



New South Wales

Trustee Amendment (Discretionary Investments) Bill 1997

Explanatory note

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

Overview of Bill

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

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

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

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

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

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

Schedule 1 Amendment of Trustee Act 1925

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

Prudent person test

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

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

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

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

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

Proposed section 14B preserves any rules and principles of law or equity that impose a duty on a trustee, except so far as they are inconsistent with the Principal Act or any other Act or the instrument creating the trust. Duties preserved include the duty of the trustee to invest trust funds in investments that are not speculative or hazardous and the duty to take advice. Any rules and principles of law or equity that relate to a provision in an instrument creating a trust that purports to exempt, limit the liability of, or indemnify a trustee in respect of a breach of trust, continue to apply.

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

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

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

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

Powers of the Supreme Court

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

Transitional provisions

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

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

Other amendments

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

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

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

Schedule 2 Amendment of other Acts and Regulations

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



New South Wales

Trustee Amendment (Discretionary Investments) Bill 1997

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New South Wales

Trustee Amendment (Discretionary Investments) Bill 1997

No. , 1997

A Bill for

An Act to amend the *Trustee Act 1925* with respect to investments in which a trustee may invest trust funds; to make consequential amendments; and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Trustee Amendment (Discretionary Investments) Act 1997*.

2 Commencement

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This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Trustee Act 1925 No 14

The *Trustee Act 1925* is amended as set out in Schedule 1.

4 Amendment of other Acts and Regulations

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Each Act and Regulation specified in Schedule 2 is amended as set out in that Schedule.

Schedule 1 Amendment of Trustee Act 1925

(Section 3)

[1] Section 4

Insert after section 3:

4 Notes

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

[2] Sections 14–14DB

Omit sections 14–14D. Insert instead:

14 Powers of investment

A trustee may, unless expressly forbidden by the instrument (if any) creating the trust: 10

- (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. 15

(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 20
- (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. 25

Note. Some Acts deem investments under the Acts to be investments that satisfy the prudent person test. See, for example, section 39 of the *Public Authorities (Financial Arrangements) Act 1987*. 30

- (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. 5
- (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. 10
- (2) Without limiting the generality of subsection (1), a duty imposed by any rules and principles of law or equity includes the following: 15
- (a) a duty to exercise the powers of a trustee in the best interests of all present and future beneficiaries of the trust, 20
 - (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. 25
- (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. 30

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: 5
- (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, 10
 - (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, 15
 - (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, 20
 - (k) the aggregate value of the trust estate,
 - (l) the effect of the proposed investment in relation to the tax liability of the trust, 25
 - (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, 30
 - (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, 5
 - (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. 10

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 15
 - (b) for the sale of all or any part of the property and undertaking of the body corporate to another body corporate, or 20
 - (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 25
 - (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. 30
- (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.

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- (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: 5
- (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 10
 - (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. 15
- (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. 20
- (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 25**
- (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 30
 - (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. 5
- (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. 10
- (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. 15
- (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. 20

14DB Guidelines for trustees

- (1) The regulations may make provision for or with respect to guidelines for the investment by trustees of trust funds. 25
- (2) A trustee does not comply with section 14A merely by complying with any regulations made for the purposes of this section.

[3] Section 15

Omit the section. 30

[4] Section 16

Omit the section.

[5] Section 19 Loss on mortgages

Omit “thereon, the security shall be deemed an authorised investment for the smaller sum, and the trustee shall only be” from section 19 (1).

Insert instead “, then the trustee is only”.

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[6] Section 19 (1)

Omit “thereof”. Insert instead “of the smaller sum”.

[7] Section 19 (2)

Omit “securities” wherever occurring. Insert instead “mortgages”.

[8] Section 21A Building societies and credit unions—transfers of engagements and amalgamations

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Insert “or credit union” after “building society” where firstly occurring in section 21A (1).

[9] Section 21A (1) (a)

Omit the paragraph. Insert instead:

15

- (a) a transfer of engagements of the building society or credit union to another building society or credit union, or

[10] Section 21A (1) (b)

Omit “society”.

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Insert instead “building society or credit union”.

[11] Section 24 Accrued interest on debentures or stock sold or purchased

Omit section 24 (3).

[12] Sections 90 and 90A

Insert after section 89:

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: 5

- (a) the nature and purpose of the trust, 10
- (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, 15
- (d) the extent the trustee acted on the independent and impartial advice of a person competent (or apparently competent) to give the advice. 20

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. 25
- (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. 30

[13] Section 107

Insert after section 106:

107 Savings and transitional provisions

Schedule 2 has effect.

[14] Schedule, heading

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Omit the heading. Insert instead "**Schedule 1 Repeals**".

[15] Schedule 2

Insert after Schedule 1 (as amended by Item [14]):

Schedule 2 Savings and transitional provisions

(Section 107) 10

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: 15

Trustee Amendment (Discretionary Investments) Act 1997

- (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. 20

- (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 25

- (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 5

2 Definition

In this Part, *amending Act* means the *Trustee Amendment (Discretionary Investments) Act 1997*. 10

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 15

- (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. 20
- (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. 25

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. 30

Schedule 2 Amendment of other Acts and Regulations

(Section 4)

2.1 Community Welfare Act 1987 No 52

Section 42 Investment of Community Disaster Relief Fund

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Omit "securities authorised under section 14A of the *Trustee Act 1925* for the investment of trust funds" from section 42 (1).
Insert instead "investment authorised for the time being by the *Trustee Act 1925*".

2.2 Dairy Industry Regulation 1995

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Clause 53 Investment of money held by the Corporation

Omit "section 14 (2) of" from clause 53 (b).

2.3 Law Foundation Act 1979 No 32

Section 19 Investment

Omit "section 14A of".

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2.4 Motor Vehicle Repairs Act 1980 No 71

Section 67 Investment

Omit "section 14A of".

**2.5 Public Authorities (Financial Arrangements) Act 1987
No 33**

Section 39 Trustee investment etc

Omit "deemed to be an investment in a security authorised by the *Trustee Act 1925*" from section 39 (3). 5

Insert instead "taken to be an investment of trust funds made in accordance with the *Trustee Act 1925*".

2.6 Public Hospitals Act 1929 No 8

Section 37 Power to borrow

Omit "and be deemed to have been an investment authorised by the *Trustee Act 1925*" from section 37 (8). 10

Insert instead "taken to be an investment of trust funds made in accordance with the *Trustee Act 1925*".

2.7 Public Trustee Act 1913 No 19

[1] Section 36 Manner of investment 15

Omit "moneys" from section 36 (1). Insert instead "money".

[2] Section 36 (1)

Omit "of the securities authorised by the *Trustee Act 1925*".

Insert instead "investment in which a trustee may invest trust funds in accordance with the *Trustee Act 1925*". 20

2.8 Soil Conservation Act 1938 No 10

Fourth Schedule Loans

Omit "shall be deemed to be a security authorised by the *Trustee Act 1925*" from clause 6 (1).

Insert instead "is taken to be an investment made in accordance with the *Trustee Act 1925*". 5

2.9 Sporting Injuries Insurance Act 1978 No 141

Section 12 Investment

Omit "section 14A of".

2.10 State Bank (Corporatisation) Act 1989 No 195 10

Section 18 Investment of trust funds etc

Omit "is to be regarded as an investment in a security authorised by the *Trustee Act 1925*".

Insert instead "is taken to be an investment made in accordance with the *Trustee Act 1925*". 15

2.11 Sydney Opera House Trust Act 1961 No 9

Section 24 Investment of funds of the Trust

Omit "securities from time to time authorised by law for the investment of trust funds" from section 24 (1).

Insert instead "investment in which a trustee may invest trust funds in accordance with the *Trustee Act 1925*". 20

2.12 Trustee Companies Act 1964 No 6

Section 17 Contributory investments

Omit "for the time being authorised by the *Trustee Act 1925* for the investment of trust funds".

Insert instead "in which a trustee may invest trust funds in accordance with the *Trustee Act 1925*". 5

2.13 Trustee Regulation 1995

Clauses 5 and 7

Omit the clauses.