

Dormant Funds Act 1942 No 25

[1942-25]



New South Wales

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Contents

Long title	4
Part 1 Preliminary	4
1 Name of Act and commencement	4
2 Definitions	4
3 Certain Acts not affected	5
Part 2 Administration	5
4 Commissioner of Dormant Funds.....	5
5 (Repealed)	5
Part 3 Functions of Commissioner	5
5A Commissioner may determine fund to be dormant.....	5
6 Returns as to funds.....	6
7 Power to require accounts and statements	7
8 Power to require attendance of trustees and persons	7
9 Notice of requirement under sec 7 or sec 8.....	8
10 Certificate as to value of dormant fund	8
11 Proposals for application of dormant fund	8
12 Proposals—dormant fund not exceeding \$10,000	9
13 Proposals—dormant fund exceeding \$10,000	9
14 Supplementary order as assurance, transfer etc.....	11
15 Effect of order.....	12
15A Register of orders to be kept	12

Part 4 Appeals	13
15B Appeals to Tribunal.....	13
16, 16A (Repealed).....	13
Part 5 Miscellaneous	13
17 Commissioner not bound by laws of evidence	13
18 Commissioner and Tribunal not bound to follow Cy-pres principle	14
19 Regulations.....	14
20 Savings and transitional provisions	14
Schedule 1 Savings and transitional provisions	14

Dormant Funds Act 1942 No 25



New South Wales

An Act to make provision for and in relation to certain funds donated, collected or acquired for charitable and other public purposes; to provide for the appointment of a Commissioner of Dormant Funds; and for purposes connected therewith.

Part 1 Preliminary

1 Name of Act and commencement

- (1) This Act may be cited as the *Dormant Funds Act 1942*.
- (2) This Act shall commence upon a day to be appointed by the Governor and notified by proclamation published in the Gazette.

2 Definitions

- (1) In this Act unless the context or subject matter otherwise indicates or requires—

Charitable purpose includes any benevolent or philanthropic or patriotic purpose.

Commissioner means the Commissioner of Dormant Funds.

Dormant fund means a fund determined under section 5A to be a dormant fund.

Fund means any property, real or personal, which has been donated to or collected or otherwise acquired by trustees for any charitable purpose or any purpose of a public character, and, in the case of a fund that has been partly used for the purposes for which it was donated, collected or otherwise acquired, means the residue of the fund.

Prescribed means prescribed by this Act or by regulations made under this Act.

Purpose of a public character means any purpose (not being a charitable purpose) which is directed to the benefit of the public or a section of the public; and without prejudice to the generality of the foregoing provisions of this definition includes any of the following purposes—

- (a) the provision of any war memorial or other public memorial whether such provision is to be made by the erection, extension or alteration of any structure or building or by the furnishing of moneys or in any other way whatsoever,

- (b) the granting of relief or assistance or comforts to persons (whether resident in New South Wales or elsewhere) adversely affected by circumstances arising out of the existence of a state of war or arising in any other way whatsoever,
- (c) the provision of parks, gardens and the like,
- (d) the establishment, provision, conducting or carrying on of an institution as defined in clause 20 of Schedule 7 to the [Crown Land Management Act 2016](#).

Tribunal means the Civil and Administrative Tribunal.

- (2) Notes included in this Act do not form part of this Act.
- (3)-(6) (Repealed)

3 Certain Acts not affected

- (1) Nothing in this Act shall affect the operation of the [Unclaimed Money Act 1995](#).
- (2) (Repealed)

Part 2 Administration

4 Commissioner of Dormant Funds

- (1) There shall be a Commissioner of Dormant Funds who shall have and may exercise and discharge all the powers, authorities, duties and functions conferred and imposed on the Commissioner by or under this Act.
- (2) The person for the time being holding the office of Chief Executive Officer of the NSW Trustee and Guardian shall be the Commissioner of Dormant Funds.

5 (Repealed)

Part 3 Functions of Commissioner

5A Commissioner may determine fund to be dormant

- (1) The Commissioner may determine a fund to be a dormant fund if satisfied that—
 - (a) for at least the immediately preceding 6 years, the trustees have not used the fund genuinely for the purposes for which it was donated, collected or otherwise acquired, or
 - (b) it is not practicable to use the fund for those purposes, or
 - (c) it is unlikely that those purposes will be achieved within a reasonable time, or
 - (d) the trusts, or the objects of the trusts or the purposes, for which the fund was donated, collected or otherwise acquired are uncertain or cannot be ascertained,

or

- (e) if the fund is held for an institution within the meaning of clause 20 of Schedule 7 to the *Crown Land Management Act 2016*—the institution is not functioning as such an institution.

A fund is not to be regarded as having been used as referred to in paragraph (a) merely because the fund is invested or merely because the proceeds of investment have been placed on deposit or have been added to the fund.

- (2) The Commissioner may revoke a determination under this section if, after making the determination, the Commissioner decides that the determination was based on inadequate, misleading or incorrect information. However, such a determination is not revocable after the Commissioner has made an order under this Act in respect of the fund to which the determination relates.
- (3) The revocation of a determination under this section does not prevent the Commissioner from making a further determination under this section with respect to the fund.
- (4) Subject to any appeal under section 15B, a determination or decision of the Commissioner under this section cannot for any reason be challenged before, or be reviewed, quashed or called into question by, any court. No proceedings, whether for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief, lie in respect of any determination or decision of the Commissioner under this section.

6 Returns as to funds

- (1) The Commissioner may require the trustees or other persons by whom any fund is held or in whom any fund is vested to furnish or cause to be furnished within the time specified in the requirement a return setting forth such particulars relating to the fund or to the trustees of the fund as may be specified in the requirement.

Any such requirement may be made in relation to all funds or funds of a specified class or description or all funds other than funds of a specified class or description.

Any such requirement may be made by notice published in one or more newspapers, or may be made by notice in writing served personally or by post on the trustee or person concerned.

- (2) Any trustee or person who, without reasonable cause, neglects or fails to furnish such return within the time so specified or who furnishes a return which is false or misleading in any material particular shall be guilty of an offence and shall be liable to a penalty not exceeding 0.5 penalty unit.

7 Power to require accounts and statements

- (1) The Commissioner may require written accounts and statements and answers to inquiries relating to any dormant fund to be rendered or made to the Commissioner by any of the following persons, that is to say—
 - (a) the trustees or other persons by whom the dormant fund is held or in whom the dormant fund is vested,
 - (b) agents of any such trustees or persons,
 - (c) depositories of any funds, securities or moneys comprising or forming part of the dormant fund,
 - (d) persons having the possession or control of any documents concerning or relating to the dormant fund or the trusts thereof or the purposes for which the dormant fund was to be utilised or applied.
- (2) The Commissioner may require the trustees or persons rendering or making any such account, statement or answer to verify the same by statutory declaration.
- (3) Nothing in this section shall extend to give the Commissioner any power of requiring from any person holding or claiming to hold any property adversely to the trustees of the dormant fund or free or discharged from the trusts attaching to the dormant fund, any information or the production of any deed or document whatsoever in relation to the property so held or claimed adversely or any trusts alleged to affect the same.

8 Power to require attendance of trustees and persons

- (1) The Commissioner may require all or any such trustees and persons as are referred to in section 7 to attend before the Commissioner, or before an officer appointed by the Commissioner for the purpose, at such times and places as may reasonably be appointed, for the purpose of being examined in relation to the dormant fund, the trusts thereof, the purposes for which the dormant fund was to be utilised or applied, and to produce on such examination all books and documents in their custody and control relating to the dormant fund.
- (2) For the purposes of any examination under this section the Commissioner or the officer appointed to conduct the examination shall have the powers, authorities, protections and immunities conferred on a commissioner by Division 1 of Part 2 of the [Royal Commissions Act 1923](#), and shall be deemed to be a sole commissioner within the meaning of that Division.

The provisions of the [Royal Commissions Act 1923](#), with the exception of section 13 and Division 2 of Part 2, shall, mutatis mutandis, apply to the examination and to any witness or person summoned by or appearing before the Commissioner or the officer conducting the examination.

9 Notice of requirement under sec 7 or sec 8

- (1) Any requirement of the Commissioner under section 7 or section 8 may be made by notice in writing served personally or by post on the trustee or person concerned.
- (2) Any trustee or person who refuses or neglects or fails to comply with any requirement of the Commissioner under section 7 or section 8 within the time specified in the notice shall be guilty of an offence and shall be liable to a penalty not exceeding 2 penalty units.

10 Certificate as to value of dormant fund

- (1) The Commissioner shall as soon as practicable after the Commissioner has completed his or her investigations in relation to any dormant fund issue a certificate as to the value of the property comprised in the dormant fund.
- (2) Such certificate shall be filed in the office of the Commissioner and shall be available for inspection by any person interested in the dormant fund or in the trusts thereof or in the purposes for which the dormant fund was to be utilised or applied.
- (3) A certificate of the Commissioner issued under this section shall, for all purposes of this Act, be conclusive evidence of the value of the property comprised in the dormant fund.

11 Proposals for application of dormant fund

- (1) Where the Commissioner considers it reasonable so to do the Commissioner may formulate proposals for the utilisation or application of any dormant fund.
- (2) Such proposals shall be in the form of a draft order—
 - (a) authorising the trustees of the dormant fund to apply the same or the income thereof or the proceeds of the realisation thereof for some or one of the trusts thereof or of the purposes for which the same was to be utilised or applied exclusively of the other or others of such trusts or purposes, or
 - (b) for the establishment of a scheme for the administration of the dormant fund, the appointment of trustees for that purpose and the vesting of the dormant fund in such trustees, or
 - (c) directing the transfer of the dormant fund to such trustees as may be specified in the order and authorising such trustees to apply the dormant fund or the income thereof or the proceeds of the realisation thereof as if it were part of the trust property of which such trustees are the trustees.

The NSW Trustee and Guardian and any existing trustee of the dormant fund shall be eligible for appointment as trustee under paragraph (b).

- (3) Before formulating proposals under this section the Commissioner shall give due consideration to any representations or suggestions made by the trustees or other persons interested in the dormant fund, or in the trusts thereof or in the purposes for which the dormant fund was to be utilised or applied.

12 Proposals—dormant fund not exceeding \$10,000

- (1) Where the Commissioner has formulated proposals under section 11 in relation to a dormant fund the value of which does not exceed \$10,000 the Commissioner shall forward a copy of such proposals to the Attorney-General.
- (2) The Attorney-General may approve or disapprove of any proposals forwarded under this section or may refer them back to the Commissioner for further consideration.
- (3) Where the Attorney-General disapproves of proposals the Commissioner may formulate further proposals a copy of which shall thereupon be forwarded to the Attorney-General.
- (4) Where the Attorney-General refers proposals back to the Commissioner for further consideration the Commissioner may vary or modify such proposals or formulate other proposals, and a copy of the proposals as so varied or modified or formulated shall thereupon be forwarded to the Attorney-General.
- (5) Where the Attorney-General has approved of any proposals forwarded under this section, the Commissioner shall sign the draft order which shall thereupon have effect as an order made under this Act.

13 Proposals—dormant fund exceeding \$10,000

- (1) **Notice of proposals under section 11** If the Commissioner has formulated proposals under section 11 in relation to a dormant fund the value of which exceeds \$10,000, the Commissioner must publish in the Gazette and in at least one newspaper a notice that—
 - (a) indicates that proposals have been formulated under this Act in relation to the dormant fund, and
 - (b) specifies a place where the proposals can be inspected, and
 - (c) fixes a date (being not earlier than 30 days after the date of publication of the notice in the Gazette) on or before which any person interested in the administration, utilisation or application of the fund may lodge with the Commissioner a request in writing that the Commissioner refer the proposals to the Tribunal, and
 - (d) specifies an address at which any such request can be lodged.
- (1A) However, if the value of the dormant fund does not exceed \$50,000 and the

Commissioner considers that the proposals so formulated are clearly appropriate, the Commissioner may dispense with the publication of the notice in a newspaper. If the Commissioner does so, the Commissioner must send a copy of the notice to the persons who are or were formerly the trustees of the fund (but only in so far as they are still alive and their whereabouts are known to the Commissioner).

- (1B) For the purposes of subsection (1), a notice may be published in any newspaper circulating throughout the State or, if the dormant fund was established and operated in a particular area of the State only, in any newspaper circulating throughout the State or that area.
- (2) **Procedure if no request for referral to Tribunal received** The following provisions apply if the Commissioner does not receive a request for the proposals to be referred to the Tribunal within the time specified in the notice for the making of such a request—
- (a) the Commissioner must forward a copy of the proposals to the Attorney General,
 - (b) the Attorney General may—
 - (i) approve the proposals, or
 - (ii) refer the proposals back to the Commissioner for further consideration, or
 - (iii) request that the Commissioner refer the proposals to the Tribunal for its consideration,
 - (c) the Commissioner must sign the draft order (which then has effect as an order made under this Act) if the Attorney General has approved of the proposals (whether as originally submitted or after they have been referred back for further consideration by the Commissioner).

2A, 2B (Repealed)

- (3) **Procedure if request for referral to Tribunal received** The following provisions apply if the Commissioner receives a request for the proposals to be referred to the Tribunal within the time specified in the notice for the making of such a request—
- (a) the Commissioner must forward a copy of the proposals to the Attorney General,
 - (b) the Commissioner must refer the proposals to the Tribunal for its consideration.
- (4) **Role of Tribunal** If proposals are referred to the Tribunal for its consideration, the Tribunal may consider the proposals and any representations that are made to the Tribunal about them by the following persons—
- (a) the person at whose request the Commissioner referred the proposals,
 - (b) the Commissioner,

(c) if the Attorney General did not request the referral—the Attorney General.

(5) The Tribunal may—

- (a) approve the proposals, or
- (b) vary or amend the proposals, or
- (c) formulate new proposals.

(6) The proposals that are finally approved by the Tribunal must be in the form of an order and may make provision with respect to any of the matters referred to in section 11 (2).

Note.

Section 15 makes provision for the effect of an order under this section.

- (7) A person who has made a request that any proposals be referred to the Tribunal may, at any time before the Tribunal has completed its consideration of the proposals, deliver or send to the Commissioner a request in writing to have the reference withdrawn.
- (8) If a reference is withdrawn, the proposals are to be dealt with as if no request for the proposals to be referred to the Tribunal had been received within the time specified in the notice.

14 Supplementary order as assurance, transfer etc

- (1) Where an order under this Act is made by the Commissioner or by the Tribunal the authority making such order may, by the same order, or the Commissioner may, by a subsequent order, give such directions as to the Commissioner or the Tribunal seem fit for the assurance, transfer, payment or vesting of any real or personal property comprising or forming part of the dormant fund.
- (2) Any person who refuses or neglects to comply with the directions in any such order shall be guilty of an offence and shall be liable to a penalty not exceeding 1 penalty unit and to a further penalty not exceeding 0.1 penalty unit for every day during which the offence continues.
- (3) Where any person directed by any such order to execute or make any assurance, transfer, payment or vesting of property, has refused or neglected to do so for a period of twenty-eight days, the Commissioner or the Tribunal, as the case may be, may appoint any other person to execute or make such assurance, transfer, payment or vesting in the name of such first-mentioned person and to do all acts necessary to give validity and operation thereto.
- (4) The execution or making of such assurance, transfer, payment or vesting, and the assurance, transfer, payment or vesting so executed or made by the person so

appointed shall, in all respects, have the same force or validity as if the same had been executed or made by the person directed by the order to execute or make the same.

15 Effect of order

- (1) Every order made under this Act shall be binding upon and shall be complied with and carried into effect by the trustees or persons named or described therein.
- (2) Every such order shall be a complete indemnity to all bankers or other depositories of any funds, securities or moneys comprising or forming part of the dormant fund, and to all trustees or persons named or described in the order for any act done pursuant to the order.
- (3) No person named or described in the order shall be concerned to inquire as to the necessity for or propriety of such order or as to the authority of the Commissioner or of the Tribunal to make the order.
- (4) The making of an order under this Act shall, in favour of all trustees and other persons named or described in the order, and of any person deriving title through or under such trustees or persons, or by operation of the order, be conclusive evidence that all conditions precedent to the making of the order have been duly complied with and that the Commissioner or the Tribunal, as the case may be, had jurisdiction to make such order.
- (5)
 - (a) Any order under this Act which provides for the appointment of trustees shall have the effect of an order made by the Supreme Court in its equitable jurisdiction, pursuant to section 70 of the [Trustee Act 1925](#).
 - (b) Any order under this Act for the vesting of the dormant fund in trustees so appointed shall have the like effect as is provided in section 78 of the [Trustee Act 1925](#) in the case of a vesting order made by the Supreme Court in its equitable jurisdiction.
- (6) All orders under this Act made by the Commissioner or by the Tribunal shall be filed in the office of the Commissioner.
- (7), (8) (Repealed)

15A Register of orders to be kept

- (1) The Commissioner must establish and keep a register of all orders made under this Act.
- (2) The Commissioner must keep available for inspection at the Commissioner's office the register and the orders made under this Act. Any person who calls at the

Commissioner's office during ordinary office hours and asks to do so is entitled, without charge, to inspect the register or any order made under this Act.

- (3) The regulations may make provision for or with respect to the keeping and inspection of the register and orders made under this Act.

Part 4 Appeals

15B Appeals to Tribunal

- (1) Any person who is dissatisfied with any of the following decisions of the Commissioner may appeal to the Tribunal against the decision—
 - (a) a determination under section 5A,
 - (b) a decision of the Commissioner revoking a determination under section 5A.

Note.

An appeal under this section is an external appeal to the Tribunal for the purposes of the [Civil and Administrative Tribunal Act 2013](#).

- (2) An appeal is to be dealt with by way of a new hearing. Fresh evidence, or evidence in addition to or substitution for the evidence on which the determination or decision appealed from was based, may, with the leave of the Tribunal, be given on the appeal.
- (3) In determining an appeal, the Tribunal may make any of the following orders—
 - (a) an order confirming the decision on appeal,
 - (b) an order quashing the decision on appeal, and, in the case of a determination under section 5A, substituting such other determination as the Commissioner could have made on the matter to which the appeal relates,
 - (c) an order remitting the matter to the Commissioner to be dealt with in accordance with the directions of the Tribunal.
- (4) An order that quashes a decision revoking a determination made under section 5A has the effect of reinstating the determination to which the decision relates.

16, 16A (Repealed)

Part 5 Miscellaneous

17 Commissioner not bound by laws of evidence

In exercising and discharging any powers, authorities, duties and functions under this Act the Commissioner shall act according to equity, good conscience and the substantial merits of the case, without regard to technicalities or legal forms, and shall not be bound by any rules of evidence but may inform the Commissioner's mind on any matter in such

manner as shall appear just.

18 Commissioner and Tribunal not bound to follow Cy-pres principle

In formulating proposals under this Act the Commissioner and the Tribunal shall give due consideration to the trusts of the dormant fund or the purposes for which the dormant fund may be utilised or applied but shall not be bound to comply with the principle known as the “Cy-pres principle”.

19 Regulations

- (1) The Governor may make regulations not inconsistent with this Act prescribing all matters which are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) Without limiting subsection (1), the regulations may provide for the fees and charges that may be imposed for the Act, including—
 - (a) the amount, or the calculation of the amount, of a fee payable to the Commissioner for the formulation of a proposal for a dormant fund to be paid out of the fund, and
 - (b) the reduction or waiver of a fee or charge by the Minister.
- (3) Without limiting subsection (2), fees may be calculated as a percentage of the value of a dormant fund regardless of the value of the fund.

20 Savings and transitional provisions

Schedule 1 has effect.

Schedule 1 Savings and transitional provisions

(Section 20)

Part 1 Preliminary

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the [Dormant Funds Amendment Act 1995](#).
- (2) A provision referred to in subclause (1) may, if the regulations so provide, take effect from the date of assent to that Act or from a later date.
- (3) To the extent to which a provision referred to in subclause (1) takes effect from a date that is earlier than its date of 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 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 publication.

Part 2 Provisions consequent on enactment of [Dormant Funds Amendment Act 1995](#)

2 Determinations of Commissioner

A determination of the Commissioner in force under section 2 (2) immediately before the commencement of section 5A is taken to be a determination in force under section 5A.

3 Appeals to Charity Referees

An appeal to the Charity Referees made under section 2 (3) before the commencement of section 15B and not determined before that commencement is taken to be an appeal made under section 15B.

4 Proposals—dormant fund exceeding \$2,000

- (1) Section 13 of this Act (as in force immediately before it was amended by Schedule 1 [12] to the [Dormant Funds Amendment Act 1995](#)) continues to apply to proposals formulated under section 11 of this Act before the commencement of that amendment as if that amendment had not commenced.
- (2) Section 13 of this Act (as in force immediately before it was amended by Schedule 1 [12] to the [Dormant Funds Amendment Act 1995](#)) continues to apply to notices published under that section before the commencement of that amendment as if that amendment had not commenced.

5 Index of orders

The index of orders kept under section 15 of this Act (as in force immediately before the commencement of Schedule 1 [14] to the [Dormant Funds Amendment Act 1995](#)) is taken to form part of the register established under section 15A of this Act.

6 Matters pending before the Charity Referees

Section 16A of this Act extends to matters that the Charity Referees were dealing with at the commencement of that section.