



A Review of the *Trusts Act 1973*

Report

**Queensland
Law Reform Commission**

A Review of the *Trusts Act 1973*

Report

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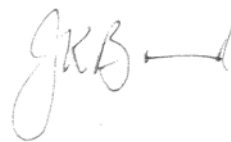
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To: The Honourable Jarrod Bleijie MP
Attorney-General and Minister for Justice

In accordance with section 15 of the *Law Reform Commission Act 1968*, the Commission is pleased to present its Report, *A Review of the Trusts Act 1973*.



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Chairperson



Mr JK Bond QC
Member



Mr BJ Herd
Member



Mrs SM Ryan QC
Member



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Previous publications in this reference:

A Review of the Trusts Act 1973 (Qld), Discussion Paper, WP No 70 (2012)

A Review of the Trusts Act 1973 (Qld), Interim Report, WP No 71 (2013)

Abbreviations

Administration of Estates Report (2009)

Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report No 65 (2009).

Trusts and Settled Land Report (1971)

Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971).

Trusts Discussion Paper (2012)

Queensland Law Reform Commission, *A Review of the Trusts Act 1973 (Qld)*, Discussion Paper, WP No 70 (2012).

Trusts Interim Report (2013)

Queensland Law Reform Commission, *A Review of the Trusts Act 1973 (Qld)*, Interim Report, WP No 71 (2013).

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Executive Summary

TERMS OF REFERENCE

[1] The Commission was asked to undertake a full review of the *Trusts Act 1973* (Qld) and, if relevant, to prepare draft legislation based on its recommendations.

[2] It has been more than 40 years since a comprehensive review of the trusts legislation has been undertaken. Many of the provisions of the current Act have their origins in English trustee legislation of the mid to late 1800s and have remained relatively unchanged since that time. As a consequence, the current legislation is replete with lengthy, densely drafted provisions and outdated language.

[3] The Commission has therefore recommended the enactment of new trusts legislation to replace the current Act. Accordingly, this Report comprises a Draft Trusts Bill 2013 and a clause-by-clause commentary on that Bill.

DRAFT TRUSTS BILL 2013

[4] The Draft Trusts Bill 2013 does not attempt to codify the law of trusts, but modernises and simplifies the trusts legislation for Queensland.

[5] It omits, in whole or in part, over 40 provisions of the current Act that are now obsolete or no longer appropriate in modern trusts legislation, or that confer powers that are no longer needed in light of the new provisions of the Draft Bill.¹

[6] The Draft Bill also introduces a number of new or substantially changed provisions to streamline the legislation, meet modern needs, and address existing gaps in the current Act. The key additions and changes include the following:

- a new statement of trustees' general management powers, conferring on trustees, in relation to the trust property, all the powers of an absolute owner of the property, subject to the trustees' duties (clause 59);
- a new statement of trustees' minimum or 'core' duties that apply generally in administering a trust (clauses 40–45), including:
 - a general duty of care that imposes a higher standard of care on professional trustees and trustees who have, or hold themselves out as having, special knowledge or experience in administering a trust;
 - a duty to act honestly and in good faith; and

¹

See the Table of Provisions in Appendix C.

- duties to keep trust accounts and make them available to beneficiaries upon request;
- a new power for a person who is the administrator or attorney (for financial matters) of a last continuing trustee who has impaired capacity for administering the trust to appoint a replacement trustee or trustees without recourse to the court (clause 16);
- clarification that nothing in the provision based on existing section 33(1)(l) relating to appropriation affects any power of appropriation conferred under the trust instrument (clause 63);
- a new power for a trustee to authorise another person to exercise the trustee's investment powers (clause 67);
- changes to a trustee's power to delegate the administration or exercise of the trusts, powers, authorities and discretions vested in the trustee (clauses 68–76), including:
 - a new limitation of 12 months on the duration of a delegation; and
 - an extension of the circumstances in which a delegation may be made to allow a delegation in anticipation of the trustee becoming temporarily incapable of performing the duties of a trustee because of impaired capacity for administering the trust;
- an increase in the amount of capital that may be applied by a trustee for the maintenance, education or advancement of a beneficiary from \$2000 or half the capital, whichever is the greater, to \$100 000 or half the capital to which the beneficiary is entitled, whichever is the greater (clause 99);
- the conferral of additional statutory powers on the court, in particular:
 - a new power to disqualify a person from being appointed as a trustee of any trust for a stated period (clause 129);
 - a new power to remove and replace office holders, other than trustees, who have been appointed under the trust instrument (clause 130); and
 - a new power to review and reduce the amount of a trustee's remuneration (clause 146);
- the conferral of jurisdiction on the District Court so that the District Court may, within its jurisdictional monetary limit, exercise the same powers that are conferred on the Supreme Court under the Draft Bill (Dictionary, definition of 'court'); and
- new provisions to enable trustees of charitable trusts, where the total value of the trust property does not exceed the monetary limit of the District Court, to apply to the Attorney-General for the approval of *cy pres* schemes, in lieu of making an application to the court (clauses 160–166).

[7] The Draft Bill also retains, in substance, a number of provisions of the current Act that remain relevant. However, those provisions have been substantially redrafted in a more modern style to bring Queensland's trusts legislation into the modern era, and to make it more accessible. Given the increasing use in modern times of the trust (particularly the family trust) as a vehicle for arranging private commercial or other financial interests, this will be of particular assistance to non-professional trustees.

[8] Appendix C to this Report includes a Table of Provisions that lists the existing sections of the *Trusts Act 1973* (Qld) and identifies the equivalent provision in the Draft Bill or, where relevant, indicates that the section has been omitted.

[9] In developing the Draft Bill, the Commission has been guided by the need for trusts legislation that facilitates the efficient and effective management of trusts with due and proper regard for the interests of the beneficiaries (or charitable purposes) for which trust property is ultimately held.

[10] The Commission has been greatly assisted throughout this review by the input of the Bar Association of Queensland, the Queensland Law Society, the Public Trustee, the Financial Services Council, Crown Law, QCAT, the Registrar of Titles and Registrar of Water Allocations and QSuper, as well as a number of individuals, including, in particular, Professor WA (Tony) Lee and Mr Tim Whitney.

Chapter 1

Introduction

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THE REVIEW

[1] In January 2012, the Commission received terms of reference to review the *Trusts Act 1973* (Qld).¹ The terms of reference required the Commission to review:

- whether the Act provides an adequate, effective and comprehensive framework for the regulation of trusts (including charitable trusts) in Queensland;
- opportunities for the Act to be modernised, simplified, clarified or updated, including in light of developments in case law and current trust practices and usage;
- whether any other relevant State legislation pertaining to the law of trusts should be amended for consistency with, or as a consequence of, any recommended amendments to the Act; and
- streamlining the law with respect to deciding disputes in relation to the terms of the administration of trusts, including the appropriate court or tribunal which is to have jurisdiction over less complex matters and disputes involving lower monetary values.

BACKGROUND

[2] It is now more than 40 years since a comprehensive review has been undertaken of trusts legislation in Queensland. In 1971, this Commission published its *Trusts and Settled Land Report*,² which was largely implemented by the enactment of the *Trusts Act 1973* (Qld).

¹ The terms of reference are set out in full in Appendix A.

² Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971).

[3] The *Trusts Act 1973* (Qld) made some important changes to the law of trusts, abolishing the *Settled Land Act 1886* (Qld) and transferring to trustees the management powers that were formerly exercisable by life tenants. The Act also assimilated the law relating to trusts of real property and trusts of personal property, removing legal distinctions that had become of historical significance only.

[4] Most amendments made to the Act since that time, with the notable exception of the changes made by the *Trusts (Investments) Amendment Act 1999* (Qld), have been of a minor nature.

[5] The law of trusts that applies in Queensland is found predominantly in the case law, rather than in the *Trusts Act 1973* (Qld) itself. This is consistent with the position in the other Australian jurisdictions, as well as in New Zealand, England and the Canadian provinces.

[6] The *Trusts Act 1973* (Qld) does not attempt to codify the law of trusts, but, instead, supplements the general law in this area. In particular, the Act facilitates the efficient administration of trusts by conferring powers on trustees that might otherwise be lacking under the trust instrument, and by ensuring that the court has appropriately wide powers to supervise the administration of trusts.

THE DISCUSSION PAPER

[7] In December 2012, the Commission completed a Discussion Paper examining a large range of issues relating to the provisions of the *Trusts Act 1973* (Qld).³ The Discussion Paper included a number of preliminary proposals and questions on which the Commission sought submissions.

[8] The Commission invited submissions from the Supreme Court, the District Court, the Magistrates Court and QCAT, key professional bodies (including the Queensland Law Society, the Bar Association of Queensland, Legal Aid Queensland, the Law Council of Australia, Crown Law and the Society of Trust and Estate Practitioners (Qld)), legal academics and legal practitioners in trusts and succession law, the Public Trustee, the Financial Services Council and trustee companies, community legal centres, and other interested organisations and individuals.

[9] Notices calling for submissions were also placed on the Commission's website, on the Queensland Government 'Get Involved' website, and in an electronic newsletter of the Queensland Law Society.

[10] The Commission received responses to the Discussion Paper from the Bar Association of Queensland, Crown Law, the Financial Services Council, the Public Trustee, QCAT, the Queensland Law Society, QSuper and the Registrar of Titles and Registrar of Water Allocations, as well as from a number of individuals

³

Queensland Law Reform Commission, *A Review of the Trusts Act 1973 (Qld)*, Discussion Paper, WP No 70 (2012), referred to throughout this Report as the '*Trusts Discussion Paper (2012)*'.

including Professor WA (Tony) Lee, a legal practitioner who practises in trusts and succession law, and a legal academic.⁴

THE INTERIM REPORT

[11] In June 2013, the Commission completed an Interim Report,⁵ which included its preliminary recommendations about a wide range of matters, including the appointment and discharge of trustees, trustees' powers, duties and protections, the appointment of agents and the delegation of trustees' powers, the powers of the court, the approval of *cy pres* schemes for charitable trusts, and the jurisdiction to hear disputes in relation to trusts.

[12] The Interim Report also examined the effect on various provisions in the legislation, particularly those that confer powers or impose duties on trustees, of the expression of a contrary intention in the trust instrument. At present, the *Trusts Act 1973* (Qld) takes a unique approach to this issue by providing that most of the provisions in the Act are invariable and cannot be excluded or modified by the trust instrument. This issue was considered on a topic-by-topic basis throughout the Interim Report.

[13] The Commission again invited submissions from the institutions, organisations and individuals mentioned at [8] above, and placed notices calling for submissions to the Interim Report on its website, on the Queensland Government 'Get Involved' website, and in an electronic newsletter of the Queensland Law Society.

[14] The Commission received a number of responses to the Interim Report, most commenting on a small number of issues.⁶ The Queensland Law Society, James Cook University and a legal practitioner who practices in trusts and succession law each also expressed general support for the preliminary recommendations.

DRAFT TRUSTS BILL 2013

[15] One of the Commission's principal recommendations in the Interim Report was for the enactment of new trusts legislation to replace the existing *Trusts Act 1973* (Qld).

[16] In accordance with the terms of reference, this Report is therefore accompanied by a Draft Trusts Bill 2013.⁷ It reflects the Commission's recommendations for the enactment of a number of new provisions, and the

⁴ The respondents to the Discussion Paper are listed in Appendix B.

⁵ Queensland Law Reform Commission, *A Review of the Trusts Act 1973 (Qld)*, Interim Report, WP No 71 (2013), referred to throughout this Report as the '*Trusts Interim Report (2013)*'.

⁶ The respondents to the Interim Report are listed in Appendix B.

⁷ The Draft Trusts Bill 2013 is set out in Appendix D.

omission of provisions that are made redundant in light of those new provisions or are obsolete or no longer appropriate in modern trusts legislation.

[17] It also reflects a substantial redrafting, in a simpler and more modern style, of many of the provisions of the current Act that have, in substance, been retained in the Draft Bill. Many of the provisions of the current Act have their origins in various English *Trustee Acts* of the mid to late 1800s, and have remained relatively unchanged since that time,⁸ with the consequence that the Act is replete with lengthy, densely drafted provisions and outdated language. The substantial redrafting that has been done in the Draft Bill brings the legislation into the modern era, preserving those provisions that remain relevant whilst making the legislation more accessible.

[18] The Commission does not, however, propose to change the fundamental role of the trusts legislation in supplementing the general law — that is, the Commission does not propose that the Draft Bill should be a trusts code.

[19] The key provisions of the Draft Bill are summarised in the Executive Summary at the beginning of this Report. In particular, the Draft Bill provides a new approach to trustees' general management powers by giving trustees, in relation to the trust property, all the powers of an absolute owner of the property, the exercise of those powers being subject to the trustees' duties. Those duties include new statutory duties to act honestly and in good faith and to maintain and provide trust accounts, as well as a new general duty of care that applies to trustees in administering a trust.

THIS REPORT

[20] Chapter 2, which is the main part of this Report, is presented as a clause-by-clause commentary on the Draft Trusts Bill 2013. Each part of that chapter relates to the corresponding part of the Draft Bill.

[21] Because the various parts of Chapter 2 consist of a commentary on the Draft Bill, they do not generally revisit issues, or discuss the submissions, that were addressed in the Interim Report unless the Commission has received further submissions about the particular issue.

[22] If a submission was received about a provision that is included in the Draft Bill, the submission is addressed in the commentary to that provision. Where, however, the submission is about a provision that has not been retained in the Draft Bill or otherwise about an issue that does not relate to a particular provision of the Draft Bill, the submission is addressed in Chapter 3 of this Report.

[23] Additionally, the Report includes a Table of Provisions in Appendix C which, by reference to the existing sections of the *Trusts Act 1973* (Qld), either identifies the equivalent provision in the Draft Bill or indicates that the section has been omitted.

⁸

See *Trusts Interim Report* (2013) [1.17], n 6.

[24] The Commission would like to thank all of the respondents who participated in the review for their contribution to the development of this Report.

[25] The Commission would also like to thank the Office of the Queensland Parliamentary Counsel and, in particular, Mr Steven Berg, Associate Parliamentary Counsel, for their expertise and assistance in drafting the Draft Trusts Bill 2013.

Chapter 2

Commentary on the Draft Trusts Bill 2013

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INTRODUCTION

[1] This chapter consists of a clause-by-clause commentary on the Draft Trusts Bill 2013, as well as the Dictionary in Schedule 1 to the Draft Bill.

[2] The commentary notes whether the provision is new or is based on an existing provision of the *Trusts Act 1973* (Qld). In the latter case, it identifies any material changes that have been made to the existing provision and outlines the reason for the relevant change.

[3] The commentary also addresses those submissions that commented on provisions that are included in the Draft Bill. However, as mentioned in Chapter 1, those submissions that were made in response to the Interim Report about provisions that have not been retained in the Draft Bill are addressed separately in Chapter 3.

[4] The commentary is organised in parts, which are numbered according to the corresponding parts of the Draft Bill.

Part 1

Preliminary

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INTRODUCTION

1.1 Part 1 of the Draft Trusts Bill 2013 provides for a number of preliminary matters.

1.2 The provisions in this part are generally based on existing provisions in Part 1 of the *Trusts Act 1973* (Qld), but also include other interpretive provisions that apply for the purposes of the whole of the Draft Bill.

DIVISION 1 INTRODUCTION

Clause 3 Application

1.3 This provision replaces, but is to the same effect as, existing section 4(1)–(3) and the first part of existing section 4(4). It also adopts a more modern drafting style.

Clause 3(1)

1.4 Clause 3(1) provides that, unless otherwise provided in the Draft Bill or another Act, the Draft Bill applies to a trust created before or after the commencement of the Draft Bill. This ensures that, ordinarily, the Draft Bill will apply not only to new trusts but also to existing trusts, so that the trustees and beneficiaries of existing trusts will also have the benefit of the new provisions in the Draft Bill.

1.5 The reference to ‘unless otherwise provided in this or another Act’ clarifies, however, that the Draft Bill does not apply in particular circumstances. One of those circumstances, referred to in the note to clause 3(1), is where the trust is created by a deed of grant in trust to which the *Land Act 1994* (Qld) applies exclusively.¹ The

¹ See *Land Act 1994* (Qld) s 90.

other circumstances are those provided for in a small number of transitional provisions in Part 13 of the Draft Bill, which continue certain provisions of the *Trusts Act 1973* (Qld) in limited situations.²

Clause 3(2)–(4)

1.6 Clause 3(2) clarifies that a settlor may confer on a trustee powers additional to, or greater than, those conferred under the Draft Bill. Clause 3(3)–(4) provides that, subject to a contrary intention in the trust instrument, any additional or greater power has effect and is exercisable in the same way, and with the same consequences, as a power conferred under the Draft Bill.

1.7 For example, while clause 99 confers power on a trustee to apply amounts of capital totalling up to \$100 000 or half the capital to which a beneficiary is entitled (whichever is the greater) for the maintenance, education or advancement of the beneficiary, clause 3(2) ensures that a settlor may confer power on a trustee to advance a greater amount of capital for that purpose. Unless the trust instrument provides otherwise, the effect of clause 3(3)–(4) is that the power of advancement conferred under the trust instrument will apply in the same way as the power given under clause 99 in relation to the amount that may be applied under that provision.

Clause 3(5)

1.8 Clause 3(5) is based on the first part of existing section 4(4) and clarifies that the powers conferred on a trustee under the Draft Bill are in addition to the powers conferred on the trustee under another Act. This ensures that, if a trustee is given power under another Act, such as the *Trustee Companies Act 1968* (Qld), the *Public Trustee Act 1978* (Qld), or the *Succession Act 1981* (Qld),³ the trustee also has the powers conferred under the Draft Bill.

Clause 3(6)

1.9 Clause 3(6) defines ‘trustee’, for the purpose of clause 3, to include a person exercising the powers of a trustee under the Draft Bill. This would include, for example, a ‘substitute trustee’ to whom the exercise of a trustee’s powers has been temporarily delegated.⁴

The effect of a contrary intention in the trust instrument

1.10 Although clause 3 generally replaces existing section 4(1)–(4), it does not include a provision to the same effect as the main part of existing section 4(4).

1.11 Existing section 4(4) provides that, ‘unless otherwise provided’, the powers conferred by the Act on a trustee apply ‘if and so far only as a contrary intention is not expressed in the instrument (if any) creating the trust’.

² See, eg, Draft Trusts Bill 2013, cl 177.

³ By virtue of the definitions of ‘trust’ and ‘trustee’ in the Dictionary, the Draft Bill applies to personal representatives in relation to the duties incidental to their office.

⁴ See Draft Trusts Bill 2013, pt 5 div 7.

1.12 The words ‘unless otherwise provided’ point to the application provisions at the beginning of each of the parts of the current Act that confer powers on trustees.⁵ In particular, existing section 31(1) states that, except where otherwise provided in Part 4 of the Act, the provisions of that part ‘shall apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust’. To the extent that the provisions in Part 4 of the Act confer powers on trustees, this operates as an exception to the general position set out in existing section 4(4). In turn, it is subject to the particular exceptions that apply in some of the provisions of Part 4, which are expressed to apply subject to a contrary intention in the trust instrument.⁶

1.13 The Commission considers that the better approach to indicating whether or not the provisions are subject to a contrary intention in the trust instrument is to rely on the general application provisions at the beginning of the various parts of the Draft Bill,⁷ and the limited exceptions to those provisions within the relevant part (if any). This allows for greater consistency and, in particular, removes any potential confusion about the relationship between existing sections 4(4) and 31(1).

Clause 4 Act binds all persons

1.14 Clause 4 replaces, but is to the same effect as, existing section 4(6).

DIVISION 2 INTERPRETATION

Clause 5 Definitions

1.15 In accordance with modern drafting practice, the definitions contained in existing section 5(1) have been relocated to the Dictionary in Schedule 1 to the Draft Bill. The Dictionary does not, however, include all of the definitions that are currently contained in existing section 5(1). As explained later in this Report, some of those definitions are no longer needed because definitions of the same terms, which apply for all Queensland Acts, are included in the *Acts Interpretation Act 1954* (Qld). Other definitions have been omitted because, in the context in which the particular terms are used in the Draft Bill, their ordinary meaning is sufficient.

Clause 6 Meaning of *charitable*

1.16 Clause 6 replaces, but is to the same effect as, existing section 103. It has been included in Part 1, rather than Part 9, of the Draft Bill because the meaning of ‘charitable’ applies not only for the provisions of Part 9 but also for other provisions of the Draft Bill.⁸

⁵ See, in particular, *Trusts Act 1973* (Qld) ss 10, 20, 31(1), 60.

⁶ See, eg, *Trusts Act 1973* (Qld) ss 47(3), 48(7), 57(1).

⁷ See Draft Trusts Bill 2013, cl 8, 40(1), 46, 58, 92, 104, 124.

⁸ See, eg, Draft Trusts Bill 2013, cl 12(5) and 43(b)(i), which are located, respectively, in pts 2 and 3 of the Draft Bill.

1.17 However, the references to ‘charity’ in the heading and text of existing section 103 have been changed in clause 6 to ‘charitable’. This better reflects the intention of the provision. As explained in the Interim Report, the relevant legal meaning is of what is ‘charitable’, rather than of what is ‘charity’.⁹ Further, the references in clause 6 to ‘charitable’ avoid any confusion with the term ‘charity’, which is used in Part 9 of the Draft Bill to refer to an institution that is established for charitable purposes.¹⁰

Continuation of established rules of law as to what is charitable

1.18 The effect of clause 6(1) and (4) is to confirm that, in Queensland, the established general law rules as to what is ‘charitable’, including the requirement of public benefit, continue to apply.

1.19 The foundation for the modern legal meaning of what is ‘charitable’ was established by the *Charitable Uses Act 1601*.¹¹ Although that Act is no longer in force,¹² the courts continue to refer to its Preamble in determining whether a given purpose is ‘charitable’ at law.¹³

1.20 As such, four broad categories of purposes are recognised as charitable: the relief of poverty; the advancement of education; the advancement of religion; and other purposes beneficial to the community and falling within the ‘spirit and intendment’ of the Preamble to the *Charitable Uses Act 1601*.¹⁴

1.21 The fourth category is a catch-all for those charitable purposes not falling within the other three categories. It ‘leaves room for flexibility in its application to particular examples which may arise’¹⁵ and ‘is capable of great, if not infinite, variation’.¹⁶ As such, the list of recognised charitable purposes within the fourth category is not closed.¹⁷

⁹ See *Trusts Interim Report* (2013) [13.3] ff.

¹⁰ See Draft Trusts Bill 2013, cl 151, which is discussed at [9.4]–[9.7] below.

¹¹ 43 Eliz 1, c 4.

¹² The application in Queensland of the *Charitable Uses Act 1601* was repealed by the *Trusts Act 1973* (Qld) s 3(1), sch 1 (Act as passed).

¹³ See GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [2.1].

¹⁴ *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 583 (Lord Macnaghten); *Incorporated Council of Law Reporting (Qld) v Federal Commissioner of Taxation* (1971) 125 CLR 659, 666–7 (Barwick CJ); *State Trustees Ltd v A-G (Vic)* (2013) 301 ALR 798, 800 (McMillan J); *Re Hoey* [1994] 2 Qd R 510, 512–13 (Demack J). For a detailed discussion, see GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) pt 4.

¹⁵ *A-G (NSW) v Sawtell* [1978] 2 NSWLR 200, 204 (Holland J).

¹⁶ *Barby v Perpetual Trustee Co Ltd* (1937) 58 CLR 316, 324 (Dixon J).

¹⁷ *A-G (NSW) v Sawtell* [1978] 2 NSWLR 200, 204 (Holland J). In that case, Holland J further explained (at 205) that the question of community benefit is ‘necessarily a question of the time at which it has to be answered’, and (at 215) that the ‘spirit of the preamble ... is not to be taken narrowly’.

1.22 Further, to be recognised as ‘charitable’, the purpose must be of public benefit.¹⁸ That is, it must be beneficial to the community or an appreciable section of the community, rather than conferring only some private advantage.¹⁹

1.23 The general law position is preserved by clause 6(1), which refers to the established rules of law in force immediately before the commencement of the provision.²⁰ This wording has been changed from existing section 103(1), however, by omitting the reference to the *Charitable Uses Act 1601*. Although the Preamble to that Act remains relevant under the general law, it is a very old statute that is itself no longer in force.

1.24 To make the provision more accessible, clause 6(1) also lists as examples the first three of the four broad categories of charitable purposes recognised under the general law — that is, the relief of poverty, the advancement of education, and the advancement of religion. This gives a useful indication of some of the particular types of purposes that will be recognised as charitable. The fourth category, however, which is necessarily expressed in broad and general terms, would have a limited illustrative utility in this context and so has not been included as one of the examples. This would not, of course, limit the meaning of the substantive provision in clause 6(1).²¹

1.25 The public benefit requirement is expressly preserved by clause 6(4).

Provision of facilities for recreation or other leisure time activity

1.26 As with existing section 103(2)–(3), clause 6(2)–(3) extends the recognition of what is ‘charitable’ to the provision, in the interests of social welfare, of facilities for recreation or other leisure time activity.²² The reference in clause 6(2) to ‘leisure time activity’ updates the language of existing section 103(2), which refers to ‘leisuretime occupation’, but is not intended to change the established meaning of that expression.

1.27 Existing section 103(2)–(3) was modelled on a similar provision in England,²³ which was introduced to remove any doubt arising from the decision of the House of Lords in *Inland Revenue Commissioners v Baddeley*²⁴ about the

¹⁸ *Strathalbyn Show Jumping Club Inc v Mayes* (2001) 79 SASR 54, 72–3 (Bleby J); *Thompson v Federal Commissioner of Taxation* (1959) 102 CLR 315, 321 (Dixon CJ); *Re Flatman* [1953] VLR 33, 36 (Barry J); *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 305 (Lord Simonds), 309 (Lord Normand); *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, 41–2 (Lord Wright), 53 (Lord Porter), 65 (Lord Simonds).

¹⁹ See generally JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1006]–[1011]; GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) ch 3.

²⁰ At present, the *Trusts Act 1973* (Qld) s 103(1) provides that the repeal by that Act of the *Charitable Uses Act 1601* ‘shall not affect the established rules of law relating to charity’.

²¹ See *Acts Interpretation Act 1954* (Qld) s 14D(b).

²² For a more detailed discussion, see *Trusts Discussion Paper* (2012) [13.8]–[13.9].

²³ *Recreational Charities Act 1958*, 6 & 7 Eliz 2, c 17, s 1 (see now *Charities Act 2011* (UK) c 25, s 5).

²⁴ [1955] AC 572.

charitable status of particular recreational organisations.²⁵ It had been held in that case that a trust for the promotion of the religious, social and physical wellbeing of persons resident in named localities, who were or were likely to become members of the Methodist Church, was not a valid charitable trust.

1.28 Whilst existing section 103(3)(b)(ii) refers to the availability of the facilities to the members of the public at large or ‘to the male members or to the female members of the public at large’, clause 6(3)(b)(ii) refers instead to the members of the public at large or ‘to a substantial section of the public at large’. This change has been made to avoid any possible discriminatory effect arising from the words used in existing section 103(3)(b)(ii), and to reflect the way in which the requirement for public benefit is expressed under the general law.²⁶ A similar expression is used in the South Australian legislation.²⁷

Clause 7 References to *security* when lending or investing trust funds

1.29 Clause 7 replaces, but is to the same effect as, existing section 5A.

1.30 It clarifies that a reference to the lending (or investing) of trust funds by a trustee on the security of property is taken to include a reference to the lending (or investing) of trust funds on the transfer of an existing security as well as on a new security.

1.31 Clause 7 is relevant for clauses 54 and 55, both of which apply in circumstances where a trustee lends trust funds on the security of property.

1.32 Clause 7 uses the expression ‘trust funds’, rather than ‘trust money’, to provide greater consistency with the language of Part 4 of the Draft Bill.

²⁵ See Charity Commission (England and Wales), *Review of the Register of Charities: The Recreational Charities Act 1958* (August 2000) [6]. See also *Re Samford Hall Trust* [1995] 1 Qd R 60, 62 (Macrossan CJ).

²⁶ See, eg, *Strathalbyn Show Jumping Club Inc v Mayes* (2001) 79 SASR 54, 73 (Bleby J); *Re Flatman* [1953] VLR 33, 36 (Barry J).

²⁷ *Trustee Act 1936* (SA) s 69C(2)(b)(ii).

Part 2

Appointment and Discharge of Trustees and Devolution of Trusts

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INTRODUCTION

2.1 Part 2 of the Draft Trusts Bill 2013 provides for:

- limitations on the appointment of certain persons as trustees;
- the maximum number of trustees that are permitted for a private trust;
- the appointment, replacement, discharge and removal of trustees without recourse to the court, and the consequential vesting of trust property;
- the devolution of trust powers and trust property on the death of a trustee;
- the disclaimer of trusts on the renunciation of probate; and
- custodian trustees.

2.2 Most of these provisions are based on the existing provisions in Part 2 of the *Trusts Act 1973* (Qld), although some are new provisions that were recommended in the Interim Report. Those provisions of Part 2 of the current Act that have not been retained in the Draft Bill are identified in Appendix C to this Report as 'omitted' provisions.

DIVISION 1 PRELIMINARY

Clause 8 Application of pt 2

2.3 Clause 8 replaces, but is to the same effect as, existing section 10.

2.4 The effect of clause 8 is that, generally, the provisions in Part 2 of the Draft Bill apply whether or not there is a contrary intention in a trust instrument.¹

Clause 9 Definition for pt 2

Trustee

2.5 Clause 9 includes a definition of 'trustee' for the purposes of Part 2 of the Draft Bill. It implements Recommendation 3-19 of the Interim Report.²

2.6 Clause 9 provides that, for Part 2, 'trustee' does not include a personal representative acting only in the capacity of a personal representative. The narrower definition in this provision is an exception to the general definition of 'trustee' in the Dictionary, paragraph (a) of which defines 'trustee' to include a personal representative.

1

For examples of exceptions, see Draft Trusts Bill 2013, cll 15(5), 16(5), 17(4).

2

See *Trusts Interim Report* (2013) [3.397] ff.

2.7 The definition in clause 9 is based on the definition of ‘trustee’ that appears in existing sections 12(9) and 16(9), and makes it unnecessary to include the narrower definition in the specific provisions of the Draft Bill that replace those sections. It also ensures that the narrower definition of ‘trustee’ applies for the purposes of clause 24, which replaces existing section 14.³

2.8 The effect of the definition in clause 9 is that Part 2 of the Draft Bill does not apply to a personal representative as such, that is, while the personal representative is still completing his or her executorial duties. While still acting in the capacity of a personal representative, the appointment and removal of a personal representative is governed by the *Succession Act 1981* (Qld) and Chapter 15 of the *Uniform Civil Procedure Rules 1999* (Qld).

2.9 However, once a personal representative has become a trustee,⁴ the provisions of Part 2 will apply to the personal representative in that new capacity.

DIVISION 2 LIMITATIONS ON APPOINTMENT

Clause 10 Conditional appointment of minor

2.10 Clause 10 is a new provision. It implements Recommendation 3-1 of the Interim Report.⁵

2.11 At present, although a trustee who is a minor is liable to be removed under existing section 12(1)(g), the *Trusts Act 1973* (Qld) does not disqualify a minor from being appointed as trustee, or otherwise provide that the appointment is void. In this respect, the Act reflects the general law principle that the appointment of a minor as a trustee is not void, but that a minor is liable to be removed as a trustee because he or she has only a limited capacity to act and may not ‘do any act as trustee which involves the exercise of a discretion’.⁶

2.12 The Commission is generally of the view that minors, because of their limited legal capacity, should not be able to be appointed as trustees. However, it also considers that a provision that simply makes the appointment of a minor void would be too absolute,⁷ as it would not be possible for the minor, on attaining his or her majority, to act as a trustee unless he or she was later appointed by the persons having the power to appoint replacement and additional trustees.

3

See *Trusts Discussion Paper* (2012) [5.167] ff.

4

Under the general law, once a personal representative has completed his or her executorial duties (but before distributing the estate of the deceased person), the personal representative holds any assets of the estate as a trustee for the beneficiaries: *Re Ponder* [1921] 2 Ch 59, 61 (Sargant J); *Pagels v MacDonald* (1936) 54 CLR 519, 526 (Latham CJ); *In the Estate of Dunn* [1963] VR 165, 166–7 (Herring CJ). See also RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (LBC Information Services, 1996) [48.08].

5

See generally *Trusts Interim Report* (2013) [3.6] ff, [3.25]–[3.26].

6

G Fricke and OK Strauss, *The Law of Trusts in Victoria* (Butterworths, 1964) 239.

7

See, eg, *Trustee Act 1925* (ACT) s 7A; *Conveyancing Act 1919* (NSW) s 151A, discussed in *Trusts Discussion Paper* (2012) [5.9]. See also *Law of Property Act 1925*, 15 & 16 Geo 5, c 20, s 20.

2.13 The Commission therefore recommended in the Interim Report that the appointment of a minor should be void unless the trust instrument provides that the appointment is to take effect on the minor attaining his or her majority, whether before or after the creation of the trust.⁸

2.14 Clause 10 gives effect to that recommendation by providing that, although the appointment of a minor as a trustee is generally of no effect,⁹ an appointment that is conditional on the minor reaching a stated age (which must be at least the age of majority) may have effect if the minor reaches that age and, on that day, is not otherwise ineligible or unable to be a trustee.

2.15 The expression 'may have effect' has been used in clause 10(2) in recognition of the fact that there may be some other reason why the appointment cannot take effect when the minor reaches the stated age, for example, if the minor is an undischarged bankrupt, if there are already four trustees of the trust, or if the minor has been disqualified from being appointed as a trustee.¹⁰

2.16 In the interests of certainty, clause 10(3) further provides that, if the minor is ineligible or unable to be a trustee on the day the minor reaches the stated age, the appointment is taken to be, and to have always been, of no effect. This avoids the inherent uncertainty that would otherwise exist if an appointment that could not take effect when the minor reached the stated age because, for example, there were already four trustees, might take effect automatically many years in the future when one of the trustees dies.¹¹

Clause 11 Undischarged bankrupt is not able to be appointed as trustee

2.17 Clause 11 is a new provision. It implements Recommendation 3-2 of the Interim Report.¹²

2.18 The Commission considers that it is undesirable that a trust should, at the outset or on the later appointment of a trustee, have a trustee appointed who is an undischarged bankrupt or who is insolvent or taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cth) or a similar law of a foreign jurisdiction. While a person's bankruptcy or insolvency is not necessarily an indication that the person is unfit to be a trustee, the fact of the person's bankruptcy or insolvency has the potential to complicate, and adversely affect, the administration of the trust as third parties may be less willing to deal with the

⁸ *Trusts Interim Report* (2013) [3.26], Rec 3-1.

⁹ The provision has been expressed in these terms to avoid any ambiguity that might arise from providing that the appointment of a minor is 'void'.

¹⁰ See Draft Trusts Bill 2013, cl 11–12, 129.

¹¹ See, eg, *Re Arbib and Class's Contract* [1891] 1 Ch 601, where the testator's son, who was then living in Australia, was appointed as a trustee 'if and when he shall return to England'. The son fulfilled the condition when, eight years after the testator's death, he returned to England for a period of six months, upon which he became a trustee with the other trustee.

¹² See generally *Trusts Interim Report* (2013) [3.27].

trustee, in particular, because bankruptcy affects the trustee's legal capacity to institute legal proceedings and to be sued.¹³

2.19 Clause 11 therefore provides that such a person is not able to be appointed as a trustee.¹⁴ The provision has been expressed in these terms to avoid any ambiguity that might arise from providing that the appointment is 'void'.

2.20 The Commission considers that different considerations may apply in the case of a person who is bankrupted *after* his or her appointment as trustee has taken effect. As explained later, the bankruptcy of a trustee is a ground for the replacement of a trustee under clause 15(1)(g) and the removal of a trustee under clause 23(1), although the replacement or removal of the trustee on that ground is not automatic under those provisions.

Clause 12 Limitation on number of trustees

2.21 Clause 12 of the Draft Bill replaces existing section 11, and retains the limitation of four trustees for private trusts that is currently imposed by that section.¹⁵ It also continues to provide that a custodian trustee must not be counted as a 'trustee' for the purpose of any limitation on the number of trustees that a trust may have.

2.22 In addition, clause 12 retains a mechanism for the approval of a greater number of trustees for a private trust. While the Commission considers that an upper limitation of four trustees is generally appropriate for private trusts, it can envisage circumstances in which it might be appropriate to have a greater number of trustees.

2.23 However, in accordance with Recommendation 3-3 of the Interim Report, the Draft Bill does not confer that power on the Attorney-General and Minister for Justice, as is currently the case under existing section 11(3)(b).¹⁶ While the Attorney-General has a special role in relation to charitable trusts, the Attorney-General does not have any particular role in relation to private trusts. Given that charitable trusts are not subject to the limitation on the number of trustees, the exercise of this power will arise only in relation to private trusts.

2.24 Instead, clause 12(3) makes provision for the approval of more than four trustees of a private trust to be given by the court, on application. To that end, the note to clause 12(3) refers to clause 126 of the Draft Bill, which provides for the persons who may apply to the court for various orders.

¹³ *Bankruptcy Act 1966* (Cth) s 58(1)(a), (3). See also s 60(1)(b), (2)–(3) for the effect of bankruptcy on existing legal proceedings.

¹⁴ The Dictionary defines 'bankrupt' to include insolvent.

¹⁵ See generally *Trusts Interim Report* (2013) [3.29] ff.

¹⁶ *Trusts Act 1973* (Qld) s 11(3)(b) refers to the 'Minister', which means the Attorney-General and Minister for Justice: see *Acts Interpretation Act 1954* (Qld) s 33(2); *Administrative Arrangements Order (No 2) 2013* (Qld) s 2.

DIVISION 3 APPOINTING, REPLACING AND REMOVING TRUSTEES

Subdivision 1 Preliminary

Clause 13 Application of div 3—appointor for trust

2.25 Clause 13 is to the same effect as existing section 12(8), but expresses that provision in a more modern drafting style.

2.26 Clause 13(2), like the second part of existing section 12(8), ensures that, if an appointor¹⁷ appoints a new trustee under Division 3 to replace a trustee in a circumstance provided for by the trust instrument, the appointment is subject to the terms of the trust instrument that apply to an appointment made in those circumstances. This ensures that, if the same circumstance for the replacement of a trustee is provided for by both the Draft Bill and the trust instrument, an appointor cannot avoid the provisions of the trust instrument that apply to the appointment by making the appointment under the statutory power, rather than under the trust instrument.

2.27 For example, if a trust instrument provides that the appointor may appoint a trustee to replace a trustee who is unfit to act as trustee, but provides that an appointment in that circumstance may be made only with the consent of a nominated person, the requirement for consent in the trust instrument will apply to the appointor if he or she exercises power under clause 15(2) to replace a named trustee mentioned in clause 15(1)(d).

Clause 14 Application of div 3—deceased trustee nominated in a will

2.28 Clause 14 is to the same effect as the first part of existing section 12(7), but is expressed in a more modern drafting style. Like the existing provision, it extends the circumstances in which a new trustee may be appointed by enabling the appointment to be made if 'a person nominated as trustee in a will (*whether as a sole trustee or otherwise*) is dead',¹⁸ whether or not the death happened before or after the death of the testator.

2.29 The inclusion of the words 'whether as a sole trustee or otherwise' clarifies that the provision applies even if there is no other person nominated as trustee who survives the testator and becomes a trustee.¹⁹

¹⁷ The term 'appointor' is defined in the Dictionary. See the discussion of that definition at [15.4] below.

¹⁸ Similar words are included in the equivalent provisions of the trustee legislation in Western Australia and New Zealand: see *Trustees Act 1962* (WA) s 7(7); *Trustee Act 1956* (NZ) s 43(7).

¹⁹ See *Trusts Discussion Paper* (2012) [5.36] ff for a detailed discussion of s 12(7) of the *Trusts Act 1973* (Qld) and *Nicholson v Field* [1893] 2 Ch 511, which concerned the narrower English provision.

Subdivision 2 Appointment of trustees

Clause 15 Appointment of trustee to replace named trustee

2.30 Clause 15 is generally based on existing section 12(1) and (3)–(4) and the second part of existing section 12(7).²⁰ It implements Recommendation 3-4 of the Interim Report by expressing those provisions in a more modern drafting style. It also implements the other recommendations mentioned below in relation to the specific subclauses of the provision.

2.31 Clause 15 does not include provisions to the effect of existing section 12(2)(a), (d), (9) or (10).

2.32 Existing section 12(2)(a) provides that, on the appointment of a trustee or trustees of trust property, the number of trustees may, subject to the restriction imposed by the Act on the number of trustees, be increased. The Commission considers that a provision to the effect of existing section 12(2)(a) is unnecessary, given that clause 15(2) makes provision for a named trustee to be replaced by more than one new trustee. However, as a reminder of the limitation imposed by the Draft Bill on the maximum number of trustees for a private trust, clause 15(2) includes a note that refers to the limitation in clause 12.

2.33 Similarly, the Commission is of the view that it is not necessary to include a provision to the effect of existing section 12(2)(d). That section provides that, on the appointment of a trustee or trustees of trust property, 'any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees shall be executed or done'. In the Interim Report, the Commission recommended that the provisions based on existing sections 12(2)(d) and 15(3), which both impose certain duties in relation to the vesting of trust property, should provide expressly that the duties are imposed on specified persons.²¹ On further consideration, the Commission is of the view that those duties are sufficiently provided for by clause 27(1), which replaces existing section 15(3), and that it is not necessary to duplicate those duties in a separate provision based on existing section 12(2)(d).

2.34 As explained above, the definition of 'trustee' in existing section 12(9) is replaced by the definition of 'trustee' in clause 9, which applies for the purposes of the whole of Part 2 of the Draft Bill.

2.35 The Draft Bill does not include the wider definition of 'trustee corporation' that is found in existing section 12(10). That term is currently used in existing section 12(2)(c)(i) and (5). However, it is no longer necessary to include that particular definition as clauses 22 and 17, which replace those provisions, do not refer expressly to a trustee corporation.

²⁰ The first part of s 12(7) of the *Trusts Act 1973* (Qld) is reflected in cl 14 of the Draft Trusts Bill 2013.

²¹ See *Trusts Interim Report* (2013) [3.332]–[3.333], Recs 3-11, 3-15(c).

Clause 15(1)

2.36 Clause 15(1) is generally based on existing section 12(1) and (3), and specifies the circumstances in which a named trustee may be replaced by the appointment of one or more new trustees. In accordance with Recommendations 3-4 and 3-5 of the Interim Report,²² clause 15(1) makes some changes to the circumstances specified in existing section 12(1) and updates the language of existing section 12(1)(h).

Additional circumstances***Matters affecting a trustee that is a corporation***

2.37 Existing section 12(1)(h) provides for the replacement of a trustee that is a corporation if it 'has ceased to carry on business, is under official management, is in liquidation or has been dissolved'.

2.38 Clause 15(1)(f) retains the first and last of these circumstances. However, instead of referring to a corporation that is under 'official management' or 'in liquidation', it refers to a corporation that is an externally-administered body corporate under section 9 of the *Corporations Act 2001* (Cth). This ensures that clause 15(1) applies to a corporation:²³

- (a) that is being wound up; or
- (b) in respect of property of which a receiver, or a receiver and manager, has been appointed (whether or not by a court) and is acting; or
- (c) that is under administration; or
- (ca) that has executed a deed of company arrangement that has not yet terminated; or
- (d) that has entered into a compromise or arrangement with another person the administration of which has not been concluded.

Bankruptcy

2.39 Clause 15(1)(g) provides for the replacement of a trustee who 'becomes bankrupt'.²⁴

2.40 Under existing section 12(1), the bankruptcy of a trustee is not a specific circumstance in which a trustee may be replaced, although it might be possible, depending on the circumstances resulting in the bankruptcy, to replace a trustee who is, or becomes, bankrupt on the ground that he or she is 'unfit' to act as a trustee.

²² See generally *Trusts Interim Report* (2013) [3.98] ff.

²³ *Corporations Act 2001* (Cth) s 9 (definition of 'externally-administered body corporate').

²⁴ The Dictionary defines 'bankrupt' to include insolvent.

2.41 The inclusion of bankruptcy as a specific circumstance in which a trustee may be replaced avoids the need to establish that a trustee who becomes bankrupt is otherwise unfit to act as a trustee. The inclusion of this circumstance does not, however, mean that a trustee who becomes bankrupt will necessarily be replaced. In particular circumstances, it may be in the interests of the beneficiaries for the trustee to remain in office, especially in the case of a small testamentary trust where the only alternative trustee would be a professional trustee who would charge for performing that role.

2.42 Clause 15(1)(g) refers to a trustee who ‘becomes bankrupt’, because clause 11 provides that a person who ‘is bankrupt’ is not able to be appointed as a trustee. As a result, clause 15(1)(g) will be relevant only where the bankruptcy occurs after the person has been appointed as trustee.

Disqualification from managing corporations

2.43 The *Corporations Act 2001* (Cth) provides that a person ceases to be a director of a company if the person becomes disqualified from managing corporations under Part 2D.6 of the Act and is ‘not given permission to manage the corporation under section 206F or 206G’.²⁵

2.44 Part 2D.6 of the *Corporations Act 2001* (Cth) provides three ways in which, depending on the circumstances, a person may be disqualified from managing corporations:²⁶

- by operation of section 206B, which is automatic in the circumstances to which that section applies, which generally are of a factual nature;
- by the court, on application by the Australian Securities and Investments Commission (‘ASIC’) or, in particular cases, the Australian Competition and Consumer Commission;²⁷ and
- by ASIC itself.²⁸

2.45 Part 2D.6 contains two provisions — sections 206F and 206G — under which a person who is disqualified from managing corporations may nevertheless be permitted to manage corporations (or a particular corporation).

2.46 Section 206F(5) provides that, if a person has been disqualified from managing corporations by ASIC, ASIC may give the person written permission to manage a particular corporation or corporations.

2.47 Section 206G applies if the person was not disqualified by ASIC. It therefore has a wider application, being the relevant provision if the person is disqualified from managing corporations by the operation of section 206B or by a

²⁵ *Corporations Act 2001* (Cth) s 206A(2).

²⁶ For a detailed discussion of pt 2D.6 of the *Corporations Act 2001* (Cth), see *Trusts Interim Report* (2013) [3.73] ff.

²⁷ See *Corporations Act 2001* (Cth) ss 206C–206EB. See s 58AA for the meaning of ‘court’.

²⁸ See *Corporations Act 2001* (Cth) s 206F.

court order made under another provision in Part 2D.6 of the Act. Section 206G gives the court the power to grant the person leave to manage corporations, a particular class of corporations, or a particular corporation.

2.48 Consequently, although section 206B provides for the automatic disqualification of a person on the grounds mentioned in that section, the person's disqualification is not necessarily absolute, since the person may apply to the court for leave to manage corporations under section 206G.

2.49 It is not an express ground for the replacement of a trustee under existing section 12(1) that the trustee has become disqualified from managing corporations, although, as with bankruptcy, the circumstances that resulted in the person's disqualification might be sufficient to justify his or her replacement as a trustee on the ground that the person is 'unfit' to act as a trustee.

2.50 In the Commission's view, if a person is disqualified from managing corporations under Part 2D.6 of the *Corporations Act 2001* (Cth), it raises a serious issue about the person's fitness to be a trustee. Although the Commission does not consider that the person should automatically cease to be a trustee, the Commission nevertheless considers that the person's disqualification should be a circumstance in which the person may be replaced as a trustee.

2.51 Clause 15(1)(h) is framed in a way that reflects the fact that a person might, despite his or her initial disqualification, be given permission under section 206F or 206G of the *Corporations Act 2001* (Cth) to manage corporations or particular corporations. Clause 15(1)(h) could not simply follow the wording of section 206A(2) of the *Corporations Act 2001* (Cth), since that provision links the person's ceasing to be a director of a particular company with an absence of permission to manage *that company*.²⁹

2.52 Under clause 15(1)(h), a trustee will be liable to be replaced if he or she is disqualified from managing corporations and either does not apply for permission to manage corporations or makes an application that is wholly refused. Similarly, a trustee will be liable to be replaced if, despite being given permission to manage a corporation or particular corporations under section 206F or 206G of the *Corporations Act 2001* (Cth), the trustee is nevertheless still disqualified from managing other corporations, whether they be named corporations or a class of corporations.

2.53 However, a trustee will not be liable to be replaced under clause 15(1)(h) if he or she is given permission to manage corporations generally and is no longer subject to any restriction in terms of the corporations that he or she may manage. This concept is reflected in the reference in clause 15(1)(h) to being given

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Corporations Act 2001 (Cth) s 206A(2) provides:

- (2) A person ceases to be a director, alternate director or a secretary of a company if:
 - (a) the person becomes disqualified from managing corporations under this Part; and
 - (b) they are not given permission to manage the corporation under section 206F or 206G. (emphasis added)

permission 'to manage all corporations under section 206F(5) or 206G' of the *Corporations Act 2001* (Cth) 'without exception or condition'.

Omitted circumstances

2.54 Clause 15(1) does not include the circumstances currently mentioned in existing section 12(1)(b) or (g), namely that the trustee:

- remains out of the State for more than one year without having properly delegated the execution of the trust (section 12(1)(b)); or
- is an infant (section 12(1)(g)).

2.55 In the Commission's view, it is no longer appropriate that a trustee should be liable to be replaced on the ground that he or she remains out of the State for more than one year without having properly delegated the execution of the trust. While such a ground would once have provided a means to replace a trustee who, through absence from the jurisdiction, could not fulfil his or her duties, with the forms of communication that are now available, it can no longer be assumed that a trustee who is out of the jurisdiction for more than 12 months is not effectively discharging his or her duties.³⁰

2.56 As mentioned earlier, clause 10 provides that the appointment of a minor as a trustee may have effect only if the appointment is conditional on the minor reaching a stated age, which must be at least the age of majority. The appointment of a minor is otherwise of no effect. In light of that provision, it is not necessary for clause 15(1) to include minority as a ground on which a trustee may be replaced.

Clause 15(2)

2.57 Clause 15(2) replaces, but is to the same effect as, that part of existing section 12(1) that specifies the persons who may appoint a trustee or trustees to replace an existing trustee and the order of priority in which those persons may exercise the power conferred under the provision.

2.58 If there is an appointor for the trust, that person has the highest priority to appoint trustees under clause 15.³¹ If there is no appointor for the trust, or no appointor who is able and willing to act as an appointor, the power to appoint trustees under clause 15(2) may be exercised by:

- the continuing trustee or trustees, if there is one or more continuing trustees of the trust; or
- the personal representative of the last continuing trustee of the trust, if there is no continuing trustee.

³⁰ *Trusts Discussion Paper* (2012) [5.45].

³¹ The term 'appointor' is defined in the Dictionary. See the discussion of that definition at [15.4] below.

2.59 Whereas existing section 12(1) refers to the ‘*surviving or continuing* trustee or trustees’, clause 15(2) refers instead to the ‘*continuing* trustee or trustees’. However, ‘continuing trustee’ is defined in the Dictionary to include a surviving trustee.³² This has been done to simplify the drafting of this clause, and the other provisions of the Draft Bill that use the same expression, without making any change to the effect of those provisions.

2.60 In the context of clause 15(2)(b)(ii), as with existing section 12(1), the reference to the ‘last’ continuing trustee is a reference to the ‘deceased trustee who, immediately before his death, was the only trustee who had not ceased, by reason of death or some other cause, to hold office as a trustee’.³³

2.61 The Dictionary also defines ‘last continuing trustee’ to include a sole trustee. Although this definition has been included principally to simplify the drafting of clause 29, which provides for the vesting of property on the death of a last continuing trustee, it also clarifies that the references in clause 15(2)(b)(ii) and (4) to a ‘last continuing trustee’ do not imply that the trust must at one time have had more than one trustee.

2.62 Whereas existing section 12(1) provides for the appointment to be made ‘by writing’, clause 15(2) provides for the appointment to be made ‘by instrument’. ‘Instrument’ is defined in Schedule 1 to the *Acts Interpretation Act 1954* (Qld) to mean ‘any document’ which, in turn, is defined widely.

Clause 15(3)

2.63 Clause 15(3) replaces, but is to the same effect as, the main part of existing section 12(4). It clarifies the extent of the power of the personal representative of the last continuing trustee of a trust to appoint a new trustee or trustees to replace the last continuing trustee. The remaining part of existing section 12(4) is included in clause 15(6), which defines ‘personal representative’ for the purposes of clause 15.

Clause 15(4)

2.64 Clause 15(4) is a new provision. It implements Recommendation 3-7 of the Interim Report.³⁴

2.65 Under the general law, most powers of executors may be exercised by them severally — that is, an individual executor may act independently of his or her co-executors and bind the estate.³⁵ The position in relation to the exercise of powers by administrators is less clear. For a long time, it was considered that

³² Traditionally, the expressions ‘surviving’ and ‘continuing’ trustees have been used in the sense that a trustee who dies leaves ‘surviving’ trustees, while a trustee who retires or is removed leaves ‘continuing’ trustees: Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 99.

³³ *Re Geelong Waterworks and Sewerage Trust* [1955] VLR 302, 308 (Smith J).

³⁴ See generally *Trusts Interim Report* (2013) [3.141] ff.

³⁵ *Union Bank of Australia v Harrison, Jones and Devlin Ltd* (1910) 11 CLR 492, 499 (Griffith CJ); *Attenborough v Solomon* [1913] AC 76, 81 (Viscount Haldane LC). See also the discussion in RA Sundberg, ‘Powers of One of Several Personal Representatives’ (1985) 59 *Australian Law Journal* 649.

administrators were required to exercise their powers jointly.³⁶ More recently, it has been suggested that ‘there is no decisive authority which answers the question whether one administrator, acting without his co-administrator, has the same power of disposition as an executor acting without the concurrence of his co-executor’.³⁷

2.66 In Queensland, section 49 of the *Succession Act 1981* (Qld) deals with the powers of personal representatives, including the manner in which those powers are to be exercised. Relevantly, it provides:

49 Particular powers of personal representatives

(1) Subject to this Act a personal representative represents the real and personal estate of the deceased and has in relation to all such estate from the death of the deceased all the powers hitherto exercisable by an executor in relation to personal estate and all the powers conferred on personal representatives by the *Trusts Act 1973*.

...

(4) The powers of personal representatives shall be exercised by them jointly.

... (emphasis added)

2.67 Section 49(1) of the *Succession Act 1981* (Qld) sets out the powers of a personal representative in relation to the ‘real and personal estate’ of a deceased person. In relation to *that property*, a personal representative has the powers previously exercisable by an executor in relation to the personal estate of a deceased person, together with the powers conferred on personal representatives by the *Trusts Act 1973* (Qld).

2.68 However, the real and personal estate of a deceased person does not include property of which the deceased was trustee.³⁸ Accordingly, the reference in section 49(1) of the *Succession Act 1981* (Qld) to the powers conferred on personal representatives by the *Trusts Act 1973* (Qld) would not include the power of appointment conferred under section 12(1) of the *Trusts Act 1973* (Qld), since it is not a power that is exercisable in relation to the real and personal estate of the deceased.

2.69 As a result, there is some uncertainty as to whether the requirement in section 49(4) of the *Succession Act 1981* (Qld) for personal representatives to exercise their powers jointly applies to the power conferred under existing section 12(1) of the *Trusts Act 1973* (Qld), or whether section 49(4) is limited to the powers mentioned in section 49(1).

³⁶ *Hudson v Hudson* (1737) 1 Atk 460; 26 ER 292; *Stanley v Bernes* (1828) 1 Hagg Ecc 221; 162 ER 564.

³⁷ *Fountain Forestry Ltd v Edwards* [1975] 1 Ch 1, 14 (Brightman J). Sundberg has suggested that, in Australia, executors and administrators are in the same position with respect to the exercise of their powers, relying on the reference by Barton J in *Union Bank of Australia v Harrison, Jones and Devlin Ltd* (1910) 11 CLR 492, 508–9 to the decision in *Jacomb v Harwood* (1751) 2 Ves Sen 265; 28 ER 172; see RA Sundberg, ‘Powers of One of Several Personal Representatives’ (1985) 59 *Australian Law Journal* 649, 650–1.

³⁸ See *Succession Act 1981* (Qld) s 45(1).

2.70 Given that uncertainty, the Commission considers it desirable for the Draft Bill to clarify this issue. Accordingly, clause 15(4) provides that, if there are two or more personal representatives of the last continuing trustee, the personal representatives must exercise the power of appointment jointly.

Clause 15(5)

2.71 Existing section 12(1) provides that the person who is entitled to appoint new trustees may appoint 'a person or persons (*whether or not being the person or persons exercising the power*) to be a trustee or trustees in the place of the trustee first in this subsection mentioned'. It therefore enables an appointor or, where relevant, the personal representative of the last continuing trustee, to appoint himself or herself as a new trustee.

2.72 The Commission considers that this approach is appropriate as the default position, but acknowledges that a settlor may have reasons for wishing to maintain a separation between the appointor and the trustees or to provide that the power (to appoint himself or herself) may not be exercised by the personal representative of the last continuing trustee.

2.73 Accordingly, clause 15(5) preserves the effect of existing section 12(1) in clarifying that an appointor or, if the power of appointment is exercisable by the personal representative of the last continuing trustee, the personal representative may be appointed as the new trustee, but makes the provision subject to a contrary intention in the trust instrument. This aspect of clause 15(5) represents a change to existing section 12(1).

Clause 15(6)

2.74 Clause 15(6) contains two definitions that apply for the purposes of clause 15.

Continuing trustee

2.75 The definition of 'continuing trustee' in clause 15(6) is to the same effect as the second part of existing section 12(7), but expresses that provision in a more modern drafting style. As explained above, references in the Draft Bill to a 'continuing trustee' also include a surviving trustee by virtue of the general definition in the Dictionary.

2.76 It was originally held that the reference to a 'surviving or continuing trustee' did not include a trustee who would cease to hold office by virtue of the particular appointment that was proposed to be made.³⁹

2.77 By providing that 'continuing trustee' includes a trustee mentioned in clause 15(1)(b) or (c) (that is, a trustee who wishes to be discharged or who refuses to act as trustee) if that trustee is willing to act under clause 15(2)(b)(i), clause 15(6) makes it 'possible for all existing trustees to retire, appointing new

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Travis v Illingworth (1865) 2 Dr & Sm 344, 346–7; 62 ER 652, 653 (Kindersley V-C).

trustees at the same time'.⁴⁰ It also enables a sole trustee who wishes to be discharged, or who is refusing to act, to appoint a new trustee or trustees in his or her place.

Personal representative

2.78 The definition of 'personal representative' in clause 15(6) is based on part of existing section 12(4), but is expressed more accurately and in a more modern drafting style than the current provision. It ensures that, to the extent that the personal representative of a last continuing trustee may appoint a new trustee to replace the deceased trustee, the exercise of that power is restricted to a personal representative who is:

- the administrator, for the time being, of the trustee's estate; or
- the executor who has proved the will of the trustee; or
- the executor by representation of the trustee's will.

2.79 Whereas existing section 12(4) refers to an executor, whether original or by representation, who has proved the will of his or her *testator*, clause 15(6) separates the references to an original executor and an executor by representation, and makes it clear that the original executor must have proved the *trustee's* will. Further, it avoids any suggestion that a person can be constituted as an executor by representation merely by proving the will of that person's testator, given that section 47 of the *Succession Act 1981* (Qld) requires every will in the chain of representation to be proved.

Clause 16 Appointment of trustee to replace last trustee with impaired capacity

2.80 Clause 16 is a new provision. It implements Recommendation 3-8 of the Interim Report.⁴¹ In limited circumstances, it provides a new mechanism for the appointment of a new trustee or trustees to replace an existing trustee who has impaired capacity for administering the trust.

2.81 Currently, if the last continuing trustee of a trust loses the capacity to administer the trust and the trust instrument does not nominate a person for the purpose of appointing new trustees, it will be necessary for an application to be made to the court for the appointment of a new trustee or trustees to replace the last continuing trustee.

2.82 The Commission considers that, in an ageing society, the situation in which a last continuing trustee has impaired capacity for the administration of the trust is likely to occur with increasing frequency, and should be specifically addressed in the Draft Bill. It therefore recommended in the Interim Report that, if a last continuing trustee has impaired capacity for the administration of the trust,

⁴⁰ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 12 November 2013) [8180].

⁴¹ See *Trusts Interim Report* (2013) [3.152] ff.

trustees may be appointed to replace that trustee by a person who is, for the time being, either of the following:⁴²

- the administrator of the trustee under the *Guardianship and Administration Act 2000* (Qld) or under the corresponding law of another Australian jurisdiction;
- the attorney for financial matters for the trustee under an enduring power of attorney made, or recognised, under the *Powers of Attorney Act 1998* (Qld).

2.83 The purpose of giving the administrator or attorney of a last continuing trustee who has impaired capacity the power to appoint a replacement trustee is to facilitate the appointment of replacement trustees in these circumstances without recourse to the court. In that respect, the recommended power serves a similar purpose to the power conferred on the personal representative of a last continuing trustee who has died to appoint a new trustee or trustees to replace the deceased trustee,⁴³ a provision that has been in effect in England since 1860 and in Queensland since 1898.⁴⁴

2.84 The Bar Association of Queensland was the only respondent to comment on the Commission's preliminary recommendation in the Interim Report. It expressed reservations about the proposal, and suggested that an issue that is likely to arise is doubt as to the nature of the proposed power:

will it be fully fiduciary, or have some fiduciary duties attaching to it, or be in the nature of a personal power? On what basis may a perceived improper exercise of that power by the administrator or attorney (eg by making an appointment that is directly or indirectly for their own benefit or for the benefit of related persons) be able to be challenged? If none of the checks and balances under the guardianship and administration or powers of attorney legislation will apply, then there is a clear potential for misuse of the power.

2.85 However, as explained below, the checks and balances in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) have as their focus the interests of the adult with impaired capacity (in this case, the trustee), rather than the beneficiaries of the trust, and would not operate as a safeguard for the beneficiaries.

2.86 As explained in the Interim Report, the power to appoint or remove trustees must not be exercised in a way that would constitute a fraud on the power.⁴⁵ That is, it must be exercised in 'good faith' and 'with an entire and single view to the real purpose and object of the power'.⁴⁶

⁴² See *Trusts Interim Report* (2013) [3.188] ff, Rec 3-8.

⁴³ See Draft Trusts Bill 2013, cl 15(2)(b)(ii).

⁴⁴ See *Trustees, Mortgagees, etc Act (Lord Cranworth's Act)*, 23 & 24 Vict, c 145, s 27; *Trustees and Executors Act 1897* (Qld) s 10(1).

⁴⁵ See *Trusts Interim Report* (2013) [12.39].

⁴⁶ *Duke of Portland v Topham* (1864) 11 HLC 32, 54; 11 ER 1242, 1251 (Lord Westbury LC), cited, for example, in *Andco Nominees Pty Ltd v Lestato Pty Ltd* (1995) 126 FLR 385, 427 (Santow J); *Dwyer v Ross* (1992) 34 FCR 463, 467 (Davies J).

2.87 Further, the courts have recognised that the power under a trust instrument to appoint or remove trustees is ordinarily of a ‘fiduciary’ character, in the sense that it must be exercised for the benefit, or in the best interests, of the beneficiaries.⁴⁷ This was explained by Davies J of the Federal Court of Australia:⁴⁸

the power to remove a trustee and to appoint a new trustee is neither a general power of appointment nor a power which may be executed in the interests of the appointor. The interests of persons other than the appointor must be taken into account. The power is a trust or fiduciary power, being a power conferred by a deed of trust, and must be exercised accordingly, in the interests of the beneficiaries.

A power, even though not a fiduciary power, must be exercised solely in furtherance of the purpose for which it was conferred. In *Duke of Portland v Topham*, the Lord Chancellor, Lord Westbury said:

Without farther dwelling on the matter, in as much as your Lordships concur in opinion, I think we must all feel that the settled principles of the law upon this subject must be upheld, namely, that the donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power.

When the power is contained in a deed of trust, the donee of the power is even more constrained to act in the interests of the persons for whose benefit the power was conferred. (emphasis added; references omitted)

2.88 This is because ‘the subject matter of the power is the office of the trustee which lies at the core of the trust and carries fundamental and onerous obligations to act in the best interests of the beneficiaries as a whole’,⁴⁹ and the function of the donee of the power is ‘naturally presumed to be to protect the same interests’.⁵⁰

2.89 In view of these matters, the Commission is not persuaded to change its recommendation in relation to this issue.

Clause 16(1)–(2)

2.90 In appointing a new trustee under clause 16, the administrator or attorney of a last continuing trustee with impaired capacity will be exercising power under the trusts legislation, rather than under the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld). This avoids the situation that the administrator or attorney would be required to apply the General Principles under those Acts. As explained in the Discussion Paper and the Interim Report,

⁴⁷ See *Trusts Interim Report* (2013) [12.39] citing, for example, *Berger v Lyster Pty Ltd* [2012] VSC 95, [67]–[85] (Habersberger J). See also, for example, *Carmine v Ritchie* [2012] NZHC 1514, [66]–[67] (Gilbert J).

⁴⁸ *Re Burton* (1994) 126 ALR 557, 559–60.

⁴⁹ *Carmine v Ritchie* [2012] NZHC 1514, [66] (Gilbert J).

⁵⁰ D Hayton (ed), *Underhill and Hayton Law Relating to Trusts and Trustees* (LexisNexis, 18th ed, 2010) [71.11].

those principles are not appropriate in this context as their focus is the interests of the adult (in this context, the trustee being replaced), rather than the interests of the beneficiaries of the trust.⁵¹

2.91 Further, because clause 16 confers the power of appointment directly on a person who is the administrator or attorney for financial matters of the last continuing trustee, it avoids the need to extend the meaning of ‘financial matter’ in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) in a way that would change the focus of those Acts,⁵² or to confer jurisdiction on QCAT to appoint an administrator to exercise this power.

2.92 The references in clause 16(2)(a)(ii) and (b) to, respectively, an order registered under section 169 of the *Guardianship and Administration Act 2000* (Qld) and an enduring power of attorney recognised under section 34 of the *Powers of Attorney Act 1998* (Qld) ensure that the application of clause 16 to administrators and attorneys extends to those appointed by an order or an enduring power of attorney made under the corresponding law of another jurisdiction and recognised under the Queensland legislation.

Clause 16(3)

2.93 Clause 16(3) implements Recommendation 3-8(c) of the Interim Report. It clarifies that, if the trustee has more than one administrator or more than one attorney, the administrators or attorneys, as the case may be, must exercise the power of appointment jointly. This is consistent with the usual position for appointors and trustees and with the Commission’s recommendation, implemented by clause 15(4), in relation to the appointment of trustees by the personal representatives of a last continuing trustee who has died.

Clause 16(4)

2.94 The effect of clause 16(4) is that the power to appoint new trustees may be exercised regardless of the terms on which the administrator or attorney is appointed. If the power to appoint trustees were to be conferred by the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), there would be a strong argument that the administrator or attorney should not be able to exercise a power that does not fall within the scope of his or her appointment. However, that argument does not carry the same weight where the power is to be exercised under the trusts legislation.

2.95 This approach has the advantage of providing greater certainty, since it avoids the need to determine whether or not the appointment of new trustees is within the scope of the administrator’s or attorney’s appointment.⁵³ Although that

⁵¹ See *Trusts Discussion Paper* (2012) [5.117] ff; *Trusts Interim Report* (2013) [3.162] ff.

⁵² As explained in the Discussion Paper, the meaning of ‘financial matter’, for an adult, would not ordinarily include the power to appoint a trustee of property held by the adult on trust for third persons: see *Trusts Discussion Paper* (2012) [5.118].

⁵³ However, if an attorney’s appointment under an enduring power of attorney is limited to personal matters and does not authorise the attorney to exercise power for *any* financial matters, the attorney will not be authorised to exercise the power under cl 16(2)(a)(ii) of the Draft Trusts Bill 2013 to replace a last continuing trustee. To that extent only, it will be necessary to have regard to the scope of the attorney’s appointment.

would not be a difficult exercise where the administrator or attorney is appointed to exercise power for *all* of the adult's financial decisions, there would inevitably be a degree of uncertainty as to whether an administrator's appointment encompassed this power when, as is often the case, an administrator is appointed to exercise power for the adult's 'complex financial decisions'.

2.96 The Commission's approach in relation to this issue is also consistent with the approach taken in existing section 12(1) (which is preserved by clause 15(2)), whereby the power of appointment conferred on the personal representative of a last continuing trustee could be exercised by a person with a limited grant of administration, such as a grant to collect and preserve the deceased's assets.

Clause 16(5)

2.97 Clause 16(5) clarifies that the administrator or attorney may appoint himself or herself as a new trustee under this provision. However, the power to do so is subject to a contrary intention in the trust instrument. This is consistent with the approach adopted in relation to appointors in clauses 15(5) and 17(4) and in relation to the personal representative of the last continuing trustee of a trust in clause 15(5).

Definitions of 'capacity' and 'impaired capacity'

2.98 The Dictionary includes definitions of 'capacity' and 'impaired capacity' that are consistent with the functional approach to capacity that applies under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld).⁵⁴

Clause 17 Appointment of additional trustee

2.99 Clause 17 is generally based on existing section 12(5).

2.100 One of the conditions for the appointment of an additional trustee under existing section 12(5) is that none of the existing trustees is a 'trustee corporation' (which means the Public Trustee or an interstate public trustee or, effectively, a licensed trustee company)⁵⁵ or a local government.

2.101 In the Commission's view, that limitation is no longer appropriate and is therefore not retained in clause 17. If there is an appointor for the trust, the appointor should have the flexibility to decide whether an additional trustee should be appointed, regardless of the nature of the existing trustees.⁵⁶ Similarly, if there is no appointor, and the existing trustee is the Public Trustee, a licensed trustee company or a local government, that trustee should have the flexibility to decide whether it would be in the interests of the trust to appoint an additional trustee.

⁵⁴ For a discussion of the functional approach to capacity, see generally Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (2010) vol 1, ch 7.

⁵⁵ See *Trusts Act 1973* (Qld) ss 5(1) (definition of 'trustee corporation'), 12(10).

⁵⁶ The term 'appointor' is defined in the Dictionary. See the discussion of that definition at [15.4] below.

2.102 The other condition for the appointment of an additional trustee under existing section 12(5) is that there are not more than three trustees. The purpose of that condition is to ensure that an additional trustee is not appointed in circumstances where the appointment would have the effect of exceeding the statutory limit of four trustees that applies for private trusts.

2.103 As that condition is currently expressed, it would prevent the appointment of a custodian trustee as an additional trustee for a trust that has four existing trustees, even though existing section 11(4) provides that a custodian trustee is not to be counted for the purpose of calculating the number of trustees of a trust. It would also prevent an additional trustee from being appointed for a charitable trust that has four or more existing trustees, even though a charitable trust is not affected by the statutory limit that applies for private trusts under clause 12.

2.104 To avoid these difficulties, clause 17(1) instead provides that one or more persons may be appointed as an additional trustee or additional trustees 'if, after the appointment, the number of trustees of the trust is not more than the number permitted under this Act'.

2.105 Because clause 12(1) provides that a private trust may not have more than four trustees, an additional trustee may not be appointed under clause 17 if that would result in a private trust having more than four trustees (excluding any custodian trustee) without the approval of the court.

Clause 18 When appointors are taken to be not able and willing to act

2.106 Clause 18 is a new provision. It implements Recommendation 3-6 of the Interim Report.⁵⁷

2.107 Under existing section 12(1), a person nominated by the trust instrument has the highest priority in relation to the power to appoint new trustees to replace an existing trustee. It is only if there is no such person, or no such person who is 'able and willing to act', that the power to appoint replacement trustees becomes exercisable by the persons next in priority (namely, under existing section 12(1), the 'surviving or continuing' trustees for the time being or the personal representative of the last 'surviving or continuing' trustee).

2.108 Existing section 12 does not provide expressly for the situation where there are two or more appointors who are individually able and willing to act, but cannot agree on who should be appointed. It has been held, however, that in this situation the appointors are taken to be 'not able and willing to act'.⁵⁸

2.109 The Commission considers that the Draft Bill should clarify when appointors are 'not able and willing to act', as this will provide greater certainty for trustees to whom the power to appoint replacement trustees then devolves. Clause 18 reflects the existing case law, but provides not only for the situation in which the appointors must exercise their powers jointly (whether under the trust instrument or

⁵⁷ See *Trusts Interim Report* (2013) [3.123] ff.

⁵⁸ *Re Sheppard's Settlement Trusts* [1888] WN 234.

under the general law), but also for the less common situation in which the trust instrument provides for them to exercise their powers by majority decision and the trustees are, effectively, deadlocked.

2.110 Clause 18 does not include any reference to the time within which the appointors are unable to agree. The time that is reasonable for a decision to be made, and the event from which time would run, will necessarily vary from case to case. In the event of a dispute, what is reasonable will be a question of fact for the court to determine in the circumstances of the particular case.

2.111 Clause 18(3) reflects the fact that, apart from the situation where the appointors cannot agree or reach a majority decision, as the case may be, there may be other circumstances in which appointors are not able and willing to act, for example, if an appointor is under a legal incapacity.

Clause 19 When trustees may be appointed for separate trust property

2.112 Clause 19 is based on existing section 12(2)(b), but expresses that provision in a more modern drafting style.

2.113 Clause 19 applies if 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, and a new trustee may be appointed under Subdivision 2. In that situation, it provides that:

- a separate trustee or separate 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
- a continuing trustee may be appointed or continue as a trustee of the separate trust property; and
- if only one trustee of the trust property was originally appointed, only one trustee need be appointed of the separate trust property.

2.114 Where, for example, the sole trustee of a testamentary trust holds certain property on trust for beneficiary A and other property on trust for beneficiary B, and the trustee wishes to be discharged from the trust in relation to beneficiary B, clause 19, in combination with clause 15(1)(b) and (6), will enable the trustee to appoint one or more new trustees of the property held on trust for beneficiary B, while continuing as trustee of the property held on trust for beneficiary A.

Clause 20 Matters relating to appointment of trustee

2.115 Clause 20 is to the same effect as existing section 12(6), but expresses that provision in a more modern drafting style.

2.116 Clause 20(1) ensures that a trustee who is appointed under Subdivision 2 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.

2.117 Clause 20(2), like existing section 12(6), provides that clause 20(1) applies in relation to a trustee both before and after the trust property is vested in the trustee. However, unlike existing section 12(6), clause 20(2) does not refer to the property being vested 'by law or by assurance or otherwise'. The Commission has not included those additional words as it considers them to be superfluous. It does not, however, intend any change to the meaning of the provision by the omission of those words.

Subdivision 3 Discharge and removal of trustees

Clause 21 Meaning of *appropriate trustee of a trust*

2.118 Clause 21 is a new provision, which has been included to simplify the drafting of clauses 22–24. It is drawn from existing section 12(2)(c), but also implements Recommendations 3-9(c), 3-10(a)–(b) and 3-13(a)–(b) of the Interim Report.

2.119 It provides that, for Subdivision 3, there is an 'appropriate trustee' of a trust if the trust has:

- at least one trustee that is a corporation (rather than, as is presently the case under existing section 12(2)(c)(i), at least one trustee that is the Public Trustee, an interstate public trustee or a trustee company);
- if only one trustee was originally appointed of the trust property or the trust instrument allows the trust to have only one trustee who is an individual — at least one trustee who is an individual; or
- if those scenarios do not apply — at least two trustees who are individuals.

2.120 Recommendations 3-9(c), 3-10(a) and 3-13(a) had provided, respectively, for the removal of a trustee without replacement, the discharge of a trustee upon the appointment of a replacement trustee, or the retirement of a trustee without a new appointment of a trustee if there would remain as trustees of the trust:

- (i) in the case of any trust (including a trust referred to in subparagraph (ii)) — a corporation or at least two individuals; or
- (ii) in the case of a trust for any charitable purpose or public purpose or for any purpose of recreation or other leisuretime use or occupation — a local government. (emphasis added)

2.121 However, Schedule 1 to the *Acts Interpretation Act 1954* (Qld) defines 'corporation' to include a 'body politic or corporate' and section 11(a) of the *Local Government Act 2009* (Qld) provides that a local government is a 'body corporate'. Accordingly, the reference in clause 21(a) to a 'corporation' is sufficient to cover the situation where the remaining trustee is a local government.

Clause 22 When trustee is discharged on appointment of new trustee

2.122 Clause 22 is generally based on existing section 12(2)(c), but also implements Recommendation 3-10 of the Interim Report.⁵⁹

2.123 Importantly, clause 22 has the effect that, on the appointment of a new trustee under clause 15(2) to replace a named trustee under clause 15(1), or on the appointment of a new trustee under clause 16(2) to replace a last continuing trustee with impaired capacity for administering the trust, the named trustee or the last trustee, as the case may be, is discharged from the trust if the trust will have an 'appropriate trustee' within the meaning of clause 21.

2.124 The inclusion of a positive statement of discharge is new and has been based on the similar provision in section 6(6) of the *Trustee Act 1925* (NSW).

2.125 The discharge of a trustee does not relieve the trustee from liability for a breach of trust committed while he or she was a trustee.⁶⁰ However, once a trustee is discharged, he or she will not be liable for a breach of trust committed by any continuing or new trustees 'unless the retiring [trustee] parted with the trust property under circumstances warranting a reasonable belief that the trust property would be insecure in the hands of the new trustees'.⁶¹ Conversely, if there is not an appropriate trustee when the trustee is replaced, the trustee will not be discharged from the trust.⁶²

Clause 23 Limited power to remove trustee without replacement

2.126 Clause 23 is a new provision. It implements Recommendation 3-9 of the Interim Report.⁶³

2.127 Currently, existing section 12(1) of the *Trusts Act 1973* (Qld) does not authorise the removal of a trustee without the concurrent appointment of a replacement trustee. Obviously, the replacement, rather than the mere removal, of a trustee has the advantage that it maintains (or, where a trustee is replaced by more than one trustee, increases) the existing number of trustees. However, if a trust has three or four trustees, there may be circumstances in which it would be desirable to remove a trustee without also appointing a new trustee to take that trustee's place.

2.128 The Commission also recognises that it may sometimes be difficult to find a person who is willing to be appointed in the place of a trustee who is liable to be replaced. For that reason, the Commission considers that the Draft Bill should

⁵⁹ See *Trusts Interim Report* (2013) [3.233] ff.

⁶⁰ LA Sheridan, *The Law of Trusts* (Barry Rose, 12th ed, 1993) 440. See also *Re Salmon* (1889) 42 Ch D 351, where the action for breach of trust was brought against the trustee after he had been replaced by other trustees.

⁶¹ LA Sheridan, *The Law of Trusts* (Barry Rose, 12th ed, 1993) 440, citing *Webster v Le Hunt* (1861) 9 WR 918.

⁶² For a discussion of this issue, see M Jacobs, 'Trustees — Obtaining an Effective Discharge on Retirement' (1986) 1 *Trust Law & Practice* 16, 17.

⁶³ See generally *Trusts Interim Report* (2013) [3.226] ff.

provide for the removal of a trustee without the concurrent appointment of a replacement trustee. The recommended provision will provide additional flexibility, especially where it may be difficult to replace the trustee.

2.129 Clause 23(1) ensures that a trustee may not be removed under this provision unless the trust will have remaining as trustees the requisite number and type of trustees — that is, an ‘appropriate trustee’ within the meaning of clause 21.

2.130 With some exceptions, a trustee may be removed under this provision in the circumstances mentioned in clause 15(1). Clause 23(1) does not, however, include the circumstance that the trustee wishes to be discharged from the office of trustee.⁶⁴ If a trustee wishes to be discharged and it is not intended to replace the trustee, provision is made for that to occur under clause 24, which replaces existing section 14.

2.131 Nor does clause 23 include the circumstance that the trustee is removed under the trust instrument.⁶⁵ Clearly, there is no need to exercise the statutory power of removal under clause 23 if the trustee has been removed under the trust instrument.

2.132 Further, provision is not made for the power of removal to be exercised by the administrator or attorney of a last continuing trustee who has impaired capacity.⁶⁶ If there is only one trustee and that trustee has impaired capacity, it is necessary for that trustee to be replaced, rather than simply removed.

2.133 Clause 23(2) includes a positive statement to the effect that the removed trustee is, on the removal, discharged from the trust.

Clause 24 Discharge of trustee without replacement

2.134 Clause 24 is generally based on existing section 14. It implements Recommendation 3-13 of the Interim Report.⁶⁷

2.135 Existing section 14 provides a means by which a trustee may be discharged from the trust without needing the authorisation of the trust instrument or the court and, unlike existing section 12, does not involve the appointment of a replacement trustee.

2.136 At present, existing section 14 provides that a trustee may retire under that provision only if, after the trustee’s discharge, there will remain as trustees the Public Trustee or a trustee company under the *Trustee Companies Act 1968* (Qld),⁶⁸ or at least two individuals.

⁶⁴ See Draft Trusts Bill 2013, cl 15(1)(b).

⁶⁵ See Draft Trusts Bill 2013, cl 15(1)(i).

⁶⁶ Cf Draft Trusts Bill 2013, cl 16(2).

⁶⁷ See *Trusts Interim Report* (2013) [3.244] ff.

⁶⁸ See *Trusts Act 1973* (Qld) s 5(1) (definition of ‘trustee corporation’).

2.137 Although this reflects a similar policy to that which underpins existing section 12(2)(c), it is narrower in many respects.⁶⁹ In particular, existing section 14 does not enable a trustee to be discharged if there will remain an interstate public trustee or trustee company or, in the case of a trust for a charitable or public purpose or a purpose of recreation or other leisuretime occupation, a local government. Nor does it provide an exception where the trust instrument provides otherwise or where only one trustee was originally appointed.

2.138 For these reasons, the Commission recommended in the Interim Report that the requirements for discharge in terms of the remaining number and type of trustees should be the same for the provision based on existing section 14 as for the provision based on existing section 12(2)(c).⁷⁰

2.139 Accordingly, clause 24 applies if a trustee declares, by instrument,⁷¹ that the trustee wishes to be discharged from all or part of the trusts reposed in the trustee and, on the discharge, the trust will have an 'appropriate trustee' within the meaning of clause 21.

2.140 Clause 24(2) provides that, subject to clause 24(3), the trustee is discharged from the trusts if the appointor, if any, for the trust and the trustee's co-trustees agree, by instrument, to the discharge of the trustee and the vesting of the trust property in the co-trustees alone.

2.141 Clause 24(3) is a new provision. It implements Recommendation 3-13(c) of the Interim Report.⁷² It is generally modelled on provisions in the ACT and New South Wales legislation,⁷³ and provides that, to the extent that the trust property requires the notification, registration or recording of the transfer to the co-trustees, the discharge of the trustee takes effect on the notification, registration or recording of the transfer. Otherwise, the discharge of the trustee takes effect on the execution, by the appointor, if any, and the co-trustees, of the instrument of agreement to discharge.

Subdivision 4 Vesting of trust property

2.142 Clauses 25–27 are generally based on existing section 15, subject to those modifications that have been made to implement Recommendation 3-15 of the Interim Report⁷⁴ and to avoid an existing ambiguity in the current *Trusts Act 1973* (Qld) in terms of the relationship between existing sections 15 and 16.

⁶⁹ See *Trusts Interim Report* (2013) [3.245]–[3.246].

⁷⁰ See *Trusts Interim Report* (2013) [3.272] ff.

⁷¹ 'Instrument' is defined in the *Acts Interpretation Act 1954* (Qld) s 36, sch 1 to mean 'any document' which, in turn, is defined widely.

⁷² See *Trusts Interim Report* (2013) [3.281] ff.

⁷³ *Trustee Act 1925* (ACT) s 8(4); *Trustee Act 1925* (NSW) s 8(4).

⁷⁴ See generally *Trusts Interim Report* (2013) [3.308] ff.

Clause 25 Vesting of trust property in new or continuing trustees

2.143 Clause 25 is generally based on existing section 15(1)–(2).

2.144 It ensures that, if a new trustee is appointed under Subdivision 2 of Division 3 of Part 2 or a trustee, without being replaced, is removed under clause 23 or discharged by agreement under clause 24, the instrument of appointment, removal or agreement to discharge (the ‘instrument of change’):

- divests the trust property from the persons who were the trustees immediately before the instrument was signed; and
- vests it in the persons who become and are the trustees as joint tenants without any conveyance, transfer or assignment.

2.145 Clause 25 also clarifies an ambiguity that currently arises under the *Trusts Act 1973* (Qld).

2.146 Under the current Act, existing section 16 is intended to be the provision that deals with the vesting of trust property when the last continuing trustee of a trust dies. However, existing section 15 also provides for the divesting and vesting of trust property when a new trustee is appointed (including to replace a trustee mentioned in existing section 12(1)(a) who has died), without creating any exception for the situation specifically provided for by existing section 16. Under existing section 15, the divesting and vesting of the trust property is directly from the former trustees to the new and continuing trustees. Under existing section 16, however, the trust property that is vested in a last continuing trustee who dies vests initially in the Public Trustee.

2.147 To avoid this overlap, clause 25(3) includes a definition of ‘new trustee’, which excludes a trustee who is appointed under clause 15 to replace a named trustee who has died if the named trustee was the last continuing trustee of the trust.

2.148 This definition narrows the reference in clause 25(1)(a) to the application of the provision if a ‘new trustee’ is appointed, and ensures that, if the last continuing trustee of a trust dies, the vesting of the trust property on and following the trustee’s death is governed solely by clauses 29 and 30.

2.149 As with existing section 15(1)–(2), which provides that the divesting and vesting of the trust property under those sections is ‘subject to the provisions of any other Act’, clause 25(2) provides that the divesting and vesting of the trust property is subject to clause 26, which deals with the requirements of other Acts.

Clause 26 When vesting takes effect

2.150 Clause 26 is partly based on an element of existing section 15(1)–(2) and is partly new. It implements Recommendation 3-15(a)–(b) of the Interim Report.

2.151 In the Interim Report, the Commission expressed the view that the statement in existing section 15(1)–(2) that those provisions are ‘subject to the provisions of any other Act’ is generally effective to indicate that other legislation

with specific transfer requirements for particular types of property will override the general vesting provisions of existing section 15. However, to make the legislation clearer in this respect and to remove any ambiguities, the Commission considered that the new trusts legislation should provide, in a separate subsection, that, if any other Act imposes or authorises the imposition of specific requirements for the transfer of property, the provisions based on existing section 15(1)–(2) apply subject to those other requirements.⁷⁵

2.152 In accordance with Recommendation 3-15(a), clause 26(1) provides that, if, or to the extent that, the divesting and vesting of the trust property must be notified, registered or recorded under the requirements of another Act, the divesting and vesting are subject to the requirements and do not take effect until the requirements are satisfied. Clause 26(3) defines ‘Act’ to include ‘an Act of the Commonwealth or another State’, and ‘requirement, of another Act’ to include a requirement that the other Act ‘authorises or permits to be imposed’.

2.153 Clause 26(2) implements Recommendation 3-15(b) by providing that, if the divesting and vesting of the trust property are subject to other statutory requirements, the execution of the instrument of change under clause 25 vests in the persons who become and are the trustees a right to call for the transfer of the trust property.⁷⁶

Clause 27 Transfer etc. of trust property

2.154 Clause 27 replaces, but is to the same general effect as, existing section 15(3)–(6).

2.155 Clause 27(1) is based on existing section 15(3), but implements Recommendation 3-15(c) of the Interim Report by specifying the persons who must do all things necessary to assist in the notification, registration or recording of the divesting and vesting of the trust property.

2.156 Clause 27(2)–(3) provides that, if the consent of a person is needed to the conveyance, transfer or assignment of any trust property, the vesting of the property under clause 25 is subject to that consent, although the consent may be obtained after the execution of the instrument of change mentioned in clause 25.

2.157 These provisions are based on existing section 15(5) and serve the same purpose as that section. In some cases, a trust instrument might require the consent of a specified person before the trust property can be transferred. As with existing section 15(5), clause 27(2) preserves that requirement but, to avoid the possibility that the vesting of the trust property under clause 25 before that consent is obtained might invalidate the vesting, clause 27(3) provides that the consent may be obtained after the execution of the instrument of change mentioned in clause 25.

⁷⁵ See *Trusts Interim Report* (2013) [3.329].

⁷⁶ Similar provision is made in a number of Australian jurisdictions: see *Trustee Act 1925* (ACT) s 9(9); *Trustee Act 1925* (NSW) s 9(7); *Trustee Act 1958* (Vic) s 45(4); *Trustees Act 1962* (WA) s 10(4).

2.158 Clause 27(4)(a) is based on the last part of existing section 15(3), and provides that the instrument of change is taken to be a conveyance of the trust property from the former trustees to the persons who become and are the trustees.

2.159 It has been observed that the 'automatic assignment of property rights by virtue of the deed of appointment of new trustees may conflict with a private agreement entered into between the trustees and a third person not to assign such rights without licence or consent'.⁷⁷ For example:⁷⁸

in respect of leasehold property a trustee-lessee may enter into a covenant not to assign without the licence or consent of the lessor. The appointment of a new trustee without obtaining the licence or consent might constitute an unintended breach of that covenant.

2.160 Clause 27(4)(b), like existing section 15(6), ensures that 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.

2.161 Clause 27(4)(b) omits the reference that currently appears in existing section 15(6) to an 'underlease'. Given that Schedule 1 to the *Acts Interpretation Act 1954* (Qld) defines 'lease' to include a sublease, the current reference to an underlease is redundant.

2.162 Clause 27(5) replaces, but is to the same effect as, existing section 15(4).

DIVISION 4 DEVOLUTION OF TRUSTS ON DEATH

2.163 Clauses 28–31 implement Recommendation 3-16 of the Interim Report.⁷⁹ They are to the same effect as existing section 16, but express that provision in a more modern drafting style. In particular, existing section 16, which is a lengthy and dense provision, has been broken down into four separate provisions to improve its comprehensibility.

2.164 Because clause 9 provides that 'trustee', in Part 2, does not include a personal representative acting only in the capacity of a personal representative, it is not necessary for Division 4 of Part 2 to include a provision to the effect of the definition of 'trustee' in existing section 16(9).

2.165 Nor is it necessary for that division to include the definition of 'trust property' that currently appears in existing section 16(9), which provides that, in section 16:

trust property includes any property vested in the trustee as mortgagee.

2.166 That definition provides some clarification in the context of the current Act because existing section 17 provides separately for the vesting of an estate or

⁷⁷ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 12 November 2013) [8430].

⁷⁸ Ibid.

⁷⁹ See generally *Trusts Interim Report* (2013) [3.348] ff.

interest in property that is vested solely in a person (*not being a trustee*) by way of mortgage.

2.167 However, because the Draft Bill does not include a provision to the effect of existing section 17,⁸⁰ it is no longer necessary to emphasise this distinction. If an estate or interest in property is vested solely in a person as trustee by way of mortgage, the estate or interest will vest, on the person's death, in accordance with the provisions of Division 4, which applies to the vesting of trust property. However, if such an interest is vested solely in a person who is not a trustee, the estate or interest will vest in accordance with the provisions of section 45 of the *Succession Act 1981* (Qld).

Clause 28 Exercise of trust powers on death

2.168 Clause 28 replaces, but is to the same effect as, existing section 16(1). It is relevant where one of two or more trustees dies.

2.169 Clause 28 provides that, if a power or trust is given to or imposed on two or more trustees jointly, the power or trust may be exercised or performed by the survivor or survivors of them for the time being.

2.170 As with existing section 16(1), clause 28 does not additionally provide for the vesting of the trust property in these circumstances. It is unnecessary for it to do so because, if two or more persons hold property as joint tenants (whether or not they are also trustees), the property passes automatically, by operation of the right of survivorship (the *jus accrescendi*), to the surviving joint tenant or joint tenants.⁸¹

Clause 29 Vesting of trust property in public trustee

2.171 Clause 29 replaces, but is to the same effect as, the opening words of existing section 16(2) and part of existing section 16(3).

2.172 It provides that, on the death of the 'last continuing trustee' of a trust, 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 new trustee under Subdivision 4 of Division 3 of Part 2.

2.173 The Dictionary defines 'continuing trustee' to include a surviving trustee⁸² and 'last continuing trustee' to include a sole trustee. These definitions ensure that clause 29 applies in the same circumstances as existing section 16(2). However, they simplify the drafting of clause 29 by avoiding the need to refer, as existing

⁸⁰ See *Trusts Interim Report* (2013) [3.369] ff, Rec 3-17. The Commission expressed the view at [3.383] that s 17 of the *Trusts Act 1973* (Qld) no longer serves its original purpose and should not be included in the new trusts legislation.

⁸¹ AJ Oakley, *Megarry's Manual of the Law of Real Property* (Sweet & Maxwell, 8th ed, 2002) 303. See *Trusts Interim Report* (2013) [3.358] ff for a discussion of the vesting of trust property that is held by trustees as tenants in common.

⁸² See n 32 above.

section 16(2) does, to the death of ‘a sole trustee or, where there were 2 or more trustees, of the last surviving or continuing trustee’.

Clause 30 Vesting of trust property on appointment of new trustee

2.174 Clause 30 replaces, but is to the same effect as, the remainder of existing section 16(2), (4) and (7). It collects, in a single provision, the various parts of existing section 16 that deal with:

- the vesting of trust property when a new trustee is appointed⁸³ or, if a new trustee is not appointed, a grant of probate of the will, or letters of administration of the estate, of the deceased trustee is made and the holder of the grant assumes the trust of the trust property; and
- the liability of the Public Trustee when the trust property is divested from the Public Trustee and vested in either a new trustee or the holder of a grant.

2.175 Clause 30(1) replaces the last part of the opening words of existing section 16(2), as well as paragraphs (a) and (b) of that provision. It provides that the trust property (being the trust property that vested in the Public Trustee under clause 29) remains vested in the Public Trustee until:

- if a new trustee (the ‘appointee’) is appointed — the appointment is made and (unless the appointment is made by the Public Trustee) the appointee gives the Public Trustee written notice of the appointment; or
- if a new trustee is not appointed — a grant of probate of the will or letters of administration of the estate of the deceased trustee is made and the holder of the grant (the ‘holder’) gives the Public Trustee written notice of the holder’s intention to assume the trust of the trust property.

2.176 Clause 30(2) replaces the last part of existing section 16(2)(a) and (4), which provide, respectively, for the vesting of the trust property in the appointee or holder.

2.177 Clause 30(3) replaces the last part of existing section 16(2)(b), and provides that, on the vesting of the trust property in the holder, the holder is taken to be a person appointed as a new trustee by an appointor.

2.178 Clause 30(4)–(5) replaces existing section 16(7). The effect of clause 30(4) is that, generally, if the trust property is divested from the Public Trustee under clause 30, all liability on the part of the Public Trustee for any action taken by the Public Trustee in relation to the trust property ends. However, clause 30(5) ensures that a person who, apart from clause 30(4), would have had a

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An appointment may be made by the persons mentioned in cl 15(2) of the Draft Trusts Bill 2013, although, since cl 30 applies to the vesting of trust property on the death of the last continuing trustee of a trust, those persons will be either the appointor (if any) or the personal representative of the last continuing trustee. Further, because cl 31(1) confers on the Public Trustee the same powers, authorities and discretions as if the Public Trustee had originally been appointed by the trust instrument, the Public Trustee may, if there is no appointor or no appointor who is able and willing to act, exercise the power of a surviving trustee to appoint a new trustee.

remedy against the Public Trustee is taken to have the same remedy against the person in whom the trust property vests under clause 30(2).

Clause 31 Powers, etc. of trustee

2.179 Clause 31 replaces, but is to the same effect as, existing section 16(5)–(6) and (8). It collects, in a single provision, the various parts of existing section 16 that deal with the exercise of power by the persons in whom the trust property has vested.

2.180 As with existing section 16(5)–(6), clause 31(1) ensures that, if the trust property vests in the Public Trustee under clause 29 or in the holder of a grant under clause 30, the Public Trustee or holder 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.

2.181 Clause 31(1) does not, however, provide for the powers of a person who is appointed as a new trustee and in whom trust property vests under clause 30, as the powers, authorities and discretions of such a person are conferred directly by clause 20. In this respect, the Draft Bill takes the same approach as existing section 16(5)–(6).

DIVISION 5 DISCLAIMER OF TRUSTS

Clause 32 Disclaimer of trusts on renunciation of probate

2.182 Clause 32 replaces, but is to the same effect as, existing section 18. It implements Recommendation 3-18 of the Interim Report.⁸⁴

2.183 The purpose of clause 32 is to ensure that a person who is appointed by will as both executor and trustee cannot hold the office of trustee if the person's right to the executorship of the will has ceased.

2.184 Clause 32(1), like existing section 18(1), provides that the person's renunciation of probate of the will, or failure to apply for probate after being properly cited or summoned, is taken to be a disclaimer of the trust contained in the will.

2.185 Clause 32(2), like existing section 18(2), applies if:

- a person appointed by will as both executor and trustee renounces probate of the will; fails to apply for probate of the will after being properly cited or summoned; or dies before probate of the will is granted to the person;⁸⁵ and
- letters of administration with the will annexed are granted to someone else.

⁸⁴ See generally *Trusts Interim Report* (2013) [3.385] ff.

⁸⁵ The circumstances mentioned in cl 32(2)(a) of the Draft Trusts Bill 2013 correspond with the circumstances mentioned in s 46 of the *Succession Act 1981* (Qld) in which a person's right to the executorship of a will ends.

2.186 It provides that the person who holds the grant is taken to be the trustee of the trust contained in the will instead of the person who was appointed by the will.

2.187 Clause 32, like existing section 18, does not apply in the situation where the person appointed by will as executor and trustee applies for a grant of probate, but the person's application is refused and a grant of letters of administration with the will annexed is made to another person. In that situation, the passing over of the executor-trustee is not taken to be a disclaimer of the trust, and does not have the effect of substituting the administrator as the trustee of the will.

2.188 As explained in the Interim Report, there may be situations where the reasons for passing over a person as executor do not warrant the person's removal as a trustee.⁸⁶ For that reason, the Commission considers it appropriate that clause 32 does not have the automatic effect that a person who is named as the executor and trustee of a will is taken to have disclaimed the trust merely because the person is passed over as executor. In those cases where it is appropriate for the person to be removed as both executor and trustee, an application for the person's removal as trustee can be made concurrently with the contested probate proceedings.

DIVISION 6 CUSTODIAN TRUSTEES

2.189 Clauses 33–39 implement Recommendation 4-5 of the Interim Report.⁸⁷ They are generally to the same effect as existing section 19, but are expressed in a more modern drafting style. In particular, existing section 19, which is a lengthy provision, has been broken down into seven separate clauses to improve its comprehensibility. These clauses also incorporate some substantive changes that were recommended in the Interim Report.

Clause 33 Appointment of custodian trustees

2.190 Clause 33 is generally based on existing section 19(1) and implements Recommendation 4-5 of the Interim Report, in part.⁸⁸

2.191 The purpose of clause 33 is to provide for the appointment of custodian trustees. The Commission considers that this provides a simple and convenient mechanism for the holding of trust property by a corporate entity — thereby ensuring continuity of legal title to the trust property over time — without losing the duties that are imposed on a trustee to act in the beneficiaries' best interests.

2.192 Clause 33(1), like existing section 19(1), enables any corporation to be appointed as custodian trustee of trust property, thereby preserving the flexibility and availability of the statutory mechanism for the appointment of custodian trustees.

⁸⁶ See *Trusts Interim Report* (2013) [3.395]–[3.396].

⁸⁷ See generally *Trusts Interim Report* (2013) [4.136] ff.

⁸⁸ See *Trusts Interim Report* (2013) [4.143] ff.

2.193 Clause 33(2) implements Recommendation 4-5(a) by clarifying the ways in which a custodian trustee may be appointed, namely, by the trust instrument, the appointor (if any) for the trust, the trustees for the time being of the trust, or the court.

2.194 The Commission also recommended in the Interim Report that the trusts legislation should clarify that, whenever a custodian trustee is to be appointed, the custodian trustee is not to be counted as a ‘trustee’ for the purpose of the usual requirement that there must not be more than four trustees of a private trust.⁸⁹ This is reflected in clause 12(4), which makes it unnecessary to deal with this issue in clause 33.

2.195 As with existing section 19(2), clause 33 applies subject to a contrary intention in the trust instrument. However, this does not apply to clause 33(2)(d), which provides for the appointment of a custodian trustee by the court. The Commission does not consider it appropriate for those parts of the provisions based on existing section 19 that relate to the jurisdiction of the court⁹⁰ to be subject to exclusion or modification by the trust instrument. This is consistent with the approach taken in existing section 19(3), which is replaced by clause 39.

Clause 34 Vesting of trust property in custodian trustee

2.196 Clause 34 replaces, but is generally to the same effect as, existing section 19(2)(a)–(b).

2.197 Clause 34(1) and (5) provides for the vesting of the trust property in the custodian trustee as if the custodian trustee were the sole trustee, and for the court to make vesting orders for that purpose.⁹¹ Clause 34(2) provides that the management of the trust property, and the exercise of the powers, authorities and discretions of the trustees, remain vested in the other trustees as ‘managing trustees’ as if there were no custodian trustee.

2.198 As explained in the Interim Report, this establishes a separation between the legal ownership of the trust property, which is given to the custodian trustee, and the management of the trust property, which remains with the other trustees.⁹²

2.199 Clause 34(3)–(4) is new and has been included for consistency with the vesting provisions in clauses 26 and 27(4).

2.200 As with existing section 19(2), clause 34 is generally subject to a contrary intention in the trust instrument. However, this does not apply to the declaratory statements in clause 34(3)–(4) or to the court’s power in clause 34(5).⁹³

⁸⁹ *Trusts Interim Report* (2013) [4.180], Rec 4-5(b).

⁹⁰ See Draft Trusts Bill 2013, cl 33(2)(d), 34(5), 35(4)–(6), 38(2), 39.

⁹¹ As to vesting orders generally, see Draft Trusts Bill 2013, cl 132.

⁹² See *Trusts Interim Report* (2013) [4.143]–[4.144].

⁹³ See [2.195] above.

Clause 35 Function of custodian trustee

2.201 Clause 35 replaces, but is to the same effect as, existing section 19(2)(c) and (e)–(f).

2.202 As explained in the Interim Report, the character of a custodian trustee is unique in that it differs from that of an ordinary trustee but also differs from that of a bare trustee.⁹⁴ The purpose of clause 35 is to delineate the custodian trustee's role in dealing with the trust property and acting on the managing trustees' instructions by providing that:

- the custodian trustee is to get in, hold, invest, and dispose of, the trust property as the managing trustees, by instrument, direct and, for that purpose, perform all acts and execute all documents as the managing trustees, by instrument, direct;
- the custodian trustee is not liable for acting on a direction given by the managing trustees or for any act or omission on the part of a managing trustee;
- the custodian trustee may apply to the court for directions if the custodian trustee believes that a direction given by the managing trustees conflicts with the trust or the law, exposes the custodian trustee to a liability, or is otherwise objectionable; and
- an order made by the court giving directions binds both the custodian trustee and the managing trustees, and the court may make an order about the costs of an application as it considers appropriate.

2.203 Whereas existing section 19(2)(c) refers to directions given by the managing trustees 'in writing', clause 35(1) refers to directions given 'by instrument'. This is consistent with the wording used in other provisions of the Draft Bill including, for example, clause 15(2), which provides for the appointment of a replacement trustee to be made by instrument.⁹⁵

2.204 As with existing section 19(2), clause 35 is generally subject to a contrary intention in the trust instrument. However, this does not apply to the provisions relating to the court's jurisdiction in clause 35(4)–(6).⁹⁶

2.205 Further, clause 35 does not include a provision to the effect of existing section 19(2)(d), which allows directions of the managing trustees to be given by majority. The omission of that provision implements Recommendation 4-5(d) of the Interim Report. The Commission has recommended the continuation of the long-standing general law rule that co-trustees of a private trust must act jointly (unless authorised by the trust instrument), and considers there is no compelling reason

⁹⁴ See *Trusts Interim Report* (2013) [4.140]–[4.142].

⁹⁵ See [2.62] above.

⁹⁶ See [2.195] above.

why the position should be different for managing trustees directing a custodian trustee.⁹⁷

Clause 36 Proceedings to be in the name of custodian trustee

2.206 Clause 36 replaces, but is to the same effect as, existing section 19(2)(g).

2.207 It deals with proceedings brought or defended in relation to the trust property of which a custodian trustee is appointed and provides that:

- a proceeding must be brought or defended, in the name of the custodian trustee, as the managing trustees by instrument direct; and
- the custodian trustee is not personally liable for the costs of bringing or defending a proceeding.

2.208 As with existing section 19(2), clause 36 applies subject to a contrary intention in the trust instrument.

Clause 37 Persons dealing with custodian trustee

2.209 Clause 37 replaces, but is to the same effect as, existing section 19(2)(h).

2.210 It clarifies that a person dealing with a custodian trustee is not required to inquire about any direction, concurrence or otherwise of the managing trustees, and is not affected by notice that the managing trustees have not concurred in the dealing.

2.211 Unlike existing section 19(2)(h), clause 37 is not made subject to the provisions of the trust instrument. Because it confers a protection on third parties, the Commission does not consider it appropriate for this clause to be subject to exclusion or modification by the trust instrument.

Clause 38 Appointment of new trustees when a custodian trustee has been appointed

2.212 Clause 38 replaces, but is to the same effect as, existing section 19(2)(i).

2.213 It clarifies that, if power to appoint new trustees is exercisable by the trustees of a trust, that power may be exercised only by the managing trustees, but that the custodian trustee has the same power as any other trustee to apply to the court for the appointment of a new trustee.

2.214 As with existing section 19(2), clause 38 applies subject to a contrary intention in the trust instrument. However, this does not apply in relation to the power of the custodian trustee to apply to the court.⁹⁸

⁹⁷ See *Trusts Interim Report* (2013) [4.189]–[4.195].

⁹⁸ See [2.195] above.

Clause 39 Ending custodian trusteeship

2.215 Clause 39 replaces, but is to the same effect as, existing section 19(3).

2.216 It deals with the persons who may apply to the court for, and the circumstances in which the court may order,⁹⁹ the ending of a custodian trusteeship. It also provides for the court to give directions and make vesting orders that it considers appropriate or necessary to give effect to the ending of the custodian trusteeship.

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See the discussion at [8.17] below of the meaning of 'expedient' in relation to the appointment and removal of trustees.

Part 3

Trustees' Duties

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INTRODUCTION

3.1 Part 3 of the Draft Trusts Bill 2013 provides for the imposition on trustees of certain minimum statutory duties.

3.2 These are new provisions that were recommended in the Interim Report.

3.3 As explained in the Interim Report, many trustees' duties, which are principally derived from the case law, can be reduced to two main kinds: loyalty and prudence.¹ The Commission's recommendations reflect the general principle that, although the Draft Bill should not codify or limit trustees' duties, it should include a statement of certain minimum or 'core' duties falling within those two categories, both as a constraint on the exercise of trustee powers and to provide guidance and clarity. The Commission considers that this is particularly important in light of its recommendations elsewhere in the Interim Report for the introduction of a wider and more flexible statement of trustee powers.²

3.4 The new duties imposed by the Draft Bill largely reflect and, in certain aspects, clarify the general law in relation to those duties. They are framed in terms of minimum obligations, rather than detailed or prescriptive requirements.

¹ See *Trusts Interim Report* (2013) [6.39]–[6.40], referring to HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 9 January 2012) [9.010]; and JH Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 *Yale Law Journal* 625, 629, 656.

² See, in particular, *Trusts Interim Report* (2013) Rec 7-1 and Draft Trusts Bill 2013, cl 59.

DIVISION 1 PRELIMINARY**Clause 40 Application of pt 3**

3.5 Clause 40 is a new provision that implements Recommendation 6-3 of the Interim Report (but in slightly wider terms).³

3.6 Clause 40(1) provides that Part 3 of the Draft Bill applies despite a contrary intention in a trust instrument. This ensures that the duties imposed by Part 3 are not capable of being excluded or modified by the trust instrument.

3.7 Recommendation 6-3(a) was confined in its terms to the provisions that are implemented by clauses 42 and 43. However, the Commission is now of the view that, because the duties imposed by clauses 44 and 45 are also minimum duties, the whole of Part 3 (and not just clauses 42 and 43) should apply despite a contrary intention in a trust instrument.

3.8 Clause 40(2) ensures that Part 3 does not limit any other duty to which a trustee is subject.

3.9 Recommendation 6-3(b) was also confined in its terms to the provisions that are implemented by clauses 42 and 43. However, the Commission is now of the view that, because the duties imposed by clauses 44 and 45 are minimum duties, the whole of Part 3 (and not just clauses 42 and 43) should be expressed not to limit any other duty to which a trustee is subject.

Clause 41 Definition for pt 3

3.10 In its submission in response to the Interim Report, the Bar Association of Queensland commented that the legislation should clarify the duties of a custodian trustee:

Is a custodian trustee subject to all usual trustee duties, or are the duties constrained in some way because of the limited role of the custodian trustee?

3.11 In response to this submission, clause 41 provides that, in Part 3, 'trustee' includes 'custodian trustee'. This ensures that the duties in Part 3 of the Draft Bill, each of which applies to a trustee in 'administering a trust', will apply to a custodian trustee to the extent that the custodian trustee can be said to be administering the trust.⁴

3.12 Clauses 42 and 43 will almost always apply to a custodian trustee. However, the extent of the application of the duty in clause 44 to keep accounts and records for the trust will depend on whether the custodian trustee is, for example, merely holding the legal title to real estate for the trust or, alternatively, is engaged in selling and possibly even distributing trust property at the direction of the managing trustees. In the latter case, the nature of the custodian trustee's

³ See generally *Trusts Interim Report* (2013) [6.102]–[6.103], [6.145]–[6.146].

⁴ 'Custodian trustee' is defined in the Dictionary to mean a corporation appointed as a custodian trustee under cl 33.

activities will subject the custodian trustee to the duty to keep records of the relevant transactions (and to make any trust accounts available for inspection pursuant to clause 45).

DIVISION 2 GENERAL DUTIES

Clause 42 Trustee's general duty in administering a trust

3.13 Clause 42 is a new provision, which states a trustee's general duty in administering a trust. With one minor modification, it implements Recommendation 6-1 of the Interim Report.⁵

3.14 At present, existing section 22(1) of the *Trusts Act 1973* (Qld) imposes a specific duty of care that applies to trustees when exercising a power of investment. However, the Act does not contain a duty of care that applies more widely to the exercise of trustees' other powers. The Commission considers it particularly important that the Draft Bill should impose a general duty of care as a safeguard for the proper exercise of the wider powers that are conferred on trustees under Part 5 of the Draft Bill.⁶

3.15 In the Interim Report, the Commission recommended that a new statutory duty of care should apply generally to a trustee in administering the trust, and that the new duty should be framed in terms that are largely consistent with existing section 22(1).⁷

3.16 As explained in the Interim Report, existing section 22(1) employs language similar to that used by Lindley LJ in *Re Whiteley*,⁸ and thereby places a greater emphasis on the fact that the trustee is not simply managing his or her own affairs, but those of another person. It also imposes a higher standard of care on a trustee whose profession, business or employment is, or includes, acting as a trustee.

3.17 Having regard to the statements of Finn J in *ASC v AS Nominees Ltd*,⁹ the Commission further recommended in the Interim Report that the higher standard of care should be imposed not only on a trustee whose profession, business or employment is, or includes, acting as a trustee, but also on a trustee who has, or holds himself or herself out as having, special knowledge or experience.¹⁰

⁵ See generally *Trusts Interim Report* (2013) [6.97]–[6.101].

⁶ See *Trusts Interim Report* (2013) Rec 7-1 and Draft Trusts Bill 2013, cl 59.

⁷ *Trusts Interim Report* (2013) [6.98]–[6.99], Rec 6-1(a)–(b).

⁸ (1886) 33 Ch D 347, 355, quoted in *Trusts Interim Report* (2013) [6.47].

⁹ (1995) 62 FCR 504, 517–18, discussed in *Trusts Interim Report* (2013) [6.51]–[6.52].

¹⁰ *Trusts Interim Report* (2013) [6.100], Rec 6-1(c).

Professional trustees

3.18 Clause 42(2) states the duty of a trustee whose profession, business or employment is, or includes, acting as a trustee. It provides that the trustee has a duty, in administering the trust, to exercise the care, diligence and skill¹¹ that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons. This is intended to apply whether or not the person is being paid for acting as a trustee in relation to the particular trust.

3.19 The duty imposed by clause 42(2) is based on the almost identical duty in existing section 22(1)(a), which applies if the trustee's profession, business or employment is, or includes, 'acting as a trustee *or investing money for other persons*'. However, because clause 42 imposes a general duty on trustees, it omits the reference to a trustee whose profession, business or employment is, or includes, 'investing money for other persons'.

3.20 Instead, that particular aspect of existing section 22(1)(a) is provided for by clause 48(1), which states the duty, in exercising an investment power, of a trustee whose profession, business or employment is, or includes, 'investing money for other persons'.

Trustees with special knowledge or experience

3.21 As mentioned above, in the Interim Report, the Commission recommended that a trustee who has, or holds himself or herself out as having, special knowledge or experience should also be subject to the higher standard of care mentioned in existing section 22(1)(a).

3.22 However, because the higher standard of care that applies to a trustee to whom clause 42(2) applies is the care, diligence and skill that a prudent person engaged in *that* profession, business or employment would exercise in managing the affairs of other persons, the relevant standard is referable to the profession, business or employment of the particular trustee. It has therefore been necessary to modify that standard slightly for a trustee who is not a person whose profession, business or employment is, or includes, acting as a trustee, but is a person who has, or holds himself or herself out as having, special knowledge or experience that is relevant to administering a trust.

3.23 Because the relevant factor in imposing the higher standard in this instance is special knowledge or experience, rather than a profession, business or employment of acting as a trustee, clause 42(3) requires the trustee 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.

3.24 This will impose a higher standard of care on such trustees, and adopts a similar structure to clause 42(2), but does not impose an identical standard of care to that provision.

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Draft Trusts Bill 2013, cl 42(6) defines 'care' to include 'diligence and skill'.

3.25 A condition for the application of clause 42(3) is that clause 42(2) does not apply. That condition has been included simply to ensure that there is no overlap between the two subclauses, given that professional trustees (who are subject to the duty in clause 42(2)) will generally have special knowledge or experience that is relevant to administering a trust.

3.26 Clause 42(3) will fill an important gap by applying to persons whose profession, business or employment is not, or does not include, acting as a trustee but who nevertheless have, or hold themselves out as having, relevant knowledge or experience above that of a prudent person of business. It will, for example, apply to people who were, but are no longer, professional trustees, as well as to people in other relevant professions, such as accountants. As with the duty in clause 42(2), this will apply whether or not the person is being paid for acting as a trustee.

Other trustees

3.27 Clause 42(4) applies if a trustee is not a person mentioned in clause 42(2) or (3). It provides that the trustee has a duty, in administering the trust, to exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of other persons. This is consistent with the ordinary standard of care that applies under existing section 22(1)(b).

3.28 However, because it is possible that a trustee may have expertise in investing money for other persons, but not be a person to whom clause 42(2) or (3) applies, clause 42(5) provides that the general duty of care imposed by clause 42(4) does not limit clause 48. This approach ensures that, to the extent that such a trustee is exercising an investment power, the trustee is subject to the higher standard of care imposed by clause 48.

Clause 43 Trustee's duty to act honestly, etc.

3.29 Clause 43 is a new provision. With one minor modification, it implements Recommendation 6-2 of the Interim Report.

3.30 Some of the duties of a trustee have been described as 'core' duties, in the sense that they are so fundamental that their exclusion would be repugnant to the existence of a trust relationship.¹² In particular, in *Armitage v Nurse*, Millett LJ stated that the duty of the trustee 'to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary' to give substance to the trust.¹³

3.31 The Commission considers that it is desirable for the Draft Bill to include a provision that reflects this statement of the core duties of trustees. Accordingly,

¹² See, eg, D Hayton, 'The Irreducible Core Content of Trusteeship' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press, 1996) 47, 57–8.

¹³ [1998] Ch 241, 253–4, cited, for example, in *Rankine v Rankine* (Unreported, Supreme Court of Queensland, de Jersey CJ, 3 April 1998).

clause 43(a) and (b)(ii) provides that a trustee must, in administering the trust, act honestly and in good faith and for the benefit of the beneficiaries.¹⁴

3.32 Recommendation 6-2 provided, in part, for trustees to act 'for the benefit of the beneficiaries'. On further consideration, the Commission is of the view that the Draft Bill should additionally provide that, in the case of a charitable trust, trustees must act 'to further the purposes of the trust'. This recognises that charitable trusts have purposes, rather than beneficiaries, as their objects, and reflects the general law duty of trustees of charitable trusts to ensure that the purposes of the trust are fulfilled so far as possible.¹⁵ This is implemented by clause 43(b)(i). A similar provision has recently been recommended by the Law Commission of New Zealand.¹⁶

3.33 Whereas the duty of care imposed by clause 42 of the Draft Bill is an expression of the general duty of prudence, the duty imposed by clause 43 is an expression of the general duty of loyalty.

DIVISION 3 OTHER DUTIES

Clause 44 Trustee's duty to keep records and accounts

3.34 Clause 44 is a new provision that implements Recommendation 6-4 of the Interim Report.

3.35 The Commission considers that the duty to keep accounts and records should be included in the Draft Bill as an important reminder, particularly to non-professional trustees, of what has been described as one of a trustee's first and ordinary duties.¹⁷ Along with the duty to provide accounts, this has been identified as one of the 'subrules of fiduciary administration' that is subsumed by the obligations of loyalty and prudence.¹⁸

3.36 The Commission therefore recommended in the Interim Report that trustees should be required:¹⁹

- to keep accurate accounts and records of the administration of the trust; and
- to maintain the accounts and records for a minimum period of three years after the termination of the trust.

¹⁴ See generally *Trusts Interim Report* (2013) [6.142]–[6.144], Rec 6-2.

¹⁵ See, eg, *Canterbury Orchestra Trust v Smitham* [1978] 1 NZLR 787, 809 (Woodhouse J); *Re The Church of England Trusts Corporation (Wangaratta)* [1924] VLR 201, 206 (Weigall AJ).

¹⁶ Law Commission of New Zealand, *Review of the Law of Trusts*, Report No 130 (2013) 19, Rec 2(1)(d).

¹⁷ See *Wroe v Seed* (1863) 4 Giff 425, 429; 66 ER 773, 774–5 (Stuart V-C); *McDonald v Ellis* (2007) 72 NSWLR 605, 613 (Bryson AJ).

¹⁸ See, eg, JH Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 *Yale Law Journal* 625, 656. For a more detailed discussion of the general law duty to keep accounts and other records, see *Trusts Interim Report* (2013) [6.147]–[6.156].

¹⁹ See *Trusts Interim Report* (2013) [6.176], [6.178], Rec 6-4(a), (c).

3.37 The Commission also recommended that trustees who are administering more than one trust should be required to keep separate accounts and records for each trust.²⁰

3.38 These recommendations are given effect by clause 44, which applies to a trustee in administering a trust.

3.39 Although clause 44 specifies the minimum time for which the documents must be kept, there may be other circumstances that would make it prudent for, or other obligations that require, trustees to keep documents for a longer period.²¹

Clause 45 Trustee's duty to provide accounts

3.40 Clause 45 is a new provision. It implements Recommendations 6-5 and 6-6 of the Interim Report.²²

3.41 The duty of trustees to account to the beneficiaries is regarded as one of the 'essential' ingredients of trusteeship,²³ and one of the important fiduciary rules encompassed by the obligations of loyalty and prudence.²⁴

3.42 Although the current law in this area is relatively complex in many respects, the general law in Australia clearly recognises a minimum obligation on trustees to provide trust accounts, upon request, to both beneficiaries of fixed trusts and persons who are potential beneficiaries under discretionary trusts. It is also clear that the general law obligation is not absolute, but is subject to exceptions.²⁵

3.43 The Commission considers it desirable for these minimum disclosure requirements to be set out in the Draft Bill. Accordingly, clause 45(1)–(2), which implements Recommendation 6-5 of the Interim Report, provides that:

- a trustee, in administering a trust, has a duty to make the trust accounts available for inspection by a beneficiary of the trust on receiving reasonable notice unless, in the circumstances, it is unreasonable to make the accounts available; and
- the trustee must provide copies of the accounts to the beneficiary on payment of the reasonable costs of providing the copies, unless, in the circumstances, it is unreasonable to provide the copies.

²⁰ See *Trusts Interim Report* (2013) [6.177], Rec 6-4(b).

²¹ For example, if the trust is a charitable trust and is registered as a 'charity' with the Australian Charities and Not-for-Profits Commission, the trustee is to keep written financial records for seven years after the transactions to which those records relate: *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) ss 55-5, 180-20(1). That Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with the Act: s 185-5.

²² See generally *Trusts Interim Report* (2013) [6.257]–[6.261].

²³ D Hayton, 'The Irreducible Core Content of Trusteeship' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press, 1996) 47, 49; *Re Simersall* (1992) 35 FCR 584, 588–9 (Gummow J).

²⁴ JH Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 *Yale Law Journal* 625, 656.

²⁵ For a detailed discussion of the general law in relation to the duty to provide accounts and other information, and beneficiaries' correlative rights to obtain information, see *Trusts Interim Report* (2013) [6.179] ff.

3.44 Recommendation 6-5 was framed in terms of the inspection of accounts by, and the provision of copies to, a 'beneficiary or potential beneficiary'. That aspect of the recommendation is given effect by clause 45(4), which defines 'beneficiary', for clause 45, to mean a person entitled to a benefit under the trust, or a person in whose favour a power to distribute the trust property may be exercised. A definition in similar terms, covering both beneficiaries and potential beneficiaries, is included in the legislation in some other jurisdictions.²⁶

3.45 Clause 45(2) also includes an example of what might constitute an unreasonable request to provide copies of accounts under that clause, namely, where a beneficiary who has received copies of the accounts continues to request updated copies of the accounts at unreasonably short intervals. The Commission considers that this will improve the accessibility of the Draft Bill and will help to highlight, for both trustees and beneficiaries, that the duty is not absolute.

3.46 Given that this provision reflects the minimum disclosure obligations recognised under the general law, clause 45(3) clarifies that nothing in clause 45 limits the right of a beneficiary:

- to obtain other information from the trustee; or
- to apply to the court for an order that the trustee provide other information.

3.47 This gives effect to Recommendation 6-6 of the Interim Report.

APPLICATION OF PART 3 TO PARTICULAR TRUSTEES

3.48 In its submission in response to the Interim Report, QSuper queried 'whether the *Trusts Act 1973* should continue to apply in its entirety to regulated superannuation funds domiciled in Queensland given the broad extent of Commonwealth laws'.

Regulated superannuation entities

3.49 Superannuation entities are governed by the *Superannuation Industry (Supervision) Act 1993* (Cth) and related legislation. That Act is not intended to apply to the exclusion of State laws to the extent that those laws are capable of operating concurrently.²⁷

3.50 A regulated superannuation fund, such as QSuper, is a registrable superannuation entity within the meaning of the *Superannuation Industry (Supervision) Act 1993* (Cth).²⁸

²⁶ See, eg, *Trusts (Guernsey) Law, 2007* (Guernsey) s 80(1); *Trusts (Jersey) Law 1984* (Jersey) s 1(1).

²⁷ *Superannuation Industry (Supervision) Act 1993* (Cth) s 350.

²⁸ *Superannuation Industry (Supervision) Act 1993* (Cth) s 10(1) (definition of 'registrable superannuation entity' para (a)).

3.51 As explained in the Interim Report, that Act imposes certain ‘covenants’ on the trustees of registrable superannuation entities, including covenants:²⁹

- to act honestly in all matters concerning the entity;
- to exercise the same degree of care, skill and diligence as a prudent superannuation trustee would exercise in relation to an entity of which it is trustee and on behalf of the beneficiaries of which it makes investments; and
- to perform the trustee’s duties and exercise the trustee’s powers in the best interests of the beneficiaries.

3.52 The trustees of a registrable superannuation entity are also subject to:

- a requirement to keep accounting records of the transactions and financial position of the entity;³⁰
- a covenant to allow a beneficiary of the entity access to prescribed information and documents, including information that the beneficiary reasonably requires for the purposes of understanding his or her benefit entitlements and investments made by the entity, and copies of the fund’s governing rules, audited accounts, and, to the extent it is relevant to the fund’s overall financial condition or the person’s entitlements, the most recent actuarial report on the fund;³¹ and
- a requirement to give copies of particular documents, including audited accounts, to other persons on request.³²

Licensed trustee companies

3.53 Licensed trustee companies, which are regulated by the *Corporations Act 2001* (Cth), are similarly subject to requirements:

- to keep financial records of the transactions and financial position of the business being carried on by the licensee;³³ and
- upon application by a person with a proper interest in the estate, including a beneficiary, to provide the person with an account of the assets and liabilities of the estate, the trustee company’s administration or management

²⁹ *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(1), (2)(a)–(c). See generally *Trusts Interim Report* (2013) [6.57]–[6.61], [6.110]–[6.113].

³⁰ The records must conform to particular requirements and be kept for at least five years after the end of the year of income to which the transactions relate: *Superannuation Industry (Supervision) Act 1993* (Cth) s 35A. See also ss 35AB–35AD in relation to auditors and actuaries.

³¹ *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(2)(j); *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 4.01; *Corporations Act 2001* (Cth) s 1017C(2), (5); *Corporations Regulations 2001* (Cth) reg 7.9.45(2).

³² *Superannuation Industry (Supervision) Act 1993* (Cth) ss 31(1), 32(1), 33(1); *Superannuation Industry (Supervision) Regulations 1994* (Cth) regs 2.30(2), 2.33(2).

³³ *Corporations Act 2001* (Cth) ss 601RAA (definition of ‘licensed trustee company’), 988A–988G.

of the estate, and any investment, distribution or other expenditure made from the estate.³⁴

3.54 In addition, the officers of a licensed trustee company are subject to particular statutory duties, including the duties to act honestly, and to exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position.³⁵

3.55 These provisions are not intended to apply to the exclusion of the *Trusts Act 1973* (Qld).³⁶

The Commission's view

3.56 In the Commission's view, there is no need to exclude the application of any of the duties imposed by Part 3 of the Draft Bill either to the trustees of registrable superannuation entities or to licensed trustee companies. The minimum duties imposed by Part 3 are capable of operating concurrently with the similar obligations presently imposed on those entities by the relevant Commonwealth legislation. Further, the Commission considers that, as minimum obligations, the duties in Part 3 should apply to all trustees, whether or not those trustees are, or may become, subject to other, more specific statutory obligations or requirements.

³⁴ *Corporations Act 2001* (Cth) ss 601SBB(1), 601RAD(1)(c), (d)(iii).

³⁵ *Corporations Act 2001* (Cth) s 601UAA(1)(a)–(b).

³⁶ See *Corporations Act 2001* (Cth) ss 601RAE(2), (4)(b), 601SAC; *Corporations Regulations 2001* (Cth) reg 5D.1.04(3), sch 8AD item 16.

Part 4

Investments

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INTRODUCTION

4.1 Part 4 of the Draft Trusts Bill 2013 provides for the powers, duties and protections of trustees in relation to the investment of trust funds.

4.2 The provisions in this part of the Draft Bill are based on the existing provisions in Part 3 of the *Trusts Act 1973* (Qld). As explained in the Interim Report, the provisions in Part 3 of the current Act were substituted by amendments made in 1999 to provide a more modern legislative framework for the regulation of trustees' powers of investment, which was similarly adopted in the other Australian jurisdictions.¹

4.3 Those provisions of the current Act that have not been retained in the Draft Bill are identified in Appendix C to this Report as 'omitted provisions'.

Clause 46 Application

4.4 Clause 46 replaces existing section 20. It provides that Part 4 of the Draft Bill applies despite a contrary intention in a trust instrument, unless otherwise provided by that part. In contrast, existing section 20 provides only that sections 29–30C (rather than all of the provisions in Part 3 of the Act) apply despite anything contained in the trust instrument.

¹

See *Trusts Interim Report* (2013) [5.3]–[5.4].

4.5 However, despite the difference in expression between the two application provisions, clause 46 has substantially the same effect as existing section 20.

4.6 Under the current Act, existing sections 21 and 23 are expressed to be subject to the trust instrument. Those exceptions are preserved by clauses 47(1)(a) and 50(1), which are based on existing sections 21 and 23, and are recognised by the expression ‘unless otherwise provided by this part’ that appears in clause 46.²

4.7 Further, although the current Act does not provide expressly that existing sections 22 and 24 apply despite a contrary intention in the trust instrument, there is no scope under the Act for a trust instrument to exclude the duties imposed by those sections or the effect of existing section 26. In certain circumstances, existing section 4(4) enables powers that are conferred under the Act to be excluded by a trust instrument, but it does not make any similar provision for a trust instrument to exclude provisions of the Act that impose duties or that provide for other matters. Accordingly, clauses 48, 49, 51 and 52 (which replace existing sections 22(1)(a) and (3), 24 and 26) have the same application as the provisions that they replace.

4.8 By virtue of existing section 20, existing sections 30–30C currently apply despite anything contained in the trust instrument.³ Clause 46 ensures that clauses 54–57, which replace those provisions, have the same application.

4.9 The only provision in Part 4 of the Draft Bill that has a different application is clause 53, which replaces existing section 28 and enables a trustee to provide a residence for a beneficiary to live in. Whereas the powers conferred under existing section 28(1) — but not the power conferred under existing section 28(2) — can presently be excluded by the trust instrument, the similar powers conferred under clause 53(1) are not capable of being excluded. That change gives effect to Recommendation 5-5(a) of the Interim Report that the provisions based on existing section 28(1)–(2) should apply whether or not a contrary intention is expressed in the trust instrument.

4.10 Because clause 46 deals with the application of all of the provisions in Part 4 of the Draft Bill, it provides greater certainty than existing section 20, which provides for the application of only some of the provisions in Part 3 of the current Act, leaving the application of other provisions to turn on a consideration of the nature of the particular provision (for example, whether it confers a power or imposes a duty) and, if the provision confers a power, the effect of existing section 4(4).

Clause 47 Power to invest

4.11 The Draft Bill continues the policy approach of the *Trusts Act 1973* (Qld) by providing for trustees to take a portfolio approach to the investment of trust funds. It achieves this by giving trustees broad powers of investment under clause 47(1), subject to the other requirements of the Draft Bill:

² However, as explained at [4.12] ff below, cl 47 of the Draft Trusts Bill 2013 modifies the extent to which the powers currently conferred under s 21 of the *Trusts Act 1973* (Qld) may be expressly forbidden by the trust instrument.

³ The Draft Trusts Bill 2013 does not include a provision to the effect of s 29 of the *Trusts Act 1973* (Qld).

- to comply with the general duty of care imposed by clause 42 or with the more specific duty of care imposed by clause 48;
- to comply with the duties imposed by the various rules or principles of law or equity, which are preserved by clause 50; and
- to have regard to the matters mentioned in clause 51.

Conferral of a broad investment power

4.12 Clause 47(1) is generally based on existing section 21. With minor modifications, it implements Recommendation 5-1 of the Interim Report.

4.13 Currently, existing section 21 provides that a trustee may, unless expressly forbidden by the trust instrument:

- invest trust funds in any form of investment; and
- at any time, vary an investment or realise an investment of trust funds and reinvest an amount resulting from the realisation in any form of investment.

4.14 Clause 47(1) changes the extent to which those powers may be expressly forbidden by the trust instrument.

4.15 Under clause 47(1)(a), the investment of trust funds in a particular form of investment will still be able to be expressly forbidden by the trust instrument. Where statutory powers of investment are conferred 'unless expressly forbidden' by the trust instrument, 'negative words' or an 'express veto' are required to exclude those powers.⁴ It is not sufficient that the instrument directs the trust property to be invested in a certain way or, by implication, forbids certain investments.⁵ As a result, clause 47(1)(a) recognises a settlor's autonomy to set limits on the permissible forms of investment, but sets a high bar for establishing those limits.

4.16 However, the effect of clause 47(1)(b) is that a settlor will no longer be able to forbid the trustee from varying an investment of trust funds, or from realising an investment of trust funds and reinvesting an amount resulting from the realisation.

4.17 The Commission considers that this change will ensure that, within the range of permissible investments, a trustee has the powers necessary to manage the trust investments effectively. This approach is also more consistent with clause 59(3)(a), which provides that the power to sell the trust property may not be excluded or modified by the trust instrument.⁶ It therefore avoids any conflict between the specific power under clause 47(1)(b)(ii) to realise an investment of

⁴ *Re Maire* (1905) 49 Sol Jo 383, 383 (Farwell J). See also *Re Rider's Will Trusts* [1958] 1 WLR 974, where the will directed the trustees to invest the trust moneys in specified stocks or real securities 'but not otherwise'.

⁵ *Re Burke* [1908] 2 Ch 248, 250 (Neville J).

⁶ This change also removes the ambiguity under the *Trusts Act 1973* (Qld) in the relationship between the power to realise an investment under s 21(b), which can be expressly forbidden by the trust instrument, and the power to sell trust property under s 32(1)(a), which applies whether or not a contrary intention is expressed in the trust instrument (s 31(1)).

trust funds for the purpose of reinvesting an amount resulting from the realisation and the non-excludable general power of sale conferred under clause 59(1).

4.18 Clause 47(3) further clarifies that a trustee must not, when reinvesting an amount realised under clause 47(1)(b)(ii), reinvest the amount in a form of investment that is expressly forbidden by the trust instrument.

The effect of a requirement to obtain a consent or approval or to comply with a direction

4.19 Clause 47(2) replaces, but is to the same effect as, existing section 22(2). It provides that a trustee must, in exercising power under clause 47(1), comply with a provision of the trust instrument that is binding on the trustee and requires the obtaining of a consent or approval or compliance with a direction for trust investments. It has been relocated to this provision because it operates as a limitation on the exercise of the trustee's power to invest.

The relationship between clauses 47 and 53

4.20 Clause 47(4) is a new provision. It provides that a trust instrument cannot limit a trustee's power under clause 53.

4.21 As mentioned earlier, the power conferred under clause 53 to provide a residence for a beneficiary to live in is intended to apply despite a contrary intention in the trust instrument.

4.22 Clause 47(4) ensures that, if a trust instrument expressly forbids the trustee from investing in real property, the instrument does not limit the trustee's power under clause 53 to buy real property for a beneficiary to use as a residence.

Clause 48 Professional trustee's duty of care in exercising investment power

4.23 Clause 48 replaces existing section 22(1)(a), in part.

4.24 Existing section 22(1) currently imposes a duty of care on trustees in the exercise of their investment powers, reflecting what is commonly referred to as the 'prudent person' rule.

4.25 Existing section 22(1)(b) requires a trustee to exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of other persons. However, existing section 22(1)(a) imposes a higher standard of care if the trustee's profession, business or employment is, or includes, '*acting as a trustee or investing money for other persons*'. In that case, the trustee must exercise the care, diligence and skill that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons.

4.26 In the Interim Report, the Commission recommended the retention of a provision to the effect of existing section 22. It also recommended that, for consistency with the new general duty of care, this provision should impose a

higher standard of care on a trustee who has, or holds himself or herself out as having, special knowledge or experience.⁷

4.27 The Commission noted the possibility, however, that, because the general duty of care was itself to be based on existing section 22, existing section 22 might not continue to be reflected as a separate provision.⁸

4.28 In accordance with Recommendation 6-1 of the Interim Report, clause 42 of the Draft Bill states a trustee's general duty in administering a trust, and provides separately that:

- if the trustee is a person whose profession, business or employment is, or includes, *acting as a trustee*, the trustee has a duty, in administering the trust, to exercise the care, diligence and skill⁹ that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons (clause 42(2));
- if the trustee is a person who has, or holds himself or herself out as having, special knowledge or experience relevant to administering a trust and clause 42(2) does not apply, the trustee has a duty, in administering the trust, 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 (clause 42(3)); and
- if the trustee is not a person mentioned in clause 42(2) or (3), the trustee has a duty, in administering the trust, to exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of other persons (clause 42(4)).

4.29 To the extent that existing section 22(1)(a) imposes a higher standard of care on a trustee whose profession, business or employment is, or includes, *acting as a trustee*, that duty is now provided for by clause 42(2) and it is not necessary to duplicate that duty in clause 48. The duty imposed by clause 42(2) will apply whether the trustee is exercising a power of investment or exercising another power in the administration of the trust.

4.30 Similarly, to the extent that existing section 22(1)(b) requires a trustee who has no special qualifications to exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of other persons, that duty is now provided for by clause 42(4), and it is not necessary to duplicate that duty in clause 48. The duty imposed by clause 42(4) will likewise apply whether the trustee is exercising a power of investment or otherwise administering the trust.

4.31 However, to the extent that existing section 22(1)(a) imposes a higher standard of care on a trustee whose profession, business or employment is, or includes, *investing money for other persons*, that duty continues to be separately provided for by clause 48(1).

⁷ *Trusts Interim Report* (2013) [5.31], Rec 5-2.

⁸ *Ibid* [5.31].

⁹ Draft Trusts Bill 2013, cl 42(6) defines 'care' to include 'diligence and skill'.

4.32 Clause 48(1) provides that, if a trustee is a person whose profession, business or employment is, or includes, investing money for other persons, the trustee has a duty, in exercising an investment power, to exercise the care, diligence and skill¹⁰ that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons.

4.33 Clause 48(2) also imposes a higher standard of care on a trustee who has, or holds himself or herself out as having, special knowledge or experience in investing money for other persons. Such a trustee has a duty 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. This is consistent with the general duty of care imposed on such a trustee by clause 42(3) and implements Recommendation 5-2 of the Interim Report.

4.34 The narrower scope of clause 48, as compared with existing section 22, is reflected in the new heading for the provision.

Clause 49 Trustee's duty to review investments

4.35 Clause 49 replaces, but is generally to the same effect as, existing section 22(3). It requires a trustee, at least every 12 months, to review the performance, individually and as a whole, of the trust investments.

4.36 It uses the expression 'at least every 12 months', rather than 'at least once in each year' (as appears in existing section 22(3)), to ensure that there cannot be more than 12 months between reviews. Under existing section 22(3), the requirement to review the performance of the trust investments would arguably be satisfied by a review at the beginning of one calendar year, followed by a review at the end of the next calendar year, even though there would be almost 24 months between the two reviews.

Clause 50 Law and equity preserved

4.37 Clause 50 replaces, but is to the same effect as, existing section 23.

4.38 The effect of clause 50(1) is to preserve all the rules or principles of law or equity that impose a duty on a trustee exercising a power of investment, except to the extent that they are inconsistent with the Draft Bill or another Act or the trust instrument.¹¹ The inclusion of a provision in these terms avoids the need to specify all of the rules and principles that apply to trustees when exercising an investment power.¹²

¹⁰ Draft Trusts Bill 2013, cl 48(3) defines 'care' to include 'diligence and skill'.

¹¹ The equivalent provisions in the other Australian jurisdictions are expressed in the same terms: *Trustee Act 1925* (ACT) s 14B(1); *Trustee Act 1925* (NSW) s 14B(1); *Trustee Act* (NT) s 7(1); *Trustee Act 1936* (SA) s 8(1); *Trustee Act 1898* (Tas) s 9(1); *Trustee Act 1958* (Vic) s 7(1); *Trustees Act 1962* (WA) s 19(1).

¹² See *Trusts Interim Report* (2013) [5.18] ff for a more detailed discussion of this issue.

4.39 However, without limiting the rules or principles mentioned in clause 50(1), clause 50(2) provides that they include a rule or principle imposing:

- a duty to exercise the powers of a trustee in the best interests¹³ of all present and future beneficiaries of the trust;
- a duty to invest trust funds in investments that are not speculative or hazardous;¹⁴
- a duty to act impartially towards beneficiaries and between different classes of beneficiaries; and
- a duty to obtain advice.¹⁵

4.40 Like existing section 23(3), clause 50(3) provides that 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.¹⁶

Clause 51 Matters to which trustee must have regard in exercising investment power

4.41 Clause 51 replaces, but is to the same effect as, existing section 24.

4.42 Clause 51(1) includes a non-exhaustive list of matters to which a trustee must have regard when exercising an investment power, 'to the extent that they are appropriate to the circumstances of the trust'.¹⁷ The relevance of particular matters in the list will vary depending on the type and purpose of the particular trust.

4.43 Clause 51(2) clarifies that a trustee may obtain, and if obtained must consider, independent and impartial advice reasonably required for the investment of trust funds or the management of the investment from a person whom the trustee reasonably believes to be competent to give the advice. It also clarifies that a trustee may pay the reasonable costs of obtaining the advice out of trust funds.

¹³ The 'best interests' of the beneficiaries are usually 'their best financial interests': *Cowan v Scargill* [1985] 1 Ch 270, 287 (Megarry V-C), cited in *Willett v Fletcher* [2004] QCA 30, [19] (Davies JA, Jones and Holmes JJ).

¹⁴ See *Learoyd v Whiteley* (1887) 12 App Cas 727, 733 (Lord Watson).

¹⁵ In exercising a power of investment, a trustee has a duty to seek advice on matters that he or she does not understand: *Cowan v Scargill* [1985] 1 Ch 270, 289 (Megarry V-C). See *Trusts Interim Report* (2013) [6.30] ff.

¹⁶ For a discussion of the extent to which a trustee's duties may be excluded, see JRF Lehane, 'Delegation of Trustees' Powers and Current Developments in Investment Funds Management' (1995) 7 *Bond Law Review* 36; D Hayton, 'The Irreducible Core Content of Trusteeship' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press, 1996) 47; PF Hanrahan, 'The Responsible Entity as Trustee' in I Ramsay (ed), *Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford* (LexisNexis Butterworths, 2002) 227, 245–8.

¹⁷ See further *Trusts Interim Report* (2013) [5.23]–[5.25].

Clause 52 Investment in securities under RITS

4.44 Clause 52 replaces, but is to the same effect as, existing section 26. It does not confer any particular power on a trustee, but clarifies the effect of a trustee's use of the electronic processes of the Reserve Bank Information and Transfer System ('RITS').¹⁸

4.45 Clause 52(1) provides that a chose in action arising under RITS that entitles its holder to a security of a particular description (the 'underlying security') is, for the Draft Bill and the trust instrument, taken to be the same in all respects as the underlying security. Clause 52(2) further provides that the holding or acquisition by a trustee of a chose in action mentioned in clause 52(1) is taken to be an investment by the trustee in the underlying security.

4.46 As the Explanatory Note to the equivalent New South Wales provision explained:¹⁹

A trustee wishing to invest in securities using the RITS system may be prevented from doing so because the actual securities are vested in the Reserve Bank while they are held in the system and the trustee obtains only a right (a legal chose in action) to securities of the same description.

The Bill inserts a new section into the Act which will equate a chose in action under the RITS system with a security of the description to which the trustee is entitled under the chose in action. A trustee who holds or acquires such a chose in action will be regarded as having invested in the underlying security.

Clause 53 Power to provide residence for beneficiary to live in

4.47 Clause 53 replaces, but is to the same general effect as, existing section 28. With minor modifications, it implements Recommendation 5-5 of the Interim Report.

4.48 As with existing section 28, clause 53 overcomes the previous narrow interpretation of 'investment', which had the effect that the purchase of a residence for the use and enjoyment of a beneficiary, rather than for a financial purpose, was not considered to be an 'investment' because it did not generate a profit or income.²⁰

4.49 The power conferred under clause 53 is especially important in the case of a beneficiary who has been left a life interest in the family home, since it enables the trustee to buy another residence for the beneficiary to live in if it becomes necessary to sell the family home because it has become unsuitable for the beneficiary.

¹⁸ See generally *Trusts Discussion Paper* (2012) [6.89]–[6.90].

¹⁹ Explanatory Note, Trustee (Amendment) Bill 1993 (NSW) 1, in relation to the provision that is now s 14F of the *Trustee Act 1925* (NSW).

²⁰ *Re Sherriff* [1971] 2 NSWLR 438, 442–3 (Helsham J).

Modernising the language of the provision

4.50 In accordance with Recommendation 5-5(b), clause 53 modernises the language of existing section 28 by referring to a ‘residence’ rather than a ‘dwelling house’.

4.51 Paragraphs (a) and (b) of the inclusive definition of ‘residence’ in clause 53(5) reflect the current definition of ‘dwelling house’ in existing section 28(5). Paragraph (c) of the definition is new, and refers to ‘an interest in a residence’, thereby ensuring that the provision will apply even if the trustee is not buying the entire interest in the residence.

Clarification that power may be used to construct a residence

4.52 Clause 53(1)(a) makes a slight change to existing section 28(1)(a) by adding a specific reference to the power to ‘construct’ a residence for a beneficiary to live in.²¹

4.53 It is arguable that the power to buy a residence would, in any event, include the power to construct a residence. However, by making express reference to the power to construct a residence, clause 53(1) removes any uncertainty about that issue. This ensures that it is possible to provide a residence for a beneficiary whose needs may require purpose-built accommodation.

Limitations on the exercise of power under clause 53

4.54 Clause 53(2)–(3) generally replaces existing section 28(3). However, because clause 53(3) operates as a limitation on both the exercise of power under clause 53(1) and the imposition of conditions under clause 53(2), it makes it clearer that the acquisition, construction, retention or securing of a residence for a beneficiary to live in, as well as the conditions on which the residence is made available to the beneficiary, must be consistent with the extent of the beneficiary’s interest under the trust.²²

4.55 Clause 53(3) does not, however, expressly require the exercise of power to be ‘consistent with the trust’. Those words, which appear in existing section 28(3), have been omitted to remove any potential conflict between this clause and clause 47(4).²³ In the Commission’s view, it is a sufficient limitation on the exercise of power under clause 53 that it must be consistent with the extent of the beneficiary’s interest under the trust.

²¹ A similar power is included in s 49(1)(c) of the *Public Trustee Act 1978* (Qld).

²² In this respect, cl 53 of the Draft Trusts Bill 2013 is closer to former s 22 of the *Trusts Act 1973* (Qld), as passed, which was replaced by existing s 28 when pt 3 of the Act was substituted by the *Trusts (Investments) Amendment Act 1999* (Qld).

²³ Draft Trusts Bill 2013, cl 47(4) provides that a ‘trust instrument can not limit a trustee’s power under section 53’.

4.56 Nor does clause 53 include a provision to the effect of existing section 28(2), which provides:²⁴

Despite the terms of the instrument creating the trust, a trustee may, if to do so would not unfairly prejudice the interests of other beneficiaries, retain as part of the trust property a dwelling house for a beneficiary to use as a residence.

4.57 The limitation in existing section 28(2) applies only to the current power under that provision to retain a dwelling house, and does not apply to the power under existing section 28(1) to purchase a dwelling house or to enter into an agreement to secure the right for a beneficiary to use a dwelling house as a residence.

4.58 The Commission considers that the concept of ‘*unfair prejudice*’ in existing section 28(2) is ambiguous, and that the interests of the other beneficiaries are better protected by the new clause 53(3), which applies to the exercise of each of the specific powers conferred under clause 53(1).

Residence contracts under the Retirement Villages Act 1999 (Qld)

4.59 In the Interim Report, the Commission recommended that the provision based on existing section 28 ‘should clarify that it enables a trustee, in appropriate circumstances, to purchase an interest in a retirement village’.²⁵

4.60 In its submission in response to the Interim Report, the Queensland Law Society submitted that:

there should be further clarification as to when it is appropriate to purchase an interest in a retirement village. To that end, we seek examples of what is intended under the heading ‘for the avoidance of doubt’.

4.61 The Queensland Law Society had earlier submitted in response to the Discussion Paper that existing section 28 should be extended to apply to those types of retirement village arrangements that include ‘the capacity to participate in capital growth’.²⁶

4.62 Section 10 of *Retirement Villages Act 1999* (Qld) sets out the requirements for a ‘residence contract’ including, in section 10(4)(a), that a residence contract must either:

- (i) purport to give a person, or give rise to a person having, an exclusive right to reside in an accommodation unit²⁷ in the retirement village; or
- (ii) provide for, or give rise to, obligations on a person in relation to the person’s or someone else’s residence in the retirement village; ...
(note added)

²⁴ Former s 22 of the *Trusts Act 1973* (Qld), as passed, did not include an equivalent provision.

²⁵ *Trusts Interim Report* (2013) Rec 5-5(c).

²⁶ See *Trusts Interim Report* (2013) [5.85] ff. In this regard, see n 31 below.

²⁷ ‘Accommodation unit’ means the part of a retirement village in which a resident has an exclusive right to reside: *Retirement Villages Act 1999* (Qld) s 4, sch (definition of ‘accommodation unit’).

4.63 The *Retirement Villages Act 1999* (Qld) does not prescribe how a resident is to hold title to an accommodation unit in the village, and retirement village operators have devised numerous ways in which to record a resident's right to reside in a unit, including freehold title (but subject to restrictions on disposal), leasehold title, licences, loan arrangements, and share scheme arrangements.²⁸

4.64 On further consideration, the Commission has decided that clause 53 should not refer expressly to the *Retirement Villages Act 1999* (Qld) in the definition of 'residence' in clause 53(5).

4.65 The Commission considers that the change in terminology from 'dwelling house' to 'residence', combined with the powers conferred under clause 53(1)(a) and (c), are sufficient to enable a trustee to enter into a residence contract, without making express reference in the provision to the *Retirement Villages Act 1999* (Qld). The Commission is also concerned that, if the definition of 'residence' in clause 53(5) included an express reference to a 'residence contract under the *Retirement Villages Act 1999* (Qld)', it could, by implication, be taken to exclude other forms of accommodation that are not specifically mentioned.

4.66 However, as an illustration of the power conferred under clause 53(1)(c), that provision includes, as an example, 'entering into a residence contract under the *Retirement Villages Act 1999*'. The inclusion of this example does not, of course, limit the meaning of the substantive provision in clause 53(1)(c).²⁹

4.67 Whether a trustee may exercise the power under clause 53 to enter into a residence contract will always depend on whether, having regard to the terms of the particular contract, the exercise of the power would meet the requirement in clause 53(3) that it is consistent with the extent of the beneficiary's interest under the trust. That will inevitably involve a consideration of the terms of the trust as well as the terms of the individual contract, particularly in relation to any service agreements³⁰ that form part of the contract and the nature of the exit entitlement³¹ provided for under the contract. Those are matters that can only be considered on a case-by-case basis.

The effect of a contrary intention in the trust instrument

4.68 In the Interim Report, the Commission observed that existing section 28 takes two different approaches to the effect of a contrary intention in the trust

²⁸ B Herd and J O'Brien, 'Other accommodation options' in N Lusk (ed), *The Queensland Law Handbook* (Caxton Legal Centre Inc, 10th ed, 2009) 457.

²⁹ See *Acts Interpretation Act 1954* (Qld) s 14D(b).

³⁰ A residence contract may include a 'service agreement', which is an agreement between a person and a scheme operator under which 'general services' or 'personal services' are to be supplied to a person who becomes a resident of a retirement village: *Retirement Villages Act 1999* (Qld) s 12.

³¹ An 'exit entitlement' is the amount that a scheme operator may be liable to pay to, or credit the account of, a former resident under a residence contract arising from the resident ceasing to reside in the accommodation unit, or the settlement of the sale of the right to reside in the accommodation unit: *Retirement Villages Act 1999* (Qld) s 16. Some retirement village operators allow a person to receive, as part of the exit entitlement, any capital gain made on the resale of the unit or at least to share in that capital gain with the operator: B Herd and J O'Brien, 'Other accommodation options' in N Lusk (ed), *The Queensland Law Handbook* (Caxton Legal Centre Inc, 10th ed, 2009) 464.

instrument. The power conferred under existing section 28(1) may be excluded by the trust instrument, but the power conferred under existing section 28(2) may not be so excluded.³²

4.69 The Commission considered that, on balance, the interests of beneficiaries who may benefit from the exercise of these powers outweigh the interests of a settlor in being able to exclude these powers. In coming to that view, the Commission noted that existing section 28(3) provides that a dwelling house that is purchased, retained or otherwise secured for use by a beneficiary under existing section 28(1) or (2) may be made available to the beneficiary 'on the conditions consistent with the trust and the extent of the beneficiary's interest that the trustee considers appropriate'.

4.70 In implementing Recommendation 5-5(a), the powers conferred under clause 53 will apply despite a contrary intention in a trust instrument. However, because that effect is now achieved by clause 46, which provides for the application of the provisions in Part 4 of the Draft Bill, it is not necessary for clause 53 to provide specifically for that issue.

Clause 54 Loans and investments by trustees not breaches of trust in particular circumstances

4.71 Clause 54 replaces, but is to the same effect as, existing section 30(1) and (3).³³ It implements Recommendation 5-8 of the Interim Report.

4.72 Clause 54(1) applies if a trustee lends trust funds on the security of property. It provides that the trustee is not in breach of trust only on the ground of the comparison of the loan amount with the value of the property when the loan was made if the conditions in either paragraph (a) or (b) of that provision are satisfied.

4.73 Clause 54(1)(a) is satisfied if it appears to the court that:³⁴

- in making the loan, the trustee was acting on an 'independent valuation of the property';³⁵
- the amount of the loan was not more than two-thirds of the value of the property (that is, of the value stated in the independent valuation); and
- the loan was made in reliance on the valuation.

³² See *Trusts Interim Report* (2013) [5.75] ff.

³³ See *Trusts Interim Report* (2013) [5.170] ff for a detailed discussion of s 30(1) of the *Trusts Act 1973* (Qld) and, in particular, the rules developed by the Courts of Equity in relation to the lending margins that should ordinarily be observed by trustees when lending on the security of real property.

³⁴ See further *Trusts Interim Report* (2013) [5.176]–[5.177].

³⁵ Draft Trusts Bill 2013, cl 54(3) defines 'independent valuation', of the property, to mean 'a valuation of the property made by a person whom the trustee reasonably believed to be competent to give the valuation and whom the trustee instructed and employed independently of any owner of the property'.

4.74 Clause 54(1)(b) is satisfied if the trustee is insured by an entity prescribed under a regulation carrying on the business of insurance against all loss that may arise because of the borrower's default.³⁶

4.75 Clause 54 is a purely protective provision. It does not confer the power to lend trust funds on the security of property. Nor does it restrict a trustee to lending two-thirds of the value of property.

4.76 Although clause 54(1)(a), like existing section 30(1)(a), could be said to adopt a somewhat arbitrary approach by protecting trustees who lend not more than two-thirds of the value of the mortgaged property,³⁷ the Commission considers that the provision provides a practical incentive for trustees not to lend more than that proportion of the mortgaged property. It therefore has the capacity to operate as a 'brake' on speculative lending,³⁸ while not preventing trustees from lending a greater proportion of the value of the property if it would be prudent to do so in the circumstances of the particular investment.

4.77 As with existing section 30(3), clause 54(2) provides that the provision applies to investments whether made before or after the commencement of that provision. However, clause 54(2) does not additionally provide, as existing section 30(3) does, that the provision applies to transfers of existing securities as well as to new securities. Because that is already provided for by clause 7 (which is based on existing section 5A), it is not necessary to repeat that in clause 54. In this respect, the Draft Bill removes the current duplication between existing sections 5A and 30(3).

Clause 55 Limitation of liability of trustee for loss on improper investment

4.78 Clause 55 replaces, but is to the same effect as, existing section 30A.³⁹ It implements Recommendation 5-9 of the Interim Report.

4.79 Ordinarily, the liability of a trustee who has committed a breach of trust is to 'put the trust estate or the beneficiary back into the position it would have been in had there been no breach'.⁴⁰ Where a trustee has lent an excessive amount on the security of a mortgage, the question that would otherwise arise is whether the amount that would put the trust estate back in that position is compensation in respect of the entire loss suffered on the investment or compensation in respect of only that part of the loan that was excessive (on the basis that a loan for the lesser amount would not have been a breach).

³⁶ See further *Trusts Interim Report* (2013) [5.178].

³⁷ For a more detailed discussion of the two-thirds lending rule, see *Trusts Discussion Paper* (2012) [6.151] ff; *Trusts Interim Report* (2013) [5.182] ff, [5.193] ff.

³⁸ The utility of the provision as a safeguard for beneficiaries stems from the fact that it restricts the trustee's protection to what is a fairly conservative lending margin. If that proportion were increased, the provision would be more likely to provide protection for what was, in fact, an imprudent loan.

³⁹ See generally *Trusts Interim Report* (2013) [5.231]–[5.233].

⁴⁰ *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 504 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ), quoting *Target Holdings Ltd v Redfern* [1996] AC 421, 437 (Lord Browne-Wilkinson).

4.80 Clause 55 avoids the causation argument that might otherwise arise as to the proper basis for assessing a trustee's liability in this context. As with existing section 30A, it treats the lesser amount that might properly have been lent as a proper investment, and limits the trustee's liability in respect of the investment to the difference between the actual amount lent and the lesser amount that might properly have been lent, plus interest.

4.81 The effect of the provision can be seen in this example. Suppose a trustee lends \$100 000 on the security of a mortgage and ultimately recovers \$55 000 of that amount. The loss on the investment is \$45 000. However, if the amount that might properly have been lent was \$80 000, the trustee's liability is limited to \$20 000, being the difference between the amount actually lent and the lesser amount that might properly have been lent, plus interest. The trustee is not liable for the part of the loss (\$25 000) that results from the depreciation in value of the property, but only for the part that results from the excessive amount lent. It has been noted that:⁴¹

This alters the rule formerly applied by which, in cases of improper investment, trustees were disallowed the whole amount of the investment if they were held liable for breach of trust. In such a case, the trustee took over the investment and paid to the trust estate the amount represented by the investment.

4.82 Clause 55 applies if the loan 'would have been a proper investment had the amount lent been less than the actual amount lent'. Accordingly, in order to obtain the protection of clause 55, a trustee must 'establish the propriety of the investment independently of value'.⁴² The provision will not apply if the investment was improper otherwise than as to the amount lent — for example, because the trustee made an investment that was not authorised,⁴³ or that was of 'such a kind that it ought never to have been made at all for any amount large or small'.⁴⁴

4.83 As with existing section 30A(2), clause 55(2) clarifies that the provision applies to investments whether made before or after the commencement of the provision.

Clause 56 Court may take into account investment strategy etc. in proceeding for breach of trust

4.84 Clause 56 replaces, but is to the same effect as, existing section 30B.

4.85 It provides that, in a proceeding against a trustee for a breach of trust in relation to the exercise of an investment power, the court may, when considering the question of the trustee's liability, take the following matters into account:

⁴¹ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1828].

⁴² *Re Walker* (1890) 59 LJ Ch 386, 391 (Kekewich J).

⁴³ *Ibid.* See also *Re Dive* [1909] 1 Ch 328, 341–2 (Warrington J).

⁴⁴ *Fouche v Superannuation Fund Board* (1952) 88 CLR 609, 637 (Dixon, McTiernan and Fullagar JJ). See also *Re Turner* [1897] 1 Ch 536, where Byrne J held (at 541–2) that the trustees could not rely on the equivalent English provision in s 9 of the *Trustee Act 1893*, 56 & 57 Vict, c 53 in respect of an investment that was 'most improvident'.

- the nature and purpose of the trust;
- whether the trustee had regard to the matters mentioned in clause 51 to the extent that they are appropriate to the circumstances of the trust;
- whether the trust investments have been made under an investment strategy formulated in accordance with the duty of a trustee under Part 4 of the Draft Bill; and
- the extent to which the trustee acted on the independent and impartial advice of a person competent, or apparently competent, to give the advice.

Clause 57 Power of court to set off gains and losses

4.86 Clause 57 replaces, but is to the same effect as, existing section 30C.

4.87 Clause 57 applies to a proceeding for breach of trust in relation to an investment by a trustee if a loss has been, or is expected to be, sustained by the trust. In that situation, the provision empowers the court to set off all or part of the loss resulting from the investment against any gain resulting from any other investment, whether in breach of trust or not.

4.88 The provision overcomes the 'anti-netting' rule, which prevented a loss on one investment by a trustee from being set off against a gain on another investment.⁴⁵

4.89 As with existing section 30C(2), clause 57(3) clarifies that the court's power under clause 57 is in addition to any other power to set off all or part of any loss against any property.

⁴⁵

Bartlett v Barclays Bank Trust Co Ltd (No 2) [1980] Ch 515, 538 (Brightman J).

Part 5

General Powers of Trustees

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INTRODUCTION

5.1 Part 5 of the Draft Trusts Bill 2013 provides for the general powers of trustees.

5.2 Many of these provisions are based on the existing provisions in Part 4 of the *Trusts Act 1973* (Qld), although some are new provisions that were recommended in the Interim Report.

5.3 The most significant new provision in Part 5 is clause 59, which confers on a trustee, in relation to the trust property, all the powers of an absolute owner of the property.

5.4 As explained in the Interim Report, the existing provisions in Part 4 of the *Trusts Act 1973* (Qld) that confer specific management powers on a trustee are lengthy, complex and prescriptive sections, which mostly originate from 19th century English trustee legislation.¹ They relate back to a time when land constituted the main form of wealth, and the trust was used principally as a device for holding and transferring land.² At that time, ‘trustees were not usually intended to exercise as wide powers of management and control as those that are usually intended to be conferred on trustees today’.³

5.5 During the last century, as economic and social conditions have changed, and commercial arrangements have become more complex, the use of trusts has expanded from being a land-holding device to an instrument of commercial activity.⁴ Trusts are now used for estate planning, commercial investment and trading, superannuation, charitable and other purposes.⁵

5.6 For this reason, the Commission recommended the enactment of a provision to give trustees broad and flexible general powers to deal with trust property, to better allow for the variety of forms and uses of modern trusts and the needs of trustees in managing trust property.⁶

¹ *Trusts Interim Report* (2013) [7.5].

² JH Langbein, ‘Why Did Trust Law Become Statute Law in the United States’ (2007) 58(5) *Alabama Law Review* 1069, 1072.

³ AW Scott and WF Fratcher, *The Law of Trusts* (Little, Brown, 4th ed, 1988) vol 3, §186. See also JH Langbein, ‘Why Did Trust Law Become Statute Law in the United States’ (2007) 58(5) *Alabama Law Review* 1069, 1073; *Trusts Interim Report* (2013) [2.2]–[2.8].

⁴ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [16.40]; JH Langbein, ‘Rise of the Management Trust’ (October 2004) 143 *Trusts & Estates* 52.

⁵ See *Trusts Discussion Paper* (2012) ch 3.

⁶ *Trusts Interim Report* (2013) Rec 7-1.

5.7 The enactment of such a provision is consistent with recent developments in trusts legislation in other jurisdictions.⁷

5.8 The Commission's recommendation is given effect by clause 59 of the Draft Bill, which, by virtue of its broad scope, has replaced most of the existing sections in the *Trusts Act 1973* (Qld) that confer specific management powers on trustees.

5.9 The remaining provisions in Part 5 of the Draft Bill are those that confer specific powers that are necessary to counter or modify particular equitable duties to which trustees would otherwise be subject (such as the power to postpone the sale of trust property that the trustee has a duty to sell) and administrative powers (such as the power to appoint agents).

DIVISION 1 PRELIMINARY⁸

Clause 58 Application of pt 5

5.10 Clause 58 replaces, but is to the same effect as, existing section 31(1).

5.11 The effect of clause 58 is that, generally, the provisions in Part 5 of the Draft Bill will apply whether or not there is a contrary intention in the trust instrument.

DIVISION 2 POWERS RELATING TO PROPERTY

Clause 59 General powers of trustee for trust property

5.12 Clause 59 is a new provision, which implements Recommendations 5-3(b), 7-1 to 7-3, 7-7 and 7-8 of the Interim Report.⁹

5.13 To the extent that they confer on trustees specific powers for the management and disposition of trust property, clause 59 replaces existing sections 25(1)–(3), 32(1)(a)–(b), (d)–(f) and (2)–(3), 33(1)(e)–(f), (h)–(i) and (k), 34–37, 38(1)–(2), 39–41, 44–45, 47(1)–(2), 50, 53, 57 and 58.

⁷

See, eg, *Trusts of Land and Appointment of Trustees Act 1996* (UK) c 47, s 6(1); *Trustee Act 2000* (UK) c 29, s 8(3); Unif Trust Code § 815(a) (amended 2010); *Trusts (Guernsey) Law, 2007* (Guernsey) s 30; *Trusts (Jersey) Law 1984* (Jersey) s 24(1). See also the proposals for similar provisions in Law Commission of New Zealand, *Review of the Law of Trusts*, Report No 130 (2013) 22, Rec 7(1); British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004), Proposed *Trustee Act*, cl 39; Scottish Law Commission, *Trustees and Trust Administration*, Discussion Paper No 126 (2004) [3.51], Proposal 9.A. These developments are discussed in *Trusts Discussion Paper* (2012) [8.19] ff; *Trusts Interim Report* (2013) [7.10] ff.

⁸

The Draft Trusts Bill 2013 does not include a provision to the effect of s 31(3) of the *Trusts Act 1973* (Qld). That provision, which imposes limitations on a statutory trustee's exercise of certain powers conferred under pt 4 of the current Act, is discussed at [13.3] ff below.

⁹

See *Trusts Interim Report* (2013) [5.50]–[5.51], [7.4] ff.

Clause 59(1)

5.14 Clause 59(1) confers on a trustee, in relation to the trust property, all the powers of an absolute owner of the property.

5.15 As explained above, the existing provisions in the *Trusts Act 1973* (Qld) give trustees specific, and, in some cases, more limited, powers of management and disposition. The general policy underlying clause 59(1) is that trustees should be given broad powers to manage the trust property, but be regulated in the *exercise* of those powers by their duties as trustees (including by the new general duty of care imposed by clause 42), rather than by the imposition of restrictions on the scope of the specific powers themselves.

5.16 The relationship between the trustee's exercise of a power conferred under clause 59(1) and the trustee's duties is made clear by the first two notes to clause 59(1).

5.17 The third note to clause 59(1) states that, for a personal representative, that clause is subject to new section 49B of the *Succession Act 1981* (Qld). This note has been included as a reminder to personal representatives that their power to carry on a business is governed by new section 49B of the *Succession Act 1981* (Qld), rather than the wider power conferred on trustees under clause 59(1).¹⁰

5.18 The enactment of clause 59(1) renders it unnecessary to include a provision to the effect of existing section 7A in the Draft Bill. That section expressly states that the exercise of a power under the current Act by a trustee is effectual to dispose of trust property free of any limitations, restrictions, powers, provisions, estates, interests and charges. Since clause 59(1) ensures that a trustee has, in relation to the trust property, all the powers of an absolute owner of the property, there would appear to be little benefit in retaining a provision to the effect of existing section 7A.

Clause 59(2)

5.19 As mentioned above, clause 58 provides that Part 5 of the Draft Bill 'applies despite a contrary intention in a trust instrument, unless otherwise provided' by that part.

5.20 The effect of a contrary intention in the trust instrument is specifically dealt with by clause 59(2), which provides that a power conferred under clause 59(1) may be excluded or modified by the trust instrument only by an express statement to that effect in the trust instrument. The purpose of this provision is to recognise and give effect to the settlor's autonomy, but to set a high bar for establishing the settlor's intention by not allowing a power conferred under clause 59(1) to be excluded or modified by implication.

¹⁰ Draft Trusts Bill 2013, cl 190, which inserts new s 49B of the *Succession Act 1981* (Qld), is discussed at [14.3] ff below.

Clause 59(3)

5.21 Importantly, clause 59(3) qualifies the operation of clause 59(2). It provides that the following powers that are conferred under clause 59(1) may not be excluded or modified by the trust instrument:

- the power to sell the trust property;
- the power to lease the trust property;
- the power to mortgage the trust property or to renew, extend or vary a mortgage of the trust property;
- the power to deal with the securities of a corporation subject to the trust;
- the power to settle a debt or claim in relation to the trust property; and
- the power to insure the trust property.

5.22 In the Commission's view, the powers mentioned in clause 59(3) are the powers that are essential for the effective and efficient management and disposition of the trust property. Clause 59(3)(f) expressly includes the power to insure the trust property. This is to ensure that, in circumstances where the duty to insure the trust property arises,¹¹ the trustee has the requisite power to insure.

DIVISION 3 PROVISIONS RELATING TO DUTY TO SELL**Clause 60 Property that a trustee is under a duty to sell**

5.23 Clause 60 implements Recommendations 8-1 and 8-2 of the Interim Report.¹²

5.24 Clause 60(1) is based on existing section 32(1)(c). It confers a general statutory power on a trustee to postpone the sale, calling in and conversion of the trust property that the trustee has a duty to sell. Under the general law, this special duty is imposed on a trustee whenever a direction to sell or convert real or personal property the subject of the trust is included in the trust instrument.¹³ As with existing section 32(1)(c), clause 60(1) modifies that duty by conferring a power to postpone the sale.

5.25 Clause 60(2) is based on existing section 32(4). It allows a trustee, subject to an express contrary intention in the trust instrument, to 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.

¹¹ See *Trusts Interim Report* (2013) [9.55].

¹² See *Trusts Interim Report* (2013) [8.3] ff.

¹³ See *Trusts Interim Report* (2013) [8.4]–[8.8] for a detailed discussion of trusts for sale.

5.26 Clause 60(3) ensures that the provisions of clause 60 do not allow a trustee to postpone the sale of trust property that is of a 'wasting, speculative or reversionary nature'. As such, clause 60(3), like existing section 32(1)(c) and (4), preserves the operation of the particular duty of conversion under the rule in *Howe v Dartmouth*.¹⁴

5.27 Although clause 60 qualifies a trustee's duty to sell, the powers of postponement conferred under clause 60 must, as with all powers, be exercised in accordance with the trustee's other duties, including the new duties imposed by clauses 42 and 43 of the Draft Bill.

5.28 The note to clause 60 also states that, for a personal representative, that clause is subject to new section 49B of the *Succession Act 1981* (Qld). This note has been included as a reminder to personal representatives that their power to carry on a business (and the period of time for which they may carry on the business without selling it) is governed by new section 49B of the *Succession Act 1981* (Qld), rather than the wider power conferred on trustees under clause 60.¹⁵

5.29 In contrast to existing section 32(4), clause 60 omits the protection for a purchaser where the trustee has a power to postpone the sale of land or an authorised investment that the trustee has a duty to sell by reason only of a trust or direction for sale. In light of the general protection given to purchasers of trust property under clause 118 (which is based on existing section 46), the specific protection that is given to purchasers by existing section 32(4) is unnecessary.

DIVISION 4 PROVISIONS RELATING TO EXPENDITURE

Clause 61 Power to expend amounts

5.30 Clause 61 replaces, with some minor modification, existing section 33(1)(a)–(f). It implements Recommendation 8-5 of the Interim Report.¹⁶

5.31 Clause 61(1), like existing section 33(1)(a)–(f), empowers a trustee, in relation to the trust property, to expend an amount (including an amount from capital) that is subject to the same trusts on various trust property expenses. This modifies the usual rule under the general law, that ordinary recurring repairs and expenses are borne by income, and more permanent, structural repairs and improvements are borne by capital,¹⁷ by empowering the trustee to expend either capital or income on repairs, improvements, outgoings and other trust property expenses.

¹⁴ (1802) 7 Ves Jun 137; 32 ER 56. See *Trusts Interim Report* (2013) [8.4] for a discussion of the rule in *Howe v Dartmouth*.

¹⁵ Draft Trusts Bill 2013, cl 190, which inserts new s 49B of the *Succession Act 1981* (Qld), is discussed at [14.3] ff below.

¹⁶ See *Trusts Interim Report* (2013) [8.102]–[8.122].

¹⁷ See *Trusts Interim Report* (2013) [8.98].

5.32 Existing section 33(1)(b) currently imposes a limit of \$10 000 on the amount that a trustee is permitted to expend on the improvement or development of the trust property without court approval. Clause 61(1)(b) removes that limitation. In the Commission's view, the imposition of a limit on the amount of money that a trustee may expend for those works without the need for court approval would be inconsistent with the general policy adopted in the Draft Bill of giving trustees additional flexibility to ensure that the trust is administered in a way that is consistent with their duties (including the new general duty of care imposed by clause 42 and the new duty imposed by clause 43 to act for the benefit of the beneficiaries or, where relevant, to further the purposes of a charitable trust).

5.33 For the purposes of the provision, clause 61(2) defines 'maintenance' to include 'repair and upkeep' and 'outgoings', in relation to the property, to include 'rates, premiums, taxes, assessments and insurance premiums'.

Clause 62 Expenditure may be apportioned between income and capital etc.

5.34 Clause 62 replaces, with some modification, existing section 33(1)(g). It deals with the apportionment and recoupment of items of expenditure made under clause 61, and implements Recommendation 8-6 of the Interim Report.¹⁸

5.35 As mentioned earlier, the usual rule under the general law is that some types of expenses are borne by income, whilst others are borne by capital. The general law also allows a trustee to apportion (or share) expenses between capital and income if they are not clearly either capital or income in nature.¹⁹

5.36 Existing section 33(1)(g) permits a trustee to apportion any payment or expenditure made under existing section 33(1)(a)–(f) between capital and income or among the beneficiaries as the trustee considers equitable. If the whole or part of any such payment or expenditure has been made out of capital, it also allows the trustee to recoup the capital from subsequent income (by transferring funds from subsequent income to reimburse the payment or expenditure previously charged to capital) if that course would be equitable in all the circumstances. However, it does not deal with the reverse situation where the initial payment of an expense has been made from income, to allow the recoupment of income from capital.

5.37 Clause 62 gives a much wider discretion to trustees in dealing with expenditure from the capital and income accounts, by allowing both for expenditure that is made out of capital to be recouped from income, as well as for expenditure that is made out of income to be recouped from capital, if to do so would be equitable in all the circumstances. This allows a trustee, in accordance with the duty to act impartially between the beneficiaries, to transfer funds between income and capital to make necessary adjustments after paying for an expense.

¹⁸ See *Trusts Interim Report* (2013) [8.123]–[8.155].

¹⁹ See *Trusts Interim Report* (2013) [8.99]–[8.101].

5.38 In addition, in contrast to existing section 33(1)(g), the powers conferred under clause 62 apply subject to an express contrary intention in the trust instrument. This approach enables a settlor to specify which beneficiaries' entitlements are ultimately to be affected by a payment or expenditure.

5.39 Existing section 47(3) empowers a trustee, subject to any direction expressed in the trust instrument, to pay for and apportion the costs of insurance premiums. In light of the general powers of expenditure and apportionment conferred under clauses 61 and 62, it is unnecessary for the Draft Bill to include a separate provision to the effect of existing section 47(3).

DIVISION 5 PROVISIONS RELATING TO APPROPRIATION

5.40 A power of appropriation 'permits of specific assets being transferred or appropriated to a beneficiary in or towards satisfaction of his share in a trust estate without the necessity for conversion'.²⁰ It amounts, in effect, 'to a sale of assets by the trustee to a beneficiary in or towards satisfaction of his share'²¹ and a set-off of the price against the beneficiary's share in the estate.²² A power of appropriation may be conferred on trustees 'expressly or by implication by the trust instrument or by statute'.²³

5.41 Clauses 63–66 provide for trustees' statutory powers of appropriation. They are generally to the same effect as existing sections 33(1)(l)–(m), (2) and (5), except for those modifications that give effect to Recommendations 10-6 and 10-8 to 10-10 of the Interim Report.²⁴

Clause 63 General

5.42 Clause 63 is generally based on existing section 33(1)(l). It provides that a trustee may appropriate any part of the trust property to satisfy, wholly or in part, a legacy payable out of the trust property, or a share of the trust property (whether contingent or absolute),²⁵ to which a person is entitled.

5.43 It implements Recommendation 10-6(a) of the Interim Report by providing, in clause 63(2)(a), that the appropriation may only be made with the consent of the person entitled or, if the person is under a legal incapacity, the person's guardian.²⁶

²⁰ *Long v Comptroller of Stamps* [1964] VR 796, 801 (Adam J).

²¹ *Ibid* 802.

²² *Re Lepine* [1892] 1 Ch 210, 219 (Fry LJ); *Re Beverly* [1901] 1 Ch 681, 685 (Buckley J).

²³ *Long v Comptroller of Stamps* [1964] VR 796, 800 (Adam J).

²⁴ See generally *Trusts Interim Report* (2013) [10.136] ff.

²⁵ Draft Trusts Bill 2013, cl 63(1)(b) and 64(1)(b) omit the additional reference in s 33(1)(l) of the *Trusts Act 1973* (Qld) to trust property that is 'settled'. The Commission considers that that expression, which is a reference to property settled by a trust instrument, is unnecessary and does not add to the scope of the provision.

²⁶ See *Trusts Interim Report* (2013) [10.152] ff, [10.173].

5.44 It also preserves the current requirement in existing section 33(1)(l) for the trustee to give notice to all the persons who are interested in the appropriation. Although, in a strict sense, the other beneficiaries do not have an interest in the appropriation,²⁷ they nevertheless have an interest in whether the appropriation occurs at fair value.

5.45 Currently, existing section 33(1)(l) provides that, except as varied by the court, the appropriation is conclusive if the person to whom notice is given does not, within one month after receiving the notice, apply to the court to vary the appropriation. Clause 63(3) increases that time to two months, on the basis that one month does not provide adequate time for a beneficiary to obtain legal advice and make the necessary application.

5.46 Clause 63(4) provides that an appropriation is conclusive and binding on all persons who are, or may be, interested in the trust property, unless varied by the court. This provision reflects the general law,²⁸ and implements Recommendation 10-8 of the Interim Report.

5.47 Clause 63(6) provides that nothing in clause 63 relating to appropriation affects any power of appropriation conferred under the trust instrument. This provision implements Recommendation 10-9 of the Interim Report. It has been included to avoid the uncertainty that arises about whether the specific requirements of clause 63, for instance, to give notice to the persons interested in the appropriation, apply to an appropriation that is made under the trust instrument, rather than under the statutory power.

5.48 The definition of 'guardian' in clause 63(7) is new. It is consistent with the language of clause 16(2) and updates the language of existing section 33(1)(l)(ii), which currently refers to 'the person having the care and management of the estate of any person who is not of full mental capacity'.

5.49 The Dictionary also defines 'guardian', in relation to a minor, generally to include a parent of the person.

5.50 In Recommendation 10-7 of the Interim Report, the Commission recommended that the new provisions in relation to appropriation should not include provisions to the effect of existing section 33(3)–(4), but should instead state that any notice given under those provisions may be served in a manner permitted by the *Acts Interpretation Act 1954* (Qld) or in such other manner as may be directed by the court. On further consideration, the Commission does not consider it necessary to include a provision to that effect.

5.51 A notice that is required to be served under clause 63 may be served in the manner provided for by section 39 of the *Acts Interpretation Act 1954* (Qld), without making express reference to that Act in the Draft Bill. Further, section 39(3)(b) provides that nothing in section 39 affects the power of a court or tribunal to authorise service of a document otherwise than as provided in section 39(1). If it is necessary for a trustee to obtain the directions of the court about the service of a

²⁷ *Re Lepine* [1892] 1 Ch 210, 215–16 (Lindley LJ).

²⁸ *Re Waters* [1889] WN 39, 39 (Kay J).

notice that is to be given under clause 63 of the Draft Bill, the trustee may apply to the court, under clause 143, for directions about the exercise of the power of appropriation.

Clause 64 Trustee is also person entitled

5.52 Clause 64 is generally to the same effect as existing section 33(2).

5.53 However, it implements Recommendation 10-6(b) of the Interim Report by providing more explicitly than the current provision that, if the trustee is also entitled to part of the trust property, an appropriation by the trustee to himself or herself is not effective until it has been approved by each beneficiary who is not under a legal incapacity and the guardian of each beneficiary who is under a legal incapacity or by the court.²⁹

Clause 65 Annuity

5.54 Clause 65 replaces, but is to the same effect as, existing section 33(1)(m). It implements Recommendation 10-10 of the Interim Report.³⁰

5.55 Clause 65 applies if a trust instrument provides for the payment of an annuity.

5.56 As with existing section 33(1)(m), clause 65(3) allows a trustee to set aside and appropriate out of any trust property available for payment of the annuity an amount that, in the trustee's opinion at the time of appropriation, is enough, when invested, to provide out of the investment income the amount required to pay the annuity.

5.57 Clause 65(4) provides that, after the appropriation has been made:

- 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
- the trustee may distribute the residue of the trust property and the income of the trust property in accordance with the trust instrument.

5.58 Clause 65(5) provides that, after distribution of the residue of the trust property and the income of the trust property, the residue and income are not liable for the annuity. In this way, the provision facilitates the distribution of the residue of the trust property and the income.

²⁹ See generally *Trusts Interim Report* (2013) [10.156] ff, [10.175] ff.

³⁰ See generally *Trusts Interim Report* (2013) [10.182] ff.

Clause 66 Notice to be given if land is distributed after appropriation

5.59 Clause 66 replaces, but is to the same effect as, existing section 33(5). It implements Recommendation 10-10 of the Interim Report, and complements clause 65.

5.60 Clause 66 applies if the trustee intends to distribute land under clause 65(4)(b), that is, after setting aside an amount to pay an annuity. Clause 66(2) provides that the trustee must notify the land registrar³¹ that the land is distributable because of an appropriation made under clause 65.

5.61 Clause 66(3), like existing section 33(5), confirms that the land registrar is not required to inquire into whether the amount appropriated was enough to provide for the annuity.

DIVISION 6 AUTHORISED EXERCISE OF INVESTMENT POWER

Clause 67 Power to authorise exercise of investment power

5.62 Clause 67 is a new provision. It implements Recommendation 4-3 of the Interim Report.³²

5.63 Under the general law, trustees are ordinarily required to act personally.³³ As a result, unless they are authorised to do so,³⁴ trustees may not delegate the exercise of their duties or powers,³⁵ not even to a co-trustee.³⁶ Accordingly, while they may take advice from experts, they cannot delegate the exercise of their discretions:³⁷

[Trustees] must inform themselves, before making a decision, of matters which are relevant to the decision. These matters may not be limited to simple matters of fact but will, on occasion (indeed, quite often) include taking advice from appropriate experts, whether the experts are lawyers, accountants, actuaries, surveyors, scientists or whomsoever. It is however for advisers to advise and for trustees to decide: trustees may not (except in so far as they are authorised to do so) delegate the exercise of their discretions, even to experts.

³¹ The Dictionary defines 'land registrar' to mean 'the registrar under the *Land Title Act 1994* or other person having the function of registering or recording dealings with land'.

³² See generally *Trusts Interim Report* (2013) [4.52] ff.

³³ *Turner v Corney* (1841) 5 Beav 515, 517; 49 ER 677, 678 (Lord Langdale MR).

³⁴ See *Pilkington v Inland Revenue Commissioners* [1964] AC 612, 639 (Viscount Radcliffe).

³⁵ *Re Trusts of Kean Memorial Trust Fund* (2003) 86 SASR 449, 471 (Besanko J); *Niak v Macdonald* [2001] 3 NZLR 334, 338 (Keith, Fisher and Paterson JJ).

³⁶ *Re Flower and Metropolitan Board of Works* (1884) 27 Ch D 592, 596 (Kay J).

³⁷ *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705, 717 (Robert Walker J). See also *Buckby v Speed* [1959] Qd R 30, 35 (Philp J; Wanstall and Stable JJ agreeing).

5.64 Except in the limited circumstances in which existing section 56 applies,³⁸ the *Trusts Act 1973* (Qld) does not make provision for a trustee to appoint a third party to exercise any of the trustee's powers or discretions.

5.65 In a number of overseas jurisdictions, legislation has been enacted or recommended to give trustees broader powers to authorise a person to exercise certain of the trustees' decision-making functions (particularly in relation to the making of investments).³⁹

5.66 Although the Commission generally considers that trustees should exercise their powers and discretions personally (unless authorised by the trust instrument to do otherwise), it also acknowledges that, for many trusts, the management of investments can require considerable expertise. As a result, it may be in the interests of the beneficiaries for the trustees to be able to authorise a person to exercise their powers of investment.

5.67 The Commission therefore recommended in the Interim Report that, subject to the expression of a contrary intention in the trust instrument, trustees should be empowered to authorise a person to exercise their powers of investment.⁴⁰

5.68 Clause 67(1) implements that recommendation by providing that a trustee may, by instrument, authorise another person to exercise any of the trustee's investment powers.⁴¹

5.69 In exercising the power of authorisation conferred under clause 67(1), trustees will be required to comply with the general duty of care imposed by clause 42.

5.70 Clause 67(2) provides that the trustee may authorise the other person to exercise power under clause 67(1) on the terms as to remuneration and any other matters that the trustee considers appropriate.

5.71 Clause 67(3) provides that the trustee is liable for the acts and omissions of the other person as if they were the trustee's own acts and omissions. This is consistent with the approach taken in relation to the liability of a trustee for the acts and omissions of a substitute trustee under clause 72, and recognises that, under both provisions, the person is exercising powers that would otherwise be required to be exercised by the trustee personally.

5.72 In recognition of the fact that clause 67 creates a significant exception to the usual duty to act personally, clause 67(4) provides that clause 67 is subject to an express contrary intention in the trust instrument. This ensures that a settlor can

³⁸ *Trusts Act 1973* (Qld) s 56 is replaced by cl 68–76 of the Draft Trusts Bill 2013.

³⁹ For a detailed discussion of the relevant provisions and recommendations in overseas jurisdictions, see *Trusts Interim Report* (2013) [4.57] ff.

⁴⁰ *Trusts Interim Report* (2013) Rec 4-3(a).

⁴¹ 'Investment power' is defined in the Dictionary to mean a power under cl 47 or a power of investment conferred under a trust instrument.

still require a trustee to act personally by expressly excluding the power conferred under clause 67.⁴²

DIVISION 7 POWER OF DELEGATION

5.73 Trusteeship is ‘an office of personal confidence’.⁴³ For that reason, a trustee is not permitted to delegate the administration of the trust, unless authorised to do so by the trust instrument or statute.⁴⁴ The prohibition on delegation is an aspect of the duty to act personally.

5.74 Clauses 68–76 of the Draft Bill provide the legislative authority for a trustee’s power of delegation, and implement Recommendation 4-6 of the Interim Report.⁴⁵

5.75 These provisions are generally based on existing section 56, but make some important changes in relation to:

- the circumstances in which a trustee may delegate the administration of a trust;
- the duration of the delegation; and
- the formal requirements for delegating the administration of a trust.

Clause 68 Application of div 7

5.76 Clause 68 provides that Division 7 applies if a trustee:

- is absent, or is about to be absent, from the State; or
- is, or may be about to become, temporarily incapable of performing the duties of a trustee, including because of impaired capacity for administering the trust.

5.77 The circumstance of impaired capacity is new, and widens the circumstances in which a delegation may be made. Its inclusion recognises that it is not unusual for physical incapacity to be accompanied by impaired capacity (even if on a temporary basis), which would, under the *Powers of Attorney Act 1998 (Qld)*, revoke the general power of attorney by which the delegation has been made.⁴⁶

⁴² This is consistent with the approach that applies under the English legislation: see *Trustee Act 2000 (UK)* c 29, ss 11(1), 26(b).

⁴³ *Trusts and Settled Land Report (1971)* 44.

⁴⁴ *Speight v Gaunt* (1883) 22 Ch D 727, 757 (Lindley LJ), 762 (Bowen LJ); *McMillan v McMillan* (1891) 17 VLR 33, 37–8 (Hodges J); *Niak v Macdonald* [2001] 3 NZLR 334, 338 (Keith, Fisher and Paterson JJ).

⁴⁵ See generally *Trusts Interim Report (2013)* [4.196] ff.

⁴⁶ *Powers of Attorney Act 1998 (Qld)* s 18(1). *Trusts Act 1973 (Qld)* s 56(1) currently requires any delegation to be made by power of attorney executed as a deed.

5.78 Because clause 69(3)(b)(iii) limits the duration of the delegation to a maximum of 12 months, it is not necessary to define the meaning of ‘temporary’ for the purposes of clause 68, as the authority of the substitute trustee will automatically end after 12 months. This approach is consistent with the Commission’s view that, if a trustee is unable to act for more than 12 months, it is more appropriate for the trustee to be replaced than to have a substitute trustee exercise the trustee’s powers on a long-term basis.

Clause 69 Delegation of powers etc. for a trust

5.79 As with existing section 56(1), clause 69(1) confers a statutory power to delegate the administration or exercise of ‘all or any trusts, powers, authorities and discretions vested in the trustee as trustee’. The reference to ‘all or any’ of the trustee’s powers, authorities and discretions ensures that a trustee may select the particular matters that are to be delegated. For example, if the period of delegation is to be quite short, a trustee might wish to delegate the power to manage the trust property, but to exclude the power to make distributions to the beneficiaries.

5.80 Clause 69(4) provides that a trustee may not make a delegation to an individual who is the trustee’s only co-trustee. This is similar to the limitation in existing section 56(1), which provides that a trustee may not make a delegation to a person who is the only other co-trustee if the person is not a trustee corporation.

Formal requirements

5.81 Clause 69(1) provides for the delegation to be made ‘by instrument of delegation’ rather than, as existing section 56(1) requires, ‘by power of attorney executed as a deed’. A delegation under existing section 56 would currently be made by way of a general power of attorney under the *Powers of Attorney Act 1998* (Qld).⁴⁷

5.82 However, clause 68 now makes provision for a trustee to delegate in anticipation of being a person with impaired capacity for administering the trust. As a result, a general power of attorney would not be an appropriate mechanism by which to make such a delegation as it would be revoked as soon as the trustee became a person with impaired capacity for administering the trust.⁴⁸

5.83 Clause 69(2) provides that the instrument of delegation must:

- state the circumstances in which the delegation is to operate; and
- be signed by the trustee and the substitute trustee.

⁴⁷ A general power of attorney made under the *Powers of Attorney Act 1998* (Qld) must be in the approved form: s 11.

⁴⁸ *Powers of Attorney Act 1998* (Qld) s 18(1). In that case, the attorney would not have any further authority.

5.84 Although Recommendation 4-6(e) of the Interim Report was to the effect that delegation should be made by way of an approved form, the Commission now considers that this is no longer necessary, and that the formalities required by clause 69(2) are sufficient.

Commencement of delegation

5.85 Clause 69(3)(a) provides that the delegation commences:

- on the happening of an event stated in the instrument of delegation; or
- if no event is stated — on the day stated in the instrument of delegation or, if no day is stated, on the day it is signed.

Duration of delegation

5.86 Under existing section 56(5), the power of attorney is revoked when the trustee returns to the State or recovers physical capacity. However, there is no particular limitation on the period for which the delegation may subsist.

5.87 In contrast, clause 69(3)(b) provides that the delegation continues in force until whichever of the following happens first:⁴⁹

- the start of the day stated in the instrument as the day the delegation ends;
- the time when the delegation is revoked by the happening of an event mentioned in clause 70;
- the start of the day that is 12 months after the delegation commences.

5.88 This provision ensures that a delegation cannot continue for more than 12 months. It reflects the Commission's view that delegation should be a temporary measure.

Clause 70 Revocation of delegation

5.89 Clause 70 is a new provision. It sets out the circumstances in which the delegation is revoked.

5.90 Because delegation under existing section 56 is currently made by way of a general power of attorney, the provisions of the *Powers of Attorney Act 1998* (Qld) that provide for the revocation of a general power of attorney in particular circumstances apply without the need for those circumstances to be mentioned in the *Trusts Act 1973* (Qld). However, because clause 69(1) of the Draft Bill provides for the delegation to be made by instrument of delegation, rather than by power of

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The legislation in the ACT, New South Wales, the Northern Territory and South Australia also prescribes a maximum period for the duration of the delegation: see *Trustee Act 1925* (ACT) s 64(5); *Trustee Act 1925* (NSW) s 64(4); *Trustee Act* (NT) sch 3 (*Trustee Act 1907* s 3(1)); *Trustee Act 1936* (SA) s 17(3). A maximum period of 12 months also applies in England: *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 25(2).

attorney, it is necessary to make specific provision for the circumstances in which the delegation will be revoked.

5.91 Clause 70(1) provides that a trustee may revoke the delegation by giving the substitute trustee an instrument of revocation signed by the trustee.

5.92 Clause 70(2) further provides that the delegation is revoked in various circumstances that relate to the substitute trustee, namely, if the substitute trustee:

- resigns; or
- is an individual and:
 - becomes a person with impaired capacity for administering the trust; or
 - becomes bankrupt⁵⁰ or takes advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cth) or a similar law of a foreign jurisdiction; or
 - dies; or
- is a corporation and:
 - stops carrying on business; or
 - becomes an externally-administered body corporate under section 9 of the *Corporations Act 2001* (Cth); or
 - is dissolved.

5.93 These circumstances are generally modelled on sections 21–24 of the *Powers of Attorney Act 1998* (Qld), which provide for when a general power of attorney is revoked, although the circumstances that relate to a substitute trustee that is a corporation have been expressed in terms that are consistent with clause 15(1)(f).

5.94 In addition, clause 70(3) provides that the delegation is revoked if the trustee becomes a person with impaired capacity for administering the trust, unless the instrument of delegation expressly provides for the delegation to continue to operate in that circumstance.

Clause 71 Powers, authorities and liabilities etc. of substitute trustee

5.95 Clause 71 replaces, but is to the same effect as, existing section 56(2) and (4).

5.96 Clause 71(1), like existing section 56(2), provides that the substitute trustee has, within the scope of the delegation, the same trusts, powers, authorities, discretions and liabilities as the person would have if the person were the trustee,

⁵⁰ The Dictionary defines 'bankrupt' to include 'insolvent'.

except for the power of delegation under clause 69. The exclusion of that particular power operates as a prohibition on subdelegation.

5.97 Clause 71(2), like existing section 56(4), confirms that a substitute trustee is subject to the court's jurisdiction and power in the administration of the trust as if the substitute trustee were the trustee.

Clause 72 Liability of trustee for acts etc. of substitute trustee

5.98 Clause 72 replaces, but is to the same effect as, existing section 56(3). It provides that a trustee is personally liable for the acts and omissions of a substitute trustee as if they were the trustee's own acts and omissions.⁵¹

5.99 The statutory power to delegate is, as stated earlier, a significant exception to the duty to act personally. This is reflected in the greater potential liability imposed on a trustee under clause 72 for the acts and omissions of a substitute trustee than is imposed under clause 113 for the acts and omissions of an agent.

Clause 73 Trustee to notify particular persons of delegation

5.100 Clause 73 is a new provision. It implements Recommendation 4-6(d) of the Interim Report by requiring a trustee who has delegated the administration of a trust under clause 69 to notify the following persons of the delegation:

- each co-trustee;
- if there is an appointor for the trust — the appointor;⁵²
- if there is no co-trustee and no appointor — each beneficiary of the trust, to the extent that it is practicable to do so.

5.101 The purpose of this provision is to ensure that those persons who have a genuine interest in knowing of the delegation will be notified of it. Depending on the circumstances in which the delegation is to operate, the fact that the delegation has become operative may raise questions about whether the trustee should be replaced by the appointor (if there is one) or by the co-trustees. Further, because co-trustees will be required to act with the substitute trustee, they have a particular reason to be notified that the delegation has been made.

5.102 In the absence of a provision to the effect of clause 73(c), the beneficiaries of a trust with a sole trustee would not necessarily have the means to ascertain who is effectively acting as the trustee.

⁵¹ This is also the position in most other Australian jurisdictions and in England: *Trustee Act 1925* (ACT) s 64(8); *Trustee Act 1925* (NSW) s 64(7); *Trustee Act* (NT) sch 3 (*Trustee Act 1907* s 3(3)); *Trustee Act 1898* (Tas) s 25AA(7); *Trustee Act 1958* (Vic) s 30(2); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 25(7).

⁵² The term 'appointor' is defined in the Dictionary. See the discussion of that definition at [15.4] below.

5.103 Clause 73(c) uses 'beneficiary' in its ordinary meaning. Elsewhere in the Draft Bill, where the Commission intends to include a person who is merely a potential beneficiary (being an eligible object under a discretionary trust), 'beneficiary' is defined to include 'a person in whose favour a power to distribute the trust property may be exercised'.⁵³ As a result, clause 73 does not impose a duty to notify a person who is only a potential beneficiary.

5.104 Further, clause 73(c) limits the obligation to give notice to the beneficiaries to 'the extent that it is practicable to do so'. This recognises that, in some circumstances, it may not be practicable to notify every beneficiary. This will be a matter for consideration on the facts of each case.

Clause 74 Acts of substitute trustee valid in favour of third parties

5.105 Clause 74 replaces, but is to the same effect as, existing section 56(6). It applies if:

- an act is done or an instrument is signed by a substitute trustee exercising or purportedly exercising power under a delegation made under clause 69 in favour of a person; and
- the substitute trustee lacked power to do the act or sign the instrument because the delegation had for any reason never commenced, had been revoked, or stopped being in force.

5.106 Clause 74(2) protects a person who deals with the substitute trustee by providing that the act done or instrument signed by the substitute trustee is, in favour of the person, as valid and effective as it would be if the delegation had commenced and was in force.

5.107 However, clause 74(3) provides that the protection given by clause 74(2) does not apply if the person dealing with the substitute trustee had, at the relevant time, actual notice that the delegation had not commenced, had been revoked or stopped being in force.

Clause 75 Effect of statutory declaration given by substitute trustee

5.108 Clause 75 replaces, but is to the same effect as, existing section 56(7). It applies if a substitute trustee makes a statutory declaration relating to a trust that:

- a delegation given under clause 69 has commenced; or
- in any transaction the substitute trustee is acting in the administration of the trust.

5.109 Clause 75(2) provides that the statutory declaration is, in favour of a person dealing with the substitute trustee, conclusive evidence of the matter stated.

⁵³

See, eg, Draft Trusts Bill 2013, cl 45(4)(b), 126(3)(b).

Clause 76 Persons dealing with substitute trustee

5.110 Clause 76 replaces, but is to the same effect as, existing section 56(8). It provides that if, in any transaction, it appears from a delegation given under clause 69, or from any evidence required for the purpose of a delegation or otherwise, that the substitute trustee is acting in the administration of a trust, a person dealing in good faith with the substitute trustee is not affected by notice of the trust.

DIVISION 8 APPLICATION OF INCOME BY TRUSTEE WHO IS A MORTGAGEE IN POSSESSION

5.111 Clauses 77–79 replace, but are generally to the same effect as, existing section 42. They implement Recommendation 8-8 of the Interim Report.⁵⁴

5.112 Existing section 42 governs the application of the income of mortgaged land received by a trustee who is a mortgagee in possession of the land. It applies when the mortgage debt (rather than the land itself) is held on trust for successive beneficiaries.⁵⁵ The provision clarifies the law as to the proper order in which a trustee-mortgagee in possession should apply income from the mortgaged land in the payment of interest due under the mortgage to the tenant for life, and the payment of rates, taxes, repairs and other outgoings necessary to preserve the security.⁵⁶ The effect of the provision, as a whole, is that the life tenant's interest under the mortgage is to be derived from the gross, rather than the net, income of the mortgaged land.

Clause 77 How income must be applied

5.113 Clause 77 is based on existing section 42(1)–(2).

5.114 Clause 77 applies if a trustee is entitled to a debt secured (wholly or in part) by a mortgage of land in trust for persons in succession, and the trustee is mortgagee in possession of the land. Clause 77(2) requires the trustee to apply the income of the land received by the trustee to pay specified outgoings (each called a 'priority outgoing').⁵⁷ These are:

- rents, taxes, rates and other outgoings affecting the land;
- premiums on insurance properly payable on the mortgaged property; and
- annual amounts or other payments and the interest on principal amounts having priority to the mortgage.

⁵⁴ See generally *Trusts Interim Report* (2013) [8.156] ff.

⁵⁵ *Re KC Smart's Settlement* (1933) 33 SR (NSW) 412, 415 (Harvey CJ in Eq); *Trust Co of Australia v Braid & Simmons* (Unreported, Supreme Court of Victoria, Eames J, 20 February 1998).

⁵⁶ See *Farmer v Chard* (1905) 5 SR (NSW) 342, 343–4 (Simpson CJ in Eq); *Re KC Smart's Settlement* (1933) 33 SR (NSW) 412, 415 (Harvey CJ in Eq).

⁵⁷ In contrast to s 42(1) of the *Trusts Act 1973* (Qld), cl 77(2) of the Draft Trusts Bill 2013 refers to the application of the 'income', rather than the 'net income', of the mortgaged land.

5.115 Clause 77(3) provides that the trustee must apply the income to pay a priority outgoing only to the extent that the priority outgoing accrues after the trustee becomes mortgagee in possession. If a priority outgoing relates to a period partly before and partly after the day the trustee becomes mortgagee in possession, clause 77(4) clarifies that the priority outgoing is taken to accrue from day to day and must be apportioned accordingly.

5.116 Clause 77(5) requires the trustee, subject to the rights of the mortgagor, to hold the balance of the income received on the trusts to which the mortgage debt is subject.

Clause 78 If all or part of an amount secured by mortgage is recovered

5.117 Clause 78 supplements clause 77. It replaces, but is to the same effect as, existing section 42(3).

5.118 Clause 78 applies if all or part of the amount secured by the mortgage is recovered, whether by repayment or on realisation of the security or otherwise.

5.119 Clause 78(2) provides that the income, or the part of the income, applied by the trustee to pay the priority outgoings that would otherwise have been payable as interest to the person entitled to the interest of the mortgage debt (the 'primary beneficiary') is to be paid to the primary beneficiary. Clause 78(3) clarifies that the primary beneficiary is not entitled to be paid interest on the payment.

5.120 Clause 78(4) requires any balance of the income to be held on the trusts to which the mortgage debt was subject.

Clause 79 Additional power to pay outgoings

5.121 Clause 79 also supplements clause 77. It replaces, but is to the same effect as, existing section 42(4).

5.122 Clause 79 ensures that, notwithstanding the provisions of clauses 77 and 78, if, in the administration of the trust, the trustee considers it necessary to do so, the trustee may apply income of the mortgaged land received by the trustee in payment of priority outgoings that accrued before the trustee became mortgagee in possession. However, under clause 79(2), the primary beneficiary⁵⁸ is entitled to recoup out of the capital of the mortgage debt any such payment made by the trustee.

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'Primary beneficiary' is defined in Draft Trusts Bill 2013, cl 78(2).

DIVISION 9 POWER TO DELIVER CHATTELS

Clause 80 Delivery of chattels to life tenant

5.123 Clause 80 replaces, but is to the same effect as, existing section 73. It implements Recommendation 10-5 of the Interim Report.⁵⁹

5.124 Under the general law, a trustee is required to have an inventory made and signed before handing property over to a life tenant,⁶⁰ but is not under an obligation to take a security unless there is a danger that would justify it.⁶¹

5.125 Clause 80, like existing section 73, reflects the position under the general law,⁶² in that the trustee's power to deliver the chattels arises on being given a signed inventory by the beneficiary.

Clause 81 Delivery of chattels to minor

5.126 Clause 81 replaces, but is to the same effect as, existing section 74.⁶³ It implements Recommendation 10-5 of the Interim Report.

5.127 Clause 81(1) gives trustees the power to deliver to a minor, or to the minor's guardian, any chattels to which the minor is beneficially entitled, while clause 81(2) provides that the receipt of the minor or guardian is a complete discharge to the trustee for the chattels.

5.128 As with existing section 74(2), clause 81(3) clarifies that the power to deliver chattels under that provision applies in addition to the power, under clause 99, to apply capital for the maintenance, education or advancement of a person, and that the value of the chattels is not to be taken into account for the purposes of clause 99(3).

DIVISION 10 OTHER PROVISIONS

Clause 82 Power to appoint agents

5.129 Currently, provisions dealing with the appointment of agents are found in existing section 54(1), which confers a general power to appoint an agent, and in existing section 43, which confers a power for trustees, *in writing*, to authorise a person, including another trustee, to give receipts.⁶⁴

⁵⁹ See generally *Trusts Interim Report* (2013) [10.113] ff.

⁶⁰ *England v Downs* (1842) 6 Beav 269; 49 ER 829.

⁶¹ *Foley v Burnell* (1783) 1 Bro CC 274; 28 ER 1125; *Temple v Thring* (1887) 56 LT 283; *Re Lazarus* (1898) 24 VLR 567.

⁶² *Trusts and Settled Land Report* (1971) 56.

⁶³ See generally *Trusts Interim Report* (2013) [10.124] ff.

⁶⁴ See generally *Trusts Interim Report* (2013) [4.6] ff, [9.4] ff.

5.130 Clause 82 draws these powers together into a single provision, which also includes the definitions currently found in existing section 54(6). It implements Recommendations 4-1, 4-2, 9-2 and 9-10 of the Interim Report.⁶⁵

5.131 Clause 82(1) and (5) gives trustees the general power to appoint and pay agents. As with existing section 54(1), clause 82(1) does not include any requirement for the appointment to be made in writing.

5.132 By including the power to appoint an agent to give receipts in the general provision for the appointment of agents, clause 82(2) assimilates the requirements for the appointment of an agent to give receipts with the requirements that apply to the appointment of agents generally.

5.133 Clause 82(3)–(4) is a new provision, which implements Recommendation 4-2 of the Interim Report. It is based on section 12(1) and (3) of the *Trustee Act 2000* (UK) and provides that trustees may authorise one or more of their number to act as their agent, but may not authorise a beneficiary to act as an agent (even if the beneficiary is also a trustee).

5.134 Existing section 54(1) currently provides that the trustee ‘shall not be responsible for the default of any such agent employed in good faith and without negligence’. That reference has been omitted from clause 82, as the liability of a trustee for the acts and omissions of an agent (or other persons) is now provided for by clause 113.

5.135 However, because the general duty of care imposed by clause 42 applies to a trustee in ‘administering a trust’, a trustee will still need to exercise the required degree of care, diligence and skill in selecting and supervising an agent who is appointed under clause 82.

Clause 83 Application of insurance money

5.136 Clause 83 is generally to the same effect as existing section 48, subject to the changes discussed below. It governs the application of money received under an insurance policy in relation to trust property, and implements Recommendation 9-6 of the Interim Report.⁶⁶

5.137 Existing section 48(1)–(2) currently provides that money received under an insurance policy in relation to trust property is capital money for the purposes of the trust, and must be held on trusts corresponding as nearly as may be with the trusts affecting the property in respect of which it is paid.⁶⁷

⁶⁵ The Draft Trusts Bill 2013 does not include provisions to the effect of s 54(2)–(5) of the *Trusts Act 1973* (Qld). For a detailed discussion of those provisions, see *Trusts Interim Report* (2013) [4.28] ff.

⁶⁶ See generally *Trusts Interim Report* (2013) [9.78] ff.

⁶⁷ Similar provision is made in most of the other Australian jurisdictions and in New Zealand and England: *Trustee Act 1925* (ACT) s 42(1), (3); *Trustee Act 1925* (NSW) s 42(1), (3); *Trustee Act 1936* (SA) s 25(5), (7); *Trustee Act 1958* (Vic) s 24(1), (3)(d); *Trustees Act 1962* (WA) s 47(1), (3); *Trustee Act 1956* (NZ) s 25(1), (3)(b); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 20(1), (3)(d). However, the provisions in South Australia, Western Australia and New Zealand are subject to a qualification so that, in certain circumstances, the money is to be regarded as income: see *Trusts Interim Report* (2013) [9.84]–[9.85].

5.138 Clause 83(3) also provides that the amount received under the insurance policy is to be held on trusts corresponding as nearly as possible with the trusts affecting the property in relation to which it was payable.

5.139 However, in recognition of the fact that the risks against which insurance is taken out will not always be limited to loss or damage to property comprising the trust capital, clause 83(2)(a) provides that, if it is consistent with the purpose for which the insurance was taken out, the amount received under the policy is to be treated as income. If that is not the case, clause 83(2)(b) provides that the amount is to be treated as capital.

5.140 Clause 83(4) provides that the amount or part of the amount may also be applied in rebuilding, reinstating, replacing or repairing the property lost or damaged.

5.141 Clause 83(5) ensures that the provision does not prejudice or affect the rights of:

- a person to require the amount, or part of the amount, received by the trustee under the insurance policy to be applied in rebuilding, reinstating, replacing or repairing the property lost or damaged;⁶⁸ or
- a mortgagee, lessor or lessee.

5.142 As with existing section 48(8), clause 83(6) provides that clause 83 applies to policies effected either before or after the commencement of the provision, but only to amounts received after its commencement. However, clause 83(6) omits the reference in existing section 48(8) to the application of the provision to *trusts* created before or after the commencement of the provision as that is already provided for by clause 3(1) of the Draft Bill.

Clause 84 Deposit of documents for safe custody

5.143 Clause 84 is generally to the same effect as existing section 49. With one modification, it implements Recommendation 4-4 of the Interim Report.⁶⁹

5.144 Clause 84 ensures that there is continued certainty about the power of trustees to deposit documents relating to the trust, or to the trust property, for safe custody. It provides that such documents may be deposited with any financial institution, law practice or corporation whose business includes the undertaking of the safe custody of documents. 'Law practice' is defined in clause 84(3) to have the meaning given under paragraph (b) of the definition of 'law practice' in schedule 2 to the *Legal Profession Act 2007* (Qld).

5.145 The reference to a financial institution or corporation appears in existing section 49. However, the reference to a law practice is new, and was included in response to the Queensland Law Society's submission about this issue.

⁶⁸ That right is conferred by s 58 of the *Property Law Act 1974* (Qld).

⁶⁹ See generally *Trusts Interim Report* (2013) [4.106] ff.

5.146 Clause 84(2) provides that an amount payable for the deposit is payable out of the income of the trust property or, if there is no income or to the extent that the income is insufficient, out of the capital of the trust property.

Clause 85 Valuations

5.147 Clause 85 replaces, but is to the same general effect as, existing section 51. It implements Recommendation 9-8 of the Interim Report.⁷⁰

5.148 Clause 85(1) empowers a trustee to ‘ascertain and fix’ the value of trust property or property that the trustee is authorised to buy or otherwise acquire. Clause 85(2) provides that the trustee may fix the value in any way that the trustee considers appropriate.

5.149 As with existing section 51, clause 85 enables a trustee to ascertain the value of any trust property or other property personally, subject to the requirement in clause 85(3) that, if the trustee is not personally qualified to ascertain the value of the property, the trustee must consult a properly qualified person about the value of the property. This beneficial feature of existing section 51(1) has been retained, because it enables a trustee personally to value property having a very low value, where the costs of engaging a professional valuer would not be justified.⁷¹

5.150 The power conferred under clause 85 is of particular relevance to the exercise of a trustee’s power of appropriation under clause 63, which provides that, for the purpose of appropriating trust property, the trustee may fix the value of the whole or any part of the property under clause 85.⁷²

The effect of fixing the value

5.151 Existing section 51(2) currently provides that a ‘valuation made’ by the trustee in good faith under the section is ‘binding on all persons beneficially interested under the trust’.

5.152 Clause 85(5) refers instead to the ‘value fixed’ by the trustee under the provision, which is more consistent with the nature of the trustee’s power under clause 85(1) to ‘ascertain and *fix the value*’ of the relevant property.

5.153 Clause 85(5) provides that the value fixed by the trustee under clause 85 and in accordance with the trustee’s duty under clause 42 is binding on all persons beneficially interested under the trust.⁷³ Given that a trustee must exercise the care, diligence and skill required by clause 42 when administering the trust, clause 85(5) reflects a more appropriate basis than existing section 51(2) on which to provide that the value fixed by the trustee is binding on the beneficiaries. In

⁷⁰ See generally *Trusts Interim Report* (2013) [9.124] ff.

⁷¹ See *Trusts Interim Report* (2013) [9.145].

⁷² Draft Trusts Bill 2013, cl 63(5).

⁷³ This is similar to the approach that now applies in England: see *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 22(3), discussed in *Trusts Interim Report* (2013) [9.134].

particular, it avoids the possibility that a value that is honestly, but negligently, fixed by the trustee could be binding on the beneficiaries.

Clause 86 Audit

5.154 Clause 86 replaces, but is to the same effect as, existing section 52. It implements Recommendation 9-9 of the Interim Report.⁷⁴

5.155 One of the duties of trustees is to keep proper accounts.⁷⁵ Under the general law:⁷⁶

it was permissible for a trustee to employ an accountant [to prepare trust accounts] wherever it was necessary from the circumstances of the case, ie if the accounts were complicated, or the trustee was not from his training and experience capable of keeping the accounts required.

5.156 Where the trust accounts are maintained by an agent or employee of the trustee, the trustee may wish to have the accounts audited to ensure that the trustee is complying with his or her duty to maintain proper accounts and otherwise to ensure that the trust property is accounted for.⁷⁷

5.157 Clause 86(1) gives a trustee the power to have the accounts of the trust property examined or audited by an accountant, while clause 86(2) requires the trustee to provide the accountant with the documents and information the accountant requires to conduct the examination or audit. However, clause 86(1) omits that part of existing section 52(1) which provides that the trustee may cause the accounts to be examined or audited 'in the trustee's absolute discretion'. Given that the power is discretionary, the Commission considers it unnecessary to include those additional words.

5.158 Clause 86(3)–(4) provides for the apportionment of the costs of the examination or audit between the capital and income of the trust property, which will be relevant where the trust has both income and capital beneficiaries.

5.159 Clause 86(5) provides that clause 86 does not authorise a trustee corporation to pay any costs or fees out of the capital or income of the trust property unless:

- the examination or audit related to a business forming part of the trust property; or

⁷⁴ See generally *Trusts Interim Report* (2013) [9.158] ff.

⁷⁵ *Kemp v Burn* (1863) 4 Giff 348; 66 ER 740. See now the duty imposed by the Draft Trusts Bill 2013, cl 44.

⁷⁶ G Fricke and OK Strauss, *The Law of Trusts in Victoria* (Butterworths, 1964) 277. See also *Henderson v M'IVER* (1818) 3 Madd 275; 56 ER 510; *Wroe v Seed* (1863) 4 Giff 425; 66 ER 773. In *Swanson v Emmerton* [1909] VLR 387, Cussen J held (at 390–1) that it was reasonable, having regard to the magnitude and nature of the estate and, so far as it was permissible to do so, to the number and personality of the trustees, for the trustees to employ a firm of solicitors to keep the accounts of the trust.

⁷⁷ In addition, s 60 of the *Public Trustee Act 1978* (Qld) provides for any person to make a written request to the Public Trustee for an investigation and audit of the condition and accounts of a trust, and for the Public Trustee to appoint an auditor to carry out such an investigation and audit.

- the court approves of the costs being paid out of the capital or income of the trust property.

5.160 Clause 86(5) is to the same effect as existing section 52(3), except that it omits the redundant reference in the current provision to the Public Trustee.⁷⁸

Clause 87 Trustee may sue himself or herself in a different capacity

5.161 Clause 87 replaces, but is to the same effect as, existing section 59. It implements Recommendation 9-11 of the Interim Report.⁷⁹

5.162 Clause 87 provides that a trustee, in that capacity, may sue, and be sued by, himself or herself in any other capacity, including the trustee's personal capacity. It provides an exception to the general rule that a person may not be both plaintiff and defendant in the same action,⁸⁰ and is a useful procedural provision.

5.163 However, clause 87 omits the reference in existing section 59 to the provision applying '[n]otwithstanding any rule of law or practice'. In the Commission's view, that part of existing section 59 is superfluous given the terms of the provision.

Clause 88 Inquiries about beneficiaries

5.164 Clause 88 replaces, but is to the same effect as, existing sections 33(1)(j) and 115. It implements, in part, Recommendation 9-12 of the Interim Report.⁸¹

5.165 Clause 88(1), like existing section 33(1)(j), provides that 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.

5.166 Clause 88(2)–(3) deals with the related issue of the costs of those inquiries. It complements clause 88(1) by providing, like existing section 115, that, subject to a contrary intention in the trust instrument, the costs, expenses and charges incurred by the trustee in making the inquiries are payable out of the legacy, amount or distributive share of, or to which, the beneficiary is entitled.

78

The Dictionary defines 'trustee corporation' to mean 'the public trustee' or 'a licensed trustee company under the Corporations Act, section 601RAA'. See also *Trusts Act 1973* (Qld) s 5(1) (definition of 'trustee corporation').

79

See generally *Trusts Interim Report* (2013) [9.175] ff.

80

See, eg, *Re Cavill Hotels Pty Ltd* [1998] 1 Qd R 396, 397 (Williams J); *Nolan v Nolan* [2011] WASC 224. As to the rule under the general law see, eg, *Re Bubnich* [1965] WAR 138. In that case, the executors sought certain orders relating to the deceased's estate. The deceased's widow was one of the executors and also, in a personal capacity, one of the defendants. Negus J (Wolff CJ and Neville J agreeing) held (at 141) that, because the deceased's widow was a necessary defendant, she could not properly be named also as a plaintiff. An order was made that, in her capacity as a co-executor, her name should be struck out as plaintiff.

81

See generally *Trusts Discussion Paper* (2012) [9.281] ff; *Trusts Interim Report* (2013) [9.181] ff.

Clause 89 Power to execute instruments etc.

5.167 Clause 89 replaces, but is to the same effect as, existing section 33(1)(n). It implements, in part, Recommendation 9-12 of the Interim Report.⁸²

5.168 Clause 89 confers a useful catch-all power on trustees to do or omit to do all acts and things and execute all instruments necessary to carry into effect the powers and authorities given under the Draft Bill or the trust instrument.

Clause 90 Exercise of powers on termination of trust

5.169 Clause 90 replaces, with some modification, existing section 31(2). It is also expressed in a more modern drafting style.

5.170 Clause 90 applies if all the beneficiaries of a trust are absolutely entitled to the trust property and no beneficiary is under a legal incapacity.

5.171 Clause 90(2) provides that, despite the termination of the trust, the trustee continues to have all the powers conferred under Part 5 of the Draft Bill to the extent necessary to effect the final distribution of the trust property (subject to the further qualification mentioned at [5.176] below).

5.172 This provision has been included to remove any doubt that a trustee has the requisite powers to effect the final distribution of the trust property upon the trust coming to an end, but before final distribution has taken place.

5.173 A trust may be 'terminated' in a number of ways,⁸³ including under a power of revocation reserved in the trust instrument, or where all of the beneficiaries are of full age and legal capacity and call upon the trustee to pay over their respective interests in the trust property.⁸⁴ Under the general law, when the trust is terminated, the trustee's active powers and duties of management also come to an end.⁸⁵ The trustee is then in the position of a 'bare trustee' and is limited to conveying the trust property to the beneficiaries, with no active management powers to deal with the property in the meantime. Especially where the trust terminates unexpectedly, this lack of power may cause difficulties, not only for the trustee, but also for a third party who is dealing with the trustee in relation to a disposition or transaction that is not yet completed.⁸⁶

5.174 This difficulty does not appear to arise under the Draft Bill since, by virtue of the definitions of 'trust' and 'trust property' in the Dictionary, the powers conferred on trustees under Part 5 of the Draft Bill apply as much to a trustee who

⁸² See generally *Trusts Discussion Paper* (2012) [9.284] ff; *Trusts Interim Report* (2013) [9.181] ff.

⁸³ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [25.125]–[25.140].

⁸⁴ *Saunders v Vautier* (1841) Cr & Ph 240; 41 ER 482.

⁸⁵ See GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [21.45]; HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 22 January 2012) [12.130].

⁸⁶ *Trusts and Settled Land Report* (1971) 29.

is, or becomes, a bare trustee as to any other trustee.⁸⁷ In that situation, the exercise of the powers would depend on the nature of the trustee's duties, including the duty to distribute the trust property.

5.175 Although clause 90 is not, therefore, strictly necessary to overcome the general law limitation, it has nevertheless been included to put the trustee's continuing powers beyond doubt. The Commission considers this particularly important for the guidance of non-professional trustees. Unlike existing section 31(2), clause 90(2) also clarifies in express terms that the powers continue only for the purpose of effecting the final distribution of the trust property.

5.176 Clause 90 also contains a further qualification on the continuation of the trustee's powers in this situation. It provides that the powers continue unless, or except to the extent that, they are expressly revoked by all the beneficiaries (being absolutely entitled and not under a legal incapacity) by written notice given to the trustee. This qualification is retained from existing section 31(2) as an important protection for the beneficiaries. It ensures, for example, that, if the beneficiaries wished to receive a trust asset *in specie* rather than the proceeds of sale, and called for the distribution of the trust property for that purpose, the beneficiaries could revoke the trustee's power to sell the asset.

5.177 Although this gives the beneficiaries a significant power to restrict the exercise of the trustee's powers, its scope of operation is limited by the particular, and narrow, circumstances in which it applies.

Clause 91 Effect of conversion of land or personal property under statutory power

5.178 Clause 91 replaces, but is to the same effect as, existing section 9. It provides that, if, as a result of the exercise of power under the Draft Bill, land is converted into personal property or personal property is converted into land, the personal property or land must be held:

- if, before conversion, the personal property or land is 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
- if, before conversion, the personal property or land was not subject to a trust — subject to limitations, conditions, powers or directions corresponding as nearly as the law and circumstances permit with those affecting the personal property or land before conversion.

87

The Dictionary defines 'trust' to include 'an implied, resulting, bare or constructive trust', and defines 'trust property' to include 'property subject to any implied, resulting, bare or constructive trust'.

Part 6

Maintenance, Education and Advancement

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INTRODUCTION

6.1 Part 6 of the Draft Trusts Bill 2013 provides for a trustee's powers to apply the income and capital of trust property for the maintenance, education, advancement or benefit of certain beneficiaries.

6.2 These provisions are based on the existing provisions in Part 5 of the *Trusts Act 1973* (Qld). Those provisions of Part 5 of the current Act that have not been retained in the Draft Bill are identified in Appendix C to this Report as 'omitted' provisions.

DIVISION 1 PRELIMINARY

Clause 92 Application of pt 6

6.3 Clause 92 replaces, but is to the same effect as, existing section 60. The effect of clause 92 is that, generally, the provisions in Part 6 of the Draft Bill apply whether or not there is a contrary intention in the trust instrument.¹

¹

For an exception, see Draft Trusts Bill 2013, cl 96(2). That provision preserves the exception currently found in s 61(7) of the *Trusts Act 1973* (Qld), which provides that the 'provisions of subsection (2) do not apply where, and to the extent that, a contrary intention is expressed in the trust instrument (if any)'.

6.4 The Commission considers that it is desirable for beneficiaries, especially minor beneficiaries, that trustees should have the power to apply income and capital for their maintenance, education, advancement or benefit.

6.5 By providing that the statutory power is not affected by a contrary intention in the trust instrument, the Draft Bill avoids the uncertainty that has arisen in other jurisdictions where the conferral of a specific power of advancement in the trust instrument has been held to limit the statutory power.²

Clause 93 Definition for pt 6

Guardian

6.6 Existing section 61(1) enables a trustee to pay trust income to a minor's parent or guardian for the minor's maintenance, education, advancement or benefit (or otherwise to apply trust income for those purposes).

6.7 The Dictionary defines 'guardian', in relation to a minor, generally to include a parent of the person.

6.8 Clause 93 further defines 'guardian', of a minor, for Part 6, to include a person who exercises parental responsibility in relation to the minor.

6.9 This inclusive definition is new, and implements Recommendation 10-1(a)(ii) of the Interim Report. Its effect is to enlarge the range of persons to whom a trustee may pay the trust income under clause 95(2).

DIVISION 2 APPLICATION OF INCOME FROM TRUST PROPERTY

6.10 Clauses 94–98 of the Draft Bill implement Recommendation 10-1 of the Interim Report. They are to the same general effect as existing section 61, but express that provision in a more modern drafting style. In particular, existing section 61, which is a lengthy and dense provision, has been broken down into five separate provisions to improve its comprehensibility.

Clause 94 Application of div 2

6.11 Clause 94 replaces existing section 61(4), which qualifies a trustee's power to apply the income of trust property in the case of a beneficiary who has a contingent interest in the property.

6.12 Clause 94(1) is generally in the same terms as the first part of existing section 61(4). It provides that Division 2 applies to a contingent or future interest in the trust property only if the trust includes the intermediate income of the property.

²

See *Trusts Interim Report* (2013) [10.87].

6.13 Clause 94(2) is based on section 43(4) of the *Trustee Act 1925* (ACT), and implements Recommendation 10-1(c) of the Interim Report by framing the provision more generally so as to ensure that a beneficiary's interest in the trust property includes the intermediate income if it is not otherwise specifically disposed of. Apart from simplifying the provision, this approach also ensures that the provision is consistent with section 33H of the *Succession Act 1981* (Qld), which has a similar effect in relation to a disposition under a will.

Clause 95 Minor's interest may be applied for maintenance etc.

6.14 Clause 95 replaces, but is to the same general effect as, existing section 61(1). It applies if a minor has an interest in the trust property, and gives the trustee the power to pay to the minor's guardian (if any) or otherwise apply for or towards the minor's 'maintenance, education (including past maintenance or education) or advancement' the income of the trust property.

6.15 The Dictionary defines 'advancement' to include 'benefit'. The inclusion of this definition assists principally in simplifying the drafting of the various provisions in Part 6 of the Draft Bill, which are based on existing sections 61–63. Under the current Act, those provisions refer to the application of income or capital for a beneficiary's 'maintenance, education (including past maintenance or education) advancement or benefit'.

6.16 In *Pilkington v Inland Revenue Commissioners*, Viscount Radcliffe explained that 'advancement' means 'the establishment in life' of the beneficiary who is the object of the power or 'at any rate some step that would contribute to the furtherance of his establishment'. The additional words 'or benefit' are enlarging words, to overcome any uncertainties about the permitted range of objects for which money could be raised and made available. The power is therefore to be construed broadly and does 'not stand upon niceties of distinction', provided that the proposed application can 'fairly be regarded as for the benefit of the beneficiary who [is] the object of the power'. Generally, 'advancement or benefit' means any use of the money that will improve the material situation of the beneficiary.³

6.17 Whereas existing section 61(1) applies where any property is held on trust for a minor 'whether absolutely or contingently', clause 95(3)(a) provides that the section applies whether the minor's interest is 'vested or contingent or absolute or liable to be divested'.

6.18 The inclusion of a reference to an interest that is 'liable to be divested' overcomes the strictness of earlier decisions that held, in relation to provisions that referred to an interest held 'either absolutely or contingently', that the provisions applied to an absolute interest and a contingent interest, but not to an interest that was absolute, but subject to defeasance.⁴ It thereby removes any doubt about the

³ [1964] AC 612, 634–5 (Viscount Radcliffe; Lords Reid, Jenkins, Hodson and Devlin agreeing).

⁴ *Re Buckley's Trusts* (1883) 22 Ch D 583, 585 (Fry J); *Parker v Dowling* (1916) 16 SR (NSW) 234, 238 (Harvey J). Cf *Re Sharp's Settlement Trusts* [1973] 1 Ch 331, 339, where Pennycuik V-C held that s 31 of the *Trustee Act 1925*, 15 & 16 Geo 5, c 19 'indisputably comprehends a vested interest subject to defeasance'. However, that provision applies where 'any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent' (emphasis added).

application of clause 95 where the minor's interest in the trust property is vested, but is liable to be divested.⁵

6.19 Clause 95(2) omits the part of existing section 61(1) that provides that the trustee may apply the income 'at the trustee's absolute discretion'. Given that the power is discretionary, the Commission considers it unnecessary to include those additional words. Further, the Commission considers that the inclusion of those words might suggest that the exercise of the power would not be reviewable by the court under clause 139 of the Draft Bill.

Clause 96 Unexpended income of trust property

6.20 Although clause 95 confers a power to pay or apply the trust income for the minor's maintenance, education or advancement, a trustee might, in the exercise of that power, choose to apply only part of the income, in which case there will remain a residue of unexpended income (the 'remaining income').

6.21 Clause 96(3) requires the trustee to invest the remaining income in authorised investments, while clause 96(4) requires the trustee to hold the authorised investments (and the income achieved by investing the remaining income) in the ways specified in that provision.

6.22 Clause 96(2) provides, however, that clause 96 is subject to a contrary intention in the trust instrument. In this respect, clause 96 adopts the same approach as existing section 61(2) and (7).

6.23 Clause 96 is otherwise to the same effect as existing section 61(2) and (7), except that it:

- omits the references in existing section 61(2)(a)(i) and (ii) to a minor who marries before attaining the age of majority;⁶
- omits the reference in existing section 61(2)(a)(ii) to 'entailed interests', as those interests were abolished with the introduction of the *Property Law Act 1974* (Qld);⁷ and
- omits the qualification in the closing paragraph of existing section 61(2)(a) that the trustee is to hold the accumulation of income for the minor absolutely 'but without prejudice to any provision with respect thereto contained in *any settlement by him or her made under any statutory powers during the person's infancy*'.

⁵ Similar provision is made in the ACT and New South Wales legislation: see *Trustee Act 1925* (ACT) s 43(1); *Trustee Act 1925* (NSW) s 43(1).

⁶ The equivalent provisions in the ACT, New South Wales, the Northern Territory and South Australia do not include any reference to the marriage of the beneficiary before attaining his or her majority: *Trustee Act 1925* (ACT) s 43(5)–(9); *Trustee Act 1925* (NSW) s 43(4)–(8); *Trustee Act* (NT) s 24(2); *Trustee Act 1936* (SA) s 33(4)–(6).

⁷ *Property Law Act 1974* (Qld) s 22.

6.24 The first two omissions implement Recommendation 10-1(b) of the Interim Report.

6.25 The third omission has been made because there is no longer a statutory power under which a minor could make a settlement of the kind mentioned in existing section 61(2)(a). The current qualification is based on the similar wording in section 31 of the English *Trustee Act 1925*. The qualification in the English provision is a reference to the power, conferred under the *Infant Settlements Act 1855*,⁸ for an infant over 20 years, if male, or over 17 years, if female, to make a binding marriage settlement with the sanction of the High Court.⁹ The *Infant Settlements Act 1855* was repealed in England by the *Family Law Reform Act 1969* (UK), except in relation to anything done before 1 January 1970.¹⁰

6.26 The *Infants' Marriage Settlements Act 1856* (NSW)¹¹ was in the same terms as the English *Infant Settlements Act 1855*, and became part of the law of the Colony of Queensland upon separation from New South Wales in 1859.¹² However, the Act was soon after repealed as a Queensland Act by the *Repealing Act 1867* (Qld).¹³

Clause 97 Adult beneficiary with contingent interest in trust property

6.27 Clause 97 replaces, but is to the same effect as, existing section 61(3).

6.28 It deals with the application of income where property is held on trust for an adult beneficiary who has a contingent interest in the property, and provides that the trustee may pay the income of the property, or a part of it, to the beneficiary or apply it for or towards the beneficiary's maintenance, education (including past maintenance or education) or advancement.¹⁴ The exercise of this power is subject to clause 94(1), which provides that Division 2 applies to a contingent (or future) interest in the trust property only if the trust includes the intermediate income.

6.29 Clause 97 will be relevant where a disposition of property in favour of a beneficiary is contingent on the beneficiary reaching a stated age that exceeds the age of majority. For example, a will might provide that trustees are to hold property for A upon reaching the age of 25, but if A does not reach that age, then for B absolutely. While clause 95 enables the trustees to apply the income of the property during A's minority, clause 97 enables them to continue to apply the income once A has turned 18 and until A obtains a vested interest in the property on reaching the age of 25.

⁸ 18 & 19 Vict, c 43. See R Cozens-Hardy Horne, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 316.

⁹ *Infant Settlements Act 1855*, 18 & 19 Vict, c 43, s 3.

¹⁰ *Family Law Reform Act 1969* (UK) s 11(a).

¹¹ 20 Vict No 2.

¹² Queensland, *Queensland Government Gazette*, No 3, 24 December 1859, 9, Proclamation cl 20; *Australian Colonies Act 1861* (Imp) 24 & 25 Vict, c 44, s 3.

¹³ *Repealing Act 1867* (Qld) 31 Vict No 39, s 2, sch.

¹⁴ The Dictionary defines 'advancement' to include 'benefit': see [6.15]–[6.16] above.

6.30 For the reason explained at [6.19] above, clause 97(2) omits the words ‘at the trustee’s sole discretion’, which appear in existing section 61(3).

6.31 In its submission in response to the Interim Report, the Bar Association of Queensland suggested that the provision should be extended to allow the trustee to apply the income not only for the maintenance, education and advancement of the adult beneficiary, but also for that of the adult’s spouse or child.

6.32 The Commission acknowledges that, in some situations, it could be to the advantage of an adult beneficiary to have the income applied for the benefit of his or her spouse or child. However, the Commission considers that the suggested change goes too far in giving the trustee the power, in effect, to change the beneficiaries under the trust. For that reason, the Commission is not persuaded to change its earlier recommendation.

Clause 98 Modified application of division for vested annuities

6.33 Clause 98 replaces, but is to the same effect as, existing section 61(5). It confers a power of maintenance and advancement where a beneficiary is entitled to a vested annuity.

6.34 As with existing section 61(5), clause 98(1) provides that the provisions of Division 2 in relation to the application of trust income apply to vested annuities with specified adaptations, while clause 98(2) provides that the amount of the authorised investments (including the income of the investments made during the period for which the annuity is payable) must be held in trust for the annuitant or the annuitant’s personal representative absolutely.¹⁵

DIVISION 3 APPLICATION OF TRUST CAPITAL

6.35 Clauses 99–100 of the Draft Bill implement Recommendation 10-2 of the Interim Report. They are to the same general effect as existing section 62, but express that provision in a more modern drafting style. In particular, existing section 62 has been broken down into two separate provisions to improve its comprehensibility.¹⁶

Clause 99 Capital of trust property may be applied for maintenance etc.

6.36 Clause 99 replaces, but is to the same general effect as, existing section 62(1)–(3), subject to increasing the maximum amount of capital that may be paid or applied under the provision.

¹⁵ Similar provision is made in most of the other Australian jurisdictions: *Trustee Act 1925* (ACT) s 43(10); *Trustee Act 1925* (NSW) s 43(9); *Trustee Act 1936* (SA) s 33(7); *Trustee Act 1958* (Vic) s 37(4); *Trustees Act 1962* (WA) s 58(4).

¹⁶ See generally *Trusts Interim Report* (2013) [10.65] ff.

6.37 The purpose of clause 99 is to give trustees the power, subject to certain limitations, to pay or apply capital for the maintenance, education (including past maintenance or education) or advancement of a beneficiary.¹⁷

6.38 Clause 99(2) clarifies that the trustee is not restricted to applying amounts for the maintenance, education or advancement of a beneficiary but can also apply any part of the capital, or share of the capital, to which the beneficiary is entitled (referred to in the provision as 'capital property').

6.39 Under existing section 62(1), the amount that may be advanced is limited to \$2000 or one-half of the capital, whichever is the greater, unless the court consents to a greater amount. In most cases, the effective limit will be one-half of the capital. The reference to '\$2000' reflects the age of the current provision, as it would operate as the 'cap' only if the beneficiary's share was less than \$4000. When existing section 62 was introduced in 1973, the inclusion of that specific amount would, in many cases, have enlarged the amount that could be applied.

6.40 In accordance with Recommendation 10-2 of the Interim Report, the maximum amount or value of the capital property that may be advanced under clause 99 has been increased to \$100 000 or half the capital to which the beneficiary is entitled, whichever is the greater (unless the court consents to a greater amount).

6.41 The advantage of including the specific amount of \$100 000, and not simply providing a limit of half the capital, is that it allows a greater amount to be advanced in the case of a smaller trust. For example, if a trust fund has a value of \$50 000, clause 99 will allow the trustee to pay or apply the whole of that capital amount. In contrast, if the limit were expressed simply as 'half the capital', the trustee would be restricted to paying or applying \$25 000.

6.42 As with existing section 62(2)–(3), clause 99(4)–(5) ensures that:

- the power may be exercised in favour of a person whether the person is entitled absolutely or contingently on reaching a stated age or on the happening of another event, and whether the person is entitled in possession, in remainder or in reversion; and
- it does not matter that the person's interest is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which the person belongs.

6.43 Although clause 99 imposes a limit on the amount or value of the capital that may be paid or applied under that provision, it does not prevent a trustee from applying a greater amount of capital for that purpose if authorised by the trust instrument. In particular, clause 3(2) provides that the Draft Bill does not prevent a settlor conferring on a trustee any powers additional to or greater than those conferred under the Draft Bill.

17

The Dictionary defines 'advancement' to include 'benefit': see [6.15]–[6.16] above.

6.44 For the reason explained at [6.19] above, clause 99(2) omits the words 'in the trustee's absolute discretion', which appear in existing section 62(1).

6.45 Further, clause 99 does not include a provision to the effect of existing section 62(6), which ensures that the application of capital for the purpose of advancement under existing section 62 is a purpose for which capital may be raised by the mortgage of the trust property under existing section 45. Under the Draft Bill, the power to mortgage the trust property is conferred under clause 59, which does not include the restrictions found in existing section 45. Accordingly, it is not necessary to include a provision to the effect of existing section 62(6).

Clause 100 Payment or application of capital under s 99

6.46 Clause 100(1)–(2) replaces, but is to the same effect as, existing section 62(5). It provides that, if the payment or application of an amount or capital property would prejudice a person entitled to a prior life or other interest in the amount or capital property, the trustee may pay or apply the amount or capital property under clause 99 only if the person consents in writing to the payment or application or if the court orders the amount or capital property to be paid or applied.¹⁸

6.47 Clause 100(3) replaces, but is to the same effect as, existing section 62(4). It provides that an amount paid or applied, or the value of capital property (to the extent that it is so applied), under clause 99 must be brought into account as part of the share in the trust property to which the person is or becomes absolutely or indefeasibly entitled.

DIVISION 4 PAYMENTS MAY BE SUBJECT TO CONDITIONS

6.48 Clauses 101–103 are generally to the same effect as existing section 63, but express that provision in a more modern drafting style. With two modifications, they implement Recommendation 10-3 of the Interim Report.

Clause 101 Trustee may impose conditions on payment of amount for maintenance etc.

6.49 Clause 101 replaces, but is generally to the same effect as, existing section 63(1) and (3).¹⁹

6.50 Clause 101(1) authorises a trustee who is exercising a power to pay or apply an amount or capital property for the maintenance, education or advancement of a person to make the payment or application of the amount or capital property subject to a condition.

¹⁸ However, the consent of any person interested under a discretionary trust is not required: *Re Beckett's Settlement* [1940] Ch 279.

¹⁹ *Trusts Act 1973* (Qld) s 63 was based on similar provisions in Western Australia and New Zealand: see *Trustees Act 1962* (WA) s 60; *Trustee Act 1956* (NZ) s 41A. See also *Trusts and Settled Land Report* (1971) 48.

6.51 Clause 101(2) provides that, without limiting clause 101(1), the condition may require the repayment of the amount or the value of the capital property, the payment of interest, or the giving of security.

6.52 Clause 101(3) further authorises a trustee, at any time after imposing a condition, to waive the condition or release an obligation undertaken or any security given because of the condition.

6.53 Clause 101, like existing section 63(1), is not restricted to a trustee's statutory powers of maintenance and advancement, but is also capable of applying to a trustee who is exercising power under the trust instrument.

6.54 The provision is a useful adjunct to a trustee's powers of maintenance and advancement, since the imposition of conditions has the potential to prevent the loss of the sums advanced:²⁰

As the law stands, *In re Pauling's Settlement Trusts*²¹ underlines that if moneys paid out are frittered away instead of being applied properly for the object described to the trustees, trustees can only refuse to make any further payments. We doubt whether such a response is appropriate in all cases; much depends upon the nature of a subsequent request for funds. But, on a more general basis, we think that trustees who pay or apply capital moneys to or for persons who do not have fully vested interests should be able to impose conditions in suitable circumstances. (note added)

6.55 Clause 101 does not, however, include a provision to the effect of the first part of existing section 63(3), which currently provides that nothing in that section 'shall impose upon a trustee any obligation to impose any condition pursuant to subsection (1)'. Because the power to impose a condition is discretionary, the Commission considers it unnecessary to provide expressly that a trustee is not required to exercise the power.

Clause 102 Amounts repaid not to be taken into account in working out amount that may be paid or applied

6.56 Clause 102 replaces, but is to the same effect as, existing section 63(2).

6.57 Clause 102 is relevant to a trustee's power to pay or apply capital under clause 99 or under any provision in a trust instrument that imposes a limit on the amount that may be paid or applied. It clarifies that an amount that is repaid to, or recovered by, the trustee in accordance with a condition imposed under clause 101(1) is taken not to have been paid or applied by the trustee.

²⁰ Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 2, 353. Both the Ontario Law Reform Commission and the British Columbia Law Institute recommended provisions in similar terms to s 63 of the *Trusts Act 1973* (Qld): Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 2, Draft Bill: An Act to revise the *Trustee Act*, cl 51; British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004), Proposed *Trustee Act*, cl 48.

²¹ [1964] Ch 303.

Clause 103 Trustee not liable for losses

6.58 Clause 103 is generally based on existing section 63(4), except that it limits the scope of the protection provided to the trustee.

6.59 Existing section 63(4) currently protects a trustee from liability for *any loss* that is incurred in respect of money that is paid or applied for a beneficiary's maintenance, education or advancement. Arguably, the breadth of the current provision would protect a trustee who, for example, paid income or capital to a parent who the trustee had reason to believe would misappropriate the payment.

6.60 The Commission has therefore limited the protection given by the provision. In particular, clause 103 protects a trustee from a loss that, in effect, relates to the imposition or enforcement of conditions.

6.61 Although the protection afforded by clause 103 is more limited than the protection currently afforded by existing section 63(4), the Commission nevertheless considers it desirable to include a provision dealing with a trustee's protection in relation to conditions to avoid the situation where trustees impose conditions routinely because of a concern that they might otherwise be liable for failing to impose any, or adequate, conditions.

Part 7

Indemnities and Protection of Trustees and Others

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INTRODUCTION

7.1 Part 7 of the Draft Trusts Bill 2013 provides for the indemnity and protection of trustees and other persons in particular circumstances.

7.2 Most of the provisions in Part 7 of the Draft Bill are based on the existing provisions in Part 6 of the *Trusts Act 1973* (Qld), although some are based on provisions in other parts of the *Trusts Act 1973* (Qld) that also deal with the issue of indemnity and protection.¹

¹ *Trusts Act 1973* (Qld) ss 13, 34(3), 38(3), 43, 46, 112–113.

7.3 Those provisions of the current Act that have not been retained in the Draft Bill are identified in Appendix C as 'omitted provisions'.

DIVISION 1 PRELIMINARY

Clause 104 Application of pt 7

7.4 Clause 104 replaces, but is to the same effect as, existing section 65. It provides that the provisions of Part 7 of the Draft Bill apply despite a contrary intention in a trust instrument.

7.5 Although existing section 65 is qualified by the expression '[e]xcept where otherwise provided in this part', the only provision in Part 6 of the current Act that is subject to a contrary intention in the trust instrument is existing section 78. As Part 7 of the Draft Bill does not include a provision to the effect of existing section 78,² it is not necessary for clause 104 to include the qualification that appears in existing section 65.

DIVISION 2 DISTRIBUTING TRUST PROPERTY

Clause 105 Giving notice of intention to distribute

7.6 Clause 105 replaces, but is generally to the same effect as, existing section 67. However, it is drafted in a more modern style and implements the changes proposed by Recommendation 11-1 of the Interim Report.

7.7 As with existing section 67, clause 105 enables a trustee to obtain protection by publishing a notice requiring any person having a claim to, or against, the trust property, whether as creditor or beneficiary or otherwise, to send particulars of the person's claim within a stated time. After that time, the trustee may 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. The trustee is not liable to any person of whose claim the trustee had no notice at the time of distribution.

The manner in which notice is to be given

7.8 In order to obtain the protection afforded by clause 105(7), the notice of intended distribution must be given in accordance with clause 105(1)(a) and (b).

7.9 Clause 105(1)(a) provides for the notice to be published:

- in a newspaper circulating throughout the State and sold at least once each week; or
- in the ways that comply with rule 599(3) and (4) of the *Uniform Civil Procedure Rules 1999* (Qld); or

²

Draft Trusts Bill 2013, cl 192 instead inserts a new s 61AA, based on s 78 of the *Trusts Act 1973* (Qld), into the *Succession Act 1981* (Qld).

- on a website approved for the purpose either under a regulation or by the Chief Justice under a practice direction.

7.10 The second of these options aligns with the requirements in the *Uniform Civil Procedure Rules 1999* (Qld) for giving notice of intention to apply for a grant of probate or letters of administration. As a result, the publication of a notice of intention to apply for a grant that satisfies the requirements of the *Uniform Civil Procedure Rules 1999* (Qld), and that incorporates a notice of intention to distribute trust property,³ will automatically satisfy the requirements of clause 105(1)(a) in relation to the publication of the notice, even if the notice is published in one of the local newspapers approved under the relevant practice directions for that purpose.⁴ This ensures that, for a deceased estate, only one set of costs need be incurred in order to satisfy the publication requirements of both the *Uniform Civil Procedure Rules 1999* (Qld) and the Draft Bill.

7.11 Recommendation 11-1 of the Interim Report did not include the second option mentioned at [7.9] above. The Commission has modified its earlier recommendation in response to a submission from the Queensland Law Society that the provision should continue to allow notice to be given in a local newspaper, as representing a lower cost option than a newspaper circulating throughout the State and sold at least once each week.

7.12 The third option mentioned at [7.9] above also includes a slight change from Recommendation 11-1 of the Interim Report. The Commission had recommended that the notice be published on a website approved for that purpose by regulation.

7.13 The Incorporated Council of Law Reporting (Qld) ('ICLRQ') strongly supported the recommendation that a notice under existing section 67 should be able to be given by publication on a suitable website, and noted its own efforts in that regard.⁵ However, it observed that existing section 67 uses practice directions, rather than regulations, as the mechanism to identify the methods of publication, and suggested that this approach had appeal as it is by practice directions under rule 599 of the *Uniform Civil Procedure Rules 1999* (Qld) that the appropriate form of advertising for probate or administration notices is identified.

³ *Uniform Civil Procedure Rules 1999* (Qld) r 599(1)(b) provides that a notice of intention to apply for a grant may include a statement calling on anyone who has a claim against the estate, as creditor, beneficiary or otherwise, to give particulars of the claim to the personal representative at the address stated in the notice. Rule 599(2) further provides that, if the notice of intention to apply for a grant includes a statement mentioned in subrule (1)(b), the notice must comply with s 67 of the *Trusts Act 1973* (Qld).

⁴ See Supreme Court of Queensland, *Practice Direction No 25 of 1999 — Rule 599(3)(c) Uniform Civil Procedure Rules: Approval of Newspapers*, 23 August 1999; Supreme Court of Queensland, *Practice Direction No 32 of 1999 — Rule 599(3)(c) Uniform Civil Procedure Rules: Approval of Newspapers*, 14 December 1999. In the relevant circumstances, the notice may be published in *The Gold Coast Bulletin*, *The Toowoomba Chronicle*, *The Sunshine Coast Daily* or *The Queensland Times*.

⁵ The Incorporated Council of Law Reporting (Qld) publishes the *Queensland Law Reporter*, which includes a free, publicly accessible online database of probate notices placed in that publication since 1 January 2012: The Incorporated Council of Law Reporting for the State of Queensland, *Probate Notice Database* <<http://www.queenslandreports.com.au/databases/probate-notice-database>>.

7.14 In recognition of the flexibility of providing for a website to be approved by the Chief Justice under a practice direction, the Commission has modified its earlier recommendation to include this as an alternative to approval under a regulation.

7.15 Obviously, it is desirable that only one website should be approved for this purpose, as it will avoid the need for creditors and other persons to search for notices on multiple websites. The Commission considers that, once a website has been approved for this purpose by either means, there would be no need for any additional website to be approved.

7.16 Clause 105(1)(b) is based on the requirement in existing section 67 to give 'such other notices as would be directed by the court to be given in an action for administration'.⁶ The reference to an 'action for administration' has been updated in clause 105(1)(b) to refer to an 'administration proceeding', which is defined in clause 105(10) to mean 'a proceeding for the administration of the estate of a deceased person, or for the administration of a trust, under the direction of the Supreme Court'.

Period of time for submitting claim

7.17 Clause 105(4) provides that the closing date for a claimant to give notice must be at least two months after the date of publication of the notice of intention to distribute. The minimum time has been increased from six weeks, which currently applies under existing section 67(1).

7.18 This change implements the recommendation of the National Committee for Uniform Succession Laws in relation to this issue,⁷ and promotes greater consistency with the other Australian jurisdictions.⁸

Notice

7.19 As with existing section 67, clause 105 does not protect a trustee in respect of a claim of which he or she has notice at the time of distribution.⁹

7.20 Clause 105(5) provides that, after the closing date or, if more than one notice is published, the closing date that is latest in time, the trustee may 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. Clause 105(6) further provides that, for clause 105(5), it does not matter whether the trustee has notice of a claim because it has been made in response to the published notice or has otherwise come to the trustee's notice.

⁶ See *Trusts Interim Report* (2013) [11.8] for a discussion of the scope of this requirement.

⁷ *Administration of Estates Report* (2009) vol 2, [21.151], Rec 21-1(c).

⁸ As explained in the Interim Report and Discussion Paper, different minimum periods are provided for in the other Australian jurisdictions: see *Trusts Interim Report* (2013) [11.39]; *Trusts Discussion Paper* (2012) [11.100]. Three jurisdictions currently provide for a minimum period of two months: *Trustee Act 1925* (ACT) s 60(3); *Administration and Probate Act* (NT) s 96, *Supreme Court Rules* (NT) r 88.88, Form 88ZF; *Trustee Act 1958* (Vic) s 33(1)(a).

⁹ *Nowell v Palmer* (1993) 32 NSWLR 574, 582 (Handley JA). See also *Trusts Interim Report* (2013) [11.9].

7.21 These provisions implement Recommendation 11-1(c) of the Interim Report, and recognise that a trustee may have 'notice' of a claim even though no claim has been submitted.

7.22 Clause 105(6) is based on the similar provision in section 55 of the *Administration and Probate Act 1935* (Tas), and implements the recommendation of the National Committee for Uniform Succession Laws on this issue.¹⁰

7.23 Clause 105 omits existing section 67(4)(b), which provides that nothing in existing section 67 relieves the trustee 'of any obligation to make searches or obtain certificates of search similar to those which an intending purchaser would be advised to make or obtain'.¹¹ Existing section 67(4)(b) is based on section 27 of the English *Trustee Act 1925*, which, in effect, ensures that a personal representative is taken to have notice of certain claims that could be ascertained by obtaining such searches as would be obtained by an intending purchaser.¹²

DIVISION 3 CLAIMS AGAINST TRUST PROPERTY

7.24 Clauses 106–110 implement Recommendation 11-2 of the Interim Report. They are to the same general effect as existing section 68, but are expressed in a more modern drafting style. In particular, existing section 68, which is quite a long provision, has been broken down into five separate provisions to improve its comprehensibility.

7.25 As with existing section 68, clauses 106–110 provide a mechanism by which trustees may require a person who has, or may have, a claim to or against the trust property or against the trustee personally to pursue his or her claim, failing which the trustee may apply to the court to have the person's claim barred.¹³

7.26 However, clauses 106–110 do not include provisions to the effect of existing section 68(7) and (8), which provide for the service of a notice or application that is to be served under existing section 68. In the Commission's view, the service of documents is sufficiently provided for by sections 39 and 39A of the *Acts Interpretation Act 1954* (Qld) and by the court's power under clause 143 of the Draft Bill to give directions, while the service of applications is sufficiently provided for by rule 116 of the *Uniform Civil Procedure Rules 1999* (Qld), which deals with substituted service.

¹⁰ *Administration of Estates Report* (2009) vol 2, [21.153], Rec 21-1(d).

¹¹ Similar provision is made in the trustee legislation of Tasmania and Victoria: *Trustee Act 1898* (Tas) s 25A(7); *Trustee Act 1958* (Vic) s 33(3)(b).

¹² *Halsbury's Statutes of England and Wales* (Butterworths, 4th ed, 2001 reissue) vol 48, 484. The National Committee for Uniform Succession Laws was of the view that the model provision should not contain a provision to the effect of s 67(4)(b) of the *Trusts Act 1973* (Qld): *Administration of Estates Report* (2009) vol 2, [21.155].

¹³ Provisions dealing with the barring of claims against the Public Trustee or a trustee company are also found in s 131 of the *Public Trustee Act 1978* (Qld) and s 32 of the *Trustee Companies Act 1968* (Qld). Those provisions enable a claim to be barred without a court order: see Chapter 3, [60] ff below.

Clause 106 Application of div 3

7.27 Clause 106 provides that Division 3 does not apply to a claim:

- under Part 4 of the *Succession Act 1981* (Qld) — that is, a claim for family provision; or
- that is an application to revoke a grant of probate or letters of administration.

7.28 Clause 106 replaces, but is to the same general effect as, the second part of existing section 68(5), except that it updates the outdated reference in that section to a claim under ‘the *Succession Act 1867*, part 5’.

Clause 107 Definitions for div 3

7.29 Clause 107 includes definitions of ‘claim’ and ‘claimant’, which apply for the purposes of Division 3. These definitions are based on the provisions of existing section 68(1) and (5) and assist in simplifying the drafting of the remaining provisions in that division of the Draft Bill.

Clause 108 Requiring claimant to start a proceeding

7.30 Clause 108 replaces, but is generally to the same effect as, existing section 68(1).

7.31 Clause 108(2) provides that a trustee may serve on the claimant a notice requiring the claimant, within six months after the date of service of the notice, to start a proceeding to enforce the claim and to prosecute the proceeding with appropriate diligence.

7.32 However, whereas existing section 68(1) is expressed to apply if a trustee ‘wishes to reject a claim’, clause 108(1) provides that clause 108(2) applies if a trustee ‘does not accept a claim’ to which the provision applies.

7.33 This implements a recommendation of the National Committee for Uniform Succession Laws and ‘would cover those situations where a personal representative or trustee has not actually rejected a claim, but does not have sufficient information to accept the claim’.¹⁴

Clause 109 Applying to court to make orders

7.34 Clause 109 replaces, but is to the same general effect as, existing section 68(2)–(4).

¹⁴

Administration of Estates Report (2009) vol 2, [22.100], Rec 22-6(b).

7.35 It provides that, at the end of the six month period, the trustee may apply to the court for an order to:¹⁵

- extend the period in which the claimant may start a proceeding to enforce the claim;
- bar the claim (including for all purposes); or
- enable the trust property to be dealt with without regard to the claim.

7.36 Existing section 68(3)(a) currently enables the court to make an order 'barring the claim', as an alternative to an order 'enabling the trust property to be dealt with without regard to the claim'. It would therefore appear that the court may bar a claim not just against the trustee (for which the latter order would be sufficient), but also against any persons to whom the property is to be distributed. However, to avoid any doubt about the extent of the court's power, clause 109(4)(a)(ii) provides expressly that the court may bar the claim 'for all purposes'.¹⁶

7.37 As with existing section 68, the barring of a claim under clause 109 is not automatic, but is a matter in the discretion of the court.

7.38 The court has a broad discretion in relation to the barring of claims, and will not bar a claim simply because the conditions for making an order have been satisfied.¹⁷ In deciding whether to bar a claim, the court will take into account:¹⁸

- the nature of the claim;
- the fact that the effect of an order barring a claim may be to substantially reduce the limitation period that applies under the *Limitation of Actions Act 1974* (Qld);
- the terms of the deceased's will (where relevant); and
- (in relation to the estate of a deceased person) the interests of the beneficiaries of the estate and the desire of the personal representative to conclude the administration of the estate.

7.39 The Queensland Law Society and a legal practitioner who practises in trusts and succession law submitted, in response to Recommendation 11-2 of the Interim Report, that it should not be necessary for the trustee to apply to the court for the barring of a claim. In their view, the provision in relation to the barring of claims should be aligned with the Public Trustee's power under section 131 of the

¹⁵ In addition to making any of these orders, the court may impose the conditions and give the directions about the proceeding or the claim, including a direction about the costs of or incidental to the application, that the court considers appropriate: Draft Trusts Bill 2013, cl 109(4)(b).

¹⁶ This is based on s 30(3)(b) of the *Administration and Probate Act 1958* (Vic) and implements a recommendation of the National Committee for Uniform Succession Laws: *Administration of Estates Report* (2009) vol 2, [22.101], Rec 22-6(c). For a more detailed discussion, see *Trusts Interim Report* (2013) [11.63]–[11.68].

¹⁷ *Re the Will of McNeill* (Unreported, Supreme Court of Queensland, Master Weld, 26 February 1982) 2–3.

¹⁸ *Ibid* 3–4.

Public Trustee Act 1978 (Qld), and provide that, after the expiration of the relevant time, the claim is automatically barred.

7.40 As explained later in this Report, there are special considerations that justify such a significant power for the Public Trustee, including that the Public Trustee administers a large number of small estates.¹⁹

7.41 However, because the barring of a claim effectively shortens the limitation period that would otherwise apply to a claim, the Commission remains of the view that the barring of a claim should generally occur only as the result of a court order. For this reason, clause 109 continues the policy reflected in existing section 68.

Clause 110 Contesting trustee's right to indemnity

7.42 Clause 110 replaces, but is to the same effect as, existing section 68(6). It provides that, if a beneficiary of the trust is not made a party to an application by a trustee under Division 3, an order made by the court on the application does not affect the beneficiary's right to contest the claim of the trustee to be entitled to indemnify himself or herself out of the trust property.

DIVISION 4 PARTICULAR PROTECTIONS FOR TRUSTEES

Clause 111 Protection relating to notice when a person is trustee of more than 1 trust

7.43 Clause 111 replaces, but is to the same effect as, existing section 69. It implements Recommendation 11-3 of the Interim Report.

7.44 The effect of clause 111 is that, if a trustee is acting for more than one trust, he or she is not, in the absence of fraud, to be taken to have notice of a matter²⁰ in relation to a trust only because notice of the matter is, or was, given to the trustee when acting for another trust.

7.45 As discussed earlier in relation to clause 105, the protection provided to a trustee who gives notice of intention to distribute trust property is dependent on the trustee not having notice of the relevant claim at the time the property is distributed. Clause 111 is of particular importance to professional trustees, who may be trustees of multiple, separate trusts.²¹

Clause 112 Protection in relation to receipts

7.46 Clause 112 replaces, but is to the same effect as, the first part of existing section 71, but expresses that provision in a more modern drafting style.

¹⁹ See Chapter 3, [65] below.

²⁰ Draft Trusts Bill 2013, cl 111(3) defines 'matter' to include 'instrument, fact and thing'.

²¹ See further *Trusts Discussion Paper* (2012) [11.128]–[11.129].

7.47 At law, if trustees joined in giving a receipt, they were, prima facie, all considered to have received the money.²² However, in equity, a trustee could be exonerated from that inference by showing that the money that was acknowledged to have been received by all of the trustees was, in fact, received by the other trustee or trustees, and that the trustee joined in giving the receipt only for conformity.²³ The equitable rule arose because:²⁴

Where the administration of the trust is vested in co-trustees, a receipt for money paid to the account of the trust must be authenticated by the signature of all the trustees in their joint capacity, and it would be tyranny to punish a trustee for an act which the very nature of his office will not permit him to decline.

7.48 Clause 112 applies if a trustee signs a receipt for the payment of an amount or for securities in order to conform with the requirements in relation to the giving of receipts by trustees, and does not receive all, or any, of the amount or securities. In that situation, the trustee is accountable only for the amount or securities actually received by the trustee. Clause 112, like existing section 71, is declaratory of the general law.

7.49 Although a trustee is not chargeable simply by reason of allowing a co-trustee to receive trust moneys, a trustee may nevertheless become liable for the misapplication of the money if, in breach of his or her duty, the trustee allows a co-trustee to retain the money for longer than the circumstances require or if the trustee fails to see that the money is applied for the purposes of the trust.²⁵

Clause 113 Protection in relation to acts of others

7.50 Clause 113 is to the same general effect as the second part of existing section 71,²⁶ but is expressed in a much more modern drafting style. It also replaces the protection currently provided to trustees under existing section 54(1) in relation to the defaults of agents, so that the liability of a trustee for the acts or omissions of an agent is now dealt with in a single provision.

7.51 Clause 113(1) provides that a trustee is liable only for the trustee's own acts or omissions.

7.52 Clause 113(2) further provides that, without limiting clause 113(1), a trustee is not liable for a loss resulting from:

- the acts or omissions of another trustee; an agent; or a financial institution, broker or other person with whom any trust funds are deposited; or

²² *Brice v Stokes* (1805) 11 Ves Jun 319, 324; 32 ER 1111, 1113 (Lord Eldon LC).

²³ *Ibid.*

²⁴ R Cozens-Hardy Horne, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 195.

²⁵ AR Rudall and JW Greig, *The Law of Trusts and Trustees* (Jordan & Sons, 2nd ed, 1898) 87, citing *Brice v Stokes* (1805) 11 Ves Jun 319; 32 ER 1111; *Thompson v Finch* (1856) 22 Beav 316; 52 ER 1130.

²⁶ For a detailed discussion of the effect of s 71 of the *Trusts Act 1973* (Qld), see *Trusts Interim Report* (2013) [11.100] ff.

- the insufficiency or deficiency of any security; or
- any other matter;

unless the loss also results from the trustee's own breach of trust.

7.53 Under the general law, 'the rule has always been that although a trustee is personally liable for any breaches of trust that he has committed, he is not liable for breaches committed by fellow trustees unless he himself is at fault'.²⁷

7.54 Existing section 71 currently provides that a trustee is not liable for certain losses 'unless the insufficiency, deficiency or loss *occurs through the trustee's own default*'. Although these words appear to apply only to the insufficiency or deficiency of any securities, or any other loss, the general law recognises that this is also the basis for holding a trustee liable for a loss caused by another trustee or person. It has been said of the equivalent provision in other trustee legislation that the provision 'give[s] no protection to a trustee who, by any neglect or default of his own, places it in the power of his co-trustee to cause a loss to the trust estate'.²⁸

7.55 It has been observed that, although a trustee is not 'vicariously liable' for the breaches of trust of a co-trustee, there are a number of ways in which a trustee, through his or her own breaches, will be personally liable for losses resulting from a co-trustee's breach of trust.²⁹

A trustee will ... be liable for breach if — due to his own active or passive conduct — his co-trustee or co-trustees do acts in contravention of the terms of the trust instrument or if they neglect their duties and loss falls upon the trust estate. But it must be emphasized that even on general equitable principle the trustee is not vicariously liable for the breaches by his co-trustee but only for his own breaches.

7.56 Under clause 113(2), a trustee is not liable for a specified loss unless it also results from the trustee's own 'breach of trust'. This replaces the reference in existing section 71 to a loss that occurs without the trustee's 'default', and continues to provide an appropriately narrow basis on which to protect a trustee from liability in respect of the losses of trust property.

7.57 Clause 113 is expressed to be subject to clauses 67 and 72. Those provisions deal with a trustee's liability for the acts and omissions of, respectively, a person authorised to exercise the trustee's investment powers and a person to whom the trustee has delegated the administration of the trust on a temporary basis. In both cases, the trustee is liable for the acts and omissions of the other person as if they were the trustee's own acts and omissions. These provisions impose a stricter liability on the trustee and therefore appear as exceptions to clause 113.

²⁷ RE Megarry and PV Baker, *Snell's Principles of Equity* (Sweet & Maxwell, 26th ed, 1966) 296. See also T Lewin, *A Practical Treatise on the Law of Trusts and Trustees* (Maxwell & Son, 3rd ed, 1857) 302; *Townley v Sherborne* (1633) J Bridg 35; 123 ER 1181.

²⁸ FG Champernowne and H Johnston, *The Trustee Act, 1893, And Other Recent Statutes Relating to Trustees With Notes* (William Clowes & Sons, 1904) 93.

²⁹ G Fricke and OK Strauss, *The Law of Trusts in Victoria* (Butterworths, 1964) 422.

Clause 114 Expenses reasonably incurred in the administration of the trust

7.58 Clause 114 replaces, but is to the same effect as, existing section 72.³⁰ It implements Recommendation 11-6 of the Interim Report.

7.59 Clause 114 gives statutory recognition to a trustee's right under the general law to be indemnified out of the trust property for expenses incurred in the proper performance of the trust.³¹ Under the right to indemnity, a trustee may either reimburse himself or herself out of trust property for expenses already paid with the trustee's own money (the 'right of reimbursement' or 'right of recoupment'), or may pay or discharge any expenses directly out of the trust property (the 'right of exoneration').

7.60 Clause 114(a) reflects the right of reimbursement, while clause 114(b) reflects the right of exoneration.

Clause 115 Protection against liability for rents etc. under a lease

7.61 Clause 115 replaces, but is to the same effect as, existing section 66. It implements Recommendation 11-7 of the Interim Report by expressing the provision in a more modern drafting style. In particular, it omits the references to 'rentcharges' that appear in existing section 66, in view of the abolition of rentcharges by the *Property Law Act 1974* (Qld).³²

7.62 Clause 115 applies if a trustee is, for any reason, liable in relation to any rent, covenant or agreement reserved by or contained in a lease or in relation to any indemnity given for any rent, covenant or such agreement. It is intended to facilitate the assignment of the lease and the distribution of the remaining trust property in a way that relieves the trustee from liability in respect of unascertained future liabilities under the lease, such as for a possible future breach by the tenant of a covenant to repair the premises.³³

7.63 As explained in the Interim Report, a trustee will become personally liable for the covenants of the lease, as an assignee, if the trustee enters into possession of the leasehold premises. In addition, a personal representative is liable in his or

³⁰ For a detailed discussion of s 72 of the *Trusts Act 1973* (Qld), see *Trusts Discussion Paper* (2012) [11.64] ff.

³¹ See, eg, *National Trustees Executors and Agency Co of Australasia Ltd v Barnes* (1941) 64 CLR 268, 274 (Stärke J), 277 (Williams J); *Ron Kingham Real Estate Pty Ltd v Edgar* [1999] 2 Qd R 439, 441–2 (McPherson JA).

³² *Property Law Act 1974* (Qld) s 176. A 'rentcharge' is the right to an annual sum payable out of land, but without any conferral of tenure in the land: LexisNexis, *Encyclopaedic Australian Legal Dictionary* (at January 2011) (definition of 'rentcharge').

Further, because cl 115 of the Draft Trusts Bill 2013 does not include a provision to the effect of s 66(1)(b) of the *Trusts Act 1973* (Qld), it is not necessary for cl 115 to include definitions to the effect of the definitions of 'grant' and 'grantee' in s 66(3) of the current Act, since those definitions are relevant only where the trustee is liable for any rent, covenant or agreement payable under or contained in a grant made in consideration of a rentcharge.

³³ See *Trusts Interim Report* (2013) [11.169] ff, discussing *Trusts Act 1973* (Qld) s 66.

her representative capacity, to the extent of the deceased's assets, for the whole term of the lease, even after it is assigned to a third party.³⁴

7.64 Clause 115 provides protection for a trustee who assigns the lease if certain conditions are satisfied. Clause 115(2) provides that the trustee may assign the lease to a person entitled to call for an assignment of the lease if the trustee:

- satisfies all liabilities under the lease that may have accrued, and been claimed, up to the date of the assignment; and
- 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 though the time for expending the amount may not have arrived).

7.65 If those conditions are met, clause 115(3) provides that the trustee may distribute the remaining trust property, without appropriating any further amount from the trust property to meet any future liability under the lease.

7.66 This overcomes the earlier practice of the courts in requiring an indemnity fund to be set apart to answer any unascertained or contingent future liabilities that might arise under the lease, which had the unsatisfactory effect of withholding part of the trust property from the beneficiaries, in some cases for very long periods.³⁵

7.67 Clause 115(4) provides that, if the trustee has assigned the lease and distributed the remaining trust property in accordance with the provision, the trustee is not personally liable for any later claim under the lease. Clause 115(5) clarifies, however, that nothing in clause 115 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 it was distributed.

7.68 The definition of 'lease' in clause 115(6) omits the reference to an 'under-lease' that currently appears in the definition of 'lease' in existing section 66(3). Given that Schedule 1 to the *Acts Interpretation Act 1954* (Qld) defines 'lease' to include a sublease, the current reference to an 'under-lease' is redundant.

7.69 Similarly, clause 115(6) omits the definition of 'lessee' that appears in existing section 66(3). Given that the *Acts Interpretation Act 1954* (Qld) provides that a reference to a person as 'lessee' includes 'a reference to the person's personal representatives, successors and assigns',³⁶ it is not necessary for clause 115(6) to provide that 'lessee' includes persons deriving title under the lessee.³⁷

³⁴ See *Trusts Interim Report* (2013) [11.164]–[11.165].

³⁵ See *Dodson v Sammell* (1861) 1 Dr & Sm 575, 577; 62 ER 498, 498–9 (*Kindersley V-C*).

³⁶ *Acts Interpretation Act 1954* (Qld) s 35A.

³⁷ See n 32 above in relation to the omission of the definitions of 'grant' and 'grantee' that currently appear in s 66(3) of the *Trusts Act 1973* (Qld).

DIVISION 5 GENERAL**Clause 116 Evidence about vacancy in a trust**

7.70 Clause 116 is generally based on existing section 13.³⁸

7.71 Clause 116(1) implements Recommendation 3-14 of the Interim Report by extending the protection afforded by existing section 13(1) to a debtor who makes a payment to a new or continuing trustee in good faith.

7.72 Further, clause 116(2) clarifies the effect of existing section 13(2) by providing that the vesting of trust property consequent on the appointment of a new trustee is as valid in favour of a subsequent purchaser acting in good faith 'as it would be if the statement were true'. This ensures that the effect of the provision is limited to a statement that, if true, would reflect a circumstance in which the trustee may be replaced.

Clause 117 Protection for persons registering dealings with trust property

7.73 Clause 117 is new as a stand-alone provision. It implements Recommendations 7-10 and 7-18 of the Interim Report by preserving the protections currently given to the Registrar of Titles and other persons registering or certifying title under existing sections 34(3) and 38(3).³⁹

7.74 Existing sections 34 and 38 relate, respectively, to the power of a trustee to join with another person in the sale of trust property and to surrender onerous leasehold or freehold property. In accordance with Recommendations 7-5 and 7-6 of the Interim Report, those sections have not been retained as stand-alone provisions in the Draft Bill. Instead, clause 59 provides that a trustee has, in relation to the trust property, all the powers of an absolute owner of the property.

7.75 In the Interim Report, it was noted that it is arguable whether the protection currently conferred under sections 34(3) and 38(3) on the Registrar of Titles continues to be strictly necessary, at least to the extent that a breach of trust is involved. The inclusion of clause 117 avoids any unforeseen and unintended consequences that might flow from the removal of the protections currently given to the Registrar of Titles by those sections.⁴⁰

7.76 The Draft Bill does not, however, preserve the protection currently afforded to a purchaser under existing sections 34(3) and 38(3). That protection is instead provided by clause 118, which is based on existing section 46, and is a provision of more general application.

³⁸ See generally *Trusts Interim Report* (2013) [3.298] ff.

³⁹ Draft Trusts Bill 2013, cl 117 applies, generally, to the 'land registrar', which is defined in the Dictionary to mean 'the registrar under the *Land Title Act 1994* or other person having the function of registering or recording dealings with land'.

⁴⁰ See generally *Trusts Interim Report* (2013) [7.85] ff.

Clause 118 Protection for purchasers and mortgagees

7.77 Clause 118 replaces, but is to the same effect as, existing section 46.⁴¹ It implements Recommendation 11-12 of the Interim Report.

7.78 Clause 118 is a beneficial provision for purchasers and mortgagees who deal with trustees. It overcomes the more limited protection that was available under the general law⁴² and relieves purchasers and mortgagees from the obligation to make the inquiries that might otherwise be expected.⁴³

Clause 119 Receipts given by trustees

7.79 Clause 119 is generally to the same effect as existing section 43. It implements Recommendation 9-1 of the Interim Report.

7.80 Clause 119 deals with the effect of a receipt given by a trustee, or a person appointed by the trustee to give receipts under clause 82.

7.81 As with existing section 43, the giving of a receipt in accordance with clause 119 ensures that the person paying, transferring, or delivering the property to the trustee is not required to see to its application and is not answerable for any loss or misapplication of the property. Before legislation to this effect was enacted, there were some circumstances in which a person paying money to a trustee was bound to see that the money was properly applied and could be held liable for its misapplication.⁴⁴

7.82 However, unlike existing section 43, clause 119 does not make provision for trustees to authorise a person, or one of their number, to give a receipt.⁴⁵ That power is separately conferred under clause 82(2)–(3), as part of the provision that provides generally for the appointment of agents and replaces existing section 54(1).

7.83 This change removes the current overlap between existing sections 43 and 54(1) and implements Recommendation 9-2 of the Interim Report. It also ensures that the empowering aspect of existing section 43 is provided for in Part 5 of the Draft Bill (which deals with the general powers of trustees), while the protective aspect of the provision is provided for in Part 7 of the Draft Bill (which deals specifically with the protection of trustees and other persons).

⁴¹ See generally *Trusts Discussion Paper* (2012) [11.239] ff.

⁴² See generally T Lewin, *A Practical Treatise on the Law of Trusts and Trustees* (Maxwell & Son, 2nd ed, 1842) 339–53; E Sugden, *A Practical Treatise of the Law of Vendors and Purchasers of Estates* (Sweet, 9th ed, 1834) vol 2, ch 11.

⁴³ See *Trusts and Settled Land Report* (1971) 40.

⁴⁴ For a detailed discussion of the historical background to this provision, see *Trusts Interim Report* (2013) [9.4]–[9.8].

⁴⁵ See *Trusts Interim Report* (2013) [9.11]–[9.16].

Clause 120 Power of court to relieve trustee from personal liability

7.84 Clause 120 replaces, but is to the same effect as, existing section 76. It implements Recommendation 11-9 of the Interim Report.⁴⁶

7.85 Clause 120 gives the court the power to relieve a trustee from personal liability for a breach of trust. As with existing section 76, clause 120(2) requires the court to be satisfied that the trustee acted honestly and reasonably, and that the trustee ought fairly to be excused for the breach of trust and for omitting to obtain the court's directions in the matter in which the trustee committed the breach of trust.⁴⁷

Clause 121 Power of court to make beneficiary indemnify for breach of trust

7.86 Clause 121 replaces, but is to the same effect as, existing section 77.⁴⁸ It implements Recommendation 11-10 of the Interim Report.

7.87 However, clause 121 expresses the court's power under existing section 77 in a more modern drafting style by avoiding the current reference to 'impounding' the beneficiary's interest in the trust property. Instead, it provides that, in the relevant circumstances, the court may, if it considers it appropriate, make an order 'indemnifying the trustee out of the beneficiary's interest in the trust property'.

7.88 Clause 121 reflects the position under the general law by allowing the court to require a beneficiary to indemnify a trustee if the trustee committed the breach of trust at the instigation or request of the beneficiary.⁴⁹ However, like existing section 77, clause 121 also extends the court's power by allowing it to make an order under the provision if the breach of trust was committed with the written consent of the beneficiary.⁵⁰

Clause 122 Indemnity for acts done under a court order

7.89 Clause 122 replaces, but is generally to the same effect as, existing section 112. It implements Recommendation 11-14 of the Interim Report.

7.90 As with existing section 112, clause 122 provides that each order purporting to be made under the Draft Bill is a complete indemnity to a person for any act done under the order.

⁴⁶ See generally *Trusts Interim Report* (2013) [11.207]–[11.210].

⁴⁷ This is a reference the court's power under cl 143 of the Draft Trusts Bill 2013. See generally *Trusts Interim Report* (2013) [11.211]–[11.216].

⁴⁸ For a more detailed discussion of the effect of s 77 of the *Trusts Act 1973* (Qld), see *Trusts Discussion Paper* (2012) [11.185] ff.

⁴⁹ See *Raby v Ridehalgh* (1855) 7 De GM & G 104; 44 ER 41; *Mara v Browne* [1895] 2 Ch 69, 92 (North J). See also RE Megarry and PV Baker, *Snell's Principles of Equity* (Sweet & Maxwell, 26th ed, 1966) 306.

⁵⁰ See *Fletcher v Collis* [1905] 2 Ch 34–5 (Romer LJ).

7.91 At common law, it is well established that an order of a superior court of record is valid and binding and has effect unless and until it is set aside,⁵¹ and that acts done according to the exigency of a judicial order, afterwards reversed, are protected, those acts being acts done in the execution of justice, which are compulsive.⁵²

7.92 However, unlike an order made by a superior court of record, a judicial order of an inferior court made without jurisdiction 'has no legal force as an order of that court' and 'may be challenged collaterally in a subsequent proceeding in which reliance is sought to be placed on it'.⁵³

7.93 Although the provision in clause 122 may not strictly be necessary as far as the Supreme Court is concerned, the Draft Bill also confers jurisdiction on the District Court.⁵⁴ Clause 122 ensures that there is no doubt as to the effect of acts done in compliance with an order of that court.

Clause 123 Remedies for wrongful distribution of trust property

7.94 Clause 123 replaces, with some modifications, existing section 113. It addresses a number of issues arising out of *Re Diplock*,⁵⁵ and implements Recommendations 14-1 to 14-3 of the Interim Report.

Clause 123(1)–(2)

7.95 Clause 123(1)–(2) replaces, but is to the same effect as, existing section 113(1). It implements Recommendation 14-1 of the Interim Report.

7.96 Clause 123(1)–(2) ensures that the same remedies for the wrongful distribution of trust property are available as in the case of the wrongful distribution of a deceased estate.

7.97 The effect of these provisions is to remove any doubt arising from the statement of Lord Simonds in *Ministry of Health v Simpson*⁵⁶ that the principles articulated in *Re Diplock* in relation to distributions made by personal representatives may not apply to distributions made by trustees.⁵⁷

51 *New South Wales v Kable* [2013] HCA 26, [32] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), [56]–[57] (Gageler J); *Kable v New South Wales* (2012) 293 ALR 719, 723 (Allsop P); *Re Macks; Ex parte Saint* (2000) 204 CLR 158, 184 (Gaudron J); *Cameron v Cole* (1944) 68 CLR 571, 590 (Rich J).

52 *Kable v New South Wales* (2012) 293 ALR 719, 728, 733–4 (Allsop P); *MacIntosh v Lobel* (1993) 30 NSWLR 441, 459 (Kirby P); *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220, 225 (Rich, Dixon, Evatt and McTiernan JJ). See also *Dr Drury's Case* (1610) 8 Co Rep 141b, 143a; 77 ER 688, 691.

53 *New South Wales v Kable* [2013] HCA 26, [56] (Gageler J).

54 See the definition of 'court' in the Dictionary.

55 [1948] Ch 465, affd *Ministry of Health v Simpson* [1951] AC 251.

56 [1951] AC 251, 265–6.

57 See generally *Trusts Interim Report* (2013) [14.8], in relation to s 113(1) of the *Trusts Act 1973* (Qld).

7.98 In *Re Diplock*, the English Court of Appeal held that, where a personal representative has wrongfully distributed the estate of a deceased person, an unpaid or underpaid creditor or beneficiary:

- has a personal action in equity (described as a claim '*in personam*') against the person to whom the property has been wrongfully distributed;⁵⁸ and
- may have a right to trace the money (described as a claim '*in rem*').⁵⁹

Clause 123(3)

7.99 Clause 123(3) is a new provision that replaces existing section 113(2). It implements Recommendation 14-2 of the Interim Report.⁶⁰

7.100 Clause 123(3) provides that a 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 person to whom a wrongful distribution of the trust property has been made.

7.101 The effect of this clause is to overcome the restriction in *Re Diplock*, which is substantially restated in existing section 113(2), on the order in which remedies are to be enforced.⁶¹

7.102 Although the Court of Appeal in *Re Diplock* confirmed the availability of an *in personam* claim as a remedy for wrongful distribution, it held that the person's claim must, in the first instance, be against the personal representative, and that the direct action against the distributee should be limited to the amount that cannot be recovered from the personal representative.⁶²

7.103 The rationale for this requirement in *Re Diplock* was that 'a personal representative could not recover at law moneys paid under a mistake of law' and that, as a consequence of the absence or exhaustion of the claimant's right to go against the personal representative, equity should intervene to provide a remedy that would otherwise be denied.⁶³

7.104 However, the law no longer prevents the recovery of moneys paid under a mistake of law,⁶⁴ so that the rationale for the rule no longer applies.

58 [1948] Ch 465, 476, 502.

59 Ibid 476, 536–7.

60 See generally *Trusts Interim Report* (2013) [14.26]–[14.28].

61 It has been held that a requirement to exhaust claims against one party before 'enforcing a remedy' against another does not prohibit the concurrent commencement and prosecution of proceedings against both parties as long as any judgment against the one is satisfied before any judgment is sought to be enforced against the other: *Corporate Systems Publishing Pty Ltd v Lingard (No 4)* [2008] WASC 21, [184] (Beech J).

62 [1948] Ch 465, 503, affd *Ministry of Health v Simpson* [1951] AC 251.

63 See *Trusts Interim Report* (2013) [14.19], quoting HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* [17.5010]. See also *Re Diplock* [1948] Ch 465, 502–4.

64 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* [17.5010], citing *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.

Clause 123(4)

7.105 Clause 123(4) replaces, but is to the same effect as, existing section 113(3). It implements Recommendation 14-1 of the Interim Report.⁶⁵

7.106 Clause 123(4) provides a statutory defence of change of position where a remedy is sought to be enforced against a person to whom a wrongful distribution of trust property has been made.

7.107 This overcomes the exclusion by Lord Simonds in *Ministry of Health v Simpson*⁶⁶ of such a defence in relation to the *in personam* claim that was recognised in *Re Diplock*, and ensures that such a defence will always be available in those circumstances. Although the High Court has recognised the defence of change of position in relation to a common law claim for moneys paid under a mistake,⁶⁷ there is some uncertainty as to whether, in the absence of statute, the defence would be recognised as a defence to an *in personam* claim based on *Re Diplock*.⁶⁸

7.108 Clause 123(4) is in the same terms as existing section 113(3). It provides that, if a remedy is sought to be enforced against the person to whom the distribution was made and the person received the distribution in good faith and so altered his or her position in reliance on the propriety of the distribution that, in the court's opinion, it would be inequitable to enforce the remedy, the court may make an order that it considers to be just in all the circumstances.

7.109 Although this formulation may be narrower than the defence of change of position that was recognised by the House of Lords in *Lipkin Gorman v Karpnale Ltd*,⁶⁹ it is generally consistent with the High Court's statement of the defence in *David Securities Pty Ltd v Commonwealth Bank of Australia*.⁷⁰

Clause 123(5)

7.110 Clause 123(5) is a new provision that implements Recommendation 14-3 of the Interim Report.⁷¹

7.111 It provides that clause 123(4) does not limit any other defence that may be available, under an Act or at law or in equity, to the person to whom the wrongful distribution of trust property has been made.

⁶⁵ See generally *Trusts Interim Report* (2013) [14.43]–[14.44].

⁶⁶ [1951] AC 251, 276.

⁶⁷ See *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 385 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

⁶⁸ It has recently been observed that, 'unlike the position in respect of a common law claim for restitution', there is 'no general defence of "change of position" to the equitable claims' recognised in *Re Diplock*. *Blue Sky Private Equity Ltd v Crawford Giles Pty Ltd* [2012] SASC 28, [100] (Gray J).

⁶⁹ [1991] 2 AC 548, 580 (Lord Goff), discussed in *Trusts Interim Report* (2013) [14.38], n 36.

⁷⁰ (1992) 175 CLR 353, 385 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ), discussed in *Trusts Interim Report* (2013) [14.38].

⁷¹ See generally *Trusts Interim Report* (2013) [14.45].

7.112 This clause has been included to provide for the possibility that the law may ultimately develop in the direction of a wider defence as recognised, for example, by the House of Lords in *Lipkin Gorman v Karpnale Ltd*,⁷² and will avoid any argument that the person to whom the trust property was distributed is restricted to the statutory defence provided by clause 123(4).

⁷²

[1991] 2 AC 548, 580 (Lord Goff), discussed in *Trusts Interim Report* (2013) [14.38], n 36.

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Court Powers

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INTRODUCTION

8.1 Part 8 of the Draft Trusts Bill 2013 provides for the powers of the court in relation to trusts, including the powers to:

- appoint or remove a trustee or other office holder of a trust;
- vest property in a new or continuing trustee or in some other person;

- review the acts, omissions or decisions of a trustee or other office holder of a trust;
- confer an additional management or administration power on a trustee where it is expedient to do so;
- authorise the variation of the beneficial interests under a trust;
- give directions concerning trust property or the exercise of a trustee's powers or discretions; and
- authorise the remuneration of a trustee.

8.2 Most of these provisions are based on the existing provisions in Part 7 of the *Trusts Act 1973* (Qld), although some are new provisions that were recommended in the Interim Report.

8.3 As a result of the new definition of 'court', which is located in the Dictionary, the powers conferred on the court in relation to applications made under the Draft Bill are exercisable by the Supreme Court or, if the value of all the trust property of the trust to which the application relates is less than the 'District Court monetary limit', the District Court. In respect of the Supreme Court, the powers conferred under Part 8 of the Draft Bill generally supplement the court's inherent jurisdiction in relation to trusts.

DIVISION 1 PRELIMINARY

Clause 124 Application of pt 8

8.4 Clause 124 replaces, but is to the same effect as, existing section 79.

8.5 The effect of clause 124 is that, generally, the provisions of Part 8 of the Draft Bill apply whether or not there is a contrary intention in the trust instrument.

Clause 125 References to *entitled to property*

8.6 Clause 125(1) provides that, in Part 8 of the Draft Bill, a reference to a person being 'entitled' to property includes a reference to the person being possessed of the property. Clause 125(2), in turn, provides that 'possessed', of property, includes being entitled to the receipt of income of property, and any vested estate (less than a life interest), at law or in equity, in possession or in expectancy, in any land. Clause 125(2) replaces the definitions of 'possession' and 'possessed' in existing section 5(1).

8.7 The purpose of clause 125 is to assist in simplifying the drafting of clauses 131 and 132, parts of which are based on existing sections 82, 84–85 and 88. Under the current Act, those provisions make reference to a person being, or becoming, 'entitled to or possessed of' property.

Clause 126 Who may bring applications before the court

8.8 Clause 126 implements Recommendation 12-12 of the Interim Report.

8.9 Clause 126(2)–(3) replaces existing section 98(1), with some modifications.

8.10 Existing section 98(1) provides that an order under the current Act for the appointment of a new trustee or an order relating to trust property may be made on the application of a trustee, a person intending to be appointed as trustee, or any person beneficially interested in the property. As explained in the Interim Report, a person who is ‘beneficially interested’ in the trust property includes a person who has a vested or contingent interest in the trust property but does not include a person in whose favour a power to distribute trust property may be exercised (that is, a person who is merely a potential beneficiary under a discretionary trust).¹

8.11 Clause 126(2) deals with standing to apply to the court for an order under the Draft Bill to appoint a new trustee or relating to trust property. It also deals with standing to apply in respect of a number of new orders that the court is empowered to make under the Draft Bill, namely, an order to remove a trustee (under clause 127(2)(b)), to disqualify a person from being appointed as a trustee (under clause 129(2)) and to remove an office holder of a trust and appoint another person to the office (under clause 130(3)).

8.12 Clause 126(3) lists the persons who have standing to apply for the orders referred to in clause 126(2). Those persons are a person who is beneficially interested in the trust property, a person in whose favour a power to distribute the trust property may be exercised, a trustee, and a person applying to be appointed as trustee. Clause 126(3), in contrast to existing section 98(1), gives standing to apply to a person in whose favour a power to distribute the trust property may be exercised.

8.13 Clause 126(4) replaces, but is to the same effect as, existing section 98(2). It enables an order relating to any interest in property subject to a mortgage to be made on the application of a person beneficially interested in the property or a person interested in the amount secured by the mortgage.

8.14 Clause 126(1) provides that clause 126 does not apply if another provision of the Draft Bill that empowers the court to make an order in relation to a particular matter already provides for who may apply to the court in that instance.²

¹ See *Trusts Interim Report* (2013) [12.225]–[12.226].

² See, eg, Draft Trusts Bill (2013) cll 39, 109(1), 143, 152.

DIVISION 2 APPOINTMENT AND REMOVAL OF TRUSTEES

Clause 127 Court may appoint or remove trustees

8.15 Clause 127 replaces, and is to the same general effect as, existing section 80, except for those modifications that implement Recommendation 12-1 of the Interim Report.

8.16 The Supreme Court has an inherent jurisdiction to appoint, remove and replace trustees, as well as a statutory jurisdiction under existing section 80 to appoint trustees and to remove trustees by replacing them.³

8.17 Existing section 80(1) applies ‘whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable to do so without the assistance of the court’.⁴ As explained in the Interim Report, this confers a wide power on the court that is commensurate with the power of appointment and removal under the court’s inherent jurisdiction.⁵ In particular, the words ‘expedient’ and ‘inexpedient’ have been given a wide meaning. ‘Expedient’ has been taken to mean ‘advantageous or merely appropriate or suitable to the circumstances of the case’, and ‘conducive to, or fit or proper or suitable having regard to the interests of the beneficiaries, the security of the trust property, the efficient and satisfactory execution of the trust and a faithful and sound exercise of the powers conferred upon the trustee’.⁶

8.18 In exercising either its statutory or inherent jurisdiction to remove a trustee, the court will regard the welfare of the beneficiaries as the dominant consideration. It is within the discretion of the court to remove a trustee if it is satisfied that, in the circumstances of the case, the continuation of the trustee would be detrimental to the interests of the beneficiaries.⁷ The court will not lightly exercise the power to remove a trustee,⁸ and the determination of whether or not it is proper to remove a trustee will depend on the particular circumstances involved.⁹ It is not, however, necessary to establish ‘bad faith, misconduct, or breach of trust’,¹⁰ or that the

³ *Re Matheson* (1994) 121 ALR 605, 612–13 (Spender J). See also *Colston v McMullen* [2010] QSC 292, [38]–[40] (White J); *Pope v DRP Nominees Pty Ltd* (1999) 74 SASR 78, 86, 89, 91 (Bleby J; Duggan and Debelle JJ agreeing).

⁴ The court will not ordinarily exercise its power to appoint a new trustee where a valid existing power to appoint trustees is vested in a person, under the trust instrument or statute, and the person is able and willing to exercise it, unless there are other circumstances rendering it expedient for the court to act (for example, where the trustee and appointor have been involved in breaches of trust, or where it was necessary for the applicant to apply to the court for other purposes): see, eg, *Pope v DRP Nominees Pty Ltd* (1999) 74 SASR 78, 87–8 (Bleby J; Duggan and Debelle JJ agreeing); *Will of Tunstall* [1921] VLR 559.

⁵ See *Trusts Interim Report* (2013) [12.6], [12.12]–[12.13].

⁶ *Wendt v Orr* [2004] WASC 28, [250] (Commissioner Johnson QC). See also *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146, [173] (Murphy JA and Hall J).

⁷ See, eg, *Re Whitehouse* [1982] Qd R 196, 205–6 (Macrossan J); *Re Matheson* (1994) 121 ALR 605, 613–14 (Spender J).

⁸ *Coral Vista Pty Ltd v Halkeas* [2010] QSC 449, [49] (Wilson J).

⁹ The court has recognised, for example, that there is no strict rule that a bankrupt trustee must be removed from office: *Miller v Cameron* (1936) 54 CLR 572, 575 (Latham CJ), 579 (Starke J), 580–1 (Dixon J); *Re Matheson* (1994) 121 ALR 605, 614 (Spender J).

¹⁰ *Elovalis v Elovalis* [2008] WASCA 141, [40] (Martin CJ; Buss JA and Newnes AJA agreeing).

trustee is not a 'fit and proper person',¹¹ to enliven the court's statutory power. The power has been used to replace a trustee where, for example, hostility or disagreement between the trustee and the beneficiaries, or between co-trustees or co-directors of a corporate trustee, has rendered the trustee's continuation adverse to the beneficiaries' interests or the proper administration of the trust.¹²

8.19 Clause 127(1)–(2) is based on existing section 80(1). Clause 127(1) provides that clause 127 applies if a person wishes to appoint a new trustee of a trust, or to remove a trustee of a trust, and it is inexpedient, difficult or impracticable to do so without a court order. Clause 127(2) empowers the court, if it is expedient to do so, to appoint a new trustee of the trust, or to remove a trustee of the trust. However, whereas existing section 80(1) confers a power to remove a trustee only by replacing the trustee with a new trustee, clause 127(2)(b) extends the court's statutory jurisdiction by empowering it to remove a trustee without the concurrent appointment of another trustee.

8.20 Clause 127(3) is based on existing section 80(2). However, in contrast to existing section 80(2), which lists particular circumstances in which the court can make an order to appoint a new trustee in place of an existing trustee,¹³ clause 127(3) states the court's power to remove and appoint a new trustee more generally. In the Commission's view, it is unnecessary to mention particular circumstances given the court's wide statutory power. Further, the ground of bankruptcy, which currently is mentioned as a particular circumstance for the replacement of a trustee only in existing section 80(2), is now a ground on which a trustee may be replaced or removed under the Draft Bill without recourse to the court.¹⁴

8.21 Clause 127(4) clarifies that, if the court could appoint a new trustee under clause 127(2)(a) to replace a trustee, the court may remove the trustee without appointing a new trustee.

8.22 Clause 127(5) is in similar terms to existing section 80(3). It provides that an order to appoint a new trustee or to remove a trustee (and any consequential vesting order or conveyance) has the same effect to discharge a former or continuing trustee that it would have if the appointment or removal had been made under a power contained in the trust instrument.

8.23 Clause 127(6) replaces, but is to the same effect as, existing section 80(4).

¹¹ *Baldwin v Greenland* [2007] 1 Qd R 117, 130–1 (Jerrard JA; McMurdo P and Helman J agreeing).

¹² See, eg, *JLS Carriers Pty Ltd v Graham* (Unreported, Supreme Court of Queensland, Jones J, 27 April 1998); *Re Whitehouse* [1982] Qd R 196 (Macrossan J); *Smith v Smith* [2006] WASC 166 (Murray J).

¹³ Those circumstances include that the existing trustee is convicted of a crime or misdemeanour, is a bankrupt, or is a corporation that is under official management or is in liquidation or has been dissolved.

¹⁴ Draft Trusts Bill 2013, cl 15(1)(g), 23.

Clause 128 Powers of new trustee

8.24 Clause 128 replaces, and is generally to the same effect as, existing section 81, but is framed in a more modern drafting style. It implements Recommendation 12-1 of the Interim Report.

8.25 Clause 128 confirms that a trustee appointed by the court has the same powers, authorities and discretions as if the trustee had been originally appointed under the trust instrument.

Clause 129 Court may disqualify person from being appointed as trustee

8.26 Clause 129 is a new provision. It implements Recommendations 12-2 and 12-3 of the Interim Report.

8.27 Clause 129 addresses the circumstances in which a person's misconduct as a trustee of a particular trust has been so serious that the person should not only be removed as trustee of that trust but should be disqualified from being appointed as a trustee of any other trust for a particular time.

8.28 It empowers the court, in very limited circumstances, to make an order disqualifying a person from being appointed as a trustee of any trust for the period stated in the order. The court may make an order of this kind only if the court:

- has replaced or removed the person as a trustee of a trust under clause 127(2)(a)(i) or (b); and
- is satisfied that the person has committed one or more breaches of trust and that the nature and seriousness of those breaches render the person unfit to act as a trustee.

8.29 If, when the disqualification order is made, the person is a trustee of another trust, the court is empowered under clause 129(3) to make a further order to remove the disqualified person as a trustee of the other trust.

Clause 130 Appointment and removal of other office holders of a trust

8.30 Clause 130 is a new provision. It implements Recommendation 12-4 of the Interim Report.

8.31 Clause 130 gives the court an express power to remove a person, other than a trustee, who holds an office created by the trust instrument (an 'office holder') and to appoint another person to that office, in the same way and in the same circumstances that the court may remove or appoint a trustee under clause 127. The purpose of this provision is to provide an additional check on the exercise of powers by an office holder (such as an appointor), who may be appointed to exercise wide powers, and to provide a clear mechanism for the office holder's removal and replacement where that course cannot be expediently done, in the best interests of the beneficiaries and the administration of the trust, without recourse to the court.

DIVISION 3 VESTING ORDERS AND ANCILLARY MATTERS

8.32 Existing sections 82, 84–85, 88–89 and 91–93 empower the court, in various circumstances, to order the vesting of trust property (and, in particular circumstances, other property) and to make certain other orders and declarations.

8.33 The effect of a vesting order is to pass the legal estate or interest in any property to which it relates to the persons named in the order without any conveyance, transfer or assignment. A vesting order is, of its nature, an order ‘founded upon and giving effect to some established equitable right or otherwise calculated to assist full effectuation of some result of the exercise of equitable jurisdiction’.¹⁵ Such an order is usually granted by the court only as a ‘last resort’, and is not intended to supersede the ordinary conveyances between the parties.¹⁶

8.34 Most of the provisions of the *Trusts Act 1973* (Qld) dealing with the power to make vesting orders have their origins in 19th century English trustee legislation,¹⁷ and have remained relatively unchanged since that time. Some of those provisions, particularly existing sections 88 and 89, are lengthy, densely drafted provisions, which are difficult to comprehend.¹⁸ As a consequence, in Recommendation 12-5 of the Interim Report, the Commission recommended that the existing vesting order provisions should be redrafted in a simpler and more modern drafting style.

8.35 Clauses 131–132 are based on existing sections 82, 83(3), 84–85, 88–89, 91, 92 (in part) and 93. Those provisions have been substantially redrafted so that they provide a briefer, and more comprehensible, statement of the court’s powers to make a vesting or related order, and the circumstances in which the court may make such an order. The new provisions are not intended to alter the established principles that the courts have applied when determining whether or not a vesting order should be made in the particular circumstances.

8.36 Clauses 133–138, which are based on existing sections 83(1)–(2), (4)–(6), 90 and 92 (in part), deal with the effect of a vesting order and other ancillary matters. Some of those clauses reflect the provisions in Subdivision 4 of Division 3 of Part 2 of the Draft Bill, which apply where property is vested in new and continuing trustees out of court.

Clause 131 Application of div 3

8.37 Clause 131 replaces, and is generally based on, existing section 82(2)–(3) and parts of existing sections 84–85 and 88–89.

¹⁵ *Estate of McCready* [2004] NSWSC 887, [17] (Barrett J).

¹⁶ *Weigall v Barber* (1884) VLR(Eq) 88a. See also *Brice v Mackay* [1983] 2 Qd R 543, 547–8 (Demack J); *Re Purkiss* [1999] 3 VR 223, 228 (Warren J).

¹⁷ See *Trusts Interim Report* (2013) [12.52].

¹⁸ See, eg, *Brice v Mackay* [1983] 2 Qd R 543, 545 (Demack J), commenting on s 89 of the *Trusts Act 1973* (Qld).

8.38 Clause 131 specifies when Division 3 applies. It sets out the various circumstances in which the court may exercise its statutory jurisdiction under that division to make a vesting or other order to effect the transfer of property. In addition to simplifying the form of the existing provisions, clause 131 provides guidance as to the circumstances in which the court may make such an order.

8.39 Clause 131(1)(a)–(i) reflects the circumstances that are mentioned in existing section 82(2). Those circumstances generally relate to situations where there has been a change of trusteeship or there is some doubt as to the vesting of trust property. In particular, clause 131(1)(i) preserves the court’s residual statutory jurisdiction, under existing section 82(2)(n), to make a vesting order if the trust property is vested in a trustee and it appears to the court to be expedient to make a vesting order.

8.40 Clause 131(1)(j)–(l) largely reflects the circumstances in which the court may make a vesting order under existing sections 84–85 and 88–89. Those circumstances, which do not involve the transmission of trusteeship, relate to the following situations:

- if, in a proceeding, the court directs the sale or mortgage or the release of a mortgage of land or makes an order for the specific performance of a contract concerning land;
- if a person entitled to property by way of mortgage is under a legal incapacity;
- if any property is subject to a contingent right in an unborn person who, on coming into existence, would become entitled to the property on a trust.

Clause 132 Court may make vesting and other orders

8.41 Clause 132 is a new provision, which deals with the court’s powers to make vesting and other orders and declarations to enable the transfer of the legal estate in trust and other property. It replaces, and is generally based on, existing sections 82(1) and 83(3), parts of existing sections 84–85 and 88–89, and existing sections 91–93.

8.42 In particular, clause 132(1) empowers the court, in any circumstance mentioned in clause 131(1), to make an order vesting the property, or an estate or interest in the property, in any person in any way and for any estate or interest that the court directs. Clause 132 is subject to clause 133, which ensures that, in cases dealing with the transmission of trusteeship, the trust property will be vested in the persons who, when the order is made, are the trustees.

8.43 In addition, or as an alternative, to making a vesting order under clause 132(1), clause 132(2) empowers the court to make any declaration, direction or other order in relation to the property that it considers appropriate, including:

- for the purpose of making a vesting order under subsection (1), a declaration that a person is a trustee, within the meaning of the Draft Bill, of the property;

- an order releasing or disposing of any contingent right to any person as the court directs;
- an order appointing a person to convey the property or release a contingent right;
- a declaration or a direction concerning the way in which the right to transfer any property vested under the Draft Bill is to be exercised.

8.44 Clause 132(2)(a) expressly preserves the court's power, in cases that do not involve the transmission of trusteeship, to declare that a person is a 'trustee' within the meaning of the Draft Bill to enable legal title to the property to be passed by a vesting order made under clause 132(1).¹⁹

8.45 Clause 132(3) assists in simplifying the drafting of clause 132 by defining an 'estate or interest', in property, to include a contingent right of an unborn person who, on coming into existence, would become entitled to the property on a trust. This is drawn from existing section 84, and is particularly relevant for clause 132(2)(b).

Clause 133 Persons in whom property may be vested

8.46 Clause 133 replaces, but is to the same effect as, existing section 83(1)–(2) and (6).

8.47 If a vesting order is to be made consequential on the appointment of a new trustee, clause 133(1) provides that the trust property is to be vested in the persons who, on the appointment, are the trustees. If a vesting order is to be made consequential on the replacement or removal of one or more of a number of trustees, clause 133(2) provides that the trust property may be vested in the continuing trustees alone. The purpose of those provisions is to ensure that, as far as possible, the legal title to trust property is always vested in the trustees, 'particularly if purchasers are to be encouraged to deal with them with the same degree of security as if they were dealing with beneficial owners'.²⁰

8.48 Clause 133(3) deals with the vesting of partly paid shares. It ensures that a vesting order may vest shares that are not fully paid up in a person only if the person applies for the order or consents to the order being made or the court directs that the person's consent be dispensed with.

Clause 134 Effect of vesting order

8.49 Clause 134 replaces, but is to the same general effect as, existing section 90(1)–(2) and part of existing section 92.

¹⁹ See *Trusts Act 1973* (Qld) s 89, which applies where the court has made an order for specific performance of a contract concerning land. See also *Trusts Act 1973* (Qld) s 88, which, in cases where the court has made an order directing the sale or mortgage of land, deems certain persons to be entitled to or possessed of the land as trustee for the purposes of the Act.

²⁰ *Trusts and Settled Land Report* (1971) 60.

8.50 Clause 134(1) provides that, subject to clause 135, the effect of a vesting order is to divest the property from the persons in whom it was vested immediately before the order was made and to vest the property in the persons named in the order without any conveyance, transfer or assignment.

8.51 Clause 134(2) clarifies that, if the order names more than one person, the order vests the property to which it relates in those persons as joint tenants.

8.52 Clause 134(3) provides that, if an order is made under clause 132(2)(c), a conveyance or release by the appointed person in accordance with the order has the same effect as a vesting order.

Clause 135 When vesting under vesting order takes effect

8.53 Clause 135 replaces, but is to the same general effect as, existing section 90(3).

8.54 Clause 135 provides that, if, or to the extent that, the divesting and vesting of property must be notified, registered or recorded under the requirements of another Act, the divesting and vesting are subject to the requirements and do not take effect until the requirements are satisfied. It further provides that the person in whom the property is vested under the vesting order must take the requisite steps to have the order notified, registered or recorded.

8.55 Clause 135 is formulated in similar terms to clause 26 of the Draft Bill, which deals with the vesting of property on the appointment or removal of a trustee out of court.

Clause 136 Transfer of property under vesting order

8.56 Clause 136 replaces, but is to the same general effect as, existing section 90(4)–(5).

8.57 Sometimes, a trust instrument may require the consent of a specified person before the property can be transferred. Clause 136(1) provides that, if the consent of a person is needed to the conveyance, transfer or assignment of any property, the vesting of the property under the vesting order is subject to the person's consent, unless the order otherwise provides. To avoid the possibility that the vesting of property before that consent is obtained might invalidate the vesting, clause 136(2) provides that, where there is a requirement for a person's consent to a transfer of trust property to be obtained, the consent may be obtained after the order is made. Clause 136(3) ensures that a vesting order, or the notification, registration or recording of the order, does not operate as a breach of covenant or condition or give rise to the forfeiture of any lease or agreement for lease or other property.

8.58 Clause 136 is formulated in similar terms to clause 27(2)–(3) and (4)(b) of the Draft Bill, which deals with the transfer of property on the appointment or removal of a trustee out of court.

Clause 137 Powers etc. of person named in vesting order as trustee

8.59 Clause 137 replaces, but is to the same general effect as, existing section 90(6).

8.60 Clause 137(1) provides that clause 137 applies if a vesting order vests property in a person as trustee.

8.61 Clause 137(2) ensures that the person who is named in the vesting order as trustee has all the powers of, and may in all matters act as, a person who had originally been appointed a trustee of the property that is the subject of the order. However, clause 137(3) provides that the court may limit or, under clauses 140 or 142 (which deal, respectively, with the court's power to confer an additional management or administration power or to vary a trust), enlarge those powers as it considers appropriate.

Clause 138 Circumstances bearing on the validity of an order made under s 132

8.62 Clause 138 replaces, but is to the same general effect as, existing section 83(4)–(5).

8.63 Clause 138(1) provides that clause 138 applies to an order made under clause 132, including a vesting order.

8.64 Clause 138(2) provides that the fact that the order is, or purports to be, founded on an allegation of the existence of a circumstance mentioned in clause 131(1) is conclusive evidence of the circumstance alleged in any court on any question about the validity of the order.

8.65 Clause 138(3) ensures that, if an order has been improperly obtained, nothing in the Draft Bill prevents the court from directing a re-conveyance of the trust property, making an order in relation to the payment of costs occasioned by the improper obtaining of the order, or making a further order under clause 132.

DIVISION 4 POWER TO REVIEW**Clause 139 Court may review decisions or apprehended decisions**

8.66 Clause 139 replaces, but is to the same general effect as, existing section 8. It implements Recommendation 12-11 of the Interim Report.

8.67 This provision confers a statutory jurisdiction on the court to review a decision, act or omission (a 'decision') or an apprehended decision of a trustee or another person (an 'office holder') who exercises, or may exercise, a power under the Draft Bill or otherwise (including under the trust instrument).

8.68 Clause 139 is expressed in a simpler and more modern drafting style than existing section 8. In particular, existing section 8(1), which is a long, densely

drafted provision, has been broken down into separate subclauses to more clearly reflect the steps involved in the statutory review process.

8.69 Clause 139(1) reflects the standing requirements that apply under existing section 8. It provides that clause 139 applies if a person (an ‘aggrieved person’):

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

8.70 Clause 139(2) provides that the aggrieved person may apply to the court to review the decision or to give directions in relation to the apprehended decision.

8.71 Traditionally, unless a lack of good faith is alleged, a trustee is not obliged to provide reasons for exercising, or failing to exercise, a discretionary power. Ordinarily, unless a trustee chooses to give reasons for a decision, the court will not examine and review the trustee’s reasons to see if they satisfy the standard of being valid reasons.²¹ Existing section 8(1) modifies the position under the general law by enabling the court to compel a trustee to appear before it and to ‘substantiate and uphold’ the grounds of the decision or the apprehended decision that is being reviewed²² (which may lead to the reversal of the trustee’s decision). Clause 139(3), which is based on existing section 8(1), continues that approach.

8.72 Whereas existing section 8 is silent as to the grounds on which the court may exercise its statutory powers of review, clause 139 includes new provisions dealing with this issue.

8.73 First, clause 139(4) sets out the general grounds of review that apply to both a trustee and an office holder. It provides that the court may review a decision or give directions about an apprehended decision of a trustee or an office holder on the ground that the decision or apprehended decision was not, or would not be, an appropriate exercise of the trustee’s or office holder’s discretion.

8.74 Secondly, clause 139(5) sets out more specific grounds on which the court may review a trustee’s decision or give directions about an apprehended decision

²¹ See *Karger v Paul* [1984] VR 161, 164–5 (McGarvie J), citing, eg, *Re Beloved Wilkes’s Charity* (1851) 3 Mac & G 440; 42 ER 330. See also *Trusts Interim Report* (2013) [12.194].

²² See *Jeffcoat v Queensland Coal & Oil Shale Mining Industry (Superannuation) Ltd* [2000] FCA 655, [22] (Kiefel J).

of a trustee. This provision reflects the general principles that the court has developed in relation to the review of a trustee's decisions both under the general law²³ and under existing section 8.²⁴ It provides that, without limiting clause 139(4), the grounds on which the court may review a decision or an apprehended decision of a trustee include that the power was, or would be, exercised:

- in bad faith;
- without real or genuine consideration; or
- contrary to the purposes of the trust.

8.75 The words 'without limiting subsection (4)' in clause 139(5) clarify that the general ground of review in clause 139(4) includes, but is not limited to, the specific grounds of review in clause 139(5). The broader statement of the grounds for review in clause 139(4) is intended to preserve the existing case law, which, in limited circumstances, permits a full merits review of a trustee's decisions.²⁵

8.76 Clause 139(6), like existing section 8(1), empowers the court to make any order (including an order as to costs) or direction it considers appropriate in the circumstances.

8.77 Clause 139(7) is generally similar to existing section 8(2). Existing section 8(3) has been omitted as it duplicates matters that are provided for under the *Uniform Civil Procedure Rules 1999* (Qld).

8.78 Several key terms are defined in clause 139(8) to simplify the drafting of the provision.

DIVISION 5 JURISDICTION TO MAKE OTHER ORDERS

Subdivision 1 Additional management or administration powers

Clause 140 Court's jurisdiction to confer additional management or administration powers

8.79 Clause 140 replaces, but is to the same general effect as, existing section 94. It implements Recommendation 12-6 of the Interim Report.

²³ See *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 441–2 (Sheller JA), citing *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440, 448; 42 ER 330, 333 (Truro LC); *Re Hay's Settlement Trusts* [1982] 1 WLR 202, 209 (Sir Robert Megarry V-C); *Karger v Paul* [1984] VR 161, 165–6 (McGarvie J). See generally RW White, 'Trusts — An Australian Perspective' (Revised version of paper presented at a Higher Courts Seminar arranged by the New Zealand Institute of Judicial Studies, Auckland and Wellington, 21 and 24 May 2010) [38] ff.

²⁴ See *Re Koczorowski* [1974] Qd R 177, 185–6 (Dunn J); *Burns v Burns* [2008] QSC 173, [32]–[36] (Chesterman J); *Wendt v Orr* [2004] WASC 28, [56] (Commissioner Johnson QC), in relation to the equivalent provision in Western Australia, citing with approval *Re Whitehouse* [1982] Qd R 196, 203 (Macrossan J).

²⁵ See, eg, *Burns v Burns* [2008] QSC 173, [36]–[38] (Chesterman J); *Re Koczorowski* [1974] Qd R 177, 185–6 (Dunn J).

8.80 Existing section 94(1) authorises the court to confer on a trustee additional powers of management and administration where:

- the court is of the opinion that a proposed disposition or transaction is expedient in the management or administration of the trust property or in the best interests of the persons, or the majority of the persons, beneficially interested under the trust; and
- it is inexpedient or difficult or impracticable to effect the disposition or transaction without the assistance of the court, or there is an absence of power in the trust instrument or by law.

8.81 In this context, the courts have construed the term ‘expedient’ liberally.²⁶ For example, it has been held to be ‘a criterion of the widest and most flexible kind’.²⁷ In *Riddle v Riddle*, Williams J defined ‘expedient’ as meaning ‘advantageous’, ‘desirable’, or ‘suitable to the circumstances of the case’,²⁸ while Dixon J described the term as meaning ‘expediency in the interests of the beneficiaries’.²⁹

8.82 It has also been held that the words ‘management or administration’ have the effect of limiting the scope of the court’s statutory jurisdiction to the managerial supervision and control of the trust property. However, the words ‘management’ and ‘administration’ are not synonymous.³⁰

the words ‘management or administration’ are ‘of wide import and pick up everything that a trustee may need to do in practical or legal terms in respect of trust property.’ Although their meanings may largely overlap, the disjunctive use of the words indicates that they are not necessarily synonymous and that an unduly narrow interpretation should be avoided. This Court has held that ‘management’ refers to ‘the management of trust property in the commercial or practical sense’, whereas ‘administration’ encompasses ‘all of the legal powers and duties which might be possessed by a trustee in respect of trust property’.
(notes omitted; emphasis added)

8.83 Clause 140 is drafted in more modern language than existing section 94, but is intended to have substantially the same effect.

8.84 Clause 140(1) sets out the grounds for making an order under that provision. The grounds are similar to those that apply under existing section 94(1), although with slightly different wording.

8.85 Clause 140(2) enables the court to make an order conferring on a trustee, either generally or in a particular matter, an additional ‘management or administration power’ on the terms and subject to any conditions that the court considers appropriate. ‘Management or administration power’ is defined in

²⁶ See also [8.17] above, in relation to s 80 of the *Trusts Act 1973* (Qld).

²⁷ *Riddle v Riddle* (1952) 85 CLR 202, 214 (Dixon J), discussing *Trustee Act 1925* (NSW) s 81, in similar terms to *Trusts Act 1973* (Qld) s 94.

²⁸ *Ibid* 222.

²⁹ *Ibid* 214.

³⁰ *Ballard v A-G* (Vic) (2010) 30 VR 413, 419–20 (Kyrou J), considering the equivalent Victorian provision.

clause 140(8) to mean a power to surrender, release or otherwise dispose of trust property, retain trust property, buy, invest in or acquire trust property or engage in another transaction for the trust, or expend an amount out of trust funds. The definition does not include the powers to sell, lease or mortgage since, by virtue of clause 59(3), those powers cannot be excluded or modified by the trust instrument.

8.86 Because clause 140 enables the court to confer additional *powers* on a trustee, clause 140(1)–(2) and (7) refers to the exercise or conferral of a ‘management or administration power’ rather than the ‘authorisation’ of a disposition or a transaction (which is the term used in existing section 94(1)). This is also more apt to describe the power to retain trust property, because the trustee may lack the power to retain trust property where he or she is under a particular duty to sell it.

8.87 Clause 140(7) implements the second part of Recommendation 12-6. It clarifies that, for the purposes of clause 140(1)(b)(ii), the circumstances in which a trustee does not have the relevant power include that the trustee does not have the particular management or administration power because a provision under the Draft Bill (for example, clause 59(2)) allows the power, which would otherwise be conferred on the trustee under the Draft Bill, to be excluded or modified under the trust instrument, and the trust instrument excludes or modifies the power. The effect of clause 140(7) is to ensure that the court has the jurisdiction to confer additional powers in those circumstances. Although it has been held that the power under existing section 94 is wide enough to cover that situation,³¹ the Commission considers it desirable to make this clear in the provision.

Subdivision 2 Variations of trusts

Clause 141 Meaning of *protective trust* for sdiv 2

8.88 Clause 141 is a new provision. It provides the meaning of ‘protective trust’ for the purposes of clause 142 (which replaces existing section 95).

8.89 Clause 141 is derived from the definition of ‘protective trusts’ in existing section 95(2), which, in turn, refers to the trusts specified in existing section 64(1) or any like trusts:

protective trusts means the trusts specified in section 64(1)(a) and (b) or any like trusts, the ***principal beneficiary*** has the same meaning as in section 64(1) and ***discretionary interest*** means an interest arising under the trust specified in section 64(1)(b) or any like trust.

8.90 In the Interim Report, the Commission recommended (in Recommendation 10-4) that the Draft Bill should not include a provision to the effect of existing section 64, on the basis that discretionary trusts are now the more common vehicle

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Riddle v Riddle (1952) 85 CLR 202, 223–4 (Williams J); *Perpetual Trustees WA Ltd v A-G (WA)* (1992) 8 WAR 441, 446–7 (Wallwork J); *Stein v Sybmore Holdings Pty Ltd* (2006) 64 ATR 325, 336 (Campbell J); *Barry v Borlas Pty Ltd* [2012] NSWSC 831, [19] (White J).

for providing flexibility in relation to distributions, and that statutory provisions in relation to protective trusts no longer have the same utility that they once did.³²

8.91 However, clause 142 will still apply in relation to a trust that is like a protective trust described in existing section 64. For that reason, clause 141 has been drafted so that it relates to a trust that meets the description of, or has a similar effect to, the type of protective trust that could currently be established under existing section 64.

Clause 142 Power of court to authorise variations of trust

8.92 Clause 142 replaces, but is to the same general effect as, existing section 95. It implements Recommendation 12-7 of the Interim Report.

8.93 Clause 142(1) confers a statutory power on the court, by order, to approve on behalf of a 'restricted or potential beneficiary' of a trust any arrangement varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the trust property.

8.94 A 'restricted or potential beneficiary', of a trust, is defined in clause 142(7) to mean:

- (a) a person having, directly or indirectly, an interest, whether vested or contingent, under the trust who is under a legal incapacity; or
- (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 specified description; or
 - (ii) a member of a specified class of persons; or
- (c) an unborn person; or
- (d) a person who, if a protective trust failed or determined, would be a member of the class of persons mentioned in section 141(5).

8.95 Under clause 142(2), the court's power to approve an arrangement for a restricted or potential beneficiary is subject to the proviso that carrying out the arrangement would be for the benefit of that beneficiary. However, that proviso does not apply in the case of a beneficiary who is either an unascertained person whose entitlement is dependent on a future event that the court is satisfied is unlikely to happen or a person mentioned in paragraph (d) of the definition of 'restricted or potential beneficiary'.

³² See *Trusts Interim Report* (2013) [10.111].

8.96 Clause 142(4), like existing section 95(1), confirms that, for the purposes of the provision, it does not matter who proposed the arrangement that is the subject of the application or whether or not there is any other person beneficially interested who is capable of assenting to the arrangement.

8.97 Clause 142(3) and (5)–(6) is in similar terms to existing section 95(3)–(5).

Subdivision 3 Other matters

Clause 143 Applying to court for directions

8.98 Clause 143 replaces, but is to the same general effect as, existing section 96. It implements Recommendation 12-8 of the Interim Report.

8.99 Together with clause 144, this clause provides a statutory ‘judicial advice’ mechanism that enables a trustee who is in doubt about what course of action he or she should take in the management or administration of trust property to approach the court for directions. Subject to certain qualifications, a trustee who acts in accordance with the court’s directions is protected from any claim by a beneficiary or creditor in respect of the course of action adopted. The giving of directions operates as an exception to the court’s ordinary function of deciding disputes between competing litigants, and enables the court to give ‘private advice’ to a trustee, the function of which is to give personal protection to a trustee.³³

8.100 Clause 143(1), like existing section 96(1), enables a trustee to apply to the court for directions about:

- the trust property or the management or administration of the trust property; or
- the exercise of any power or discretion vested in the trustee.

8.101 However, in contrast to existing section 96(1), clause 143 does not require that an application for directions be made on ‘a written statement of facts’. That requirement is unnecessary because the *Uniform Civil Procedure Rules 1999* (Qld) generally require that evidence in a proceeding started by application be given on affidavit.³⁴

8.102 Clause 143(2), which is based on existing section 96(2), requires the trustee to serve the application on each person having an interest in the application or any of them that the court considers expedient.

Clause 144 Acting under court direction

8.103 Clause 144 replaces, and is to the same effect as, existing section 97, but expresses that provision in a more modern drafting style. It implements Recommendation 12-8 of the Interim Report and complements clause 143.

³³ See *Trusts Interim Report* (2013) [12.106] ff.

³⁴ *Uniform Civil Procedure Rules 1999* (Qld) r 390(b).

8.104 By virtue of clause 144(1)–(3) and (5), a trustee who acts in accordance with a direction of the court under clause 143 is taken, in relation to the trustee's own liability, to have discharged his or her duty as trustee in the subject matter of the direction, even if the direction is later varied, set aside, invalidated, overruled or declared to be no effect.

8.105 Clause 144(4) provides that clause 144 does not protect the trustee from liability for an act done in accordance with a direction if the trustee commits a fraud or wilfully conceals or misrepresents a material matter:

- in obtaining the direction; or
- in agreeing, either expressly or impliedly, with the court in making the order giving the direction.

Clause 145 Remuneration of trustee

8.106 Clause 145 replaces, but is to the same general effect as, existing section 101. It implements Recommendation 12-9 of the Interim Report.

Professional trustees

8.107 Clause 145(1) is based on the first part of existing section 101(2). It overcomes the general law restrictions on the charging of professional fees for services provided by professional trustees.³⁵

8.108 It provides that, subject to an express contrary intention in the trust instrument, a professional trustee for whom no benefit or remuneration is provided in the trust instrument is entitled to charge his or her professional or business expenses in relation to the trust against the trust property.

8.109 Clause 145(4) defines 'professional trustee' to mean a trustee 'whose profession, business or employment is, or includes, acting as a trustee' (in keeping with the concept of 'professional trustee' that is used in clause 42). It also defines 'professional or business expenses', of a professional trustee, to mean 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.

Authorisation of remuneration by the court

8.110 Clause 145(2)–(3) is based on existing section 101(1) and the second part of existing section 101(2). It supplements the inherent jurisdiction of a Court of Equity to authorise remuneration where it considers it necessary for the proper administration of the trust.³⁶

³⁵ *Trusts Interim Report* (2013) [12.164].

³⁶ See, eg, *Re Queensland Coal and Oil Shale Mining Industry (Superannuation) Ltd* [1999] 2 Qd R 524, 526 (Williams J).

8.111 Clause 145(2) gives the court a broad power to authorise any person, including a professional trustee, to charge the remuneration for the person's services as trustee 'that the court considers appropriate if the circumstances appear to the court to justify the charge'. The court's discretion is in similarly wide terms to existing section 101(1). In particular cases, the courts, in authorising the trustee's remuneration, have had regard to the degree of responsibility exercised, the amount of skill and knowledge required and applied by the trustee, and the value to the beneficiaries of the work done.³⁷

8.112 Clause 145(3) further provides that, in exercising that power, the court may take into account any charges that have been paid out of the trust property, as professional or business expenses, under clause 145(1).

Clause 146 Court may reduce excessive amounts

8.113 Clause 146 is a new provision. It implements Recommendation 12-10 of the Interim Report.

8.114 Clause 146 empowers the court to review the remuneration charged by a person for the person's services as trustee. It is modelled on a similar provision in New South Wales and a provision included in the model Administration of Estates Bill 2009.³⁸

8.115 Clause 146(1)–(2) provides that, if the court considers that an amount payable to a trustee for the trustee's services or an amount charged, or proposed to be charged, by the trustee in relation to the trust is excessive, the court may review the amount and, on the review, reduce the amount. An 'amount' is defined in clause 146(4) to include a part of the amount. This formulation is wide enough to allow the review of remuneration as well as other amounts 'charged' in relation to the trust, such as solicitor's costs.³⁹

8.116 Although clause 146 does not specify any particular matters for the court to consider in deciding whether the remuneration is excessive, the existing case law concerning the determination of what is just and reasonable remuneration for the trustee will continue to be relevant to the exercise of the court's discretion.⁴⁰

8.117 Clause 146(3) provides that the court's power applies despite any provision of a trust instrument, or of an Act, authorising the charging of the amount. As explained in the Interim Report, one of the principal benefits of a review mechanism is that it overcomes the situation in which the trust instrument or an Act has authorised remuneration at a level that, in the particular circumstances of the trust, turns out to be excessive, and makes it possible for the court to protect the interests of the beneficiaries.

³⁷ See *Re Postle and Hodson's Application* [1991] 1 Qd R 160, 163–4 (Byrne J).

³⁸ *Probate and Administration Act 1898* (NSW) s 86A; *Administration of Estates Report* (2009) vol 4, model Administration of Estates Bill 2009, cl 432, discussed in *Trusts Interim Report* (2013) [12.168]–[12.169].

³⁹ See, eg, *Chick v Grosfeld* [2012] NSWSC 1166; *Shave v Shave* [2011] NSWSC 1356, in relation to *Probate and Administration Act 1898* (NSW) s 86A.

⁴⁰ See n 37 above.

8.118 This provision will enable the court to review the remuneration charged by the Public Trustee.⁴¹ The Commission does not consider, however, that there will be room for clause 146 to operate in the context of the fees charged by licensed trustee companies, in respect of which provision for court review is made as part of a national regulatory scheme.⁴² As explained in the Interim Report, the general policy intention of that scheme is to reserve to the Commonwealth exclusive responsibility in the area of licensed trustee companies' fees.⁴³

Clause 147 Property of minor

8.119 Clause 147 implements Recommendations 12-5 and 12-13 of the Interim Report. It replaces, and is to the same general effect as, existing sections 86 and 87, with some modifications.

8.120 Clause 147 confers power on the court to appoint a person to deal with property on behalf of a minor or, in certain circumstances, to settle or compromise a minor's claim to property.

Clause 147(1)

8.121 Clause 147(1) provides that, if a minor is beneficially entitled to property,⁴⁴ the court may make an order, on the terms it considers appropriate, appointing a person to deal with the property or to exercise the powers of a trustee in relation to the property.

8.122 With some modifications, clause 147(1) replaces existing section 87(1), which was 'designed to permit the Court, in effect, to approve a particular dealing or transaction that the Court considers necessary or desirable in the interests of the infant'.⁴⁵ It does not permit the court to appoint a trustee of the property, but is wide enough to enable a person to be appointed to 'sell property and to invest the proceeds of sale or do other things in respect of the property that a trustee may do generally in respect of trust property'.⁴⁶

8.123 In relation to the equivalent provision in Western Australia,⁴⁷ it was explained that the provision is necessary because of 'the inability of the infant in

⁴¹ See *Public Trustee Act 1978* (Qld) s 17.

⁴² *Corporations Act 2001* (Cth) s 601TEA.

⁴³ *Trusts Interim Report* (2013) [12.170]–[12.173], [12.183].

⁴⁴ In this context, the expression 'beneficially entitled' to property 'does not ... confine the operation of the section to cases in which the infant's interest is an equitable one' but merely excludes 'cases in which the infant has a legal title only and not a beneficial interest': *Re White* [1959] VR 661, 664–5 (Smith J), cited with approval in *Rubery v Rubery* [2003] WASC 164, [23] (Barker J).

⁴⁵ *Rubery v Rubery* [2003] WASC 164, [33] (Barker J), in relation to *Trustees Act 1962* (WA) s 82, which is in virtually identical terms.

⁴⁶ *Ibid* [33], [39].

⁴⁷ *Trustees Act 1962* (WA) s 82.

whom property is vested to enter into a binding transaction concerning that property'.⁴⁸

8.124 In keeping with the approach taken in the other provisions in Part 8 of the Draft Bill, and having regard to the wider provision in New South Wales,⁴⁹ clause 147(1) has been expressed in broad terms.

8.125 In particular, clause 147(1) omits the separate provision in existing section 87(1)(b) that applies where the property comprises 'stock or a thing in action'. Existing section 87(1)(b) empowers the court to vest in the appointed person the right to transfer or call for a transfer of the stock, or to receive the dividends or income of the stock, or to sue for and recover the thing in action. The Commission considers, however, that this is adequately covered by the provision in clause 147(1)(a) for a person to be appointed to 'deal with the property'.

8.126 Clause 147(7) defines 'deal', with property, to include sell, convey, lease, mortgage, charge and sue for and recover the property. In addition, the *Acts Interpretation Act 1954* (Qld) defines 'property' in wide terms to specifically include things in action.⁵⁰

Clause 147(2)–(3)

8.127 Clause 147(2)–(3) replaces, with some modifications, existing section 86(1).

8.128 Clause 147(2) provides that, if a minor has a claim to property, the court may make an order appointing a person to settle or compromise the claim.

8.129 This is expressed in slightly different terms from existing section 86(1), which empowers the court to appoint a person to 'enter into any agreement for or on behalf of' the minor. However, as explained in the Interim Report,⁵¹ the purpose of that section was not to provide for the authorisation of contracts generally, but for the more particular situation in which it was desirable to enter into an agreement to compromise a claim on behalf of a minor, that might not otherwise be binding.⁵² It supplements the inherent jurisdiction of a Court of Equity, in its *parens patriae* jurisdiction, to sanction compromises of disputed rights on behalf of minors where it is for the minor's benefit.⁵³ This is now reflected in the terms of clause 147(2), with

⁴⁸ Law Reform Sub-Committee of the Law Society (WA), *The Law of Trusts*, Report (1961), Supplement 76. 'One of the most important instances of contractual incapacity is that arising from minority', and, under the common law, minors will only be bound by contracts in particular circumstances: JW Carter, E Peden and GJ Tolhurst, *Contract Law in Australia* (LexisNexis Butterworths, 5th ed, 2007) [15-04] ff.

⁴⁹ *Minors (Property and Contracts) Act 1970* (NSW) s 50.

⁵⁰ *Acts Interpretation Act 1954* (Qld) s 36, sch 1 defines 'property' to mean 'any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes things in action'.

⁵¹ See *Trusts Interim Report* (2013) [12.239].

⁵² See *Trusts and Settled Land Report* (1971) 61; *Katundi v Hay* [1940] St R Qd 39 (Philp J).

⁵³ See *Wood v Public Trustee (WA)* (1995) 22 MVR 369, 372–3 (Pidgeon J; Rowland and Franklyn JJ agreeing); *Dickson v Australian Associated Motor Insurers* [2011] 1 Qd R 214 (Mullins J); *Katundi v Hay* [1940] St R Qd 39, 41 (Philp J).

other types of agreements dealing with a minor's property falling within the wider power in clause 147(1).

8.130 Settlements and compromises of particular claims on behalf of persons under a legal incapacity, including minors, are the subject of particular provisions in other legislation. In particular, section 59 of the *Public Trustee Act 1978* (Qld) provides that a settlement or compromise of a claim for money or damages by or on behalf of a 'person under a legal disability', including a settlement or compromise made out of court 'before action brought', is to be made with the sanction of a court or the Public Trustee.⁵⁴ Where a settlement or compromise is sanctioned in accordance with that section, it is binding on the person by, or on whose behalf, the claim was made.⁵⁵

8.131 Clause 147(3) therefore imposes a restriction on the operation of clause 147(2) in relation to settlements and compromises. It provides that clause 147(2) does not apply if the settlement or compromise may be sanctioned by a court or the Public Trustee under section 59 of the *Public Trustee Act 1978* (Qld).

8.132 Finally, whereas existing section 86(3) defines 'court' for the purposes of that section to include, where the amount of the subject matter is within the jurisdiction of the District Court, the District Court or a District Court judge, that definition has been omitted from clause 147, in light of the new definition of 'court' in the Dictionary.

Clause 147(4)–(6)

8.133 Clause 147(4)–(6) is to the same general effect as the relevant parts of the provisions in existing sections 86(1)–(2) and 87(1)–(2).

8.134 Clause 147(4) provides that the court must not make an order under clause 147 unless it appears to the court that the order is for the benefit of the minor or of the minor and some other person.

8.135 Clause 147(5) provides that an act done under clause 147 is binding on the minor.

8.136 Finally, clause 147(6) specifies the persons who may apply for an order under clause 147, namely, the minor's guardian or litigation guardian. 'Guardian', in relation to a minor, is defined in the Dictionary to include the person's parent.

Clause 148 Court's power to make order in absence of party

8.137 Clause 148 replaces, but is to the same effect as, existing section 99. It implements Recommendation 12-13 of the Interim Report.

8.138 It empowers the court, in certain circumstances, to make orders in the absence of a party to a proceeding.

⁵⁴ *Public Trustee Act 1978* (Qld) s 59(1)–(2). 'Person under a legal disability' is defined in s 59(1A) of that Act to include a child. See also *Uniform Civil Procedure Rules 1999* (Qld) r 98.

⁵⁵ *Public Trustee Act 1978* (Qld) s 59(3).

8.139 Clause 148(1) provides that the court may decide a proceeding in the absence of service on a trustee who is a defendant in the proceeding if the court is satisfied that a diligent search has been made and the trustee cannot be found. Clause 148(2) enables the court to give judgment against the person, as trustee, as if the person had been properly served. Clause 148(3) clarifies that, subject to clause 148(5), the 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 any other capacity.

8.140 Clause 148(5) enables the court to appoint someone to represent the interests of a party to a proceeding relating to a trust who is out of the jurisdiction, under a legal incapacity, cannot be found, is unborn, unidentifiable or unascertainable. The court might make such an appointment, for example, in proceedings on an application to vary the beneficial interests under a trust. Alternatively, clause 148(5) enables the court to proceed in the party's absence.

8.141 'Party' is defined in clause 148(6) to include a person or class of persons that the court considers should be made a party or parties to the proceeding, or should be given an opportunity to attend and be heard in the proceeding.

Clause 149 Court's power to charge costs on trust property

8.142 Clause 149 replaces, but is to the general effect of, existing section 100. It implements Recommendation 12-13 of the Interim Report.

8.143 Clause 149 empowers the court to order that the costs of an application be paid or raised out of the land or personal estate to which the application relates, or out of the income of the land or personal estate, or to be borne and paid in the way and by the persons the court considers just.

Clause 150 Payment into court by trustee

8.144 Clause 150 replaces, but is to the same effect as, existing section 102. It implements Recommendation 12-13 of the Interim Report.

8.145 Clause 150(1) permits the deposit into court by a trustee of an amount of money or securities belonging to a trust that is held by the trustee or is under the trustee's control. The circumstances in which a trustee might wish to utilise this provision include, for example, where the trustee holds funds on behalf of a minor or a person who cannot be located, or pending the outcome of litigation concerning a person's interest under the trust.

8.146 Clause 150(3) provides that the amount or securities deposited into court are, subject to the rules of court, to be dealt with as directed by the court by order.

8.147 Clause 150(2) and (4)–(6) facilitates the deposit into court of the amount or securities in the event that a majority of trustees wish to deposit the amount or securities into court, but the agreement of the remaining trustees cannot be obtained.

8.148 Clause 150(7) provides that a deposit, payment or delivery of an amount or securities under a court order is as valid and effective as it would be if it had been done by all persons entitled to the amount or securities.

8.149 Clause 150(8) provides that the receipt of the proper officer of the court is a sufficient discharge to the trustee for the amount or securities deposited into court.

Part 9

Charitable Trusts

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INTRODUCTION

9.1 Part 9 of the Draft Trusts Bill 2013 provides for certain matters specific to charitable trusts, in particular:

- the court's statutory power to make orders in relation to charitable trusts, including orders to approve *cy pres* schemes;
- the saving of charitable trusts that additionally include a non-charitable and invalid purpose;
- the occasions on which property of a charitable trust may be applied *cy pres*; and
- the power of the Attorney-General, in particular circumstances, to approve *cy pres* schemes.

9.2 Many of these provisions are based on existing provisions in Part 8 of the *Trusts Act 1973* (Qld), while others are new provisions that were recommended in the Interim Report.

9.3 Although the Draft Bill generally continues the policy approach of the *Trusts Act 1973* (Qld) in that most of its provisions apply equally to trustees of both private and charitable trusts,¹ Part 9 of the Draft Bill, like Part 8 of the current Act, is specific to charitable trusts.

DIVISION 1 PRELIMINARY

Clause 151 Definition for pt 9

Charity

9.4 Clause 151 includes a definition of ‘charity’ for the purposes of Part 9 of the Draft Bill, which is in the same terms as the definition of ‘charity’ in existing section 106(5).

9.5 It defines ‘charity’ to mean an institution, whether or not incorporated, that is established for charitable purposes.

9.6 This definition is relevant for:

- clause 152, which is based on existing section 106(2)–(3), and which provides that a ‘charity’ interested in the proper administration of a charitable trust may apply to the court for an order in relation to the trust, and that notice of an application to the court must generally be given to any ‘charity’ that the court directs; and
- clause 160(5), which is a new provision, and which provides that the Attorney-General, in deciding whether to approve a *cy pres* scheme for a charitable trust, must have regard to any submissions made to the Attorney-General by a ‘charity’ interested in the proper administration of the trust.

9.7 For this reason, clause 151 is located in Division 1 of Part 9 of the Draft Bill, to ensure that the definition applies for the whole of Part 9.

9.8 The meaning of what is ‘charitable’ is likewise of particular relevance for Part 9. However, that term is also relevant for a number of provisions in other parts of the Draft Bill. Accordingly, clause 6 (Meaning of *charitable*), which is based on existing section 103, is located in Part 1, rather than Part 9, of the Draft Bill.

9.9 Similarly, as explained later in this Report, the definition of ‘charitable trust’ that currently appears in existing section 106(5) has been modified slightly and relocated to the Dictionary, as that term is also used in several provisions in other parts of the Draft Bill.

¹

For examples of exceptions to this general policy, see Draft Trusts Bill 2013, cl 12(5), 43(b)(i).

DIVISION 2 PROCEEDINGS IN RELATION TO CHARITABLE TRUSTS

9.10 Division 2 deals with proceedings in relation to charitable trusts and generally replaces existing section 106(1)–(4). The definitions in existing section 106(5) have been relocated, respectively, to clause 151 and the Dictionary.

Clause 152 Applications to court under this part

9.11 Clause 152 replaces, but is to the same general effect as, existing section 106(2)–(3).

9.12 Clause 152(1) specifies the entities that may apply to the court for an order in relation to a charitable trust, either under clause 153 or 159, including a person or charity ‘interested in the proper administration of the trust’.² In that regard, the reference to ‘the charity’ that currently appears in existing section 106(2)(b) has been relocated to clause 152(1)(c) to clarify that a charity may make an application to the court only if it is interested in the proper administration of the trust.

9.13 Clause 152(2) requires notice of the application to be given to certain persons. This generally reflects existing section 106(3) but specifies the persons to whom notice must be given with more particularity, depending on who has made the application. This clarifies, for instance, that, if the application is made by one of the trustees of the trust, notice must be given to any other trustee who is not a party to the application as well as to the Attorney-General and any other person or charity that the court directs.

9.14 For consistency with the list of persons who may apply to the court, the reference that currently appears in existing section 106(3) to ‘such other person as the court directs’ has been changed in clause 152(2)(c) to clarify that the court may direct that notice be given to ‘any other person or charity’.

Clause 153 Court may make orders for charitable trusts

9.15 Clause 153 replaces, but is to the same effect as, existing section 106(1) and (4).

9.16 Clause 153 empowers the court, on application, to make a range of orders in relation to a charitable trust, including an order requiring a trustee to carry out the trust or to comply with a scheme approved in relation to the trust, whether under Part 9 of the Draft Bill or otherwise.³

²

A person will have a sufficient interest in the administration of the trust if his or her interest is ‘materially greater than or different from that possessed by ordinary members of the public’: *Re Hampton Fuel Allotment Charity* [1989] Ch 484, 494 (Nicholls LJ), cited in GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [14.47].

³

The words ‘or otherwise’ provide for the situation where the Supreme Court has approved a scheme, being either a *cy pres* scheme or an administrative scheme, in its inherent jurisdiction in relation to charitable trusts.

9.17 Clause 153 supplements the inherent jurisdiction of the Supreme Court to deal with charitable trusts.⁴ By virtue of the definition of ‘court’ that is included in the Dictionary,⁵ clause 153 also confers jurisdiction on the District Court in cases where the value of all the trust property of the trust to which the application relates is less than the monetary limit of the District Court’s civil jurisdiction.

DIVISION 3 TRUST CONTAINING A NON-CHARITABLE AND INVALID PURPOSE

Clause 154 Inclusion of non-charitable purpose not to invalidate trust

9.18 Clause 154 replaces, but is to the same effect as, existing section 104.

9.19 The effect of clause 154 is to clarify that the inclusion in a charitable trust of a non-charitable and invalid purpose does not invalidate the trust. This overcomes the general law rule that, in some circumstances, a trust may fail if it is expressed to be for a range of purposes, only some of which are charitable.⁶

9.20 The word ‘only’ has been included in clause 154(2)(a) to clarify that there may be other reasons why a purported charitable trust is not valid, for example, that it does not satisfy the general requirement of certainty of subject matter.⁷

9.21 Clause 154(3) is to the same effect as existing section 104(3). It provides that clause 154 does not apply to a trust declared before, or to the will of any testator dying before, 1 July 1973. This avoids any argument that clause 154 could operate to save a trust declared before the commencement of the current Act (and before the introduction of the statutory saving provision) that would otherwise be invalid. This preserves the status quo for such trusts and avoids disturbing any rights acquired on the basis that those trusts have been treated as invalid.

DIVISION 4 APPLYING PROPERTY CY PRES

Clause 155 Application

9.22 Clause 155 replaces, but is to the same general effect as, existing section 105(5). Clause 155 is, however, of more general application than existing section 105(5), since it applies to all of the provisions in Division 4 of Part 9, including those clauses that are new.

9.23 The effect of clause 155 is to ensure that nothing in Division 4, which deals with the application of property of a charitable trust *cy pres*, affects the operation of the provisions of the *Charitable Funds Act 1958* (Qld).

⁴ For a more detailed discussion of the inherent and statutory jurisdiction of the Supreme Court to deal with the enforcement of charitable trusts, see *Trusts Interim Report* (2013) [13.10] ff.

⁵ The definition of ‘court’ implements Recommendation 15-2 of the Interim Report and is discussed at [15.15] ff below.

⁶ See *Trusts Discussion Paper* (2012) [13.12]–[13.13]; *Trusts Interim Report* (2013) [13.7].

⁷ A similar approach is taken in the *Variation of Trusts Act 1994* (Tas) s 4(2).

9.24 As explained in the Interim Report, the *Charitable Funds Act 1958* (Qld) provides a separate statutory procedure for the application to other purposes of funds raised for certain specific purposes, including by lotteries.⁸

Clause 156 References to *purposes* of a charitable trust

9.25 Clause 156 replaces, and is to the same general effect as, existing section 105(3). It has been located here because it is an expression that is used in several clauses in Division 4 of Part 9 of the Draft Bill.

9.26 It provides that a reference in that 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 under this division or otherwise—the purposes for which the trust property may, for the time being, be applied.

9.27 The effect of the provision is to ensure that, if the purposes of a charitable trust have already been changed by a *cy pres* scheme, the purposes as so altered may be further changed by a new *cy pres* scheme.⁹

Clause 157 Occasions for applying property *cy pres*

9.28 Clause 157 replaces, but is to the same effect as, existing section 105(1)–(2).

9.29 The effect of clause 157(1) is to declare the circumstances in which the purposes of a charitable trust may be changed to allow the property, or part of it,¹⁰ to be applied *cy pres* and, in so doing, to widen the circumstances that would otherwise apply under the general law. In particular, clause 157, like existing section 105(1), overrides the general law requirement that the original purposes of the trust have actually failed, it being sufficient if those purposes have stopped providing ‘a suitable and effective way’ of using the trust property.¹¹

9.30 Clause 157(2) provides, however, that clause 157(1) does not affect the conditions that must be satisfied in order that property given for charitable purposes may be applied *cy pres*, except to the extent that the conditions require a failure of the purposes. This preserves the requirement under the general law to find a general charitable intention in cases of initial impossibility.¹²

⁸ See *Trusts Interim Report* (2013) [13.67]–[13.68].

⁹ The words ‘or otherwise’ in cl 156(b) of the Draft Trusts Bill 2013 are adopted from s 105(3) of the *Trusts Act 1973* (Qld) and provide for the situation where the Supreme Court has approved a *cy pres* scheme in its inherent jurisdiction in relation to charitable trusts.

¹⁰ The Dictionary defines ‘trust property’ to include ‘part of the trust property’.

¹¹ For a more detailed discussion of the circumstances in which property may be applied *cy pres* under the general law and under the *Trusts Act 1973* (Qld), see *Trusts Interim Report* (2013) [13.22] ff.

¹² See *Re Pitt* (2002) 84 SASR 109, 118 (Duggan J).

Editor's note

9.31 Clause 157 includes an editor's note about the expression 'applied cy pres' which appears in clause 157, as well as in a number of other clauses in Division 4 of Part 9.

9.32 The editor's note explains that, if the trust property of a charitable trust is 'applied cy pres', it means that the trust property is applied to another charitable purpose as near as possible to the original purposes of the trust, having regard to the spirit of the trust. This reflects the recognised meaning of the expression 'cy pres',¹³ and the requirement, under statutory provisions like existing section 105, to have regard to the 'spirit of the trust'.¹⁴

9.33 The inclusion of this explanation as an editor's note, rather than as a definition, ensures that the general law meaning of the expression 'applied cy pres' is not inadvertently changed, while still improving the accessibility of the Draft Bill.¹⁵

Clause 158 Trustee's duty to secure use of trust property for charitable purposes

9.34 Clause 158 replaces, but is to the same general effect as, existing section 105(4).

9.35 The effect of clause 158 is to require the trustee of a charitable trust to secure the effective use of the trust property for charitable purposes by making an application in appropriate cases to have the property applied *cy pres*. This reflects the duty imposed on the trustees of charitable trusts under the general law.¹⁶

9.36 Whereas existing section 105(4) simply refers to 'taking steps' to enable the property to be applied *cy pres*, clause 158(2) clarifies that this requires trustees to make an appropriate application, either under Division 4 of Part 9 of the Draft Bill or otherwise (that is, to the court in its statutory or inherent jurisdiction or to the Attorney-General under this division), for the approval of a *cy pres* scheme. A similar approach is taken in the Tasmanian legislation.¹⁷ In the Commission's view, this will provide greater certainty for trustees as to the nature of the duty imposed by clause 158.

¹³ See, eg, GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [15.1], [15.70]–[15.74]; GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [29.300]; M Evans, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2012) [29.59].

¹⁴ See, eg, *The Congregation of the Religious Sisters of Charity of Australia v A-G (Qld)* [2011] QSC 100, [30]–[31] (Martin J), citing *Cram Foundation v Corbett-Jones* [2006] NSWSC 495, [45] (Brereton J). The term 'spirit of the trust' refers to the basic intention underlying the gift: see *Trusts Interim Report* (2013) [13.31], n 52 and the references cited there.

¹⁵ An editor's note to an Act or to a provision of an Act is not part of the Act, but material set out in an official copy of an Act may be considered in the interpretation of a provision of the Act: *Acts Interpretation Act 1954* (Qld) ss 14(7), 14B(1), (3)(a).

¹⁶ See *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, 74 (Lord Simonds); *A-G ex rel Rathbone v Waipawa Hospital Board* [1970] NZLR 1148, 1154 (Beattie J).

¹⁷ *Variation of Trusts Act 1994* (Tas) s 10.

Clause 159 Court may approve scheme for applying trust property *cy pres*

9.37 Clause 159 is drawn from existing section 106(1) and (4).

9.38 Existing section 106 confers power on the court to make a range of orders in relation to the enforcement of charitable trusts. Although it does not state in express terms that the court may ‘approve’ a *cy pres* scheme, it has been relied on by the court as conferring, among other things, the power to approve *cy pres* schemes for charitable trusts.¹⁸

9.39 Clause 159 of the Draft Bill is intended to deal separately and in more express terms with that part of existing section 106 which confers power on the court to approve *cy pres* schemes. This ensures that all of the provisions in the Draft Bill that deal with the application of property *cy pres* are located within a single division. The Commission does not intend, however, for clause 159 to add anything substantively new to the court’s statutory jurisdiction.

9.40 As explained above, the persons who may apply to the court, and the requirements for giving notice of applications, are dealt with in clause 152.

Clause 160 Attorney-General may approve scheme for applying trust property *cy pres*

9.41 Clause 160 is a new provision. Subject to certain refinements, it implements Recommendations 13-1 and 13-2(a)–(b) and (e) of the Interim Report.¹⁹

Clause 160(1)–(2), (4) and (6)–(7)

9.42 Although the Attorney-General is the guardian of the public interest in the enforcement of charitable trusts and has the right and duty under the general law to assist the court in the formulation of *cy pres* schemes, the Attorney-General in Queensland presently ‘has no independent authority to change the destination of a trust fund’.²⁰

9.43 However, the legislation in some of the other Australian jurisdictions enables trustees of certain charitable trusts to apply to the Attorney-General for the approval of a *cy pres* scheme, in lieu of making an application to the court.²¹ Those jurisdictions limit the Attorney-General’s power to approve *cy pres* schemes to trusts that fall below a certain monetary threshold.

¹⁸ See, eg, *The Congregation of the Religious Sisters of Charity of Australia v A-G (Qld)* [2011] QSC 100 (Martin J); *Re Peirson Memorial Trust* [1995] QSC 308 (White J).

¹⁹ See generally *Trusts Interim Report* (2013) [13.58] ff.

²⁰ *Re Vosz* [1926] SASR 218, 233 (Murray CJ). For a more detailed discussion of the role of the Attorney-General under the general law in the enforcement of charitable trusts, see *Trusts Interim Report* (2013) [13.15]–[13.16], [13.33]–[13.34].

²¹ See *Charitable Trusts Act 1993* (NSW) pt 4; *Trustee Act 1936* (SA) s 69B(3)(b), (4)–(9); *Variation of Trusts Act 1994* (Tas) ss 7–9; *Charities Act 1978* (Vic) s 4; *Charitable Trusts Act 1962* (WA) ss 10A, 18. See the discussion of those provisions in *Trusts Interim Report* (2013) [13.35]–[13.43].

9.44 The Commission considers that the conferral of such a jurisdiction on the Attorney-General, for smaller charitable trusts, is desirable given the costs involved in applications to the court and the traditional role of the Attorney-General in the enforcement of charitable trusts.

9.45 It therefore recommended in the Interim Report that the Draft Bill should provide that:²²

- the trustees of certain smaller charitable trusts may, in lieu of making an application to the court, apply to the Attorney-General for the approval of a *cy pres* scheme;
- the Attorney-General may approve a *cy pres* scheme on the same grounds as the court; and
- the Attorney-General must not approve a *cy pres* scheme if he or she considers that it would be more appropriate for the application to be dealt with by the court, because, for example, of its contentious character or any special question of law or fact.

9.46 Those recommendations are reflected in clause 160(1)–(2), (4) and (6)–(7) of the Draft Bill.

9.47 Initially, the Commission considered that the monetary threshold for the Attorney-General's jurisdiction should be set at \$1 million, having regard to the significant costs that may be involved in a court hearing. On further consideration, however, the Commission is of the view that the relevant threshold should be the monetary limit, from time to time, of the civil jurisdiction of the District Court (which, at present, is \$750 000).²³ This is given effect in clause 160(1)(b) and (6)(a). In particular, clause 160(6)(a) provides that the Attorney-General may approve the scheme if satisfied that the value of all the trust property is not more than the 'District Court monetary limit'.²⁴

9.48 The effect of this, in combination with the Commission's recommendation elsewhere in the Interim Report about the conferral of jurisdiction on the District Court,²⁵ is that:

- if the value of all the trust property is less than the monetary limit of the District Court, the trustees may apply either to the District Court or to the Attorney-General for the approval of a *cy pres* scheme; but
- if the value of all the trust property exceeds the monetary limit of the District Court, an application for the approval of a *cy pres* scheme would need to be made to the Supreme Court.

²² See generally *Trusts Interim Report* (2013) [13.58] ff, Rec 13-2(a)–(b), (e).

²³ See *District Court of Queensland Act 1967* (Qld) s 68(2).

²⁴ 'District Court monetary limit' is defined in the Dictionary to mean the monetary limit of the District Court under the *District Court of Queensland Act 1967* (Qld) s 68.

²⁵ *Trusts Interim Report* (2013) Rec 15-2. See also the discussion of the definition of 'court' at [15.15] ff below.

Clause 160(3) and (5)

9.49 In its submission in relation to Recommendation 13-2 of the Interim Report concerning particular provisions about the Attorney-General's *cy pres* jurisdiction, Crown Law noted that 'other provisions may be included, for example, provisions requiring trustees to provide information in connection with the application, if required by the Attorney-General'.

9.50 The Commission agrees with that submission. Accordingly, in order to ensure that the Attorney-General's decisions are informed and fair, clause 160(3)(b)–(c) and (5) of the Draft Bill provides that:

- the Attorney-General, on receiving an application:
 - may require the trustee to provide any information, opinions or advice that the Attorney-General considers appropriate; and
 - may make any investigations and inquiries that the Attorney-General considers appropriate; and
- in deciding whether to approve a *cy pres* scheme, the Attorney-General must have regard to any submissions made to the Attorney-General by a person or charity interested in the proper administration of the trust.²⁶

9.51 Similar provisions are included in the legislation in Victoria and Western Australia, respectively.²⁷

9.52 Additionally, clause 160(3)(a) provides that the Attorney-General must require the trustee to give public notice of the trustee's application in the way the Attorney-General considers appropriate. This complements clause 161(2).

Clause 161 Application under s 160

9.53 Clause 161 is a new provision that relates to applications made under clause 160.

9.54 Clause 161(1) provides for applications to be made in the approved form and to be accompanied by any fee prescribed under regulation.²⁸ The Commission considers this appropriate to facilitate the efficiency of the Attorney-General's new jurisdiction.

²⁶ See n 2 above in relation to the expression 'person with an interest in the administration of the trust'.

²⁷ See *Charities Act 1978* (Vic) s 4(2); *Charitable Trusts Act 1962* (WA) s 10A(5)(b).

²⁸ See also Draft Trusts Bill 2013, cl 171, which provides that the Governor in Council may make regulations under the Draft Bill, and cl 172, which provides that the chief executive may approve forms for use under the Draft Bill.

9.55 Along with clause 160(3)(a), clause 161(2) implements Recommendation 13-2(c) of the Interim Report by requiring public notice to be given of applications made to the Attorney-General for the approval of a *cy pres* scheme.²⁹

9.56 The Commission considers that, whilst all applications to the Attorney-General should be publicly notified, the particular way in which the notification is to be given should be decided by the Attorney-General rather than specified in the Draft Bill. Clause 160(3)(a) therefore provides that the Attorney-General must require the trustee to give public notice of the application in the way the Attorney-General considers appropriate, and clause 161(2) requires the trustee to give public notice of the application in the way required by the Attorney-General.

Clause 162 Publication of approval or refusal of scheme

9.57 Clause 162 is a new provision that also complements clause 160.

9.58 This clause implements Recommendation 13-2(d) of the Interim Report, with minor modifications, by requiring the Attorney-General, if the Attorney-General either approves or refuses to approve a *cy pres* scheme, to give public notice of the approval or refusal in the way the Attorney-General considers appropriate. Although the Commission's initial recommendation was confined to the publication of approvals given by the Attorney-General, it now considers that public notice of both approvals and refusals should be required.

9.59 As with clauses 160(3)(a) and 161(2), the Commission considers that, whilst the legislation should require public notice to be given of all approvals or refusals, it should leave the manner in which the notice is given to the discretion of the Attorney-General. This is given effect in clause 162(2)(a).

9.60 Clause 162(2)(b) further provides that, if the scheme is approved, the Attorney-General must give public notice of the day, not earlier than 28 days after the notice is given, on which the scheme takes effect. This enables full effect to be given to clause 163(2)(b).

Clause 163 Effect of approval of scheme

9.61 Clause 163 is also a new provision. It clarifies when a scheme that has been approved by the Attorney-General under clause 160 takes effect, having regard to the requirement for public notice and the possibility of an appeal being made from the Attorney-General's decision.

9.62 Clause 163(2) is modelled on section 16(2) of the *Charitable Trusts Act 1993* (NSW), but has been aligned with the appeal provisions of the *Uniform Civil Procedure Rules 1999* (Qld) including, in particular, the time for starting an appeal.³⁰ It is also framed in terms of when the 'scheme' takes effect. In contrast,

²⁹ See generally *Trusts Interim Report* (2013) [13.63].

³⁰ See *Uniform Civil Procedure Rules 1999* (Qld) r 748(a). Rule 748 applies to an appeal to a court from an entity other than a court, with the necessary changes, by virtue of r 785.

the New South Wales legislation provides for when an 'order' made by the Attorney-General takes effect.

9.63 Clause 163(2) therefore provides that a scheme approved by the Attorney-General does not take effect until:

- if an appeal is made from the Attorney-General's decision to approve the scheme to the Supreme Court — the day the Attorney-General's decision is affirmed by the Supreme Court or the appeal is dismissed; or
- otherwise — 28 days after public notice of the approval has been given under clause 162 or the later day stated in the notice.

9.64 Clause 163(3) clarifies that, on taking effect, the scheme is as effective for all purposes as it would be if it were approved by order of the court. Similar provision is made in the New South Wales legislation.³¹

Clause 164 Register of approvals

9.65 Clause 164 is a new provision that relates to approvals given under clause 160.

9.66 As an extension of Recommendation 13-2(d) of the Interim Report, the Commission considers that provision should be made for the chief executive to keep available for public inspection a register of all approvals of *cy pres* schemes given by the Attorney-General. This will ensure that, as with orders made by the court, there is an appropriate level of transparency and openness where the purposes of a charitable trust have been changed.

9.67 Clause 164 gives effect to this. It draws on similar provisions in some of the other Australian jurisdictions.³²

Clause 165 Appeal from Attorney-General's decision approving a scheme

9.68 Clause 165 is also a new provision. With some refinements, it implements Recommendation 13-2(f) of the Interim Report.

9.69 It provides that a person aggrieved by the Attorney-General's decision to approve a scheme under clause 160 may appeal from the decision to the Supreme Court.

9.70 Initially, the Commission had recommended that a trustee or a person aggrieved by a *decision* of the Attorney-General should be able to appeal from the decision to the Supreme Court.

³¹ *Charitable Trusts Act 1993* (NSW) s 12(4).

³² See *Charitable Trusts Act 1993* (NSW) s 19; *Trustee Act 1936* (SA) s 69B(9); *Variation of Trusts Act 1994* (Tas) s 9.

9.71 After further consideration, however, the Commission is of the view that it is not necessary for the Draft Bill to provide for appeals from a decision of the Attorney-General *refusing* to approve a *cy pres* scheme. As explained below in relation to clause 166, this is because, if a trustee applies to the Attorney-General for approval of a *cy pres* scheme and the Attorney-General refuses to approve the scheme, the appropriate course is for the trustee to apply to the court for approval of the scheme. Accordingly, clause 165 is limited to appeals from decisions of the Attorney-General to *approve* a scheme.

9.72 Further, the Commission does not consider it necessary for clause 165 to include an express reference to a 'trustee' who is aggrieved by the decision. The reference to a 'person' is wide enough to include a trustee.

9.73 Similarly, although a 'charity' with an interest in the proper administration of the trust might be aggrieved by a decision of the Attorney-General to approve a scheme, the Commission does not consider it necessary for clause 165 to refer expressly to a 'charity'.³³

9.74 The term 'person' includes an individual and a corporation,³⁴ and is therefore wide enough to include a 'charity' that is a corporation. If the charity is an unincorporated body, the appeal should be taken in accordance with the specific provisions in the *Uniform Civil Procedure Rules 1999* (Qld) that provide for one or more persons to start proceedings, including appeals,³⁵ as a representative party for a group of persons having the same interest in the subject matter of the proceeding.³⁶

9.75 An appeal under clause 165 would fall under rule 784 of the *Uniform Civil Procedure Rules 1999* (Qld) as being an appeal 'from an entity other than a court'. As such, most of the detailed provisions of general application in Part 1 of Chapter 18 of the *Uniform Civil Procedure Rules 1999* (Qld) would apply with the necessary changes,³⁷ making it unnecessary to provide for those procedural matters in the Draft Bill.

Clause 166 Attorney-General's refusal to approve a scheme

9.76 Clause 166 is a new provision that complements clause 160 and, in particular, clause 165.

9.77 In the Commission's view, if a trustee's application to the Attorney-General is refused, the trustee should be permitted to make a first instance application to the court for approval of the scheme.

³³ Draft Trusts Bill 2013, cl 151 defines 'charity'. See [9.4] ff above.

³⁴ *Acts Interpretation Act 1954* (Qld) s 36, sch 1 (definition of 'person').

³⁵ 'Proceeding' is defined to include an appeal: see *Uniform Civil Procedure Rules 1999* (Qld) r 4(2); *Civil Proceedings Act 2011* (Qld) s 4, sch 1 Dictionary.

³⁶ *Uniform Civil Procedure Rules 1999* (Qld) r 75. See also rr 76–77.

³⁷ See *Uniform Civil Procedure Rules 1999* (Qld) r 785(1).

9.78 Accordingly, clause 166 clarifies that a decision by the Attorney-General to refuse to approve a *cy pres* scheme does not prevent a trustee aggrieved by the decision from applying to the court under clause 159 or otherwise³⁸ for approval of the scheme.

9.79 The combined effect of this clause with clause 165 is that, on an application by a trustee to the Attorney-General for the approval of a *cy pres* scheme:

- if the Attorney-General approves the scheme — a person aggrieved by the decision may appeal from the decision to the Supreme Court; and
- if the Attorney-General refuses to approve the scheme — the trustee may apply to the court for the approval of the scheme.

9.80 The Commission considers that this approach is preferable to providing for the trustee to appeal from the Attorney-General's refusal to the Supreme Court, particularly given that the Attorney-General's consideration of the application is not a judicial determination. Further, the refusal may have been made in one of the circumstances identified in clause 160(7)(a) or (c), which requires the Attorney-General to refuse to approve a scheme if satisfied that:

- the value of all the trust property is more than the District Court monetary limit (being the relevant monetary threshold for the exercise of the Attorney-General's jurisdiction under clause 160); or
- it is more appropriate that the application be dealt with by the court because of the contentious nature of the application, because a special question of law or fact arises, or for another reason.

9.81 Ordinarily, an application to the court upon the Attorney-General's refusal of a scheme would be an application to the District Court. However, if the reason for the refusal was that the value of all the trust property exceeds the monetary limit of the District Court, the application would need to be made to the Supreme Court.

38

The words 'or otherwise' provide for the situation where an application is made to the Supreme Court in its inherent jurisdiction in relation to charitable trusts.

Part 10

Gifts for Philanthropic Purposes

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INTRODUCTION

10.1 Part 10 of the Draft Trusts Bill 2013 replaces, but is to the same effect as, Part 9 of the *Trusts Act 1973* (Qld).

10.2 Part 9 of the current Act was inserted in 2009.¹ It gives trustees of ‘prescribed trusts’ the power to provide money, property or benefits to a deductible gift recipient under the *Income Tax Assessment Act 1997* (Cth), whether or not the power is conferred under the trust instrument, without compromising the tax exempt status of the donor. These provisions were introduced to enable gifts to be made to government-linked entities that are not ‘charities’ at law.²

10.3 In 2005, amendments were made to the *Income Tax Assessment Act 1997* (Cth) to allow certain trustees to donate to deductible gift recipients, whether or not the deductible gift recipients were recognised at law as a ‘charity’, while still retaining their tax exempt status.³ This enabled those trustees to make donations to, for example, public hospitals, universities, libraries, museums and art galleries, and approved scientific research institutions.⁴ The provisions were intended ‘to open up a new vehicle for private philanthropy’.⁵

10.4 However, the terms of trust instruments had tended to limit trustees’ powers to make donations to deductible gift recipients to those that were also recognised as charities. As such, trustees who provided funds to a non-charitable deductible gift recipient recognised by the taxation legislation ‘would be in breach of

¹ *Criminal Proceeds Confiscation and Other Acts Amendment Act 2009* (Qld) s 84.

² Queensland, *Parliamentary Debates*, Legislative Assembly, 2 December 2008, 3965 (KG Shine, Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland).

³ See *Tax Laws Amendment (2005 Measures No 3) Act 2005* (Cth) s 3, sch 1.

⁴ See *Income Tax Assessment Act 1997* (Cth) ss 30-15 table items 1–2, 50-1, 50-20, 50-52, 50-72; pt 2-5 div 30 subdiv 30-B.

⁵ GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [17.48].

their ... trust instruments'.⁶ The provisions in Part 9 of the *Trusts Act 1973* (Qld) were inserted to overcome this lack of power.⁷

10.5 As explained in the Discussion Paper, the Commission is not aware of any issues in relation to these provisions⁸ and, with one very minor exception, does not propose any change to them.

10.6 Currently, the heading for Part 9 of the *Trusts Act 1973* (Qld) is 'Gifts by particular trusts for philanthropic purposes'. This has been changed in the Draft Bill to 'Gifts for philanthropic purposes' to make it clearer that it is the gifts, rather than the trusts, that are for philanthropic purposes.

Clause 167 Definitions for pt 10

10.7 Clause 167 replaces, but is to the same effect as, existing section 107. It includes three definitions that apply for the purposes of Part 10:

- 'eligible recipient', which means a deductible gift recipient under the *Income Tax Assessment Act 1997* (Cth), whether or not the deductible gift recipient is a charity at law or is established for a charitable purpose or purposes;
- 'prescribed trust', which means a trust that establishes and maintains a fund mentioned in item 2 of the table in section 30-15 of the *Income Tax Assessment Act 1997* (Cth) or that is established for charitable or philanthropic purposes and is of a class prescribed under a regulation; and
- 'trust instrument', which means the initial instrument establishing a prescribed trust, as modified by all validly executed amendments.⁹

Clause 168 Prescribed trust—trust instrument containing express power to give to eligible recipients

10.8 Clause 168 replaces, but is to the same effect as, existing section 108.

10.9 It provides that the trust instrument of a prescribed trust may include an express power for the trustees to provide money, property or benefits to or for an eligible recipient or for the establishment of an eligible recipient.

Clause 169 Prescribed trust—trust instrument not containing express power to give to eligible recipients

10.10 Clause 169 replaces, but is to the same effect as, existing section 109.

⁶ Queensland, *Parliamentary Debates*, Legislative Assembly, 2 December 2008, 3965 (KG Shine, Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland).

⁷ Ibid.

⁸ See *Trusts Discussion Paper* (2012) [13.43]–[13.46].

⁹ This definition is similar to the general definition of 'trust instrument' in the Dictionary, except that it is specific to 'prescribed trusts'.

10.11 Depending on the terms of the trust instrument, it may not always be possible for a trustee of a prescribed trust to alter the trust instrument to include a power to make donations to deductible gift recipients that are not charities.¹⁰

10.12 Clause 169(1) gives trustees of a prescribed trust, whose trust instrument does not contain an express power to do so, the statutory power to provide money, property or benefits to or for an eligible recipient or for the establishment of an eligible recipient.

10.13 Clause 169(2) provides that clause 169(1) applies despite a contrary intention in the trust instrument, except to the extent that there is an express prohibition in the trust instrument against the provision by the trustees of money, property or benefits:

- to or for a particular eligible recipient or class of eligible recipients; or
- for the establishment of a particular eligible recipient or class of eligible recipients.

10.14 Clause 169(3), like existing section 109(3), provides that clause 169(1) does not apply to the trustees of a prescribed trust unless there is in force a declaration substantially to the effect of the approved form for the prescribed trust. Clause 169(4)–(7) is to the same effect as existing section 109(4)–(7).

Clause 170 Ancillary provisions

10.15 Clause 170 replaces, but is to the same effect as, existing section 110.

10.16 Clause 170(1) provides that a reference to a ‘prescribed power’, in relation to a prescribed trust, means:

- a power referred to in clause 168 that is included in the trust instrument (that is, an express power); or
- a power referred to in clause 169 as applying to a prescribed trust (that is, the statutory power conferred under clause 169).

10.17 Clause 170(2) provides that the Draft Bill applies to a prescribed trust as if the prescribed power were a power exercisable for a charitable purpose.¹¹

10.18 Without limiting that provision, clause 170(3) further provides that the existence or exercise of the prescribed power does not affect:

- the validity or status of a charitable trust as a charitable trust;¹² or

¹⁰ See Queensland, *Parliamentary Debates*, Legislative Assembly, 2 December 2008, 3965 (KG Shine, Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland).

¹¹ For the meaning of ‘charitable’, see Draft Trusts Bill 2013, cl 6.

¹² ‘Charitable trust’ is defined in the Dictionary to mean a trust created for a charitable purpose.

- the control of a prescribed trust by the Supreme Court in the exercise of the court's general jurisdiction in relation to charitable trusts, for which purpose the court's jurisdiction extends to the prescribed power as if the power were exercisable for a charitable purpose.¹³

10.19 Clause 170(3) also provides that a prescribed trust is to be construed and given effect to as if the prescribed power were exercisable for a charitable purpose and any payment or application of the trust property or the trust income in the way allowed by the power were to or for a charitable purpose.

13

Although the Draft Trusts Bill 2013 gives the District Court jurisdiction in relation to an application made under the Draft Bill if the value of all the trust property of the trust to which the application relates is less than the District Court monetary limit, only the Supreme Court has a general jurisdiction in relation to charitable trusts.

Part 11

Miscellaneous

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INTRODUCTION

11.1 Part 11 of the Draft Trusts Bill 2013 provides for a number of miscellaneous matters, including:

- a regulation-making power;
- approved forms; and
- the appointment of local governments as trustees for particular trusts.

11.2 Most of these provisions are based on existing provisions in Part 10 of the *Trusts Act 1973* (Qld).

Clause 171 Regulation-making power

11.3 Clause 171 is a new provision. It provides that the Governor in Council may make regulations under the Draft Bill.

11.4 This clause was included to facilitate:¹

- clause 105(1)(a)(iii)(A), which provides that a notice of intention to distribute trust property may be given by publishing a notice on a website approved for the purpose under a regulation; and
- clause 161(1)(b), which provides that an application to the Attorney-General for the approval of a *cypres* scheme under clause 160 must be accompanied by any fee prescribed under regulation for the application.

Clause 172 Approved forms

11.5 Clause 172 replaces, but is to the same effect as, existing section 118. It provides that the chief executive may approve forms for use under the Draft Bill.

¹ See also Draft Trusts Bill 2013, cl 54(1)(b), 167 (definition of 'prescribed trust' para (b)).

11.6 Several clauses of the Draft Bill make provision for particular matters to be in an approved form.²

Clause 173 Local governments may be trustee for certain purposes

11.7 Clause 173 replaces, but is to the same general effect as, existing section 116.

11.8 It provides that a local government may be appointed as a trustee of particular types of trusts, whether as a sole trustee or as a trustee with others, and may act in the administration of the trust property, for the purpose of and according to the trust, even if the purpose is not a function of local government.³ It applies subject to a contrary intention in the trust instrument.

11.9 Whereas existing section 116 provides that a local government may be appointed as a trustee of a trust for 'any charitable or public purpose', clause 173(1)(a) refers simply to a 'charitable trust'.⁴ This ensures that consistent terminology is used throughout the Draft Bill for references to charitable trusts.⁵

11.10 In addition, the provision in existing section 116 for a local government to be appointed as a trustee of a trust for 'any purpose of recreation or other leisuretime use or occupation' has been slightly modified. Clause 173(1)(b) instead refers to a trust '*for the benefit of persons* for recreation or other leisure time activity'. This reflects the position that, ordinarily, a trust must have a person or persons, rather than a purpose, as its object,⁶ and expresses the provision in terms that are consistent with the updated language of clause 6(2).

11.11 It also accords with the intended scope of the original provision. This part of existing section 116 was included in order to clarify that a local government could be appointed as a trustee, including as a sole trustee, of certain types of 'private trusts which may not come within the definition of "charitable"' because they are not 'for the benefit of the public at large', in particular, trusts for a purpose of recreation or other leisure time activity that are 'restricted to the use and benefit of members of, for example, an association'.⁷

² See Draft Trusts Bill 2013, cl 105(3), 161(1)(a), 169(3)–(4).

³ *Trusts Act 1973* (Qld) s 117, which imposes certain requirements when land is transferred to a local government as the sole transferee, has not been retained. The omission of that provision is discussed at Chapter 3, [14] ff below.

⁴ The omission of the reference to a 'public purpose' does not affect other legislation that provides for the appointment of a local government as a trustee for such a purpose. See, eg, *Land Act 1994* (Qld) s 44(1), (2)(b), sch 6 (definitions of 'statutory body' and 'trust land'), which enables the Minister to appoint a local government as a trustee of land comprising a reserve or deed of grant in trust for 'community purposes' under ch 3 of that Act.

⁵ 'Charitable trust' is defined in the Dictionary to mean a trust created for a charitable purpose. As to whether a purpose is 'charitable', see Draft Trusts Bill 2013, cl 6.

⁶ See GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [17.85].

⁷ Queensland, *Parliamentary Debates*, Legislative Assembly, 23 May 1979, 4750 (WD Lickiss, Minister for Justice and Attorney-General).

Part 12

Repeal

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INTRODUCTION

12.1 Part 12 of the Draft Trusts Bill 2013 provides for the repeal of the *Trusts Act 1973* (Qld).

Clause 174 Repeal of Trusts Act 1973

12.2 Clause 174 repeals the *Trusts Act 1973* (Qld). This gives effect to the Commission's principal recommendation in the Interim Report that new trusts legislation should be enacted to replace the current Act.¹

TRANSITIONAL PROVISIONS

12.3 Despite the repeal of the *Trusts Act 1973* (Qld), a number of provisions of the current Act will continue to have effect, for a limited time or purpose, as a result of the transitional provisions contained in the Draft Trusts Bill 2013.

12.4 Part 13 of the Draft Bill provides for the continued application of, or the continued effect of certain things done under, the following provisions of the current Act:²

- section 6 (Exercise of powers);
- section 11 (Limitation of the number of trustees);
- section 15 (Vesting of trust property in new and continuing trustees);
- section 17 (Devolution of mortgage estates on death);
- section 55 (Protection of financial institutions);
- section 56 (Power to delegate trusts);

¹ *Trusts Interim Report* (2013) [1.18].

² The transitional provisions are discussed in more detail in Part 13 below. The other transitional provisions are concerned with ensuring that the new provisions of the Draft Trusts Bill 2013 will apply in relation to matters that arose before the commencement of cl 175.

- section 57 (Power to carry on business);
- section 67 (Protection of trustees by means of advertisements); and
- section 82 (Vesting orders).

Part 13

Transitional Provisions for Repealed Sections of the *Trusts Act 1973*

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INTRODUCTION

13.1 Part 13 of the Draft Trusts Bill 2013 includes a small number of transitional provisions that deal with the effect of the repeal of the *Trusts Act 1973* (Qld).

DEFINITIONS FOR PT 13

13.2 Clause 175 includes two definitions that apply for the purposes of Part 13 of the Draft Bill:

- ‘commencement’, which means the commencement of clause 175; and
- ‘repealed Act’, which means the repealed *Trusts Act 1973* (Qld).

STATUTORY TRUSTEES

13.3 One of the significant effects of the *Trusts Act 1973* (Qld) was to assimilate the law in relation to trusts of real and personal property, particularly in relation to property held for successive beneficiaries, by abolishing settled land and bringing the tenants for life of existing settled land into the same regime as trustees.¹

13.4 The Act as passed repealed the *Settled Land Act 1886* (Qld). It then provided, in existing section 6, for the exercise of the powers conferred on trustees by ‘statutory trustees’, namely: persons who were existing tenants for life of settled land immediately before the commencement of the *Trusts Act 1973* (Qld); and, in respect of land that, after the commencement of that Act, would have been settled land but for the repeal of the *Settled Land Act 1886* (Qld), the trustees of the land

¹ See the discussion in *Trusts Discussion Paper* (2012) [4.2]–[4.14].

or, if there were none, the persons beneficially interested in the land.² The exercise of power by a statutory trustee is subject to the requirements of existing section 7 and to the limitations imposed by existing section 31(3).³

13.5 Existing sections 6, 7, 31(3) and the definition of 'statutory trustee' in existing section 5(1) of the Act, are now therefore of extremely limited relevance, relating as they do to circumstances that existed prior to the commencement of the Act in 1973. For this reason, the Draft Bill does not retain those provisions.

13.6 However, to the extent that a 'statutory trustee' within the meaning of the current Act may continue to exist, the effect of those provisions is preserved by the transitional provision in clause 176 of the Draft Bill.

13.7 Clause 176(1) provides that clause 176 applies to a person who was, immediately before the commencement, a statutory trustee. 'Statutory trustee' has the meaning given under section 5 of the repealed Act.⁴

13.8 Clause 176(2) provides that, after the commencement, the statutory trustee may exercise the powers that were available to the statutory trustee before the commencement under section 6 of the repealed Act 'subject to the limitations imposed on the exercise of the powers under the repealed Act'.

13.9 Clause 176(3) further provides that the repealed Act continues to apply, after the commencement, in relation to the statutory trustee and the exercise of powers by the statutory trustee as if the repealed Act had not been repealed.

13.10 These provisions ensure the continued operation of section 6 of the repealed Act, as well as the requirements and limitations that apply to the exercise of the statutory trustee's powers under sections 7 and 31(3) of the repealed Act.

13.11 Finally, clause 176(4) provides that, to remove any doubt, the Draft Bill does not confer any power on the statutory trustee.

OTHER TRANSITIONAL PROVISIONS

Preserving the effect of repealed provisions

13.12 Most of the other transitional provisions preserve or continue the effect of particular sections of the repealed Act, or acts taken under the repealed Act, for a limited time or purpose.

² 'Statutory trustee' is defined in *Trusts Act 1973* (Qld) s 5(1).

³ *Trusts Act 1973* (Qld) s 31(3) requires a statutory trustee to obtain the sanction of the court for the exercise of the powers of sale etc, and the power to raise money by mortgage, under ss 32(1)(a)–(c), (e)–(f) and 45.

⁴ Draft Trusts Bill 2013, cl 176(5).

Limitation of the number of trustees

13.13 Clause 177 continues the effect of certain aspects of existing section 11, which limits the maximum number of trustees of a private trust to four. That limitation is now stated in clause 12(1) of the Draft Bill.

13.14 When the *Trusts Act 1973* (Qld) was passed, this limitation was new. As a consequence, existing section 11 had included its own transitional provision to deal with existing trusts that had more than four trustees. Existing section 11(1) provides that, in that situation, no new trustees shall be capable of being appointed until the number of trustees is reduced to less than four and thereafter the number shall not be increased beyond four.

13.15 Clause 177(2) continues the effect of that provision, despite clause 12(1) of the Draft Bill and the repeal of the repealed Act, to cases in which that provision applied immediately before the commencement.

13.16 Existing section 11(3)(b) also provides for the Minister to approve, by certificate in writing, a greater number of trustees than four. That mechanism is changed under clause 12(3) of the Draft Bill to the approval of the court.

13.17 Clause 177(3) continues the effect of a written certificate that was given by the Minister under section 11(3) of the repealed Act and in force immediately before the commencement, despite clause 12(1) of the Draft Bill and the repeal of the repealed Act.

Power to delegate trusts

13.18 Clause 181 continues the effect, for a limited time only, of delegations made by power of attorney under section 56 of the repealed Act.

13.19 The power of a trustee under the Draft Bill to delegate his or her trusts departs in a number of significant ways from the current power of delegation under existing section 56. In particular, clause 69 of the Draft Bill limits the duration of the delegation to a maximum period of 12 months. It also provides for the delegation to be made 'by instrument', rather than by power of attorney as is presently required by existing section 56.

13.20 In order to give full effect to the Commission's view that delegations should be a temporary measure, clause 181 provides that existing powers of attorney given under section 56 of the repealed Act expire one year after the commencement. Clause 181 continues the effect of section 56 of the repealed Act in relation to those powers of attorney until either the power of attorney ends in a way provided for under the repealed Act or expires by virtue of clause 181. Otherwise, it continues the effect of section 56 of the repealed Act to the extent it confers protection on a person dealing with the donee of the power of attorney.

Other provisions

13.21 Other provisions of the repealed Act that are preserved or continued for a limited time or particular purpose are:⁵

- section 15, to the extent that the vesting or divesting of trust property is to be notified, registered or recorded, and the notification, registration or recording has not been done before the commencement;
- section 17, to the extent that an estate or interest in property by way of mortgage is vested in the Public Trustee and until a grant of probate or letters of administration to the estate of the deceased mortgagee is made and the mortgaged property devolves to and vests in the person to whom the grant is made;
- section 55, in relation to anything done before the commencement for which protection was afforded by that section to a financial institution;
- section 57, to the extent that a trustee is, immediately before the commencement, exercising power to carry on a business under that section; and
- section 67, in relation to the distribution of trust property if a trustee has, before the commencement, advertised under that section and the date fixed in the notice was a date after the commencement.

13.22 Additionally, clause 187 provides that, if a vesting order made under section 82 of the repealed Act has not been given full effect on the commencement, it continues to have effect after the commencement, with the necessary changes, as if it had been made under the Draft Bill.

Applying new provisions to existing cases

13.23 The remaining transitional provisions have been included to remove any doubt that certain new provisions of the Draft Bill will apply in relation to matters that arose before the commencement:

- clause 183 ensures that the new provisions dealing with the application of income for the maintenance, education and advancement of a person⁶ will apply to all trusts from the commencement, whether or not the trustee had, before the commencement, exercised power under section 61 of the repealed Act;
- clause 184 similarly ensures that the new provisions dealing with the application of capital for the maintenance, education and advancement of a person⁷ will apply to all trusts from the commencement, whether or not the

⁵ See Draft Trusts Bill 2013, cll 178–180, 182, 185.

⁶ Draft Trusts Bill 2013, pt 6 div 2.

⁷ Draft Trusts Bill 2013, pt 6 div 3.

trustee had, before the commencement, exercised power under section 62 of the repealed Act; and

- clause 188 ensures that the new provision dealing with remedies for the wrongful distribution of trust property,⁸ which removes the requirement in section 113(2) of the repealed Act about the order in which remedies may be enforced, will apply to all trusts from the commencement.

13.24 This ensures that immediate advantage can be taken of these particularly beneficial provisions.

13.25 Further, clause 186 applies if, before the commencement, a trustee served a notice on a person under section 68 of the repealed Act and the date by which the person was called on to take legal proceedings and prosecute the proceedings with all due diligence was the date of, or a date after, the commencement. It ensures that the trustee may apply to the court for an order under clause 109 if the person has not taken legal proceedings or prosecuted the proceedings with all due diligence as required under the notice and section 68 of the repealed Act.

8

Draft Trusts Bill 2013, cl 123.

Part 14

Amendment of *Succession Act 1981*

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INTRODUCTION

14.1 Part 14 of the Draft Trusts Bill 2013 relocates to the *Succession Act 1981* (Qld) three provisions of the *Trusts Act 1973* (Qld), as modified in accordance with recommendations made by the Commission in the Interim Report. The three provisions do not apply to inter vivos trusts, but will be relevant only to the estates of deceased persons. Accordingly, the Commission is of the view that the provisions are better placed in the *Succession Act 1981* (Qld).

Clause 189 Act amended

14.2 Clause 189 provides that Part 14 of the Draft Bill amends the *Succession Act 1981* (Qld).

Clause 190 Insertion of new ss 49B and 49C

14.3 Clause 190 inserts new sections 49B and 49C into the *Succession Act 1981* (Qld). It implements Recommendation 8-3 of the Interim Report.

New section 49B: Power to carry on business

14.4 New section 49B replaces existing section 57(1)–(4), with the necessary changes to confine its application to personal representatives and with certain other modifications. It is also expressed in a more modern drafting style.

14.5 Existing section 57 empowers a trustee or personal representative to continue, for a limited period, to carry on a business that was being carried on with the trust property by the settlor at the commencement of the trust, and to exercise certain incidental powers for that purpose.¹ It is principally directed to the situation in which the trust property includes a business but the trust instrument, if any, does not confer any express or implied power to carry on the business.²

¹ See generally *Trusts Interim Report* (2013) [8.27] ff.

² *Trusts Act 1973* (Qld) s 57(1) applies subject to ‘the provisions of ... the instrument (if any) creating the trust’.

14.6 That scenario typically arises in the case of a deceased estate, where there is either no will or the will does not provide for the carrying on of the business.³ Further, in keeping with the special position of personal representatives, who are under a duty to 'distribute the estate of the deceased, subject to the administration thereof, as soon as may be',⁴ the power conferred under existing section 57(1) is not open-ended but is limited to a particular period.

14.7 For these reasons, the Commission recommended that a provision to the general effect of existing section 57 should be included in the *Succession Act 1981* (Qld), rather than in the trusts legislation.⁵ This would ensure that personal representatives, for whom the provision is most relevant, would continue to have the benefit and guidance of the statutory default power, whilst trustees would be governed by the wider and more general powers conferred under the Draft Bill. It also reflects a recommendation of the National Committee for Uniform Succession Laws for the inclusion in the *Succession Act 1981* (Qld) of a provision in similar terms to existing section 57.⁶

14.8 Accordingly, new section 49B applies if, at the time of a person's death, the person is engaged in carrying on a business, and confers the power to carry on the business on the deceased person's personal representative.

14.9 New section 49B(2) clarifies, however, that the power given by that section applies subject to any other Act 'other than the *Trusts Act 2013*, sections 59 and 60'.

14.10 This is to ensure that the specific provision in the *Succession Act 1981* (Qld) governs a personal representative's power to carry on a business, rather than the wider and more general powers conferred on trustees under clauses 59 and 60 of the Draft Bill.⁷ Under clause 59, a trustee has all the powers, in relation to the trust property, of an absolute owner of the property. In addition, under clause 60, a trustee has the power to postpone, for an indefinite and unlimited period, the sale of trust property that the trustee has a duty to sell. Those clauses thereby empower a trustee, subject to the trustee's general duties, to carry on a business that forms part of the trust property without limiting the particular period for which the trustee may do so. In contrast, the power conferred under new section 49B is more limited, consistent with the general duty of personal representatives to distribute the estate as soon as may be.

14.11 As a reminder to personal representatives that their power to carry on a business is governed by new section 49B, clauses 59(1) and 60 of the Draft Bill both include a note that, for a personal representative, those respective clauses are subject to new section 49B of the *Succession Act 1981* (Qld).

³ See, eg, *Re Benson* (1915) 34 NZLR 639; *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319.

⁴ *Succession Act 1981* (Qld) s 52(1)(d).

⁵ See *Trusts Interim Report* (2013) [8.51]–[8.54].

⁶ See *Administration of Estates Report* (2009) vol 1, [11.276], Rec 11-21, vol 4, model Administration of Estates Bill 2009, cll 408–409.

⁷ See *Trusts Interim Report* (2013) [8.62]–[8.64].

New section 49B(2)

14.12 New section 49B(2) confers power on the deceased person's personal representative to carry on the business for a particular period.

14.13 Whereas existing section 57(1) provides a default period of two years or such other (possibly longer) period as may be necessary to wind up the business, new section 49B(2) ensures that personal representatives will ordinarily be limited to a period no longer than two years. It enables the business to be carried on only for:⁸

- the period, *up to* two years from the person's death, that is reasonably necessary for the realisation of the business; or
- the further period or periods that the court approves.

14.14 As well as providing certainty, this is more consistent with the general duty of a personal representative to distribute the estate as soon as may be.

14.15 With one change, it also gives effect to a recommendation of the National Committee for Uniform Succession Laws.⁹ Instead of referring to the period that is 'necessary or desirable for the winding up of the business', new section 49B(2) refers to the period that is 'reasonably necessary for the realisation of the business'. This better reflects the purpose of the power and the nature of the personal representative's obligation to administer and distribute the estate.

New section 49B(3)–(4)

14.16 With one modification, new section 49B(3)–(4) is to the same general effect as existing section 57(2).

14.17 Existing section 57(2)(a) provides that, in carrying on a business under that section, a trustee may employ 'any part of the trust property which is subject to the same trusts'. That formulation is not, however, apposite in the context of a provision that applies to personal representatives in the administration of a deceased estate. Neither does it include any limitation on the use of the other trust property for that purpose, such as it being reasonably necessary.

14.18 For these reasons, new section 49B(3)(a) provides instead that the personal representative may 'use any part of the deceased person's estate that is reasonably necessary' for the purpose of carrying on the business. This gives effect to a recommendation of the National Committee for Uniform Succession Laws.¹⁰

⁸ See generally *Trusts Interim Report* (2013) [8.80]–[8.81].

⁹ See *Administration of Estates Report* (2009) vol 1, [11.278]–[11.279], Rec 11-21(a)(ii).

¹⁰ See generally *Trusts Interim Report* (2013) [8.91]–[8.93]; *Administration of Estates Report* (2009) vol 1, [11.280], Rec 11-21(b).

New section 49B(5)–(7)

14.19 New section 49B(5)–(7) is to the same general effect as existing section 57(3)–(4). In particular, it provides for applications to be made to the court for leave to carry on the business, and for the court to make orders, including orders retrospective to a stated date or subject to conditions, that the court considers appropriate.

New section 49B(8)–(9)

14.20 New section 49B(8)–(9) deals with the effect of a contrary intention appearing in the deceased person's will.

14.21 New section 49B(8) provides that, if the deceased person's estate is being administered under the deceased person's will, the section is subject to a contrary intention appearing in the will. This is consistent with the opening words of existing section 57(1), except that it has been changed to refer to the will of the deceased person rather than to a trust instrument.

14.22 New section 49B(9) is a new provision. It clarifies that the reference to a 'contrary intention', appearing in the deceased person's will, includes a provision of the will that confers on the personal representative the power to postpone the sale of any property that was being used by the deceased person, at the time of the person's death, in carrying on the business. This preserves the effect of an implied power to carry on the business, arising from an express power in the will to postpone sale, for a particular or longer period than the period provided for in new section 49B(2)(a).¹¹

New section 49C: Subscribing to a relevant fund if carrying on a business

14.23 New section 49C is to the same general effect as existing section 57(5). It provides an ancillary power for a personal representative who is carrying on a business under new section 49B. In particular, it authorises the personal representative, in certain circumstances, to use income from the business to subscribe to a fund created for objects or purposes in support of a business of a similar nature and subscribed to by other persons engaged in a similar business. The personal representative may subscribe to any such fund in connection with the business that the personal representative considers would be prudent to subscribe to if he or she were acting for himself or herself.

14.24 Because this part of existing section 57 has been included as a separate provision, the provisions of general application in existing section 57(1) and (4), dealing with the effect of a contrary intention and declaring that nothing in that section affects any other authority to do the acts authorised by the section, are also included in new section 49C.

11

As to the operation of an implied power to carry on a business arising from an express power in the trust instrument to postpone sale, see *Trusts Discussion Paper* (2012) [8.246]–[8.255].

Clause 191 Insertion of new s 53A

New section 53A: Protection for personal representatives for calls made after transfer of shares

14.25 Clause 191 inserts a new section 53A into the *Succession Act 1981* (Qld). The new provision replaces, but is to the same general effect as, existing section 75, subject to a slight change to extend the application of that section. It implements Recommendation 11-8 of the Interim Report.¹²

14.26 Where the estate of a deceased person includes partly paid shares, a personal representative who has transferred or distributed the shares may become subject to a subsequent liability under the *Corporations Act 2001* (Cth) in the event that the company is wound up.¹³

14.27 The *Corporations Act 2001* (Cth) provides that, in the winding up of a company (other than a no liability company), the members and past members of the company are liable to contribute to paying the company's debts and liabilities, as well as the costs, charges and expenses of the winding up.¹⁴ The maximum amount of their liability is the amount, if any, that is unpaid on the shares in respect of which they are liable as a present or past member.¹⁵

14.28 A person who is liable, whether as a member or past member, to contribute to the property of the company in the event that it is wound up is known as a 'contributory'.¹⁶ If a contributory dies, his or her personal representatives are liable 'in due course of administration to contribute to the company's property in discharge of his or her liability to contribute and are contributories accordingly'.¹⁷

14.29 In order to avoid personal liability in respect of calls made after partly paid shares had been transferred, it was formerly the practice for personal representatives to reserve part of the estate for the payment of any possible future calls on shares, or to require an indemnity from the beneficiary upon distribution or transfer, or to apply to the court for protection against such liability.¹⁸

¹² See generally *Trusts Discussion Paper* (2012) [11.172] ff; *Trusts Interim Report* (2013) [11.189] ff.

¹³ See *Corporations Act 2001* (Cth) ss 9 (definition of 'contributory' para (a)(i)), 514–516, 520–522, 528(a).

¹⁴ See *Corporations Act 2001* (Cth) ss 514–515.

¹⁵ *Corporations Act 2001* (Cth) s 516. The liability of a past member is also subject to further limitations. A past member is not liable in respect of a debt or liability of the company contracted *after* the past member ceased to be a member: s 520. Further, a past member need not contribute if he, she or it ceased to be a member one year or more before the winding up and, ordinarily, need not contribute unless it appears to the court that the existing members are unable to satisfy the contributions that they are liable to make under the Act: ss 521–522.

¹⁶ *Corporations Act 2001* (Cth) s 9 (definition of 'contributory' para (a)(i)).

¹⁷ *Corporations Act 2001* (Cth) s 528(a).

¹⁸ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2054]; HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* [16.450]; RE Megarry and PV Baker, *Snell's Principles of Equity* (Sweet & Maxwell, 26th ed, 1966) 370; *Re King* [1907] 1 Ch 72; *Day v Day* (1903) 4 SR (NSW) 21; *Chisholm v Gilchrist* (1902) 2 SR (NSW) Eq 84.

14.30 As with existing section 75, the protection afforded by new section 53A enables the personal representative, as soon as he or she has procured the registration of some other person as the holder of the shares, to distribute the balance of the estate without reserving any portion of the estate to meet any potential liability that might subsequently accrue in respect of the unpaid part of the shares. It therefore relieves a personal representative who has transferred the shares from the liability that might accrue in a winding up of the company,¹⁹ and facilitates the efficient administration of deceased estates.

14.31 Currently, existing section 75 applies to personal representatives and not more widely to trustees. Where the partly paid shares are subject to a testamentary trust or to a trust arising as the result of the minority of a beneficiary, and are later distributed on the termination of the trust, the distribution will at that stage be made by a trustee in that capacity, rather than by a personal representative (even if the personal representative and the trustee are one and the same). To allow for those situations, new section 53A has been extended to apply not only to a personal representative but also to the trustee of the will or estate of a deceased person.

14.32 As explained in the Interim Report, the Commission is of the view that it would not be appropriate to extend the protection to trustees generally, because the purpose of giving this statutory protection is to facilitate the efficient administration of deceased estates.²⁰ If trustees of inter vivos trusts choose to invest in partly paid shares, their liability, in the event of the winding up of the company, should be the same as the liability of any other member or past member of the company.

Clause 192 Insertion of new s 61AA

New section 61AA: Abolition of rule in Allhusen v Whittell

14.33 New section 61AA is generally to the same effect as existing section 78. It implements Recommendation 11-11 of the Interim Report by omitting the references in existing section 78 to succession duty and estate duty and by expressing that provision in a simpler and more modern drafting style.

14.34 The rule in *Allhusen v Whittell*²¹ is an equitable rule of apportionment developed to achieve fairness between beneficiaries with successive interests. It applies where a gift of the residuary estate is made to persons in succession, and governs the application of income accrued during the period of administration on amounts that have yet to be expended in payment of the testator's debts, legacies and expenses.²² The tenant for life of the residuary estate is not entitled to such income, since his or her entitlement is to the income of the *net* estate (that is, to the

¹⁹ *Re Blackwood* [1908] VLR 517.

²⁰ See *Trusts Interim Report* (2013) [11.206].

²¹ (1867) LR 4 Eq 295.

²² GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [22.150].

estate that remains *after* the debts and legacies have been paid).²³ If, therefore, the tenant for life receives all of the income accrued during the administration period, an apportionment must be made between capital and income; that is, the 'trust accounts must be adjusted to ensure that any money paid to the income beneficiary which exceeds what should have been paid is credited to the capital account and deducted from further payments of income to the income beneficiary until the adjustment is reconciled'.²⁴

14.35 New section 61AA replaces the rule in *Allhusen v Whittell* with the different apportionment rules that currently apply under existing section 78.

14.36 New section 61AA(2) replaces existing section 78(1), in part, and provides that the deceased person's personal representative must not apply any part of the income of the settled property to pay any of the following (each of which is referred to as a 'capital expense'):

- the debts and liabilities that have accrued at the date of the deceased person's death;
- the funeral, testamentary and administration expenses;
- any legacies bequeathed by the will.

14.37 It therefore ensures that these expenses are paid out of capital.

14.38 However, new section 61AA(3), which replaces existing section 78(2), provides that new section 61AA(2) does not apply to:

- any commission that is payable to the personal representative in relation to the income of the settled property; or
- any testamentary or administration expenses that, apart from new section 61AA(2), would be payable wholly out of income.²⁵

14.39 New section 61AA(4) replaces existing section 78(3). It provides that the personal representative must:

- 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
- pay the balance of the income of the settled property to the person for the time being entitled to the income.

²³ R Cozens-Hardy Horne, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 230; HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* [11.3020].

²⁴ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* [11.3020].

²⁵ Similar provision is made in Western Australia: *Trustees Act 1962* (WA) s 104(2).

14.40 Importantly, new section 61AA(5), which replaces existing section 78(4), provides that, 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 section 61AA, the income is taken to be income of the residuary estate.²⁶ This provision effectively removes the equitable duty to apportion that income between the income and capital accounts.

14.41 New section 61AA, like existing section 78, avoids the need for personal representatives to make the difficult and complex adjustments that would otherwise be required under the general law if the provision were simply omitted. In recommending the retention of a provision to the effect of existing section 78 in the Interim Report, the Commission noted the support of the Queensland Law Society and a legal practitioner who practises in trusts and succession law for the existing provision.²⁷

14.42 New section 61AA does not, however, include the definition of 'administration expenses' that currently appears in existing section 78(5).

14.43 As noted in the Interim Report,²⁸ succession duty was abolished in Queensland from 1 January 1977 and Commonwealth estate duty was abolished from 1 July 1979,²⁹ although both types of duty would still be payable in respect of the estates of persons dying before those dates.³⁰ However, the Commission considers that, given the length of time that has elapsed since those duties were abolished, it would now be extremely rare for there to be any estates with outstanding duty.³¹ For that reason, the Commission recommended in the Interim Report that the provision based on existing section 78 should not include the definition of 'administration expenses' that currently appears in existing section 78(5).³²

14.44 Existing section 114 is also omitted on the basis that it is no longer necessary in the context of the Draft Bill. Existing section 114 provides:

²⁶ Similar provision is made in the ACT, New South Wales, the Northern Territory, Victoria, Western Australia and New Zealand: *Administration and Probate Act 1929* (ACT) s 41D(5); *Probate and Administration Act 1898* (NSW) s 46D(3); *Administration and Probate Act* (NT) s 58(5); *Trustee Act 1958* (Vic) s 74(3); *Trustees Act 1962* (WA) s 104(4); *Trustee Act 1956* (NZ) s 84(3).

²⁷ *Trusts Interim Report* (2013) [11.249] ff.

²⁸ *Ibid* [11.258].

²⁹ *Succession and Gift Duties Abolition Act 1976* (Qld) s 4; *Estate Duty Assessment Amendment Act 1978* (Cth) s 4.

³⁰ *Acts Interpretation Act 1954* (Qld) s 20(2)(b)–(c); *Acts Interpretation Act 1901* (Cth) s 7(2)(b)–(c). Further, the *Statute Law Revision Act 1995* (Qld), sch 6 of which repealed the *Succession Duties Act 1892* (Qld) and the *Succession and Gift Duties Abolition Act 1976* (Qld), provides expressly that, despite the repeal of the *Succession Duties Act 1892* (Qld), that Act continues to apply to a succession conferred on a successor if the entitlement or interest of the successor vested in the successor in possession before 1 January 1977: sch 10 s 3(1), (4).

³¹ See *Trusts Discussion Paper* (2012) [11.218].

³² *Trusts Interim Report* (2013) [11.262], Rec 11-11(a).

114 Fees and commission deemed a testamentary expense

The fees, commission, remuneration, and other charges payable to a personal representative in respect of the administration of the estate of a deceased person shall be deemed to be testamentary expenses.

14.45 Its inclusion in the *Trusts Act 1973* (Qld) may have served some purpose while the Act included existing section 78. However, the subject matter of section 114 is not relevant to any provision of the Draft Bill.

Schedule 1

Dictionary

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INTRODUCTION

15.1 This part of the Report explains those definitions in the Dictionary in Schedule 1 to the Draft Trusts Bill 2013 that play a significant role in the interpretation of the Draft Bill or that have changed in a material way from the corresponding definitions in section 5(1) of the *Trusts Act 1973* (Qld).

DEFINITIONS

Accountant

15.2 The Dictionary includes an updated definition of ‘accountant’, which is relevant for clauses 82 and 86 of the Draft Bill. It replaces the definition of ‘public accountant’ in existing section 5(1).

Advancement

15.3 The Dictionary defines ‘advancement’ to include ‘benefit’. The inclusion of this definition assists principally in simplifying the drafting of the various provisions

in Part 6 of the Draft Bill, which are based on existing sections 61–63.¹ Under the current Act, those provisions refer to the application of income or capital for a beneficiary's 'maintenance, education (including past maintenance or education) advancement or *benefit*.'²

Appointor

15.4 The Dictionary includes a definition of 'appointor', for a trust, which is based on the reference in existing section 12(1) (and the similar reference in existing section 12(5)) to 'the person nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust'. The inclusion of this definition assists in simplifying the drafting of clauses 13, 15(2) and 17(2), which are based on existing section 12(1), (5) and (8), and of clauses 16(1), 18 and 73, which are new provisions.

Capacity

15.5 The Dictionary includes definitions of 'capacity', for a trustee for administering the trust, and 'impaired capacity', for a trustee administering a trust, in order to give effect to clauses 16 and 68 of the Draft Bill.

15.6 Clause 16, which is a new provision, deals with the out-of-court appointment of a new trustee or new trustees to replace the last continuing trustee of a trust who has impaired capacity for administering the trust. Clause 68 deals with the temporary delegation of a trustee's trusts, powers, authorities and discretions to another person if the trustee is, or may be about to become, temporarily incapable of performing the duties of a trustee including, as a new circumstance, because of impaired capacity for administering the trust.

15.7 The definitions of 'capacity' and 'impaired capacity' in the Dictionary are consistent with the functional approach to capacity that applies under the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld), but have been modified to reflect the particular context.³

15.8 The definitions in the *Guardianship and Administration Act 2000* (Qld) and *Powers of Attorney Act 1998* (Qld) apply in relation to a 'matter', being, for example, a financial matter that relates to the *adult's* financial affairs.⁴ Because this relates to the affairs of the adult himself or herself, it is not apposite to the position of a trustee whose duty is to hold and deal with property on behalf of others. As such, the definitions in the Dictionary refer to the capacity or impaired capacity of a trustee for 'administering the trust', rather than for a 'matter'.

¹ The definition of 'advancement' is also relevant for cl 141 of the Draft Trusts Bill 2013 (Meaning of *protective trust* for sdiv 2).

² See also [6.16] above for a discussion of the meaning of the terms 'advancement' and 'benefit'.

³ For a discussion of the functional approach to capacity, see generally Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws* (2010) vol 1, ch 7.

⁴ See *Guardianship and Administration Act 2000* (Qld) sch 2 s 1; *Powers of Attorney Act 1998* (Qld) sch 2 s 1.

Charitable trust

15.9 Although the term ‘charitable trust’ is used primarily in Part 9 of the Draft Bill (Charitable trusts), it is defined in the Dictionary because several provisions in other parts of the Draft Bill also use the term ‘charitable trust’.⁵

15.10 The definition replaces, with some modification, the definition of ‘charitable trust’ in existing section 106(5), which currently defines ‘charitable trust’, for that section, to mean ‘any property held in trust for a charitable purpose’.

15.11 In contrast, the Dictionary defines ‘charitable trust’ to mean ‘a trust created for a charitable purpose’. A similar definition is used in some of the other Australian jurisdictions.⁶

15.12 This definition focuses on the trust itself, rather than the trust property. It is therefore more consistent with the general definition of ‘trust’ that also appears in the Dictionary.⁷

15.13 In determining whether a purpose is ‘charitable’, clause 6 of the Draft Bill, which replaces existing section 103, will apply.

Continuing trustee

15.14 In order to simplify the drafting of a number of provisions in the Draft Bill, particularly in Part 2, the Dictionary defines ‘continuing trustee’ to include a surviving trustee. This preserves the traditional distinction in meaning between the expressions ‘surviving’ and ‘continuing’ trustees,⁸ whilst enabling a shorter expression to be used in the provisions of the Draft Bill.

Court

15.15 The Dictionary defines ‘court’, for an application under the Draft Bill, to mean:

- if the value of all the trust property of the trust to which the application relates is less than the District Court monetary limit — the District Court; or
- otherwise — the Supreme Court.

⁵ See, eg, Draft Trusts Bill 2013, cl 12(5), 43(b)(i).

⁶ See, eg, *Charitable Trusts Act 1993* (NSW) s 3; *Charities Act 1978* (Vic) s 7J.

⁷ The definition of ‘trust’ in the Dictionary replaces, but is to the same general effect as, the definition in the *Trusts Act 1973* (Qld) s 5(1).

⁸ Traditionally, the expressions ‘surviving’ and ‘continuing’ trustees have been used in the sense that a trustee who dies leaves ‘surviving’ trustees, while a trustee who retires or is removed leaves ‘continuing’ trustees: Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 99.

15.16 This definition implements Recommendation 15-2 of the Interim Report,⁹ and ensures that, within the ‘District Court monetary limit’ (which is also a defined term in the Dictionary), the District Court may exercise the same jurisdiction under the Draft Bill as the Supreme Court.

15.17 Although some of the respondents to the Interim Report reiterated their earlier submissions that jurisdiction should not be conferred on the District Court, the Commission remains of the view that it is appropriate to do so. As explained in the Interim Report, this approach recognises that the District Court has a substantial general civil jurisdiction that is commensurate with the level of judicial and representational expertise required to deal with trust matters.¹⁰ It also recognises that the District Court already has an apparently wide jurisdiction under section 68(1)(b)(viii) of the *District Court of Queensland Act 1967* (Qld) to hear and determine matters, within its monetary limit, ‘for the execution of a trust or a declaration that a trust subsists’, and clarifies the extent of that jurisdiction in relation to applications under the Draft Bill.

15.18 To the extent that it confers jurisdiction on the District Court under the Draft Bill, the definition requires that the value of *all* the trust property of the trust to which the application relates is less than the District Court monetary limit. That is, it is the total value of all of the trust property that is relevant, rather than the value of any discrete part of the trust property that might be in issue in the application.

Create

15.19 The Dictionary defines ‘create’, a trust, to include establish a trust. The inclusion of this definition simplifies the language of the Draft Bill in relation to the creation of trusts, since it relies on the definition of ‘establish’ in the *Acts Interpretation Act 1954* (Qld), which includes ‘constitute and continue in existence’.¹¹

15.20 As a result, clause 3(1) of the Draft Bill refers to a trust ‘created’ before or after the commencement of the Draft Bill, rather than to a trust ‘constituted or created’ before or after that time, as existing section 4(1) currently does.

Impaired capacity

15.21 As explained above, the Dictionary includes a new definition of ‘impaired capacity’, for a trustee administering a trust, which has been included to give effect to clauses 16 and 68 of the Draft Bill.¹²

⁹ See generally *Trusts Interim Report* (2013) [15.9] ff.

¹⁰ *Trusts Interim Report* (2013) [15.36].

¹¹ *Acts Interpretation Act 1954* (Qld) s 36, sch 1 (definition of ‘establish’).

¹² See [15.5] ff above.

Insolvent

15.22 The Dictionary includes a new definition of 'insolvent', which is consistent with the meaning of that term under section 5(3) of the *Bankruptcy Act 1966* (Cth). The new definition complements the definition of 'bankrupt', which is defined to include 'insolvent'. The definition of 'bankrupt' is relevant, in particular, for new clauses 11, 15(1)(g) and 70.

Purposes, of a charitable trust

15.23 The Dictionary includes a signpost to clause 156, which states how 'purposes', of a charitable trust, is to be interpreted for Division 4 of Part 9 of the Draft Bill.

Solvent

15.24 The Dictionary includes a new definition of 'solvent', which is consistent with the meaning of that term under section 5(2) of the *Bankruptcy Act 1966* (Cth). The new definition complements the definition of 'bankrupt' and the new definition of 'insolvent'.

Trust

15.25 The definition of 'trust' in the Dictionary is generally to the same effect as the definition of that term in existing section 5(1). However, it omits from the current definition the references that the definition:

- does not include 'the duties incidental to an estate conveyed by way of mortgage'; and
- extends 'to cases where the trustee has a beneficial interest in the trust property'.

15.26 The current definition in existing section 5(1) is in virtually identical terms to the definition originally included in the English *Trustee Act 1850*,¹³ which has been carried over in subsequent Acts.

15.27 Since 1861, it has been the case in Queensland that a mortgage of real property takes effect as a security only, and does not operate as a transfer of the property intended to be charged by the mortgage.¹⁴ In view of that position, the Commission does not consider it necessary for the definition of 'trust' to continue to clarify that the term does not include the duties incidental to an estate conveyed by way of mortgage.

¹³ 13 & 14 Vict, c 60, s 2.

¹⁴ *Real Property Act 1861* (Qld) s 60 (repealed). See now *Land Title Act 1994* (Qld) s 74.

15.28 Nor does the Commission consider it necessary for the definition to provide expressly that the term extends to cases where the trustee has a beneficial interest in the trust property. Commentators on the English *Trustee Act 1893* noted that the effect of this aspect of the equivalent definition in that Act¹⁵ was that the meaning of ‘trust’ and ‘trustee’ were ‘not rendered inapplicable merely by reason of the trustee having a beneficial interest in the trust property’.¹⁶ Although a trustee cannot under the general law be the sole beneficiary of a trust,¹⁷ there is no impediment to a trustee being one of the beneficiaries of a trust. Accordingly, this part of the current definition does not serve any real purpose and has therefore been omitted.

Trustee

15.29 Paragraph (a) of the definition of ‘trustee’ in the Dictionary is generally to the same effect as the definition of that term in existing section 5(1), except that, as explained below, it omits paragraphs (c) and (e) of the current definition.¹⁸

15.30 In addition, paragraphs (b) and (c) of the definition of ‘trustee’ in the Dictionary include signposts to the particular definitions of that term in:

- clause 9, which provides that, for Part 2, ‘trustee’ does not include a personal representative acting only in the capacity of a personal representative; and
- clause 41, which provides that, for Part 3, ‘trustee’ includes custodian trustee.

Trust instrument

15.31 The Dictionary includes a new definition of ‘trust instrument’.

15.32 Paragraph (a) of the definition defines ‘trust instrument’ generally to mean any instrument creating a trust, as modified by all validly executed amendments. The reference to ‘any instrument creating a trust’ enables provisions throughout the Draft Bill to be simplified by referring to the ‘trust instrument’, rather than to the ‘instrument (*if any*) creating the trust’ as appears in the current Act. The additional words ‘as modified by all validly executed amendments’ ensure that, if the original trust instrument has been modified by another instrument, the references in the Draft Bill to the ‘trust instrument’ will encompass those changes.

¹⁵ *Trustee Act 1893*, 56 & 57 Vict, c 53, s 50.

¹⁶ AR Rudall and JW Greig, *The Law of Trusts and Trustees* (Jordan & Sons, 2nd ed, 1898) 160.

¹⁷ Where the ‘legal and equitable ownership of property, formerly separate, unite in one person the equitable interest merges in the legal one’: *Suncorp Insurance and Finance v Commissioner of Stamp Duties* [1998] 2 Qd R 285, 305 (Davies JA). See also *Chief Commissioner of Stamp Duties (NSW) v ISPT Pty Ltd* (1998) 45 NSWLR 639, 648 (Mason P); *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431, 463 (Aickin J).

¹⁸ See [15.40] ff below.

15.33 Paragraph (b) of the definition of ‘trust instrument’ additionally includes a signpost to the particular definition of that term in clause 167, which applies for the purposes of Part 10 of the Draft Bill.

15.34 In turn, the Dictionary defines ‘instrument, creating a trust’ — which is an expression that forms part of the new definition of ‘trust instrument’ — in similar terms to the definition in existing section 5(1).

Trust property

15.35 The definition of ‘trust property’ in the Dictionary is generally to the same effect as the definition of that term in existing section 5(1). However, in order to simplify the drafting of a number of provisions in the Draft Bill, the definition additionally provides that ‘trust property’ includes ‘part of the trust property’.

OMITTED DEFINITIONS

15.36 The Dictionary does not include definitions of the following terms that currently appear in existing section 5(1):

- ‘land’;
- ‘mortgage’, ‘mortgagee’ and ‘possession’;
- ‘person’; and
- ‘personal representative’.

15.37 Instead, the Draft Bill relies on the definitions in Schedule 1 to the *Acts Interpretation Act 1954* (Qld) of:

- ‘land’ and, in turn, ‘interest’, in relation to land or other property;
- ‘mortgage’, ‘mortgagee in possession’ and ‘possession’;
- ‘person’; and
- ‘personal representative’.

15.38 The Draft Bill also relies on a number of other definitions of general application in Schedule 1 to the *Acts Interpretation Act 1954* (Qld), including the definitions of:

- ‘instrument’, which means any document, which is in turn defined widely;¹⁹
- ‘lease’, which includes a sublease;²⁰ and

¹⁹ See, eg, Draft Trusts Bill 2013, cl 15(2), 69(1).

²⁰ See, eg, Draft Trusts Bill 2013, cl 27(4)(b), 115(6).

- ‘minor’, in substitution for the word ‘infant’.²¹

15.39 Additionally, definitions of the following terms that currently appear in existing section 5(1) have been omitted from the Dictionary on the basis that they are unnecessary in light of the natural and ordinary meaning of those words:

- ‘conveyance’;
- ‘execute’;
- ‘rent’; and
- ‘transfer’.

15.40 Finally, the Dictionary omits the definition of ‘statutory trustee’ that appears in existing section 5(1). It also omits the references that currently appear in paragraphs (c) and (e) of the definition of ‘trustee’ in existing section 5(1) to:

- a person who, immediately before the commencement of the *Trusts Act 1973* (Qld), ‘was a trustee of the settlement or in any way a trustee under the *Settled Land Act 1886* and who, if that Act had not been repealed, would be such a trustee’; and
- a statutory trustee.

15.41 This reflects the omission from the Draft Bill of the provisions of the current Act that deal with statutory trustees, namely, existing sections 6, 7 and 31(3). By virtue of the transitional provision in clause 176, those sections, and the relevant definitions in existing section 5(1), will continue to apply to statutory trustees as if they had not been repealed.

²¹

See, eg, Draft Trusts Bill 2013, cl 94–96.

Chapter 3

Other Matters

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INTRODUCTION

[1] This chapter discusses the Commission’s approach to a small number of other matters, either about provisions that have not been retained in the Draft Trusts Bill 2013 or issues that do not relate to a particular provision of the Draft Bill.

OMITTED PROVISIONS OF THE *TRUSTS ACT 1973* (QLD)

[2] As explained in Chapter 1 of this Report, a number of provisions of the current Act have not been retained in the Draft Bill on the basis that they are obsolete, no longer appropriate in modern trusts legislation, or made redundant by new provisions.¹ The following discussion relates to two of these provisions, about which the Commission received submissions in response to the Interim Report.

Section 29: Power of trustee to retain investments

[3] In the Interim Report, the Commission recommended that the new trusts legislation should not include a provision to the effect of section 29 of the *Trusts Act 1973* (Qld).²

¹ See Appendix C, which identifies those provisions of the *Trusts Act 1973* (Qld) that have not been retained in the Draft Trusts Bill 2013.

² *Trusts Interim Report* (2013) [5.168]–[5.169], Rec 5-7.

[4] In response to that recommendation, QSuper suggested ‘that further thought should be given as to whether a provision to the effect of the existing section 29’ should be retained:

It appears that the section provides some protection for trustees during the period where an investment ceases to be an authorised investment and when the investment is sold.

[5] Existing section 29 provides that a trustee is not liable for breach of trust by reason only of continuing to hold certain investments:

29 Power of trustee to retain investments

A trustee is not liable for breach of trust only because the trustee continues to hold an investment that has stopped being an investment—

- (a) authorised by the instrument creating the trust; or
- (b) properly made by the trustee exercising a power of investment; or
- (c) made under this part as previously in force from time to time; or
- (d) authorised by another Act or the general law. (emphasis added)

[6] The protection afforded by existing section 29 is limited by the words ‘only because’. As Millett J observed in relation to the then English provision:³

The protection afforded by the section [section 4 of the English *Trustee Act 1925*] is limited. It does not prevent the trustee from being liable for breach of trust if he should continue to retain an unauthorised investment without proper justification for doing so.

[7] It has been suggested that the provision ‘affords little (if any) more protection than trustees enjoyed before, but it is a useful sedative to those who fulfil the thankless and unremunerative task of trustees’.⁴ Commentators on the original English provision observed that:⁵

Both the Legislature and the Court have from time to time laid down rules for ascertaining the propriety of new investments, but these rules are not expressly made applicable to the retention of existing securities. It would indeed appear obvious that where an investment is one which might be properly made at the moment, it is one which may be properly retained. When, however, the investment is not one which could be properly made at the moment, the question arises whether it can be properly retained.

[8] In their view, there is no general principle that, ‘in the absence of direction to the contrary a trustee is bound to realise investments which are not such investments as might properly be made at the moment’, although a duty to realise

³ *Wright v Ginn* [1995] Pens LR 33, [4].

⁴ AE Randall, *A Selection of Leading Cases in Equity with Notes* (Stevens & Sons, 1912) 198.

⁵ FG Champernowne and H Johnston, *The Trustee Act, 1893, and Other Recent Statutes Relating to Trustees* (William Clowes & Sons, 1904) 176.

an investment could arise in limited circumstances, including 'where the security of the fund demands such a course'.⁶

[9] Many of the older cases in relation to the retention of unauthorised investments arose in circumstances where there was a change in the nature of the investment, very often occurring independently of the trustee, which had the result that the trustee was then holding an unauthorised investment.⁷ In that situation, the trustee was required to convert the investment into one that was authorised. Section 29 would not relieve the trustee of that general law duty.⁸

The Commission's view

[10] The Commission remains of the view that the protection afforded by section 29 of the *Trusts Act 1973* (Qld) is extremely limited, given that it is confined to liability arising solely from the retention of particular investments. The section does not, for example, relieve a trustee of the duty to sell an investment that has ceased to be authorised if the trustee would otherwise be subject to such a duty under the general law. Nor does it relieve a trustee of the duty to take steps to enforce a non-performing mortgage, if that would be the prudent course.

[11] Further, while it may have provided comfort to trustees at a time when trustees had extremely limited powers of investment, trustees' powers of investment have since undergone major reforms.

[12] Trustees now have extremely wide powers of investment, and are subject to particular duties in exercising those powers. For example, trustees have a duty under existing section 22(3) to review the performance of trust investments on an annual basis, and existing section 24(1)(o) requires them to have regard to the results of a review of existing trust investments. These duties have been retained by clauses 49 and 51(1)(o) of the Draft Bill, together with the new general duty of care imposed by clause 42.

[13] In view of these matters, the Commission remains of the view that section 29 of the *Trusts Act 1973* (Qld) no longer serves a useful purpose, and that it harks back to a time when trustees had very restricted powers of investment. For this reason, the Draft Trusts Bill 2013 does not include a provision to the effect of existing section 29. The Commission notes, in this regard, that the equivalent provision of the English *Trustee Act 1925* was repealed on the recommendation of the Law Commission of England and Wales.⁹

⁶ Ibid. These commentators also suggested that such an obligation would arise '(1) under an express direction to convert, [and] (2) under such a direction implied in the fact that the trusts are declared by will of a residuary personalty given as one fund for persons in succession'.

⁷ For a detailed discussion of s 29 of the *Trusts Act 1973* (Qld), see *Trusts Interim Report* (2013) [5.145] ff.

⁸ See FG Champernowne and H Johnston, *The Trustee Act, 1893, and Other Recent Statutes Relating to Trustees* (William Clowes & Sons, 1904) 177.

⁹ See *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 4, repealed by the *Trustee Act 2000* (UK) c 29, s 40(1), (3), sch 2 pt II para 18, sch 4 pt II; Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999) [2.27], n 50, which recommended the repeal of pt 1 of the *Trustee Act 1925*, 15 & 16 Geo 5, c 19 (which included s 4).

Section 117: Requirement upon certain transfers to local government

[14] When the *Trusts Act 1973* (Qld) was amended to make provision for a local government to be appointed as sole trustee of particular types of trusts,¹⁰ it was considered appropriate to include 'certain precautions'.¹¹ Specifically, it was 'felt desirable in the public interest' that, where a local government is appointed as trustee, 'the trust documents should always be available for scrutiny if necessary'.¹² In particular, the intention was that:¹³

- if land is transferred to a local government as sole trustee, the transfer is to be 'by way of a nomination of trustees' to ensure that 'a copy of the trust document is held at all times by the Registrar of Titles'; and
- in the case of '[a]ll other transfers' of land to a local government, the transfer is to be accompanied by a statutory declaration that the land is not being transferred to the local government as sole trustee.

[15] The first of these matters was provided for under then existing provisions of the *Real Property Act 1861* (Qld),¹⁴ and is now dealt with in Division 6 of Part 6 of the *Land Title Act 1994* (Qld).

Land Title Act 1994 (Qld)

[16] Section 109 of the *Land Title Act 1994* (Qld) provides that there are two ways in which a person may be registered as trustee of an interest in a lot: by the registration of an instrument transferring the interest to, or creating the interest in favour of, the person as trustee; or by the registration of a request to vest the interest in the person as trustee.¹⁵

[17] Relevantly, section 110 of the Act provides that an instrument of transfer may be lodged to transfer an interest in a lot to a trustee or by the registered owner to declare that the registered owner holds the interest as trustee.¹⁶ It further provides that a certified copy of a document stating the details of the trust, or creating the trust, must be deposited with the instrument of transfer.¹⁷

[18] As explained in the Land Title Practice Manual, although it is 'not compulsory for a trust to be disclosed on the register', where the trust is to be disclosed, and the transferee recorded on the register in the capacity of trustee, the

¹⁰ See *Trusts Act Amendment Act 1979* (Qld) ss 4–5.

¹¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 26 April 1979, 4285 (WD Lickiss, Minister for Justice and Attorney-General).

¹² *Ibid* 4284. See also at 4285 and 23 May 1979, 4750.

¹³ *Ibid* 23 May 1979, 4750. See also at 26 April 1979, 4284.

¹⁴ *Real Property Act 1861* (Qld) ss 77–78 (repealed).

¹⁵ The registration of a request to vest the interest in the person as trustee, which applies where an order is made under the *Trusts Act 1973* (Qld) or another Act, is dealt with in *Land Title Act 1994* (Qld) s 110A.

¹⁶ *Land Title Act 1994* (Qld) s 110(1).

¹⁷ *Land Title Act 1994* (Qld) s 110(3). This document, although deposited, does not form part of the freehold land register: s 110(4).

words ‘as trustee’ must be included on the transfer form and the deed of trust must either be deposited or incorporated by reference to an instrument previously deposited with earlier dealings.¹⁸ If ‘as trustee’ appears on the form but a deed of trust has not been deposited, or if a deed of trust has already been deposited and ‘as trustee’ does not appear on the form, ‘the dealing will be requisitioned for clarification and amendment’.¹⁹

[19] A transfer to a local government as trustee, for a trust referred to in section 116 of the *Trusts Act 1973* (Qld), is to be effected in the same way.²⁰

[20] The overall policy approach to the recording of trusts in the register is explained in the Land Title Practice Manual as follows:²¹

Broadly, the provisions of the [*Land Title Act 1994* (Qld)] attempt to limit the circumstances in which a trustee may be registered, and regulate how the trustee may be registered on the register. Essentially, the Registrar is concerned to ensure that the register shows the legal ownership of an interest in a lot or tenure under the *Land Act 1994*. The Registrar is less concerned to ensure that the beneficial interests are shown, although the Registrar may be concerned that future dealings by the trustee are authorised.

Section 117 of the Trusts Act 1973 (Qld)

[21] The second of the matters mentioned at [14] above was addressed by the inclusion of section 117 in the *Trusts Act 1973* (Qld).²²

[22] It provides that, where land is transferred to a local government as the sole transferee by means of an instrument of transfer, the instrument is not to be registered unless accompanied by a statutory declaration that the land is not being transferred to the local government as a sole trustee.²³ Although it is not expressly stated in those terms, it appears that this is intended to apply where the local government is the sole transferee but not as a trustee.²⁴

[23] Although the Land Title Practice Manual refers to the requirements of section 117 of the *Trusts Act 1973* (Qld), it does not provide any explanation of their purpose.²⁵

¹⁸ Department of Natural Resources and Mines (Qld), *Land Title Practice Manual (Queensland)* (July 2009) [51-2022] <http://www.dnrm.qld.gov.au/_data/assets/pdf_file/0006/97134/land-title-practice-manual.pdf>. See also at [51-2043] and [1-2380]–[1-2390].

¹⁹ Ibid [51-2022].

²⁰ Ibid [1-2570].

²¹ Ibid [51-0000].

²² *Trusts Act Amendment Act 1979* (Qld) s 6, inserting s 113 of the *Trusts Act 1973* (Qld). Section 113 was renumbered as s 117 by the *Criminal Proceeds Confiscation and Other Acts Amendment Act 2009* (Qld) s 83(2).

²³ *Trusts Act 1973* (Qld) s 117(1).

²⁴ See [14] above.

²⁵ See Department of Natural Resources and Mines (Qld), *Land Title Practice Manual (Queensland)* (July 2009) [1-2580].

The Commission's view

[24] In its submission to the Discussion Paper and the Interim Report, the Registrar of Titles queried whether section 117 of the *Trusts Act 1973* (Qld) should be retained, observing, in particular, that the requirement is not well known, appears to be 'onerous', and 'may not be the best way of achieving the apparent policy intent'.

[25] The Commission agrees that the requirement imposed by existing section 117 is an unnecessary obligation with little real benefit. Its inclusion in the *Trusts Act 1973* (Qld) appears to have been driven by a concern to ensure a measure of public scrutiny in the case of transfers of land to local governments as sole trustees. In that respect, however, the appropriate safeguards are provided for in the *Land Title Act 1994* (Qld), and it is unnecessary to impose an additional requirement for ordinary transfers to local governments that does not apply in relation to other transferees. The Draft Bill does not, therefore, include a provision to the effect of section 117 of the *Trusts Act 1973* (Qld).

OTHER ISSUES RAISED IN THE SUBMISSIONS

The elements of a valid trust

[26] In response to the Discussion Paper, the Queensland Law Society submitted that the new trusts legislation should set out the essential elements of a valid trust. In academic writing, these are often summarised in terms of a requirement for an express trust to meet the 'three certainties' of:²⁶

- intention;
- subject matter; and
- object.

[27] In the Interim Report, the Commission noted the Queensland Law Society's submission but did not propose the inclusion of such a legislative statement. The Commission observed that a legislative statement in general terms as to the requirement for the three certainties would be of little assistance in those instances where there is a genuine doubt as to whether one of those certainties is present. It also expressed the concern that a detailed articulation of those requirements would effectively involve the codification of this important aspect of the law of trusts and could unsettle the existing law and inhibit its further development.²⁷

[28] The Queensland Law Society reiterated its submission in response to the Interim Report, explaining that, in its view, outlining 'the minimum requirements for a valid trust' in the legislation would not amount to a codification of the law, and would 'provide more certainty and reduce litigation' with 'significant benefit to

²⁶ See, eg, GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [17.05] ff.

²⁷ *Trusts Interim Report* (2013) [10.20].

trustees, beneficiaries and persons dealing with a trust'. A legal practitioner who practices in trusts and succession law also suggested that this would improve the accessibility of the legislation.

The Commission's view

[29] The Commission confirms its earlier view that the Draft Bill should not attempt to state the essential elements of a valid trust. The question whether a trust is valid involves a consideration, on the facts of each case, of a range of factors encompassing the 'three certainties', as well as many other matters including compliance in particular cases with relevant formalities, the capacity of the settlor to create the trust, and the legality of the trust's purpose.²⁸ An attempt to articulate the elements of a valid trust would either be so detailed as to inhibit the further development of the law, or would be in such general and qualified terms as to be of little utility. For this reason, the Draft Bill does not include a statement about the essential elements of a valid trust.

The rule against perpetuities

[30] In response to the Interim Report, the Society of Trust and Estate Practitioners ('STEP') and the Queensland Law Society submitted that the rule against perpetuities, which is relevant to the law of trusts, should be reviewed. In particular, those respondents suggested that consideration should be given to reviewing the perpetuity period, in light of the abolition of the rule in South Australia. The Queensland Law Society also submitted that the rule should be dealt with in trusts legislation, rather than in the *Property Law Act 1974* (Qld).

[31] As explained in the Discussion Paper, the rule against perpetuities (sometimes referred to as the rule against the remoteness of vesting) has the effect that the disposition of an interest in property is void if the interest will not vest within the required time.²⁹ The rule is therefore relevant (with some exceptions) to trusts, as well as to other dispositions of property interests. In Queensland, the rule against perpetuities is dealt with in the *Property Law Act 1974* (Qld).³⁰

[32] In South Australia, the rule has been abolished in favour of a mechanism for the court, in specified circumstances, to vary the terms of a disposition of property.³¹ The rule has also recently been modified in England following a review

²⁸ See generally GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) ch 17–19.

²⁹ See *Trusts Discussion Paper* (2012) [3.3]. In Queensland, the person making the disposition 'may specify a period not exceeding 80 years, failing which the perpetuity period is the common law period of a life or lives in being plus 21 years': JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [929]; *Property Law Act 1974* (Qld) s 209(1).

³⁰ *Property Law Act 1974* (Qld) pt 14. In the other jurisdictions, see *Perpetuities and Accumulations Act 1985* (ACT); *Perpetuities Act 1984* (NSW); *Law of Property Act* (NT) pt 11; *Law of Property Act 1936* (SA) pt 6 div 3; *Perpetuities and Accumulations Act 1992* (Tas); *Perpetuities and Accumulations Act 1968* (Vic); *Property Law Act 1969* (WA) pt 11.

³¹ See *Law of Property Act 1936* (SA) ss 61–62.

of *The Rules Against Perpetuities and Excessive Accumulations* by the Law Commission of England and Wales.³²

The Commission's view

[33] The Commission considers that, in light of the reforms that have occurred in other jurisdictions, there is merit in the suggestion that the rule against perpetuities should be reviewed. However, the Commission considers that this issue falls beyond the scope of its present review of the *Trusts Act 1973* (Qld). The Commission also observes that Queensland's property legislation is currently under review.³³ For these reasons, the Commission has not made any recommendations concerning this issue in this Report.

Federal reforms in relation to charities

[34] In its submission in response to the Interim Report, the Queensland Law Society observed that the law relating to charities and 'not-for-profit' entities 'has undergone substantial review' in Australia, and submitted that 'attention be directed to the proposed Government standards for charitable trusts, the definition of charity and the impact on Queensland trusts'.

[35] The Federal Government's not-for-profit reforms have centred to date on two key areas: the formation of the Australian Charities and Not-for-Profits Commission (the 'ACNC'); and the introduction of a statutory definition of 'charity'. Although its reform agenda has some bearing on charitable trusts, it has a much wider remit than that, encompassing a diverse range of 'not-for-profit' activities, organisations, and legal structures.³⁴

The Australian Charities and Not-for-Profits Commission and the registration of 'charities'

[36] The ACNC was established in December 2012 under the *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) as an independent national regulator of charities.

[37] The ACNC Commissioner is responsible for maintaining a publicly available register of charities, and for monitoring and enforcing compliance by registered charities with the regulatory obligations imposed on them under that Act.³⁵

³² See *Perpetuities and Accumulations Act 2009* (UK) c 18; Law Commission of England and Wales, *The Rules Against Perpetuities and Excessive Accumulations*, Report No 251 (1998).

³³ See Queensland Government, Department of Justice and Attorney-General, *Review of property law in Queensland* (15 August 2013) <<http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/current-activities/review-of-property-law-in-queensland>>.

³⁴ See Australian Government (The Treasury), 'Not-For-Profit Reform' <<http://www.treasury.gov.au/Policy-Topics/PeopleAndSociety/NFP-reform>>.

³⁵ See *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) ch 2 pt 2-2, ch 4.

[38] Registration as a 'charity' is voluntary. However, it is a prerequisite for access to certain Commonwealth tax concessions, and 'may also be a prerequisite for other exemptions, benefits and concessions'.³⁶ The ACNC determines the threshold question of whether an entity is a 'charity', whilst the ATO remains responsible for determining a charity's eligibility for tax concessions.³⁷

[39] Registration is open to an 'entity', including an individual, body corporate, unincorporated association or trust,³⁸ that meets certain conditions. In particular, it must be a not-for-profit entity and a 'charity'.³⁹ 'Charity' is now defined by other new Commonwealth legislation (see below).

[40] Once registered, an entity must comply with certain governance standards and reporting requirements.⁴⁰ Where the entity is a trust, these obligations are imposed on the trustee or trustees for the time being (and, where the trustee is a company that is a body corporate, on the directors of the company).⁴¹

The statutory definitions of 'charity' and 'charitable purpose'

[41] In determining whether an entity is a 'charity', the ACNC will apply the statutory definitions of 'charity' and 'charitable purpose' under the *Charities Act 2013* (Cth).

[42] Section 5 of the *Charities Act 2013* (Cth) provides that 'charity' means an entity that is a not-for-profit entity and all of the purposes of which are 'charitable purposes that are for the public benefit' (or are incidental and ancillary to such purposes).⁴²

[43] Section 12 of that Act defines 'charitable purpose' in broad terms to include, for example, the purpose of advancing health, advancing social or public welfare, advancing culture, promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia, promoting or protecting human rights, and advancing the natural environment.

[44] Many of these purposes are potentially wider than those recognised under section 103 of the *Trusts Act 1973* (Qld) (and clause 6 of the Draft Bill) as being charitable. That is, perhaps, understandable given the different purpose served by

³⁶ *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) s 15-5(3)–(4).

³⁷ See Australian Government (Australian Charities and Not-for-Profits Commission), 'Obligations to other regulators' <http://www.acnc.gov.au/ACNC/Manage/Ongoing_Obs/Obs_otherReqs/ACNC/Edu/Obs_OtherReqs.aspx?hkey=695ded18-5d20-4cee-aff7-cf6f19508687>.

³⁸ *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) s 205-5(1)(e). See also s 205-5(3).

³⁹ *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) s 25-5(1)(a)–(b), (3)(a), (5). See also, in relation to registration as a 'subtype of entity', s 25-5(2)–(3), (5).

⁴⁰ See *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) ch 3; *Australian Charities and Not-for-Profits Commission Regulation 2013* (Cth).

⁴¹ *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) s 180-20(1).

⁴² Further, none of the entity's purposes can be 'disqualifying purposes', and the entity must not be an individual, a political party, or a government entity: *Charities Act 2013* (Cth) s 5 (definition of 'charity' paras (c)–(d)).

the Commonwealth definition, in particular, the role it serves in determining an entity's entitlement to access to Commonwealth tax concessions.

The Commission's view

[45] The Commission remains of the view that the meaning of 'charitable' in clause 6 of the Draft Bill should continue to be based on section 103 of the *Trusts Act 1973* (Qld).

[46] In its view, clause 6 is in simpler and more flexible terms than the definitions of 'charity' and 'charitable purpose' under the *Charities Act 2013* (Cth). Clause 6 provides that the 'established rules of law relating to what is charitable' apply and in this way provides for the general law to apply as it continues to develop. Other than specifically recognising the provision of recreational facilities, clause 6 does not seek to either restate or extend the general law meaning of what is charitable.

[47] Clause 6 is generally concerned with charitable trusts and is relevant, in particular, to the determination of whether a purported charitable trust is actually a valid charitable trust (that is, whether its purposes are recognised as 'charitable'), and in relation to determining the range of purposes for which a charitable trust can be altered by a *cy pres* scheme. This differs from the context in which the Federal definition of 'charity' is to operate.

[48] Further, the recent federal reforms in relation to the 'not-for-profit' sector are still in a state of flux. The Minister for Social Services, the Hon Kevin Andrews, has announced the Federal Government's intention to consult with the sector on 'abolishing the Australian Charities and Not-for-profits Commission and establishing a centre for excellence and a possible national register of charities'.⁴³

Protection for a dissenting trustee

[49] In the Interim Report, the Commission did not recommend any change to the current requirement under the general law that trustees of a private trust must act jointly unless they are authorised by the trust instrument to act by majority.⁴⁴

[50] In response to the Interim Report, the Queensland Law Society expressed support for that recommendation but suggested that, where the trust instrument authorises co-trustees to act by majority, the trusts legislation should include protections for a dissenting trustee. It observed that, if majority decision-making is provided for in the trust instrument, safeguards for the dissenting trustees may also be included in the instrument, but this 'may not always be the case'. It submitted that the trusts legislation should include provisions similar to those that apply in the United States and Canada.

⁴³ Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2013, 36 (KJ Andrews, Minister for Social Services).

⁴⁴ *Trusts Interim Report* (2013) Rec 6-7.

[51] As explained in the Interim Report, section 703 of the American Uniform Trust Code empowers co-trustees to act by majority.⁴⁵ As part of that provision, the Code provides that each trustee shall exercise reasonable care to ‘prevent a cotrustee from committing a serious breach of trust’ and to ‘compel a cotrustee to redress a serious breach of trust’.⁴⁶ It goes on to provide that:⁴⁷

- (h) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any cotrustee of the dissent at or before the time of the action is not liable for the action unless the action is a serious breach of trust.

[52] The commentary to the Uniform Trust Code provision explains that the protection for dissenting co-trustees, and its limits in the case of ‘serious breaches’ of trust, is intended to reflect the general law.⁴⁸

[53] The British Columbia Law Institute has also recommended that the *Trustee Act* in that province should provide that co-trustees may act by majority. Its recommended provision goes further than the Uniform Trust Code by providing that a dissenting trustee, who states his or her disagreement with the decision or act of the majority in writing, ‘is not liable for any breach of trust or any loss resulting from that decision or act’.⁴⁹

[54] A number of the submissions to the Interim Report on the question of majority decision-making expressed concern about the inclusion of statutory protections of this kind.⁵⁰ In particular, the Bar Association of Queensland commented that, ‘if a dissenting trustee was absolved of any liability for the conduct’, he or she may thereby lose the ‘incentive to veto conduct that trustee regarded as being in breach of trust’. The Financial Services Council made a similar comment. Further, Professor Lee considered it unnecessary to include such provisions in the legislation as the law already ‘allows for the indemnification of a trustee where other trustees have committed a breach’.

The Commission’s view

[55] Under the general law, ‘the rule has always been that although a trustee is personally liable for any breaches of trust that he has committed, he is not liable for breaches committed by fellow trustees unless he himself is at fault’.⁵¹ This is given statutory effect in section 71 of the *Trusts Act 1973* (Qld) which provides, in part, that a trustee is ‘answerable and accountable only for the trustee’s own acts, receipts, neglects or defaults, and not for those of any other trustee, ... unless the

⁴⁵ See *Trusts Interim Report* (2013) [6.276] ff.

⁴⁶ Unif Trust Code § 703(g) (amended 2010).

⁴⁷ Unif Trust Code § 703(h) (amended 2010).

⁴⁸ Unif Trust Code (amended 2010), Comment 118, citing Restatement (Second) of Trusts §§ 184, 224 (1959). See also Restatement (Third) of Trusts § 81 (Duty with Respect to Co-Trustees) (2007).

⁴⁹ British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 40, Proposed *Trustee Act*, cl 12. This recommendation has not been implemented.

⁵⁰ See generally *Trusts Interim Report* (2013) [6.284]–[6.292].

⁵¹ RE Megarry and PV Baker, *Snell’s Principles of Equity* (Sweet & Maxwell, 26th ed, 1966) 296.

... loss occurs through the trustee's own default'. That is, the trustee will be liable, for example:⁵²

where he has participated in the breach, or where he has improperly delegated the administration of the trust to his co-trustee, or where he has failed to exercise reasonable care to prevent his committing a breach of trust or where he subsequently approves or acquiesces in or conceals his co-trustee's breach of trust or fails to take proper action to compel his co-trustee to redress the breach of trust.

[56] The Commission considers that this adequately and appropriately sets out the circumstances in which a co-trustee may be protected from liability for various losses to the trust estate. Accordingly, a provision to the general effect of this part of existing section 71 is included in the Draft Bill (clause 113).

[57] A provision to the general effect of section 76 of the *Trusts Act 1973* (Qld), under which the court may relieve a trustee from personal liability for a breach of trust if the trustee has acted honestly and reasonably and ought fairly to be excused, is also included in the Draft Bill (clause 120).

[58] In light of these provisions, the Commission does not consider it necessary to include an additional statutory indemnity provision that applies specifically to a dissenting co-trustee in cases where the trustees have been authorised to act by majority. Nor does the Commission consider it desirable for the Draft Bill to confer a greater or more absolute protection on such trustees. In its view, the conferral of such protection is a matter that is more appropriate for the trust instrument and for the courts, particularly as the question of whether a dissenting co-trustee has discharged his or her own duties will always turn on its own facts.

RELATED PROVISIONS IN OTHER LEGISLATION

[59] In the Discussion Paper, the Commission canvassed a number of provisions of the *Public Trustee Act 1978* (Qld) and the *Trustee Companies Act 1968* (Qld) that concern matters that are also addressed in the *Trusts Act 1973* (Qld):⁵³

- *Public Trustee Act 1978* (Qld) sections 48–50, 129 and 131; and
- *Trustee Companies Act 1968* (Qld) sections 28–32.

Barring of claims

[60] Of these provisions, the Commission gave particular consideration to the provisions dealing with the barring of claims — section 131 of the *Public Trustee Act 1978* (Qld) and section 32 of the *Trustee Companies Act 1968* (Qld).

⁵² G Fricke and OK Strauss, *The Law of Trusts in Victoria* (Butterworths, 1964) 422. For a detailed discussion of *Trusts Act 1973* (Qld) s 71 and the general law of which it is declaratory, see *Trusts Interim Report* (2013) [11.100] ff.

⁵³ See *Trusts Discussion Paper* (2012) ch 16.

[61] Under section 131(2) of the *Public Trustee Act 1978* (Qld), the claimant or person called upon to lodge a claim is given three months from receiving notice that the Public Trustee refuses to recognise the person's claim in which to satisfy the Public Trustee of the person's claim or to commence legal proceedings and serve the Public Trustee. If neither of those events occurs, the Public Trustee is authorised to deal with the estate or property without having regard to the existence of the claim. Further, the right of the claimant or person to recover the claim is 'absolutely barred as against so much of the estate or property as has been distributed'. The effect of that provision is that the claim is barred not only against the Public Trustee but also, to the extent that the estate or property has been distributed, against the person to whom it has been distributed.

[62] Section 32 of the *Trustee Companies Act 1968* (Qld) has a narrower scope than section 68 of the *Trusts Act 1973* (Qld) and section 131 of the *Public Trustee Act 1978* (Qld), as it applies only to a person claiming to be a creditor of the estate of a deceased person. However, it includes a similar, although not identical, procedure to that in section 131 of the *Public Trustee Act 1978* (Qld).

[63] Under section 32(1) of the *Trustee Companies Act 1968* (Qld), a trustee company may give a claimant notice that the trustee company refuses to recognise the claim. If the claimant does not, within six months of receipt of the notice, institute proceedings to enforce the claim, the trustee company may distribute the assets without regard to the claim or so much of it as the trustee company has by notice refused to recognise. In that situation, the claimant's right to recover the amount of the claim 'from the trustee company' is absolutely barred.⁵⁴ The provision does not purport to prevent the claimant from following the assets into the hands of a beneficiary to whom they have been distributed.

The Commission's view

[64] The Draft Bill includes provisions to the effect of section 68 of the *Trusts Act 1973* (Qld).⁵⁵ Those provisions continue the current policy of existing section 68, under which a claim may be barred only by an order of the court. Although the Commission received submissions from the Queensland Law Society and a legal practitioner who practises in trusts and succession law suggesting that existing section 68 should be aligned with section 131 of the *Public Trustee Act 1978* (Qld), it has not adopted that approach. In the Commission's view, the barring of claims without the need for a court order is too significant to be the ordinary means for dealing with claims against trustees.

[65] The Commission considers, however, that the nature of the Public Trustee's function justifies the wider powers given to that body. As the Public Trustee observed in its submission, it 'frequently attends to very modest trusts in terms of corpus where the financial and administrative burden of applying to the Court would be disproportionate'.

⁵⁴ *Trustee Companies Act 1968* (Qld) s 32(2).

⁵⁵ Draft Trusts Bill 2013, cll 106–110.

[66] Although trustee companies do not have the same justification for having their own particular procedure for the barring of claims, section 32 of the *Trustee Companies Act 1968* (Qld) has a fairly narrow application, applying only to the creditors of a deceased estate. In addition, the section does not prevent the claimant from following property into the hands of the person to whom it has been distributed. For this reason, the Commission does not make any recommendation to change that provision.

Other provisions

[67] Although there is some overlap between the other provisions mentioned at [59] above and the provisions of the Draft Trusts Bill 2013, it would not be possible, in the context of this review, to determine the extent to which the other provisions need to be retained. That would entail a comprehensive review of the *Public Trustee Act 1978* (Qld) and the *Trustee Companies Act 1968* (Qld), which is outside the scope of this review.

[68] However, the policy of the Draft Trusts Bill 2013, as with the *Trusts Act 1973* (Qld), is that the powers conferred on a trustee under it are in addition to the powers conferred on the trustee under any other Act.⁵⁶ In that way, any additional powers that a trustee may have under the *Public Trustee Act 1978* (Qld) or the *Trustee Companies Act 1968* (Qld) will simply operate concurrently with the Draft Trusts Bill 2013.

CONSEQUENTIAL AMENDMENTS

[69] As noted in the Discussion Paper, a number of Acts refer to specific provisions of the *Trusts Act 1973* (Qld).⁵⁷ The legislation that is introduced to implement the Draft Trusts Bill 2013 will need to provide for the consequential amendment of those other Acts to ensure that they refer to the provisions of the new trusts legislation.

[70] The Draft Bill does not include those consequential amendments as the other Acts may themselves change in the period before implementation.

⁵⁶ See Draft Trusts Bill 2013, cl 3(5).

⁵⁷ See *Trusts Discussion Paper* (2012) [16.46], Table 16.1.

Appendix A

Terms of Reference

A REVIEW OF THE *TRUSTS ACT 1973*

1. I, PAUL THOMAS LUCAS, Attorney-General, refer the *Trusts Act 1973* (the Act) to the Queensland Law Reform Commission (the Commission) for review pursuant to section 10 of the *Law Reform Commission Act 1968*, including, but not limited to:
 - whether the Act provides an adequate, effective and comprehensive framework for the regulation of trusts (including charitable trusts) in Queensland;
 - opportunities for the Act to be modernised, simplified, clarified or updated, including in light of developments in case law and current trust practices and usage;
 - whether any other relevant State legislation pertaining to the law of trusts should be amended for consistency with, or as a consequence of, any recommended amendments to the Act; and
 - streamlining the law with respect to deciding disputes in relation to the terms of the administration of trusts; including the appropriate court or tribunal which is to have jurisdiction over less complex matters and disputes involving lower monetary values.
2. In undertaking this reference, I ask the Commission to have regard to:
 - the increased use of private trusts, including family discretionary trusts and testamentary discretionary trusts;
 - the use of trusts in commercial business arrangements, public investments and superannuation; and
 - other relevant State and Commonwealth legislation that provides for matters pertaining to the law of trusts.
3. In performing its functions under this reference, the Commission is asked to prepare, if relevant, draft legislation based on the Commission's recommendations.
4. The Commission is to provide an interim report to the Attorney-General advising its recommendations by 30 June 2013. The date for a final report including draft legislation is 31 December 2013.

Dated the 25th day of January 2012.

PAUL LUCAS MP
Attorney-General,
Minister for Local Government
and Special Minister of State

Appendix B

List of Respondents

Respondents to the Discussion Paper

Bar Association of Queensland

Crown Law

Financial Services Council

Dr Darryn Jensen

Professor WA (Tony) Lee

The Public Trustee

Queensland Law Society

Registrar of Titles and Registrar of Water Allocations

QCAT

QSuper

Mr Tim Whitney

Respondents to the Interim Report

Bar Association of Queensland

Crown Law

Queensland Law Society

Incorporated Council of Law Reporting Queensland

James Cook University

Registrar of Titles and Registrar of Water Allocations

Society of Trust and Estate Practitioners ('STEP')

QSuper

Mr Tim Whitney

Appendix C

Table of Provisions

The following table indicates the destination of the existing provisions of the *Trusts Act 1973* (Qld). It identifies the equivalent provision in the Draft Trusts Bill 2013 or, where relevant, notes that the provision has been omitted.

The final two columns identify, with respect to the Interim Report, the Preliminary Recommendation that related to the particular provision and the paragraph number where the Commission expressed its view about whether the provision should be retained, changed or omitted.

A paragraph number in the final column that is marked with asterisks (**) denotes a reference to a paragraph number of this Report.

Trusts Act 1973	Draft Trusts Bill 2013	Interim Report Preliminary Rec(s)	Commission View
4(1)–(4)	3		
4(5)	Omitted		
4(6)	4		
5	5, Sch 1 Dictionary	Rec 15-2	15.36
5A	7		
6	Omitted (see 176 for transitional provision)		Chapter 2, 13.3 ff**
7	Omitted (see 176 for transitional provision)		Chapter 2, 13.3 ff**
7A	Omitted		Chapter 2, 5.18**
8	139	Rec 12-11	12.221 ff
9	91		
10	8		
11	12 (see 177 for transitional provision)	Rec 3-3	3.48 ff
12(1)(a), (c)–(f), (h)	15(1)(a)–(f)	Rec 3-4	3.98
12(1)(b), (g)	Omitted	Rec 3-5(a)	3.99, 3.106
12(1) (remainder)	15(2)	Rec 3-4	3.98
12(2)(a)	Omitted	Rec 3-4	Chapter 2, 2.32**
12(2)(b)	19	Rec 3-4	
12(2)(c)	21–22	Recs 3-4, 3-10	3.272 ff, 3.295 ff

Trusts Act 1973	Draft Trusts Bill 2013	Interim Report Preliminary Rec(s)	Commission View
12(2)(d)	Omitted	Recs 3-4, 3-11	3.332 Chapter 2, 2.33**
12(3)	15(1)(i)	Rec 3-4	
12(4)	15(3) and (6), definition of 'personal representative'	Rec 3-4	
12(5)	17	Recs 3-4, 3-12	3.58
12(6)	20	Rec 3-4	
12(7)	14, 15(6), definition of 'continuing trustee'	Rec 3-4	
12(8)	13	Rec 3-4	
12(9)	9	Rec 3-19	3.405
12(10)	Omitted	Rec 3-4(b)	3.276 Chapter 2, 2.35**
13	116	Rec 3-14	3.306 ff
14	24	Rec 3-13	3.272 ff, 3.285 ff
15	25–27 (see 178 for transitional provision)	Rec 3-15	3.329 ff
16(1)–(9) 16(9) definition of 'trust property'	9, 28–31 Omitted	Recs 3-16, 3-19	3.367, 3.405 Chapter 2, 2.165 ff**
17	Omitted (see 179 for transitional provision)	Rec 3-17	3.382 ff
18	32	Rec 3-18	3.396
19	33–39	Rec 4-5	4.158, 4.168, 4.179 ff, 4.188, 4.195
20	46		
21	47(1)	Rec 5-1	5.29
22(1) 22(2) 22(3)	42(2), 48(1) 47(2) 49	Rec 5-1	5.29 ff
23	50	Rec 5-1	5.29
24	51	Rec 5-1	5.29
25	Omitted (but see 59(1), (3)(d))	Rec 5-3	5.50 ff, 5.52 ff
26	52		
27	Omitted (but see 61(1)(c))	Rec 5-4	5.68 ff
28	53	Rec 5-5	5.88 ff
29	Omitted	Rec 5-7	5.168 ff Chapter 3, [3] ff**

Trusts Act 1973	Draft Trusts Bill 2013	Interim Report Preliminary Rec(s)	Commission View
30(1), (3)	54	Rec 5-8	5.228 ff
30(2)	Omitted	Rec 5-10	5.257
30A	55	Rec 5-9	5.240
30B	56		
30C	57		
31(1)	58		
31(2)	90		
31(3)	Omitted (see 176 for transitional provision)		Chapter 2, 13.3 ff**
32(1)(a)	Omitted (but see 59(1), (3)(a))	Rec 7-5(a)	7.76 ff
32(1)(b)	Omitted (but see 59)	Rec 7-6(d)	7.184
32(1)(c)	60	Rec 8-1	8.24 ff
32(1)(d)–(f)	Omitted (but see 59(1), (3)(b))	Rec 7-5(b)	7.201
32(2)	Omitted (but see 59)		
32(3)	Omitted (but see 59(1), (3)(b))	Rec 7-5(b)	7.201
32(4)	60	Recs 8-1, 8-2	8.24 ff
33(1)(a)–(f) 33(1)(e)–(f)	61 Power to subdivide etc omitted (but see 59)	Recs 7-6(e), 8-5	7.207, 8.110, 8.122
33(1)(g)	62	Rec 8-6	8.139 ff, 8.154
33(1)(h)	Omitted (but see 59)	Recs 7-6(f), 7-15	7.213, 7.217
33(1)(i)	Omitted (but see 59(1), (3)(c))	Rec 7-5(c)	7.177 ff
33(1)(j)	88(1)	Rec 9-12	9.183
33(1)(k)	Omitted (but see 59)	Rec 7-6(g)	7.223
33(1)(l)	63	Recs 10-6(a), 10-8, 10-9	10.173 ff
33(1)(m)	65	Rec 10-10	10.191
33(1)(n)	89	Rec 9-12	9.183
33(2)	64	Rec 10-6(b)	10.175 ff
33(3)–(4)	Omitted	Rec 10-7	10.178 Chapter 2, 5.50 ff**
33(5)	66	Rec 10-10	10.191
34(1)–(2) 34(3)	Omitted (but see 59) 117(1)	Rec 7-5(a) Recs 7-9, 7-10	7.78 7.91 ff
35	Omitted (but see 59)	Rec 7-11	7.104
36	Omitted (but see 59)	Recs 7-6(a), 7-12	7.122 ff
37	Omitted (but see 59)	Recs 7-6(b), 7-13	7.141 ff

Trusts Act 1973	Draft Trusts Bill 2013	Interim Report Preliminary Rec(s)	Commission View
38(1)–(2)	Omitted (but see 59)	Recs 7-6(h), 7-16	7.236 ff
38(3)	117(2)	Recs 7-17, 7-18	7.246 ff
39	Omitted (but see 59)	Recs 7-6(i), 7-19	7.259 ff
40	Omitted (but see 59)	Rec 7-20	7.273
41	Omitted (but see 59)	Rec 7-21	7.281
42	77–79	Rec 8-8	8.165
43	82(2)–(3), 119	Recs 9-1, 9-2	9.24 ff
44	Omitted (but see 59(1), (3)(e))	Recs 9-3, 9-4	9.39, 9.48 ff
45	Omitted (but see 59(1), (3)(a), (c))	Recs 7-5(c), 7-6(c)	7.165 ff
46	118	Rec 11-12	11.268
47	Omitted (but see 59(1), (3)(f))	Recs 8-7, 9-5	8.155, 9.68 ff
48	83	Rec 9-6	9.90, 9.94
49	84	Rec 4-4	4.134
50	Omitted (but see 59)	Rec 9-7	9.110 ff, 9.122 ff
51	85	Rec 9-8	9.153 ff
52	86	Rec 9-9	9.172
53	Omitted (but see 59)	Rec 7-5(a)	7.78
54(1), (6)	82	Recs 4-1, 4-2, 9-2, 9-10	4.25 ff, 9.173 ff, 11.157
54(2)–(5)	Omitted	Rec 4-1	4.36, 4.51
55	Omitted (see 180 for transitional provision)	Rec 11-13	11.282 ff
56	68–76 (see 181 for transitional provision)	Rec 4-6	4.219 ff, 4.231 ff, 4.245, 4.256 ff, 4.278 ff Chapter 2, 5.84**
57	Omitted (but see 59) See 190, which inserts new ss 49B–49C of the <i>Succession Act 1981</i> (Qld) (see 182 for transitional provision)	Recs 8-3, 8-4	8.51 ff, 8.64, 8.69, 8.80 ff, 8.91 ff
58	Omitted (but see 59)	Rec 5-6	5.100 ff
59	87	Rec 9-11	9.180
60	92		10.64, 10.91
61	94–98 (see 183 for transitional provision)	Rec 10-1	10.17 ff, 10.28, 10.39, 10.53, 10.57
62	99–100 (see 184 for transitional provision)	Rec 10-2	10.81 ff
63	101–103	Rec 10-3	10.99

Trusts Act 1973	Draft Trusts Bill 2013	Interim Report Preliminary Rec(s)	Commission View
64	Omitted	Rec 10-4	10.111 ff
65	104		
66	115	Rec 11-7	11.187 ff
67	105 (see 185 for transitional provision)	Rec 11-1	11.31 ff, 11.43, 11.50
68	106–110 (see 186 for transitional provision)	Rec 11-2	11.57, 11.62, 11.72 ff
69	111	Rec 11-3	11.77
70	Omitted	Rec 11-4	11.98 ff
71	112–113	Rec 11-5	11.154 ff
72	114	Rec 11-6	11.162
73	80	Rec 10-5	10.122
74	81	Rec 10-5	10.134
75	Omitted See 191, which inserts new s 53A of the <i>Succession Act 1981</i> (Qld)	Rec 11-8	11.204 ff Chapter 2, 14.1, 14.25 ff**
76	120	Rec 11-9	11.225 ff
77	121	Rec 11-10	11.232
78	Omitted See 192, which inserts new s 61AA of the <i>Succession Act 1981</i> (Qld)	Rec 11-11	11.252 ff, 11.262 Chapter 2, 14.1, 14.33 ff**
79	124		
80	127	Rec 12-1	12.16 ff
81	128	Rec 12-1	12.18
82	131–132 (see 187 for transitional provision)	Rec 12-5	12.70 ff
83	132–133, 138	Rec 12-5	12.70 ff
84	131–132	Rec 12-5	12.70 ff
85	131–132	Rec 12-5	12.70 ff
86	147	Rec 12-13	12.249
87	147	Rec 12-5	12.70 ff
88	131–132	Rec 12-5	12.70 ff
89	131–132	Rec 12-5	12.70 ff
90	134–137	Rec 12-5	12.70 ff
91	132	Rec 12-5	12.70 ff
92	132, 134	Rec 12-5	12.70 ff
93	132	Rec 12-5	12.70 ff

Trusts Act 1973	Draft Trusts Bill 2013	Interim Report Preliminary Rec(s)	Commission View
94	140	Rec 12-6	12.84 ff
95	141–142	Rec 12-7	12.105
96	143	Rec 12-8	12.145 ff
97	144	Rec 12-8	12.145, 12.155
98	126	Rec 12-12	12.235
99	148	Rec 12-13	12.249
100	149	Rec 12-13	12.249
101	145	Rec 12-9	12.180
102	150	Rec 12-13	12.250
103	6		
104	154		
105	155–158		
106	151–153, 159		
107	167		
108	168		
109	169		
110	170		
111	Omitted		
112	122	Rec 11-14	11.290
113	123 (see 188 for transitional provision)	Recs 14-1, 14-2, 14.3	14.26 ff, 14.43 ff
114	Omitted		Chapter 2, 14.44 ff**
115	88(2)–(3)		
116	173		
117	Omitted		Chapter 3, [14] ff**
118	172		

Appendix D

Draft Trusts Bill 2013

The Draft Trusts Bill 2013 gives effect to the Preliminary Recommendations made in the Trusts Interim Report and, where relevant, to any changes or additions made to those recommendations in this Report.



Queensland

Trusts Bill 2013

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2013

A Bill

for

An Act relating to trusts, and to amend the *Succession Act 1981* for particular purposes

Draft

The Parliament of Queensland enacts—

Part 1 Preliminary

Division 1 Introduction

1 Short title

This Act may be cited as the *Trusts Act 2013*.

2 Commencement

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

3 Application [TA, s 4(1)–(4)]

- (1) Unless otherwise provided in this or another Act, this Act applies to a trust created before or after the commencement of this Act.

Note—

For an example of where other provision is made, see the *Land Act 1994*, section 90.

- (2) This Act does not prevent a settlor conferring on a trustee any powers additional to or greater than those conferred under this Act.
- (3) Any additional or greater power has effect and is exercisable in the same way, and with the same consequences, as a power conferred under this Act.
- (4) Subsection (3) is subject to a contrary intention in the trust instrument.
- (5) The powers conferred on a trustee under this Act are in addition to the powers conferred on the trustee under another Act.

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(6) In this section—

trustee includes a person exercising the powers of a trustee under this Act.

4 Act binds all persons [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 [TA, s 5]

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

6 Meaning of *charitable* [TA, s 103]

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

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 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—

Draft

[s 7]

- (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.

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

In this Act, a reference to lending (or investing) trust funds by a trustee on the *security* of property is taken to include a reference to the lending (or investing) of trust funds on the transfer of an existing security as well as on a new security.

Part 2 Appointment and discharge of trustees and devolution of trusts

Division 1 Preliminary

8 Application of pt 2 [TA, s 10]

This part applies despite a contrary intention in a trust instrument, unless otherwise provided by this part.

9 Definition for pt 2 [TA, ss 12(9) and 16(9); R3–19]

In this part—

trustee does not include a personal representative acting only in the capacity of a personal representative.

Division 2 Limitations on appointment

10 Conditional appointment of minor [New; R3–1]

- (1) An appointment of a minor as a trustee is of no effect.
- (2) However, the appointment may have effect if—
 - (a) it is conditional on the minor reaching a stated age (which must be at least the age of majority); and
 - (b) the minor reaches that age and, on that day, is not otherwise ineligible or unable to be a trustee.

Examples for paragraph (b)—

- The minor is an undischarged bankrupt.
 - There are already 4 trustees of the trust.
 - The minor is disqualified from being appointed as a trustee under section 129.
- (3) If the minor is ineligible or unable to be a trustee on the day the minor reaches the stated age, the appointment is taken to be and to have always been of no effect.

11 Undischarged bankrupt is not able to be appointed as trustee [New; R3–2]

A person who is bankrupt or taking advantage of the laws of bankruptcy as a debtor under the *Bankruptcy Act 1966* (Cwlth) or a similar law of a foreign jurisdiction is not able to be appointed as a trustee.

12 Limitation on number of trustees [TA, s 11; R3–3]

- (1) A trust may not have more than 4 trustees.

[s 13]

- (2) If more than 4 persons are named as trustees under the trust instrument—
- (a) only the first 4 persons named who are able and willing to act as trustees are trustees; and
 - (b) each remaining person becomes a trustee only if—
 - (i) a vacancy happens in the office of a trustee mentioned in paragraph (a); and
 - (ii) the person is appointed to fill the vacancy.
- (3) However, the court may, on application, approve the appointment of more than 4 trustees of a trust if it is satisfied it is appropriate to do so in the particular circumstances of the case.
- Note—*
See section 126 for who may apply to the court.
- (4) A custodian trustee must not be counted for the purpose of any limitation on the number of trustees a trust may have.
- Note—*
See division 6 for provisions about custodian trustees.
- (5) This section does not apply to a charitable trust.

Division 3 Appointing, replacing and removing trustees

Subdivision 1 Preliminary

13 Application of div 3—appointor for trust [TA, s 12(8); R3–4]

- (1) If there is an appointor for a trust, this division applies whether the appointment of a new trustee or trustees is made in a circumstance mentioned in this division or in the trust instrument.

-
- (2) However, if the appointor appoints a trustee under this division in a circumstance mentioned in the trust instrument, the appointment is subject to the terms applying to an appointment in that circumstance under the trust instrument.

14 Application of div 3—deceased trustee nominated in a will [TA, s 12(7); R3–4]

If a person nominated as trustee in a will (whether as a sole trustee or otherwise) is dead, this division has effect in relation to the trust whether the death of the person happened before or after the death of the testator.

Subdivision 2 Appointment of trustees

15 Appointment of trustee to replace named trustee [TA, s 12(1), (3), (4) and (7); R3–4, 3–5, 3–7]

- (1) This section applies if a trustee of a trust (the *named trustee*), whether original or substituted and whether appointed by the court or otherwise—
- (a) dies; 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; or
 - (f) is a corporation that—
 - (i) has stopped carrying on business; or
 - (ii) is an externally-administered body corporate under the Corporations Act, section 9; or
 - (iii) has been dissolved; or
 - (g) becomes bankrupt; or

Draft

[s 15]

- (h) is disqualified from managing corporations under the Corporations Act, part 2D.6 and does not have permission to manage all corporations under section 206F(5) or 206G of that Act without exception or condition; or
 - (i) is removed under the trust instrument.
- (2) The following persons may appoint, by instrument, 1 or more persons as trustees (*new trustee*) to replace the named 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—
 - (i) the continuing trustee or trustees, if there is 1 or more continuing trustees of the trust; or
 - (ii) the personal representative of the last continuing trustee of the trust, if there is no continuing trustee.

Notes—

- 1 Under section 12, the number of trustees for particular trusts may not be more than 4.
- 2 See section 127 for the court's power to appoint trustees.

- (3) If subsection (2)(b)(ii) applies—
- (a) the personal representative is taken to have always had the power of appointment conferred under the subsection; and
 - (b) if the personal representative is the executor, original or by representation, of the last continuing trustee, the personal representative may exercise the power of appointment conferred under the subsection without the agreement of any executor named in the trustee's will who—
 - (i) has renounced probate of the trustee's will; or
 - (ii) has not proved the trustee's will.

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- (4) If there are 2 or more personal representatives of the last continuing trustee, the personal representatives must exercise the power of appointment jointly.
- (5) To remove any doubt, it is declared that, subject to a contrary intention in the trust instrument, an appointor or the personal representative of the last continuing trustee who may appoint a new trustee under subsection (2)(a) or (b)(ii) may be appointed as the new trustee.
- (6) In this section—
- continuing trustee* includes a trustee mentioned in subsection (1)(b) or (c) who is willing to act under subsection (2)(b)(i).
- personal representative*, of the last continuing trustee, means—
- (a) the administrator, for the time being, of the trustee's estate; or
 - (b) the executor who has proved the will of the trustee; or
 - (c) the executor by representation of the trustee's will.

16 Appointment of trustee to replace last trustee with impaired capacity [New; R3–8]

- (1) This section applies if—
- (a) the last continuing trustee (the *last trustee*) of a trust is incapable of acting as trustee because he or she 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 15 to appoint a new trustee for the last trustee.
- (2) The following persons may appoint, by instrument, 1 or more persons as trustee to replace the last trustee—
- (a) a person (*administrator*) who is—
 - (i) the administrator appointed under the *Guardianship and Administration Act 2000* for the last trustee; or

Draft

[s 17]

- (ii) authorised to do anything in relation to a financial matter for the last trustee by an order registered under the *Guardianship and Administration Act 2000*, section 169;
- (b) a person (**attorney**) who is authorised to do anything in relation to a financial matter for the last trustee by an enduring power of attorney made under, or recognised under section 34 of, the *Powers of Attorney Act 1998*.

Note—

See section 127 for the court's power to appoint trustees.

- (3) If more than 1 administrator or more than 1 attorney is appointed or authorised for the last trustee, the administrators or attorneys must exercise the power of appointment jointly.
- (4) The administrator or attorney may exercise the power to appoint under this section whether or not the administrator's or attorney's appointment or power of attorney authorises the exercise of the power.
- (5) To remove any doubt, it is declared that, subject to a contrary intention in the trust instrument, an administrator or attorney who may appoint a new trustee under subsection (2) may be appointed as the new trustee.

17 Appointment of additional trustee [TA, s 12(5); R3–12]

- (1) One or more persons may be appointed as an additional trustee or additional trustees of a trust if, after the appointment, the number of trustees of the trust is not more than the number permitted under this Act.

Notes—

- 1 Generally, the number of trustees for a trust may not be more than 4. See section 12 for the general rule and the exceptions to the rule.
- 2 Custodian trustees must not be counted for the purpose of any limitation on the number of trustees a trust may have. See section 12(4).

-
- (2) The following persons may appoint, by instrument, 1 or more persons as an additional trustee or additional trustees under subsection (1)—
- (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 existing trustees of the trust.

Note—

See section 127 for the court's power to appoint trustees.

- (3) The persons mentioned in subsection (2) are not required to appoint an additional trustee or additional trustees unless the appointment of 1 or more additional trustees is required under—
- (a) the trust instrument; or
 - (b) another Act.
- (4) To remove any doubt, it is declared that, subject to a contrary intention in the trust instrument, an appointor may be appointed as an additional trustee.

18 When appointors are taken to be not able and willing to act [New; R3–6]

- (1) This section applies if there are 2 or more appointors for a trust.
- (2) For sections 15(2)(b) and 17(2)(b), the appointors are taken to be not able and willing to act if either of the following applies—
- (a) the trust instrument either requires the appointors to exercise the power of appointment jointly or does not state whether the appointors are to exercise the power of appointment jointly and all of the appointors can not agree on the appointment;
 - (b) the trust instrument provides for the appointors to exercise the power of appointment by majority and the

Draft

[s 19]

appointors can not reach a majority decision on the appointment.

- (3) Subsection (2) does not limit the circumstances under which the appointors may be unable or unwilling to act as appointors.

19 When trustees may be appointed for separate trust property [TA, s 12(2)(b); R3–4]

- (1) This section applies if 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 subdivision—
 - (a) a separate trustee or separate 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, only 1 trustee need be appointed of the separate trust property.

20 Matters relating to appointment of trustee [TA, s 12(6); R3–4]

- (1) A trustee appointed under this subdivision 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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Subdivision 3 Discharge and removal of trustees

21 Meaning of *appropriate trustee* of a trust [New; R3–9(c), 3–10(a) and (b) and 3–13(a) and (b)]

For this subdivision, there is an *appropriate trustee* of a trust if the trust has—

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

Examples of corporations—

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

- (b) if only 1 trustee was originally appointed of the trust property or the trust instrument allows the trust to have only 1 trustee who is an individual—at least 1 trustee who is an individual; or

- (c) if paragraphs (a) and (b) do not apply—at least 2 trustees who are individuals.

22 When trustee is discharged on appointment of new trustee [TA, s 12(2)(c); R3–10]

- (1) This section applies if, on the appointment of a new trustee under section 15(2) or 16(2), there is an appropriate trustee of the relevant trust.

- (2) On the appointment of the new trustee, the named trustee or the last trustee who has been replaced is discharged from the trust.

- (3) If the named trustee declared, by instrument, that the trustee wished to be discharged from only part of the trusts reposed in the trustee, the trustee is discharged from that part only.

- (4) In this section —

last trustee means a last trustee mentioned in section 16(1).

Draft

[s 23]

**23 Limited power to remove trustee without replacement
[New; R3–9]**

- (1) A named trustee of a trust (other than a trustee mentioned in section 15(1)(b) or (i)) may be removed as a trustee under subsection (2) without a new trustee being appointed if, on the removal, there is an appropriate trustee of the trust.
- (2) The following persons may, by instrument, remove the named 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 or trustees.
- (3) On the removal of the named trustee, the named trustee is discharged from the trust.
- (4) Section 18 applies in deciding whether an appointor is able and willing to act for subsection (2).

**24 Discharge of trustee without replacement [TA, s 14;
R3–13; 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 of the trusts reposed in the trustee; and
 - (b) on the discharge, there will be an appropriate trustee of the trust.
- (2) Subject to subsection (3), the trustee is discharged from the trusts if the appointor, if any, for the trust and the trustee's co-trustees agree, by instrument, to—
 - (a) the discharge of the trustee; and
 - (b) the vesting of the trust property in the co-trustees alone.
- (3) The discharge of the trustee takes effect—
 - (a) to the extent the trust property requires the notification, registration or recording of a transfer to the

Draft

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- co-trustees—on the notification, registration or recording of the transfer; or
- (b) if paragraph (a) does not apply or to the extent that paragraph (a) does not apply—on the execution by the appointor, if any, and the co-trustees of the instrument of agreement to discharge.
- (4) For this section, it is not necessary that a new trustee be appointed to replace the trustee who is discharged.

Subdivision 4 Vesting of trust property

25 Vesting of trust property in new or continuing trustees [TA, s 15(1) and (2); R3–15]

- (1) This section applies if—
- (a) a new trustee of a trust is appointed under subdivision 2; or
- (b) a trustee of a trust, without being replaced, is—
- (i) removed under section 23; or
- (ii) discharged by agreement under section 24.
- (2) Subject to section 26, the instrument of appointment, removal or agreement to discharge (*instrument of change*)—
- (a) divests the trust property from the persons who were the trustees immediately before the instrument was signed (the *former trustees*); and
- (b) vests it in the persons who become and are the trustees as joint tenants without any conveyance, transfer or assignment.
- (3) In this section—
- new trustee*, of a trust, does not include a trustee who is appointed under section 15 to replace a trustee mentioned in section 15(1)(a) if the trustee mentioned in section 15(1)(a) was the last continuing trustee of the trust.

Draft

[s 26]

Note—

See section 30(1)(a) and (2) for the vesting of trust property in a new trustee who is appointed in the place of a last continuing trustee who has died.

26 When vesting takes effect [TA, s 15(1) and (2) (in part), New; R3–15]

- (1) If, or to the extent that, the divesting and vesting of the trust property must be notified, registered or recorded under the requirements of another Act, the divesting and vesting are subject to the requirements and do not take effect until the requirements are satisfied.
- (2) If subsection (1) applies, the execution of the instrument of change under section 25 vests in the persons who become and are the trustees a right to call for the transfer of the trust property.
- (3) In this section—
Act includes an Act of the Commonwealth or another State.
requirement, of another Act, includes a requirement the other Act authorises or permits to be imposed.

27 Transfer etc. of trust property [TA, s 15(3) to (6); R3–15]

- (1) The following persons must do all things necessary to assist in the notification, registration or recording of the divesting and vesting of the trust property—
 - (a) a person who—
 - (i) was replaced as trustee of the trust on the appointment of a new trustee as mentioned in section 25(1)(a); or
 - (ii) was a trustee of the trust as mentioned in section 25(1)(b);
 - (b) a continuing trustee of the trust;
 - (c) a new trustee of the trust.

-
- (2) If the consent of a person is needed to the conveyance, transfer or assignment of any trust property, the vesting of the property under section 25 is subject to the consent.
 - (3) However, the consent may be obtained after the execution of the instrument of change mentioned in section 25 by the persons who are then trustees.
 - (4) The instrument of change—
 - (a) is taken to be a conveyance of the trust property from the former trustees to the persons who become and are the trustees; 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.
 - (5) If trust property vests in the public trustee under section 29, it is not necessary to notify, register or record the vesting if the public trustee has not acted in relation to the trust or if the only action taken by the public trustee has been the appointment of a new trustee.

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Division 4 Devolution of trusts on death

28 Exercise of trust powers on death [TA, s 16(1); R3–16]

If a power or trust is given to or imposed on 2 or more trustees jointly, the power or trust may be exercised or performed by the survivors or survivor of them for the time being.

29 Vesting of trust property in public trustee [TA, s 16(2) (opening words) and (3); R3–16]

On the death of the last continuing trustee of a trust, 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 new trustee under division 3, subdivision 4.

[s 30]

**30 Vesting of trust property on appointment of new trustee
[TA, s 16(2) (remainder), (4) and (7); R3–16]**

- (1) The trust property remains vested in the public trustee until—
 - (a) if a new trustee (the *appointee*) is appointed—the appointment is made and (unless the appointment is made by the public trustee) the appointee gives the public trustee written notice of the appointment; or
 - (b) if a new trustee is not appointed—a grant of probate of the will or letters of administration of the estate of the deceased trustee is made and the holder of the grant (the *holder*) gives the public trustee written notice of the holder’s intention to assume the trust of the trust property.
- (2) The trust property devolves to and vests in the appointee or holder in the same way and subject to the same provisions as trust property vests in a new trustee under division 3, subdivision 4.
- (3) On the vesting of the trust property in the holder, the holder is taken to be a person appointed as a new trustee by an appointor.
- (4) If the trust property is divested from the public trustee under this section, all liability on the part of the public trustee (other than liability for which the public trustee is not entitled to be indemnified out of the trust property) for any action taken by the public trustee in relation to the trust property ends.
- (5) However, any person who, apart from subsection (4), would 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 subsection (2).

31 Powers, etc. of trustee [TA, s 16(5)–(6) and (8); R3–16]

- (1) If the trust property vests in the public trustee under section 29 or in the holder under section 30, the public trustee or holder 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.

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- (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 or may exercise under the *Public Trustee Act 1978*, section 62.

Division 5 Disclaimer of trusts

32 Disclaimer of trusts on renunciation of probate [TA, s 18; R3–18]

- (1) If a person appointed by will as both executor and trustee—
 - (a) renounces probate of the will; or
 - (b) after being properly cited or summoned, fails to apply for probate of the will;the renunciation or failure is taken to be a disclaimer of the trust contained in the will.
- (2) If—
 - (a) a person appointed by will as both executor and trustee—
 - (i) renounces probate of the will; or
 - (ii) after being properly cited or summoned, fails to apply for probate of the will; or
 - (iii) dies before probate of the will is granted to the person; and
 - (b) letters of administration with the will annexed are granted to someone else;

the person who holds the grant is taken to be appointed trustee of the will instead of the person who was appointed by the will.

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Division 6 Custodian trustees

33 **Appointment of custodian trustees [TA, s 19(1); R4–5]**

- (1) A corporation may be appointed as 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 for the time being of the trust, by instrument; or
 - (d) the court, by order.
- (3) Subsections (1) and (2)(a) to (c) apply subject to a contrary intention in the trust instrument.

34 **Vesting of trust property in custodian trustee [TA, s 19(2)(a) and (b); R4–5]**

- (1) On the appointment of a custodian trustee of a trust, the trust property of which the custodian trustee is appointed vests in the custodian trustee as if the custodian trustee were the sole trustee.
- (2) However, the management of the trust property and the exercise of all powers, authorities and discretions exercisable by the trustees under the trust remain vested in the trustees (the *managing trustees*) other than the custodian trustee as fully and effectively as if there were no custodian trustee.
- (3) Section 26 applies to the divesting and vesting of the trust property under this section as if a reference in the section to a trustee were a reference to a custodian trustee and a reference in the section to the instrument of change under section 25 were a reference to the appointment of the custodian trustee.
- (4) The appointment (whether it is evidenced by the trust instrument, another instrument or by the court order)—

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- (a) is taken to be a conveyance of the trust property from the 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.
- (5) The court may, on application, make vesting orders to give effect to subsection (1).

Note—

See section 126 for who may apply to the court.

- (6) Subsections (1) and (2) apply subject to a contrary intention in the trust instrument.

35 Function of custodian trustee [TA, s 19(2)(c), (e) and (f); R4–5]

- (1) The custodian trustee's function is to get in and hold the trust property and invest, and dispose of, the trust property as the managing trustees, by instrument, direct.
- (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) The custodian trustee is not liable—
 - (a) for acting on a direction given under subsection (2); or
 - (b) for any act or omission on the part of a managing trustee.
- (4) However, if the custodian trustee believes a direction conflicts with the trust or the law, or exposes the custodian trustee to a liability, or is otherwise objectionable, the custodian trustee may apply to the court for directions in the matter.
- (5) An order made by the court giving directions binds both the custodian trustee and the managing trustees.
- (6) The court may make an order about the costs of an application under subsection (4) as it considers appropriate.

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[s 36]

- (7) Subsections (1) to (3) apply subject to a contrary intention in the trust instrument.

36 Proceedings to be in the name of custodian trustee [TA, s 19(2)(g); R4–5]

- (1) A proceeding in relation to the trust property must be brought, or defended, in the name of the custodian trustee as the managing trustees, by instrument, direct.
- (2) The custodian trustee is not personally liable for the costs of bringing or defending a proceeding.
- (3) This section applies subject to a contrary intention in the trust instrument.

37 Persons dealing with custodian trustee [TA, s 19(2)(h); R4–5]

A person dealing with a custodian trustee—

- (a) is not required to inquire about any direction, concurrence or otherwise of the managing trustees; and
- (b) is not affected by notice of the fact the managing trustees have not concurred.

38 Appointment of new trustees when a custodian trustee has been appointed [TA, s 19(2)(i); R4–5]

- (1) If power to appoint new trustees is exercisable by the trustees of a trust, the power may only be exercised by the managing trustees of the trust.
- (2) However, the custodian trustee has the same power as any other trustee to apply to the court for the appointment of a new trustee.
- (3) Subsection (1) applies subject to a contrary intention in the trust instrument.

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39 Ending custodian trusteeship [TA, s 19(3); R4–5]

- (1) Any of the following persons may apply to the court to end a custodian trusteeship—
 - (a) the custodian trustee;
 - (b) a managing trustee;
 - (c) a beneficiary of the trust.
- (2) The court may order the ending of the custodian trusteeship if it is 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 give the directions the court considers appropriate, and make the vesting orders it considers necessary, to give effect to the ending of the custodian trusteeship.

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Part 3 Trustees' duties

Division 1 Preliminary

40 Application of pt 3 [New; R6–3]

- (1) This part applies despite a contrary intention in a trust instrument.
- (2) This part does not limit any other duty to which a trustee is subject.

41 Definition for pt 3 [New]

In this part—

trustee includes custodian trustee.

Division 2 General duties

42 Trustee's general duty in administering a trust [TA, s 22(1); New; R6-1]

- (1) This section states a trustee's general duty in administering a trust.
- (2) If the trustee is a person whose profession, business or employment is, or includes, acting as a trustee, the trustee has a duty, in administering the trust, to exercise the care that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons.
- (3) If—
 - (a) the trustee is a person who has, or holds himself or herself out as having, special knowledge or experience relevant to administering a trust; and
 - (b) subsection (2) does not apply;the trustee has a duty, in administering the trust, to exercise the care that a prudent person having that special knowledge or experience would exercise in managing the affairs of other persons.
- (4) If the trustee is not a person mentioned in subsection (2) or (3), the trustee has a duty, in administering the trust, to exercise the care that a prudent person of business would exercise in managing the affairs of other persons.
- (5) Subsection (4) does not limit section 48.
- (6) In this section—

care includes diligence and skill.

43 Trustee's duty to act honestly, etc. [New; R6-2]

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

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

Division 3 Other duties

44 Trustee's duty to keep records and accounts [New; R6–4]

- (1) A trustee, in administering a trust, has a duty—
 - (a) to keep accurate accounts and records for the trust; and
 - (b) to 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.

45 Trustee's duty to provide accounts [New; R6–5, 6–6]

- (1) A trustee, in administering a trust, has a duty to make the trust accounts available for inspection by a beneficiary of the trust on receiving reasonable notice unless, in the circumstances, it is unreasonable to make the accounts available.
- (2) The trustee must provide copies of the accounts to the beneficiary on payment of the reasonable costs of providing the copies unless, in the circumstances, it is unreasonable to provide the copies.

Example of an unreasonable request to provide copies of accounts—
a beneficiary who has received copies of the accounts continues to request updated copies of the accounts at unreasonably short intervals
- (3) Nothing in this section limits the right of a beneficiary of a trust—
 - (a) to obtain other information from the trustee; or

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[s 46]

- (b) to apply to the court for an order that the trustee provide other information.
- (4) In this section—
 - beneficiary*, of a trust, means—
 - (a) a person entitled to a benefit under the trust; or
 - (b) a person in whose favour a power to distribute the trust property may be exercised.

Part 4 Investments

46 Application [TA, s 20]

This part applies despite a contrary intention in a trust instrument, unless otherwise provided by this part.

47 Power to invest [TA, ss 21, 22(2); R5–1]

- (1) A trustee may—
 - (a) unless expressly forbidden by the trust instrument, invest trust funds in any form of investment; and
 - (b) at any time—
 - (i) vary an investment of trust funds; or
 - (ii) realise an investment of trust funds and reinvest an amount resulting from the realisation.
- (2) A trustee must, in exercising power under subsection (1), comply with a provision of the trust instrument that is binding on the trustee and requires the obtaining of a consent or approval or compliance with a direction for trust investments.
- (3) Without limiting subsection (2), a trustee must not, when reinvesting an amount under subsection (1)(b)(ii), reinvest the amount in a form of investment that is expressly forbidden by the trust instrument.

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- (4) A trust instrument can not limit a trustee's power under section 53.

48 Professional trustee's duty of care in exercising investment power [TA, s 22(1)(a); R5-1, 5-2]

- (1) If a trustee is a person whose profession, business or employment is, or includes, investing money for other persons, the trustee has a duty, in exercising an investment power, to exercise the care that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons.

- (2) If—

(a) a trustee is a person who has, or holds himself or herself out as having, special knowledge or experience in investing money for other persons; and

(b) subsection (1) does not apply;

the trustee has a duty, in exercising an investment power, to exercise the care that a prudent person having that special knowledge or experience would exercise in managing the affairs of other persons.

Note—

See also section 42 for a trustee's general duty in administering a trust.

- (3) In this section—

care includes diligence and skill.

49 Trustee's duty to review investments [TA, s 22(3); R5-1]

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

50 Law and equity preserved [TA, s 23; R5-1]

- (1) A rule or principle of law or equity imposing a duty on a trustee exercising an investment power continues to apply

[s 51]

except to the extent it is inconsistent with this or another Act or the trust instrument.

- (2) Without limiting the rules or principles mentioned in subsection (1), they include a rule or principle imposing—
 - (a) a duty to exercise the powers of a trustee in the best interests of all present and future beneficiaries of the trust; and
 - (b) a duty to invest trust funds in investments that are not speculative or hazardous; and
 - (c) a duty to act impartially towards beneficiaries and between different classes of beneficiaries; and
 - (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 cost of obtaining the advice is payable out of trust funds.

51 Matters to which trustee must have regard in exercising investment power [TA, s 24; R5–1]

- (1) Without limiting the matters a trustee may take into account when exercising an investment power, a trustee must, to the extent that they are appropriate to the circumstances of the trust, have regard to the following matters—
 - (a) the purposes of the trust and the needs and circumstances of the beneficiaries;
 - (b) the desirability of diversifying trust investments;
 - (c) the nature of, and risk associated with, existing trust investments and other trust property;
 - (d) the need to maintain the real value of the capital or income of the trust;
 - (e) the risk of capital or income loss or depreciation;

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

52 Investment in securities under RITS [TA, s 26]

- (1) A chose in action arising under RITS that entitles its holder to a security of a particular description (the *underlying security*) is, for this Act and the 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.

[s 53]

(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 means the Reserve Bank of Australia's Information and Transfer System, as operating from time to time.

53 Power to provide residence for beneficiary to live in [TA, s 28; R5-5]

(1) A trustee may—

(a) buy or construct a residence for a beneficiary of the trust to live in; or

(b) retain a residence that is part of the trust property for the beneficiary to live in; or

(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) A residence bought, constructed, retained or otherwise secured for the beneficiary to live in may be made available to the beneficiary for that purpose on the conditions that the trustee considers appropriate.

(3) The trustee may exercise the 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) The trustee may retain a residence acquired under this section after the beneficiary has stopped living in the residence.

(5) 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

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- (b) amenities or facilities for use in association with the use of a residence; and
- (c) an interest in a residence.

54 Loans and investments by trustees not breaches of trust in particular circumstances [TA, s 30(1) and (3); R5–8]

- (1) If a trustee lends trust funds on the security of property, the trustee is not in breach of trust only on the ground of the comparison of the loan amount 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; and
 - (iii) the loan was made in reliance on the valuation; or
 - (b) the trustee is insured by an entity prescribed under a regulation carrying on the business of insurance against all loss that may arise because of the borrower’s default.
- (2) This section applies to investments whether made before or after the commencement of this section.
- (3) In this section—

independent valuation, of the property, means a valuation of the property made by a person whom the trustee reasonably believed to be competent to give the valuation and whom the trustee instructed and employed independently of any owner of the property.

55 Limitation of liability of trustee for loss on improper investment [TA, s 30A; R5–9]

- (1) If a trustee improperly lends trust funds on a security that would have been a proper investment had the amount lent been less than the actual amount lent—

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[s 56]

- (a) the security is taken to be a proper investment in relation to the lesser amount; and
 - (b) the trustee is only liable for the difference between the actual amount lent and the lesser amount, with interest.
- (2) This section applies to investments whether made before or after the commencement of this section.

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

In a proceeding against a trustee for a breach of trust in relation to the exercise of an investment power, the court may, when considering the question of the trustee's liability, take into account the following matters—

- (a) the nature and purpose of the trust;
- (b) whether the trustee had regard to the matters mentioned in section 51 to the extent they are appropriate to the circumstances of the trust;
- (c) whether the trust investments have been made under an investment strategy formulated in accordance with the duty of a trustee under this part;
- (d) the extent the trustee acted on the independent and impartial advice of a person competent, or apparently competent, to give the advice.

57 Power of court to set off gains and losses [TA, s 30C]

- (1) This section applies to a proceeding for breach of trust in relation to an investment by a trustee 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 in breach of trust or not.
- (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 5 General powers of trustees

Division 1 Preliminary

58 Application of pt 5 [TA, s 31(1)]

This part applies despite a contrary intention in a trust instrument, unless otherwise provided by this part.

Division 2 Powers relating to property

59 General powers of trustee for trust property [New; R5–3, 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 part 3 for the general duties in administering a trust to which a trustee is subject.
 - 2 Under section 40, part 3 does not limit any other duty to which a trustee is subject.
 - 3 For a personal representative, this provision is subject to the *Succession Act 1981*, section 49B.
- (2) A power conferred under subsection (1) may be excluded or modified by the trust instrument only by an express statement to that effect in the trust instrument.
- (3) However, the following powers conferred under subsection (1) may not be excluded or modified by the trust instrument—
- (a) power to sell the trust property;
 - (b) power to lease the trust property;
 - (c) power to mortgage the trust property or power to renew, extend or vary a mortgage of the trust property;
 - (d) power to deal with the securities of a corporation subject to the trust;

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[s 60]

- (e) power to settle a debt or claim in relation to the trust property;
- (f) power to insure the trust property.

Division 3 Provisions relating to duty to sell

60 Property that a trustee is under a duty to sell [TA, s 32(1)(c), (4); R8-1, 8-2]

- (1) A trustee may postpone the sale, calling in and conversion of the trust property that the trustee has a duty to sell.
- (2) Subject to an express contrary intention in the trust instrument, a 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) This section does not apply if the trust property is of a wasting, speculative or reversionary nature.

Note—

For a personal representative, this section is subject to the *Succession Act 1981*, section 49B.

Division 4 Provisions relating to expenditure

61 Power to expend amounts [TA, s 33(1)(a) to (f); R8-5]

- (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 the following matters—
 - (a) maintaining or renovating the property, whether or not the work is necessary for the purpose of salvage of the property;
 - (b) improving or developing the property;
 - (c) paying calls on shares subject to the trusts;

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- (d) paying outgoings in relation to the property;
 - (e) if the property is land—subdividing the land and related expenses;
 - (f) providing, constructing or maintaining any of the following for the property that are likely to be beneficial to the property—
 - (i) roads, footpaths and other works for pedestrian and vehicular use;
 - (ii) utility services and other works.
- (2) In this section—
- maintenance* includes repair and upkeep.
- outgoings*, in relation to the property, include rates, premiums, taxes, assessments and insurance premiums.

62 Expenditure may be apportioned between income and capital etc. [TA, s 33(1)(g); R8–6]

- (1) A trustee may, in relation to the trust property, apportion expenditure made under section 61 between capital and income or otherwise among the persons entitled to the capital or income in the way the trustee considers equitable.
- (2) If the whole 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 the whole 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.

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Division 5 Provisions relating to appropriation

63 General [TA, s 33(1)(l); R10–6(a), 10–8 and 10–9]

- (1) A trustee may appropriate any part of the trust property to satisfy, wholly or in part—
 - (a) a legacy, payable out of the trust property, to which a person is entitled; or
 - (b) a share of the trust property (whether contingent or absolute) to which a person is entitled.
- (2) However—
 - (a) the appropriation may only be made with the consent of the person entitled or, if the person is under a legal incapacity, the person’s guardian; and
 - (b) the appropriation must not adversely affect any specific gift; and
 - (c) before the appropriation is effective, notice of the intended appropriation must be given to—
 - (i) each person not under a legal incapacity who is interested in the appropriation; and
 - (ii) the guardian of each person who is under a legal incapacity and is interested in the appropriation.
- (3) A person to whom notice is given under subsection (2)(c) may, within 2 months after receiving the notice or the further period allowed by the court on application, apply to the court to vary the appropriation.
- (4) An appropriation is conclusive and binding on all persons who are, or may be, interested in the trust property, unless varied by the court.
- (5) For subsection (1), the trustee may fix the value of the whole or any part of the property under section 85.
- (6) Nothing in this section relating to appropriation affects any power of appropriation conferred under the trust instrument.

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- (7) In this section—
- guardian**, of a person under a legal incapacity, includes—
- (a) a person who is—
 - (i) the administrator appointed under the *Guardianship and Administration Act 2000* for the person; or
 - (ii) authorised to do anything in relation to a financial matter for the person by an order registered under the *Guardianship and Administration Act 2000*, section 169; and
 - (b) a person who is authorised to do anything in relation to a financial matter for the person by an enduring power of attorney made under, or recognised under section 34 of, the *Powers of Attorney Act 1998*.

64 Trustee is also person entitled [TA, s 33(2); R10–6(b)]

- (1) This section applies if, for section 63, the trustee is also a person entitled to—
 - (a) a legacy payable out of the trust property; or
 - (b) a share of the trust property, whether contingent or absolute.
- (2) Section 63 applies in relation to the intended appropriation with the following changes—
 - (a) the trustee is not required to give notice of the appropriation to himself or herself;
 - (b) the appropriation is not effective until it has been approved by—
 - (i) each beneficiary who is not under a legal incapacity and the guardian of each beneficiary who is under a legal incapacity; or
 - (ii) the court on an ex parte application of the trustee or otherwise.

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[s 65]

- (3) In this section—
guardian see section 63(7).

65 Annuity [TA, s 33(1)(m); R10–10]

- (1) This section applies if a trust instrument provides for the payment of an annuity.
- (2) It does not matter whether the annuity may be charged on the trust property.
- (3) A trustee may set aside and appropriate out of any trust property available for payment of the annuity an amount that, in the trustee's opinion at the time of appropriation, is enough, when invested, to provide out of the investment income the amount required to pay the annuity.
- (4) 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.
- (5) After distribution of the residue of the trust property and the income of the trust property, the residue and income are not liable for the annuity.
- (6) In this section—
annuity includes any other periodic payment.

66 Notice to be given if land is distributed after appropriation [TA, s 33(5), R10–10]

- (1) This section applies if the trustee intends to distribute land under section 65(4)(b).
- (2) The trustee must notify the land registrar that the land is distributable because of an appropriation made under section

65.

- (3) The land registrar is not required to inquire into whether the amount appropriated was enough to provide for the annuity.

Division 6 Authorised exercise of investment power

67 Power to authorise exercise of investment power [New; R4–3]

- (1) A trustee may, by instrument, authorise another person to exercise any of the trustee’s investment powers.
- (2) The trustee may authorise the other person to exercise power under subsection (1) on the terms as to remuneration and any other matters the trustee considers appropriate.
- (3) The trustee is liable for the acts and omissions of the other person as if they were the trustee’s own acts and omissions.
- (4) This section is subject to an express contrary intention in the trust instrument.

Division 7 Power of delegation

68 Application of div 7 [TA, s 56(1); R4–6(a)]

This division 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, temporarily incapable of performing the duties of a trustee, including because of impaired capacity for administering the trust.

Draft

[s 69]

69 Delegation of powers etc. for a trust [TA, s 56(1); R4–6(b) and (c)]

- (1) The trustee may, despite any rule or principle of law or equity to the contrary, by instrument of delegation, delegate to an adult resident or a trustee corporation (*substitute trustee*) in the State the administration or exercise of all or any trusts, powers, authorities and discretions vested in the trustee as trustee, whether alone or jointly with any other person or persons.
- (2) 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 substitute trustee.
- (3) The delegation—
 - (a) commences—
 - (i) on the happening of an event stated in the instrument of delegation; or
 - (ii) if subparagraph (i) does not apply—on the day stated in the instrument of delegation or, if no day is stated, on the day it is signed; and
 - (b) continues in force until whichever of the following happens first—
 - (i) the start of the day stated in the instrument as the day the delegation ends;
 - (ii) the time when the delegation is revoked by the happening of an event mentioned in section 70;
 - (iii) the start of the day that is 12 months after the day the delegation commences.
- (4) The trustee may not make a delegation under this section to an individual who is the trustee's only co-trustee.

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70 Revocation of delegation [New]

- (1) The trustee may revoke the delegation by giving the substitute trustee an instrument of revocation signed by the trustee.
- (2) Also, the delegation is revoked if the substitute trustee—
 - (a) resigns; or
 - (b) is an individual and—
 - (i) becomes a person with impaired capacity for administering the trust; or
 - (ii) becomes bankrupt or takes 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
 - (c) is a corporation and—
 - (i) stops carrying on business; or
 - (ii) becomes an externally-administered body corporate under the Corporations Act, section 9; or
 - (iii) is dissolved.
- (3) Further, the delegation is revoked if the trustee becomes a person with impaired capacity for administering the trust, unless the instrument of delegation expressly provides for the delegation to continue to operate in that circumstance.

71 Powers, authorities and liabilities etc. of substitute trustee [TA, s 56(2) and (4); R4–6]

- (1) A substitute trustee has, within the scope of the delegation, the same trusts, powers (other than the power of delegation conferred under section 69), authorities, discretions, duties and liabilities as the person would have if the person were the trustee.
- (2) A substitute trustee is subject to the court's jurisdiction and power in the administration of the trust as if the substitute trustee were the trustee.

[s 72]

72 Liability of trustee for acts etc. of substitute trustee [TA, s 56(3); R4–6]

A trustee is liable for the acts and omissions of a substitute trustee as if they were the trustee's own acts and omissions.

73 Trustee to notify particular persons of delegation [New; R4–6(d)]

A trustee who delegates the administration or exercise of all or any trusts, powers, authorities and discretions vested in the trustee as trustee to a substitute trustee under section 69 must notify the following persons of the delegation—

- (a) each co-trustee;
- (b) if there is an appointor for the trust—the appointor;
- (c) if there is no co-trustee and no appointor for the trust—each beneficiary of the trust, to the extent that it is practicable to do so.

74 Acts of substitute trustee valid in favour of third parties [TA, s 56(6); R4–6]

- (1) This section applies if—
 - (a) an act is done or an instrument is signed by a substitute trustee exercising or purportedly exercising power under a delegation made under section 69 in favour of a person; and
 - (b) the substitute trustee lacked power to do the act or sign the instrument because the delegation had, for any reason, never commenced, had been revoked or stopped being in force.
- (2) The act done or instrument signed by the substitute trustee is, in favour of the person dealing with the substitute trustee, as valid and effective as it would be if the delegation had commenced and was in force.
- (3) Subsection (2) does not apply if the person dealing with the substitute trustee had, at the relevant time, actual notice that

Draft

the delegation had not commenced, had been revoked or stopped being in force.

75 Effect of statutory declaration given by substitute trustee [TA, s 56(7); R4–6]

- (1) This section applies if a substitute trustee makes a statutory declaration relating to a trust that—
 - (a) a delegation given under section 69 has commenced; or
 - (b) in any transaction the substitute trustee is acting in the administration of the trust.
- (2) The statutory declaration is, in favour of a person dealing with the substitute trustee, conclusive evidence of the matter stated.

76 Persons dealing with substitute trustee [TA, s 56(8); R4–6]

- (1) This section applies if, in any transaction, it appears from a delegation given under section 69, or from any evidence required for the purpose of a delegation or otherwise, that the substitute trustee is acting in the administration of a trust.
- (2) A person dealing in good faith with the substitute trustee is not affected by notice of the trust.

Division 8 Application of income by trustee who is a mortgagee in possession

77 How income must be applied [TA, s 42(1) and (2); R8–8]

- (1) This section applies if—
 - (a) a trustee is entitled, whether solely or as a co-mortgagee, to a debt secured (wholly or in part) by a mortgage of land in trust for persons in succession; and
 - (b) the trustee is mortgagee in possession of the land.

Draft

[s 78]

- (2) The trustee must apply the income of the land received by the trustee to pay the following (each a *priority outgoing*)—
 - (a) rents, taxes, rates and other outgoings affecting the land;
 - (b) premiums on insurance properly payable on the mortgaged property;
 - (c) annual amounts or other payments and the interest on principal amounts having priority to the mortgage.
- (3) However, the trustee must apply the income to pay a priority outgoing only to the extent that the priority outgoing accrues after the trustee becomes mortgagee in possession.
- (4) 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.
- (5) Subject to the rights of the mortgagor, the trustee must hold the balance of the income received on the trusts to which the mortgage debt is subject.

78 If all or part of an amount secured by mortgage is recovered [TA, s 42(3); R8–8]

- (1) This section applies if all or part of the amount secured by the mortgage is recovered, whether by repayment or on realisation of the security or otherwise.
- (2) The income, or the part of the income, applied by the trustee to pay the priority outgoings that would otherwise have been payable as interest to the person entitled to the interest of the mortgage debt (*primary beneficiary*) is to be paid to the primary beneficiary.
- (3) The primary beneficiary is not entitled to be paid interest on the payment.
- (4) Any balance of the income must be held on the trusts to which the mortgage debt was subject.

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79 Additional power to pay outgoings [TA, s 42(4); R8–8]

- (1) Despite any other provision of this division, if in the administration of the trust the trustee considers it necessary to do so, the trustee may apply income of the mortgaged land received by the trustee in payment of priority outgoings that accrued before the trustee became mortgagee in possession of the land.
- (2) However, the primary beneficiary is entitled to recoup out of the capital of the mortgage debt any payment made by the trustee under subsection (1).
- (3) In this section—
primary beneficiary see section 78(2).

Division 9 Power to deliver chattels

80 Delivery of chattels to life tenant [TA, s 73; R10–5]

- (1) This section applies if—
 - (a) chattels are included in the trust property; and
 - (b) a beneficiary entitled to a life interest or another limited interest in the chattels 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.

81 Delivery of chattels to minor [TA, s 74; R10–5]

- (1) A trustee may deliver to a minor, or to the minor's guardian, any chattels to which the minor is beneficially entitled.
- (2) The receipt of the minor or guardian is a complete discharge to the trustee for the chattels.
- (3) The power conferred under this section is in addition to the power conferred under section 99 and, for section 99(3), the

[s 82]

value of the chattels is not to be taken into account in any way.

Division 10 Other provisions

82 Power to appoint agents [TA, ss 43, 54(1) and (6); R4-1, 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.

Examples of things an agent may be appointed to do—

- receive and pay amounts
 - keep trust accounts
- (2) Without limiting subsection (1), a trustee may appoint an agent to give a receipt for property payable, transferable or deliverable to the trustee.
- (3) A trustee may appoint another trustee as an agent.
- (4) However, a trustee may not appoint a beneficiary as an agent even if the beneficiary is also a trustee.
- (5) A trustee—
- (a) may pay an agent who is appointed under this section; and
 - (b) is entitled to be allowed and paid any charge or expense incurred because of the agent's appointment.
- (6) In this section—
- agent*** includes solicitor, accountant, financial institution, trustee corporation, financial services licensee and regulated principal.

financial services licensee means a financial services licensee, defined under the Corporations Act, section 761A, whose licence covers dealing in, or providing advice about, securities.

Draft

regulated principal means a regulated principal—

- (a) defined under the Corporations Act, section 1430; and
- (b) dealing in, or providing advice about, securities as authorised by the Corporations Act, part 10.2, division 1, subdivision D.

83 Application of insurance money [TA, s 48; R9–6]

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

Draft

[s 84]

- (6) This section applies to policies effected either before or after the commencement of this section, but only to amounts received after the commencement of this section.

84 Deposit of documents for safe custody [TA, s 49; R4–4]

- (1) A trustee may deposit a document held by the trustee relating to the trust, or to the trust property, with any financial institution, law practice or corporation whose business includes the undertaking of the safe custody of documents.
- (2) An amount payable for the deposit is payable out of the income of the trust property or, if there is no income or to the extent the income is insufficient, out of the capital of the trust property.
- (3) In this section—
law practice has the meaning given under the *Legal Profession Act 2007*, schedule 2, definition *law practice*, paragraph (b).

85 Valuations [TA, s 51; R9–8]

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

- (5) The value fixed by the trustee under this section and in accordance with the trustee's duty under section 42 is binding on all persons beneficially interested under the trust.

86 Audit [TA, s 52; R9–9]

- (1) A trustee may have the accounts of the trust property examined or audited by an accountant from time to time.
- (2) The trustee must provide the accountant with the documents and information the accountant requires to conduct the examination or audit.
- (3) Subject to subsection (5), 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 capital and partly out of income, as the trustee considers appropriate.
- (4) However, in the absence of any direction by the trustee to the contrary in any special case, costs attributable to capital are payable out of capital and costs attributable to income are payable out of income.
- (5) If the trustee or 1 of the trustees is a trustee corporation, the costs of the examination or audit are not payable out of the trust property unless—
 - (a) the examination or audit related 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.

87 Trustee may sue himself or herself in a different capacity [TA, s 59; R9–11]

- (1) A trustee, in that capacity, may sue, and be sued by, himself or herself 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 as to the way in which the differing interests are to be represented.

[s 88]

88 Inquiries about beneficiaries [TA, ss 33(1)(j) and 115; R9–12]

- (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 of, or to which, the beneficiary is entitled.
- (3) Subsection (2) applies subject to a contrary intention in the trust instrument.

89 Power to execute instruments etc. [TA, s 33(1)(n); R9–12]

A trustee may, in relation to the trust property, do or omit to do all acts and things and execute all instruments necessary to carry into effect the powers and authorities given under this Act or the trust instrument.

90 Exercise of powers on termination of trust [TA, s 31(2)]

- (1) This section applies if—
 - (a) all the beneficiaries of a trust are absolutely entitled to the trust property; and
 - (b) no beneficiary is under a legal incapacity.
- (2) Despite the termination of the trust, a trustee of the trust continues to have all the powers conferred under this part to the extent necessary to effect the final distribution of the trust property unless, or except to the extent that, the powers are expressly revoked by all the beneficiaries by written notice given to the trustee.

91 Effect of conversion of land or personal property under statutory power [TA, s 9]

If, as a result of the exercise of power under this Act, land is converted into personal property or personal property is

converted into land, the personal property or land must be held—

- (a) if, before conversion, the personal property or land is 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 limitations, conditions, powers or directions corresponding as nearly as the law and circumstances permit with those affecting the personal property or land before conversion.

Part 6 Maintenance, education and advancement

Division 1 Preliminary

92 Application of pt 6 [TA, s 60]

This part applies despite a contrary intention in a trust instrument, unless otherwise provided by this part.

93 Definition for pt 6 [New; R10–1(a)(ii)]

In this part—

guardian, of a minor, includes a person who exercises parental responsibility in relation to the minor.

Draft

[s 94]

Division 2 Application of income from trust property

94 Application of div 2 [TA, s 61(4); R10–1(c); ACT Trustee Act, s 43(4)]

- (1) This division applies to a contingent or future interest in the trust property only if the trust includes the intermediate income of the property.
- (2) Without limiting the *Succession Act 1981*, section 33H, a contingent or future interest in property that is held on trust for a minor is taken, during his or her minority (if the interest continues for so long), 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.

95 Minor's interest may be applied for maintenance etc. [TA, s 61(1); R10–1(a)(i)]

- (1) This section applies if a minor has an interest in the trust property.
- (2) The trustee may pay to the minor's guardian (if any) or otherwise apply for or towards the minor's maintenance, education (including past maintenance or education) or advancement, the income of the property or a part of the income.

Draft

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- (3) For this section, it does not matter—
- (a) whether the minor's interest is vested or contingent or absolute or liable to be divested; or
 - (b) whether there is—
 - (i) another fund that may be applied to the minor's maintenance, education or advancement; or
 - (ii) another person who is bound by law to provide for the minor's maintenance or education.

96 Unexpended income of trust property [TA, s 61(2) and (7); R10–1(b)]

- (1) This section applies to income of the trust property that has not been used for the minor's maintenance, education or advancement under section 95 (the *remaining income*) during the minor's minority and while the minor's interest continues.
- (2) This section is subject to a contrary intention in the trust instrument.
- (3) The trustee must invest the remaining income (and the income achieved by investing the remaining income) in authorised investments.
- (4) The amount of the authorised investments (including the income of the investments) is to be held as follows—
 - (a) if subsection (5) applies—for the minor absolutely;
 - (b) if subsection (5) does not apply—as an accretion to the capital of the property from which the income arose which, together, are to form a single fund for all purposes.
- (5) This subsection applies if the minor—
 - (a) becomes an adult and his or her interest in the income during his or her minority is a vested interest; or
 - (b) on becoming an adult is entitled to the property from which the income arose in fee simple, absolute or determinable, or absolutely.

Draft

[s 97]

- (6) Despite subsection (4), the trustee may, at any time during the minor's minority, apply the income and the authorised investments, or a part of the income and investments, for the minor under section 95 as if it were income arising in the current year.
- (7) For subsection (4)(b), it does not matter whether the minor had a vested interest in the income.

97 Adult beneficiary with contingent interest in trust property [TA, s 61(3); R10–1]

- (1) This section applies if an adult beneficiary has a contingent interest in the trust property.
- (2) The trustee may—
 - (a) pay the income of the property or a part of the income to the beneficiary; or
 - (b) apply the income of the property or a part of the income for or towards the beneficiary's maintenance, education (including past maintenance or education) or advancement.

98 Modified application of division for vested annuities [TA, s 61(5); R10–1]

- (1) This division applies to a vested annuity as if—
 - (a) a reference to the income of the trust property were a reference to the vested annuity; and
 - (b) a reference to the minority of a beneficiary while the beneficiary is alive were a reference to the period for which the annuity is payable.
- (2) However, the amount of the authorised investments (including the income of the investments made during the period for which the annuity is payable) must be held in trust for the annuitant or the annuitant's personal representative absolutely.

Draft

Division 3 Application of trust capital

- 99 Capital of trust property may be applied for maintenance etc. [TA, s 62(1) to (3); R10–2]**
- (1) This section applies if, under a trust, a person is entitled to the capital of the trust property or any share of the capital.
 - (2) Subject to section 100, the trustee may—
 - (a) pay or apply amounts for the maintenance, education (including past maintenance or education) or advancement of the person out of the capital or share to which the person is entitled; or
 - (b) apply any part of the capital or share to which the person is entitled (the *capital property*) for that purpose.
 - (3) The amounts or value of the capital property (to the extent it is so applied) must not be more than, in total, \$100000 or one-half the capital or share (whichever is the greater) unless the court, on application, consents to the payment or application of a greater amount.
 - (4) The power to pay or apply amounts or capital property may be exercised—
 - (a) whether the person is entitled absolutely or contingently on the person reaching a stated age or on the happening of another event; and
 - (b) whether the person is entitled in possession, in remainder or in reversion.
 - (5) Also, it does not matter whether the person's interest is liable—
 - (a) to be defeated by the exercise of a power of appointment or revocation; or
 - (b) to be diminished by the increase of the class to which the person belongs.

Draft

[s 100]

100 Payment or application of capital under s 99 [TA, s 62(4) and (5); R10–2]

- (1) An amount or capital property may not be paid or applied under section 99 if the payment or application would prejudice a person entitled to a prior life or other interest, whether vested or contingent, in the amount or capital property paid or applied.
- (2) However, the amount or capital property may be paid or applied if—
 - (a) the person whose interest may be prejudiced is an adult who is not under a legal incapacity and consents in writing to the payment or application; or
 - (b) the court, on the trustee’s application, orders the amount or capital property to be paid or applied.
- (3) An amount paid or applied, or the value of capital property (to the extent that it is so applied), under section 99 must be brought into account as part of the share in the trust property to which the person is or becomes absolutely or indefeasibly entitled.

Draft

Division 4 Payments may be subject to conditions

101 Trustee may impose conditions on payment of amount for maintenance etc. [TA, s 63(1) and (3); R10–3]

- (1) A trustee exercising a power to pay or apply an amount or capital property for the maintenance, education or advancement of a person may make the payment or application of the amount or capital property subject to a condition.
- (2) Without limiting subsection (1), the condition may require the repayment of the amount or the value of the capital property (to the extent it is so applied), the payment of interest on the amount or value or the giving of security for the amount or value.

- (3) However, at any time after imposing a condition, the trustee may, either wholly or in part, waive the condition or release an obligation undertaken or any security given because of the condition.
- (4) 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.

102 Amounts repaid not to be taken into account in working out amount that may be paid or applied [TA, s 63(2); R10–3]

- (1) This section applies in working out the amount or value of the capital property (to the extent it has been so applied) that a trustee who has imposed a condition under section 101(1) may pay or apply in exercise of the power.
- (2) An amount repaid to the trustee or recovered by the trustee is taken not to have been paid or applied by the trustee.

103 Trustee not liable for losses [TA, s 63(4); R10–3]

A trustee is not liable for any loss that may be incurred in relation to an amount that is paid or applied under this part if the loss arises—

- (a) because of a failure to impose any or adequate conditions under section 101(1); 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 for the protection of 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.

Draft

[s 104]

Part 7 Indemnities and protection of trustees and others

Division 1 Preliminary

104 Application of pt 7 [TA, s 65]

This part applies despite a contrary intention in a trust instrument.

Division 2 Distributing trust property

105 Giving notice of intention to distribute [TA, s 67(1), (2), (3) and (4)(a); R11–1]

- (1) A trustee intending to distribute the trust property may give notice of that intention—
 - (a) by publishing a notice—
 - (i) in a newspaper circulating throughout the State and sold at least once each week; or
 - (ii) in the ways that comply with the *Uniform Civil Procedure Rules 1999*, rule 599(3) and (4); or
 - (iii) on a website approved for the purpose—
 - (A) under a regulation; or
 - (B) by the Chief Justice under a practice direction; and
 - (b) in the other ways the Supreme Court would direct notice to be given in an administration proceeding.
- (2) The notice must require any person having any claim to, or against, the trust property, whether as creditor or beneficiary or otherwise, to send particulars of the person's claim to the trustee not later than the date stated in the notice (the *closing date*).

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- (3) For subsection (1)(a), the notice is sufficient if given in the approved form.
- (4) The closing date must be at least 2 months after the date of publication of the notice.
- (5) After the closing date or, if more than 1 notice is published, the closing date that is latest in time, the trustee may 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.
- (6) For subsection (5), it does not matter whether the trustee has notice of a claim because it has been made in response to the published notice or has otherwise come to the trustee's notice.
- (7) The trustee is not liable to any person of whose claim the trustee had no notice at the time of the distribution for any of the trust property distributed after the closing date.
- (8) 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 section 123.

- (9) Subsection (8) does not limit section 123(4) or any other defence available, under an Act or at law or in equity, to the person to whom the distribution is made.
- (10) In this section—

administration proceeding means a proceeding for the administration of the estate of a deceased person, or for the administration of a trust, under the direction of the Supreme Court.

Division 3 Claims against trust property

106 Application of div 3 [TA, s 68(5); R11–2(c)]

This division does not apply to a claim—

Draft

[s 107]

- (a) under the *Succession Act 1981*, part 4; or
- (b) that is an application to revoke a grant of probate or letters of administration.

107 Definitions for div 3 [TA, s 68(1) and (5); R11–2]

In this division—

claim does not include a claim for which insurance is required to be, and is, maintained under an Act.

claimant includes each of the following—

- (a) a creditor;
- (b) a person making a claim as a beneficiary;
- (c) a person the trustee has reason to believe may become a claimant.

108 Requiring claimant to start a proceeding [TA, s 68(1); R11–2(a)]

- (1) Subsection (2) applies if a trustee does not accept a claim that has been made, or that the trustee has reason to believe may be made—
 - (a) to or against the trust property; or
 - (b) against the trustee personally because the trustee is under a liability for which the trustee is entitled to reimbursement out of the trust property.
- (2) The trustee may serve on the claimant a notice requiring the claimant, within 6 months after the date of service of the notice, to start a proceeding to enforce the claim and to prosecute the proceeding with appropriate diligence.

109 Applying to court to make orders [TA, s 68(2)–(4); Vic Administration and Probate Act, s 30(3)(b); R11–2(b)]

- (1) At the end of the 6 month period, the trustee may apply to the court for an order under subsection (4).

-
- (2) A copy of the application must be served on the claimant.
 - (3) The court may make an order under subsection (4) if, on the hearing of the application, the claimant does not satisfy the court that the claimant—
 - (a) has started a proceeding to enforce the claim; and
 - (b) is prosecuting the proceeding with appropriate diligence.
 - (4) The court may, by order—
 - (a) either—
 - (i) extend the period to start the proceeding to enforce the claim; or
 - (ii) bar the claim (including for all purposes); or
 - (iii) enable the trust property to be dealt with without regard to the claim; and
 - (b) impose the conditions and give the directions about the proceeding or the claim, including a direction about the costs of or incidental to the application, that the court considers appropriate.
 - (5) If a trustee has served notices under section 108 on 2 or more claimants, the trustee may seek orders against any or all of the claimants in a single application and the court may make orders accordingly.

110 Contesting trustee's right to indemnity [TA, s 68(6); R11-2]

- (1) Subsection (2) applies if a beneficiary of the trust is not made a party to an application by a trustee under this division.
- (2) An order made by the court on the application does not affect the beneficiary's right to contest the claim of the trustee to be entitled to indemnify himself or herself out of the trust property.

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Division 4 Particular protections for trustees

111 Protection relating to notice when a person is trustee of more than 1 trust [TA, s 69; R11–3]

- (1) This section applies to a trustee acting for more than 1 trust.
- (2) The trustee is not, in the absence of fraud, to be taken to have notice of a 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 instrument, fact and thing.

112 Protection in relation to receipts [TA, s 71; R11–5]

- (1) This section applies if a trustee—
 - (a) signs a receipt for the payment of an amount or for securities in order to conform with the requirements in relation to the giving of receipts by trustees; and
 - (b) 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.

113 Protection in relation to acts of others [TA, s 71; R11–5]

- (1) Subject to sections 67 and 72 , a trustee is liable only for the trustee's own acts or omissions.
- (2) Without limiting subsection (1), a trustee is not liable for a loss resulting from—
 - (a) 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; or

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- (b) the insufficiency or deficiency of any security; or

Note for paragraph (b)—

See section 57 for the court's power to set off gains and losses.

- (c) any other matter;

unless the loss also results from the trustee's own breach of trust.

114 Expenses reasonably incurred in the administration of the trust [TA, s 72; R11–6]

A trustee may—

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

115 Protection against liability for rents etc. under a lease [TA, s 66; R11–7]

- (1) This section applies if a trustee is, for any reason, liable in relation to—
- (a) any rent, covenant or agreement reserved by or contained in a lease; or
- (b) any indemnity given for any rent, covenant or agreement mentioned in paragraph (a).
- (2) The trustee may assign the lease to a person entitled to call for an assignment of the lease if the trustee—
- (a) satisfies all liabilities under the lease that may have accrued, and been claimed, up to the date of the assignment; and
- (b) 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

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[s 116]

the leased property (even though the time for expending the amount may not have arrived).

- (3) If the trustee acts under subsection (2), 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 under subsection (2)(b), to the persons entitled to the trust property.
- (4) A trustee who acts under subsection (2) and distributes the remaining trust property under subsection (3)(b) is not personally liable for any later claim under the lease.
- (5) 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 it was distributed.
- (6) In this section—
- lease* includes—
- (a) an agreement for a lease; and
 - (b) an instrument giving an indemnity as mentioned in subsection (1)(b) 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.

Division 5 General

116 Evidence about vacancy in a trust [TA, s 13; R3–14]

- (1) A statement in an instrument, under which a new trustee of a trust is appointed or a trustee of a trust is removed, about how a vacancy in the office of trustee happened is conclusive evidence of the circumstances under which the vacancy

happened 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 land registrar or other person registering or certifying title.
- (2) The vesting of the trust property on the appointment of a new trustee or the removal of a trustee is as valid in favour of a subsequent purchaser acting in good faith as it would be if the statement were true.
- (3) This section applies to an instrument of appointment whether signed before or after the commencement of this Act.

117 Protection for persons registering dealings with trust property [TA, ss 34(3) and 38(3); R7–10, 7–18]

- (1) If a trustee has joined with someone else in the sale of the trust property, the land registrar or another person registering a dealing with the trust property is not affected by notice of, or required to inquire into, the circumstances of the apportionment of the purchase price when registering a dealing relating to the sale of the trust property.
- (2) The land registrar is not required to inquire into the surrendering of leasehold or freehold land by a trustee.

118 Protection for purchasers and mortgagees [TA, s 46; R11–12]

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

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

Draft

[s 119]

119 Receipts given by trustees [TA, s 43; R9–1]

- (1) This section applies if a person pays an amount or transfers or delivers property (the *property*) to a trustee.
- (2) The written receipt of the trustee, or a person appointed by the trustee to give receipts under section 82, is a sufficient discharge for the property and the person paying, transferring, or delivering the property—
 - (a) is not required to see to its application; and
 - (b) is not answerable for any loss or misapplication of the property.

120 Power of court to relieve trustee from personal liability [TA, s 76; R11–9]

- (1) This section applies if it appears to the court that a trustee, whether appointed by the court or otherwise, 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 the trustee—
 - (a) has acted honestly and reasonably; and
 - (b) 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.
- (3) For this section, it does not matter whether the transaction alleged to be the breach of trust happened before or after the commencement of this section.

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121 Power of court to make beneficiary indemnify for breach of trust [TA, s 77; R11–10]

- (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) For this section, it does not matter whether the breach of trust was committed before or after the commencement of this section.
- (4) In this section—
trustee includes a person claiming through the trustee.

122 Indemnity for acts done under a court order [TA, s 112; R11–14]

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

123 Remedies for wrongful distribution of trust property [TA, s 113; R14–1 to 14–3]

- (1) This section applies if a trustee has wrongfully distributed the trust property.
- (2) A person who suffers loss because of the distribution may enforce the same remedies against the trustee, and against any person to whom the distribution has been made (*respondent*), 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 respondent.

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- (4) If—
- (a) a remedy is sought to be enforced against a respondent; and
 - (b) the respondent has received the distribution in good faith and has so altered his or her position in reliance on the propriety of the distribution that, in the court's opinion, it would be inequitable to enforce the remedy;
- the court may make an order it considers to be just in all the circumstances.
- (5) Subsection (4) does not limit any other defence that may be available to the respondent under an Act, at law or in equity.

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Part 8 Court powers

Division 1 Preliminary

124 Application of pt 8 [TA, s 79]

This part applies despite a contrary intention in a trust instrument, unless otherwise provided by this part.

125 References to *entitled* to property [TA, s 5]

- (1) In this part, a reference to a person being *entitled* to property includes a reference to the person being possessed of the property.
- (2) In this section—
- possessed*, of property, includes being entitled to—
- (a) the receipt of income of property; and
 - (b) any vested estate (less than a life interest), at law or in equity, in possession or in expectancy, in any land.

126 Who may bring applications before the court [TA, s 98; R12–12]

- (1) This section does not apply if another provision of this Act provides for who may apply to the court in relation to a particular matter.
- (2) A person mentioned in subsection (3) may apply to the court for an order under this Act—
 - (a) to appoint a new trustee; or
 - (b) to remove a trustee; or
 - (c) to disqualify a person from being appointed as a trustee; or
 - (d) to remove an office holder of a trust and appoint another person to the office; or
 - (e) relating to the trust property.
- (3) The persons are—
 - (a) a person who is beneficially interested in the trust property, whether or not the person is under a legal incapacity; and
 - (b) a person in whose favour a power to distribute the trust property may be exercised; and
 - (c) a trustee; and
 - (d) a person applying to be appointed as trustee.
- (4) The following persons may apply to the court for an order relating to any interest in any property subject to a mortgage—
 - (a) a person who is beneficially interested in the property, whether or not the person is under a legal incapacity;
 - (b) a person interested in the amount secured by the mortgage.

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Division 2 Appointment and removal of trustees

127 Court may appoint or remove trustees [TA, s 80; New; R12-1]

- (1) This section applies if a person wishes to appoint a new trustee of a trust, or to remove a trustee of a trust, and it is inexpedient, difficult or impracticable to do so without a court order.
- (2) The court may, if it is expedient to do so, by order—
 - (a) appoint a new trustee of the trust—
 - (i) to replace a trustee; or
 - (ii) to be an additional trustee; or
 - (iii) if there is no trustee; or
 - (b) remove a trustee of the trust.
- (3) Without limiting subsection (2), the appointment of a new trustee may be made to replace a trustee who—
 - (a) desires to be discharged; or
 - (b) for any reason, appears to the court 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 without appointing a new trustee.
- (5) An order to appoint a new trustee or to remove a trustee (and any consequential vesting order or conveyance) has the same effect to discharge a former or continuing trustee it would have if the appointment or removal had been made under a power contained in the trust instrument.
- (6) This section does not confer power to appoint an executor or administrator.

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128 Powers of new trustee [TA, s 81; R12–1]

A trustee appointed, by order, under section 127(2), 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.

129 Court may disqualify person from being appointed as trustee [New; R12–2, 12–3]

- (1) This section applies if the court—
 - (a) has replaced or removed a person as trustee of a trust under section 127(2)(a)(i) or (b); and
 - (b) is satisfied that—
 - (i) the person has committed 1 or more breaches of trust; and
 - (ii) the nature and seriousness of the breaches render the person unfit to act as a trustee.
- (2) The court may, by order, disqualify the person from being appointed as a trustee of any trust for a stated period.
- (3) If, when the order is made, the person is a trustee of another trust, the court may, by order, remove the person as trustee of the other trust.

130 Appointment and removal of other office holders of a trust [New; R12–4]

- (1) This section applies if—
 - (a) an office (other than the office of trustee) is created under a trust instrument; and
 - (b) a person appointed to the office (*office holder*) may exercise a power in relation to the trust or the trust property.
- (2) A person may apply to the court to remove the office holder from the office and to appoint another person to the office, if

Draft

[s 131]

it is inexpedient, difficult or impracticable to do so without a court order.

- (3) The court may, if it is expedient to do so, by order—
 - (a) remove the office holder from the office; and
 - (b) appoint another person to the office.
- (4) An office holder may be removed from the office, and a person may be appointed to the office, for any reason a person may be removed, or appointed, as trustee under section 127.

Division 3 Vesting orders and ancillary matters

131 Application of div 3 [TA, ss 82(2) and (3), 84, 85, 88 and 89; R12–5]

- (1) This division applies if—
 - (a) a new trustee is appointed—
 - (i) by the court; or
 - (ii) under this Act; or
 - (iii) under the trust instrument; or
 - (b) a trustee—
 - (i) is replaced or removed; 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—
 - (i) has stopped carrying on business; or
 - (ii) is an externally-administered body corporate under the Corporations Act, section 9; or
 - (iii) has been dissolved; or

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- (d) a trustee, who is directed to do so by a person absolutely entitled to the trust property or the dividends or income of the trust property, neglects or refuses, within 28 days after receiving a written request from the person—
 - (i) to convey the trust property; or
 - (ii) to receive the dividends or income of the trust property; or
 - (iii) to sue for or recover the trust property; or
- (e) there is no personal representative of the last trustee or the personal representative of the last trustee can not be found; or
- (f) it is uncertain—
 - (i) whether the last trustee is alive or dead; or
 - (ii) who the personal representative of the last trustee is; or
 - (iii) who the survivor of 2 or more trustees jointly entitled to the trust property was; or
- (g) a person, who is required to do so under a court order, neglects or refuses—
 - (i) to convey the trust property; or
 - (ii) to receive the dividends or income of the trust property; or
 - (iii) to sue for or recover the trust property; or
- (h) a deceased person was entitled to the trust property and his or her personal representative is under a legal incapacity; or
- (i) the trust property is vested in a trustee and it appears to the court to be expedient to make a vesting order; or
- (j) in a proceeding, the court directs the sale or mortgage or the release of a mortgage of land or makes an order for the specific performance of a contract concerning land; or

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[s 132]

- (k) a person entitled to property by way of mortgage is under a legal incapacity; or
 - (l) any property is subject to a contingent right in an unborn person who, on coming into existence, would become entitled to the property on a trust.
- (2) For subsection (1), a trustee is entitled to the trust property even if—
- (a) the trust property is held jointly with someone else; or
 - (b) the trustee is entitled to the trust property by way of mortgage or otherwise.
- (3) In this section—

last trustee means the last trustee who was entitled to the trust property.

unborn person includes a class of unborn persons.

132 Court may make vesting and other orders [New; TA, ss 82(1), 83(3), 84, 85, 88, 89 and 91 to 93; R12–5]

- (1) Subject to section 133, the court may, in any circumstance mentioned in section 131(1), make an order (*vesting order*) vesting the property or an estate or interest in the property (the *property*) in any person in any way and for any estate or interest that the court directs.
- (2) In addition, or alternatively, the court may make any declaration, direction or other order in relation to the property as 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 or disposing of any 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; and

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(d) a declaration or a direction concerning the way in which the right to transfer any property vested under this Act is to be exercised.

(3) In this section—

estate or interest, in property, includes a contingent right of an unborn person who, on coming into existence, would become entitled to the property on a trust.

133 Persons in whom property may be vested [TA, s 83(1), (2) and (6); R12–5]

(1) If a vesting order is to be made consequential on the appointment of a new trustee, the trust property is to be vested in the persons who, on the appointment, are the trustees.

(2) If a vesting order is to be made consequential on the replacement or removal of 1 or more of a number of trustees, the trust property may 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 the person's consent be dispensed with.

134 Effect of vesting order [TA, s 90(1), (1A) and (2) and 92; R12–5]

(1) Subject to section 135, a vesting order—

(a) divests the property to which it relates from the persons in whom it was vested immediately before the order was made; and

(b) vests the property in the persons named in the order as trustees or otherwise in accordance with the order without any conveyance, transfer or assignment.

[s 135]

- (2) If more than 1 person is named in the order, the property vests in the persons as joint tenants.
- (3) If an order is made under section 132(2)(c), a conveyance or release by the appointed person in accordance with the order has the same effect as a vesting order.

135 When vesting under vesting order takes effect [TA, s 90(3); R12–5]

- (1) If, or to the extent that, the divesting and vesting of property must be notified, registered or recorded under the requirements of another Act, the divesting and vesting are subject to the requirements and do not take effect until the requirements are satisfied.
- (2) 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—
 - (a) produce the order to the land 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 land registrar or other person for the purpose.
- (3) In this section—

Act includes an Act of the Commonwealth or another State.

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

136 Transfer of property under vesting order [TA, s 90(4) and (5); R12–5]

- (1) If the consent of a person is needed to the conveyance, transfer or assignment of any property, the vesting of the property under the vesting order is subject to the consent, unless the order otherwise provides.
- (2) However, the consent may be obtained after the making of the vesting order by the persons named in the order.

- (3) 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.

**137 Powers etc. of person named in vesting order as trustee
[TA, s 90(6); R12–5]**

- (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, under the vesting order limit or, under section 140 or 142, enlarge the trustee's powers as it considers appropriate.

**138 Circumstances bearing on the validity of an order made
under s 132 [TA, s 83(4) and (5); R12–5]**

- (1) This section applies to an order made under section 132, including a vesting order.
- (2) The fact that the order is founded or purports to be founded on an allegation of the existence of a circumstance mentioned in section 131(1) is conclusive evidence of the circumstance alleged in any court on any question about the validity of the order.
- (3) However, if an order has been improperly obtained, nothing in this Act prevents the court from—
 - (a) directing a reconveyance of the trust property; or
 - (b) making an order in relation to the payment of costs occasioned by the improper obtaining of the order; or
 - (c) making a further order under section 132.

Draft

Division 4 Power to review

139 **Court may review decisions or apprehended decisions** **[TA, s 8; R12–11]**

- (1) This section applies if a person (*aggrieved person*)—
 - (a) has—
 - (i) an interest (whether direct or indirect or vested or contingent) in the 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 office holder in the exercise of a power; or
 - (ii) has reasonable grounds to apprehend a decision of the trustee or office holder in the exercise of a power by which the person will be aggrieved.
- (2) The aggrieved person may apply to the court—
 - (a) to review the decision; or
 - (b) to give directions in relation to the apprehended decision.
- (3) The court may require the trustee or office holder to appear before it to substantiate and uphold the grounds of the decision or the apprehended decision that is being reviewed or about which directions are sought.
- (4) The court may review a decision or give directions about an apprehended decision of a trustee or office holder on the ground the decision or apprehended decision was not, or would not be, an appropriate exercise of the trustee's or office holder's discretion.
- (5) Without limiting subsection (4), the grounds on which the court may review a decision or give directions about an apprehended decision of a trustee include that the power was, or would be, exercised—

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-
- (a) in bad faith; or
 - (b) without real or genuine consideration; or
 - (c) contrary to the purposes of the trust.
- (6) The court may make any order (including an order as to costs) or direction it considers appropriate in the circumstances.
- (7) However, an order must not—
- (a) disturb a distribution of the trust property, made without breach of trust, before the trustee or office holder 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.
- (8) In this section—
- decision* includes act and omission.
- office holder* includes a person (other than a trustee) exercising, or who may exercise, a power.
- power*, in relation to a trustee or office holder, means a power conferred on the trustee or office holder under this Act or otherwise.

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Division 5 Jurisdiction to make other orders

Subdivision 1 Additional management or administration powers

140 Court's jurisdiction to confer additional management or administration powers [TA, s 94; R12–6]

- (1) This section applies in relation to a trust if the court is satisfied—
- (a) the exercise of a particular management or administration 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 under the trust; and
- (b) the management or administration power can not be exercised because—
 - (i) it is inexpedient or difficult or impracticable to exercise the power without a court order; or
 - (ii) the trustee does not have the management or administration power under this Act, any trust instrument or otherwise.
- (2) The court may, by order, confer on the trustee, either generally or in a particular matter, the management or administration power on the terms and subject to any conditions the court considers appropriate.
- (3) Without limiting subsection (2), 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 borne; and
 - (c) the extent to which the amount or the costs are to be divided between capital and income.
- (4) The court may rescind or vary an order made under this section.
- (5) The rescission or variation of an order 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 rescind or vary the order.
- (6) An application to the court under this section may be made by any trustee or any person beneficially interested under the trust.
- (7) For subsection (1)(b)(ii), it does not matter that the trustee does not have the particular management or administration power because—

-
- (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

Note—

See section 59(2).

- (b) the trust instrument excludes or modifies the power.
- (8) In this section—

management or administration power means—

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

Subdivision 2 Variations of trusts

141 Meaning of *protective trust* for sdiv 2 [New]

- (1) A ***protective trust*** is a trust that meets the description or has a similar effect to a trust that meets the description set out under this section.
- (2) Under the trust, income, including an annuity or other periodical income payment, is directed to be held on trusts for the benefit of a person (the ***principal beneficiary***) for the period of the principal beneficiary's life or for a lesser period (the ***trust period***).
- (3) During the trust period, the income is, without prejudice to any prior interest, held on the following trusts—
 - (a) on trust for the principal beneficiary until the trust (the ***primary trust***) fails or determines because of an intervening event;

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[s 142]

- (b) on trust for the secondary beneficiaries on the happening of an intervening event.
- (4) An intervening event is an event provided for under the trust instrument that, if it happens, results in—
 - (a) the principal beneficiary 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.
- (5) If the primary trust fails or determines during the trust period, the trust instrument will provide, during the remainder of the trust period, for the trust income to be applied as the trustee considers appropriate for the maintenance, education (including past maintenance or education) or advancement of any or all of the secondary beneficiaries.
- (6) The secondary beneficiaries usually include—
 - (a) the principal beneficiary and his or her spouse or issue; or
 - (b) 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.

142 Power of court to authorise variations of trust [TA, s 95; R12–7]

- (1) The court may, by order, approve for a restricted or potential beneficiary any arrangement varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the trust property.
- (2) However, the court may approve an arrangement for a restricted or potential beneficiary only if carrying out the arrangement would be for the restricted or potential beneficiary's benefit unless the restricted or potential beneficiary—

- (a) is an unascertained person whose entitlement is dependent on a future event that the court is satisfied is unlikely to happen; or
 - (b) is a person mentioned in paragraph (d) of the definition *restricted or potential beneficiary* in subsection (7).
- (3) Notice of an application to the court for an order under subsection (1) must be given to all persons as the court directs.
- (4) For this section, it does not matter—
- (a) who proposed the arrangement the subject of the application; or
 - (b) whether or not there is any other person beneficially interested who is capable of assenting to the arrangement.
- (5) Nothing in this section limits a management or administration power conferred on a trustee under section 140.
- (6) This section does not apply to trusts affecting property settled by Act of Parliament.
- (7) In this section—
- restricted or potential beneficiary***, of a trust, means—
- (a) a person having, directly or indirectly, an interest, whether vested or contingent, under the trust who is under a legal incapacity; or
 - (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 specified description; or
 - (ii) a member of a specified class of persons; or
 - (c) an unborn person; or

[s 143]

- (d) a person who, if a protective trust failed or determined, would be a member of the class of persons mentioned in section 141(5).

Subdivision 3 Other matters

143 Applying to court for directions [TA, s 96; R12–8]

- (1) A trustee may apply to the court for a direction about—
 - (a) the trust property or the management or administration of the trust property; or
 - (b) the exercise of any power or discretion vested in the trustee.
- (2) The application must be served on each person having an interest in the application or any of them that the court considers expedient.

144 Acting under court direction [TA, s 97; R12–8]

- (1) This section applies if a trustee is acting under a direction of the court as mentioned in section 143.
- (2) The trustee is taken, in relation to the trustee's own liability, to have discharged his or her duty as trustee in the subject matter of the direction.
- (3) Subsection (2) applies even if the direction is later varied or set aside.
- (4) This section does not protect the trustee from liability for an act done under any direction if the trustee commits a fraud or wilfully conceals or misrepresents a material matter—
 - (a) in obtaining the direction; or
 - (b) in agreeing, either expressly or impliedly, with the court in making the order giving the direction.
- (5) In this section—

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

145 Remuneration of trustee [TA, s 101; R12–9]

- (1) Subject to an express contrary intention in the trust instrument, a professional trustee for whom no benefit or remuneration is provided in the trust instrument is entitled to charge his or her professional or business expenses in relation to the trust against the trust property.
- (2) The court may, on application, authorise any person, including a professional trustee, to charge the remuneration for the person's services as trustee that the court considers appropriate if the circumstances appear to the court to justify the charge.
- (3) For subsection (2), the court may take into account any charges that have been paid out of the trust property under subsection (1).
- (4) In this section—

professional or business expenses, 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 means a trustee whose profession, business or employment is, or includes, acting as a trustee.

trustee includes a custodian trustee.

146 Court may reduce excessive amounts [New; NSW Probate and Administration Act, s 86A; R12–10]

- (1) This section applies if the court considers that either of the following amounts is excessive—
 - (a) an amount payable to a trustee for the trustee's services;
 - (b) an amount charged or proposed to be charged by the trustee in relation to the trust.

Draft

[s 147]

- (2) The court may, on its own initiative or on the application of a person interested in the trust, review the amount and may, on the review, reduce the amount.
- (3) Subsection (2) applies despite—
 - (a) any provision of a trust instrument authorising the charging of the amount; or
 - (b) any provision of an Act authorising the charging of the amount.
- (4) In this section—

amount includes a part of the amount.

147 Property of minor [TA, ss 86 and 87; R12–5 and 12–13]

- (1) If a minor is beneficially entitled to property of which there is no trustee, the court may, by order, on the terms it considers appropriate, appoint a guardian of the minor or some other appropriate person—
 - (a) to deal with the property; or
 - (b) to exercise the powers conferred on a trustee under this Act in relation to the property.
- (2) If a minor has a claim to property, the court may, by order, appoint a guardian of the minor or some other appropriate person to settle or compromise the claim.
- (3) However, subsection (2) does not apply if the settlement or compromise may be sanctioned by a court or the public trustee under the *Public Trustee Act 1978*, section 59.
- (4) The court must not make an order under this section unless it appears to the court that the order is for the benefit of the minor or of the minor and some other person.
- (5) An act done under this section is binding on the minor.
- (6) An application for an order under this section may be made by the minor’s guardian or litigation guardian.
- (7) In this section—

Draft

deal, with property, includes sell, convey, lease, mortgage, charge and sue for and recover the property.

148 Court's power to make order in absence of party [TA, s 99; R12–13]

- (1) The court may decide a proceeding in the absence of service on a person who, as a trustee, is a defendant in the proceeding if the court is satisfied—
 - (a) a diligent search has been made for the person; and
 - (b) the person can not be found.
- (2) The court may give judgment against the person, as trustee, as if the person had been properly served.
- (3) Subject to subsection (5), 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 any other capacity.
- (4) Subsection (5) applies if a party to a proceeding relating to a trust—
 - (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.
- (5) The court may appoint a person to represent the party or may proceed in the party's absence and an order made in the proceeding is binding on the party.
- (6) In this section—

party, to a proceeding, includes a person or class of persons that the court considers should—

 - (a) be made a party or parties to the proceeding; or
 - (b) be given an opportunity to attend and be heard in the proceeding, at the time of the proceeding.

Draft

149 Court's power to charge costs on trust property [TA, s 100; R12–13]

The court may order that the costs of an application—

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

150 Payment into court by trustee [TA, s 102; R12–13]

- (1) A trustee may deposit into court an amount or securities belonging to a trust that is held by the trustee or is under the trustee's control.
- (2) If the amount or securities are held by, or under the control of, more than 1 trustee, the amount or securities may be deposited into court on a decision of a majority of the trustees.
- (3) The amount or securities are, subject to rules of court, to be dealt with as directed by the court by order.
- (4) Subsection (5) applies if an amount or securities are vested in trustees, and a majority of the trustees wish to deposit the amount or securities into court, but the agreement of the remaining trustees can not be obtained.
- (5) The court may order the amount or securities be deposited into court without the agreement of the remaining trustees.
- (6) If the amount or securities are deposited with a financial institution, broker or other depositary, the court may order payment or delivery of the amount or securities to the majority of the trustees for depositing into court.
- (7) A deposit, payment or delivery of an amount or securities under a court order is as valid and effective as it would be if it had been done by all persons entitled to the amount or securities.

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- (8) The receipt of the proper officer of the court is a sufficient discharge to the trustee for the amount or securities deposited into court.

Part 9 Charitable trusts

Division 1 Preliminary

151 Definition for pt 9 [TA, s 106(5)]

In this part—

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

Division 2 Proceedings in relation to charitable trusts

152 Applications to court under this part [TA, s 106(2) and (3)]

- (1) An application to the court under this part may be made by any of the following—
- (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.
- (2) Notice of the application must be given to—
- (a) if the application is made by a person or charity mentioned in subsection (1)(b) or (c)—the Attorney-General and any trustee who is not a party to the application; and

Draft

[s 153]

- (b) if the application is made by a person or charity mentioned in subsection (1)(a) or (c)—the trustee of the trust; and
- (c) generally—any other person or charity to whom the court directs notice be given.

153 Court may make orders for charitable trusts [TA, s 106(1) and (4)]

The court may, on application in relation to a charitable trust, make any of the following orders—

- (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 or something else as it considers just.

Division 3 Trust containing a non-charitable and invalid purpose

154 Inclusion of non-charitable purpose not to invalidate trust [TA, s 104]

- (1) This section applies if the purposes to 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 to the non-charitable and invalid purpose.
- (3) This section does not apply to a trust declared before, or to the will of any testator dying before, 1 July 1973.

Division 4 Applying property cy pres

155 Application [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.

156 References to *purposes* of a charitable trust [TA, s 105(3)]

In this division, a reference 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 under this division or otherwise—the purposes for which the trust property may, for the time being, be applied.

157 Occasions for applying property cy pres [TA, s 105(1) and (2)]

- (1) The purposes of a charitable trust may be changed to allow the trust property to be applied cy pres if—
 - (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 spirit of the trust; or

Draft

[s 157]

- (b) the purposes provide a use for part only of the trust property; or
 - (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 spirit of the trust; or
 - (d) the purposes referred to—
 - (i) an area that was, but has since stopped being, a unit for some other purpose; or
 - (ii) a class of persons or to an area that has—
 - (A) stopped being suitable, having regard to the spirit of the trust; or
 - (B) stopped being practical in administering the trust; or
 - (e) the purposes, wholly or in part—
 - (i) have been adequately provided for in other ways; or
 - (ii) have stopped being charitable, in law; or
 - (iii) have, in any other way, stopped providing a suitable and effective way of using the trust property, having regard to the spirit of the trust.
- (2) However, subsection (1) does not affect the conditions that must be satisfied in order that property given for charitable purposes may be applied cy pres, except to the extent that the conditions require a failure of the purposes.

Editor's note—

If the trust property of a charitable trust is applied cy pres, it means the trust property is applied to another charitable purpose as near as possible to the original purposes of the trust, having regard to the spirit of the trust.

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158 Trustee's duty to secure use of trust property for charitable purposes [TA, s 105(4)]

- (1) This section applies to the trustee of a charitable trust if the circumstances permit and require 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 it applied cy pres.

159 Court may approve scheme for applying trust property cy pres [TA, s 106(1) and (4)]

- (1) The court may, on application in relation to a charitable trust, make an order approving a scheme to change the purposes of the trust to allow the trust property to be applied cy pres if the court is satisfied that, under section 157, the trust property may be applied cy pres.

Note—

See section 152 for who may apply to the court.

- (2) Without limiting section 153, the court may make any other order on an application to approve a scheme under this section as it considers just.

160 Attorney-General may approve scheme for applying trust property cy pres [New; R13-1, 13-2(a), (b) and (e); NSW Charitable Trusts Act s 14(1)(b); Tas Variation of Trusts Act s 7(3)(a) and (b); Vic Charities Act s 4(1), (2) and (3)(a); WA Charitable Trusts Act s 10A(4) and (5)]

- (1) This section applies if—
 - (a) the trustee of a charitable trust seeks approval for a scheme to change the purposes of the trust to allow the trust property to be applied cy pres; and
 - (b) the value of all the trust property is not more than the District Court monetary limit.

Draft

[s 160]

- (2) The trustee may, instead of applying to the court under section 159 or otherwise, apply to the Attorney-General to approve the scheme.
- (3) The Attorney-General—
 - (a) must require the trustee to give public notice of the application in the way the Attorney considers appropriate; and
 - (b) may require the trustee to provide any information, opinions or advice that the Attorney considers appropriate; and
 - (c) may make any investigations and inquiries that the Attorney considers appropriate.
- (4) The Attorney-General may approve the scheme or refuse to approve the scheme.
- (5) In deciding whether to approve the scheme, the Attorney-General must have regard to any submissions made to the Attorney by a person or charity interested in the proper administration of the trust.
- (6) The Attorney-General may approve the scheme if satisfied that—
 - (a) the value of all the trust property is not more than the District Court monetary limit; and
 - (b) under section 157, the trust property may be applied cy pres.
- (7) The Attorney-General must refuse to approve the scheme if satisfied that—
 - (a) the value of all the trust property is more than the District Court monetary limit; or
 - (b) under section 157, the trust property may not be applied cy pres; or
 - (c) it is more appropriate that the application be dealt with by the court—

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- (i) because of the contentious nature of the application; or
- (ii) because a special question of law or fact arises; or
- (iii) for another reason.

161 Application under s 160 [New; R13–2(c); SA s 69B(5); Vic Charities Act s 4(1); WA Charitable Trusts Act s 10A(5)(a)]

- (1) An application under section 160 must be—
 - (a) made in the approved form; and
 - (b) accompanied by any fee prescribed under regulation for the application.
- (2) A trustee applying for approval of a scheme under section 160 must give public notice of the application in the way required by the Attorney-General.

162 Publication of approval or refusal of scheme [New; R13–2(d); WA Charitable Trusts Act s 10A(6)(b)]

- (1) This section applies if the Attorney-General approves, or refuses to approve, a scheme under section 160.
- (2) The Attorney-General must give public notice of—
 - (a) the approval or refusal in the way the Attorney considers appropriate; and
 - (b) if the scheme is approved, the day, not earlier than 28 days after the notice is given, on which the scheme takes effect.

163 Effect of approval of scheme [New; NSW Charitable Trusts Act ss 12(4) and 16(2)]

- (1) This section applies if the Attorney-General approves a scheme under section 160.
- (2) The scheme does not take effect until—

Draft

[s 164]

- (a) if an appeal is made from the Attorney-General's decision to approve the scheme to the Supreme Court—the day the Attorney's decision is affirmed by the court or the appeal is dismissed; or
 - (b) otherwise—28 days after public notice of the approval has been given under section 162 or the later day stated in the notice.
- (3) On taking effect, the scheme is as effective, for all purposes, as it would be if it were approved by order of the court.

164 Register of approvals [New; R13–2(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 approvals given by the Attorney-General under section 160.
- (2) The register must be available for public inspection at a place decided by the chief executive during the department's ordinary business hours.

165 Appeal from Attorney-General's decision approving a scheme [New; R13–2(f)]

A person aggrieved by the Attorney-General's decision to approve a scheme under section 160 may appeal from the decision to the Supreme Court.

166 Attorney-General's refusal to approve a scheme [New]

A decision by the Attorney-General to refuse to approve a scheme under section 160 does not prevent a trustee aggrieved by the decision applying to the court under section 159 or otherwise to approve the scheme.

Draft

Part 10 Gifts for philanthropic purposes

167 Definitions for pt 10 [TA, s 107]

In this part—

eligible recipient means a deductible gift recipient under the *Income Tax Assessment Act 1997* (Cwlth), whether or not the deductible gift recipient is a charity at law or (without limitation) is established for a charitable purpose or purposes.

prescribed trust means a trust—

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

trust instrument means the initial instrument establishing a prescribed trust, as modified by all validly executed amendments.

168 Prescribed trust—trust instrument containing express power to give to eligible recipients [TA, s 108]

The trust instrument of a prescribed trust may include an express power for the trustees to provide money, property or benefits to or for an eligible recipient or for the establishment of an eligible recipient.

169 Prescribed trust—trust instrument not containing express power to give to eligible recipients [TA, s 109]

- (1) The powers of the trustees of a prescribed trust, whose trust instrument does not contain an express power to do so, include a power to provide money, property or benefits to or for an eligible recipient or for the establishment of an eligible recipient.

[s 170]

Draft

- (2) Subsection (1)—
 - (a) applies despite a contrary intention in the trust instrument; but
 - (b) does not apply in relation to a particular eligible recipient or a particular class of eligible recipients to the extent that 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 class of eligible recipients; or
 - (ii) for the establishment of that eligible recipient or class of eligible recipients.
- (3) Subsection (1) does not apply to the trustees of a prescribed trust unless there is in force a declaration substantially to the effect of the approved form for the prescribed trust.
- (4) For the purpose of making a declaration under this section, the approved form may be modified so as to limit the application of the declaration to a stated eligible recipient or stated class of eligible recipients.
- (5) If the declaration made for a prescribed trust is so limited, subsection (1) in its application to the prescribed trust has effect only in relation to the stated eligible recipient or stated class of eligible recipients.
- (6) The trustees must ensure that the declaration, or a certified copy of it, is retained with the records of the prescribed trust.
- (7) The trustees are not under a duty to make a declaration under this section, nor are the trustees in breach of a duty in making a declaration under this section.

170 Ancillary provisions [TA, s 110]

- (1) A reference in this section to *prescribed power*, in relation to a prescribed trust, means—
 - (a) a power referred to in section 168 included in the trust instrument; or

- (b) the power referred to in section 169 as applying to the prescribed trust.
- (2) This Act applies to a prescribed trust as if the prescribed power were a power exercisable for a charitable purpose.
- (3) Without limiting subsection (2)—
 - (a) neither the existence nor the exercise of the prescribed power affects the validity or status of a charitable trust as a charitable trust; and
 - (b) a 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 a 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.

Draft

Part 11 Miscellaneous

171 Regulation-making power [New]

The Governor in Council may make regulations under this Act.

[s 172]

172 Approved forms [TA, s 118]

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

173 Local governments may be trustee for certain purposes [TA, s 116]

- (1) A local government may be appointed a trustee of—
 - (a) a charitable trust; or
 - (b) a trust for the benefit of persons for recreation or other leisure time activity.
- (2) The appointment may be as sole trustee or as a trustee with others.
- (3) The local government may act in the administration of the trust property for the purpose of and according to the trust even if the purpose is not a function of local government.
- (4) For an existing trust, subsection (3) applies subject to a contrary intention in the trust instrument.

Draft

Part 12 Repeal

174 Repeal of Trusts Act 1973

The Trusts Act 1973, No. 24 is repealed.

Part 13 Transitional provisions for repealed sections of the Trusts Act 1973

175 Definitions for pt 13

In this part—

commencement means the commencement of this section.

repealed Act means the repealed *Trusts Act 1973*.

176 Repealed s 6 (Exercise of powers)

- (1) This section applies to a person who was, immediately before the commencement, a statutory trustee.
- (2) After the commencement, the statutory trustee may exercise the powers available to the statutory trustee before the commencement under section 6 of the repealed Act subject to the limitations imposed on the exercise of the powers under the repealed Act.
- (3) The repealed Act continues to apply, after the commencement, in relation to the statutory trustee and the exercise of powers by the statutory trustee as if the repealed Act had not been repealed.
- (4) To remove any doubt, it is declared that this Act, except to the extent provided under this section, does not confer any power on the statutory trustee.
- (5) In this section—

statutory trustee has the meaning given under section 5 of the repealed Act.

177 Repealed s 11 (Limitation of the number of trustees)

- (1) This section applies despite section 12(1) and the repeal of the repealed Act.

Draft

[s 178]

- (2) If, immediately before the commencement, section 11(1) of the repealed Act applied in relation to the number of trustees for particular property, the section continues to have effect until its effect is exhausted.
- (3) If, immediately before the commencement, a certificate in writing mentioned in section 11(3) of the repealed Act was in force approving a greater number of trustees than 4 in whom property is vested or to be vested, the certificate continues to have effect to authorise the greater number of trustees of the trust.

178 Repealed s 15 (Vesting of trust property in new and continuing trustees)

- (1) This section applies if—
 - (a) under section 15 of the repealed Act, it is requisite that the vesting in a new trustee or the divesting from a discharged trustee should be notified to or registered or recorded by the registrar or other person having the duty or function of registering or recording any discharge or appointment of trustees or divesting or vesting or other dealings; and
 - (b) the notification, registration or recording has not been done before the commencement.
- (2) Despite its repeal, the repealed Act continues to have effect, for the notification, registration or recording of the vesting or divesting.

179 Repealed s 17 (Devolution of mortgage estates on death)

- (1) This section applies if, before the commencement, an estate or interest in property by way of mortgage was, and remains, vested in the public trustee under section 17 of the repealed Act.
- (2) Despite the repeal of the repealed Act, section 17 of the repealed Act continues to have effect until a grant of probate or letters of administration to the estate of the deceased

mortgagee is made and the mortgaged property devolves to and vests in the person to whom the grant is made.

180 Repealed s 55 (Protection of financial institutions)

Despite the repeal of the repealed Act, section 55 of the repealed Act continues to have effect in relation to anything done before the commencement for which protection was afforded by that section.

181 Repealed s 56 (Power to delegate trusts)

- (1) This section applies in relation to a power of attorney mentioned in section 56 of the repealed Act that is in operation immediately before the commencement.
- (2) Despite the repeal of the repealed Act and subject to subsection (4), section 56 of the repealed Act continues to have effect in relation to the power of attorney until the first of the following happens—
 - (a) the power of attorney ends in any way provided for under the repealed Act;
 - (b) the power of attorney expires under subsection (3).
- (3) The power of attorney expires at the end of the day 1 year after the commencement of this section.
- (4) Section 56(6), (7) and (8) of the repealed Act continues to have effect, after the commencement, in relation to any person dealing with the donee of the power of attorney.

182 Repealed s 57 (Power to carry on business)

- (1) This section applies if, immediately before the commencement, a trustee is exercising power under section 57 of the repealed Act to carry on business.
- (2) Despite the repeal of section 57 of the repealed Act, the section continues to apply to the trustee who may continue to act under the section as if it had not been repealed.

[s 183]

183 Repealed s 61 (Power to apply income for maintenance etc. and to accumulate surplus income during a minority)

To remove any doubt, it is declared that a trustee may exercise power under part 6, division 2 for the maintenance, education and advancement of a person whether the trust was created before or after the commencement and whether or not the trustee had, before the commencement, exercised power under section 61 of the repealed Act.

184 Repealed s 62 (Power to apply capital for advancement etc.)

To remove any doubt, it is declared that a trustee may exercise power under part 6, division 3 for the maintenance, education and advancement of a person whether the trust was created before or after the commencement and whether or not the trustee had, before the commencement, exercised power under section 62 of the repealed Act.

185 Repealed s 67 (Protection of trustees by means of advertisements)

- (1) This section applies if, before the commencement, a trustee advertised as mentioned in section 67 of the repealed Act in relation to the distribution of any of the trust property or estate and the date fixed in the notice was a date after the commencement.
- (2) Despite its repeal, section 67 of the repealed Act continues to apply in relation to the distribution of the trust property or estate and the rights and liabilities of the trustee or any other person.
- (3) In this section—
liabilities includes obligations.

186 Repealed s 68 (Barring of claims)

- (1) This section applies if, before the commencement, a trustee served a notice on a person under section 68 of the repealed

Act and the date by which the person was called on to take legal proceedings and prosecute the proceedings with all due diligence was the date of, or a date after, the commencement.

- (2) The trustee may apply to the court for an order under section 109 if the person has not taken legal proceedings or prosecuted the proceedings with all due diligence as required under the notice and section 68 of the repealed Act.

187 Repealed s 82 (Vesting orders)

- (1) This section applies if a vesting order has been made under section 82 of the repealed Act but has not been given full effect on the commencement.
- (2) The vesting order continues to have effect, with necessary changes, as if it had been made under this Act.

188 Repealed s 113(2) (Remedies for wrongful distribution of trust property)

To remove any doubt, it is declared that a person who has suffered loss by reason of the wrongful distribution of trust property or of the estate of a deceased person before the commencement is not required to exhaust all remedies that may be available to the person against the trustee before seeking to enforce a remedy against someone else under section 123.

Part 14 Amendment of Succession Act 1981

189 Act amended

This part amends the *Succession Act 1981*.

Draft

[s 190]

190 Insertion of new ss 49B and 49C

After section 49A—

insert—

**49B Power to carry on business [TA, s 57(1) to (4);
Admin of Estates Bill, cl 408; R8–3]**

- (1) This section applies if, at the time of a person's death, the person is engaged in carrying on a business.
- (2) Subject to any other Act other than the *Trusts Act 2013*, sections 59 and 60, the deceased person's personal representative may carry on the business only for—
 - (a) the period, up to 2 years from the person's death, reasonably necessary for the realisation of the business; or
 - (b) the further period or periods that the court approves.
- (3) For the purpose of carrying on the business, the personal representative may do any of the following—
 - (a) use any part of the deceased person's estate that is reasonably necessary;
 - (b) increase or reduce, as necessary, usage of the estate under paragraph (a);
 - (c) buy stock, machinery, implements and chattels;
 - (d) employ the managers, agents, workers and others the personal representative considers appropriate;
 - (e) at any time, enter into a partnership agreement to take the place of any partnership agreement subsisting immediately before the deceased person's death or at any time after;

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-
- (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 his or her own right.
- (5) The personal representative or a beneficiary of the deceased person's estate may apply to the court for leave to carry on the business at any time, whether or not any previous authority to carry on the business has ended.
- (6) For subsection (5), the court may make the order, including an order retrospective to a stated date or subject to conditions, it considers appropriate.
- (7) Nothing in this section affects any other authority to do the acts authorised to be done under this section.
- (8) 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.
- (9) In this section—
contrary intention, appearing in the deceased person's will, includes a provision of the will that confers on the personal representative the power to postpone the sale of any property that was being used by the person, at the time of the person's death, in carrying on the business.

49C Subscribing to a relevant fund if carrying on a business [TA, s 57(5); Admin of Estates Bill, cl 409; R8-3]

- (1) This section applies if a personal representative is carrying on a business under section 49B.
- (2) The personal representative may subscribe to any relevant fund in connection with the business that the personal representative considers would be

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[s 191]

prudent to subscribe to if he or she were acting for himself or herself.

- (3) Subscriptions must be paid from the business income.
- (4) Nothing in this section affects any other authority the personal representative may have to subscribe to a 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 any fund created for objects or purposes in support of any business of a similar nature and subscribed to by other persons engaged in a similar business.

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191 Insertion of new s 53A

After section 53—

insert—

53A Protection for personal representatives for calls made after transfer of shares [TA, s 75; R11–8]

- (1) This section applies if a deceased person was registered as the holder of shares in a company that have not been fully paid up.
- (2) The deceased person's personal representative may distribute the deceased person's estate as soon as the personal representative has procured 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 they 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.

192 Insertion of new s 61AA

Part 5, division 2, after section 61—

insert—

61AA Abolition of rule in Allhusen v Whittell [TA, s 78; R11–11]

- (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 deceased person's personal representative must not apply any part of the income of 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;

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- (c) any legacies bequeathed by the will.
- (3) Subsection (2) does not apply to—
 - (a) any commission that is 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 the deceased person,
includes a trustee of the will of the deceased
person.

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Schedule 1 Dictionary

section 5

accountant means—

- (a) a member of CPA Australia who is entitled to use the letters ‘CPA’ or ‘FCPA’; or
- (b) a member of The Institute of Chartered Accountants in Australia 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’.

advancement includes benefit.

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

appropriate trustee, for part 2, division 3, subdivision 3, see section 21.

approved form see section 172.

authorised investments means investments of trust funds that are—

- (a) authorised by the trust instrument; or
- (b) made by the trustee exercising a power of investment under part 4 or under an order under section 140; or
- (c) authorised by another Act or the general law.

bankrupt includes insolvent.

benefit, in relation to any person, includes insurance on the life of the person.

capacity, for a trustee for administering the trust, means the trustee is capable of—

- (a) understanding the nature and effect of decisions about administering the trust; and

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- (b) freely and voluntarily making decisions about administering the trust; and
 - (c) communicating the decisions in some way.

charitable see section 6.

charitable trust means a trust created for a charitable purpose.

charity, for part 9, see section 151.

claim, for part 7, division 3, see section 107.

claimant, for part 7, division 3, see section 107.

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 surviving trustee.

court, for an application under this Act, means—

- (a) if the value of all the trust property of the trust to which the application relates is less than the District Court monetary limit—the District Court; or
- (b) otherwise—the Supreme Court.

create, a trust, includes establish a trust.

custodian trustee means a corporation appointed as a custodian trustee under section 33.

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

eligible recipient, for part 10, see section 167.

entitled, to property, for part 8, see section 125.

guardian, in relation to a minor, includes—

- (a) generally—a parent of the person; and

(b) for part 6—see section 93.

impaired capacity, for a trustee administering a trust, means the trustee does not have capacity for administering the trust.

insolvent, in relation to a person, means the person is not solvent.

instrument, creating a trust, means any instrument, including an Act, creating the trust, whether made or enacted before or after, or partly before and partly after, the commencement of this definition.

investment power means a power under section 47 or a power of investment conferred under a trust instrument.

land registrar means the registrar under the *Land Title Act 1994* or other person having the function of registering or recording dealings with land.

last continuing trustee includes sole trustee.

lease includes bailment.

managing trustees see section 34(2).

named trustee see section 15.

payment, in relation to stocks and securities, includes the deposit or transfer of them.

prescribed trust, for part 10, see section 167.

priority outgoing see section 77.

protective trust, for part 8, division 5, subdivision 2, see section 141.

public trustee see the *Public Trustee Act 1978*.

purposes, of a charitable trust, for part 9, division 4, see section 156.

sale, of property, includes an exchange of property.

securities includes stock and debentures.

security, in relation to lending or investing trust funds, see section 7.

solvent, in relation to a person, means the person is able to pay all the person's debts, as and when they become payable.

stock includes shares.

substitute trustee, for part 5, division 7, see section 69.

trust includes—

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

trustee—

- (a) generally, includes—
 - (i) a trustee corporation; and
 - (ii) another corporation in which property subject to a trust is vested; and
 - (iii) a personal representative; and
- (b) for part 2—see section 9; and
- (c) for part 3—see section 41.

trustee corporation means—

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

trust instrument—

- (a) generally—means any instrument creating a trust, as modified by all validly executed amendments; and
- (b) for part 10—see section 167.

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

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- (d) land that is lawfully 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 life, or for the life of any other person or persons, or for any lesser period; and
- (f) for a trustee who is the personal representative of a deceased person, the estate of the deceased person; and
- (g) part of the trust property.

vesting order see section 132.

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