



Queensland

# Trusts Bill 2024

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# Consultation draft—November 2023

Trusts Bill 2024

Contents

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**2023**

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**A Bill**

for

**An Act to consolidate and amend the law relating to trusts, to repeal the *Trusts Act 1973*, and to amend this Act, the *Succession Act 1981* and the legislation mentioned in schedule 2 for particular purposes**

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The Parliament of Queensland enacts—

## Part 1 Preliminary

### Division 1 Introduction

#### 1 Short title

This Act may be cited as the *Trusts Act 2024*.

#### 2 Commencement [TB, cl 2]

This Act commences on a day to be fixed by proclamation.

#### 3 Application of Act [TB, cll 3, 8, 40, 46, 58, 92, 104 and 124; TA, ss 4(1)–(4), 10, 20, 31(1), 60, 65 and 79]

- (1) This Act applies in relation to a trust whether created before or after, or partly before and partly after, the commencement of this Act, except to the extent this Act or another Act provides otherwise.

*Note—*

For an example of an Act providing otherwise, see the *Land Act 1994*, section 90.

- (2) Also, this Act applies despite a contrary intention in any trust instrument, except to the extent this Act provides otherwise.
- (3) This Act does not prevent a settlor conferring on a trustee any powers additional to or greater than those conferred under this Act.
- (4) Any additional or greater power conferred on a trustee by a settlor has effect and is exercisable in the same way, and with the same consequences, as a power conferred under this Act.



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- (5) Subsection (4) applies subject to an express contrary intention in the trust instrument.
  - (6) The powers conferred on a trustee under this Act are in addition to the powers conferred on the trustee under any other Act.
  - (7) In this section—  
*trustee* includes a person exercising the powers of a trustee under this Act.

**4 Act binds all persons [TB, cl 4; TA, s 4(6)]**

This Act binds all persons, including the State and, to the extent the legislative power of the Parliament permits, the Commonwealth and the other States.

**Division 2 Interpretation**

**5 Definitions [TB, cl 5; TA, s 5]**

The dictionary in schedule 1 defines particular words used in this Act.

**6 Meaning of *trust* [TB, sch 1; TA, s 5]**

*Trust* includes—

- (a) an implied, resulting, bare or constructive trust; and
- (b) the duties incidental to the office of a personal representative.

**7 Meaning of *trustee* and *statutory trustee* [TB, sch 1; TA, ss 5 and 6(1)(b)(i)]**

- (1) *Trustee* includes—
  - (a) a trustee corporation; and

[s 8]

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- (b) another corporation in which property subject to a trust is vested; and
  - (c) a personal representative; and
  - (d) a statutory trustee.
- (2) A person, other than a person under a legal incapacity, is a *statutory trustee* in relation to trust property comprising land if—
- (a) the person is beneficially entitled to possession of the land, or to the rents and profits of the land; and
  - (b) apart from this section, there is no trustee of the land.

*Note—*

See part 14 in relation to statutory trustees.

**8 Meaning of *trust instrument* [TB, sch 1; TA, s 5]**

- (1) The *trust instrument*, in relation to a trust, is any instrument creating the trust, as modified by all validly executed amendments.
- (2) In this section—  
*instrument* includes an Act.

**9 Meaning of *trust property* and references to trust property [TB, sch 1; TA, s 5]**

- (1) *Trust property* includes—
  - (a) property settled on any trust; and
  - (b) property subject to any implied, resulting, bare or constructive trust; and
  - (c) property subject to a trust or direction for sale, however arising; and
  - (d) land that is vested in a person for an estate for the person's own or any other life, or for a term of years determinable on life not being a mere lease at rent, or for any greater estate not being a fee simple absolute; and

- 
- (e) land in relation to which a person has, under a will, a personal licence to reside for the person's own or any other life, or for any lesser period; and
  - (f) the estate of a deceased person.
- (2) A reference in this Act to trust property includes a reference to a part of the trust property.

**10 Meaning of *capacity* and *impaired capacity* [TB, sch 1; New]**

- (1) A person has *capacity* for a matter only if the person is capable of—
- (a) understanding the nature and effect of decisions about the matter; and
  - (b) freely and voluntarily making decisions about the matter; and
  - (c) communicating the decisions in some way.
- (2) A person has *impaired capacity* for a matter if the person does not have capacity for the matter.

*Example of a matter for this section—*

administering a trust

**11 Meaning of *charitable* [TB, cl 6; TA, s 103]**

- (1) The established rules of law relating to what is *charitable*, as in force immediately before the commencement, continue to apply.

*Examples of categories of charitable purposes—*

- the relief of poverty
- the advancement of education
- the advancement of religion

- (2) Despite any rule of law to the contrary, it is declared that it is and always has been charitable to provide, or to help in providing, facilities for recreation or other leisure time

[s 12]

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activity, if the facilities are provided in the interests of social welfare.

- (3) For subsection (2), facilities are provided in the interests of social welfare only if—
- (a) the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended; and
  - (b) either—
    - (i) those persons have need of the facilities because of their youth, age, infirmity or disability, poverty or social and economic circumstances; or
    - (ii) the facilities are to be available to the members of the public at large or to a substantial section of the public at large.
- (4) Nothing in this section limits the requirement that, in order to be charitable, a gift, trust or institution must be for the public benefit.

**12 References to security when lending or investing trust funds [TB, cl 7; TA, s 5A]**

In this Act, a reference to a trustee lending (or investing) trust funds on the security of property includes a reference to a trustee lending (or investing) trust funds on a new security or on the transfer of an existing security.

**Part 2 Restrictions on appointment of trustees and related matters**

**13 Persons who can not be appointed as trustees [TB, cll 10(1) and 11; New; Rec 3-1 and 3-2]**

- (1) The following persons can not be appointed as a trustee—
- (a) a child;

- 
- (b) an individual who is a bankrupt, or is taking advantage of the laws of bankruptcy as a debtor, under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction;
  - (c) a person who is disqualified from being appointed as a trustee by an order made under section 172.
- (2) The purported appointment of a person mentioned in subsection (1)(a), (b) or (c) is of no effect.
  - (3) Subsections (1)(b) and (2) do not affect the appointment of an individual who becomes a bankrupt, or starts to take advantage of the laws of bankruptcy, as mentioned in subsection (1)(b) after the person's appointment as trustee has taken effect.

*Note—*

See, however, sections 20 and 28 in relation to the replacement and removal of a trustee who becomes a bankrupt or starts to take advantage of the laws of bankruptcy.

- (4) This section does not apply in relation to the appointment of a personal representative.

**14 Limit on number of trustees of particular trusts [TB, cl 12(1), (2), (4) and (5); TA, s 11(1)–(3)(a) and (4); Rec 3-3]**

- (1) This section applies to a trust other than—
  - (a) a charitable trust; or
  - (b) a trust that is, or would apart from this section be, a self managed superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993* (Cwlth).
- (2) The trust may not have more than 4 trustees.
- (3) If more than 4 persons are named as trustees under the trust instrument—
  - (a) the first 4 persons named, who are able and willing to act as trustees and whose appointments are otherwise able to take effect, are the trustees; and

[s 15]

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*Example of a person who is not able to act as a trustee—*

a person who has impaired capacity for administering the trust

*Example of a person whose appointment as a trustee is not otherwise able to take effect—*

a person who can not, under section 13, be appointed as a trustee

- (b) the appointment of the other persons is of no effect.
- (4) A custodian trustee is not to be counted for the purpose of any limitation on the number of trustees the trust may have.

*Note—*

See part 4 in relation to custodian trustees.

- (5) This section applies subject to section 15.

**15 Court approval of more than 4 trustees for particular trusts [TB, cl 12(3); TA, s 11(3)(b); Rec 3-3]**

- (1) This section applies in relation to a trust other than a trust mentioned in section 14(1)(a) or (b).
- (2) The court may, on application, make an order approving the appointment of more than 4 trustees of the trust if satisfied it is appropriate to do so in the particular circumstances of the case.

*Note—*

See section 167 in relation to the persons who may apply to the court for particular orders.

- (3) The number of trustees approved by the court on an application under subsection (2) is the ***approved number***.

*Example—*

If the court approves the appointment of 6 trustees, the approved number is 6.

- (4) If the court makes an order under subsection (2) in relation to a trust, section 14 applies to the trust as if—
- (a) the reference in section 14(2) to 4 trustees were a reference to the approved number of trustees; and

- (b) the references in section 14(3) to 4 persons were references to the approved number of persons.

**16 Local government trustees may act in administration of trusts [TB, cl 173(3) and (4); TA, s 116]**

- (1) If a local government is appointed as trustee of a trust, the local government may act in the administration of the trust for the purpose of, and according to, the trust, even if the purpose is not a function of local government.
- (2) Subsection (1) applies whether or not the local government is an original trustee of the trust.
- (3) However, if the local government is not an original trustee of the trust, subsection (1) applies subject to a contrary intention in the trust instrument.

**Part 3 Appointment, discharge and removal of trustees and devolution of trusts**

**Division 1 Preliminary**

**17 Application of part [TB, cll 8–9; TA, ss 12(9) and 16(9); Rec 3-19]**

This part applies in relation to a trustee who is the personal representative of the estate of a deceased person only if, and to the extent, the personal representative—

- (a) has completed the administration of all, or a part, of the estate; and
- (b) holds the estate, or a part of the estate, in the capacity of trustee only.

[s 18]

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**18 When appointors are not *able and willing to act* [TB, cll 18 and 23(4); New; Rec 3-6]**

For this part, if there are 2 or more appointors for a trust, the appointors are not *able and willing to act* as appointors for the trust if—

- (a) the appointors can not, within a reasonable period—
  - (i) if the trust instrument provides for the appointors to exercise the power of appointment by majority—reach a majority decision on the appointment; or
  - (ii) otherwise—reach a unanimous decision on the appointment; or
- (b) the appointors are otherwise not able and willing to act as appointors.

**Division 2 Appointment of trustees**

**19 Application of division [TB, cll 13–14; TA, s 12(7)–(8); Rec 3-4]**

- (1) If there is an appointor for a trust, the provisions of this division relating to appointors apply, whether the appointment of a trustee is to be made in a circumstance mentioned in this division or in the trust instrument.
- (2) However, if an appointor is authorised under this division to appoint a trustee in a circumstance that is also mentioned in the trust instrument, an appointment made under this division in that circumstance is subject to the terms applying under the trust instrument to an appointment in that circumstance.
- (3) If a will names a person as trustee of a trust created by the will and the person is dead, the provisions of this division that apply if a trustee is dead apply—
  - (a) whether the person is named as a sole trustee or otherwise of the trust; and



- (b) whether the death of the person happened before or after the death of the testator.

**20 Appointment of trustees—replacement of trustee in particular circumstances [TB, cl 15(1), (2)(a) and (b)(i) and (5)–(6); TA, s 12(1), (3) and (7); Recs 3-4, 3-5 and 3-7]**

- (1) This section applies if a trustee of a trust (the *relevant trustee*)—
  - (a) is dead; or
  - (b) declares, by instrument, that the trustee wishes to be discharged from all or part of the trusts reposed in the trustee; or
  - (c) refuses to act as trustee; or
  - (d) is unfit to act as trustee; or
  - (e) is incapable of acting as trustee, including, for example, because of having impaired capacity for administering the trust; or
  - (f) becomes a bankrupt, or starts to take advantage of the laws of bankruptcy as a debtor, under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction; or
  - (g) is disqualified from managing corporations under the Corporations Act, part 2D.6 and either—
    - (i) does not have permission under section 206GAB or 206G of that Act to manage all corporations; or
    - (ii) has permission under section 206GAB or 206G of that Act to manage all corporations, but the permission is subject to exceptions or conditions; or
  - (h) is a corporation that—
    - (i) has stopped carrying on business; or
    - (ii) is a Chapter 5 body corporate within the meaning of the Corporations Act, section 9; or

[s 21]

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- (iii) has been deregistered or has otherwise ceased to exist; or
- (i) is removed under the trust instrument.
- (2) For subsection (1), it does not matter whether the relevant trustee is an original trustee of the trust or was appointed by the court or otherwise.
- (3) The following persons may, by instrument, appoint 1 or more persons as trustees to replace the relevant trustee—
  - (a) if there is an appointor for the trust—the appointor;
  - (b) if there is no appointor for the trust, or no appointor who is able and willing to act as an appointor—the continuing trustee of the trust or, if there is more than 1 continuing trustee, the continuing trustees.

*Notes—*

- 1 See section 14 in relation to the limit applying to the number of trustees of particular trusts.
- 2 See also section 170 in relation to the court’s power to appoint and remove trustees.
- (4) Subject to a contrary intention in the trust instrument, if there is an appointor for the trust, the appointor may appoint themselves as a trustee under subsection (3)(a).
- (5) In this section—
  - continuing trustee* includes a relevant trustee mentioned in subsection (1)(b) or (c) who is willing to act under subsection (3)(b).

**21 Appointment of trustees—replacement of last continuing trustee who is dead [TB, cl 15(2)(b)(ii) and (3)–(6); TA, s 12(1)(a) and (4); Recs 3-4 and 3-7]**

- (1) This section applies if—
  - (a) the last continuing trustee of a trust is dead; and
  - (b) there is no appointor for the trust, or no appointor who is able and willing to act under section 20 to appoint a trustee to replace the last continuing trustee.

- (2) For subsection (1), it does not matter whether the last continuing trustee was an original trustee of the trust or was appointed by the court or otherwise.
- (3) The personal representative of the last continuing trustee may, by instrument, appoint 1 or more persons as trustees to replace the last continuing trustee.

*Notes—*

- 1 See section 14 in relation to the limit applying to the number of trustees of particular trusts.
  - 2 See also section 170 in relation to the court's power to appoint and remove trustees.
- (4) The personal representative of the last continuing trustee—
- (a) is taken to have always had the power of appointment conferred under subsection (3); and
  - (b) if the personal representative is the executor, whether original or by representation, of the last continuing trustee's will—may exercise the power of appointment conferred under subsection (3) without the agreement of any executor named in the trustee's will who has not proved the trustee's will.
- (5) Subject to a contrary intention in the trust instrument, the personal representative of the last continuing trustee may appoint themselves as a trustee under subsection (3).
- (6) If there is more than 1 personal representative of the last continuing trustee, the personal representatives must exercise the power of appointment under subsection (3) jointly.
- (7) In this section—
- personal representative*, of the last continuing trustee of a trust, does not include an executor named in the trustee's will who has not proved the trustee's will.

**22 Appointment of trustees—replacement of last continuing trustee with impaired capacity [TB, cl 16; New; Rec 3-8]**

- (1) This section applies if—

- (a) the last continuing trustee of a trust is incapable of acting as trustee because the trustee has impaired capacity for administering the trust; and
  - (b) there is no appointor for the trust, or no appointor who is able and willing to act under section 20 to appoint a trustee to replace the last continuing trustee; and
  - (c) there is an administrator or attorney for the last continuing trustee who is authorised, under their appointment as administrator or attorney, to exercise power for all financial matters for the trustee.
- (2) For subsection (1), it does not matter whether the last continuing trustee is an original trustee of the trust or was appointed by the court or otherwise.
  - (3) The administrator or attorney may, by instrument, appoint 1 or more persons as trustees to replace the last continuing trustee.

*Notes—*

- 1 See section 14 in relation to the limit applying to the number of trustees of particular trusts.
  - 2 See also section 170 in relation to the court’s power to appoint and remove trustees.
- (4) The administrator or attorney may appoint themselves as a trustee under subsection (3).
  - (5) If there is more than 1 administrator or more than 1 attorney for the last continuing trustee, the administrators or attorneys must exercise the power of appointment under subsection (3) jointly.
  - (6) To remove any doubt, it is declared that—
    - (a) the exercise of the power of appointment under subsection (3) is not made in the capacity of administrator or attorney for the last continuing trustee; and
    - (b) neither the *Guardianship and Administration Act 2000* nor the *Powers of Attorney Act 1998* applies in relation to the exercise of the power of appointment.
  - (7) This section applies subject to a contrary intention in—

- (a) the trust instrument; or
- (b) the order or instrument by which the administrator or attorney is appointed.

**23 Appointment of trustees—additional trustees [TB, cl 17; TA, s 12(5); Rec 3-12]**

- (1) This section applies in relation to a trust if—
  - (a) the number of trustees of the trust is less than the number of trustees permitted for the trust under section 14; or
  - (b) section 14 does not apply to the trust.
- (2) The following persons may, by instrument, appoint 1 or more persons as additional trustees of the trust—
  - (a) if there is an appointor for the trust—the appointor;
  - (b) if there is no appointor for the trust, or no appointor who is able and willing to act as an appointor—the trustee of the trust or, if there is more than 1 trustee, the trustees.

*Notes—*

- 1 See section 14 in relation to the limit applying to the number of trustees of particular trusts.
  - 2 See also section 170 in relation to the court's power to appoint and remove trustees.
- (3) However, the persons mentioned in subsection (2) are not required to exercise the power conferred under that subsection unless the appointment of 1 or more additional trustees is required under the trust instrument or an Act.
  - (4) Subject to a contrary intention in the trust instrument, if there is an appointor for the trust, the appointor may appoint themselves as an additional trustee under subsection (2)(a).

[s 24]

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**24 Appointment of trustees—separate set of trustees for separate trust property [TB, cl 19; TA, s 12(2)(b); Rec 3-4]**

- (1) This section applies if, under a trust, a part of the trust property (the *separate trust property*) is held on a trust distinct from the trust relating to any other part of the trust property.
- (2) If a new trustee may be appointed under this division—
  - (a) a separate set of trustees may be appointed for the separate trust property, whether or not a new trustee is, or is to be, appointed for any other part of the trust property; and
  - (b) a continuing trustee may be appointed or continue as a trustee of the separate trust property; and
  - (c) if only 1 trustee of the trust property was originally appointed—1 trustee may be appointed of the separate trust property.

**25 Powers etc. of trustees appointed under division [TB, cl 20; TA, s 12(6); Rec 3-4]**

- (1) A person appointed under this division as the trustee of trust property has all the powers, authorities and discretions of, and may in all matters act as, a person who had originally been appointed a trustee of the trust property under the trust instrument.
- (2) Subsection (1) applies in relation to the trustee both before and after the trust property is vested in the trustee.

**Division 3 Discharge and removal of trustees**

**26 Meaning of *minimum trustee requirements* [TB, cl 21; New; Recs 3-9(c), 3-10(a) and (b) and 3-13(a) and (b)]**

For this division, the *minimum trustee requirements* for a trust are that—

- (a) the trust has at least 1 trustee that is a corporation; or

*Examples of a corporation—*

- the public trustee
- a licensed trustee company under the Corporations Act
- a company registered under the Corporations Act
- a local government

*Note—*

See section 16 in relation to the power of a local government to act in the administration of a trust.

- (b) the trust has at least 2 trustees who are individuals; or
- (c) if only 1 trustee was originally appointed or the trust instrument allows the trust to have only 1 trustee who is an individual—the trust has at least 1 trustee who is an individual.

**27 Discharge of trustee on appointment of new trustee [TB, cl 22; TA, s 12(2)(c); Rec 3-10]**

- (1) This section applies if—
- (a) a new trustee is appointed under division 2 to replace a trustee (the *replaced trustee*); and
- (b) on the appointment of the new trustee, the minimum trustee requirements for the trust are satisfied.
- (2) On the appointment of the new trustee, the replaced trustee is discharged from the trust.
- (3) However, if the replaced trustee has declared, as mentioned in section 20(1)(b), that the trustee wishes to be discharged from only part of the trusts reposed in the trustee and is replaced under section 20 in relation to that part only, the trustee is discharged from that part only.

[s 28]

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**28 Removal and discharge of trustee without appointment of new trustee [TB, cl 23; New; Rec 3-9]**

- (1) This section applies in relation to a relevant trustee mentioned in section 20(1)(c), (d), (e), (f), (g) or (h).
- (2) For subsection (1), it does not matter whether the relevant trustee is an original trustee of the trust or was appointed by the court or otherwise.
- (3) The following persons may, by instrument, remove the relevant trustee without appointing a new trustee to replace the relevant trustee—
  - (a) if there is an appointor for the trust—the appointor;
  - (b) if there is no appointor for the trust, or no appointor who is able and willing to act as an appointor—the continuing trustee of the trust or, if there is more than 1 continuing trustee, the continuing trustees.
- (4) However, subsection (3) applies only if, on the removal of the relevant trustee, the minimum trustee requirements for the trust will be satisfied.
- (5) On the removal of the relevant trustee under this section, the relevant trustee is discharged from the trust.

**29 Discharge of trustee who wishes to be discharged [TB, cl 24; TA, ss 14 and 15(2); Rec 3-13; ACT Trustee Act, s 8(4)]**

- (1) This section applies if—
  - (a) a trustee declares, by instrument, that the trustee wishes to be discharged from all, or part (the *relevant part*), of the trusts reposed in the trustee; and
  - (b) on the discharge, the minimum trustee requirements will be satisfied for the trust or relevant part.
- (2) Subject to subsection (3), the trustee is discharged from the trusts or relevant part if the trustee’s co-trustees and, if there is an appointor for the trust, the appointor, by instrument, agree to—
  - (a) discharge the trustee from the trusts or relevant part; and



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- (b) vest the trust property in the co-trustees alone.
  - (3) The discharge of the trustee takes effect—
    - (a) to the extent it is necessary, in order to vest the trust property in the co-trustees alone, for a transfer of the trust property to be notified, registered or recorded under the requirements of another Act or of a law of another State or the Commonwealth—on the notification, registration or recording of the transfer; or
    - (b) if, or to the extent, paragraph (a) does not apply—according to the terms of the instrument mentioned in subsection (2).
  - (4) If the trustee has declared, as mentioned in subsection (1)(a), that the trustee wishes to be discharged from only the relevant part of the trusts, the references in subsections (2)(b) and (3)(a) to the trust property are references to the trust property held on trust under the relevant part.
  - (5) To remove any doubt, it is declared that it is not necessary for a new trustee to be appointed to replace the trustee who is discharged.

#### **Division 4                      Notification of trustee’s delegate if trustee replaced or removed**

##### **30            Person replacing or removing trustee to notify person who was trustee’s delegate [New]**

- (1) This section applies if—
  - (a) a trustee is—
    - (i) replaced under division 2; or
    - (ii) removed under section 28 or under the trust instrument, without being replaced; or
    - (iii) discharged under section 29; and

[s 31]

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- (b) when the trustee is replaced, removed or discharged, the relevant person has notice that the trustee had, under section 99, delegated a matter in relation to the trust.
- (2) For subsection (1)(b), it does not matter whether the relevant person has notice of the delegation of the matter because the trustee gave notice to the relevant person under section 103, or otherwise.
- (3) The relevant person must give the person to whom the delegation was made written notice that the trustee has been replaced, removed or discharged, as the case may be.
- (4) For this section, the *relevant person* is—
  - (a) if the trustee is replaced or removed as mentioned in subsection (1)(a)(i) or (ii)—the person replacing or removing the trustee; or
  - (b) if the trustee is discharged as mentioned in subsection (1)(a)(iii)—any person whose agreement to the discharge is required under section 29.

**Division 5                      Vesting of trust property on  
 appointment, removal or discharge  
 of trustees**

**31            Application of division [TB, cl 25(1) and (3)]**

- (1) This division applies if, by instrument (an *instrument of change*)—
  - (a) a new trustee is appointed, whether under division 2 or under the trust instrument and whether to replace a trustee or to be an additional trustee; or
  - (b) a trustee is—
    - (i) removed under section 28; or
    - (ii) discharged under section 29.

- (2) However, this division does not apply if a new trustee is appointed to replace the last continuing trustee of a trust who is dead.

*Note—*

See division 7 in relation to the vesting of trust property on the death of the last continuing trustee of a trust.

### 32 Definitions for division

In this division—

*instrument of change* see section 31(1).

*post-change trustee*, in relation to an instrument of change, means a person who, on the appointment of a new trustee, or the removal or discharge of a trustee, under the instrument, becomes or continues as a trustee of the trust to which the instrument relates.

*pre-change trustee*, in relation to an instrument of change, means a person who, immediately before the appointment of a new trustee, or the removal or discharge of a trustee, takes effect under the instrument, is a trustee of the trust to which the instrument relates.

### 33 Vesting of trust property [TB, cll 25(2) and 26; TA, s 15(1)–(2); New; Rec 3-15]

- (1) On the appointment of the new trustee, or the removal or discharge of the trustee, under the instrument of change, the instrument of change—
- (a) divests the trust property from the pre-change trustees; and
  - (b) without any conveyance, transfer or assignment, vests the trust property in—
    - (i) the post-change trustee; or
    - (ii) if there is more than 1 post-change trustee—the post-change trustees, as joint tenants.

[s 34]

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- (2) However, to the extent the divesting and vesting of the trust property have effect only if notified, registered or recorded under the requirements of another Act or of a law of another State or the Commonwealth—
  - (a) the divesting and vesting of the trust property are subject to the requirements of the other Act or law; and
  - (b) the instrument of change—
    - (i) vests in the post-change trustee a right to call for a transfer of the trust property; or
    - (ii) if there is more than 1 post-change trustee—vests in the post-change trustees jointly a right to call for a transfer of the trust property.

**34 Transfer etc. of trust property [TB, cl 27; TA, s 15(3) (in part) and (5)–(6); Rec 3-15]**

- (1) Each pre-change trustee and post-change trustee must do all things necessary to assist in the notification, registration or recording of the divesting and vesting of the trust property under a requirement mentioned in section 33(2).
- (2) The instrument of change is taken to be a conveyance of the trust property from the pre-change trustees to the post-change trustee or, if there is more than 1 post-change trustee, to the post-change trustees as joint tenants.
- (3) However, the instrument of change does not have effect as a breach of covenant or condition, or give rise to the forfeiture, of any lease or agreement for lease or other property.
- (4) If the consent of a person is needed to the conveyance, transfer or assignment of the trust property—
  - (a) the vesting of the property under this division is subject to the consent; but
  - (b) the consent may be obtained after the execution of the instrument of change by the post-change trustee or, if there is more than 1 post-change trustee, the post-change trustees.

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**Division 6                      Devolution of trusts on death of trustee**

**35        Exercise of trust powers on death [TB, cl 28; TA, s 16(1); Rec 3-16]**

- (1) This section applies if—
  - (a) a power is given to, or a trust is imposed on, 2 or more trustees jointly; and
  - (b) 1 or more of the trustees dies.
- (2) The surviving trustee or, if there is more than 1 surviving trustee, the surviving trustees may exercise the power or perform the trust, as the case may be.

**Division 7                      Vesting of trust property and devolution of trusts—death of last continuing trustee**

**36        Application of division**

This division applies if the last continuing trustee of a trust dies.

**37        Vesting of trust property in public trustee [TB, cll 27(5) and 29; TA, ss 15(4) and 16(2) (opening words) and (3); Rec 3-16]**

- (1) On the death of the last continuing trustee, the trust property devolves to and vests in the public trustee in the same way, and subject to the same provisions, as trust property vests in a post-change trustee under division 5.
- (2) However, it is not necessary for the public trustee to notify, register or record the vesting of the trust property under section 34, as applied under subsection (1), if—
  - (a) the public trustee does not act in relation to the trust; or

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- (b) the only action taken by the public trustee is the appointment of a new trustee.
- (3) The trust property remains vested in the public trustee until it is divested from the public trustee under section 39 or 40.

**38 Powers etc. of public trustee [TB, cl 31; TA, s 16(5) and (8); Rec 3-16]**

- (1) While the trust property is vested in the public trustee under section 37, the public trustee has all the powers, authorities and discretions of, and may in all matters act as, a person who had originally been appointed as a trustee of the trust property under the trust instrument.
- (2) However, unless the court, in special circumstances, otherwise directs, the public trustee is not required to exercise any of the powers, authorities or discretions or act in the administration of the trust.
- (3) This section does not limit any power the public trustee has under the *Public Trustee Act 1978*, section 61 or 62.

**39 Vesting of trust property in new trustee [TB, cl 30(1)(a) and (2); TA, s 16(2)(a); Rec 3-16]**

- (1) This section applies if—
  - (a) a new trustee is appointed to replace the last continuing trustee; and
  - (b) for an appointment made other than by the public trustee—the new trustee gives the public trustee written notice of the appointment.
- (2) The trust property—
  - (a) is divested from the public trustee; and
  - (b) devolves to and vests in the new trustee in the same way, and subject to the same provisions, as trust property vests in a post-change trustee under division 5.

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**40 Vesting of trust property in holder of grant [TB, cl 30(1)(b) and (2); TA, s 16(2)(b); Rec 3-16]**

- (1) This section applies if—
- (a) a new trustee has not been appointed to replace the last continuing trustee; and
  - (b) a grant of probate of the will, or letters of administration of the estate, of the last continuing trustee is made to a person, other than the public trustee; and
  - (c) the holder of the grant gives the public trustee written notice of—
    - (i) the making of the grant; and
    - (ii) the holder's intention to assume the trust of the trust property.
- (2) The trust property—
- (a) is divested from the public trustee; and
  - (b) devolves to and vests in the holder of the grant in the same way, and subject to the same provisions, as trust property vests in a post-change trustee under division 5.

**41 Powers etc. of holder of grant [TB, cll 30(3) and 31(1); TA, s 16(2)(b) and (6); Rec 3-16]**

If the trust property vests in the holder of a grant under section 40, the holder—

- (a) is taken to be a person appointed as a new trustee by an appointor for the trust; and
- (b) has all the powers, authorities and discretions of, and may in all matters act as, a person who had originally been appointed as a trustee of the trust property under the trust instrument.

**42 Liability of public trustee [TB, cl 30(4) and (5); TA, s 16(7); Rec 3-16]**

- (1) This section applies if the public trustee—

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- (a) is liable for any action taken by the public trustee in relation to the trust; and
  - (b) is entitled to be indemnified out of the trust property for the liability.
- (2) On the divesting of the trust property from the public trustee under section 39 or 40—
- (a) the public trustee’s liability ends; and
  - (b) a person who would, apart from paragraph (a), have had a remedy against the public trustee is taken to have the same remedy against the person in whom the trust property vests under section 39 or 40.

## Division 8

### **Vesting of trust property and devolution of trusts—last continuing trustee with impaired capacity for particular matters**

#### **43 Application of division [New]**

- (1) This division applies if—
- (a) an administrator is appointed for all financial matters for the last continuing trustee of a trust; or
  - (b) any of the following entities decides that the last continuing trustee of a trust has impaired capacity for all financial matters or for administering the trust—
    - (i) the Supreme Court;
    - (ii) the District Court;
    - (iii) QCAT;
    - (iv) a corresponding interstate entity.
- (2) In this section—
- corresponding interstate entity* means—
- (a) the Supreme Court of another State; or



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- (b) the District Court of another State or the County Court of Victoria; or
  - (c) a tribunal established under the law of another State that exercises jurisdiction corresponding to the jurisdiction exercisable by QCAT under the *Guardianship and Administration Act 2000*.

#### **44 Vesting of trust property in public trustee [New]**

- (1) On the appointment of the administrator or the making of the decision, the trust property devolves to and vests in the public trustee in the same way, and subject to the same provisions, as trust property vests in a post-change trustee under division 5.
- (2) However, it is not necessary for the public trustee to notify, register or record the vesting of the trust property under section 34, as applied under subsection (1), if—
  - (a) the public trustee does not act in relation to the trust; or
  - (b) the only action taken by the public trustee is the appointment of a new trustee.
- (3) The trust property remains vested in the public trustee until it is divested from the public trustee under section 46.

#### **45 Powers etc. of public trustee [New]**

- (1) While the trust property is vested in the public trustee under section 44, the public trustee has all the powers, authorities and discretions of, and may in all matters act as, a person who had originally been appointed as a trustee of the trust property under the trust instrument.
- (2) However, unless the court, in special circumstances, otherwise directs, the public trustee is not required to exercise any of the powers, authorities or discretions or act in the administration of the trust.
- (3) This section does not limit any power the public trustee has under the *Public Trustee Act 1978*, section 61 or 62.

**46 Vesting of trust property in new trustee [New]**

- (1) This section applies if—
  - (a) a new trustee is appointed to replace the last continuing trustee; and
  - (b) for an appointment made other than by the public trustee—the new trustee gives the public trustee written notice of the appointment.
- (2) The trust property—
  - (a) is divested from the public trustee; and
  - (b) devolves to and vests in the new trustee in the same way, and subject to the same provisions, as trust property vests in a post-change trustee under division 5.

**47 Liability of public trustee [New]**

- (1) This section applies if the public trustee—
  - (a) is liable for any action taken by the public trustee in relation to the trust; and
  - (b) is entitled to be indemnified out of the trust property for the liability.
- (2) On the divesting of the trust property from the public trustee under section 46—
  - (a) the public trustee’s liability ends; and
  - (b) a person who would, apart from paragraph (a), have had a remedy against the public trustee is taken to have the same remedy against the person in whom the trust property vests under section 46.

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**Division 9**                      **Disclaimer of testamentary trusts  
and related matters**

**48**            **Disclaimer of testamentary trust on renunciation of  
probate [TB, cl 32(1); TA, s 18(1); Rec 3-18]**

- (1) This section applies if a person who is appointed by will as both executor of the will and trustee—
  - (a) renounces probate of the will; or
  - (b) fails to apply for probate of the will after being properly cited or summoned to apply.
- (2) The renunciation or failure is taken to be a disclaimer by the person of the trust contained in the will.

**49**            **When grantee under letters of administration is taken to  
be trustee of testamentary trust [TB, cl 32(1); TA, s 18(2);  
Rec 3-18]**

- (1) This section applies if—
  - (a) a person who is appointed by will as both executor of the will and trustee—
    - (i) is taken under section 48 to have disclaimed the trust contained in the will; or
    - (ii) dies before probate of the will is granted to the person; and
  - (b) letters of administration with the will are granted to another person (the *grantee*).
- (2) The grantee is taken to have been appointed trustee of the trust instead of the person.

## Part 4 Custodian trustees

### 50 Meaning of *managing trustees* [TB, cl 34(2)]

If a custodian trustee of trust property is appointed, the trustees of the trust, other than the custodian trustee, are the *managing trustees* of the trust.

### 51 Appointment of custodian trustee [TB, cl 33; TA, s 19(1); Rec 4-5(a)]

- (1) A corporation may, under this section, be appointed as the custodian trustee of trust property.
- (2) The appointment may be made by—
  - (a) the trust instrument; or
  - (b) if there is an appointor for the trust—the appointor, by instrument; or
  - (c) the trustees of the trust, by instrument; or
  - (d) the court, by order.
- (3) Subsection (2)(b) and (c) applies subject to a contrary intention in the trust instrument.

### 52 Vesting of trust property in custodian trustee [TB, cl 34(1) and (3)–(6); TA, s 19(2)(a); Rec 4-5]

- (1) On the appointment of a custodian trustee of trust property, the trust property vests in the custodian trustee as if the custodian trustee were the sole trustee.
- (2) The instrument of appointment of the custodian trustee—
  - (a) is taken to be a conveyance of the trust property from the managing trustees to the custodian trustee; but
  - (b) does not have effect as a breach of covenant or condition, or give rise to the forfeiture, of any lease or agreement for lease or other property.

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- (3) Section 33(2) applies to the divesting and vesting of the trust property under this section as if—
    - (a) the reference in section 33(2)(b) to the instrument of change were a reference to the instrument of appointment of the custodian trustee; and
    - (b) the reference in section 33(2)(b)(i) to the post-change trustee were a reference to the custodian trustee.
  - (4) The court may, on application, make vesting orders to give effect to subsection (1).

*Note—*

See section 167 in relation to the persons who may apply to the court for particular orders.

- (5) Subsection (1) applies subject to an express contrary intention in the trust instrument.
- (6) In this section—

*instrument of appointment*, of a custodian trustee, means the trust instrument, other instrument or court order by which the custodian trustee is appointed.

**53 Trust powers, authorities and discretions of managing trustees not affected [TB, cll 34(2) and (6) and 38; TA, s 19(2)(b) and (i); Rec 4-5]**

- (1) This section applies if trust property vests in a custodian trustee under section 52.
- (2) The exercise of all powers, authorities and discretions exercisable by trustees under the trust, including the management of the trust property, remains vested in the managing trustees of the trust as fully and effectively as if there were no custodian trustee.
- (3) Without limiting subsection (2), the custodian trustee does not have the power to appoint a new trustee of the trust.

*Note—*

See, however, section 167(3) in relation to a custodian trustee's power to apply to the court for an order appointing a new trustee of the trust.

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- (4) This section applies subject to an express contrary intention in the trust instrument.

**54 Function of custodian trustee [TB, cl 35(1), (2) and (7); TA, s 19(2)(c); Rec 4-5]**

- (1) A custodian trustee’s function is to do the following, as the managing trustees, by instrument, direct—
  - (a) get in and hold the trust property;
  - (b) invest the trust property;
  - (c) dispose of the trust property.
- (2) For performing the custodian trustee’s function under subsection (1), the custodian trustee must perform all acts and execute all documents as the managing trustees, by instrument, direct.
- (3) This section applies subject to an express contrary intention in the trust instrument.

**55 Protection from liability for custodian trustee [TB, cl 35(3) and (7); TA, s 19(2)(e)–(f); Rec 4-5]**

- (1) A custodian trustee is not personally liable for an act done, or an omission made, under a direction of the managing trustees mentioned in section 54(1) or (2).
- (2) Also, a custodian trustee is not personally liable for an act done, or an omission made, by any of the managing trustees.
- (3) This section applies subject to an express contrary intention in the trust instrument.

**56 Liability of managing trustees for acts and omissions of custodian trustee [TA, s 71]**

- (1) This section applies if a custodian trustee does an act, or makes an omission, under a direction of the managing trustees mentioned in section 54(1) or (2).

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- (2) The managing trustees are liable for the act done, or the omission made, as if it were the managing trustees' own act or omission.
  - (3) This section applies subject to an express contrary intention in the trust instrument.

**57 Application by custodian trustee for directions [TB, cl 35(4)–(6); TA, s 19(2)(e); Rec 4-5]**

- (1) A custodian trustee may apply to the court for directions if the custodian trustee believes a direction of the managing trustees mentioned in section 54(1) or (2)—
  - (a) conflicts with the trust instrument or the law; or
  - (b) exposes, or would expose, the custodian trustee to a personal liability; or
  - (c) is otherwise objectionable.
- (2) The court may, on an application under subsection (1), make the orders and give the directions the court considers appropriate, including an order about the costs of the application.
- (3) An order made under subsection (2) giving directions binds the custodian trustee and the managing trustees.

**58 Proceedings to be in name of custodian trustee [TB, cl 36; TA, s 19(2)(g); Rec 4-5]**

- (1) A proceeding in relation to trust property that is vested in a custodian trustee must be brought, or defended, in the name of the custodian trustee as the managing trustees, by instrument, direct.
- (2) If a custodian trustee brings or defends a proceeding under a direction of the managing trustees mentioned in subsection (1)—
  - (a) the custodian trustee is not personally liable for the costs of bringing or defending the proceeding; but

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- (b) the managing trustees are personally liable for the costs of bringing or defending the proceeding, as if it had been brought or defended by the managing trustees.
- (3) This section applies subject to an express contrary intention in the trust instrument.

**59 Persons dealing with custodian trustee [TB, cl 37; TA, s 19(2)(h); Rec 4-5]**

A person dealing with a custodian trustee—

- (a) is not required to inquire about—
  - (i) any direction of the managing trustees about the dealing; or
  - (ii) whether the managing trustees have agreed to the dealing; and
- (b) is not affected by notice of the fact the managing trustees have not agreed to the dealing.

**60 Ending custodian trusteeship [TB, cl 39; TA, s 19(3); Rec 4-5]**

- (1) The following persons may apply to the court to end a custodian trusteeship—
  - (a) the custodian trustee;
  - (b) a managing trustee of the trust;
  - (c) a beneficiary of the trust.
- (2) The court may order the ending of the custodian trusteeship if satisfied that—
  - (a) it is the general wish of the beneficiaries of the trust; or
  - (b) it is expedient to end the custodian trusteeship on other grounds.
- (3) The court may, to give effect to the ending of the custodian trusteeship—



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- (a) give the directions it considers appropriate; and
  - (b) make the vesting orders it considers necessary.

**61 Managing trustees' right to indemnity not affected [New]**

Nothing in this part limits the right of the managing trustees of a trust to be indemnified out of the trust property in relation to liabilities incurred in the proper administration of the trust.

## **Part 5 Trustees' duties**

### **Division 1 Preliminary**

**62 Application of part [New; TB, cll 40 and 42(5); Rec 6-3]**

This part does not limit any other duty to which a trustee is subject, whether under this Act or otherwise.

**63 Definitions for part [TB, cl 41; New]**

In this part—

*professional trustee* means—

- (a) a trustee whose profession, business or employment is, or includes, acting as a trustee; or
- (b) a custodian trustee whose profession, business or employment is, or includes, acting as a custodian trustee.

*trustee* includes a custodian trustee.

**Division 2**                      **General duty to exercise care,  
diligence and skill in administering  
trusts**

**64**            **Duty of professional trustees [TB, cl 42(2); TA, s 22(1);  
New; Rec 6-1]**

- (1) This section applies to a trustee if the trustee is a professional trustee.
- (2) The trustee has a duty, in administering a trust, to exercise the care, diligence and skill that a prudent person engaged in the trustee's profession, business or employment would exercise in managing the affairs of other persons.

**65**            **Duty of particular non-professional trustees [TB, cl 42(3);  
TA, s 22(1); New; Rec 6-1]**

- (1) This section applies to a trustee if—
  - (a) the trustee is not a professional trustee; but
  - (b) the trustee has, or holds themselves out as having, special knowledge or experience relevant to administering trusts or trusts of a particular type.
- (2) The trustee has a duty, in administering a trust or a trust of the particular type, to exercise the care, diligence and skill that a prudent person having that special knowledge or experience would exercise in managing the affairs of other persons.

**66**            **Duty of other trustees [TB, cl 42(4) and (5); TA, s 22(1);  
New; Rec 6-1]**

- (1) This section applies to a trustee if—
  - (a) the trustee is not a professional trustee; and
  - (b) section 65 does not apply to the trustee.
- (2) The trustee has a duty, in administering a trust, to exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of other persons.

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**Division 3                      Duty to act honestly and in good faith**

**67            Duty to act honestly and in good faith [TB, cl 43; New; Rec 6-2]**

A trustee has a duty, in administering a trust, to act honestly and in good faith—

- (a) if the trust is a charitable trust—to further the purposes of the trust; or
- (b) otherwise—for the benefit of the beneficiaries of the trust.

**Division 4                      Duties relating to accounts and other records**

**68            Duty to keep accounts and other records [TB, cl 44; New; Rec 6-4]**

- (1) A trustee has a duty, in administering a trust, to—
  - (a) keep accurate accounts and records for the trust; and
  - (b) keep the accounts and records for at least 3 years after the termination of the trust.
- (2) If a person is the trustee of more than 1 trust, the person must keep separate accounts and records for each trust.

**69            Duty to make accounts available for inspection and to provide copies [TB, cl 45; New; Recs 6-5 and 6-6]**

- (1) A trustee has a duty, in administering a trust, to do the following on request by a beneficiary of the trust—
  - (a) to make the accounts for the trust available for inspection by the beneficiary within a reasonable period after the request is made;

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- (b) to provide copies of the accounts for the trust to the beneficiary, within a reasonable period after the request is made, on payment of the reasonable costs of providing the copies.
- (2) However, subsection (1) does not apply if the request is unreasonable in the circumstances.  
*Example of a request to provide copies of accounts that may be unreasonable in the circumstances—*
  - a request by a beneficiary who has been provided with copies of the accounts to be provided with updated copies of the accounts at very short intervals
- (3) Subsection (1) does not limit any right of a beneficiary—
  - (a) to obtain other information from the trustee; or
  - (b) to apply to the court for an order that the trustee provide other information.
- (4) In this section—  
*beneficiary*, of a trust, includes a person in whose favour a power to distribute the trust property may be exercised.

## Part 6 Investments

### Division 1 Preliminary

#### 70 Definitions for part [TB, sch 1]

In this part—

*investment power* means—

- (a) a power of investment conferred on a trustee under the trust instrument; or
- (b) a power conferred on a trustee under this part.

*professional investor* means a person whose profession, business or employment is, or includes, investing money for other persons.

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**Division 2**                      **Duty of particular trustees to exercise care, diligence and skill in exercising investment powers**

**71**            **Duty of trustees who are professional investors [TB, cl 48; TA, s 22(1)(a); Recs 5-1 and 5-2]**

- (1) This section applies to a trustee if the trustee is a professional investor.
- (2) The trustee has a duty, in exercising an investment power, to exercise the care, diligence and skill that a prudent person engaged in the trustee's profession, business or employment would exercise in managing the affairs of other persons.
- (3) This section applies subject to a contrary intention in the trust instrument.

*Note—*

See also part 5, division 2 in relation to a trustee's general duty in administering a trust.

**72**            **Duty of particular trustees who are not professional investors [TB, cl 48; TA, s 22(1)(a); Recs 5-1 and 5-2]**

- (1) This section applies to a trustee if—
  - (a) the trustee is not a professional investor; but
  - (b) the trustee has, or holds themselves out as having, special knowledge or experience in investing money for other persons.
- (2) The trustee has a duty, in exercising an investment power, to exercise the care, diligence and skill that a prudent person having that special knowledge or experience would exercise in managing the affairs of other persons.
- (3) This section applies subject to a contrary intention in the trust instrument.

[s 73]

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*Note—*

See also part 5, division 2 in relation to a trustee's general duty in administering a trust.

### **Division 3                    Duties and powers in relation to investments**

#### **73        Power to invest [TB, cl 47; TA, ss 21 and 22(2); Rec 5-1]**

- (1) A trustee may invest trust funds in any form of investment, other than a forbidden form of investment.
- (2) Also, a trustee may, at any time—
  - (a) vary an investment of trust funds; or
  - (b) realise an investment of trust funds and reinvest an amount resulting from the realisation in any form of investment, other than a forbidden form of investment.
- (3) A trustee must, in exercising power under subsection (1) or (2), comply with any provision of the trust instrument that is binding on the trustee and requires the trustee to—
  - (a) obtain a consent or approval in relation to trust investments; or
  - (b) comply with a direction in relation to trust investments.
- (4) In this section—

*forbidden form of investment*, in relation to trust funds, means a form of investment that is expressly forbidden by the trust instrument.

*Note—*

See, however, section 79 for a power that can not be limited by a trust instrument.

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**74 Matters to which trustee must have regard in exercising investment power [TB, cl 51(1); TA, s 24(1); Rec 5-1]**

- (1) A trustee, in exercising an investment power, must have regard to the following matters, to the extent they are appropriate to the circumstances of the trust—
- (a) the purposes of the trust and the needs and circumstances of the beneficiaries;
  - (b) the desirability of diversifying the trust investments;
  - (c) the nature of, and the risk associated with, the 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 at the end of, the term of the proposed investment;
  - (k) the total value of the trust property;
  - (l) the effect of the proposed investment for the tax liability of the trust;
  - (m) the likelihood of inflation affecting the value of the proposed investment or other trust property;
  - (n) the cost (including commissions, fees, charges and duties payable) of making the proposed investment;
  - (o) the results of a review of the existing trust investments.
- (2) Subsection (1) does not limit the matters to which a trustee may have regard in exercising an investment power.

[s 75]

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**75 Advice for particular investment purposes [TB, cl 51(2); TA, s 24(2); Rec 5-1]**

- (1) A trustee may obtain independent and impartial advice, from a person the trustee reasonably believes is competent to give the advice, if the advice is reasonably required for—
  - (a) the investment of trust funds; or
  - (b) the management of the trust investments.
- (2) If the trustee obtains advice under subsection (1), the trustee—
  - (a) must consider the advice; and
  - (b) may pay, out of the trust funds, the reasonable costs of obtaining the advice.

**76 Duty to review investments [TB, cl 49; TA, s 22(3); Rec 5-1]**

A trustee must, at least every 12 months, review the performance, individually and as a whole, of the trust investments.

**77 Law and equity preserved [TB, cl 50; TA, s 23; Rec 5-1]**

- (1) A rule or principle of law or equity that imposes a duty on a trustee exercising an investment power continues to apply except to the extent it is inconsistent with this Act or another Act or with the trust instrument.
- (2) Without limiting subsection (1), the rules or principles mentioned in that subsection include a rule or principle imposing any of the following duties—
  - (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 obtain advice.
- (3) A rule or principle of law or equity relating to a provision in a trust instrument that purports to exempt, limit the liability of, or indemnify a trustee in relation to a breach of trust continues to apply.
- (4) If a trustee is under a duty to obtain advice, the reasonable costs of obtaining the advice are payable out of the trust funds.

**78 Investment in securities under RITS system [TB, cl 52; TA, s 26]**

- (1) A chose in action arising under the RITS system that entitles its holder to a security of a particular description (the *underlying security*) is, for this Act and a trust instrument, taken to be the same in all respects as the underlying security.
- (2) The holding or acquisition by a trustee of a chose in action mentioned in subsection (1) is taken to be 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 relation to securities of a particular description and not in relation to particular securities.
- (4) In this section—

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

**79 Power to provide residence for beneficiary to live in [TB, cl 53; TA, s 28; Rec 5-5]**

- (1) A trustee may do any of the following for a beneficiary of the trust—
- (a) buy or construct a residence for the beneficiary to live in;

[s 79]

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- (b) retain a residence that is part of the trust property for the beneficiary to live in;
- (c) enter into an agreement or arrangement to secure a right to use a residence for the beneficiary to live in.

*Example for paragraph (c)—*

entering into a residence contract under the *Retirement Villages Act 1999*

- (2) Also, a trustee who exercises power under subsection (1) may make the residence available to the beneficiary to live in on the conditions the trustee considers appropriate.
- (3) However, a trustee may exercise power under subsection (1), or impose conditions under subsection (2), only if the exercise of the power, or the imposition of the conditions, is consistent with the extent of the beneficiary's interest under the trust.
- (4) A trustee may retain a residence bought, constructed, retained or otherwise secured for use by a beneficiary under this section after the beneficiary has stopped living in the residence.
- (5) To remove any doubt, it is declared that subsection (4) does not limit the operation of the *Retirement Villages Act 1999* or any other Act.
- (6) Despite section 73, a trust instrument can not forbid the exercise of, or otherwise limit, a trustee's power under this section.
- (7) In this section—  
**residence** includes—
  - (a) a building or part of a building designed, or converted or capable of being converted, for use as a residence; and
  - (b) amenities or facilities for use in association with the use of a residence; and
  - (c) an interest in a residence.

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**80 Power to authorise another person to exercise trustee's investment powers [TB, cl 67(1), (2) and (4); New; Rec 4-3]**

- (1) A trustee may, by instrument, authorise another person to exercise any of the trustee's investment powers.
- (2) The authorisation may be made on the terms the trustee considers appropriate, including terms relating to remuneration.
- (3) However, the authorisation of the other person does not limit any duty or other requirement applying to the trustee under this part or part 5 in relation to the exercise of the trustee's investment powers.

*Note—*

See also section 81 in relation to the liability of the trustee for the acts done, and the omissions made, by the person in exercising the trustee's investment powers.

- (4) This section applies subject to an express contrary intention in the trust instrument.

**Division 4 Liability of trustees in relation to exercise of investment powers**

**81 Liability of trustee for acts and omissions of person authorised to exercise trustee's investment powers [TB, cl 67(3) and (4); New; Rec 4-3]**

- (1) This section applies if a trustee authorises another person under section 80 to exercise any of the trustee's investment powers.
- (2) The trustee is liable for the acts done, and the omissions made, by the other person in exercising the trustee's investment powers as if the acts and omissions were the trustee's own acts and omissions.
- (3) This section applies subject to an express contrary intention in the trust instrument.

**82 Particular loans by trustee not in breach of trust [TB, cl 54(1); TA, s 30(1); Rec 5-8]**

- (1) This section applies if a trustee lends trust funds on the security of property.
- (2) The trustee is not in breach of trust only because of the comparison of the amount of the loan with the value of the property when the loan was made if—
  - (a) it appears to the court that—
    - (i) in making the loan, the trustee was acting on an independent valuation of the property; and
    - (ii) the amount of the loan was not more than two-thirds of the value of the property stated in the independent valuation; and
    - (iii) the loan was made in reliance on the independent valuation; or
  - (b) the trustee is insured by a prescribed insurer against all loss that may arise because of the borrower’s default.
- (3) For this section, a valuation of a property made by a person is an *independent valuation* of the property if the trustee—
  - (a) instructed and employed the person to make the valuation independently of any owner of the property; and
  - (b) reasonably believed the person was competent to make the valuation.
- (4) In this section—
 

*prescribed insurer* means an entity, prescribed by regulation, that carries on the business of insurance.

**83 Limitation of liability of trustee for loss on improper investment [TB, cl 55(1); TA, s 30A(1); Rec 5-9]**

- (1) This section applies if—
  - (a) a trustee improperly lends trust funds on the security of property; but

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- (b) the loan would have been a proper investment if a lesser amount had been lent.
  - (2) For the trustee's liability in relation to the investment—
    - (a) the security is taken to be a proper investment in relation to the lesser amount; and
    - (b) the trustee is liable only for the difference between the actual amount lent and the lesser amount, with interest.

**84 Court may take into account investment strategy etc. in proceeding for breach of trust [TB, cl 56; TA, s 30B]**

- (1) This section applies in relation to a proceeding against a trustee for a breach of trust in relation to the exercise of an investment power.
- (2) The court may, in considering the question of the trustee's liability, take the following matters into account—
  - (a) the nature and purpose of the trust;
  - (b) the amount of the trust funds invested in the exercise of the investment power;
  - (c) whether the trustee had regard to the matters mentioned in section 74 to the extent they are appropriate to the circumstances of the trust;
  - (d) whether the trust investments have been made under an investment strategy formulated in accordance with the duty of a trustee under this part;
  - (e) the extent to which the trustee acted on advice that the trustee reasonably believed—
    - (i) was given by a person who was independent and competent to give the advice; and
    - (ii) was impartial.

[s 85]

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**85 Court may set off gains and losses [TB, cl 57; TA, s 30C]**

- (1) This section applies in relation to a proceeding against a trustee for a breach of trust in relation to an investment if a loss has been, or is expected to be, sustained by the trust.
- (2) The court may set off all or part of the loss resulting from the investment against all or part of any gain resulting from any other investment, whether or not the other investment is a breach of trust.
- (3) The power of set-off conferred under subsection (2) is in addition to any other power or entitlement to set off all or part of any loss against any property.

**Part 7 General powers of trustees**

**Division 1 Powers in relation to trust property**

**86 General powers in relation to trust property [TB, cl 59; New; Recs 5-3, 7-1 to 7-3, 7-7 and 7-8]**

- (1) A trustee has, in relation to the trust property, all the powers of an absolute owner of the property.

*Notes—*

- 1 See, however, part 5 in relation to the duties of a trustee in administering a trust.
  - 2 See also the *Succession Act 1981*, section 49B in relation to particular limitations on a personal representative's power to carry on a business.
- (2) Without limiting subsection (1), the powers conferred on a trustee under subsection (1) include the following powers—
    - (a) the power to sell the trust property;
    - (b) the power to lease the trust property;
    - (c) the power to mortgage the trust property or to renew, extend or vary a mortgage of the trust property;

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- (d) the power to deal with the securities of a corporation subject to the trust;
  - (e) the power to settle a debt or claim in relation to the trust property;
  - (f) the power to insure the trust property against the loss of or damage to the trust property or any risk or liability relating to the trust property.
- (3) A power conferred under subsection (1), other than a power mentioned in subsection (2)(a) to (f), may be excluded or modified by an express statement to that effect in the trust instrument.

*Note—*

See, however, section 221 in relation to the exercise of particular powers under this section by a statutory trustee.

**87 Power to postpone sale, calling in and conversion of particular trust property [TB, cl 60; TA, s 32(1)(c) and (4); Recs 8-1 and 8-2]**

- (1) A trustee may postpone the sale, calling in and conversion of trust property that the trustee has a duty to sell.
- (2) Subject to an express contrary intention in the trust instrument, if the trustee's duty to sell arises because of a trust or direction for sale, the trustee may postpone the sale of the trust property for an indefinite and unlimited period, whether or not that period is longer than the period during which the trust or direction for sale remains valid.
- (3) However, this section does not apply if the trust property is of a wasting, speculative or reversionary nature.

*Notes—*

- 1 See, however, the *Succession Act 1981*, section 49B in relation to particular limitations on a personal representative's power to carry on a business.
- 2 See also section 221 in relation to the exercise of power under this section by a statutory trustee.

[s 88]

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**88 Power to execute instruments etc. [TB, cl 89; TA, s 33(1)(n); Rec 9-12]**

A trustee may, in relation to the trust property, do anything, make any omission, and execute any instrument, necessary to carry into effect the powers and authorities given under this Act or the trust instrument.

**Division 2 Expenditure in relation to trust property**

**89 Power to expend amounts [TB, cl 61; TA, ss 27(b) and 33(1)(a)–(f); Rec 8-5]**

- (1) A trustee may, in relation to the trust property, expend an amount (including an amount from capital) that is subject to the same trusts for 1 or more of the following purposes—
  - (a) to maintain or renovate the trust property, whether or not the work is necessary for the purpose of salvaging the property;
  - (b) to improve or develop the trust property;
  - (c) to pay calls on shares subject to the same trust;
  - (d) to pay outgoings in relation to the trust property;
  - (e) if the trust property is land or a water allocation—to subdivide the land or water allocation and pay related expenses;
  - (f) to provide, construct or maintain any of the following for the trust property if they are likely to be beneficial to the property—
    - (i) roads, footpaths and other works for pedestrian or vehicular use;
    - (ii) utility services and other works.
- (2) If the trustee is a trustee corporation, the trustee may exercise the power conferred under subsection (1)(c) even if the shares



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on which the calls are made are shares in the trustee corporation.

(3) In this section—

*maintain*, in relation to property, includes repair the property and provide for the upkeep of the property.

*outgoings* includes rates, premiums, taxes, assessments and insurance premiums.

**90 Power to apportion expenditure between income and capital and recoup particular expenditure [TB, cl 62; TA, s 33(1)(g); Rec 8-6]**

- (1) A trustee may, in relation to the trust property, apportion expenditure made under section 89 between capital and income or otherwise among the persons entitled to the capital or income in the way the trustee considers equitable.
- (2) If all or part of the expenditure is made out of capital, the trustee may recoup the expenditure out of capital from income, if to do so would be equitable in all the circumstances.
- (3) If all or part of the expenditure is made out of income, the trustee may recoup the expenditure out of income from capital, if to do so would be equitable in all the circumstances.
- (4) The exercise of power under this section is subject to—
  - (a) this Act; and
  - (b) a direction of the court; and
  - (c) an express contrary intention in the trust instrument.

**Division 3 Appropriation**

**91 Definitions for division [TB, cl 63(7)]**

In this division—

*entitled person* see section 94(1)(a) and (b).

[s 92]

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*extension application* see section 93(4).

*interested person* see section 92(2).

*variation application* see section 93(1)(a).

**92 Notice of proposed appropriation [TB, cll 63(2)(c) and 64(2)(a); TA, s 33(1)(l)(ii) and (2); Rec 10-6(a)]**

- (1) This section applies if a trustee proposes to appropriate trust property under section 94.
- (2) Before making the appropriation, the trustee must give written notice of the proposed appropriation to each person interested in the appropriation (each an *interested person*).
- (3) However, if the trustee is an interested person, subsection (2) does not require the trustee to give notice of the proposed appropriation to themselves.
- (4) If an interested person is an adult with impaired capacity for financial matters relating to the proposed appropriation or is a child, the trustee may comply with subsection (2) in relation to the interested person only by giving the notice to—
  - (a) if the interested person is an adult—each administrator or attorney for the interested person who is authorised, under their appointment as administrator or attorney, to exercise power for financial matters relating to the proposed appropriation; or
  - (b) if the interested person is a child—each guardian of the child.

**93 Interested person may apply to vary proposed appropriation or waive right to apply [TB, cll 63(3); TA, s 33(1)(l)(ii); Rec 10-6(a)]**

- (1) An interested person who is given notice of a proposed appropriation under section 92 may—
  - (a) make an application to the court to vary the proposed appropriation (a *variation application*); or

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- (b) by written notice given to the trustee at any time, waive the interested person's right to make a variation application.
  - (2) Subject to subsections (3) and (4), a variation application must be started within 2 months after the interested person is given notice of the proposed appropriation.
  - (3) The interested person may, by written notice given to the trustee within the period mentioned in subsection (2), shorten the period that would otherwise apply under subsection (2) to the shorter period stated in the notice.
  - (4) The court may, on application (an *extension application*) made by the interested person at any time, allow a variation application to be started within a longer period.
  - (5) The court may make the orders it considers appropriate in relation to a variation application or an extension application.
  - (6) This section applies subject to section 95.

**94 Appropriation to satisfy legacy or share generally [TB, cl 63(1), (2)(a) and (b), (4)–(6) and 64(2)(b); TA, s 33(1)(l) and (2); Recs 10-6(a), 10-8 and 10-9]**

- (1) A trustee may appropriate any part of the trust property to satisfy all or part of—
  - (a) a legacy, payable out of the trust property, to which a person (an *entitled person*) is entitled; or
  - (b) a share of the trust property, whether contingent or absolute, to which a person (also an *entitled person*) is entitled.
- (2) An appropriation of trust property under this section may be made only if—
  - (a) the appropriation does not adversely affect any specific gift of the trust property; and
  - (b) the entitled person consents to the appropriation; and

[s 94]

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- (c) for an appropriation in relation to which the trustee is an interested person, the appropriation has been approved by—
    - (i) each other interested person; or
    - (ii) the court, on an *ex parte* application by the trustee or otherwise; and
  - (d) notice of the proposed appropriation has been given under section 92; and
  - (e) the circumstances mentioned in subsection (3)(a), (b) or (c) apply.
- (3) For subsection (2)(e), the circumstances are—
- (a) all of the following apply—
    - (i) the relevant application period for each interested person has ended;
    - (ii) no interested person has, within the relevant application period for the person, started a variation application and served the application on the trustee;
    - (iii) if any interested person has, since the end of the relevant application period for the person, filed an extension application and served the application on the trustee—the application has been dismissed by the court; or
  - (b) if any interested person has started a variation application and served the application on the trustee within the relevant application period for the person or any longer period allowed by the court on an extension application—the application has been dismissed by the court; or
  - (c) each interested person has given the trustee notice under section 93(1)(b) waiving the person’s right to make a variation application.

- (4) For making an appropriation under this section, the trustee may, under section 121, fix the value of all or any part of the trust property as at the day the appropriation is made.
- (5) An appropriation made under this section is conclusive and binding on all persons who are, or may be, interested in the trust property, unless varied by the court on a variation application.
- (6) This section does not limit or otherwise affect any power of appropriation conferred under the trust instrument.
- (7) This section applies subject to section 95.
- (8) In this section—  
*relevant application period*, for an interested person, means the following period within which a variation application by the interested person must be started—
  - (a) if paragraph (b) does not apply—the period mentioned in section 93(2);
  - (b) if the interested person has given the trustee notice under section 93(3)—the shorter period stated in the notice.

**95 Exercise of power for particular interested persons and entitled persons [TB, cl 63(7); TA s 33(1)(l); Rec 10-6(a)]**

- (1) If an interested person is a child, only the guardian of the child may—
  - (a) give notice under section 93(1)(b) waiving the interested person's right to make a variation application; or
  - (b) give notice under section 93(3) shortening the period that would otherwise apply under section 93(2); or
  - (c) approve an appropriation of trust property, as mentioned in section 94(2)(c)(i).
- (2) If an entitled person is a child, only the guardian of the child may give consent for the child to the making of an appropriation of trust property, as mentioned in section 94(2)(b).

[s 96]

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- (3) If there is more than 1 guardian of a child, the guardians must act jointly in exercising power for the child for a matter mentioned in subsection (1) or (2).
- (4) Sections 92 to 94 do not limit or otherwise affect—
  - (a) the operation of a provision of another Act that provides for how, or by whom, an application to the court may be made on behalf of a person under a legal incapacity; or
  - (b) the powers of an administrator or attorney for a person with impaired capacity for a matter.

**96 Appropriation to pay annuity [TB, cl 65; TA, s 33(1)(m); Rec 10-10]**

- (1) This section applies if a trust instrument provides for the payment of an annuity, whether or not the trust instrument provides that the annuity may be charged on the trust property.
- (2) The trustee may set aside and appropriate out of any trust property available for payment of the annuity an amount (the *appropriated amount*) that, in the trustee’s opinion at the time of appropriation, is enough, when invested, to provide out of the income of the investment the amount required to pay the annuity.
- (3) After the appropriation has been made—
  - (a) the annuitant has the same right of recourse to the capital and income of the appropriated amount as the annuitant would have had against the trust property if no appropriation had been made; and
  - (b) the trustee may distribute the residue of the trust property and the income of the trust property in accordance with the trust instrument.
- (4) On the distribution of the residue of the trust property and the income of the trust property under subsection (3)(b), the residue and the income cease to be liable for the annuity.
- (5) In this section—  
*annuity* includes any periodic payment.

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**97 Notice to relevant registrar if land or water allocation to be distributed after appropriation to pay annuity [TB, cl 66; TA, s 33(5), Rec 10-10]**

- (1) This section applies if a trustee proposes, under section 96(3)(b), to distribute trust property that is land or a water allocation.
- (2) The trustee must give the relevant registrar written notice that the trust property may be distributed because of an appropriation made under section 96(2).
- (3) The relevant registrar is not required to inquire into whether the appropriated amount set aside under that section is enough to provide for payment of the annuity.

**Division 4 Delegation**

**Subdivision 1 Preliminary**

**98 Definitions for division**

In this division—

*delegate* see section 99(4)(b).

*instrument of delegation* see section 99(2).

**Subdivision 2 Delegation by trustees**

**99 Power to delegate matters [TB, cll 68 and 69(1)–(2) and (4); TA, s 56(1); Rec 4-6(a)–(c)]**

- (1) This section applies if a trustee—
  - (a) is absent, or is about to be absent, from the State; or
  - (b) is, or may be about to become, because of physical infirmity, temporarily incapable of performing the duties of a trustee.

[s 100]

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- (2) The trustee may, by instrument (an *instrument of delegation*), delegate the administration or exercise of all or any trusts, powers, authorities and discretions vested in the trustee as trustee to—
  - (a) an individual who resides in the State, if—
    - (i) for an individual who is a co-trustee of the trustee—the individual is not the trustee’s only co-trustee; or
    - (ii) for another individual—section 13(1) would not prevent the individual from being appointed as a trustee; or
  - (b) a trustee corporation that carries on business in the State.
- (3) For subsection (2), it does not matter whether the trusts, powers, authorities and discretions are vested in the trustee alone or jointly with 1 or more other persons.
- (4) The instrument of delegation must—
  - (a) state the circumstances in which the delegation is to operate; and
  - (b) be signed by the trustee and the person to whom the matters are delegated (the *delegate*).
- (5) This section applies despite any rule or principle of law or equity to the contrary.

**100 Period during which delegation is in effect [TB cl 69(3)]**

- (1) The delegation of a matter under section 99 commences—
  - (a) on the happening of an event stated in the instrument of delegation as the time the delegation commences; or
  - (b) if the instrument of delegation does not state an event as mentioned in paragraph (a)—
    - (i) on the day stated in the instrument of delegation as the day the delegation commences; or



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- (ii) if no day is stated for that purpose—on the day the instrument of delegation is signed.
- (2) The delegation of the matter continues in effect until the first of the following happens—
    - (a) the happening of an event stated in the instrument of delegation as the time the delegation ends;
    - (b) the beginning of the day, if any, stated in the instrument of delegation as the day the delegation ends;
    - (c) the beginning of the day that is 12 months after the day the delegation commences;
    - (d) the delegation is revoked under subdivision 3;
    - (e) the trustee is replaced or removed, or is otherwise discharged from the trust, whether under part 3 or otherwise;
    - (f) the trustee dies.

**101 Effect of delegation [TB, cl 71; TA, s 56(2) and (4); Rec 4-6]**

- (1) If a trustee delegates a matter under section 99, the delegate has, within the scope of the delegation, the same trusts, powers, authorities, discretions, duties and liabilities in relation to the matter as the delegate would have if the delegate were the trustee, other than the power of delegation conferred under section 99.
- (2) However, the delegate may perform or exercise a delegated matter only in the circumstances stated in the instrument of delegation as the circumstances in which the delegation is to operate.
- (3) The delegate is subject to the court’s jurisdiction and power in the administration of the trust as if the delegate were the trustee.

[s 102]

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**102 Liability of trustee for acts and omissions of delegate [TB, cl 72; TA, s 56(3); Rec 4-6]**

A trustee who delegates a matter under section 99 is liable for the acts done, and the omissions made, by the delegate in relation to the matter as if they were the trustee’s own acts and omissions.

**103 Trustee to notify particular persons of delegation [TB, cl 73; New; Rec 4-6(d)]**

- (1) A trustee who delegates a matter under section 99 must give written notice of the delegation to—
  - (a) if the trustee has any co-trustees—each co-trustee; and
  - (b) if there is an appointor for the trust who is not also the trustee—the appointor.
- (2) If neither subsection (1)(a) nor (b) applies, the trustee must give written notice of the delegation to each beneficiary of the trust, to the extent it is practicable to do so.

**Subdivision 3 Revocation of delegation**

**104 Revocation by trustee [TB, cl 70(1) and (3); New]**

- (1) A trustee who delegates a matter under section 99 may revoke the delegation by giving the delegate an instrument, signed by the trustee, revoking the delegation.
- (2) Also, the delegation of the matter by the trustee is revoked if the trustee becomes a person with impaired capacity for administering the trust.

**105 Revocation by delegate [TB, cl 70(2); New]**

The delegation of a matter under section 99 to a delegate is revoked if—

- (a) the delegate resigns by written notice given to the trustee; or

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- (b) the delegate becomes disqualified from being appointed as a trustee by an order made under section 172; or
  - (c) for a delegate who is an individual, the delegate—
    - (i) becomes a person with impaired capacity for administering the trust; or
    - (ii) becomes a bankrupt, or starts to take advantage of the laws of bankruptcy as a debtor, under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction; or
    - (iii) dies; or
  - (d) for a delegate that is a trustee corporation, the delegate—
    - (i) stops carrying on business; or
    - (ii) becomes a Chapter 5 body corporate within the meaning of the Corporations Act, section 9; or
    - (iii) is deregistered or otherwise ceases to exist.

#### **Subdivision 4 Protections for third parties**

##### **106 References to delegate**

A reference in this subdivision to a delegate includes a reference to a former delegate.

##### **107 Validity of particular acts of delegate in favour of third party [TB, cl 74; TA, s 56(6); Rec 4-6]**

- (1) This section applies if—
  - (a) a delegate does an act, or signs an instrument, in favour of another person in the exercise, or purported exercise, of power under a delegation made under section 99; but
  - (b) the delegate lacks the power to do the act, or sign the instrument, because the delegation, for any reason, is not in operation.

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- (2) The act done or instrument signed by the delegate is, in favour of the other person, as valid and effective as it would be if the delegation had been in operation.
- (3) Subsection (2) does not apply if, when the act was done or the instrument was signed, the other person had actual notice that the delegation was not in operation.
- (4) For this section, a delegation is *in operation* at a particular time only if, at that time—
  - (a) the delegation has commenced and is in effect; and
    - Note—*  
See section 100 in relation to when a delegation commences and is in effect.
  - (b) the stated circumstances apply.
- (5) In this section—  
*stated circumstances*, in relation to the delegation of a matter under section 99, means the circumstances stated in the instrument of delegation by which the delegation is made as the circumstances in which the delegation is to operate.

**108 Effect of statutory declaration by delegate [TB, cl 75; TA, s 56(7); Rec 4-6]**

- (1) This section applies if a delegate makes a statutory declaration relating to a trust stating that—
  - (a) the delegation of a matter under section 99 has commenced and has not been revoked or otherwise ended; or
  - (b) in any transaction, the delegate is acting in the administration of the trust.
- (2) The statutory declaration is, in favour of a person dealing with the delegate, conclusive evidence of the matter stated.

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**109 Persons dealing with delegate in good faith not affected by notice of trust [TB, cl 76; TA, s 56(8); Rec 4-6]**

- (1) This section applies if, in any transaction, it appears from the delegation of a matter under section 99, or from any evidence required for the purpose of a delegation under that section or otherwise, that the delegate is acting in the administration of a trust.
- (2) A person dealing in good faith with the delegate is not affected by notice of the trust.

**Division 5 Appointment of agents**

**110 Definition for division [TB, cl 82(6); TA, s 54(6); Recs 4-1, 4-2, 9-2 and 9-10]**

In this division—

*agent* includes each of the following—

- (a) an accountant;
- (b) a financial institution;
- (c) a financial services licensee, within the meaning of the Corporations Act, section 761A, whose Australian financial services licence under that Act covers dealing in, or providing advice about, securities;
- (d) a solicitor;
- (e) a trustee corporation.

**111 Appointment of agent [TB, cl 82(1)–(4); TA, ss 43 and 54(1); Recs 4-1, 4-2, 9-2 and 9-10]**

- (1) A trustee may, instead of acting personally, appoint an agent to transact business, or do another thing, required to be done in the administration of the trust.
- (2) Without limiting subsection (1), a trustee may appoint an agent to do 1 or more of the following—

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- (a) receive and pay amounts;
  - (b) give a receipt for property payable, transferable or deliverable to the trustee;
  - (c) keep trust accounts.
- (3) A trustee may appoint a co-trustee as an agent.
- (4) However, a trustee may not appoint a beneficiary of the trust as an agent even if the beneficiary is also a co-trustee.

**112 Payment of agent and reimbursement of trustee [TB, cl 82(5); TA, s 54(1); Rec 4-1]**

A trustee—

- (a) may pay an agent who is appointed under section 111; and
- (b) is entitled to be allowed and paid any charge or expense that is reasonably and properly incurred because of the agent's appointment.

**Division 6 Application of income by trustee-mortgagee in possession**

**113 Definitions for division**

In this division—

*mortgage debt* see section 114(1)(a).

*primary beneficiary*, in relation to a mortgage debt held on trust for persons in succession, means the person entitled to the interest of the mortgage debt.

*priority outgoing*, in relation to land the subject of a mortgage, means any of the following—

- (a) rents, taxes, rates and other outgoings affecting the land;
- (b) premiums on insurance properly payable in respect of the land;

- (c) annual amounts or other payments and the interest on principal amounts having priority to the mortgage.

**114 Application of income—priority outgoings accruing after trustee becomes mortgagee in possession [TB, cl 77; TA, s 42(1)–(2); Rec 8-8]**

- (1) This section applies if—
  - (a) a trustee is entitled, whether solely or as a co-mortgagee, to a debt that is secured, wholly or partly, by a mortgage of land (the *mortgage debt*); and
  - (b) the mortgage debt is held on trust for persons in succession; and
  - (c) the trustee becomes mortgagee in possession of the land.
- (2) The trustee must apply the income of the land received by the trustee to pay the priority outgoings in relation to the land, but only if, or to the extent, the priority outgoings accrue on or after the day the trustee becomes mortgagee in possession.
- (3) If a priority outgoing relates to a period partly before and partly after the day the trustee becomes mortgagee in possession, the priority outgoing is taken to accrue from day to day and must be apportioned accordingly.
- (4) Subject to the rights of the mortgagor, the trustee must hold the balance of the income of the land received by the trustee on the trusts to which the mortgage debt is subject.

**115 Payment to primary beneficiary on recovery of all or part of mortgage debt [TB, cl 78; TA, s 42(3); Rec 8-8]**

- (1) This section applies if—
  - (a) all or part of the mortgage debt is recovered, whether by repayment or on realisation of the security or otherwise; and
  - (b) under section 114, the trustee has applied income of the land received by the trustee to pay 1 or more priority outgoings in relation to the land; and

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- (c) the income, or part of the income, applied by the trustee would otherwise have been payable to the primary beneficiary as interest of the mortgage debt.
- (2) As between the beneficiaries for whom the mortgage debt is held on trust—
  - (a) the income, or the part of the income, applied by the trustee that would otherwise have been payable to the primary beneficiary is taken to be arrears of interest on the mortgage debt; and
  - (b) the amount recovered by the trustee must be apportioned accordingly.
- (3) However, the primary beneficiary is not entitled to be paid interest on the amount taken to be arrears of interest under subsection (2)(a).

**116 Application of income—priority outgoings accruing before trustee becomes mortgagee in possession [TB, cl 79; TA, s 42(4); Rec 8-8]**

- (1) This section applies in relation to a priority outgoing in relation to the land if, or to the extent, the priority outgoing accrued before the trustee became mortgagee in possession of the land.
- (2) If the trustee considers it necessary to do so in the administration of the trust, the trustee may apply the income of the land received by the trustee in payment of the priority outgoing.
- (3) However, the primary beneficiary is entitled to recoup out of the capital of the mortgage debt any payment made by the trustee under subsection (2).
- (4) This section applies despite any other provision of this division.



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## Division 7                      Delivery of chattels

### 117      **Delivery of chattels to beneficiary with life interest or other limited interest [TB, cl 80; TA, s 73; Rec 10-5]**

- (1) This section applies if—
  - (a) under a trust, a beneficiary is entitled to a life interest, or another limited interest, in any chattels; and
  - (b) the beneficiary asks the trustee to deliver the chattels to the beneficiary.
- (2) The trustee may deliver the chattels to the beneficiary on being given a signed inventory for the chattels by the beneficiary.

### 118      **Delivery of chattels to child [TB, cl 81; TA, s 74; Rec 10-5]**

- (1) This section applies if, under a trust, a child is beneficially entitled to any chattels.
- (2) The trustee may deliver the chattels to the child or a guardian of the child.
- (3) The receipt of the child or the guardian is a complete discharge to the trustee for the chattels delivered under subsection (2).
- (4) The power conferred under this section is in addition to the power conferred under section 132 and, for section 132(4), the value of the chattels is not to be taken into account in any way.

## Division 8                      Other provisions

### 119      **Application of insurance money [TB, cl 83(1)–(5); TA, s 48(1)–(3) and (5)–(7); Rec 9-6]**

- (1) This section applies if—
  - (a) an insurance policy has been kept up against the loss of or damage to trust property (whether by fire or

- otherwise) or any other risk or liability relating to trust property; and
- (b) the trustee receives an amount under the policy.
- (2) For subsection (1), it does not matter whether the insurance policy was kept up—
- (a) under the trust or under any power, whether statutory or otherwise; or
- (b) in performance of any obligation, whether statutory or otherwise.
- (3) For the purposes of the trust, the amount received by the trustee—
- (a) is to be treated as income to the extent it is consistent with the purpose for which the insurance policy was taken out; or
- (b) is to be treated as capital if, or to the extent, paragraph (a) does not apply.
- (4) The amount is to be held on trusts corresponding as nearly as possible with the trusts affecting the property in relation to which the amount was payable.
- (5) Also, the trustee may apply the amount, or part of the amount, in rebuilding, reinstating, replacing or repairing the property that was lost or damaged.
- (6) However, if the amount has been paid into court, subsection (5) applies subject to any direction of the court.
- (7) This section does not prejudice or affect—
- (a) the rights of a person to require the amount or part of the amount to be applied in rebuilding, reinstating, replacing or repairing the property that was lost or damaged; or
- (b) the rights of a mortgagee, lessor or lessee of the property, whether under an Act or otherwise.

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**120 Deposit of documents for safe custody [TB, cl 84; TA, s 49; Rec 4-4]**

- (1) A trustee may deposit a document held by the trustee relating to the trust, or to the trust property, with a relevant entity whose business includes undertaking the safe custody of documents.
- (2) An amount payable for the deposit of the document is payable out of—
  - (a) the income of the trust property; or
  - (b) if there is no income or to the extent the income is insufficient—the capital of the trust property.
- (3) In this section—

*relevant entity* means any of the following entities—

- (a) a law practice within the meaning of the *Legal Profession Act 2007*;
- (b) a financial institution;
- (c) a corporation.

**121 Valuations [TB, cl 85; TA, s 51; Rec 9-8]**

- (1) A trustee may, for the purpose of giving effect to the trust or the trust instrument or a provision of this Act or another Act, ascertain and fix the value of—
  - (a) the trust property; or
  - (b) any property the trustee is authorised to buy or otherwise acquire.
- (2) The trustee may ascertain and fix the value in any way the trustee considers appropriate.
- (3) If the trustee is not personally qualified to ascertain the value of any property, the trustee—
  - (a) must consult a properly qualified person (whether employed by the trustee or not) about the value of the property; but

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- (b) is not bound to accept a valuation made by the person.
- (4) The value fixed by the trustee under this section and in accordance with the trustee's duties under part 5, divisions 2 and 3 is binding on all persons beneficially interested in the trust property.

**122 Audit [TB, cl 86; TA, s 52; Rec 9-9]**

- (1) A trustee—
  - (a) may have the accounts of the trust property examined or audited by an accountant; and
  - (b) must, for that purpose, give the accountant the documents and information the accountant requires to conduct the examination or audit.
- (2) The costs of the examination or audit, including the accountant's fee, are payable out of the capital or income of the trust property, or partly out of the capital and partly out of the income, as the trustee considers appropriate.
- (3) However, in the absence of any direction by the trustee to the contrary in a special case—
  - (a) costs attributable to capital are payable out of the capital; and
  - (b) costs attributable to income are payable out of the income.
- (4) Despite subsection (2), if the trustee or 1 of the trustees is a trustee corporation, the costs of the examination or audit are payable out of the trust property only if—
  - (a) the examination or audit relates to a business forming part of the trust property; or
  - (b) the court approves of the costs being paid out of the capital or income of the trust property.

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- 123 Trustee may sue themselves in different capacity [TB, cl 87; TA, s 59; Rec 9-11]**
- (1) A trustee, in that capacity, may sue and be sued by themselves in any other capacity, including the trustee's personal capacity.
  - (2) However, the trustee must obtain the directions of the court in which the proceeding is taken about the way the differing interests are to be represented.
- 124 Inquiries about beneficiaries [TB, cl 88; TA, ss 33(1)(j) and 115; Rec 9-12]**
- (1) A trustee may make the inquiries, by way of advertisement or otherwise, that the trustee considers necessary to ascertain the existence or whereabouts of a beneficiary of the trust.
  - (2) The costs, expenses and charges incurred by the trustee in making the inquiries about the beneficiary are payable out of the legacy, amount or distributive share to which the beneficiary is entitled.
  - (3) Subsection (2) applies subject to an express contrary intention in the trust instrument.
- 125 Exercise of trustee powers when particular beneficiaries are absolutely entitled [TB, cl 90; TA, s 31(2)]**
- (1) This section applies in relation to a trust other than a trust created by a court order.
  - (2) A trustee may exercise the powers conferred under this part in relation to the trust property even though—
    - (a) all the beneficiaries are absolutely entitled to the trust property; and
    - (b) each beneficiary is an adult—
      - (i) who has capacity for financial matters relating to the trust property; or
      - (ii) for whom an administrator or attorney is authorised, under their appointment as administrator or attorney, to exercise power for

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financial matters relating to the beneficiary's interest in the trust property.

- (3) However, subsection (2) does not apply to the extent a power conferred under this part is expressly revoked by all the beneficiaries, by written notice given to the trustee by—
- (a) each beneficiary mentioned in subsection (2)(b)(i); and
  - (b) the administrator or attorney for each beneficiary mentioned in subsection (2)(b)(ii).

**126 Effect of conversion of land or personal property under statutory power [TB, cl 91; TA, s 9]**

- (1) This section applies if, as a result of the exercise of power under this Act—
- (a) land is converted into personal property; or
  - (b) personal property is converted into land.
- (2) The personal property or land must be held—
- (a) if, before conversion, the personal property or land was subject to a trust—on a trust corresponding as nearly as the law and circumstances permit with the trust affecting the personal property or land before conversion; or
  - (b) if, before conversion, the personal property or land was not subject to a trust—subject to the limitations, conditions, powers or directions corresponding as nearly as the law and circumstances permit with those affecting the personal property or land before conversion.

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## **Part 8 Maintenance, education and advancement**

### **Division 1 Preliminary**

#### **127 Definition for part [TB, cl 93; New; Rec 10-1(a)(ii)]**

In this part—

*relevant capital* see section 132(2).

### **Division 2 Application of trust income**

#### **128 Child beneficiaries—application of trust income for maintenance etc. [TB, cll 94 and 95; TA, s 61(1) and (4); Rec 10-1(a)(i) and (c); ACT Trustee Act, s 43(4)]**

- (1) This section applies if, under a trust, a trustee holds trust property for a beneficiary who is a child.
- (2) The trustee may pay all or part of the income of the trust property to the beneficiary's guardian (if any), or otherwise apply all or part of the income, for or towards the beneficiary's maintenance, education or advancement (including past maintenance or education).
- (3) The power conferred under subsection (2) may be exercised—
  - (a) whether the beneficiary's interest in the trust property is a vested interest or a contingent or future interest or is absolute or liable to be divested; and
  - (b) whether or not—
    - (i) there is another fund that may be applied for the beneficiary's maintenance, education or advancement; or
    - (ii) there is another person who is bound by law to provide for the beneficiary's maintenance or education.

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- (4) However, despite subsection (3)(a), if the beneficiary’s interest in the trust property is a contingent or future interest, the power conferred under subsection (2) may be exercised only if the interest includes the intermediate income of the trust property.
- (5) For subsection (4) and without limiting the *Succession Act 1981*, section 33H, a contingent or future interest in the trust property is taken, during the beneficiary’s minority and while the beneficiary’s interest continues, to include the intermediate income if—
  - (a) the interest would not, apart from this section, include the intermediate income; and
  - (b) the intermediate income is not expressly or specifically disposed of, but would pass to some other person—
    - (i) only because of an interest to which the person is entitled under a residuary or a general disposition in the trust instrument; or
    - (ii) in the absence of a disposition mentioned in subparagraph (i), on intestacy or as a resulting trust.

**129 Child beneficiaries—investment and application of unexpended trust income [TB, cl 96; TA, s 61(2) and (7); Rec 10-1(b)]**

- (1) This section applies if—
  - (a) under section 128, a trustee may pay or apply the income of trust property for or towards a beneficiary’s maintenance, education or advancement; but
  - (b) some or all of the income of the trust property (the *remaining income*) has not been paid or applied under that section during the beneficiary’s minority and while the beneficiary’s interest continues.
- (2) The trustee must—



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- (a) invest the remaining income (and the income achieved by investing the remaining income) in authorised investments; and
  - (b) hold the amount of the authorised investments (including the income of the investments) as provided under subsection (3) or (4).
- (3) The amount is to be held for the beneficiary absolutely if—
- (a) the beneficiary becomes an adult and the beneficiary's interest in the income during the beneficiary's minority was a vested interest; or
  - (b) the beneficiary, on becoming an adult, is entitled to the property from which the income arose in fee simple, absolute or determinable, or absolutely.
- (4) If neither subsection (3)(a) nor (b) applies—
- (a) the amount is to be held as an accretion to the capital of the trust property from which the income arose; and
  - (b) the amount and the capital are to form a single fund for all purposes.
- (5) For subsection (4), it does not matter whether the beneficiary had a vested interest in the income.
- (6) Despite subsection (2)(b), the trustee may, at any time during the beneficiary's minority and while the beneficiary's interest continues, pay or apply all or part of the amount of the authorised investments for or towards the beneficiary's maintenance, education or advancement under section 128 as if it were income arising in the current year.
- (7) This section applies subject to a contrary intention in the trust instrument.
- (8) In this section—
- authorised investment*** means an investment of trust funds that—
- (a) is authorised by the trust instrument; or

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- (b) is made exercising a power of investment conferred under part 6 or under an order made under section 187; or
- (c) is authorised by another Act or the general law.

**130 Adult beneficiaries—application of trust income for maintenance etc. [TB, cll 94(1) and 97; TA, s 61(3)–(4); Rec 10-1]**

- (1) This section applies if, under a trust—
  - (a) a trustee holds trust property for a beneficiary who is an adult; and
  - (b) the beneficiary has a contingent interest in the trust property; and
  - (c) the beneficiary’s interest includes the intermediate income of the trust property.
- (2) The trustee may pay all or part of the income of the trust property to the beneficiary, or otherwise apply all or part of the income, for or towards the beneficiary’s maintenance, education or advancement (including past maintenance or education).

**131 Vested annuities [TB, cl 98; TA, s 61(5); Rec 10-1]**

- (1) Sections 128 to 130 apply in relation to a vested annuity as if—
  - (a) the annuity were the income of trust property that is held by a trustee on trust to pay the income of the trust property to the annuitant; and
  - (b) the reference in sections 128 and 129 to the period during the beneficiary’s minority and while the beneficiary’s interest continues were a reference to the period for which the annuity is payable.
- (2) However, despite section 129(2)(b), the amount of the authorised investments (including the income of the investments made during the period for which the annuity is

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payable) must be held on trust for the annuitant or the annuitant's personal representative absolutely.

### **Division 3                      Application of trust capital**

#### **132      Application of trust capital for beneficiary's maintenance etc. [TB, cl 99; TA, s 62(1)–(3); Rec 10-2]**

- (1) This section applies if, under a trust, a beneficiary is entitled to the capital, or any share of the capital, of the trust property.
- (2) The capital, or the share of the capital, to which the beneficiary is entitled is the *relevant capital*.
- (3) Subject to section 133, the trustee may—
  - (a) pay or apply amounts out of the relevant capital for or towards the beneficiary's maintenance, education or advancement (including past maintenance or education); or
  - (b) apply any part of the relevant capital for or towards any of those purposes.
- (4) The amounts of the relevant capital paid or applied and the value of the parts of the relevant capital applied must not, in total, be more than the greater of the following amounts—
  - (a) the prescribed amount under section 134;
  - (b) one-half the relevant capital.

*Note—*

See, however, section 137 in relation to amounts that are taken not to have been paid or applied.

- (5) However, the court may, on application, authorise the trustee to—
  - (a) pay or apply greater amounts out of the relevant capital; or
  - (b) apply part of the relevant capital of greater value.

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- (6) The power to pay or apply amounts, or apply part of the relevant capital, may be exercised—
  - (a) whether the beneficiary is entitled to the relevant capital absolutely or contingently on the beneficiary reaching a stated age or on the happening of another event; or
  - (b) whether the beneficiary is entitled in possession, in remainder or in reversion.
- (7) Also, it does not matter whether the beneficiary’s entitlement to the relevant capital—
  - (a) is liable to be defeated by the exercise of a power of appointment or revocation; or
  - (b) is liable to be diminished by an increase of the class to which the beneficiary belongs.

**133 Restriction on application of trust capital [TB, cl 100(1) and (2); TA, s 62(5); Rec 10-2]**

- (1) A trustee may not pay or apply an amount out of relevant capital, or apply a part of relevant capital, under section 132 if the payment or application would prejudice a person who is entitled to a prior life interest or other interest, whether vested or contingent, in the amount or part.
- (2) However, the amount or part of the relevant capital may be paid or applied if—
  - (a) the person whose interest may be prejudiced—
    - (i) is an adult who has capacity for financial matters relating to the payment or application; and
    - (ii) consents in writing to the payment or application; or
  - (b) the court, on application by the trustee, orders the amount to be paid or the part of the relevant capital to be applied.

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**134 Prescribed amount for application of trust capital**

- (1) For section 132(4), the *prescribed amount* is—
- (a) for the period starting on the commencement of this section and ending on 30 June following the first anniversary of the commencement of this section—\$100,000; or
  - (b) for the financial year starting immediately after the end of the period mentioned in paragraph (a)—\$100,000 plus the CPI increase for the financial year; or
  - (c) for a later financial year—the prescribed amount for the previous financial year plus the CPI increase for the financial year.

- (2) In this section—

*CPI* means the all groups consumer price index for Brisbane published by the Australian Bureau of Statistics.

*CPI increase*, for a financial year, means the amount worked out by multiplying the prescribed amount for the previous financial year by the percentage increase, if any, in the CPI between the following quarters—

- (a) the March quarter for the financial year before the previous financial year;
- (b) the March quarter for the previous financial year.

**135 Trust capital applied to be brought into account [TB, cl 100(3); TA, s 62(4)]**

- (1) This section applies if an amount is paid or applied out of relevant capital, or a part of relevant capital is applied, under this division in relation to a beneficiary.
- (2) The amount paid or applied, or the value of the part applied, as the case may be, must be brought into account as part of the share in the trust property to which the beneficiary is or becomes absolutely or indefeasibly entitled.

*Note—*

See, however, section 137 in relation to amounts that are taken not to have been paid or applied.

## **Division 4                    Imposition of conditions**

### **136    Trustee may impose conditions [TB, cl 101; TA, s 63(1) and (3); Rec 10-3]**

- (1) This section applies to a trustee in exercising a power, whether under division 2 or 3 or the trust instrument—
  - (a) to pay or apply an amount of trust income for a beneficiary’s maintenance, education or advancement (including past maintenance or advancement); or
  - (b) to pay or apply an amount out of relevant capital, or apply a part of relevant capital, for any of those purposes.
- (2) The trustee may impose conditions on the payment or application of the amount or on the application of the part of the relevant capital.
- (3) Without limiting subsection (2), a condition may require—
  - (a) the repayment of—
    - (i) the amount paid or applied; or
    - (ii) the value of the part of the relevant capital applied; or
  - (b) the payment of interest on the amount or value; or
  - (c) the giving of security for the amount or value.
- (4) However, at any time after imposing a condition under subsection (2), the trustee may—
  - (a) waive all or part of the condition; or
  - (b) release all or part of an obligation undertaken, or security given, because of the condition.

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- (5) A trustee, when imposing a condition about giving security, is not affected by any restriction on the investment of trust funds, whether imposed under this Act or otherwise.

**137 Amounts repaid or recovered taken not to have been paid or applied [TB, cl 102; TA, s 63(2); Rec 10-3]**

- (1) This section applies if a trustee, in exercising a power mentioned in section 136(1), imposes a condition under section 136(2).
- (2) An amount repaid to the trustee, or recovered by the trustee, is taken not to have been paid or applied by the trustee.

**138 Trustee not liable for losses [TB, cl 103; TA, s 63(4); Rec 10-3]**

A trustee is not liable for any loss that may be incurred in relation to an amount of trust income or of relevant capital that is paid or applied, or a part of relevant capital that is applied, as mentioned in section 136(1) if the loss arises—

- (a) because of a failure to impose any or adequate conditions under section 136(2); or
- (b) without limiting paragraph (a), because of a failure to take security or adequate security; or
- (c) because of a failure to take action to protect the security; or
- (d) through the release or abandonment of the security without payment; or
- (e) from any other matter in relation to the conditions imposed or the waiver of any condition.

## Part 9 Indemnities and protection of trustees and other persons

### Division 1 Distributing trust property

#### 139 Giving notice of intention to distribute [TB, cl 105(1)–(4) and (10); TA, s 67(1)–(2); Rec 11-1]

- (1) A trustee who intends to distribute trust property may give notice of that intention by—
  - (a) publishing, under subsection (2) or (3), a notice that requires any person having any claim to, or against, the trust property, whether as a creditor or beneficiary or otherwise, to send particulars of the person’s claim to the trustee by a stated day (the *closing day*) that is at least 2 months after the day the notice is published; and
  - (b) giving any other notices the court may direct.
- (2) If the notice under subsection (1)(a) is included in a notice of intention to apply for a grant, the notice of intention to apply for a grant must be published in the way required under the *Uniform Civil Procedure Rules 1999*.
- (3) If the notice under subsection (1)(a) is not included in a notice of intention to apply for a grant, the notice must be published—
  - (a) in a newspaper circulating throughout the State and sold at least once each week; or
  - (b) on a website approved for the purpose—
    - (i) by regulation; or
    - (ii) by the Chief Justice, by notice published on the Queensland Courts website.
- (4) In this section—
 

*notice of intention to apply for a grant* means a notice, in the approved form under the *Supreme Court of Queensland Act*



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1991, of intention to apply for a grant within the meaning of the *Succession Act 1981*, section 5.

**140 Protection of trustee distributing after closing day [TB, cl 105(5)–(9); TA, s 67(3)–(4)(a); Rec 11-1]**

- (1) A trustee who gives notice under section 139 of the trustee's intention to distribute trust property—
  - (a) may, after the closing day, distribute the trust property having regard only to the claims, whether formal or not, of which the trustee has notice at the time of the distribution; and
  - (b) is not liable, in respect of any of the trust property distributed after the closing day, to any person of whose claim the trustee had no notice at the time of the distribution.
- (2) If the trustee gives more than 1 notice under section 139, a reference in subsection (1) to the closing day is a reference to the latest in time of the closing days stated in the notices.
- (3) For subsection (1)(a), it does not matter whether the trustee has notice of a claim because it has been made in response to the notice given under section 139 or has otherwise come to the trustee's notice.
- (4) This section does not affect the right of any person to enforce a remedy for the person's claim against a person to whom a distribution of any of the trust property has been made.

*Note—*

See division 3 in relation to remedies for the wrongful distribution of trust property.

- (5) Subsection (4) does not limit section 148 or any other defence available, under an Act or at law or in equity, to the person to whom the distribution is made.
- (6) In this section—  
*closing day* see section 139(1)(a).

[s 141]

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**Division 2**                      **Claims against trust property and trustees**

**141**      **Definitions for division [TB, cl 107; TA, s 68(1) and (5); Rec 11-2]**

In this division—

*claim*, in relation to a trust—

- (a) means a claim—
  - (i) to or against the trust property; or
  - (ii) against the trustee personally because the trustee is under a liability for which the trustee is entitled to reimbursement out of the trust property; but
- (b) does not include—
  - (i) a claim under the *Succession Act 1981*, part 4; or
  - (ii) a claim that is an application to revoke a grant of probate or letters of administration; or
  - (iii) a claim for which insurance is required to be, and is, maintained under an Act.

*claimant* means a person who makes a claim in relation to a trust, whether as a creditor or beneficiary or otherwise.

*potential claimant* means a person who may make a claim in relation to a trust, whether as a creditor or beneficiary or otherwise.

**142**      **Trustee may require claimant or potential claimant to start proceeding [TB, cl 108; TA, s 68(1); Rec 11-2(a)]**

- (1) This section applies if a trustee does not accept a claim in relation to the trust that has been made, or that the trustee has reason to believe may be made, by a claimant or potential claimant.

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- (2) The trustee may, by written notice given to the claimant or potential claimant, require the claimant or potential claimant—
    - (a) to start a proceeding to enforce the claim within 6 months after the day the notice is given; and
    - (b) to prosecute the proceeding with appropriate diligence.

**143 Trustee may apply to court for orders in relation to claim [TB, cl 109(1) and (5); TA, s 68(2) and (4); Rec 11-2(b)]**

- (1) The trustee may, not earlier than 6 months after notice is given to the claimant or potential claimant under section 142, make an application to the court for orders under section 144 in relation to the claim.
- (2) If the trustee has given notice under section 142 to 2 or more claimants or potential claimants—
  - (a) the trustee may seek orders against any or all of the claimants or potential claimants in a single application; but
  - (b) the application may not be made earlier than 6 months after the latest day notice is given under section 142 to any of the claimants or potential claimants.

**144 Court may make orders in relation to claim [TB, cl 109(3)–(5); TA, s 68(3)–(4); Vic Administration and Probate Act, s 30(3)(b); Rec 11-2(b)]**

- (1) This section applies if, on the hearing of an application made by the trustee under section 143, the claimant or potential claimant does not satisfy the court that the claimant or potential claimant—
  - (a) has started a proceeding to enforce the claim; and
  - (b) is prosecuting the proceeding with appropriate diligence.
- (2) The court may, by order—

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- (a) extend the period for the claimant or potential claimant to start a proceeding to enforce the claim; or
  - (b) bar the claim (including for all purposes); or
  - (c) enable the trust property to be dealt with without regard to the claim.
- (3) Also, the court may make the other orders and give the directions about the proceeding or the claim that the court considers appropriate, including, for example, any of the following orders or directions—
- (a) an order or direction that a beneficiary of the trust be given notice of the application;
  - (b) an order that a beneficiary of the trust be made a respondent to the application;
  - (c) an order imposing conditions;
  - (d) an order about the costs of and incidental to the application.
- (4) If, under section 143(2), the application seeks orders against 2 or more claimants or potential claimants, the court may make orders against any or all of the claimants or potential claimants.

**145 Contesting trustee’s right to indemnity [TB, cl 110; TA, s 68(6); Rec 11-2]**

- (1) This section applies if a beneficiary of the trust—
- (a) is not a party to an application made by the trustee under section 143; and
  - (b) is not made a respondent to the application by an order made under section 144(3)(b).
- (2) An order made by the court on the application does not affect the beneficiary’s right to contest a claim of the trustee to be entitled to indemnify themselves out of the trust property.

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**Division 3 Remedies for wrongful distribution of trust property**

**146 Definition for division**

In this division—

*recipient* see section 147(2).

**147 Enforcement of remedies for wrongful distribution [TB, cl 123; TA, s 113; Recs 14-1 to 14-3]**

- (1) This section applies if a trustee has wrongfully distributed trust property.
- (2) A person who suffers loss because of the wrongful distribution may enforce the same remedies against the trustee, and against any person to whom the distribution has been made (a *recipient*), as the person could enforce against a personal representative who has wrongfully distributed the estate of a deceased person.
- (3) The person is not required to exhaust all remedies that may be available to the person against the trustee before seeking to enforce a remedy against a recipient.

**148 Effect of change of position of recipient [TB, cl 123; TA, s 113; Recs 14-1 to 14-3]**

- (1) This section applies if—
  - (a) a person who suffers loss because of the wrongful distribution of trust property seeks to enforce a remedy against a recipient; and
  - (b) the recipient has received the distribution in good faith and has so changed the recipient's position in reliance on the propriety of the distribution that, in the court's opinion, it would be inequitable to enforce the remedy.
- (2) The court may make an order it considers to be just in all the circumstances.

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**149 Other defences available to recipient not limited**

Section 148 does not limit any other defence that may be available to the recipient under an Act, or at law or in equity.

**Division 4 Particular protections for trustees**

**150 Protection relating to notice when person is trustee of more than 1 trust [TB, cl 111; TA, s 69; Rec 11-3]**

- (1) This section applies to a trustee who is acting for more than 1 trust.
- (2) The trustee is not, in the absence of fraud, to be taken to have notice of any matter in relation to a trust only because notice of the matter is, or was, given to the trustee when acting for another trust.
- (3) In this section—  
*matter* includes an instrument, a fact and a thing.

**151 Protection in relation to receipts [TB, cl 112; TA, s 71; Rec 11-5]**

- (1) This section applies if—
  - (a) a trustee signs a receipt for the payment of an amount or for securities in order to comply with the requirements in relation to the giving of receipts by trustees; and
  - (b) the trustee does not receive all, or any, of the amount or securities.
- (2) The trustee is accountable only for the amount or securities actually received by the trustee.

**152 Protection in relation to acts and omissions of other persons and losses [TB, cl 113; TA, s 71; Rec 11-5]**

- (1) A trustee—

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- (a) is personally liable only for the trustee's own acts or omissions; and
  - (b) is not personally liable for the acts or omissions of—
    - (i) another trustee; or
    - (ii) an agent; or
    - (iii) a financial institution, broker or other person with whom any trust funds are deposited.
- (2) A trustee is not personally liable for the insufficiency or deficiency of any security, or any other loss, unless the insufficiency, deficiency or loss results from the trustee's own breach of trust.
- Note—*
- See section 85 for the court's power to set off gains and losses.
- (3) This section applies subject to sections 56, 58, 81 and 102.

**153 Expenses reasonably incurred in administering trust [TB, cl 114; TA, s 72; Rec 11-6]**

A trustee may—

- (a) reimburse themselves out of the trust property for the expenses reasonably incurred in administering the trust; or
- (b) pay or discharge from the trust property the expenses reasonably incurred in administering the trust.

**154 Protection against liability for rents etc. under lease [TB, cl 115; TA, s 66; Rec 11-7]**

- (1) This section applies if—
- (a) a trustee is, for any reason, liable in relation to—
    - (i) any rent, covenant or agreement reserved by or contained in a lease; or
    - (ii) any indemnity given for any rent, covenant or agreement mentioned in subparagraph (i); and

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- (b) before assigning the lease as mentioned in subsection (2), the trustee—
  - (i) satisfies all liabilities under the lease that may have accrued, and been claimed, up to the date of the assignment; and
  - (ii) if necessary, sets apart a fund that is enough to pay any future claim that may be made in relation to a fixed and ascertained amount that the lessee agreed to expend on the leased property (even if the time for expending the amount has not arrived).
- (2) If the trustee assigns the lease to a person entitled to call for an assignment of the lease, the trustee—
  - (a) is not required to appropriate any further amount from the trust property to meet any future liability under the lease; and
  - (b) may distribute the remaining trust property, other than any fund set apart as mentioned in subsection (1)(b)(ii), to the persons entitled to the trust property.
- (3) A trustee who acts under subsection (1)(b) and distributes the remaining trust property under subsection (2)(b) is not personally liable for any later claim under the lease.
- (4) Nothing in this section affects the right of the lessor, or a person deriving title under the lessor, to follow the trust property into the hands of the persons to whom the trust property has been distributed.
- (5) In this section—
  - lease* includes—
    - (a) an agreement for a lease; and
    - (b) an instrument giving an indemnity as mentioned in subsection (1)(a)(ii) or varying the liabilities under the lease.

*person entitled*, to call for an assignment of a lease, includes a purchaser and a beneficiary under the will, or on the intestacy, of a deceased person.



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**Division 5                      General**

**155      Evidence about vacancy in trust or removal of trustee  
[TB, cl 116(1) and (2); TA, s 13(1)–(3); Rec 3-14]**

- (1) This section applies in relation to a statement in an instrument, under which a new trustee is appointed or a trustee is removed, about—
  - (a) the circumstances in which the vacancy in the office of trustee arose; or
  - (b) the circumstances in which the trustee was removed.
- (2) The statement is conclusive evidence of the circumstances in favour of any of the following persons acting in good faith—
  - (a) a subsequent purchaser;
  - (b) a debtor making payment to a new or continuing trustee of the trust;
  - (c) the relevant registrar or another person registering or otherwise recording a dealing with the trust property.
- (3) Also, the vesting of the trust property on the appointment of the new trustee, or on the removal of the trustee, is as valid in favour of a subsequent purchaser acting in good faith as it would be if the statement were true.

**156      Protection for persons registering dealings with trust property [TB, cl 117; TA, ss 34(3) and 38(3); Recs 7-10 and 7-18]**

- (1) If a trustee has joined with another person in the sale of trust property, the relevant registrar or another person registering or otherwise recording a dealing with the trust property is not, when registering or recording a dealing relating to the sale—
  - (a) affected by notice of the circumstances of the apportionment of the proceeds of sale; or
  - (b) required to inquire into those circumstances.

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- (2) Also, the relevant registrar is not required to inquire into the surrender, by a trustee, of—
  - (a) freehold or leasehold land; or
  - (b) a water allocation or a lease of a water allocation.

**157 Protection for purchasers and mortgagees [TB, cl 118; TA, s 46; Rec 11-12]**

A purchaser or mortgagee paying or lending an amount to a trustee on a sale or mortgage of trust property is not required to inquire into—

- (a) whether the amount is needed or is not more than is needed; or
- (b) whether the trustee has power to effect the sale or mortgage; or
- (c) how the amount is applied.

**158 Receipts given by trustees [TB, cl 119; TA, s 43; Rec 9-1]**

If a person pays an amount, or transfers or delivers property, to a trustee—

- (a) the written receipt of the trustee, or a person appointed by the trustee to give receipts under section 111, is a sufficient discharge for the amount or property; and
- (b) the person paying the amount or transferring or delivering the property—
  - (i) is not required to see to the application of the amount or property; and
  - (ii) is not answerable for any loss or misapplication of the amount or property.

**159 Power of court to relieve trustee from personal liability**  
[TB, cl 120(1)–(2); TA, s 76; Rec 11-9]

- (1) This section applies if it appears to the court that a trustee is, or may be, personally liable for a breach of trust.
- (2) The court may relieve the trustee either wholly or partly from personal liability for the breach of trust if the court is satisfied—
  - (a) the trustee has acted honestly and reasonably; and
  - (b) the trustee ought fairly to be excused—
    - (i) for the breach of trust; and
    - (ii) for omitting to obtain the court’s directions in the matter in which the trustee committed the breach of trust.

*Note—*

See part 11, division 8 in relation to applications to the court for directions about matters relating to a trust.

**160 Power of court to make beneficiary indemnify for breach of trust**  
[TB, cl 121; TA, s 77; Rec 11-10]

- (1) This section applies if a trustee commits a breach of trust at the instigation or request, or with the written consent, of a beneficiary.
- (2) The court may, if it considers it appropriate, make an order indemnifying the trustee out of the beneficiary’s interest in the trust property.
- (3) In this section—

*trustee* includes a person claiming through the trustee.

**161 Indemnity for acts done under court order**  
[TB, cl 122; TA, s 112; Rec 11-14]

Each order purporting to be made under this Act is a complete indemnity to a person for any act done under the order.

## Part 10 Remuneration of trustees

### 162 Definitions for part [TB, cl 145(4); TA, s 101(2) and (3)]

In this part—

*professional charges*, of a professional trustee, means all usual professional or business charges for business transacted, time expended, and acts done by the trustee or the trustee’s firm, including acts that a trustee who is not in a profession or business could have done personally.

*professional trustee* has the meaning given by section 63.

*trustee* has the meaning given by section 63.

### 163 Remuneration of professional trustees [TB, cl 145(1) and (4); TA, s 101(2); Rec 12-9]

- (1) A professional trustee for whom no benefit or remuneration is provided in the trust instrument is entitled to charge, and to be paid out of the trust property, the trustee’s professional charges in relation to the trust.
- (2) This section applies subject to an express contrary intention in the trust instrument.

### 164 Remuneration of trustees under court order [TB, cl 145(2)–(3); TA, s 101(1) and (2), final clause; Rec 12-9]

- (1) The court may, on application by a trustee (including a professional trustee), make an order authorising the trustee to charge, and to be paid out of the trust property, the remuneration for the trustee’s services that the court considers appropriate if the circumstances appear to the court to justify the charge.
- (2) If the application is made by a professional trustee, the court may take into account any professional charges that have been paid out of the trust property to the trustee under section 163.

- 165 Court may reduce excessive amounts for commission and professional charges [TB, cl 146; New; NSW Probate and Administration Act, s 86A; Rec 12-10]**
- (1) This section applies if the court considers that either of the following amounts charged, or proposed to be charged, by a trustee in respect of a trust is excessive—
    - (a) an amount for commission;
    - (b) an amount for professional charges.
  - (2) The court may, on its own initiative or on application by a person interested in the trust, review the amount and, on the review, reduce the amount.
  - (3) Subsection (2) applies despite any provision of an Act, or of the trust instrument, authorising the charging of the amount.
  - (4) However, this section does not apply in relation to a trustee that is—
    - (a) a licensed trustee company within the meaning of the Corporations Act, section 601RAA; or
    - (b) the public trustee, to the extent an amount mentioned in subsection (1)(a) or (b) is charged, or proposed to be charged, by the public trustee as fees and charges under the *Public Trustee Act 1978*, section 17.
  - (5) In this section, a reference to an amount includes a reference to a part of an amount.

## Part 11 Court powers

### Division 1 Preliminary

**166 Definition for part [TB, cl 125(2); TA, s 5]**

In this part—

*possessed*, of property, includes—

- (a) entitled to the receipt of income of property; and

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- (b) entitled to any vested estate (less than a life interest), at law or in equity, in possession or in expectancy, in land.

## Division 2 Applications for orders

### 167 Persons who may apply for particular orders relating to trusts [TB, cl 126(1)–(3); TA, s 98(1); Rec 12-12]

- (1) This section applies in relation to an application to the court for any of the following orders in relation to a trust—
  - (a) an order under section 15 approving the appointment of more than 4 trustees of the trust;
  - (b) an order under section 170 appointing a new trustee;
  - (c) an order under section 170 removing a trustee;
  - (d) an order under section 172 disqualifying a person from being appointed as a trustee or removing the person as a trustee;
  - (e) an order under this Act relating to the trust property.
- (2) The application may be made by—
  - (a) a trustee; or
  - (b) a person applying to be appointed as a trustee; or
  - (c) a person who is beneficially interested in the trust property, whether or not the person is under a legal incapacity; or
  - (d) a person in whose favour a power to distribute the trust property may be exercised.
- (3) A custodian trustee may also apply for an order mentioned in subsection (1)(b).
- (4) Subsection (2) does not apply if another provision of this Act provides for the persons who may apply to the court in relation to the particular matter.

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**168 Persons who may apply for orders relating to interests in mortgaged property [TB, cl 126(1) and (4); TA, s 98(2); Rec 12-12]**

- (1) This section applies in relation to an application to the court for an order under this Act in relation to an interest in any property subject to a mortgage.
- (2) The application may be made by—
  - (a) a person who is beneficially interested in the property, whether or not the person is under a legal incapacity; or
  - (b) a person who is interested in the amount secured by the mortgage.
- (3) Subsection (2) does not apply if another provision of this Act provides for the persons who may apply to the court in relation to the particular matter.

**169 Division does not limit or affect particular provisions**

This division does not limit or otherwise affect the operation of a provision of another Act that provides for how, or by whom, an application may be made on behalf of a person under a legal incapacity.

**Division 3 Appointment and removal of trustees and other office holders and related matters**

**170 Power to appoint and remove trustees [TB, cl 127; TA, s 80; New; Rec 12-1]**

- (1) This section applies if—
  - (a) it is expedient for a new trustee of a trust to be appointed or for a trustee of a trust to be removed; and
  - (b) it is inexpedient, difficult, impracticable or impossible to do so without an order of the court.

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- (2) The court may, on application, make 1 or more of the following orders in relation to the trust—
  - (a) an order appointing a new trustee to replace a trustee who has been removed;
  - (b) an order appointing a new trustee to be an additional trustee or because there is no existing trustee;
  - (c) an order removing a trustee.
- (3) Without limiting subsection (2)(a), the appointment of a new trustee may be made to replace a trustee—
  - (a) who wishes to be discharged; or
  - (b) who appears to the court, for any reason, to be undesirable as a trustee.
- (4) If the court could appoint a new trustee under subsection (2)(a) to replace a trustee, the court may remove the trustee under subsection (2)(c) without appointing a new trustee, but only if, on the removal of the trustee, the trust will have at least 1 trustee.
- (5) An order appointing a new trustee or removing a trustee (and any consequential vesting order or conveyance) has effect to discharge a former trustee only to the extent the appointment or removal would have that effect if it had been made under a power for that purpose contained in the trust instrument.
- (6) This section does not confer power to appoint or remove a personal representative.

**171 Powers etc. of trustees appointed by court [TB, cl 128; TA, s 81; Rec 12-1]**

- (1) A person appointed by an order made under section 170(2) as the trustee of trust property has all the powers, authorities and discretions of, and may in all matters act as, a person who had originally been appointed a trustee of the trust property under the trust instrument.
- (2) Subsection (1) applies in relation to the trustee both before and after the trust property is vested in the trustee.



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**172 Power to disqualify persons from appointment as trustees and remove them as trustees of other trusts [TB, cl 129; New; Recs 12-2 and 12-3]**

- (1) This section applies if—
  - (a) a person has been removed as trustee of a trust under section 170(2)(c); and
  - (b) the court is satisfied—
    - (i) the person has committed 1 or more breaches of trust; and
    - (ii) the nature and seriousness of the breaches make the person unfit to act as a trustee.
- (2) The court may, by order—
  - (a) disqualify the person from being appointed as a trustee of any trust for a stated period; and
  - (b) if the person is a trustee of another trust when an order is made under paragraph (a)—remove the person as trustee of the other trust.

**173 Power to appoint and remove particular office holders [TB, cl 130; New; Rec 12-4]**

- (1) This section applies if—
  - (a) it is expedient for a person to be appointed to, or removed from, a relevant office; and
  - (b) it is inexpedient, difficult, impracticable or impossible to do so without an order of the court.
- (2) The court may, on application, by order—
  - (a) appoint the person to the relevant office; or
  - (b) remove the person from the relevant office; or
  - (c) remove the person from the relevant office and appoint another person to the office.
- (3) The application may be made by—
  - (a) a trustee; or

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- (b) a person who is beneficially interested in the trust property, whether or not the person is under a legal incapacity; or
  - (c) a person in whose favour a power to distribute the trust property may be exercised.
- (4) A person may be appointed to, or removed from, a relevant office for any reason a person may be appointed, or removed, as a trustee under section 170.
- (5) In this section—
- relevant office* means an office created under a trust, other than the office of trustee, under which a person appointed to the office—
- (a) may exercise a power in relation to the trust or the trust property; and
  - (b) must act in a fiduciary capacity in exercising the power.

#### **Division 4                    Vesting orders and related matters**

**174    Application of division [TB, cl 131; TA, ss 82(2)–(3), 84, 85, 88 and 89; Rec 12-5]**

- (1) This division applies if—
- (a) a new trustee is appointed under the trust instrument, under this Act or another Act, or otherwise by the court; or
  - (b) a trustee—
    - (i) is replaced or removed, or is discharged under section 29; or
    - (ii) is under a legal incapacity; or
    - (iii) is out of the court’s jurisdiction; or
    - (iv) can not be found; or
  - (c) a trustee that is a corporation—

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- (i) has stopped carrying on business; or
  - (ii) is a Chapter 5 body corporate within the meaning of the Corporations Act, section 9; or
  - (iii) has been deregistered or has otherwise ceased to exist; or
- (d) a trustee, who is directed in writing to do so by a person absolutely entitled to the trust property or to the dividends or income of the trust property, neglects or refuses, within 28 days after being given the direction, to—
- (i) convey the trust property; or
  - (ii) receive the dividends or income of the trust property; or
  - (iii) sue for or recover the trust property; or
- (e) the last continuing trustee of a trust has died and 1 of the following applies—
- (i) there is no personal representative of the last continuing trustee;
  - (ii) the personal representative of the last continuing trustee can not be found;
  - (iii) it is uncertain who the personal representative of the last continuing trustee is; or
- (f) it is uncertain whether the last trustee of a trust known to have been entitled to, or possessed of, any trust property is alive or dead; or
- (g) in circumstances where 2 or more trustees were jointly entitled to, or possessed of, trust property, it is uncertain who the survivor of the trustees was; or
- (h) trust property is vested in a trustee and it appears to the court to be expedient to make a vesting order.
- (2) Also, this division applies if—
- (a) a person, who is required to do so under a court order, neglects or refuses to—

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- (i) convey any property; or
- (ii) receive the dividends or income of any property; or
- (iii) sue for or recover any property; or
- (b) a deceased person was entitled to, or possessed of, any property and the deceased person's personal representative is under a legal incapacity; or
- (c) any property is subject to a contingent right in an unborn person, or in unborn persons of a class, who, on coming into existence, would become entitled to, or possessed of, the property under a trust; or
- (d) in a proceeding, the court—
  - (i) directs the sale or mortgage, or the release of a mortgage, of land; or
  - (ii) makes an order for the specific performance of a contract concerning land; or
- (e) a person entitled to, or possessed of, property by way of mortgage is under a legal incapacity.
- (3) For this section, a trustee is entitled to, or possessed of, trust property even if—
  - (a) the trust property is held jointly with another person; or
  - (b) the trustee is entitled to, or possessed of, the trust property by way of mortgage or otherwise.

**175 Court may make vesting and other orders etc. [TB, cl 132; New; TA, ss 82(1), 83(3), 84–85, 88–89 and 91–93; Rec 12-5]**

- (1) The court may make an order (a *vesting order*) vesting the trust property or other property in any person in any way and for any estate or interest that the court directs.
- (2) Subsection (1) applies subject to section 176.
- (3) As well as, or instead of, making a vesting order in relation to the trust property or other property, the court may make any

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declaration or order, or give any direction, in relation to the property that it considers appropriate, including—

- (a) for the purpose of making a vesting order under subsection (1), a declaration that a person is a trustee, within the meaning of this Act, of the property; and
  - (b) an order releasing a contingent right or disposing of a contingent right to any person as the court directs; and
  - (c) an order appointing a person to convey the property or release a contingent right.
- (4) If the court makes a vesting order in relation to the trust property or other property, it may also make a declaration, or give a direction, about the way the right to transfer the property is to be exercised.
- (5) In this section—
- contingent right*, in relation to property, includes—
- (a) a contingent right of an unborn person, or of unborn persons of a class, who, on coming into existence, would become entitled to, or possessed of, the property under a trust; and
  - (b) the estate or interest in the property that an unborn person, or unborn persons of a class, mentioned in paragraph (a) would become entitled to, or possessed of, on coming into existence.

**176 Restrictions on vesting orders in particular circumstances [TB, cl 133; TA, s 83(1)–(2) and (6); Rec 12-5]**

- (1) If a vesting order is to be made consequential on the appointment of a new trustee, including on the appointment of a new trustee to replace a trustee, the trust property must be vested in the persons who, on the appointment, are the trustees.
- (2) If a vesting order is to be made consequential on the removal of 1 or more of a number of trustees without being replaced,

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or on the discharge of a trustee under section 29, the trust property must be vested in the continuing trustees alone.

- (3) A vesting order may vest shares that are not fully paid up in a person only if—
  - (a) the person applies for the order or consents to the order being made; or
  - (b) the court directs that the person’s consent be dispensed with.

**177 Effect of vesting and other orders [TB, cll 134 and 135(1); TA, ss 90(1)–(2) and 92; Rec 12-5]**

- (1) A vesting order—
  - (a) divests the trust property or other property to which the order relates from the persons in whom the property was vested immediately before the order was made; and
  - (b) without any conveyance, transfer or assignment, vests the property in—
    - (i) the person named, as trustee or otherwise, in the order; or
    - (ii) if more than 1 person is named, as trustee or otherwise, in the order—the persons named in the order, as joint tenants.
- (2) However, to the extent the divesting and vesting of the property have effect only if notified, registered or recorded under the requirements of another Act or of a law of another State or the Commonwealth, the divesting and vesting of the property are subject to the requirements of the other Act or law.
- (3) If an order is made under section 175(3)(c), a conveyance or release by the appointed person in accordance with the order has the same effect as a vesting order.

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**178 Transfer of property under vesting order [TB, cll 135(2) and 136; TA, s 90(3)–(5); Rec 12-5]**

- (1) The person in whom the property is vested under the vesting order must, for the purpose of effecting the notification, registration or recording of the order under a requirement mentioned in section 177(2)—
  - (a) produce the order to the relevant registrar or other person having the function of receiving notification of, or registering or recording, the vesting; and
  - (b) do any other act that is required by the relevant registrar or other person for that purpose.
- (2) The vesting order, or the notification, registration or recording of the order, does not have effect as a breach of covenant or condition, or give rise to the forfeiture, of any lease or agreement for lease or other property.
- (3) If the consent of a person is needed to the conveyance, transfer or assignment of any property—
  - (a) the vesting of the property under a vesting order is subject to the consent, unless the order otherwise provides; but
  - (b) the consent may be obtained after the making of the vesting order by the persons named in the order.

**179 Powers etc. of person named in vesting order as trustee [TB, cl 137; TA, s 90(6); Rec 12-5]**

- (1) This section applies if a vesting order vests property in a person as trustee.
- (2) The person named in the vesting order as trustee has all the powers, authorities and discretions of, and may in all matters act as, a person who had originally been appointed a trustee of the trust property under the trust instrument.
- (3) However, the court may—
  - (a) under the vesting order, limit the trustee's powers as the court considers appropriate; or

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- (b) under section 187 or 191, enlarge the trustee’s powers as the court considers appropriate.

**180 Circumstances relating to validity of vesting and other orders etc. [TB, cl 138; TA, s 83(4)–(5); Rec 12-5]**

- (1) This section applies in relation to a vesting order or any other order, declaration or direction made, or given, under section 175.
- (2) The fact that the order, declaration or direction is founded, or purports to be founded, on an allegation of the existence of a circumstance mentioned in section 174(1) or (2) is conclusive evidence of the circumstance alleged in any court on any question about the validity of the order, declaration or direction.
- (3) However, if the order, declaration or direction has been improperly obtained, nothing in this Act prevents the court from—
  - (a) in the case of a vesting order—directing a reconveyance of the property the subject of the order; or
  - (b) making an order in relation to the payment of costs occasioned by the improper obtaining of the order, declaration or direction; or
  - (c) making a further order or declaration, or giving a further direction, under section 175.

**Division 5 Review of decisions and apprehended decisions**

**181 Application of division [TB, cl 139(1); TA, s 8(1); Rec 12-11]**

This division applies if a person (an *aggrieved person*)—

- (a) has—



- (i) an interest (whether direct or indirect or vested or contingent) in trust property; or
  - (ii) a right of proper administration in relation to a trust; and
- (b) either—
- (i) is aggrieved by a decision of a trustee or another person in the exercise of a relevant power; or
  - (ii) has reasonable grounds to apprehend a decision of a trustee or another person in the exercise of a relevant power by which the person will be aggrieved.

**182 Definitions for division [TB, cl 139(8); TA, s 8(1); Rec 12-11]**

In this division—

*aggrieved person* see section 181.

*decision* includes an act and an omission.

*relevant power*, in relation to a trustee or another person, means a power in relation to trust property or a trust that—

- (a) is conferred on the trustee or other person under this Act or otherwise; and
- (b) must be exercised in a fiduciary capacity.

**183 Application for review or directions [TB, cl 139(2); TA, s 8(1); Rec 12-11]**

The aggrieved person may apply to the court—

- (a) to review the decision of the trustee or other person; or
- (b) to give directions in relation to the apprehended decision of the trustee or other person.

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**184 Grounds for review or directions [TB, cl 139(3)–(5); TA, s 8(1); Rec 12-11]**

- (1) The court may review the decision, or give directions about the apprehended decision, on the ground the decision or apprehended decision was not, or would not be, an appropriate exercise of the relevant power by the trustee or other person.
- (2) Without limiting subsection (1), the grounds on which the court may review the decision, or give directions about the apprehended decision, of the trustee or other person include that the relevant power was, or would be, exercised—
  - (a) in bad faith; or
  - (b) without real or genuine consideration; or
  - (c) contrary to the purposes of the trust.
- (3) The court may require the trustee or other person to appear before it to substantiate and uphold the grounds of the decision or apprehended decision.

**185 Orders and directions [TB, cl 139(6) and (7); TA, s 8(2); Rec 12-11]**

- (1) The court may, on the application, make the orders and give the directions it considers appropriate, including an order about the costs of the application.
- (2) However, an order must not—
  - (a) disturb a distribution of the trust property, made without breach of trust, before the trustee or other person became aware of the making of the application to the court; or
  - (b) affect a right acquired by a person in good faith and for valuable consideration.

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**Division 6                      Conferral of additional management powers**

**186      Definition for division [TB, cl 140(8); TA, s 94(1); Rec 12-6]**

In this division—

*management power*, in relation to a trust, means any power for the management or administration of the trust or the trust property, including, for example—

- (a) the power to surrender, release or otherwise dispose of the trust property; and
- (b) the power to retain the trust property; and
- (c) the power to buy, invest in or acquire trust property or engage in another transaction for the trust; and
- (d) the power to expend an amount out of trust funds.

**187      Court may confer additional management powers [TB, cl 140(1)–(3) and (7); TA, s 94(1); Rec 12-6]**

- (1) This section applies in relation to a trust if the court is satisfied—
  - (a) the exercise of a particular management power—
    - (i) would be expedient in the management or administration of the trust property; or
    - (ii) would be in the best interests of the persons, or the majority of the persons, beneficially interested in the trust property; and
  - (b) the management power can not be exercised because—
    - (i) it is inexpedient, difficult or impracticable to exercise the power without a court order; or
    - (ii) the trustee does not have the management power under this Act, the trust instrument or otherwise.
- (2) For subsection (1)(b)(ii), it does not matter that the trustee does not have the particular management power because—

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- (a) this Act allows the power, which would otherwise be conferred on the trustee under this Act, to be excluded or modified under the trust instrument; and
- (b) the trust instrument excludes or modifies the power.

*Note—*

See section 86(3) in relation to the powers that may be excluded or modified under the trust instrument.

- (3) The court may, by order, confer on the trustee, either generally or in a particular matter, the management power on the terms and subject to any conditions the court considers appropriate.
- (4) Without limiting subsection (3), the court may direct—
  - (a) how an amount authorised to be expended is to be paid; and
  - (b) how the costs of any transaction are to be borne; and
  - (c) the extent to which the amount or the costs are to be apportioned between capital and income.

**188 Court may revoke or vary order [TB, cl 140(4)–(5); TA, s 94(2); Rec 12-6]**

- (1) The court may, by further order, revoke or vary an order made under section 187.
- (2) The revocation or variation of an order made under section 187 does not affect any act or thing done in reliance on the order before the person doing the act or thing became aware of the application to the court to revoke or vary the order.

**189 Persons who may apply for order [TB, cl 140(6); TA, s 94(3); Rec 12-6]**

An application for an order under section 187 or 188 in relation to a trust may be made by—

- (a) any trustee of the trust; or
- (b) any person beneficially interested in the trust property.

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## Division 7 Variations of trusts

### 190 Meaning of *protective trust* [TB, cl 141; New]

- (1) For this division, a trust is a *protective trust* if, under the trust, income is, without prejudice to any prior interest—
  - (a) held on trust for the benefit of a person (the *principal beneficiary*)—
    - (i) for the period of the principal beneficiary’s life or a lesser period (in either case the *trust period*); or
    - (ii) until the trust (the *primary trust*) sooner fails or determines because of an intervening event; and
  - (b) if the primary trust fails or determines during the trust period—held on trust for the remainder of the trust period to be applied, as the trustee considers appropriate, for the maintenance, education or advancement (including past maintenance or education) of 1 or more of the following persons—
    - (i) the principal beneficiary and the principal beneficiary’s spouse or issue;
    - (ii) if the principal beneficiary has no spouse or issue—the principal beneficiary and the persons who would, if the principal beneficiary were actually dead, be entitled to the trust property or the income of the trust property.
- (2) For this division, a trust is also a *protective trust* if it has a similar effect to a trust mentioned in subsection (1).
- (3) In this section—

*income* includes an annuity and any other periodic payment of income.

*intervening event*, in relation to a primary trust, means an event provided for under the trust instrument that, if it happens, results in—

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- (a) the principal beneficiary under the primary trust being deprived of the right to receive the income, or part of the income, of the trust; and
- (b) the consequent failure or determination of the primary trust.

**191 Power of court to authorise variations of trust [TB, cl 142; TA, s 95; Rec 12-7]**

- (1) The court may make an order under this section approving an arrangement in relation to a trust for any of the following persons (each a *restricted beneficiary*)—
  - (a) a person under a legal incapacity who has an interest under the trust, whether directly or indirectly and whether vested or contingent;
  - (b) a person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trust at a future date or on the happening of a future event (each later in time than the date of an application to the court under this section) because the person becomes—
    - (i) a person of a particular description; or
    - (ii) a member of a particular class of persons;
  - (c) an unborn person;
  - (d) a person who, if a protective trust failed or determined, would be a member of the class of persons mentioned in section 190(1)(b)(i) or (ii).
- (2) An arrangement may—
  - (a) vary or revoke all or any of the trusts; or
  - (b) enlarge the powers of the trustees of managing or administering any of the trust property.
- (3) An arrangement may be approved only if carrying out the arrangement would be for the benefit of the restricted beneficiary.

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- (4) However, subsection (3) does not apply if the restricted beneficiary is—
    - (a) an unascertained person whose entitlement is dependent on a future event that the court is satisfied is unlikely to happen; or
    - (b) a person mentioned in subsection (1)(d).
  - (5) An order approving an arrangement may be made regardless of—
    - (a) who has proposed the arrangement; or
    - (b) whether there is any other person beneficially interested in the trust property who is capable of assenting to the arrangement.
  - (6) Notice of an application to the court for an order under this section must be given to all persons as the court directs.
  - (7) Nothing in this section limits a management power conferred on a trustee under division 6.
  - (8) This section does not apply in relation to a trust affecting property settled by an Act.

## **Division 8                      Applications for directions**

### **192      Court may give directions about particular matters [TB, cl 143; TA, s 96; Rec 12-8]**

- (1) The court may, on application by a trustee, give the directions it considers appropriate about—
  - (a) the trust property; or
  - (b) the management or administration of the trust property; or
  - (c) the exercise of any power or discretion vested in the trustee.

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- (2) An application for directions under subsection (1) must be served on each person having an interest in the application or any of them that the court considers expedient.

**193 Protection of trustee acting under court directions [TB, cl 144; TA, s 97; Rec 12-8]**

- (1) If a trustee acts in accordance with a direction of the court given under section 192, the trustee is taken, in relation to the trustee's own liability, to have discharged the trustee's duty as trustee in the matter the subject of the direction.
- (2) Subsection (1) applies even if the direction is later varied or set aside.
- (3) However, this section does not protect the trustee from liability for an act done under the direction if, in obtaining the direction, or in agreeing (either expressly or impliedly) with the court in making the order giving the direction, the trustee—
  - (a) commits a fraud; or
  - (b) wilfully conceals a material matter; or
  - (c) misrepresents a material matter.
- (4) In this section—

*varied or set aside* includes invalidated, overruled and declared to be of no effect.

**Division 9 Other matters**

**194 Court's power to make orders in relation to property or claim of child [TB, cl 147; TA, ss 86–87; Recs 12-5 and 12-13]**

- (1) If a child is beneficially entitled to property of which there is no trustee, the court may, on application by the child's litigation guardian, make an order, on the terms the court



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considers appropriate, appointing the litigation guardian or another person the court considers appropriate—

- (a) to deal with the property; or
  - (b) to exercise in relation to the property the powers conferred on a trustee under this Act.
- (2) If a child has a claim to property, the court may, on application by the child’s litigation guardian, make an order appointing the litigation guardian or another person the court considers appropriate to settle or compromise the claim.
- (3) However, subsection (2) does not apply if the settlement or compromise may be sanctioned under the *Public Trustee Act 1978*, section 59 by a court or the public trustee.
- (4) The court must not make an order under subsection (1) or (2) unless it appears to the court that the order is for the benefit of—
- (a) the child; or
  - (b) the child and another person.
- (5) An act done under an order made under this section is binding on the child.
- (6) In this section—
- deal*, with property, includes sell, convey, lease, mortgage, charge and sue for and recover the property.

**195 Court’s power to decide proceeding in absence of trustee [TB, cl 148(1)–(3); TA, s 99(1); Rec 12-13]**

- (1) This section applies if—
- (a) a person is, as trustee, a defendant in a proceeding; and
  - (b) the court is satisfied—
    - (i) a diligent search has been made for the person; and
    - (ii) the person can not be found.
- (2) The court may—

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- (a) decide the proceeding in the absence of service on the person; and
  - (b) give judgment against the person, as trustee, as if the person had been properly served.
- (3) Subject to section 196, judgment given against the person, as trustee, does not affect any interest the person may have in the matters in question in the proceeding in another capacity.

**196 Court's power to appoint representative or make orders in absence of party or interested person [TB, cl 148(4)–(6); TA, s 99(2); Rec 12-13]**

- (1) This section applies if, at the time of the hearing of a proceeding in relation to a trust, a party to the proceeding or an interested person in relation to the proceeding—
- (a) is not within the jurisdiction; or
  - (b) is under a legal incapacity; or
  - (c) can not be found; or
  - (d) is unborn; or
  - (e) is not capable of being identified or ascertained.
- (2) The court may—
- (a) make an order appointing a person to represent the party or interested person; or
  - (b) proceed in the absence of the party or interested person.
- (3) An order made in the proceeding is binding on the party or interested person.
- (4) In this section—
- interested person***, in relation to a proceeding, means a person, or persons of a class, who the court considers—
- (a) should be made a party or parties to the proceeding; or
  - (b) should be given an opportunity to attend and be heard in the proceeding.

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**197 Court's power to charge costs on property [TB, cl 149; TA, s 100; Rec 12-13]**

The court may order that the costs of an application under this Act—

- (a) be paid or raised out of—
  - (i) the property to which the application relates; or
  - (ii) the income of the property to which the application relates; or
- (b) be borne and paid in the way and by the persons the court considers just.

**198 Payment of particular trust property into court by trustees [TB, cl 150; TA, s 102; Rec 12-13]**

- (1) This section applies in relation to trust property comprising trust funds or securities.
- (2) A trustee who holds the trust property, or has the trust property under the trustee's control, may pay the trust property into court.
- (3) Subject to rules of court, the trust property is to be dealt with as the court, by order, directs.
- (4) The receipt of the proper officer of the court is a sufficient discharge to the trustee for the payment of the trust property into court.
- (5) If the trust property is held by, or is under the control of, more than 1 trustee, the trust property may be paid into court on a decision of a majority of the trustees.
- (6) If a majority of the trustees in whom the trust property is vested wish to pay the trust property into court but the agreement of the remaining trustees can not be obtained, the court may order—
  - (a) that the trust property be paid into court without the agreement of the remaining trustees; and

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- (b) if the trust property is deposited with a financial institution, broker or other depository—that the trust property be paid or delivered to the majority of the trustees for payment into court.
- (7) The payment or delivery of trust property under an order made under this section is as valid and effective as it would be if the payment or delivery had been made by all of the trustees of the trust property.

## **Part 12 Charitable trusts**

### **Division 1 Trusts containing non-charitable and invalid purposes**

#### **199 Inclusion of non-charitable and invalid purpose not to invalidate trust [TB, cl 154; TA, s 104]**

- (1) This section applies if, under a trust, the purposes for which the trust property is directed or allowed to be applied include, or could be taken to include, both a charitable purpose and a non-charitable and invalid purpose.
- (2) The trust—
  - (a) is not invalid only because of the inclusion of the non-charitable and invalid purpose; and
  - (b) is to be construed, and has effect, as if the trust did not direct or allow the trust property to be applied for the non-charitable and invalid purpose.
- (3) This section does not apply in relation to a trust declared before, or to the will of a testator dying before, 1 July 1973.

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**Division 2                      Applications to court in relation to  
   charitable trusts**

**200      Who may apply [TB, cl 152(1); TA, s 106(2)]**

Any of the following entities may apply to the court for an order under this part in relation to a charitable trust—

- (a) the Attorney-General or a person authorised by the Attorney-General;
- (b) a trustee of the trust;
- (c) a person, or charity, interested in the proper administration of the trust.

**201      Notice of application [TB, cl 152(1); TA, s 106(3)]**

- (1) The applicant must give written notice of the application to—
  - (a) if the applicant is the Attorney-General or a person authorised by the Attorney-General—the trustees of the trust; or
  - (b) if the applicant is a trustee of the trust—
    - (i) the Attorney-General; and
    - (ii) any trustee of the trust who is not a party to the application; or
  - (c) if the applicant is a person, or charity, interested in the proper administration of the trust—
    - (i) the Attorney-General; and
    - (ii) the trustees of the trust.
- (2) Also, the applicant must give written notice of the application to any other person or charity as directed by the court.

**202      Orders [TB, cl 153; TA, s 106(1) and (4)]**

The court may make any of the following orders in relation to the charitable trust—

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- (a) an order giving directions about the administration of the trust;
- (b) an order requiring a trustee to carry out the trust;
- (c) an order requiring a trustee to comply with a scheme approved in relation to the trust, whether under this part or otherwise;
- (d) an order requiring a trustee to satisfy the trustee's liability for a breach of the trust;
- (e) an order about costs;
- (f) an order about another matter that the court considers just.

### **Division 3                      Schemes to allow trust property to be applied cy pres**

#### **Subdivision 1              Preliminary**

#### **203      References to purposes of charitable trust [TB, cl 156; TA, s 105(3)]**

A reference in this division to the purposes of a charitable trust is a reference to—

- (a) if paragraph (b) does not apply—the original purposes of the trust; or
- (b) if the application of the trust property has been changed or regulated by a scheme approved under this division or otherwise—the purposes for which the trust property may, for the time being, be applied.

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**204 Circumstances in which purposes of charitable trust may be changed under sdiv 2 or 3 [TB, cl 157; TA, s 105(1)–(2)]**

- (1) The circumstances in which the purposes of a charitable trust may be changed under subdivision 2 or 3 to allow the trust property to be applied cy pres are as follows—
- (a) the purposes, wholly or in part—
    - (i) have been, as far as may be, fulfilled; or
    - (ii) can not be carried out; or
    - (iii) can not be carried out according to the directions given and to the relevant considerations;
  - (b) the purposes provide a use for part only of the trust property;
  - (c) the trust property and other property that may be applied for similar purposes—
    - (i) can be more effectively used in conjunction; and
    - (ii) can be appropriately applied to common purposes, having regard to the relevant considerations;
  - (d) the purposes refer to—
    - (i) an area that was, but has since ceased to be, a unit for some other purpose; or
    - (ii) a class of persons, or an area, that has ceased to be suitable, having regard to the relevant considerations, or to be practical in administering the trust;
  - (e) the purposes, wholly or in part—
    - (i) have been adequately provided for in other ways; or
    - (ii) have ceased to be charitable; or
    - (iii) have, in any other way, ceased to provide a suitable and effective way of using the trust property, having regard to the relevant considerations.
- (2) For subsection (1), the *relevant considerations* are—

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- (a) the spirit of the trust; and
  - (b) the social and economic conditions prevailing at the time of the proposed change to the purposes of the trust.
- (3) Subsection (1) does not affect the conditions that, apart from this Act, must be satisfied in order that property given for charitable purposes may be applied cy pres, except to the extent the conditions require a failure of the purposes.

**205 Relationship with Charitable Funds Act 1958 [TB, cl 155; TA, s 105(5)]**

This division does not affect the application of the *Charitable Funds Act 1958* to the funds to which that Act applies.

**Subdivision 2 Approval of schemes by court**

**206 Court may approve scheme [TB, cl 159; TA, s 106(1) and (4)]**

- (1) This section applies if—
- (a) an application is made to the court for an order approving a scheme to change the purposes of a charitable trust to allow the trust property to be applied cy pres; and
- Note—*
- See section 200 for who may apply to the court.
- (b) the court is satisfied that 1 or more of the circumstances mentioned in section 204(1)(a) to (e) apply in relation to the charitable trust.
- (2) The court may—
- (a) grant, or refuse to grant, the order; and
  - (b) make any other order the court considers just.



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### **Subdivision 3      Approval of schemes by Attorney-General**

**207      Trustee may apply to Attorney-General to approve  
scheme [TB, cll 160(1)–(2) and 161(1); New; Recs 13-1 and  
13-2(a), (b) and (e); Vic Charities Act s 4(1)]**

- (1) This section applies if—
  - (a) the trustee of a charitable trust seeks approval of a scheme to change the purposes of the trust to allow the trust property to be applied cy pres; and
  - (b) the purposes of the trust have not previously been changed by the court under subdivision 2 or otherwise; and
  - (c) the value of all the trust property is not more than the District Court monetary limit.
- (2) The trustee may, instead of applying to the court under subdivision 2 or otherwise, apply to the Attorney-General to approve the scheme.
- (3) The application must—
  - (a) be in the approved form; and
  - (b) comply with any requirements prescribed by regulation for the application; and
  - (c) be accompanied by any fee prescribed by regulation for the application.

**208      Requirements for public notice etc. [TB, cll 160(3) and  
161(2); New; Rec 13-2(c); Tas Variation of Trusts Act s  
7(3)(a)–(b); Vic Charities Act s 4(2); WA Charitable Trusts  
Act s 10A(5)(a)]**

- (1) On receiving the application, the Attorney-General must, by written notice given to the trustee, require the trustee to give public notice of the application in a stated way the Attorney-General considers appropriate.

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- (2) The trustee must give public notice of the application in the way stated in the notice given under subsection (1).
- (3) The public notice must—
  - (a) invite persons and charities interested in the proper administration of the charitable trust to make written submissions to the Attorney-General within a stated period of at least 28 days after the notice is published (the *submission period*); and
  - (b) state how submissions to the Attorney-General may be made.

**209 Powers of Attorney-General**

- (1) The Attorney-General may do 1 or more of the following things—
  - (a) ask the trustee to provide any information, opinions or advice the Attorney-General considers appropriate;
  - (b) make any other investigations and inquiries the Attorney-General considers appropriate;
  - (c) propose a variation of the scheme.
- (2) If the Attorney-General proposes a variation of the scheme, the Attorney-General must consult the trustee on the proposed variation.

**210 Deciding application [TB, cl 160(4)–(7); New; Recs 13-1 and 13-2(a), (b) and (e); NSW Charitable Trusts Act s 14(1)(b); Tas Variation of Trusts Act s 7(3)(a)–(b); Vic Charities Act s 4(3)(a); WA Charitable Trusts Act s 10A(4)]**

- (1) The Attorney-General must consider the application and decide to—
  - (a) approve the scheme; or
  - (b) approve the scheme with a variation proposed under section 209(1)(c); or
  - (c) refuse to approve the scheme.

- (2) In making the decision, the Attorney-General must have regard to any written submissions made to the Attorney-General, within the submission period, by a person or charity interested in the proper administration of the charitable trust.
- (3) The Attorney-General may decide to approve the scheme under subsection (1)(a) or (b) only if satisfied that—
  - (a) the value of all the trust property is not more than the District Court monetary limit; and
  - (b) 1 or more of the circumstances mentioned in section 204(1)(a) to (e) apply in relation to the charitable trust; and
  - (c) the trustee has given public notice of the application in compliance with section 208(2) and (3); and
  - (d) for an approval under subsection (1)(b)—the trustee consents to the variation of the scheme proposed by the Attorney-General.
- (4) The Attorney-General must decide to refuse to approve the scheme if the Attorney-General considers it more appropriate that the application be dealt with by the court—
  - (a) because of the contentious nature of the application; or
  - (b) because a special question of law or fact arises; or
  - (c) for another reason.
- (5) If the Attorney-General decides to refuse to approve the scheme, the Attorney-General must give the trustee written notice of the decision, including the reasons for the decision.
- (6) In this section—  
*submission period* see section 208(3)(a).

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- 211 Public notice of Attorney-General’s decision [TB, cl 162; New; Rec 13-2(d); WA Charitable Trusts Act s 10A(6)(b)]**
- (1) The Attorney-General must give public notice, in the way the Attorney-General considers appropriate, of the Attorney-General’s decision in relation to the scheme.
  - (2) If the decision is to approve the scheme, the public notice must also state—
    - (a) that, under section 213, a person aggrieved by the decision may, within 28 days after the notice is given, appeal against the decision to the Supreme Court; and
    - (b) the day the scheme takes effect if an appeal against the decision is not started under section 213.
- 212 Effect of decision to approve scheme [TB, cl 163; New; NSW Charitable Trusts Act ss 12(4) and 16(2)]**
- (1) If the Attorney-General decides under section 210 to approve the scheme, the scheme takes effect on—
    - (a) if an appeal against the decision is started under section 213—the day the Supreme Court affirms the decision or dismisses the appeal; or
    - (b) otherwise—the day that is 28 days after public notice of the decision is given under section 211 or, if the public notice states a later day, the later day.
  - (2) On taking effect, the scheme is as effective, for all purposes, as it would be if it were approved by an order of the court under subdivision 2.
- 213 Appeal against decision to approve scheme [TB, cl 165; New; Rec 13-2(f)]**
- (1) If the Attorney-General decides under section 210 to approve the scheme, a person aggrieved by the decision may appeal against the decision to the Supreme Court.

- 
- (2) The appeal must be started within 28 days after public notice of the decision to approve the scheme is given under section 211.

**214 Application for court approval not prevented by decision to refuse to approve scheme [TB, cl 166; New]**

If the Attorney-General decides under section 210 to refuse to approve the scheme, the decision does not prevent the trustee applying to the court under subdivision 2 or otherwise to approve the scheme.

**215 Register of approvals [TB, cl 164; New; Rec 13-2(d); NSW Charitable Trusts Act s 19; SA s 69B(9); Tas Variation of Trusts Act s 9]**

- (1) The chief executive must keep a register of all schemes approved by the Attorney-General under section 210.
- (2) The register may—
- (a) be kept in any form, including electronically, that the chief executive decides; and
  - (b) include any other information relating to a scheme mentioned in subsection (1) that the chief executive considers appropriate, including, for example, details of any appeal started under section 213 against the Attorney-General's decision to approve the scheme.
- (3) The register must—
- (a) if kept electronically—be published on, or accessible through, the department's website; or
  - (b) otherwise—be available for public inspection, during the department's ordinary business hours, at a place decided by the chief executive.

#### **Subdivision 4      Duty of trustees to make cy pres applications**

##### **216      Duty of trustee in relation to application of property cy pres [TB, cl 158; TA, s 105(4)]**

- (1) This section applies to the trustee of a charitable trust if the circumstances permit the trust property to be applied cy pres.
- (2) The trustee has a duty to secure the effective use of the trust property for charitable purposes by making an appropriate application under this division or otherwise to have the property applied cy pres.

#### **Part 13                      Gifts by particular trustees for philanthropic purposes**

##### **217      Definitions for part [WA Charitable Trusts Act s 48]**

In this part—

*eligible recipient* means a deductible gift recipient within the meaning of the *Income Tax Assessment Act 1997* (Cwlth) that—

- (a) is mentioned in section 30-15, table, item 1 of that Act; and
- (b) is not a charity because of its connection with government or being a government entity; and
- (c) would be a charity if it did not have the connection with government or were not a government entity.

*government entity* has the meaning given by the *Charities Act 2013* (Cwlth), section 4.

*prescribed power*, for a prescribed trust, see sections 218(2) and 219(3).

*prescribed trust* means—

- 
- (a) a fund mentioned in the *Income Tax Assessment Act 1997* (Cwlth), section 30-15, table, item 2; or
  - (b) a trust that—
    - (i) is established and maintained for charitable or philanthropic purposes; and
    - (ii) is of a class prescribed by regulation.

**218 Prescribed trust—express power to give to eligible recipients [TB, cl 168; TA, s 108]**

- (1) The trust instrument for a prescribed trust may include an express power for the trustees to provide money, property or benefits—
  - (a) to or for an eligible recipient; or
  - (b) for the establishment of an eligible recipient.
- (2) An express power mentioned in subsection (1) that is included in the trust instrument for a prescribed trust is a ***prescribed power*** for the trust.

**219 Prescribed trust—no express power to give to eligible recipients [TB, cl 169; TA, s 109]**

- (1) This section applies if the trust instrument for a prescribed trust does not include an express power mentioned in section 218(1).
- (2) The trustees' powers for the prescribed trust include the power to provide money, property or benefits—
  - (a) to or for an eligible recipient; or
  - (b) for the establishment of an eligible recipient.
- (3) The power conferred under subsection (2) in relation to the prescribed trust is a ***prescribed power*** for the trust.
- (4) Subsection (2)—
  - (a) applies despite any provision to the contrary in the trust instrument; but

[s 220]

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- (b) does not apply in relation to a particular eligible recipient, or to eligible recipients of a particular class, to the extent there is an express prohibition in the trust instrument against the provision by the trustees of money, property or benefits—
  - (i) to or for that eligible recipient or eligible recipients of that class; or
  - (ii) for the establishment of that eligible recipient or eligible recipients of that class.

**220 Application of Act to prescribed trust [TB, cl 170; TA, s 110]**

- (1) This Act applies in relation to a prescribed trust as if a prescribed power for the trust were a power exercisable for a charitable purpose.
- (2) Without limiting subsection (1)—
  - (a) neither the existence nor the exercise of the prescribed power affects the validity or status of the prescribed trust as a charitable trust; and
  - (b) the prescribed trust is to be construed and given effect to as if—
    - (i) the prescribed power were a power exercisable for a charitable purpose; and
    - (ii) any payment or application of the trust property or the trust income, or any part of either of them, in the way allowed by the power were to or for a charitable purpose; and
  - (c) the existence or exercise of the prescribed power does not affect the control of the prescribed trust by the Supreme Court in the exercise of the court’s general jurisdiction in relation to charitable trusts; and
  - (d) the jurisdiction mentioned in paragraph (c) extends to the prescribed power as if the power were exercisable for a charitable purpose.



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## Part 14 Statutory trustees

### 221 Restriction on exercise of particular powers by statutory trustees [TA, ss 31(3) and 32(1)(d)]

Despite sections 86 and 87, a statutory trustee may exercise the following powers in relation to the trust property only with the approval of the court—

- (a) the powers mentioned in section 86(2)(a) and (c);
- (b) the power mentioned in section 86(2)(b), other than to the extent the power is exercised to—
  - (i) lease the trust property at a reasonable rent for a term of not more than 1 year, or from year to year, or for a weekly, monthly or other periodic tenancy, or a tenancy at will; or
  - (ii) renew a lease or tenancy mentioned in subparagraph (i);
- (c) the power to vary the terms of a lease of the trust property or accept, or join with any other persons in accepting, the surrender of a lease of the trust property;
- (d) the powers mentioned in section 87.

### 222 Rights, duties and protections of statutory trustees [TA, s 7(b) and (d)]

- (1) In exercising a power under this Act, a statutory trustee—
  - (a) has all the rights of a trustee; and
  - (b) has all the duties and liabilities of a trustee for the parties beneficially interested in the trust property; and
  - (c) is entitled to all the indemnities and protections to which a trustee is entitled.
- (2) However, despite subsection (1)(b), a statutory trustee is not liable to impeachment of waste in relation to the exercise of a power under this Act.

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- (3) This section applies subject to any order made, or direction given, by the court.

## **Part 15                    Miscellaneous**

### **223     Regulation-making power [TB, cl 171; New]**

The Governor in Council may make regulations under this Act.

### **224     Approved forms [TB, cl 172; TA, s 118]**

The chief executive may approve forms for use under this Act.

## **Part 16                    Repeal, transitional and validation provisions**

### **Division 1                Repeal**

#### **225     Repeal of Trusts Act 1973 [TB, cl 174]**

The Trusts Act 1973, No. 24 is repealed.

### **Division 2                Transitional and validation provisions**

**226     ...**

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## Part 17 Amendment of Acts

### Division 1 Amendment of this Act

#### 227 Act amended

This division amends this Act.

#### 228 Amendment of long title

Long title, from ‘, to repeal’—  
*omit.*

### Division 2 Amendment of Succession Act 1981

#### 229 Act amended [TB, cl 189]

This division amends the *Succession Act 1981*.

#### 230 Insertion of new ss 49B–49D [TB, cl 190]

After section 49A—

*insert—*

##### **49B Power to carry on business [TA, s 57(1)–(4); Admin of Estates Bill, cl 408; Rec 8-3]**

- (1) This section applies if, at the time of a deceased person’s death, the person was engaged in carrying on a business.
- (2) The personal representative of the deceased person may carry on the business, but only for—
  - (a) the period, of not more than 2 years from the deceased person’s death, that is reasonably necessary for realising the business; and

- (b) any further period approved by the court under section 49D.
- (3) For the purpose of carrying on the business, the personal representative may—
  - (a) use any part of the deceased person's estate that is reasonably necessary; and
  - (b) increase or reduce, as necessary, usage of the estate under paragraph (a); and
  - (c) buy stock, machinery, implements and chattels; and
  - (d) employ the managers, agents, workers and other persons the personal representative considers appropriate; and
  - (e) at any time, enter into a partnership agreement to take the place of any partnership agreement subsisting immediately before, or at any time after, the deceased person's death; and
  - (f) enter into share-farming agreements.
- (4) For subsection (3)(e), it does not matter that the personal representative was a partner of the deceased person in the personal representative's own right.
- (5) Nothing in this section affects any other authority to do the acts authorised to be done under this section.
- (6) If the deceased person's estate is being administered under the deceased person's will, this section is subject to a contrary intention appearing in the will.
- (7) The reference in subsection (6) to a contrary intention appearing in the deceased person's will includes a reference to a provision of the will that confers on the personal representative of the deceased person the power to postpone the sale of

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any property that was being used by the deceased person, at the time of the person's death, in carrying on the business.

- (8) This section applies—
  - (a) despite the *Trusts Act 2024*, sections 86 and 87; but
  - (b) subject to the other provisions of the *Trusts Act 2024* and any other Act.

**49C Power to subscribe to particular funds if carrying on business [TA, s 57(5); Admin of Estates Bill, cl 409; Rec 8-3]**

- (1) This section applies if the personal representative of a deceased person is carrying on a business under section 49B.
- (2) The personal representative may subscribe to a relevant fund in connection with the business if the personal representative considers it would, if the personal representative were acting for themselves, be prudent to subscribe to the fund.
- (3) Subscriptions to the relevant fund must be paid from the business income of the deceased person's estate.
- (4) Nothing in this section affects any other authority the personal representative may have to subscribe to the relevant fund.
- (5) If the deceased person's estate is being administered under the deceased person's will, this section is subject to a contrary intention appearing in the will.
- (6) In this section—  
*relevant fund*, in connection with a business, means a fund that—

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- (a) is created for objects or purposes in support of any business of a similar nature; and
- (b) is subscribed to by other persons engaged in a similar business.

**49D Court may approve period for carrying on business**

- (1) This section applies if, at the time of a deceased person's death, the person was engaged in carrying on a business.
- (2) The court may, on application by the personal representative of the deceased person or a beneficiary of the deceased person's estate—
  - (a) by order, approve that the personal representative may carry on the business for a stated period, including on the conditions the court considers appropriate; and
  - (b) make the order retrospective to a stated date.
- (3) An application for an order under subsection (2) may be made at any time, whether or not any previous authority to carry on the business, including a previous approval under this section, has ended.

**231 Insertion of new s 53A [TB, cl 191]**

After section 53—

*insert—*

**53A Protection for personal representatives for calls made after transfer of shares [TA, s 75; Rec 11-8]**

- (1) This section applies if, on a deceased person's death, the person was registered as the holder of shares in a company that have not been fully paid up.

- 
- (2) The personal representative of the deceased person may distribute the deceased person's estate as soon as the personal representative has obtained the registration of some other person as the holder of the shares.
  - (3) It is not necessary for a distribution under subsection (2) for the personal representative to reserve any portion of the estate for the payment of calls made after the date of the registration, whether the call is made by the company or its directors or by its liquidator in a winding-up.
  - (4) Nothing in this section affects any right that the company or its liquidator may have to follow the assets of the deceased person's estate into the hands of the persons to whom the assets have been distributed.
  - (5) In this section—  
*personal representative*, of a deceased person, includes a trustee of the will or estate of the deceased person.

**232 Insertion of new s 61AA [TB, cl 192]**

After section 61—

*insert—*

**61AA Abolition of rule in Allhusen v Whittell [TA, s 78; Rec 11-11]**

- (1) This section applies if—
  - (a) under the will of a person who dies on or after 1 July 1973, any property included in a disposition of the residuary estate is settled in succession (the *settled property*); and
  - (b) income is derived from the settled property.
- (2) The personal representative of the deceased person must not apply any part of the income of

[s 232]

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- the settled property to pay any of the following (each a *capital expense*)—
- (a) the debts and liabilities that have accrued at the date of the deceased person's death;
  - (b) the funeral, testamentary and administration expenses;
  - (c) any legacies bequeathed by the will.
- (3) Subsection (2) does not apply in relation to—
- (a) any commission payable to the personal representative in relation to the income of the settled property; or
  - (b) any testamentary or administration expenses that, apart from that subsection, would be payable wholly out of income.
- (4) The personal representative must—
- (a) apply the income of the settled property, in priority to any other property, to pay the interest (if any) that accrues on a capital expense after the date of the deceased person's death and up to the payment of the capital expense; and
  - (b) pay the balance of the income of the settled property to the person for the time being entitled to the income.
- (5) If, after the deceased person's death, income is derived from property that is ultimately applied (wholly or in part) to pay a capital expense, for this section, the income is taken to be income of the residuary estate.
- (6) This section—
- (a) affects only the rights of the beneficiaries under the deceased person's will; and
  - (b) does not affect the rights of creditors of the deceased person's estate.



- (7) This section applies subject to—
  - (a) a contrary intention appearing in the deceased person’s will; and
  - (b) the provisions of any Act as to charges on the property of the deceased person’s estate.
- (8) In this section—

*personal representative*, of a deceased person, includes a trustee of the will of the deceased person.

## **Part 18                      Other amendments**

### **233      Legislation amended**

Schedule 2 amends the legislation it mentions.

## Schedule 1 Dictionary

section 5

***able and willing to act***, as appointors for a trust, for part 3, see section 18.

***accountant*** means—

- (a) a member of CPA Australia who is entitled to use the letters ‘CPA’ or ‘FCPA’; or
- (b) a member of Chartered Accountants Australia and New Zealand who is entitled to use the letters ‘CA’ or ‘FCA’; or
- (c) a member of the Institute of Public Accountants who is entitled to use the letters ‘MIPA’ or ‘FIPA’.

***administrator*** means—

- (a) an administrator under the *Guardianship and Administration Act 2000* appointed for 1 or more financial matters for a person; or
- (b) another person authorised by an order registered under the *Guardianship and Administration Act 2000*, section 169 to do anything in relation to 1 or more financial matters for a person.

***advancement***, in relation to a beneficiary, includes benefit.

***agent***, for part 7, division 5, see section 110.

***aggrieved person***, for part 11, division 5, see section 181.

***appointor***, for a trust, means a person nominated in the trust instrument for the purpose of appointing new trustees of the trust.

***approved form*** means a form approved under section 224.

***attorney*** means a person appointed as an attorney, and authorised to do anything in relation to 1 or more financial matters for another person, by an enduring power of attorney—

- 
- (a) made by the other person under the *Powers of Attorney Act 1998*; or
  - (b) made by the other person in another jurisdiction and recognised under section 34 of that Act.

**benefit**, in relation to the advancement of a person, includes insurance on the life of the person.

**capacity**, for a matter, see section 10(1).

**charitable** see section 11.

**charitable trust** means a trust created for a charitable purpose.

**charity** means an institution, whether or not incorporated, that is established for charitable purposes.

**claim**, in relation to a trust, for part 9, division 2, see section 141.

**claimant**, for part 9, division 2, see section 141.

**contingent right**, in relation to land, includes—

- (a) a contingent or executory interest and a possibility coupled with an interest, whether the object of the gift or limitation of the interest or possibility is or is not ascertained; and
- (b) a right of entry, whether immediate or future, and whether vested or contingent.

**continuing trustee** includes a surviving trustee.

**court** means—

- (a) in relation to an application under this Act relating to a trust or trust property—
  - (i) if the value of all the trust property of the trust is less than the District Court monetary limit—the District Court; or
  - (ii) otherwise—the Supreme Court; or
- (b) in relation to another application under this Act—
  - (i) if the value of the property to which the application relates is less than the District Court monetary

limit or the subject matter of the application is otherwise within the jurisdiction of the District Court—the District Court; or

- (ii) otherwise—the Supreme Court.

**create**, a trust, includes establish a trust.

**custodian trustee** means a corporation appointed as a custodian trustee under section 51.

**decision**, for part 11, division 5, see section 182.

**delegate**, for part 7, division 4, see section 99(4)(b).

**District Court monetary limit** means the monetary limit of the District Court under the *District Court of Queensland Act 1967*, section 68(2).

**eligible recipient**, for part 13, see section 217.

**entitled person**, for part 7, division 3, see section 94(1)(a) and (b).

**extension application**, for part 7, division 3, see section 93(4).

**financial matter**—

- (a) in relation to an adult for whom an attorney is appointed—see the *Powers of Attorney Act 1998*, schedule 2, section 1; or
- (b) in relation to any other adult—see the *Guardianship and Administration Act 2000*, schedule 2, section 1.

**government entity**, for part 13, see section 217.

**guardian**, in relation to a child, means—

- (a) a parent of the child; or
- (b) another person who has the legal parental responsibility for making decisions about the long-term care, wellbeing and development of the child.

**impaired capacity**, for a matter, see section 10(2).

**instrument of change**, for part 3, division 5, see section 31(1).

**instrument of delegation**, for part 7, division 4, see section 99(2).

*interested person*, for part 7, division 3, see section 92(2).

*investment power*, for part 6, see section 70.

*last continuing trustee* includes a sole trustee.

*lease* includes bailment.

*management power*, in relation to a trust, for part 11, division 6, see section 186.

*managing trustees*, of a trust, see section 50.

*minimum trustee requirements*, for a trust, for part 3, division 3, see section 26.

*mortgage debt*, for part 7, division 6, see section 114(1)(a).

*payment*, in relation to securities, includes the deposit or transfer of the securities.

*possessed*, of property, for part 11, see section 166.

*post-change trustee*, in relation to an instrument of change, for part 3, division 5, see section 32.

*potential claimant*, for part 9, division 2, see section 141.

*pre-change trustee*, in relation to an instrument of change, for part 3, division 5, see section 32.

*prescribed power*, for a prescribed trust, for part 13, see sections 218(2) and 219(3).

*prescribed trust*, for part 13, see section 217.

*primary beneficiary*, in relation to a mortgage debt held on trust for persons in succession, for part 7, division 6, see section 113.

*priority outgoing*, in relation to land the subject of a mortgage, for part 7, division 6, see section 113.

*professional charges*, of a professional trustee, for part 10, see section 162.

*professional investor*, for part 6, see section 70.

*professional trustee*—

(a) for part 5—see section 63; or

(b) for part 10—see section 162.

**protective trust**, for part 11, division 7, see section 190.

**public trustee** means the public trustee under the *Public Trustee Act 1978*.

**recipient**, for part 9, division 3, see section 147(2).

**relevant capital**, for part 8, see section 132(2).

**relevant power**, in relation to a trustee or another person, for part 11, division 5, see section 182.

**relevant registrar** means—

- (a) in relation to land—the registrar under the *Land Title Act 1994* or other person having the function of registering or recording dealings with land; or
- (b) in relation to a water allocation—the registrar under the *Water Act 2000*.

**requirement**, of another Act or of a law of another State or the Commonwealth, includes a requirement the other Act or law authorises or permits to be imposed.

**sale**, of property, includes an exchange of property.

**securities** includes stock and debentures.

**statutory trustee** see section 7(2).

**stock** includes shares.

**trust** see section 6.

**trustee**—

- (a) generally—see section 7(1); or
- (b) for part 5—see section 63; or
- (c) for part 10—see section 162.

**trustee corporation** means—

- (a) the public trustee; or
- (b) a licensed trustee company within the meaning of the Corporations Act, section 601RAA.

**trust instrument** see section 8.

**trust property** see section 9.

**variation application**, for part 7, division 3, see section 93(1)(a).

**vesting order** see section 175(1).

**water allocation** means a water allocation under the *Water Act 2000*.

Trusts Bill 2024

Schedule 2

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**Schedule 2      Other amendments**

section 233

**[To be completed]**

1