or agreement against assignment or disposing of the land without licence or consent, the land shall not vest until it is duly transferred, unless—
- (a) before the execution of the deed of appointment, or the deed or deeds of consent and retirement, as the case may be, the requisite licence or consent to the assignment or disposition has been obtained, or
  - (b) by virtue of any statute or rule of law the vesting would not operate as a breach of covenant or give rise to a forfeiture.

In this subsection **lease** includes an underlease and an agreement for a lease or underlease.

- (7) If any property does not vest under this section until transfer or registration, the execution and registration of the deed of appointment, or of the deed or deeds of consent and retirement, as the case may be, shall nevertheless vest the right to call for a transfer of the property, and to sue for or recover the property.
- (8) This section extends to an appointment by deed, or a retirement by deed, under the provisions of the instrument, if any, creating the trust.
- (9) This section applies to trusts created either before or after the commencement of this Act.

## 10 Renunciation of probate

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



of the will or administration with the will annexed is, by or under this or any other Act, granted or transferred to the NSW Trustee or a trustee company in the place of that person or in addition to that person, then the NSW Trustee or trustee company shall, without further appointment, be deemed to be appointed trustee or one of the trustees of the will, as the case may require.

(2A), (2B) (Repealed)

(3) This section applies only to a renunciation failure grant or transfer after the commencement of this Act.

## **11 Ceasing to be executor**

- (1) If any property is vested in any person as executor of a will under which the person is the trustee of the property or is beneficially entitled thereto, such person may, at any time after all the executorial duties with respect to the property have been duly performed, declare by registered instrument in writing that he or she has ceased to hold the property as executor and that he or she holds the same as trustee or as beneficiary, as the case may be.
- (2) Where a declaration is so made, the property shall, except as otherwise provided in this section, be deemed to be held in accordance with the declaration.
- (3) In the case of land subject to the provisions of the *Real Property Act 1900*—
  - (a) where a declaration is so made that the executor holds as trustee, the property shall not be deemed to be so held until the Registrar-General enters a caveat forbidding the registration of any instrument not in accordance with the trusts and provisions declared and contained in the will so far as concerns the land affected by the declaration,
  - (b) where a declaration is so made that the executor holds as beneficiary, the property shall not be deemed to be so held until the Registrar-General withdraws any inconsistent caveat.
- (4) This section applies to wills made either before or after the commencement of this Act, and whether the executorial duties have been performed before or after the commencement of this Act.

## **12 Registration**

- (1) Any instrument by which a new trustee is appointed, or by which a trustee retires or disclaims, or by which an executor declares that the executor holds as trustee or as beneficiary, as the case may be, may be registered in the office of the Registrar-General in the manner and on payment of the fees prescribed by regulation under the *Conveyancing Act 1919*.
- (2) This section extends to an appointment or retirement, whether under this Part or

under the provisions of the instrument creating the trust or otherwise, and to a consent to an appointment or retirement.

- (3) This section applies whether the trust does or does not relate to land subject to the provisions of the *Real Property Act 1900*.
- (4) In the case of land subject to the provisions of the *Real Property Act 1900*, where an appointment or retirement or an instrument by which an executor declares that the executor holds as trustee or as beneficiary, as the case may be, is registered, the Registrar-General is hereby authorised and directed to make an entry of the vesting of the trust property or to enter vary and withdraw caveats as may be proper in the circumstances—

Provided that the Registrar-General shall not be bound so to do until a written request is made to the Registrar-General by the persons in whom the property is to be vested, such evidence is given as the Registrar-General may reasonably require, and such notice, if any, is given to any other person as the Registrar-General may direct.

- (5) Nothing in this section shall prevent an appointment retirement disclaimer or other instrument from being registered under any law now in force.
- (6) This section applies to instruments executed either before or after the commencement of this Act.

### **13 Protection of purchasers**

- (1) A statement contained in any registered deed by which a new trustee is appointed, to the effect that a trustee has remained out of New South Wales for more than one year without having properly delegated the execution of the trust, or has remained out of New South Wales for more than two years, or refuses or is unfit to act, or is incapable of acting, shall, in favour of a subsequent purchaser in good faith, be conclusive evidence of the matter so stated upon any question as to the validity of the appointment and of any vesting consequent thereon.
- (2) A statement contained in any registered instrument by which an executor declares that the executor holds any property as trustee or as beneficiary, as the case may be, to the effect that all executorial duties with respect to the property have been duly performed, shall in favour of a subsequent purchaser in good faith be conclusive evidence of the matter so stated upon any question as to the capacity in which the property was held.
- (3) The protection afforded by this section shall extend to the Registrar-General Crown Solicitor or other person registering or certifying title.
- (4) This section applies to deeds executed either before or after the commencement of this Act.

## **Division 2 Powers and duties**

### **14 Powers of investment**

A trustee may, unless expressly forbidden by the instrument (if any) creating the trust—

- (a) invest trust funds in any form of investment, and
- (b) at any time vary any investment.

### **14A Duties of trustee in respect of power of investment**

- (1) This section has effect subject to the instrument (if any) creating the trust.
- (2) A trustee must, 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.

#### **Note—**

Some Acts deem investments under the Acts to be investments that satisfy the prudent person test. See, for example, section 6.3 of the [Government Sector Finance Act 2018](#).

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

### **14B Law and equity preserved**

- (1) Any rules and principles of law or equity that impose a duty on a trustee exercising a power of investment continue to apply except to the extent that they are inconsistent with this or any other Act or the instrument (if any) creating the trust.
- (2) Without limiting the generality of subsection (1), a duty imposed by any rules and principles of law or equity includes the following—
  - (a) a duty to exercise the powers of a trustee 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,
  - (d) a duty to take advice.
- (3) 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.
- (4) If a trustee is under a duty to take advice, the reasonable costs of obtaining the advice are payable out of trust funds.

**14C Matters to which trustee is to have regard when exercising power of investment**

- (1) Without limiting the matters that a trustee may take into account when exercising a power of investment, a trustee must, so far as they are appropriate to the circumstances of the trust, if any, have regard to the following matters—
- (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 the 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,

- (o) the results of a review of existing trust investments in accordance with section 14A (4).
- (2) A trustee may, having regard to the size and nature of the trust, do either or both of the following—
  - (a) obtain and consider independent and impartial advice reasonably required for the investment of trust funds or the management of the investment from a person whom the trustee reasonably believes to be competent to give the advice,
  - (b) pay out of trust funds the reasonable costs of obtaining the advice.
- (3) A trustee is to comply with this section unless expressly forbidden by the instrument (if any) creating the trust.

#### **14D Powers of trustee in relation to securities**

- (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, or
  - (b) for the sale of all or any part of the property and undertaking of the body corporate to another body corporate, or
  - (c) for the acquisition of securities of the body corporate, or of control of the body corporate, by another body corporate, or
  - (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, the securities subject to the trust 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, or
  - (b) assign to any person, including a beneficiary under the trust, the benefit of the right, or the title to the right, 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 Division, 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) is to be held as capital of the trust.
- (7) This section applies in relation to securities acquired before or after the commencement of the *Trustee Amendment (Discretionary Investments) Act 1997*, subject to the instrument (if any) creating the trust.

**14DA Power to purchase dwelling-house as residence for beneficiary**

- (1) Without limiting section 14C and subject to the instrument (if any) creating the trust, a trustee may—
  - (a) purchase 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 (if any) creating the trust, a trustee may, if to do so would not unfairly prejudice the interests of 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 beneficiary's interest 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 association with the use of a dwelling-house.

**14DB Guidelines for trustees**

- (1) The regulations may make provision for or with respect to guidelines for the investment by trustees of trust funds.
- (2) A trustee does not comply with section 14A merely by complying with any regulations made for the purposes of this section.

**14E Advisory committee**

- (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 NSW Trustee, and
  - (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, and
  - (d) 2 persons appointed by the Attorney General who, in the opinion of the Attorney General, have experience relevant to the function of the Committee.
- (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.
- (6) The Committee may seek the advice of such persons as it sees fit on matters related to the function of the Committee.

**14F Investment in securities under Reserve Bank RITS system**

- (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 trust instrument creating a trust, taken to be the same in all respects as the underlying security.
- (2) Accordingly, the holding or acquisition by a trustee of such a chose in action is to be regarded as an investment by the trustee in the underlying security.
- (3) It does not matter that the right conferred by the chose in action 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 commencement of this section but applies only to the extent that the trust instrument creating the trust does

not expressly forbid its application.

(5) In this section—

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

## **15, 16 (Repealed)**

## **17 Accepting a short title**

- (1) A trustee shall not be chargeable with breach of trust upon the ground only that in effecting the purchase of or in lending money upon the security of any property the trustee has accepted a shorter title than the title which a purchaser is, in the absence of a special condition, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted.
- (2) This section extends to transfers of existing securities as well as to new securities.
- (3) This section applies to investments made either before or after the commencement of this Act.

## **18 Ratio of loan to value**

- (1) A trustee lending money on the security of any property on which the trustee can lawfully lend shall not be chargeable with 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, provided that the loan was made in accordance with this section.
- (2) In making the loan the trustee must have acted upon a report as to the value of the property made by a qualified valuer, 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.
- (4) The loan must have been made under the advice of the valuer expressed in the report.
- (5) This section extends to transfers of existing securities as well as to new securities.



(6) This section applies to investments made either before or after the commencement of this Act.

(7) In this section—

**prescribed insurer** means an insurer or an insurer of a class prescribed by the regulations.

**qualified valuer** means (subject to the regulations) a person who—

(a) has membership of the Australian Valuers Institute (other than associate or student membership), or

(b) has membership of the Australian Property Institute (other than student or provisional membership), acquired in connection with his or her occupation as a valuer, or

(c) has membership of the Royal Institution of Chartered Surveyors as a chartered valuer, or

(d) is of a class prescribed by the regulations.

## **19 Loss on mortgages**

(1) Where a trustee improperly advances trust money on a mortgage security which would at the time of investment be a proper investment in all respects for a smaller sum than is actually advanced, then the trustee is only liable to make good the sum advanced in excess of the smaller sum with interest.

(2) This section extends to transfers of existing mortgages as well as to new mortgages.

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

## **20 Release of part of the security**

(1) Where any property is held by a trustee by way of security and the trustee has power under this Act or otherwise to invest on mortgage and to vary investments, the trustee—

(a) may release part of the property from the mortgage, whether any part of the mortgage debt is repaid or not, provided that the unreleased part of the property would, at the time, be a proper investment in all respects for the amount remaining unpaid,

(b) may, on a sale by the mortgagor or part of the mortgaged property and on the receipt by the trustee of the whole of the purchase money thereof after deduction of the expenses of the sale, release such part from the mortgage.

- (2) A subsequent purchaser of the released part of the property, or the Registrar-General Crown Solicitor or other person registering or certifying title, shall not be concerned to inquire whether the release was authorised by this section.
- (3) This section applies to securities created either before or after the commencement of this Act.

## **21 Arrangement with company**

- (1) Where any security of a company is held by a trustee, and the trustee can lawfully hold or retain the same, the trustee may, in like manner as if the trustee were beneficially entitled to the security, concur in any scheme or arrangement—
  - (a) for the reconstruction of the company, or
  - (b) for the amalgamation of the company with any other company, or
  - (c) for the sale of all or any part of the property and undertaking of the company to any other company, or
  - (d) for the release modification or variation of any rights privileges or liabilities attached to the security.
- (1A) Where any security of a company is held by a trustee, and the trustee can lawfully hold or retain the security, the trustee may, in like manner as if the trustee were beneficially entitled to the security, accept and carry out any proposal made in writing by or on behalf of another company for the purchase by that other company of any securities in the first-mentioned company in consideration of the allotment of securities in that other company whether with or without any other consideration in any case where—
  - (a) the proposal is conditional upon the holders of a proportion (not being less than 75 per cent) in value of such of the securities in the first-mentioned company as have not already been acquired by that other company agreeing to deal with those securities in accordance with the proposal, and
  - (b) a sufficient number of the holders of the securities in question (including the trustees) agree in writing to deal with the shares in accordance with the proposal.
- (2) In lieu of or exchange for the security the trustee may accept any security of any denomination or description of—
  - (a) in the case of a scheme or arrangement referred to in subsection (1)—the reconstructed, new or purchasing company, or
  - (b) in the case of a proposal referred to in subsection (1A)—the company that purchased the security.

- (3) The trustee shall not be responsible for any loss occasioned by any act or thing so done in good faith, and may hold and retain any security so accepted in like manner as the trustee could have done if the same had been an investment authorised by the instrument, if any, creating the trust or by law.
- (4) The powers conferred by this section shall be exercisable subject to the consent of any person whose consent to a change of investment is required by the instrument, if any, creating the trust or by law.
- (5) Anything done by a trustee before the commencement of this Act which would have been authorised by this section (subsection (1A) excepted) if then in force shall be deemed to have been and is hereby authorised by this Act.
- (6) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (7) This section applies to trusts created either before or after the commencement of this Act.

#### **21A Building societies and credit unions—transfers of engagements and amalgamations**

- (1) Where a trustee has invested trust funds in a building society or credit union and may lawfully retain the investment, the trustee may, as if the trustee were beneficially entitled to the investment, concur in—
  - (a) a transfer of engagements of the building society or credit union to another building society or credit union, or
  - (b) a merger of the building society or credit union under the *Financial Institutions (New South Wales) Code*.
- (2) Where the instrument creating a trust requires the consent of any person before an investment of the trust funds may be changed, the powers conferred by subsection (1) may not be exercised without the consent of that person.
- (3) 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 terms of that instrument and to the provisions therein contained.
- (4) This section applies to trusts created before or after the commencement of Schedule 1 to the *Trustee (Investment Powers) Amendment Act 1982*.

#### **22 New shares in a company**

- (1) Where a preferential right to subscribe for a security in a company is offered to a trustee in respect of any holding in the company, the trustee may—

- (a) exercise the right and apply capital money subject to the trust in payment of the consideration, or
  - (b) renounce the right, or
  - (c) assign the benefit of the right for the best consideration that can reasonably be obtained to any person, including a beneficiary under the trust.
- (2) Where a trustee assigns the benefit of the right the consideration received by the trustee for the assignment shall be held as capital money of the trust.
- (2A) In any case in which the preferential right in subsection (1) referred to is offered to the trustee, the trustee may in any case in which the shares the subject-matter of the right are subject to a special or reserve liability, whether under the provisions of section 254N of the *Corporations Act 2001* of the Commonwealth or otherwise, in the event of the winding-up of the company exercise the right and hold the said shares as if they were part of the trustee's original holding in the company.
- (3) The trustee shall not be responsible for any loss occasioned by any act or thing so done in good faith.
- (4) The powers conferred by this section shall be exercisable subject to the consent of any person whose consent to a change of investment is required by law or by the instrument, if any, creating the trust.
- (5) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (6) This section applies to trusts created either before or after the commencement of this Act.

### **23 Calls on shares**

- (1) A trustee may apply capital money subject to a trust in payment of the calls on any shares subject to the trust.
- (2) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (3) This section applies to trusts created either before or after the commencement of this Act.

### **24 Accrued interest on debentures or stock sold or purchased**

- (1) Where any payment received by a trustee in respect of a sale of debentures or inscribed stock bearing interest at a fixed rate shall be or include payment for the

right to receive any interest accrued from the debentures or stock at the time of the sale, though the interest may not then be due, the amount of the accrued interest shall for the purposes of the trust be deemed to have been received as interest in respect of the period during which the interest so accrued.

- (2) Where any payment made by a trustee in respect of a purchase of any debentures or inscribed stock bearing interest at a fixed rate shall be or include payment for the right to receive any interest accrued from the debentures or stock at the time of the purchase, though the interest may not then be due, the amount of the accrued interest when received shall for the purposes of the trust be deemed to have been received as purchase money repaid.
- (3) (Repealed)
- (4) Anything done by a trustee before the commencement of this Act which would have been authorised by this section if then in force shall be deemed to have been and is hereby authorised by this Act.
- (5) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (6) This section applies to trusts created either before or after the commencement of this Act.

## **25 Continued holding**

- (1) A trustee shall not be liable for breach of trust by reason only of the trustee's continuing to hold an investment which has ceased to be an investment authorised by the instrument, if any, creating the trust or by law.
- (2) This section applies to investments made either before or after the commencement of this Act.

## **26 Powers incident to sale**

- (1) A trustee for sale may—
  - (a) sell all or any part of the trust property,
  - (b) sever and sell fixtures apart from the balance of the property,
  - (c) grant and sell any easement right or privilege of any kind over or in relation to the property,
  - (d) do anything that a mortgagee may do under subsection (1) of section 110 of the [Conveyancing Act 1919](#) to the like extent as if the powers conferred by that subsection on a mortgagee in relation to the mortgaged property or any part

thereof were in terms conferred by this subsection on the trustee in relation to the trust property or any part thereof,

- (e) join with any other person in doing anything under any of the preceding paragraphs of this subsection,
  - (f) pay or apply capital money subject to the trust for any of the purposes mentioned in this subsection.
- (2) The sale may be subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, and may be—
- (a) either subject to prior charges or not,
  - (b) either together or in lots, in subdivision or otherwise,
  - (c) by public auction or by private contract.
- (3) The trustee may vary any contract for sale, buy in at any auction, rescind any contract for sale and re-sell, without being answerable for any loss.
- (4) If the trustee joins with any other person in selling, 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.
- (4A) A contravention of subsection (4) shall not invalidate or be deemed to have invalidated any instrument intended to affect or evidence the title to any land.
- (5) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (6) This section applies to trusts or powers created either before or after the commencement of this Act.

## **27 Duration of trust or power to sell**

- (1) Where the instrument creating a trust or power to sell property does not expressly limit the duration of the trust or power, the trustee may, if so requested in writing by any beneficiary, sell the property under the authority conferred by this section and shall be deemed to be a trustee for sale accordingly, 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 free of any incapacity, but in all other respects the authority conferred by this section shall be subject to any restrictions to which the power or trust created by the instrument is subject.
- (2) Nothing in this section shall affect any trust or power to sell which is for the time being in existence under the instrument creating the trust or power.

- (3) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (4) This section applies to trusts or powers created either before or after the commencement of this Act.

**27A (Repealed)**

**27B Postponement of sale**

- (1) A power to postpone sale shall be implied in every trust for sale, unless a contrary intention appears.
- (2) Where there is a power to postpone sale, then (subject to any express direction to the contrary in the instrument, if any, creating the trust for sale) the trustee for sale shall not be liable in any way for postponing the sale, in the exercise of the trustee's discretion, for any indefinite period; nor shall a purchaser be concerned in any case with any directions respecting the postponement of sale.
- (3) The provisions of subsections (1) and (2) apply to trusts created either before or after the commencement of this Act.
- (4) Where a disposition or settlement coming into operation after the commencement of the *Trustee (Amendment) Act 1929* contains a trust either to retain or sell any property, the same shall be construed as a trust to sell the property with power to postpone the sale.

**27C Purchaser under a trust for sale**

- (1) A trust for sale shall, so far as regards the safety and protection of any purchaser, be deemed to subsist notwithstanding any lapse of time until the property is conveyed to or under the direction of the persons interested in the proceeds of sale, and in the case of land until the conveyance is duly registered.
- (2) Nothing in this section shall prevent any court from making an order restraining a sale.
- (3) This section applies to trusts created and to the execution thereof either before or after the commencement of this Act.

**28 Deferred payment on sale of land**

- (1) A trustee for sale may sell land on terms of deferred payment or otherwise.
- (2) The terms of deferred payment may provide either for the purchase money being paid by instalments, or for the unpaid purchase money being secured by mortgage.
- (3) If the purchase money is to be paid by instalments, the terms upon which the land is

sold shall, in addition to such other provisions as the trustee may deem proper, include provisions for giving effect to the following—

- (a) that part of the purchase money shall be paid on the execution of the contract of sale,
  - (b) that the balance of the purchase money shall be payable in instalments, the first not later than three years from the date of the contract of sale and the others at intervals of not more than a year beginning from the date on which the first instalment is payable, and shall bear interest payable half-yearly or oftener on the amount from time to time unpaid. No instalment which is made payable during the first three years from the date of the contract of sale shall be of an amount less than five per centum of the purchase money, and all instalments which are made payable after the third year from the date of the contract of sale shall be equal in amount,
  - (c) that the whole of the purchase money and interest shall be payable within a period not exceeding ten years from the date of the contract of sale,
  - (d) that if any instalment or interest or part thereof is in arrear and unpaid for six months or for such less period as may be specified, the whole of the purchase money shall become due and payable.
- (4) If the unpaid purchase money is to be secured by mortgage, the terms upon which the land is sold shall, in addition to such other provisions as the trustee may deem proper, include provisions for giving effect to the following—
- (a) that part of the purchase money shall be paid on the execution of the contract of sale,
  - (b) that the unpaid purchase money shall be secured by a registered mortgage of the land sold, with or without the security of any other property, and shall bear interest payable half-yearly or oftener on the amount from time to time unpaid,
  - (c) that the mortgage shall contain covenants by the mortgagor to pay the principal money secured and the interest thereon, to maintain and protect the property, and to keep all buildings, if any, thereon insured against loss or damage by fire to the full insurable value thereof,
  - (d) that notwithstanding section 106 of the [Conveyancing Act 1919](#) the mortgagor shall not have power to make any lease of the property, unless the trustee consents in writing.
- (5) Whether the purchase money is to be paid by instalments or the unpaid purchase money is to be secured by mortgage, the trustee shall not be deemed to be lending money within the meaning of section 18 so as to be bound to act in accordance with the provisions of that section, and shall not be liable for any loss which may be



incurred by reason only of the security being insufficient at the date of the mortgage.

- (6) The part of the purchase money to be paid on the execution of the contract of sale shall not be less than the sum which a person acting with prudence would, if the land were the person's own, have accepted in the circumstances in order to sell the land to the best advantage.
- (7) The trustee shall not be bound to require payment of any greater part of the purchase money before letting the purchaser into possession, or before conveying the land and taking a mortgage back, than a person acting with prudence would, if the land were the person's own, have considered as sufficient, provided that the trustee shall not convey the land and take a mortgage back until at least one-tenth part of the purchase money has been paid.
- (8) Notwithstanding that the purchase money is to be paid by instalments, the trustee may at any time after one-tenth of the purchase money has been paid convey the land and take a mortgage back in any case where a person acting with prudence would, if the land were the person's own, have been willing in the circumstances so to do, and in any such case the mortgage shall be in accordance with paragraphs (b) (c) and (d) of subsection (4), and the provisions of subsection (5) shall apply.
- (9) Any mortgage under this section may be for any period not exceeding ten years from the date of the contract of sale.
- (10) The trustee may, on such terms, if any, as the trustee deems proper, by writing waive or vary any right arising from failure to comply with any term of the contract of sale or of any mortgage under this section within the proper time.
- (11) Where the sale is made under the order of the Court, the provisions of this section shall apply, unless the Court shall otherwise direct.
- (12) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (13) This section applies to trusts created either before or after the commencement of this Act.

## **29 Sale or purchase under [Conveyancing Act 1919](#)**

- (1) A trustee who is either a vendor or a purchaser may sell or buy without excluding the application of subsection (2) of section 53 of the [Conveyancing Act 1919](#).
- (2) This section shall be deemed to have applied as from the commencement of that Act.

## **30 Depreciatory conditions**

- (1) Where a trustee sells subject to any condition which may have been unnecessarily

depreciatory—

- (a) the purchaser shall not be at liberty to make any objection to the title on that ground,
- (b) the sale shall not be impeached by any beneficiary upon that ground, unless it also appears that the consideration for the sale was thereby rendered inadequate,
- (c) the sale shall not, after the execution of the conveyance, be impeached as against the purchaser upon that ground, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

- (2) This section applies to sales made either before or after the commencement of this Act.

### **31 Sale of part of land**

- (1) 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 otherwise.
- (2) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (3) This section applies to trusts or powers created either before or after the commencement of this Act.

### **32 Sale exchange and partition**

- (1) Where a trustee is authorised by the instrument, if any, creating the trust or by law to dispose of land by way of sale exchange or partition, the trustee may so dispose—
  - (a) of the land with or without an exception or reservation of all or any of the mines and minerals therein, or
  - (b) of any mines and minerals.
- (2) The disposition may be with or without a grant or reservation of powers of working, wayleaves, or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or incident to or connected with mining purposes, in relation to the land or any part thereof, or any other land.
- (3) The exchange or partition may be made subject to and in consideration of the reservation of an undivided share in mines or minerals.
- (4) The exchange or partition may be made upon terms of giving or receiving any money for equality of exchange or partition.
- (5) For the purpose of completing the disposition the trustee may convey or otherwise

dispose of the land either by way of revocation and appointment of the use or otherwise as may be necessary.

- (6) This section extends to any other person authorised to dispose of land by way of sale exchange or partition.
- (7) This section applies to trusts or powers created either before or after the commencement of this Act.

### **32A Power to purchase equity of redemption in lieu of foreclosure**

A trustee unless expressly forbidden by the instrument, if any, creating the trust, may, in lieu of proceeding to foreclosure, purchase the equity of redemption of land in New South Wales the subject of a mortgage held by the trustee under which default has been made where the moneys expended in such purchase are subject to the same trusts as the mortgage debt: Provided that in no case shall the moneys paid by way of consideration for such purchase exceed five per cent of the amount due under the mortgage.

### **33 Sale 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, the trustee shall hold the property on trust for sale, with power to postpone the sale for such a period as the trustee may think proper.
- (2) The net proceeds of sale, after payment of costs and expenses, shall 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 shall not affect any rule of law relating to the apportionment of capital and income between tenant for life and remainderman.
- (4) This section shall not affect the right of any person to require that, instead of a sale, the property shall be conveyed to the person or in accordance with the person's directions.
- (5) This section applies whether the property is discharged from the right of redemption by virtue of the statutes of limitation or of an order for foreclosure or purchase of the equity of redemption or otherwise.
- (6) This section extends to securities by way of mortgage of land under the [Real Property Act 1900](#) and in relation thereto an order for foreclosure includes an order for foreclosure under that Act.
- (7) This section applies whether the property has become or becomes discharged from the right of redemption before or after the commencement of this Act.

### **34 Release of equity of redemption 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.
- (2) 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 of the part thereof discharged, provided that the trustee has acted bona fide and on the advice of a person whom the trustee 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.
- (3) A subsequent purchaser or the Registrar-General Crown Solicitor or other person registering or certifying title shall not be concerned to inquire whether the release was authorised by this section.
- (4) This section applies whether the equity of redemption vested in the trustee before or after the commencement of this Act.

### **35 Surrender of onerous lease**

- (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.
- (2) 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, provided that the trustee has acted bona fide and on the advice of a person whom the trustee 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.
- (3) A subsequent purchaser or the Registrar-General Crown Solicitor or other person registering or certifying title shall not be concerned to inquire whether the surrender was authorised by this section.
- (4) This section applies whether the leasehold vested in the trustee before or after the commencement of this Act.

### **36 Leasing**

- (1) A trustee may make a lease of land in possession in any of the following cases, that is to say—
  - (a) where the trustee holds the land with power to manage the same, or upon trust

for sale with an express power to postpone the sale, the lease may be for any term not exceeding five years,

(b) where the trustee holds the land without power to manage the same, or upon trust for sale without an express power to postpone the sale, the lease may be for any term not exceeding three years.

(2) A trustee shall not be deemed to hold land with power to manage the same within the meaning of this section by reason only of the fact that it is proper to postpone sale in order to sell to the best advantage and in the meantime to manage the land.

(3) Any lease which a trustee is authorised to make under this section or under the instrument, if any, creating the trust or power may—

(a) provide for a rent increasing at such times as may be specified in the lease,

(b) give an option of renewal, provided that the duration of the lease and any such renewal shall not in the aggregate exceed the term for which the trustee is authorised to make the lease.

(4) If the land is the subject of a settlement within the meaning of Part 4 of the *Conveyancing and Law of Property Act 1898* and there is any other person authorised by the settlement or by that Act to demise the land or any part thereof, this section shall not apply unless that person in writing authorises the trustee to make the lease.

(5) Subsections (4), (5), (6), (7), (8), and (10) of section 106 of the *Conveyancing Act 1919* shall apply to any lease under this section—

Provided that if the land includes premises licensed under the *Liquor Act 2007* a bonus or fine may be taken in respect of the lease, and the trustee shall apportion the same over the period of the lease as if it were rent, but no person paying any such bonus or fine shall be concerned to see that any such apportionment is made.

(6) This section shall not apply to a bare trustee for persons all of whom are entitled in possession and are free of any incapacity.

(7) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(8) This section applies to trusts created either before or after the commencement of this Act.

### **37 Renewal of renewable leasehold**

(1) Where a leasehold for lives or for years is vested in a trustee and the lease is renewable from time to time, either under any covenant or contract, or by custom or usual practice, the trustee may obtain from time to time the renewal on the

accustomed and reasonable terms.

- (2) If required in writing by any person having any beneficial interest present future or contingent in the leasehold, the trustee shall use his or her best endeavours to obtain from time to time the renewal on such terms.
- (3) The trustee may from time to time make or concur in making a surrender of the lease for the time being subsisting, and may do all such other acts as are requisite for the renewal.
- (4) If by the terms of the instrument, if any, creating the trust the person in possession for the person's 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 shall not apply unless the consent in writing of that person is obtained to the renewal.
- (5) The trustee may pay or apply capital money subject to the trust for the purpose of obtaining the renewal.
- (6) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (7) This section applies to trusts created either before or after the commencement of this Act.

### **38 Raising money**

- (1) Where a trustee is authorised by the instrument, if any, creating the trust or by law to pay or apply capital money for any purpose or in any manner, the trustee shall have 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 held upon the same trusts as the capital money.
- (1A) Where a trustee holds land in respect of which moneys are due and payable for rates or taxes or in respect of which the trustee is under a statutory obligation to expend moneys and the trustee has no moneys subject to the same trusts as such land wherewith to pay such rates or taxes or discharge such statutory obligation the trustee shall have and shall be deemed always to have had power to raise the money required to make such payment or discharge such obligation by sale or mortgage of the whole or part of such land or by sale, conversion, calling in, or mortgage of all or any part of the trust property for the time being in possession held upon the same trusts as such land.
- (2) This section shall not apply to a trustee of property held for charitable purposes.

### **39 Protection of purchasers or mortgagees**

No purchaser or mortgagee, paying or advancing money on a sale or mortgage purporting to be made under any trust or power vested in a trustee, shall be concerned to see that the money is wanted, or that no more than is wanted is raised, or to see to the application thereof.

#### **39A Application of income by trustee-mortgagee in possession**

- (1) In any case in which 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 such debt for persons by way of succession, and such trustee is at the commencement of the [Conveyancing, Trustee and Probate \(Amendment\) Act 1938](#) or at any time after such commencement becomes mortgagee in possession of the mortgaged land, the trustee shall apply the net income of the mortgaged land received by the trustee after such commencement or after the trustee becomes mortgagee in possession, as the case may be, as follows, namely—
- (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 under the mortgage instrument or under the [Conveyancing Act 1919](#) and the cost of executing necessary repairs,
  - (c) in keeping down all annual sums or other payments and the interest on all principal sums having priority to the mortgagee in right whereof the trustee is in possession.

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

- (2) The rents, taxes, charges, outgoings, premiums, costs, annual sums, payments and interest so to be discharged, kept down and paid shall be those accruing due—
- (a) after the commencement of the [Conveyancing, Trustee and Probate \(Amendment\) Act 1938](#), where the trustee is in possession of the mortgaged land at such commencement,
  - (b) after the date of possession by the trustee, where the entry into possession is after the commencement of the [Conveyancing, Trustee and Probate \(Amendment\) Act 1938](#)—

Provided that if at the commencement of the [Conveyancing, Trustee and Probate \(Amendment\) Act 1938](#) or on the date of possession by the trustee, as the case may be, any rents, taxes, rates, outgoings, annual sums, payments, interest or premiums mentioned in paragraphs (a), (b), or (c) of subsection (1) were or are due and unpaid,

and such of those rents, taxes, rates, outgoings, annual sums, payments and premiums as are periodical payments, were payable wholly or in part in respect of any period subsequent to such commencement or to such date of possession, as the case may be, then such lastmentioned rents, taxes, rates, outgoings, 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 paragraphs (a), (b), and (c) of subsection (1) as would otherwise have been payable as interest to the person entitled to the interest of the mortgage debts 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 the trustee deems it necessary so to do, apply income of the mortgaged property received by the trustee after the commencement of the [Conveyancing, Trustee and Probate \(Amendment\) Act 1938](#) 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.

### **39B Validation of certain payments by trustee-mortgagee in possession**

In any case in which, prior to the commencement of the [Conveyancing, Trustee and Probate \(Amendment\) Act 1938](#), a trustee was entitled either severally or as a co-mortgagee to a debt secured by a mortgage of land in trust as to the whole or part of such debt for persons by way of succession and the trustee, having entered into possession of the mortgaged property, has, before such commencement, applied or shall, after such commencement apply bona fide the net income of the mortgaged property received by the trustee before such commencement in payment of any rents, rates, taxes, insurance premiums, outgoings or annual sums on the mortgaged property or of the interest on prior incumbrances on the mortgaged property, or in executing necessary repairs thereto, then—

- (a) the trustee shall not be liable for breach of trust by reason of the trustee's having so applied the income of the mortgaged property and shall not be liable personally to make any recoupment in respect of any income so applied by the trustee before or after such commencement, and
- (b) the person entitled to the income of the mortgage debt—



- (i) shall not be entitled to any recoupment out of the capital of the mortgage debt of any moneys payable to the person as interest and so applied by the trustee prior to the twenty-sixth day of May, one thousand nine hundred and thirty-three, except such part of such moneys as were applied by the trustee in payment of any rents, rates, taxes, insurance premiums, outgoings or annual sums accrued due prior to the trustee's possession, but such moneys, except such lastmentioned part (if any), shall as between the persons respectively entitled to the income and capital of the mortgage debt be deemed to be arrears of interest and the amount of moneys secured by the mortgage recovered by the trustee whether by repayment or on realisation of the security or otherwise shall be apportioned accordingly,
- (ii) shall be entitled to recoupment out of the capital of the mortgage debt of any moneys payable to the person as interest and so applied by the trustee after the twenty-fifth day of May, one thousand nine hundred and thirty-three.

#### **40 Powers**

- (1) Where trust property consists of or includes any share or interest in property or the proceeds of the sale of property not vested in the trustee, or any other thing in action, the trustee on the same falling into possession, or becoming payable or transferable—
  - (a) may agree upon or ascertain the amount or value thereof or any part thereof in such manner as the trustee may think fit,
  - (b) may accept in or towards satisfaction thereof, at the market or current value, or upon any valuation or estimate of value which the trustee shall think fit, any securities authorised by the instrument, if any, creating the trust or by law for the investment of money subject to the trust,
  - (c) may allow any deductions for duties costs charges and expenses which the trustee may think proper or reasonable, and
  - (d) may execute any release in respect of the premises, so as effectually to discharge all accountable parties from all liability in respect of any matters coming within the scope of such release.

The trustee shall not be responsible for any loss occasioned by any act or thing so done by the trustee in good faith.

- (2) Unless and until required in writing so to do by some person beneficially interested under the trust or by the guardian of that person's person or estate, and unless also due provision is made to the trustee's satisfaction for payment of the costs of any proceedings required to be taken, the trustee shall not be under any obligation—
  - (a) to apply for any stop or other like order upon any securities or other property out of or on which such share or interest or other thing in action 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 or any of them or any part thereof are for the time being or had at any time been vested.
- (3) The trustee may if he or she thinks fit refer any of the matters mentioned in subsection (2) to the person beneficially entitled or to the guardian of that person's person or estate.
- (4) The trustee shall not be chargeable with breach of trust by reason of any omission in any of the matters mentioned in subsection (2), except when required and upon due provision made as therein mentioned.
- (5) Nothing in this section shall relieve a trustee of the obligation to get in and obtain payment or transfer of any such share or interest or other thing in action on the same falling into possession.
- (6) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (7) This section applies to trusts created either before or after the commencement of this Act.

#### **41 Insurance**

- (1) A trustee may insure against loss or damage, whether by fire or otherwise, any insurable property, and against any risk or liability against which it would be prudent for a person to insure if the person were acting on the person's own behalf.
- (2) The insurance may be for any amount, provided that, together with the amount of any insurance already on foot, the total shall not exceed the insurable value or liability.
- (3) The premiums may be paid by the trustee 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 the income.
- (4) This section applies if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (5) This section applies to trusts created either before or after the commencement of this Act.

## **42 Application of insurance money**

- (1) Where a policy of insurance against the loss or damage of any property subject to a trust, whether by fire or otherwise, has been kept up under any trust in that behalf, or under any power statutory or otherwise, or in performance of any obligation statutory or otherwise, the money receivable by a trustee under the policy shall be capital money for the purposes of the trust.
- (2) If the money is receivable in respect of property held upon trust for sale, the same shall be held upon the trusts and subject to the powers and provisions applicable to money arising by a sale under the trust.
- (3) In any other case the money 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) The money or any part thereof may also 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.
- (5) Any such application by the trustees 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.
- (6) Nothing in this section shall prejudice or affect the right of any person to require the money or any part thereof to be applied in rebuilding, reinstating or repairing the property lost or damaged.
- (7) Nothing in this section shall prejudice or affect the rights of any mortgagee lessor or lessee, whether under any statute or otherwise.
- (8) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (9) This section applies to trusts and to policies created or effected either before or after the commencement of this Act, but only to money received after the commencement of this Act.

## **42A Maintenance for adult beneficiaries**

- (1) If property is held in trust for an adult beneficiary for any kind of interest, whether vested or contingent or absolute or liable to be divested, the trustee may pay the beneficiary, or otherwise apply the whole or any part of the income of the property for or towards the maintenance, education or benefit of the beneficiary.
- (2) This section—
  - (a) applies only if and to the extent a contrary intention is not expressed in the

instrument, if any, creating the trust, and

(b) has effect subject to the terms and provisions of the instrument.

(3) This section extends to trusts created before the commencement of this section.

(4) In this section—

**adult beneficiary** means a beneficiary who is not an infant.

**Note—**

Sections 43 and 43A make provision for the payment or application of trust income for or towards the maintenance or education of infant beneficiaries based on when the instrument creating the trust came into operation.

**43 Maintenance for infant beneficiaries and accumulation—instruments that came into operation on or after 1 March 1926**

(1) Where any property is held in trust for a person who is for the time being an infant for any interest whatsoever, whether vested or contingent, and whether absolute or liable to be divested, the trustee may at the trustee's sole discretion pay to the parent or guardian, if any, of the infant, or to the person with whom the infant is for the time being residing, or otherwise apply to the whole or any part of the income of the property, for or towards the maintenance education or benefit of the infant.

(1A) The power conferred by subsection (1) extends to the payment, after the commencement of the *Minors (Property and Contracts) Act 1970*, of income to an infant who has reached the age of eighteen years, but this subsection does not limit the generality of subsection (1).

(2) The power conferred by subsection (1) may be exercised whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the maintenance or education of the infant, or not.

(3) The power conferred by subsection (1) shall not prejudice or affect any prior interest in or charge over the property—

Provided that where the interest for which the property is held in trust for the infant is future or contingent, and the trust for the infant would not, apart from the provisions of this section, carry the intermediate income, and the same is not expressly or specifically disposed of but would pass to some other person in virtue only of an interest to which that other person is entitled under a residuary or a general gift in the instrument, if any, creating the trust, or in the absence of such a gift then as upon intestacy or as upon a resulting trust, the trust for the infant shall, during the infancy, if the interest of the infant so long continues, be deemed to carry the intermediate income, and the interest of such person shall not be deemed to be a prior interest within the meaning of this subsection.

- (4) During the infancy, if the interest of the infant so long continues, the trustee shall accumulate all the residue of the income in the way of compound interest by investing the same, and the resulting income thereof from time to time on securities on which the trustee is by the instrument, if any, creating the trust, or by law authorised to invest the trust money.
- (5) During the infancy, if the interest of the infant so long continues, the trustee may at any time, if he or she thinks fit, apply the accumulations or any part thereof as if the same were income arising in the then current year.
- (6) In the following cases the trustee shall hold the accumulations absolutely for the infant, that is to say—
  - (a) if otherwise than by virtue of this section the infant is entitled to the income which has been accumulated, or
  - (b) if under the provisions of the instrument, if any, creating the trust, the infant is entitled on attaining the age of twenty-one years or on the occurrence of some prior event to a vested interest, whether absolute or liable to be divested, in fee-simple or in full ownership in the property from which the income arose, and the infant in fact becomes entitled to such vested interest.
- (7) Any accumulations held in trust in accordance with subsection (6) shall be so held without prejudice to any provision with respect thereto contained in any settlement made by the infant under any statute during the infant's infancy.
- (8) Except in the cases mentioned in subsection (6), and notwithstanding that the person for whom the property is held in trust had a vested interest in the income by virtue of this section, the trustee shall hold the accumulations as an accretion to the capital of the property from which the accumulations arose, and as one fund with such capital for all purposes, and so that if such property is a settled estate within the meaning of Part 4 of the *Conveyancing and Law of Property Act 1898*, the accumulations shall be held on the same trusts as if the same were capital money arising therefrom.
- (9) This section extends 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 absolutely.
- (9A) This section does not affect such right as an infant may have in consequence of the *Minors (Property and Contracts) Act 1970* upon reaching the age of eighteen years or otherwise, to call for payment or transfer of property to which the infant is absolutely entitled.
- (10) This section applies only if and as far as a contrary intention is not expressed in the

instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to the provisions therein contained.

- (11) This section, and the repeal of section 18 of the *Trustee Act 1898* by this Act, apply only where the instrument, if any, creating the trust comes into operation after the commencement of this Act.

**Note—**

This Act repealed all of the provisions of the *Trustee Act 1898 (the 1898 Act)*, other than section 1 (Name of Act) and section 18. The above subsection limited the ongoing application of section 18 of the 1898 Act to any instrument creating a trust where the instrument came into operation before 1 March 1926. Section 43A contains provisions transferred from section 18 of the 1898 Act by the *Statute Law (Miscellaneous Provisions) Act 2011*.

**43A Maintenance for infant beneficiaries and accumulation—instruments that came into operation before 1 March 1926**

- (1) Subsections (2)–(5) re-enact (with minor modification) section 18 of the *Trustee Act 1898* and are transferred provisions to which section 30A of the *Interpretation Act 1987* applies.
- (2) In all cases where any property is held by trustees in trust for an infant, either absolutely or contingently on his or her attaining the age of 21 years, or on the occurrence of any event previously to his or her attaining that age, such trustees may pay to the guardian (if any) of such infant, or may otherwise apply for or towards the maintenance or education of such infant, the whole or any part of the income to which such infant may be entitled in respect of such property, whether there be any other fund applicable to the same purpose or any other person bound by law to provide for such maintenance or education or not, and such trustees shall accumulate all the residue of such income by way of compound interest by investing the same, and the resulting income thereof from time to time, in proper securities for the benefit of the person who shall ultimately become entitled to the property from which such accumulation has arisen—
- (3) Provided that such trustees may at any time apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

**Note—**

Subsections (2) and (3) re-enact section 18 (1) and (2) of the *Trustee Act 1898 (the 1898 Act)* and, as provided by subsection (1), are transferred provisions to which section 30A of the *Interpretation Act 1987* applies. They were transferred by the *Statute Law (Miscellaneous Provisions) Act 2011* to enable the repeal of the 1898 Act. On the commencement of this Act on 1 March 1926, those provisions were repealed by the Schedule to this Act, except to the extent provided by section 43 (11). As a result they applied only where the instrument creating the trust came into operation before that date.

- (4) The power conferred by subsection (2) extends to the payment, after the commencement of the *Minors (Property and Contracts) Act 1970*, of income to an infant who has reached the age of 18 years, but this section does not limit the generality of subsection (1).

- (5) This section does not affect such right as an infant may have in consequence of the *Minors (Property and Contracts) Act 1970*, upon reaching the age of 18 years or otherwise, to call for payment or transfer of property to which he or she is absolutely entitled.

#### **44 Advancement**

- (1) Where under a trust a person is entitled to the capital of the trust property or any share thereof, the trustee may from time to time pay or apply any capital money subject to the trust, not exceeding altogether in amount one-half of the value of the property or share, for the advancement or benefit of such person or where such person is an infant, for the maintenance, education, advancement or benefit of such person in such manner as the trustee shall in the trustee's absolute discretion think fit.
- (1A) (Repealed)
- (2) The power conferred by this section may be exercised whether the person is entitled absolutely or contingently on the person's attaining any specified age or on the occurrence of any other event, or subject to a gift over on the person's death under any specified age or on the occurrence of any other event, and, notwithstanding that the interest of the person so entitled is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which the person belongs.
- (3) The power conferred by this section may be exercised whether the person is so entitled in possession or in remainder or reversion.
- (4) If the person is or becomes absolutely and indefeasibly entitled to share in the trust property, the money so paid or applied shall be brought into account as part of such share.
- (5) No such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and of the age of eighteen years or upwards and consents in writing to the payment or application.
- (6) This section applies only where the trust property consists of money or securities or property held upon trust for sale calling in and conversion, and the money or securities or the proceeds of the sale calling in and conversion are not by statute or in equity considered as land, or applicable as capital money for the purposes of Part 4 of the *Conveyancing and Law of Property Act 1898*.
- (7) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

- (8) From and after the commencement of the *Conveyancing, Trustee and Probate (Amendment) Act 1938* this section shall apply to trusts created before as well as after the commencement of the lastmentioned Act.

#### 45 Protective trusts

- (1) Income may be directed to be held “on protective trusts” for the benefit of any person (in this section called **the principal beneficiary**) for the period of the principal beneficiary’s life or for any less period, and where there is such a direction the income shall during the period (in this section called **the trust period**), and without prejudice to any prior interest, be held upon trust as provided in this section.
- (2) During the trust period, or until the trust of the income fails or determines during the subsistence of the trust period, the income shall be held upon trust for the principal beneficiary.
- (3) The trust of the income shall fail or determine in any of the following cases, as well as on the termination of the trust period, whichever first happens, that is to say, if the principal beneficiary does or attempts to do or suffers any act or thing or if any event happens whereby if the income were payable to the principal beneficiary absolutely, the principal beneficiary would be deprived of the right to receive the same or any part thereof.
- (4) The trust of the income shall so fail or determine, whether the principal beneficiary does or attempts to do or suffers the act or thing before or after the termination of any prior interest.
- (5) The trust of the income shall not so fail or determine by reason of an advance under any statutory or express power.
- (6) If the trust of the income fails or determines during the subsistence of the trust period, the income shall during the residue of that period be held upon trust for the application thereof—
- (a) for the maintenance, support, or otherwise for the benefit of all or any one or more exclusively of the others of the principal beneficiary and his or her spouse, if any, and his or her children or more remote issue, if any, as the trustee in the trustee’s absolute discretion thinks fit, or
- (b) if there is no spouse or issue of the principal beneficiary in existence, then for the maintenance, support, or otherwise for the benefit of all or any one or more exclusively of the other or others of the principal beneficiary and the persons who would, if the principal beneficiary were actually dead, be entitled to the trust property or the income thereof or of the annuity fund, if any, or arrears of the annuity, as the case may be, as the trustee in the trustee’s absolute discretion thinks fit.



- (7) This section extends to an annuity or other periodical income payment directed to be held on protective trusts.
- (8) Any trusts implied by this section may be set aside in any case where an express trust to the same effect might be set aside.
- (9) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (10) This section applies only to trusts created after the commencement of this Act.
- (11) In this section—

**spouse** means—

- (a) the person to whom a person is legally married (including the husband or wife of a person), or
- (b) the other party to a de facto relationship in which the parties have cohabited for a period of not less than 2 years,

but where more than one person would so qualify as a spouse, means only the last person so to qualify.

**Note—**

“De facto relationship” is defined in section 21C of the [Interpretation Act 1987](#).

- (11A) In this section, a reference to a child of a person includes, if the person is in a de facto relationship, or a domestic relationship within the meaning of the [Property \(Relationships\) Act 1984](#), a reference to the following—
  - (a) a child born as a result of sexual relations between the parties to the relationship,
  - (b) a child adopted by both parties,
  - (c) in the case of a de facto relationship between a man and a woman, a child of the woman of whom the man is the father or of whom the man is presumed, by virtue of the [Status of Children Act 1996](#), to be the father (except where the presumption is rebutted),
  - (d) in the case of a de facto relationship between 2 women, a child of whom both of those women are presumed to be parents by virtue of the [Status of Children Act 1996](#),
  - (e) a child for whose long-term welfare both parties have parental responsibility (within the meaning of the [Children and Young Persons \(Care and Protection\) Act 1998](#)).

- (12) Subsection (11) does not apply in relation to a trust created before the commencement of the amendments made to this Act by the *Property (Relationships) Legislation Amendment Act 1999*.

**45A Equitable life tenant—conditions on entry into possession**

- (1) In this section, **prescribed trustee** means the NSW Trustee or a trustee company.
- (2) Where the equitable life tenant of land which is comprised in an estate committed to the administration or management of a prescribed trustee is entitled to the possession of that land or to the receipt of the rents and profits of that land, the prescribed trustee may, by notice in writing served on that life tenant, require the life tenant to comply with such conditions as to—
- (a) the keeping in repair of the buildings and other erections upon the land,
  - (b) the payment of rents, taxes, rates and other outgoings affecting the land that are not of a capital nature, and
  - (c) the payment of premiums in respect of policies of insurance against the loss of or damage to the buildings and other erections upon the land,
- as the prescribed trustee thinks fit.
- (3) If an equitable life tenant of land breaches any condition which a prescribed trustee has required the life tenant to comply with pursuant to subsection (2), the prescribed trustee may serve a notice on the life tenant stating that unless the breach is rectified within a reasonable time specified in the notice the prescribed trustee will be entitled to enter into possession of the land and to receive the rents and profits of the land for the purpose of rectifying the breach.
- (4) If a breach of a condition is not rectified within the time specified in the notice served on an equitable life tenant of land under subsection (3)—
- (a) the prescribed trustee is entitled to enter into possession of the land and to receive the rents and profits of the land for the purpose of rectifying the breach, and
  - (b) the life tenant ceases to be so entitled until the breach is rectified.
- (5) Where a prescribed trustee rectifies a breach of condition imposed on an equitable life tenant of land, any money received by the prescribed trustee pursuant to subsection (4) that was not applied for the purpose of rectifying the breach shall be paid to that life tenant.
- (6) A prescribed trustee shall not require an equitable life tenant of land to comply with any condition pursuant to this section if—

- (a) any instrument by which the estate concerned was committed to the administration or management of the prescribed trustee—
  - (i) expressly prohibits the prescribed trustee from exercising the power conferred by this section, or
  - (ii) expressly excuses the life tenant from complying with the condition, or
- (b) the Court so orders.

(7) A notice under this section may be served either personally or by post.

#### **46 Appropriation**

- (1) A trustee may appropriate any part of the property subject to the trust or of the real or personal estate of a testator or intestate in the actual condition or state of investment thereof in or towards satisfaction of a legacy or of any share or interest in the property or estate, whether settled or not, as to the trustee may seem just and reasonable, according to the respective rights of the persons interested in the property or estate, provided that—
  - (a) the appropriation shall not be made so as to affect prejudicially any specific gift devise or bequest,
  - (b) the appropriation shall be made with the consent, if any, required by this section,
  - (c) in making the appropriation the trustee shall have regard to the rights of any person who may thereafter come into existence or who cannot be found or ascertained at the time of the appropriation or as to whom it is uncertain at that time whether he or she is living or dead, and of any other person whose consent is not required by this section.
- (2) The power of appropriation conferred by this section shall extend and apply to—
  - (a) property over which a testator exercises a general power of appointment,
  - (b) setting apart a fund to answer an annuity by means of the income of the fund or otherwise, provided that at the time of appropriation the fund would be sufficient, if it were invested in Government securities of the Commonwealth of Australia at par, to provide an income exceeding the annuity by at least fifteen per centum thereof,
  - (c) setting apart a sum of money in or towards the satisfaction of a legacy share or interest.
- (3) For the purpose of an appropriation under this section the trustee may ascertain and fix the value of the respective parts of the property or estate and the liabilities to which the property or estate is subject as the trustee may think fit, and shall for that

purpose employ a duly qualified valuer in any case where such employment may be necessary.

- (4) An appropriation made pursuant to this section shall bind all persons interested in the property or estate, including the persons whose consent is not required, and to the extent to which the appropriation is made in or towards satisfaction of the legacy share or interest, the rights to which any person is entitled in virtue of the legacy share or interest shall be restricted to the part of the property or estate so appropriated and shall not extend to any other part thereof which may be dealt with or disposed of freed from any such rights.
- (5) An appropriation of property whether it is or is not an investment authorised by law or by the instrument, if any, creating the trust for the investment of money subject thereto, shall not, except as otherwise provided by this section, be made thereunder for the benefit of a person absolutely and beneficially entitled in possession, unless the person is of the age of eighteen years or upwards and of full capacity and the person consents in writing.
- (6) An appropriation shall not, except as otherwise provided in this section, be made thereunder in respect of any settled legacy share or interest, unless either the trustee thereof, if any, not being also the trustee making the appropriation, or the person who may for the time being be entitled to the income, consents in writing.
- (7) If the person whose consent is required under subsection (5) or subsection (6), not being the trustee of a settled legacy share or interest—
  - (a) is a minor, the consent may be given on the person's behalf by the person's parents or parent with whom the person resides or in whose custody the person is, as the case may be, or by the person's testamentary or other guardian, or if there is no such parent or guardian, by the Court,
  - (b) is an insane or incapable person, the consent may be given on the person's behalf by the person's committee or manager, or if there is no such committee or manager, by the Court,
  - (c) is an insane patient, the consent may be given on the person's behalf either by the Master in Lunacy or by the Court,
  - (d) is a person who cannot be found or ascertained, or as to whom it is uncertain whether he or she is living or dead, the consent may be given on the person's behalf by the Court.
- (8) If the appropriation is of an investment authorised by law or by the instrument, if any, creating the trust for the investment of money subject thereto no consent save of the trustee, if any, of a settled legacy share or interest shall be required on behalf of—
  - (a) a minor, where there is no parent or guardian,

- (b) an insane or incapable person or an insane patient, where there is no committee or manager,
- (c) a person who may come into existence after the time of appropriation, or who cannot be found or ascertained at that time, or as to whom it is uncertain at that time whether he or she is living or dead.

(8A) Notwithstanding anything contained in paragraph (b) of subsection (1) or in subsection (5) or subsection (7) the consent of the annuitant shall not be necessary in any case in which the trustee, after having set apart a fund to answer the annuity, which fund at the time of appropriation would be sufficient, if it were invested in Government securities of the Commonwealth of Australia at par, to provide an income exceeding the annuity by at least twenty per centum thereof, has actually invested the fund in such securities.

(9) Where an appropriation is made under this section in respect of a settled legacy share or interest, the property appropriated shall be subject to all trusts for sale and powers of leasing disposition management and varying investments which would have been applicable thereto or to the legacy share or interest in respect of which the appropriation is made, if no such appropriation had been made, provided that nothing in this section shall relieve the trustee of the settled legacy share or interest, where the trustee is not the trustee making the appropriation, from the obligation to obtain payment or transfer of the property appropriated, if or when the same is so payable or transferable.

(10) Where the exercise of any power of sale conferred on a legal representative by section 153 of the *Conveyancing Act 1919* is subject to any condition or to the leave of the Court being obtained, the legal representative shall not be entitled to appropriate any part of the real estate under the powers conferred by this section, except with the leave of the Court.

(11) The trustee may make any conveyance or assent which may be necessary for giving effect to an appropriation under this section.

(12) Any appropriation or disposition of property made in purported exercise of the powers conferred by this section shall, in favour of a purchaser in good faith, be deemed to have been made in accordance with the requirements of this section, and after all requisite consents, if any, have been given.

The protection afforded by this subsection shall extend to the Registrar-General Crown Solicitor or other person registering or certifying title.

(13) In this section a **settled legacy share or interest** means a legacy share or interest settled by the trust instrument, if any, or by any other instrument, and includes any legacy share or interest to which a person is not absolutely entitled in possession at the date of the appropriation.

- (14) In this section a **manager** means the person appointed under the *Lunacy Act 1898* to undertake the care and management of the property of an incapable person, and an **insane patient** means an insane patient within the meaning of that Act.
- (15) This section shall not prejudice any other power of appropriation conferred by law or by the instrument, if any, creating the trust, and the powers conferred by this section shall be in addition to any such power.
- (16) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (17) This section applies to trusts created either before or after the commencement of this Act.

#### **47 Payment to the NSW Trustee or a trustee company**

- (1) Where any money is held in trust for a minor, or for a person who is unable to give a good discharge or cannot be found, the trustee may pay the money to the NSW Trustee or, except where the money is held in trust for a person who cannot be found, a trustee company, and on such payment shall furnish the NSW Trustee or trustee company, as the case may be, with a copy of the trust instrument, or where there is no such instrument, then with a statutory declaration setting forth the trusts on which the money is held and shall also furnish such information as to the disability or identity of the person for whom such money is held in trust as the public trustee or trustee company, as the case may be, may require.
- (2) The NSW Trustee or trustee company shall hold the money in trust for the minor or for such other person in accordance with the trusts affecting the same.
- (3) Where the money is held in trust for a minor or an insane or incapable person, the NSW Trustee or trustee company may at the NSW Trustee's or the trustee company's discretion exercise in respect of such money the powers conferred upon the NSW Trustee or trustee company, as the case may be, by this or any other Act in respect of money held in trust for a minor.
- (4) This section applies to trusts created either before or after the commencement of this Act.

#### **48 Receipts**

- (1) The receipt in writing of trustees or of a sole trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to the trustees or the sole trustee under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

- (2) This section applies to trusts created either before or after the commencement of this Act.

#### **49 Compounding**

- (1) The trustee or the majority acting together, or a sole trustee where by the instrument, if any, creating the trust, or by statute, a sole trustee is authorised to execute the trusts and powers thereof, may, if and as the trustees or the majority, or the sole trustee, may think fit—
- (a) accept any property before the time at which it is made transferable or payable,
  - (aa) sever and apportion any blended trust funds or property,
  - (b) accept any composition or any security, real or personal, for any debt or for any property claimed,
  - (c) allow any time for payment for any debt,
  - (d) compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the estate or trust,
  - (e) for any of those purposes enter into, give, execute, and do such agreements, instruments of composition or arrangements, releases, and other things, as to the trustees or the majority, or the sole trustee, seem expedient.
- (2) An executor or administrator may pay or allow any debt or claim on any evidence that the executor or administrator thinks sufficient, and may, if and as the executor or administrator may think fit, do any of the things mentioned in paragraphs (a) (b) (c) (d) and (e) of subsection (1).
- (3) The trustees trustee executor or administrator shall not be responsible for any loss occasioned by any act or thing so done by the trustees, trustee, executor or administrator in good faith.
- (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 shall have effect subject to the terms of that instrument, and to the provisions therein contained.
- (5) This section applies to trusts created either before or after the commencement of this Act.

#### **50 Deposit for safe custody**

- (1) A trustee may deposit any documents held by the trustee relating to the trust, or to the trust property, with any bank, building society or credit union or with any incorporated company whose business it is to undertake the safe custody of documents.

- (2) Any sum payable in respect of the deposit may be paid out of the income of the trust property.
- (3) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (4) This section applies to trusts created either before or after the commencement of this Act.

## **51 Audit**

- (1) A trustee may, in his or her 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 the person as the person shall require.
- (2) The costs of the examination or audit, including the fee of the person making the examination or audit, shall be paid out of the capital or income of the trust property, or partly in one way and partly in the other, as the trustee shall in his or her absolute discretion think fit.
- (3) In default of any direction, in any special case, by the trustee to the contrary, costs attributable to capital shall be borne by capital and those attributable to income by income.
- (4) Where the trustee is the NSW Trustee or an incorporated company, nothing in this section shall, except in the case of a business forming part of the trust property, authorise any costs or fee to be paid out of or borne by the capital or income of the trust property.
- (5) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (6) This section applies to trusts created either before or after the commencement of this Act.

## **52 Valuation**

- (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 any statute, from time to time, by duly qualified agents, ascertain and fix the value of any trust property in such manner as the trustee thinks proper.
- (2) Any valuation so made in good faith shall be binding upon all persons interested under the trust.



- (3) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (4) This section applies to trusts created either before or after the commencement of this Act.

### **53 Employment of agents**

- (1) A trustee may, instead of acting personally, employ and pay an agent, whether being a bank, building society or credit union or an Australian legal practitioner, stockbroker or any other person, to transact any business or do any act required to be transacted or done in the execution of the trust or in the administration of the estate.
- (2) The trustee shall be entitled to be allowed and paid all charges and expenses so incurred.
- (3) The trustee shall not be responsible for the default of any such agent if employed in good faith.
- (4) This section extends, in the case of a bank, building society, credit union, Australian legal practitioner, stockbroker or real estate agent, or in the case of a prescribed person or a person of a prescribed class, to the receipt and payment of moneys.
- (5) Nothing in this section shall authorise a trustee to employ an agent in any case where a person acting with prudence would not employ the agent to transact the business or do the act, if the business or act was required to be transacted or done in such person's own affairs.
- (6) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (7) This section applies to trusts created either before or after the commencement of this Act.

### **54 Banks, building societies and credit unions**

- (1) Where there are more than two trustees or where there are two trustees one of whom is the NSW Trustee or a trustee company and the trustees by writing under their hands authorise a bank, building society or credit union—
  - (a) to pay bills of exchange drawn upon the banking account of the trustees by two or more trustees named in that behalf in the authority, or by the NSW Trustee or a trustee company if one of the trustees and so named in that behalf in the authority, or
  - (b) to recognise as a valid endorsement upon any bill of exchange or promissory note

payable to the order of the trustees the indorsement thereon by two or more trustees named in that behalf in the authority, or by the NSW Trustee or a trustee company if one of the trustees and so named in that behalf in the authority, or where the indorsement is for collection and credit of any account of the trustees with a bank, building society or credit union, the indorsement thereon by any one or more of the trustees named in that behalf in the authority,

the bank, building society or credit union acting in pursuance of the 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 the authority—

Provided that the duration of any such authority shall be limited to a period not exceeding three months on any one occasion, except where—

- (i) the trustee or one of the trustees named in the authority is the Public Trustee or a trustee company, or
  - (ii) the authority is to indorse for collection and credit of any account of the trustees with a bank, building society or credit union.
- (2) This section shall not affect any question of the liability of any trustee for breach of trust in giving the authority.
- (3) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (4) This section applies to trusts created either before or after the commencement of this Act.

#### **54A Banker may recognise certain signatures and endorsements**

- (1) Where two or more persons in a fiduciary position (other than trustees under a will, settlement or like instrument) have deposited with a banker moneys which have been received by them as such fiduciaries, it shall be lawful for the banker, when so authorised by such person—
- (a) to pay cheques drawn on the banker by any one or more of them or by any agent authorised by them,
  - (b) to recognise as a valid endorsement upon any bill of exchange or promissory note payable to the order of such persons an endorsement by any one or more of them or any agent authorised by them.
- (2) Where any person in a fiduciary position (other than a trustee under a will, settlement or like instrument) has deposited with a banker moneys which have been received by the person as such fiduciary, it shall be lawful for the banker when so authorised by

such person—

(a) to pay cheques drawn on the banker by any agent authorised by the person,

(b) to recognise as a valid endorsement on any bill of exchange or promissory note payable to the order of such person an endorsement by any agent authorised by the person.

(3) Nothing in this section contained shall affect any liability of such persons or person to the persons towards whom they are or he or she is in a fiduciary position.

(4) In this section, **banker** includes a bank, a building society and a credit union.

## 55 Foreign property

(1) Where any property subject to a trust or forming part of the estate of a testator or intestate is in any place outside New South Wales, the trustee may appoint any person to act as the trustee's agent or attorney for any of the following purposes—

(a) selling, converting, collecting, getting in, and executing and perfecting assurances of, or managing, or cultivating, or otherwise administering the property,

(b) executing or exercising any discretion trust or power vested in the trustee in relation to the property.

(2) The agent or attorney may be so appointed with such ancillary powers, and with and subject to such provisions and restrictions as the trustee may think fit, including a power to appoint substitutes.

(3) The trustee shall not by reason only of having made the appointment, be responsible for any loss arising thereby.

(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 shall have effect subject to the terms of that instrument and to the provisions therein contained.

(5) This section applies to trusts created either before or after the commencement of this Act.

## 56 Undivided interests

(1) Where an undivided share in the proceeds of sale of land directed to be sold, or in any other property, is subject to a trust or forms part of the estate of a testator or intestate, the trustee may, without prejudice to the trust for sale affecting the entirety of the land and the powers of the trustees for sale in reference thereto, execute or exercise any trust or power vested in the trustee in relation to such share, in conjunction with the persons entitled to or having power in that behalf over the other share or shares.

- (2) This section applies notwithstanding that the trustee may be entitled to or interested in any such other share, either in the trustee's own right or in a fiduciary capacity.
- (3) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (4) This section applies to trusts created either before or after the commencement of this Act.

### **57 Two or more trustees**

- (1) Where a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.
- (2) This section applies to powers and trusts created either before or after the commencement of this Act.

### **58 Powers of attorney**

- (1) A trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the payment or act the person who gave the power of attorney was dead or had done some act to avoid the power, if this fact was not known to the trustee at the time of the trustee's so acting or paying.
- (2) Nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made.
- (3) The person so entitled shall have the same remedy against the person to whom the payment is made as he or she would have had against the trustee.
- (4) This section applies to trusts created either before or after the commencement of this Act.

### **59 Implied indemnity**

- (1) A trustee shall be chargeable only for money and securities actually received by the trustee, notwithstanding the trustee's signing any receipt for the sake of conformity.
- (2) A trustee shall be answerable and accountable only for the trustee's own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through the trustee's own wilful neglect or default.

- (3) Nothing in subsections (1) and (2) shall prejudice the provisions of the instrument, if any, creating the trust.
- (4) A trustee may reimburse himself or herself, or pay or discharge out of the trust property all expenses incurred in or about execution of the trustee's trusts or powers.
- (5) This section applies to trusts created either before or after the commencement of this Act.

## **60 Distribution after notice**

- (1) Where a trustee intends to convey or distribute any property to or among the persons entitled thereto, the trustee may give notice in the manner and form prescribed by rules of the Court of the intention so to convey or distribute the property.
- (2), (3) (Repealed)
- (4) At the expiration of the time fixed by the notice the trustee may convey or distribute the property or any part thereof to or among the persons entitled thereto, having regard only to the claims, formal or otherwise, of which the trustee then had notice.
- (5) If the notice has been given the trustee shall not, as respects the property conveyed or distributed, be liable to any person of whose claim the trustee has not had notice at the time of the conveyance or distribution.
- (6) Nothing in this section shall prejudice the right of any person to follow the property, or any property representing the same, into the hands of any person who may have received the same.
- (7) In relation to a conveyance or distribution of property after the commencement of the *Children (Equality of Status) Act 1976*, a trustee referred to in subsection (5) shall be deemed to have notice of the claim of any person whose entitlement to the property or to any part of it would have become apparent if the trustee had applied for and obtained a certificate under section 50 of the *Births, Deaths and Marriages Registration Act 1995*.
- (8) **Validation** A notice that satisfies this subsection is taken for all purposes to be a notice that complies with this section (as in force before or after the commencement of this subsection). A notice satisfies this subsection if it is given—
  - (a) in the case of a trustee who is an executor or administrator—in accordance with Rule 91 of Part 78 of the *Supreme Court Rules 1970* as in force on or after 13 January 1992, or
  - (b) in any other case—in the manner provided for by this section as in force at any time.

## **61 Distribution where estate comprises leaseholds, and in certain other cases**

- (1) Section 94 of the *Probate and Administration Act 1898* shall apply to an assignment or conveyance executed by a trustee and to the distribution of the trust property in like manner as that section applies to an assignment or conveyance by a legal representative and to the distribution of the estate of a testator or intestate.
- (2) Nothing in this section shall prejudice the right of the lessor or grantor and the persons deriving title under the lessor or grantor to follow the trust property into the hands of the persons amongst whom the same may have been distributed.
- (3) This section applies only to assignments or conveyances executed after the commencement of this Act.

## **61A Personal liability of legal representative or trustee**

The legal representative or trustee of the will 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 such deceased person as soon as such legal representative or trustee 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 such registration whether made by the company or its directors or by its liquidators in a winding up, but nothing herein contained shall affect any right which the company or its liquidator may have to follow the assets of such deceased person into the hands of any persons amongst whom the same have been distributed or who have received the same.

## **62 Notice**

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

## **63 Advice**

- (1) A trustee may apply to the Court for an opinion advice or direction on any question respecting the management or administration of the trust property, or respecting the interpretation of the trust instrument.
- (2) If the trustee acts in accordance with the opinion advice or direction, the trustee shall be deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in the subject matter of the application, provided that the trustee has not been guilty of any fraud or wilful concealment or misrepresentation in obtaining the opinion advice or direction.
- (3) Rules of court may provide for the use, on an application under this section, of a

written statement signed by the trustee or the trustee's Australian legal practitioner, or for the use of other material, instead of evidence.

- (4) Unless the rules of court otherwise provide, or the Court otherwise directs, it shall not be necessary to serve notice of the application on any person, or to adduce evidence by affidavit or otherwise in support of the application.
- (5)-(7) (Repealed)
- (8) Where the question is who are the beneficiaries or what are their rights as between themselves, the trustee before conveying or distributing any property in accordance with the opinion advice or direction shall, unless the Court otherwise directs, give notice to any person whose rights as beneficiary may be prejudiced by the conveyance or distribution.
- (9) The notice shall state shortly the opinion advice or direction, and the intention of the trustee to convey or distribute in accordance therewith.
- (10) Any person who claims that the person's rights as beneficiary will be prejudiced by the conveyance or distribution may within such time as may be prescribed by rules of court, or as may be fixed by the Court, apply to the Court for such order or directions as the circumstances may require, and during such time and while the application is pending, the trustee shall abstain from making the conveyance or distribution.
- (11) Subject to subsection (10), and subject to any appeal, any person on whom notice of any application under this section is served, or to whom notice is given in accordance with subsection (8), shall be bound by any opinion advice direction or order given or made under this section as if the opinion advice direction or order had been given or made in proceedings to which the person was a party.

## **Division 3 Delegation**

### **64 Execution of trust**

- (1) Where a trustee is absent from New South Wales or is about to depart therefrom, the trustee may by registered deed delegate the execution of the trust.
- (2) A trustee may not so delegate, unless the trustee's co-trustees or co-trustee, and such other person, if any, as is empowered to appoint trustees, consent by the same or other registered deed to the delegation, and the delegation is to the NSW Trustee or to a trustee company or to a person residing in New South Wales who is either a co-trustee or is capable of being appointed a trustee of the trust.
- (3) The delegation may be made in respect of the whole or any part of the trust.
- (3A) A delegation given under the authority of this section by a trustee who is the legal representative of a deceased person shall, unless the contrary is expressed in the

deed of delegation, operate to delegate not only the execution of the duties incident to the office of legal representative of such deceased person (including the exercise and discharge of all the powers, authorities, duties and functions of the trustee as such legal representative) but also the execution of the trusts which devolve upon such trustee when the administration of the estate of such deceased person is completed.

This subsection shall be deemed to have commenced on the first day of March, one thousand nine hundred and twenty-six.

- (4) The delegation shall not operate beyond two years from the date of the deed and shall be made on one occasion only, unless after the delegation the trustee has returned to New South Wales and is again absent or about to depart therefrom, provided that in the event of the delegate dying or the delegation being revoked, another delegation may be made for the balance of the period of two years.
- (5) The delegation shall not be made, whether to a co-trustee or to any other person, unless there will be remaining in New South Wales to perform the trust the NSW Trustee or a trustee company or two persons whether as trustee or as delegate.
- (6) Two or more trustees may delegate concurrently.
- (7) A trustee who delegates his or her trust shall remain answerable for all acts and omissions of the delegate within the scope of the delegation as if they were the acts and omissions of the trustee, and the delegate shall be subject to the jurisdiction and powers of any Court so far as respects the execution of the trust in the same manner as if the delegate were the trustee.
- (8) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained, provided that nothing in this subsection shall affect the jurisdiction or powers of any Court.
- (9) This section applies to trusts created either before or after the commencement of this Act.

## **65 Consent to exercise of trust or power**

- (1) Where a person whose consent is required by any instrument to the exercise of a trust or power is absent from New South Wales or is about to depart therefrom, the person may by registered deed delegate the right to consent to the NSW Trustee, or a trustee company.
- (2) Two or more persons may delegate concurrently.
- (3) The person who delegates and the delegate shall be severally liable for an improper exercise of the right to consent.



- (4) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the power or trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (5) This section applies to trusts or powers created either before or after the commencement of this Act.

#### **66 Persons dealing with delegate**

- (1) No person dealing in good faith with the delegate under any deed of delegation authorised by this Part shall, by reason only that by the delegation or any evidence or document in connection therewith it appears that the delegate is acting in the execution of any trust, be affected for any purpose with notice of the trust.
- (2) This section applies to dealings before as well as after the commencement of this Act.

#### **67 Power of attorney**

Every delegation under this Part is taken to be a power of attorney within the meaning of the [Powers of Attorney Act 2003](#) and that Act (with the exception of Part 3) applies to that delegation, whether the delegation was made before or after the commencement of that Act.

#### **68 Registration**

- (1) Any instrument by which a trust or the right to consent to the exercise of a trust or power is delegated may be registered in the office of the Registrar-General as prescribed by regulation under the [Conveyancing Act 1919](#).
- (2) This section extends to a delegation, whether under this Part or under the provisions of the instrument creating the trust or power or otherwise, and whether the trust or power does or does not relate to land subject to the provisions of the [Real Property Act 1900](#).
- (3) This section extends to a consent to a delegation.
- (4) This section applies to instruments executed either before or after the commencement of this Act.

### **Division 4 Statute of limitations**

#### **69 (Repealed)**

## **Part 3 Powers of the Court**

### **Division 1 New trustees and vesting orders**

#### **70 New trustees**

- (1) The Court may 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) The appointment may be made 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.
- (3) In particular and without prejudice to the generality of any other provision of this section, the Court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of a serious indictable offence, or is a bankrupt, or being a corporation is in liquidation or is dissolved.
- (4) In the case of any trust for a charity the Court may make an order for the appointment of a new trustee on such evidence of the trust as the Court deems sufficient.
- (5) This section shall be deemed to authorise the Court to make an order for the reappointment of the continuing trustees alone as new trustees.
- (6) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.
- (7) (Repealed)
- (8) Every trustee appointed under this section shall, as well before as after the trust property becomes vested in the trustee, have the same powers authorities and discretions, and may in all respects act as if the trustee had been originally appointed a trustee by the instrument, if any, creating the trust.
- (9) Nothing in this section shall give power to appoint an executor or administrator.

#### **71 Vesting orders**

- (1) The Court may make an order in this Act called a vesting order, which shall have effect as provided in section 78.
- (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 a minor,
  - (e) where a trustee is an insane or an incapable person or person of unsound mind,
  - (f) where a trustee is out of the jurisdiction of the Court,
  - (g) where a trustee cannot be found,
  - (h) where a trustee being a corporation is dissolved,
  - (i) 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 twenty-eight days next after a request in writing has been made to the trustee by the person so entitled,
  - (j) where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any property,
  - (k) where, as to the last trustee known to have been entitled to or possessed of any property, it is uncertain whether he or she is living or dead,
  - (l) where there is no legal representative of a trustee who was entitled to or possessed of any property or where it is uncertain who is the legal representative of a trustee who was entitled to or possessed of any property,
  - (m) 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,
  - (n) where the Court might have made a vesting order if this Act had not been passed,
  - (o) where property is vested in a trustee, whether by way of mortgage or otherwise, either solely or jointly with any other person, and it appears to the Court to be expedient to make a vesting order.
- (3) The provisions of paragraphs (d), (e), (f), (g), (h), and (i) of subsection (2) extend to a trustee entitled to or possessed of any property either solely or jointly with any other person.
- (4) Where the order is consequential on the appointment of a new trustee, the property shall be vested in the persons who, on the appointment are the trustees.
- (5) Where the vesting order is consequential on the retirement of one or more of a

number of trustees, the property may be vested in the continuing trustees alone.

- (6) Subject to the provisions of subsection (4), the vesting order may vest the property in any such person in any such manner and for any 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.
- (7) The fact that the order is founded or purports to be founded on an allegation of the existence of any of the matters mentioned or referred to in subsection (2), shall be conclusive evidence of the matter so alleged in any Court upon any question as to the validity of the order.
- (8) This section shall not prevent the Court from directing a reconveyance or the payment of costs occasioned by any such order if improperly obtained, or from making a further vesting order.
- (9) 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 the same in the person who would have been entitled to the estate which determined, had it remained subsisting estate.

## **72 Contingent rights of unborn persons**

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

## **73 (Repealed)**

## **74 Minor or insane mortgagee**

Where any person entitled to or possessed of property by way of mortgage is a minor, or is an insane or an incapable person or person of unsound mind, the Court may make a vesting order vesting or releasing or disposing of the property, with the right to transfer or call for a transfer of property, or to receive the dividends or income thereof, or to sue for or recover property or any interest in respect thereof, in like manner as in the case of a trustee being a minor, or insane or incapable person, or person of unsound mind.

## **75 Deceased mortgagee**

- (1) Where a mortgagee of land has died, the Court may make a vesting order vesting the land in such person or persons in such manner and for such estate as the Court may direct—

Provided that where the land is subject to the provisions of the *Real Property Act 1900* the order may discharge the mortgage.

- (2) The order may only be made if the mortgagee did not enter into possession, and the money due in respect of the mortgage has been paid to a person entitled to receive the same, or that last-mentioned person consents to any order for the reconveyance of the land.
- (3) The order may be made in any of the following cases, namely—
  - (a) where the legal representative of the mortgagee is out of the jurisdiction of the Court or cannot be found,
  - (b) where the legal representative of the mortgagee, on demand made by or on behalf of a person entitled to require a conveyance of the land has stated in writing that he or she will not convey the same or does not convey the same for the space of twenty-eight days next after a proper deed for conveying the land has been tendered to him or her by or on behalf of the person so entitled,
  - (c) where it is uncertain as to the legal representative of the mortgagee whether he or she is living or dead,
  - (d) where there is no legal representative of a mortgagee who has died intestate as to the land, or where the mortgagee has died and it is uncertain who is the mortgagee's legal representative,
  - (e) where the Court might have made a vesting order if this Act had not been passed.
- (3A) With such modifications as may be necessary, subsections (1A), (1B) and (1C) of section 98 of the *Conveyancing Act 1919* apply to and in respect of an order under this section and the mortgage to which it relates and so apply—
  - (a) as if a reference in those subsections to a determination by the court were a reference to an order under this section, and
  - (b) as if the words “, except to the extent that it is extinguished or reduced by the operation of this section,” were omitted from subsection (1C) of that section.
- (4) The fact that the order is founded or purports to be founded on an allegation of the existence of any of the matters mentioned or referred to in subsection (3) shall be conclusive evidence of the matter in any Court upon any question as to the validity of the order.
- (5) This section shall not prevent the Court from directing a reconveyance or the payment of costs occasioned by any such order if improperly obtained, or from making a further vesting order.

## **76 Sale or mortgage of land**

- (1) Where an order is made by the Court directing the sale or mortgage of any land, the Court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate as the Court thinks fit in the purchaser or mortgagee or in any other person.
- (2) For the purposes of this section every person who is entitled to or possessed of the land, or entitled to a contingent right therein, and is a party to the proceedings in which the order is made or is otherwise bound by the order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee within the meaning of this Act.

## **77 Specific performance, and other matters**

- (1) The Court may make a vesting order where an order is made by the Court for the specific performance of a contract concerning any land, or for the partition or sale in lieu of partition of any land, or for the exchange of any land, or for the conveyance of any land, either in cases arising out of the doctrine of election or otherwise.
- (2) For the purposes of this section the Court may declare—
  - (a) that any of the parties to the suit or other proceedings are trustees of the land or any part thereof within the meaning of this Act,
  - (b) that the interests of unborn persons who might claim under any party to the proceedings, or under the will or voluntary settlement of any person deceased, who was during his or her lifetime a party to the contract or transactions concerning which the order is made, are the interests of persons who on coming into existence would be trustees within the meaning of this Act.
- (3) The vesting order may be made with respect to the rights of those persons born and unborn as if they had been trustees.

## **78 Effect of vesting order**

- (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 shall have the same effect as if the persons who before the appointment or retirement were the trustees, if any, had duly executed all proper conveyances of the property for such estate or interest as the Court directs, or if there is no such person, or no such person of full capacity, then 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 other case the vesting order shall have 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 Part 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 provisions of the *Real Property Act 1900*, the land shall not vest until the appropriate entries are made in accordance with the provisions of that Act, and in the case of any other land, the land shall not vest before the order is registered in the office of the Registrar-General as prescribed by regulation under the *Conveyancing Act 1919*.
- (4) In the case of property subject to the provisions of the Closer Settlement Acts, the *Crown Land Management Act 2016*, the *Mining Act 1992* or the *Offshore Minerals Act 1999*, or any other Act relating to Crown lands, the proper officer is hereby authorised, upon the vesting order being registered as provided in subsection (3), to make all such entries as may be necessary to give effect thereto.
- (5) In the following cases the vesting order shall vest in the person named in the order the right to transfer or call for a transfer of the property or security, that is to say, in the case of—
  - (a) any property that does not come within subsections (3) or (4), but a transfer of which is required to be registered by or under any Act, whether of this State or otherwise,
  - (b) any security that is only transferable 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.
- (6) In the case of any security or chose in action the vesting order shall vest 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.
- (7) The person in whom the right to transfer or call for the transfer of any property or security is so vested may transfer the property or security to himself or herself or any other person according to the order, and all corporations companies associations and persons shall obey the order.
- (8) After notice in writing of the vesting order it shall not be lawful for any company 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.

## **79 Appointment of person to convey**

In all cases where a vesting order can be made the Court may, if it is more convenient, appoint a person to convey the property or release any contingent right, and a conveyance or release by that person in conformity with the order shall have the same effect as an order under the appropriate provision.

## **80 Trustees of charities**

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 in proceedings 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 2 Dealings and improvements**

### **81 Advantageous dealings**

- (1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust, or by law, the Court—
  - (a) may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, including adjustment of the respective rights of the beneficiaries, as the Court may think fit, and
  - (b) may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.
- (2) The provisions of subsection (1) shall be deemed to empower the Court, where it is satisfied that an alteration whether by extension or otherwise of the trusts or powers conferred on the trustees by the trust instrument, if any, creating the trust, or by law is expedient, to authorise the trustees to do or abstain from doing any act or thing which if done or omitted by them without the authorisation of the Court or the consent of the beneficiaries would be a breach of trust, and in particular the Court may authorise the trustees—
  - (a) to sell trust property, notwithstanding that the terms or consideration for the sale may not be within any statutory powers of the trustees, or within the terms of the instrument, if any, creating the trust, or may be forbidden by that instrument,
  - (b) to postpone the sale of trust property,
  - (c) to carry on any business forming part of the trust property during any period for which a sale may be postponed,
  - (d) to employ capital money subject to the trust in any business which the trustees are authorised by the instrument, if any, creating the trust or by law to carry on.
- (3) The Court may from time to time rescind or vary any order made under this section,



or may make any new or further order.

- (4) The powers of the Court under this section shall be in addition to the powers of the Court under its general administrative jurisdiction and under this or any other Act.
- (5) This section applies to trusts created either before or after the commencement of this Act.

## **82 Improvements and repairs**

- (1) Where any leasehold or freehold land is vested in a trustee, the Court may authorise the trustee to pay or apply capital money subject to the trust for any one or more of the following purposes, as to the Court seems fit, that is to say—
  - (a) to effect repairs to any existing buildings, dams, fences or other erections upon the land,
  - (b) to effect improvements of or upon the land, or to reconstruct enlarge or improve any existing buildings, dams, fences or other erections thereon,
  - (c) to erect any new buildings, dams, fences or other erections upon the land,
  - (d) to erect or join in erecting any give and take fence, that is to say, a fence part of which is on the land and part on adjoining land,
  - (e) to restock the land with sheep, cattle, or horses,
  - (f) to replace machinery or implements required for the land.
- (2) The trustee may be so authorised where the Court, having due regard to the interest of all persons beneficially interested in the land, thinks that the proposed expenditure is expedient, although it may not be necessary for the purpose of the salvage of the property.
- (3) The amount of capital money that may be so expended shall be stated in the order authorising the proposed expenditure.
- (4) The Court may authorise the trustee, as to the Court seems fit—
  - (a) to raise the amount by mortgage of the land, or by sale of a part thereof,
  - (b) to raise the amount by mortgage or sale of any other real or personal property held upon the same trusts,
  - (c) to pay the amount out of any moneys under the control of the trustee and held by the trustee upon the same trusts,
  - (d) to provide the amount partly in one and partly in another of those modes,
  - (e) to provide a sinking fund out of income.

- (5) Where the amount is authorised to be raised by mortgage the Court may give directions to the trustee how the principal and interest are to be paid.
- (6) The Court may require such provision for a sinking fund as the Court thinks proper.
- (7) The Court shall give such directions as appear necessary and proper, so as to throw upon the respective interests of the persons beneficially interested their proper proportion of the moneys to be expended.
- (8) No purchaser or mortgagee paying or advancing money upon any sale or mortgage authorised by the Court under this section shall be required to see to the application of the purchase money or mortgage money, and the protection given by this subsection shall extend to the Registrar-General Crown Solicitor or other person registering or certifying title.
- (9) This section applies to trusts created either before or after the commencement of this Act.

#### **82A Improvement and repairs without the approval of the Court**

- (1) Where any leasehold or freehold land is vested in a trustee and in the opinion of the trustee it is expedient in the interest of all persons beneficially interested in the land to expend capital moneys subject to the trust for any one or more of the purposes specified in paragraphs (a) to (f) both inclusive of subsection (1) of section 82 the trustee may, without the authority of the Court, expend on all or any of such purposes capital moneys subject to the trust not exceeding in all the prescribed amount.
  - (1A) For the purpose of subsection (1), the prescribed amount is—
    - (a) in the case of a trustee other than the NSW Trustee or a trustee company—\$50,000 or 30% of the value of the land, whichever is the greater, or
    - (b) in the case of the NSW Trustee or a trustee company—
      - (i) \$50,000 (or such other amount as may be prescribed by the regulations) or 30% of the value of the land, whichever is the greater, or
      - (ii) if all the persons beneficially interested in the land are able to give a good discharge, an amount agreed upon between the NSW Trustee or the trustee company and all those persons,whichever is the greater.
- (2) Where in the opinion of the trustee it is expedient to exercise the power conferred by subsection (1) the trustee may without the authority of the Court exercise any of the powers specified in subsection (4) of section 82, and the trustee shall throw upon the respective interests of the persons beneficially interested a proper proportion of the moneys so expended.

- (3) Subsection (8) of section 82 shall apply mutatis mutandis to any sale or mortgage made by a trustee in exercise of the powers conferred by this section.
- (4) This section applies to trusts created either before or after the commencement of the *Conveyancing, Trustee and Probate (Amendment) Act 1938*.

**83 (Repealed)**

**84 Sale of minor's property**

- (1) Where any property is held in trust for a minor, the Court may authorise the trustee to sell the whole or any part of the property.
- (2) The authority shall be given on such terms and subject to such provisions and conditions as the Court may think fit.
- (3) The Court may confer upon the trustee such powers as appear necessary or proper for the purpose, including power to concur with any other person.
- (4) This section applies whether the trust is for the minor solely or together with any other person, and whether the interest of the minor is or is not in possession.
- (5) This section applies to trusts created either before or after the commencement of this Act.

**Division 3 Relief and indemnity**

**85 Excusable breaches of trust**

- (1) Where a trustee is or may be personally liable for any breach of trust, the Court may relieve the trustee either wholly or partly from personal liability for the breach.
- (2) The relief may not be given unless it appears to the Court that the trustee has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the direction of the Court in the matter in which the trustee committed the breach.
- (3) (Repealed)
- (4) This section applies whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act.

**86 Indemnity for breach of trust**

- (1) Where a trustee commits a breach of trust at the instigation or request or with the written consent 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 person claiming through the trustee.

- (2) The provisions of subsection (1) shall be deemed to empower the Court to impound all or any part of the interest of any beneficiary who receives any pecuniary benefit from the breach of trust.
- (3) This section applies notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation.
- (4) This section applies to breaches of trust committed as well before as after the commencement of this Act, but shall not prejudice any question in any suit or other proceeding instituted before and pending at the commencement of this Act.

## **Division 3A Power of Court to vary trusts**

### **86A Court order to approve arrangement**

- (1) If property is held in trust under any instrument creating the trust, the Court may, if it thinks fit, by order approve any arrangement to—
  - (a) vary or revoke all or any of the trust, or
  - (b) enlarge the powers of the trustees for the purpose of managing or administering any of the property subject to the purpose of the trust.
- (2) An order under this section may be made by the Court only on behalf of—
  - (a) any person under the trust having an interest directly or indirectly, or vested or contingent, who by reason of being a minor or other incapacity is incapable of assenting, or
  - (b) any person who may become entitled, directly or indirectly, to an interest under the trust, and the entitlement is contingent on a future date or event that has not occurred at the time of application for an order under this section, or
  - (c) any unborn person, or
  - (d) any person in respect of any discretionary interest of the person under protective trusts where the interest of the principal beneficiary has not failed or determined.
- (3) This section—
  - (a) extends to a trust created before the commencement of this section, and
  - (b) does not apply to trusts affecting property created by another Act, and
  - (c) does not limit the operation of section 81.

- (4) In this section—

***discretionary interest***, in relation to protective trusts, means an interest arising under section 45(6).

***principal beneficiary*** has the same meaning as in section 45.

***protective trusts*** has the same meaning as in section 45.

#### **86B Court order to benefit person subject to application**

- (1) The Court must not approve an arrangement on behalf of any person under section 86A unless the carrying out of the order would be for the benefit of that person.
- (2) Subsection (1) does not apply to an approval of an arrangement under 86A(2)(d).

#### **86C Court may direct notice of application to certain persons**

Notice of an application to the Court for an order under section 86A must be given to any persons as the Court may direct.

### **Division 4 Miscellaneous powers**

#### **87 Division of chattels**

- (1) Where any chattels are vested in a trustee for persons in undivided shares, any person interested in a moiety or upwards may apply to the Court for an order for division of the chattels or any of them, according to a valuation or otherwise.
- (2) The Court may make such order and give any consequential directions as it thinks fit.

#### **88 Order in absence of a trustee**

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 thereto to serve the person with a process of the Court and that the person cannot be found, the Court may hear and determine the proceedings and make an order therein against that person in his or her character of a trustee as if he or she had been duly served or had entered an appearance in the proceedings, and had also appeared by his or her Australian legal practitioner at the hearing, but without prejudice to any interest he or she may have in the matters in question in the proceedings in any other character.

#### **89 Proceedings under [Mental Health Act 1958](#)**

Where an application is made under this Part concerning a person of unsound mind, the Court may direct an application to be made to the Court under the [Mental Health Act 1958](#) for the purpose of having such person declared an insane or an incapable person, and may postpone making any order until that application has been heard.

#### **90 Court may take into account investment strategy in action for breach of trust**

In proceedings against a trustee for a breach of trust in respect of a duty under Division 2 of Part 2 relating to the trustee's power of investment, the Court may, when considering the question of the trustee's liability, take into account the following—

- (a) the nature and purpose of the trust,
- (b) whether the trustee had regard to the matters set out in section 14C 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 Division 2 of Part 2,
- (d) the extent the trustee acted on the independent and impartial advice of a person competent (or apparently competent) to give the advice.

#### **90A Power of Court to set off gains and losses arising from investment**

- (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.

### **Division 5 Applications and orders**

#### **91 Defendants**

- (1) In proceedings in the Court under this Act, the plaintiff shall join as defendants such persons, if any, as the Court thinks fit.
- (2) If in proceedings in the Court under this Act any person who has been or ought to be made a defendant cannot be found in New South Wales, or if it is uncertain whether the person is living or dead, or if service cannot be effected on the person without expense disproportionate to the value of the person's interest, the Court may direct that the person be removed as a defendant or may dispense with service on the person, and may order that the person be deemed to have submitted the person's rights and interests to be dealt with by the Court.

#### **92 Persons entitled to apply**

- (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 interested in the property, whether under disability or not, or of any person duly appointed trustee thereof.
- (2) An order under this Act concerning any property subject to a mortgage may be made on the application of any person interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage.

### **93 Costs**

- (1) (Repealed)
- (2) The Court may order the costs charges and expenses of and incident to any application or any order under this Act to be paid or to be raised by sale or mortgage out of the property in respect whereof the same is made or out of the income thereof, or to be borne and paid in such manner and by such persons as to the Court may seem just.
- (3) In any proceedings with respect to the management or administration of any property subject to a trust or forming part of the estate of a testator or intestate, or with respect to the interpretation of the trust instrument, the Court may, if it thinks fit, order any costs to be paid out of such part of the property as in the opinion of the Court is the real subject matter of the proceedings.
- (4) This section shall extend to any direction opinion or advice, any payment into or out of court, and any conveyance or transfer in pursuance of an order.

### **94 (Repealed)**

## **Part 4 Payment into Court**

### **95 Trustees**

- (1) Where trustees, or the majority of trustees, have in their hands or under their control money or securities belonging to a trust, they may pay the same into court.
- (2) Where any money or securities are vested in any persons as trustees, and the majority are desirous of paying the same 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.
- (3) Where any such money or securities are deposited with any banker broker or other depositary, the Court may order transfer payment or delivery of the money or securities to the majority of the trustees for the purpose of payment into court.
- (4) Every transfer payment and delivery made in pursuance of any such order shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the money or securities so transferred paid or delivered.

### **96 Person liable to minor or person of unsound mind**

Where a minor or person of unsound mind is entitled to any money payable in discharge of land stock or chose in action conveyed under this Act, the person by whom the money is payable may pay the money into court.

### **97 Life assurance companies**

- (1) Where any money is payable by any life assurance company under a life policy in respect of which, in the opinion of the board of directors, no sufficient discharge can otherwise be obtained, the company may pay the money into court.
- (2) Where in the opinion of the Court the payment in was made without reasonable grounds, the Court may order all costs occasioned thereby to be paid by the company.
- (3) In this section **life assurance company** means any corporation, company, or society carrying on the business of life assurance, not being a friendly society; and **life policy** includes any policy not foreign to the business of life assurance.

### **98 Money or securities**

- (1) The payment of money or securities into court shall be subject to rules of court.
- (2) The receipt or certificate of a registrar of the Court or other proper officer shall be a sufficient discharge to any trustee person or company for money or securities paid into court.
- (3) Money or securities paid into court shall, subject to rules of court, be dealt with according to the orders of the Court.
- (4) The Court may make such order as it thinks fit as to the investment payment or distribution of money or securities paid into court, or the dividends or income thereof.

### **99 Trustee**

In this Part **trustee** includes every implied or constructive trustee without any exception.

## **Part 5 Miscellaneous provisions**

### **100 Escheat**

- (1) Property vested in any person upon any trust or by way of mortgage shall not escheat or be forfeited to the Crown by reason of the attainder or conviction for any offence of the trustee or mortgagee.
- (2) Property so vested shall remain in the trustee or mortgagee or survive to his or her co-trustee, or vest in his or her legal representative as if the attainder or conviction had not taken place.
- (3) This section shall not prevent the escheat or forfeiture of any property vested in any trustee or mortgagee so far as relates to any beneficial interest therein of the trustee or mortgagee, but the property, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if this Act had not been passed.



## 100A Limitation of liability of beneficiaries in respect of trustees

(1) The rule of equity known as the rule in *Hardoon v Belillios* is abolished.

### Note—

The rule is considered to have originated in the decision of the Privy Council in *Hardoon v Belillios*[1901] AC 118. The NSW Law Reform Commission recommended the abolition of the rule in *Report 144 (2018): Laws relating to beneficiaries of trusts*. This section gives effect to Recommendation 2.1 of that Report.

(2) Accordingly, a beneficiary under a trust (whether created before, on or after the commencement day) is not liable to indemnify the trustee or make any other payment to the trustee or any other person for any act, default, obligation or liability of the trustee arising on or after the commencement day unless—

(a) the beneficiary has agreed in writing to be liable, or

(b) subsection (3) applies.

(3) This section does not prevent a trustee of an investment trust from recovering any amount that a beneficiary under the trust is liable to pay for a right, interest or other entitlement to profits, income or other returns generated by the trust.

(4) To avoid doubt, this section does not affect any liability that a beneficiary under a trust may have in a capacity other than as a beneficiary.

(5) In this section—

**commencement day** means the day on which this section commenced.

**investment trust** means any trust (however described) created for the purpose of generating profits, income or other returns for its beneficiaries using funds provided by them, and includes a unit trust scheme within the meaning of the *Duties Act 1997*.

## 101 Property vested in the NSW Trustee

Where any new trustee is appointed under or in pursuance of the powers conferred by any instrument creating a trust, or by this or any other Act, all the property which for the time being is vested in the NSW Trustee by virtue of the *Probate and Administration Act 1898* and is subject to the trust in respect of which the new trustee is appointed, shall, on registration of the order or deed appointing the new trustee, and without other assurance in the law, become and be legally and effectually vested in the new trustee either solely or jointly with any surviving or continuing trustee, as the case may require.

## 102 Account by fiduciary

Where any guardian, manager, receiver, trustee or other fiduciary appointed by the Court has been or is (whether by Act, by rule of court or by order in any proceedings) directed to account from time to time to the Court, or to file any report or account in any registry of the Court, the Court may order compliance with the direction, on the application of any

party interested or of its own motion.

### 103 Indemnity

- (1) This Act and every order purporting to be made under this Act shall be a complete indemnity to all companies associations and persons for any acts done pursuant thereto.
- (2) It shall not be necessary for any company association or person to inquire concerning the propriety of the order or whether the Court had jurisdiction to make the same.

### 104 Rules of Court

- (1) Rules of Court may be made under the [Supreme Court Act 1970](#) for better carrying the provisions and objects of this Act into effect.
- (2) Subsection (1) does not limit the rule-making powers conferred by the [Supreme Court Act 1970](#).

### 104A Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed by regulation.
- (2) (Repealed)

### 105, 106 (Repealed)

### 107 Savings and transitional provisions

Schedule 2 has effect.

## Schedule 1 Repeals

Reference to Act	Subject or short title	Extent of repeal
1898 No 4	<a href="#">Trustee Act 1898</a>	Sections 2 to 17 inclusive, and 19 to 70 inclusive.
1898 No 4	<a href="#">Trustee Act 1898</a>	Section 18, except as otherwise provided by section 43 (11) of this Act.
1898 No 13	<a href="#">Wills, Probate and Administration Act 1898</a>	Section 96.
1900 No 24	<a href="#">Partition Act 1900</a>	Section 6.
1902 No 98	<a href="#">Trustee Act Amendment Act 1902</a>	The whole Act.
1915 No 31	<a href="#">Trustees Delegation of Powers Act 1915</a>	The whole Act, except sections 6 and 9.

## Schedule 2 Savings and transitional provisions

(Section 107)

### Part 1 Preliminary

#### 1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts—

*Trustee Amendment (Discretionary Investments) Act 1997*

any other Act that amends this Act

- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as—
- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
- (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

### Part 2 Provisions consequent on enactment of **Trustee Amendment (Discretionary Investments) Act 1997**

#### 2 Definition

In this Part, **amending Act** means the *Trustee Amendment (Discretionary Investments) Act 1997*.

#### 3 Application of sections 14-14DB

Sections 14-14DB apply to trusts created before or after the commencement of Schedule 1 [2] to the amending Act.

#### 4 Transitional provision

- (1) A trustee, or a person empowered or required by a provision (however expressed) of any other Act or any instrument to invest money in investments authorised by this Act, may invest, or maintain an investment, in any security authorised by section 14A (2) of this Act as in force immediately before the commencement of Schedule 1 [2] to the amending Act for a period of up to 2 years (or such other period as may be

prescribed by the regulations) after that commencement.

- (2) Subclause (1) applies to a trustee if the trustee is not expressly forbidden from investing in such a security by the instrument (if any) creating the trust or any provision of or made under this or any other Act.

#### **5 Trustee not liable**

A trustee who continues to invest money in securities in accordance with clause 4 (1) is taken to have complied with section 14A as inserted by the amending Act.

### **Part 3 Provision consequent on enactment of [Courts and Crimes Legislation Amendment Act 2010](#)**

#### **6 Saving of existing regulation**

A regulation made for the purposes of section 18 (3) of the Act that is in force on the commencement of this clause is taken to be a regulation made for the purposes of section 18 (7) of the Act.