



ANNO VICESIMO NONO

ELIZABETHAE II REGINAE

A.D. 1980

No. 55 of 1980

An Act to amend the Trustee Act, 1936-1974.

[Assented to 3rd July, 1980]

BE IT ENACTED by the Governor of the State of South Australia, with the advice and consent of the Parliament thereof, as follows:

1. (1) This Act may be cited as the "Trustee Act Amendment Act, 1980". Short titles.
- (2) The Trustee Act, 1936-1974, is hereinafter referred to as "the principal Act".
- (3) The principal Act, as amended by this Act, may be cited as the "Trustee Act, 1936-1980".
2. This Act shall come into operation on a day to be fixed by proclamation. Commencement.
3. Section 4 of the principal Act is amended—
 - (a) by inserting after the definition of "instrument" in subsection (1) the following definition:—

"investment adviser" means a person licensed as an investment adviser under the Securities Industry Act, 1979;

and
 - (b) by striking out from subsection (1) the definition of "securities" and inserting in lieu thereof the following definition:—

"securities" includes debentures, bonds, stock, funds and shares:.Amendment of principal Act, s. 4—
Interpretation.
4. Section 5 of the principal Act is repealed and the following sections are enacted and inserted in its place:—
 5. (1) Subject to this section, a trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands—
 - (a) in securities issued or guaranteed by—
 - (i) the Treasurer or the Government of the State;Repeal of s. 5 of principal Act and enactment of sections in its place.
Authorized investments.

- (ii) the Treasurer, or the Government of the Commonwealth;
 - (iii) any instrumentality of the Crown in right of the State, or the Commonwealth;
 - (iv) the South Australian Gas Company;
 - (v) any municipal or district council;
 - or
 - (vi) any prescribed authority or body;
- (b) on first legal mortgage—
- (i) of an estate in fee simple in land in the State;
 - or
 - (ii) of a perpetual lease granted under the Crown Lands Act, 1929-1978, or a corresponding previous enactment;
- (c) on deposit with—
- (i) any bank carrying on the business of banking in the State;
 - (ii) a prescribed building society;
 - (iii) any body corporate carrying on life insurance business under the *Life Insurance Act* 1945 of the Commonwealth;
- (d) with any dealer in the short term money market, approved by the Reserve Bank of Australia as an authorized dealer, that has established lines of credit with that bank as a lender of last resort;
- (e) in—
- (i) ordinary or preference stock or shares;
 - or
 - (ii) debentures (including debenture stock or notes) whether constituting a charge on assets or not, issued by a company;
- (f) on deposit (whether secured or unsecured) with a company at call or for a fixed term not exceeding seven years;
- (g) in the common fund of—
- (i) Bagot's Executor and Trustee Company Limited;
 - (ii) Elder's Trustee and Executor Company Limited;
 - (iii) Executor Trustee and Agency Company of South Australia Limited;
 - or
 - (iv) Farmers' Co-operative Executors and Trustees Limited.

(2) A trustee is not empowered by subsection (1) (e) of this section to invest—

- (a) in any ordinary stock or shares the price of which is not quoted on the Stock Exchange of Adelaide or a Stock Exchange that is a member of the Australian Associated Stock Exchanges;
- (b) in any debentures or preference stock or shares of any company where the price of the ordinary stock or shares of the company is not quoted on the Stock Exchange of Adelaide or a Stock Exchange that is a member of the Australian Associated Stock Exchanges;

or

(c) in stock, shares or debentures—

- (i) that are not registered on a register kept by the company in Australia;

and

- (ii) that are not fully paid up (unless by the terms of issue they are required to be fully paid up within nine months of the date of issue).

(3) A trustee is not empowered by subsection (1) (e) or (f) of this section to invest in stock, shares or debentures of, or on deposit with, a company unless the company—

(a) has a paid up share capital of more than four million dollars;

and

(b) has paid a dividend in each of the ten years immediately preceding the year in which the investment is made on all the ordinary stock and shares issued by the company (excluding any stock or shares that, by the terms of their issue, do not rank for dividend),

but a trustee may invest—

(c) in the stock, shares or debentures of a company that does not conform with paragraphs (a) and (b) of this subsection if the company—

- (i) was formed for the purpose of taking over a company, or acquiring the whole of the undertaking of a company, that does comply with those paragraphs;

and

- (ii) is declared by regulation to be a company, in the stock, shares or debentures of which a trustee is authorized to invest trust funds;

or

(d) in debentures of, or on deposit with, a company that does not conform with paragraphs (a) and (b) of this subsection if—

- (i) repayment of the deposits or the amounts secured by the debentures is unconditionally guaranteed by a company that does conform with those paragraphs;

or

- (ii) the company is a subsidiary (as defined by the Companies Act, 1962-1980) of a bank carrying on the business of banking in the State and repayment of the deposits or the amounts secured by the debentures is unconditionally guaranteed by the bank.

(4) A trustee who proposes to make any investment under subsection (1) (e) or (f) of this section shall first consider whether the investment is satisfactory having regard to—

- (a) the nature and purposes of the trust;
- (b) the need to ensure that investments of the trust are, so far as circumstances allow, sufficiently diversified;

and

- (c) the need to ensure equity between the beneficiaries of the trust,

and shall obtain written advice from an independent expert on the matters referred to in paragraphs (a) and (b) of this subsection.

(5) Where a trustee has invested moneys under subsection (1) (e) or (f) of this section, the trustee shall, at yearly or more frequent intervals, obtain and consider the written advice of an independent expert on the question of whether those investments should be retained having regard to the matters referred to in subsection (4) (a) and (b) of this section.

(6) The reasonable cost of obtaining the advice referred to in subsection (5) of this section is payable out of the trust estate.

(7) A trustee is not empowered by paragraph (g) of subsection (1) of this section to invest any trust funds in his hands in a common fund the whole or a part of which is or may be invested in a manner not permitted by this section.

(8) A trustee may, at any time, realize investments made under this section and may reinvest the moneys resulting from realization of investments in the same or any other manner permitted by this section.

(9) In this section—

“bank” means any body corporate that is authorized under the *Banking Act 1959* of the Commonwealth to carry on the business of banking and includes the Savings Bank of South Australia and the State Bank of South Australia;

“company” means any body corporate constituted under the law of a State or Territory of the Commonwealth;

“independent expert” means—

- (a) a person who carries on business as an investment adviser or who is a member of a Stock Exchange that is a member of the Australian Associated Stock Exchanges;

and

- (b) who is not a trustee under the relevant trust or an employee of any such trustee.

5a. (1) Where a trustee is of the opinion that—

- (a) it is desirable to purchase a dwellinghouse for the use of any beneficiary under the trust;

and

- (b) the purchase of a dwellinghouse for that purpose would not unfairly prejudice the interests of any other beneficiary under the trust,

the trustee may—

- (c) invest any trust funds in his hands in the purchase of a dwellinghouse;

and

- (d) permit the beneficiary to reside in the dwellinghouse on such terms and conditions as the trustee thinks fit.

(2) A trustee shall not purchase a dwellinghouse in pursuance of subsection (1) of this section if the purchase would be contrary to the terms of the trust.

(3) The price paid for a dwellinghouse purchased in pursuance of this section must not exceed the value of the dwellinghouse as certified by a licensed valuer who is reasonably believed by the trustee to be competent to make the valuation and to be acting independently of the vendor of the dwellinghouse.

(4) A dwellinghouse purchased under this section shall be held upon trust for sale.

(5) A trustee may retain as an asset of the trust any dwellinghouse purchased under this section, notwithstanding that no beneficiary is residing in the dwellinghouse.

(6) Where in the opinion of a trustee—

- (a) it is desirable that a dwellinghouse that forms part of the trust property be retained for the use of a beneficiary under the trust;

and

- (b) the retention of the dwellinghouse for that purpose would not unfairly prejudice the interests of any other beneficiary under the trust,

the trustee may, notwithstanding the terms of the trust, retain the dwellinghouse as part of the trust property and permit the beneficiary to reside therein on such terms and conditions as the trustee thinks fit.

(7) In this section “dwellinghouse” includes a part of a building that is designed for occupation as a permanent residence.

5. Section 35 of the principal Act is amended by striking out subsection (1) and inserting in lieu thereof the following subsections:—

(1) A trustee is accountable only for trust property actually received by him unless he wilfully or negligently failed, in breach of his obligations under the trust, to take possession of the trust property.

Application
of trust
funds for
purchase of
dwellinghouse.

Amendment of
principal Act,
s. 35—
Liability of
trustees.

(1a) A trustee is not liable for any loss of trust property unless—

(a) the loss occurred as a result of his own wrongful or negligent act or omission;

or

(b) the loss occurred as a result of circumstances that the trustee could reasonably be expected to have foreseen and to have avoided.

Amendment of
principal Act,
s. 57—
Power to make
beneficiary
indemnify
for breach of
trust.

6. Section 57 of the principal Act is amended by striking out from subsection (1) the passage “, and notwithstanding that the beneficiary may be a married woman restrained from anticipation,”.

Repeal of
ss. 59 and 59a
of principal
Act.

7. Sections 59 and 59a of the principal Act are repealed.

Enactment of
s. 59c of
principal Act.

8. The following section is enacted and inserted in the principal Act after section 59b thereof:—

Power of
Court to
authorize
variations
of trust.

59c. (1) The Supreme Court may, on the application of a trustee, or of any person who has a vested, future, or contingent interest in property held on trust—

(a) vary or revoke all or any of the trusts;

(b) where trusts are revoked—

(i) distribute the trust property in such manner as the Court considers just;

or

(ii) resettle the trust property upon such trusts as the Court thinks fit;

or

(c) enlarge or otherwise vary the powers of the trustees to manage or administer the trust property.

(2) In any proceedings under this section the interests of all actual and potential beneficiaries of the trust must be represented, and the Court may appoint counsel to represent the interests of any class of beneficiaries who are at the date of the proceedings unborn or unascertained.

(3) Before the Court exercises its powers under this section, the Court must be satisfied—

(a) that the application to the court is not substantially motivated by a desire to avoid, or reduce the incidence of tax;

(b) that the proposed exercise of powers would be in the interests of beneficiaries of the trust and would not result in one class of beneficiaries being unfairly advantaged to the prejudice of some other class;

(c) that the proposed exercise of powers would not disturb the trusts beyond what is necessary to give effect to the reasons justifying the exercise of the powers;

and

(d) that the proposed exercise of powers accords as far as reasonably practicable with the spirit of the trust.

(4) An order made by the Supreme Court in the exercise of powers conferred by this section is binding upon all present and future trustees and beneficiaries of the trust.

(5) This section does not apply to—

(a) a trust affecting property settled by an Act;

or

(b) a charitable trust.

(6) This section does not derogate from any other power of the Supreme Court to vary or revoke a trust, or to enlarge or otherwise vary the powers of trustees.

9. The following sections are enacted and inserted in the principal Act after section 69 thereof:—

Enactment of
ss. 69a, 69b
and 69c of
principal Act.

69a. (1) Where the purposes for which property is required or permitted to be applied in pursuance of a trust (whether constituted before or after the enactment of this section) are partly charitable, and partly non-charitable and invalid, the trust shall not be held to be invalid, but shall be construed as if no provision had been made requiring or permitting the application of property for purposes that are non-charitable and invalid.

Inclusion of
non-charitable
and invalid
purposes not
to invalidate
a trust.

(2) This section does not apply to any trust declared by the will of any testator dying before, or to any other trust declared before, the enactment of this section, if before the enactment of this section—

(a) the trust has been declared to be invalid by any order or judgment made or given in legal proceedings;

or

(b) property subject to the trust or income therefrom has been paid or conveyed to, or applied for the benefit of, or set apart for, the persons entitled to that property or income by reason of the invalidity of the trust.

69b. (1) The purposes for which property is required or permitted to be applied in pursuance of a charitable trust may be altered by a scheme approved under this section in any of the following circumstances:—

Application
of trust
property
cy-pres.

(a) where the original purposes, in whole or in part—

(i) have been as far as possible fulfilled;

or

(ii) cannot be carried out, or not according to the directions given and to the spirit of the gift;

(b) where the original purposes provide a use for part only of the trust property;

(c) where the trust property could be more effectively used if combined with other property applicable for similar purposes and administered jointly with that property;

(d) where it is not reasonably practicable having regard to—

(i) the value of the trust property;

(ii) changes in circumstances that have taken place since the constitution of the trust;

or

(iii) any other relevant factor,

to apply the trust property in accordance with the original purposes;

or

(e) where the original purposes, in whole or in part—

(i) have been adequately provided for by other means;

(ii) have ceased to be charitable purposes;

or

(iii) have ceased to provide a suitable and effective method of using the trust property.

(2) References in this section to the original purposes of a charitable trust shall be construed, where the purposes for which the trust property is required or permitted to be applied have been altered or regulated by a scheme or otherwise, as referring to the purposes for which the property is for the time being required or permitted to be applied.

(3) Where circumstances exist justifying the alteration of the purposes for which property may be applied in pursuance of a charitable trust, the trustee may apply to the Supreme Court for approval of a scheme altering the purposes for which property is required or permitted to be applied in pursuance of the trust.

(4) The trustee shall cause notice of an application under this section to be given in accordance with the directions of the Supreme Court.

(5) Upon approval of a scheme altering the purposes for which property is required or permitted to be applied in pursuance of a charitable trust, those purposes shall be altered in accordance with the approved scheme.

(6) A scheme shall not be approved under this section unless in the opinion of the Supreme Court the scheme accords as far as reasonably practicable with the spirit of the original gift.

**Recreational
charities.**

69c. (1) Any trust (whether constituted before or after the enactment of this section) to provide, or assist in the provision of, recreational facilities for the public benefit is a charitable trust.

(2) This section does not apply to recreational facilities unless—

(a) the facilities are provided with the object of improving the conditions of life of the persons for whom they are primarily intended;

and

(b) either—

(i) those persons have need of those facilities by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances;

or

(ii) the facilities are to be available to the general public, or a substantial section of the general public.

10. The following new Part is enacted and inserted in the principal Act after section 84 thereof:—

Enactment of
Part VA of
principal Act.

PART VA

RECORDS TO BE KEPT BY TRUSTEES AND INVESTIGATIONS

84a. In this Part—

Interpretation.

“inspector” means a person appointed as an inspector under this Part:

“trust” means a trust created by a will or other instrument of trust; and “trustee” means the trustee administering such a trust.

84b. (1) A trustee shall keep such records relating to his administration of the trust property as may be prescribed.

Records to be
kept by
trustee.

Penalty: Five hundred dollars.

(2) A trustee shall, at the request of—

(a) the Public Trustee;

(b) another trustee of the trust;

or

(c) a beneficiary under the trust,

produce the records kept by the trustee in pursuance of this section for inspection and permit the Public Trustee, the other trustee or the beneficiary (as the case may be) to examine and make copies of those records.

Penalty: Five hundred dollars.

84c. (1) The Supreme Court may, of its own motion, or on the application of any person who has, in the opinion of the Court, a proper interest in the matter, appoint an inspector to investigate the administration of any trust.

Appointment
of inspector.

(2) An inspector must be a person who holds prescribed qualifications.

(3) The Supreme Court may make orders for the payment of the whole or part of the costs of an investigation under this Part—

(a) by the applicant for the investigation;

(b) by a trustee or beneficiary of the trust;

or

(c) out of the trust estate.

Powers of an
inspector.

84d. (1) For the purpose of investigating the administration of a trust, an inspector may—

- (a) require any person to produce documents relevant to the administration of the trust;
- (b) take copies of, or extract from, any such documents;
- (c) require any person to answer any question relevant to the administration of the trust;

and

- (d) exercise any other power conferred on him by the Court.

(2) A person who—

- (a) refuses or fails to produce documents in his custody or power when required to do so by an inspector;
- (b) refuses or fails to answer to the best of his knowledge, information and belief any question put to him by an inspector under this section;

or

- (c) hinders an inspector in the exercise of his powers,

shall be guilty of an offence and liable to a penalty not exceeding two thousand dollars or imprisonment for six months or both.

(3) A person may decline to answer a question put to him by an inspector under this section if the answer to the question would tend to incriminate him of an offence.

Reports to
be made to
Attorney-
General.

84e. (1) Upon completing an investigation under this Part, an inspector shall make a report in writing to the Supreme Court and to the Attorney-General upon the results of the investigation.

(2) An inspector shall make such interim reports to the Supreme Court and to the Attorney-General in relation to an investigation under this Part as the Court may direct.

Confidentiality.

84f. An inspector shall not divulge any information that comes to his notice in the course of an investigation under this Part and relates to the administration of the trust subject to the investigation except—

- (a) to the Supreme Court and to the Attorney-General;

or

- (b) as directed by the Court.

Penalty: Two thousand dollars.

11. The following section is enacted and inserted in the principal Act after section 93 thereof:—

Enactment of
s. 94 of
principal Act.

94. The Governor may make such regulations as are contemplated by this Act, or as are necessary or expedient for the purposes of this Act.

Regulations.

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

K. D. SEAMAN, Governor