



Queensland
Law Reform Commission

A Review of the *Trusts Act 1973* (Qld)

Discussion Paper

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**A Review of the *Trusts Act 1973*
(Qld)**

Discussion Paper

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THE REVIEW

1.1 In January 2012, the Commission received terms of reference to review the *Trusts Act 1973* (Qld).¹ The terms of reference require 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.

1.2 The terms of reference also require the Commission, in undertaking the review, to have regard to the following matters:

- 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.

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

BACKGROUND

1.3 It is now more than 40 years since a comprehensive review has been undertaken of trusts legislation in Queensland. In 1971, this Commission published a Report on *The Law Relating to Trusts, Trustees, Settled Land and Charities* (the '1971 Report'), which was largely implemented by the enactment of the *Trusts Act 1973* (Qld).²

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

1.5 Most amendments made to the Act since that time, with the notable exception of the changes made in 2000 in relation to trustees' powers of investment, have been of a minor nature. This review provides an opportunity to examine whether the Act can be further improved and simplified, especially in relation to its articulation of trustees' duties and powers.

THE COMMISSION'S APPROACH TO THIS REVIEW

1.6 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.

1.7 The *Trusts Act 1973* (Qld) does not attempt to codify the law of trusts, but, instead, supplements the general law. 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.

1.8 The Commission does not propose to change the fundamental role of the *Trusts Act 1973* (Qld) in supplementing the general law — that is, the Commission does not propose that the current Act should be replaced with a trusts code.

KEY TOPICS AND STRUCTURE OF THIS DISCUSSION PAPER

1.9 Chapters 2 and 3 of this Paper give an overview of, respectively, the historical development of the trust and the nature, classification and use of trusts in the modern context; and Chapter 4 gives an overview of the development, scope and application of the *Trusts Act 1973* (Qld).

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

³ These changes are discussed in more detail in Chapter 4.

1.10 Chapter 5 examines the provisions in Part 2 of the Act, which deal with the appointment, replacement and retirement of trustees, and the vesting of property on the death of a trustee and on the appointment of a new trustee.

1.11 Chapter 6 examines the provisions in Part 3 of the Act, which deal with trustee's duties, powers and protections in relation to the investment of trust property. Those provisions were the subject of significant amendments in 2000, and give trustees wide powers of investment, subject to a statutory duty of care and certain other duties. The discussion of those provisions presents a platform for the discussion in later parts of this Paper of the possible adoption of a similar approach to other trustee powers. The chapter also considers the concept of 'total return investment'.

1.12 Chapter 7 gives an overview of trustees' duties under the general law, and examines whether:

- the Act should include a statutory duty of care (similar to the duty imposed by section 22 of the Act) that would apply to trustees generally in the administration of the trust, rather than being limited to the exercise of a power of investment;
- any of the specific duties that apply under the general law should be incorporated into the Act as statutory duties;
- the Act should include specific provisions to clarify the duty of trustees in relation to the keeping of accounts and other records, and the associated duty to provide accounts and other information to beneficiaries; and
- the duty of trustees to act jointly should remain unchanged or whether the Act should make provision for trustees to act by majority decision.

1.13 Chapters 8 and 9 examine, respectively, the management and administrative powers conferred on trustees by Part 4 of the Act.⁴ These provisions make up a considerable portion of the overall content of the Act.

1.14 Chapter 8 proposes that the Act should be amended to provide that trustees have, in relation to the trust property, all the powers of an absolute owner (the 'general property power'). It then considers whether any of the management powers currently conferred by the Act should be retained in stand-alone provisions, omitted, or included in a provision that lists examples of specific powers conferred by the general property power.

1.15 Chapter 9 examines the administrative powers conferred on trustees, including the powers to give receipts, insure trust property, compound liabilities, and make inquiries of beneficiaries. In particular, it considers the scope of trustees' power to employ agents and asks whether, and to what extent, the Act should enable trustees to appoint a third party (a delegate) to exercise some of the trustees' discretions.

4

While there is inevitably some overlap between 'management powers' and 'administrative powers', the Commission uses those terms in this Discussion Paper to distinguish between those powers that relate to the 'management of trust property in the commercial or practical sense' and those powers that relate to the 'legal powers and duties of trustees': see [12.74] below.

1.16 Chapter 10 examines a number of provisions, mostly in Parts 5 and 6, of the Act that deal with trustees' distributive powers and considers whether any of those provisions requires clarification or amendment. They include the powers to apply income or capital for the maintenance and advancement of a beneficiary, the delivery of chattels to life tenants and infants, and the power to appropriate trust property to beneficiaries.

1.17 Chapter 11 examines the provisions of the Act, mostly contained in Part 6, that deal with trustees' and third parties' indemnities and protections in certain situations. Among other things, it considers the circumstances in which a trustee should be protected from liability for the acts or defaults of an agent, and whether any refinements should be made to the protection conferred on trustees by means of advertisement for claims, for example, by providing for notices to be published on a dedicated searchable section of the Supreme Court website (were such a facility to be provided).

1.18 Chapter 12 examines the provisions of Part 7 of the Act that deal with the court's powers to appoint and remove trustees, to make vesting orders, and to make other orders relating to the administration of trusts. These include the power to give directions concerning the trust property or the trustees' powers, to authorise remuneration, and to review trustees' acts, omissions and decisions.

1.19 Chapter 13 examines the provisions in Parts 8 and 9 of the Act that relate to charitable trusts and the provision of gifts for philanthropic purposes. In particular, it considers whether, in addition to the court, the Attorney-General should be empowered to approve *cy pres* schemes for certain charitable trusts.

1.20 Chapter 14 examines the 'miscellaneous' provisions contained in Part 10 of the Act including, in particular, the provision in section 113 dealing with remedies for the wrongful distribution of trust property.

1.21 Chapter 15 gives an overview of the jurisdiction of the Supreme Court and other courts and tribunals to deal with matters relating to trusts. It considers whether the jurisdiction of the District Court to hear and determine actions for the execution of trusts should be clarified, and whether it would be appropriate or desirable, in less complex matters and matters involving lower monetary values, for the jurisdiction to hear trust disputes to be conferred on Magistrates Courts or the Queensland Civil and Administrative Tribunal.

1.22 Chapter 16 examines a number of provisions of the *Public Trustee Act 1978* (Qld) and the *Trustee Companies Act 1968* (Qld) that apply when the Public Trustee or a trustee company is acting as a trustee (or in certain other capacities) and that relate to powers or protections that are also available under the *Trusts Act 1973* (Qld). It also identifies the provisions of a number of other Acts that refer to provisions of the *Trusts Act 1973* (Qld), and which may need to be amended as a consequence of any changes recommended to the *Trusts Act 1973* (Qld) — in particular, if provisions of the Act are to be omitted or renumbered.

1.23 This Discussion Paper also examines the interaction of the provisions in the Act, particularly those that confer powers or impose duties on trustees, with the expression of a contrary intention in the trust instrument. 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.⁵ This issue is considered on a topic-by-topic basis throughout the Paper.

1.24 As a general observation, the Commission considers that the drafting style of the *Trusts Act 1973* (Qld) is now quite dated, with many lengthy and dense provisions. This reflects the fact that many of the provisions of the Act have their origins in English trustee Acts of the mid to late 1800s and have remained relatively unchanged since that time.⁶ Although the Commission's focus in this Discussion Paper has been on the substantive legal issues arising under the Act, the Commission is also mindful of the need to simplify and modernise the legislation.

SUBMISSIONS AND CONSULTATION

1.25 In Chapters 5 to 16 of this Discussion Paper, the Commission has asked a number of specific questions and made a number of preliminary proposals. The Commission welcomes submissions on those questions and proposals, as well as on any other issues that are relevant to the terms of reference that are not the subject of a specific question or proposal.

1.26 Submissions may be in any format and may respond to some, or all, of the issues raised in this Discussion Paper. Details on how to make a submission are set out at the front of this Paper.

1.27 The closing date for submissions is **18 March 2013**.

TIMEFRAME FOR THE REVIEW

1.28 The Commission is required to provide an interim report to the Attorney-General advising of its recommendations by 30 June 2013.

1.29 The Commission is required to provide its final report, including draft legislation (if relevant), by 31 December 2013.

⁵ This is discussed in more detail in Chapter 4.

⁶ Moreover, it was not unusual for provisions of the various English trustee Acts to be based on the wording of clauses commonly included in trust instruments of the time: see, eg, the comments in *Re Brier* (1884) 26 Ch D 238, 243 (Earl of Selborne LC); *Pilkington v Inland Revenue Commissioners* [1964] AC 612, 634 (Viscount Radcliffe); Law Commission of England and Wales, *Trustees' Powers and Duties*, Consultation Paper No 146 (1997) [3.19].

Chapter 2

The Historical Development of the Trust

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THE MEDIEVAL USE

2.1 The origins of the modern trust can be traced to medieval England and a practice known as the ‘use’ or ‘feoffment to uses’. The *feoffor* conveyed land to a *feoffee* (in modern terminology, the trustee) to hold for the benefit of the *cestui que use* (the beneficiary).¹ The common form was for land to be conveyed ‘to A and his heirs to the use of B and his heirs’.²

2.2 The popularity of conveying land on a use in the Middle Ages is attributed to two main reasons. First, it provided relief from the payment of feudal dues that were otherwise owed under the system of land tenure.³ An owner of land (the feoffor) could convey land to be held by a feoffee for the feoffor’s benefit and at his direction. In this way, the feoffor could remain in possession of the land and continue to enjoy the benefits and profits while avoiding feudal dues. Such ‘passive uses’ were common.⁴ Secondly, the practice of conveying land on a use gave landholders greater freedom to distribute land and to provide for family members other than the heir.⁵

THE DEVELOPMENT OF THE USE

2.3 Sir William Holdsworth has attributed ‘the unique character of the English use or trust’ to ‘the unique manner in which the principles of equity were developed in England, owing to the fact that their administration was entrusted to a separate

1 GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [16.25].

2 KE Digby, *An Introduction to the History of the Law of Real Property* (Clarendon Press, 1875) 252.

3 GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [16.30]; HG Hanbury, *Modern Equity: The Principles of Equity* (Stevens & Sons, 8th ed, 1962) 8–9.

4 Sir William Holdsworth, *A History of English Law* (Methuen and Sweet and Maxwell, first published 1924, 1945 ed) vol 4, 423.

5 At the time, inheritance laws provided that land automatically devolved to the first born son. It was not until the *Statute of Wills* was enacted in 1540 that a person could devise land by will. However, the same effect could be achieved by declaring that land was to be held to the use of certain persons after death: Sir William Holdsworth, *A History of English Law* (Methuen and Sweet and Maxwell, first published 1924, 1945 ed) vol 4, 438; HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 August 2009) [1.110].

court'.⁶ Until the enactment of the *Judicature Acts* of 1873 and 1875, the common law courts and courts of equity were distinct.⁷ The law in relation to uses and trusts was developed within the exclusive jurisdiction of the courts of equity (in particular, the Court of Chancery).⁸

2.4 The fundamental feature of the use was the separation of legal ownership (which could be enforced at common law) and a beneficial interest (which could be enforced in equity):⁹

under the feudal doctrine of seisin, the common law recognised the feoffee to use as having legal ownership, but did not recognise the interest of the cestuis que use. The latter had, in actuality, nothing but an expectation or confidence that their feoffee to use would hold the land to their use. By the outset of the 15th century, however, equity's jurisdiction had extended to recognising the interest of the cestuis que use. The Court of Chancery did not act directly against the land itself (the so-called right in rem: the right against the world at large) but acted on the conscience of the feoffee to use to carry out the terms of the use in accord with the general principles of equity. In this way, equity did not interfere with the common law seisin of the feoffee to use, but proceeded against the conscience of the individual feoffee to use to comply with her or his personal obligations (proceedings in personam: the right against the person) to the cestui que use.

2.5 The law in relation to uses developed in parallel with their growing popularity. For example, while uses could initially be created only by an express agreement, by the end of the fifteenth century it was established that uses could also arise by implication.¹⁰ Furthermore, the development of springing and shifting uses, which provided that an interest could arise on the happening of a future event, allowed for increased flexibility in the creation of future interests in land:¹¹

Under a 'springing use', no prior estate was disturbed and the interest arose at the time of some future event. For example, 'A to the use of any wife B may marry' or 'A to the use of C at 21'. Under a 'shifting use' the prior estate 'shifted' on the occurrence of a specified event. For example, 'A to the use of B however if B obtains Blackacre to C' or 'A to the use of D but if D marries to the use of E'.

2.6 The principles established by the Court of Chancery in the fifteenth century 'turned the interest of the beneficiary into a new kind of ownership, analogous to what was later called the "equitable estate"':¹²

⁶ Sir William Holdsworth, *A History of English Law* (Methuen and Sweet and Maxwell, first published 1924, 1945 ed) vol 4, 418.

⁷ PH Pettit, *Equity and the Law of Trusts* (Oxford University Press, 11th ed, 2009) 8.

⁸ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [16.25].

⁹ Ibid.

¹⁰ Sir William Holdsworth, *A History of English Law* (Methuen and Sweet and Maxwell, first published 1924, 1945 ed) vol 4, 421.

¹¹ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [16.30]. See also KE Digby, *An Introduction to the History of the Law of Real Property* (Clarendon Press, 1875) 256.

¹² JH Baker, *An Introduction to English Legal History* (Butterworths LexisNexis, 4th ed, 2002) 251.

If the feoffees died, the trust passed to the heir of the last survivor; if the feoffees alienated the land, the trust bound the purchaser, unless he bought for value without notice of the trust, in which case alone his conscience was clear. (notes omitted)

THE STATUTE OF USES

2.7 By the fifteenth and early sixteenth centuries, the use had become so widespread that it was said that the majority of land in England was held in use.¹³

2.8 One of the most important legislative developments in the history of uses and trusts was the enactment of the *Statute of Uses of 1535*.¹⁴ The Act brought an end to the most common type of use — the ‘passive use’ — by transferring the legal ownership to the *cestui que use*, thereby ‘executing’ the use.¹⁵ As explained earlier, this type of use was primarily employed to evade feudal dues.¹⁶

2.9 Significantly, however, the *Statute of Uses* did not execute all uses or prevent the creation of uses.¹⁷ For example, it did not apply to uses where the feoffee-trustee had active duties to perform; nor did it apply to leaseholds or chattels.¹⁸ In particular, the *Statute of Uses* did not execute a ‘use upon a use’, where land was conveyed ‘to A to the use of B to the use of C and his heirs’.¹⁹ It was the ‘use upon a use’ that eventually gave rise to the trust.²⁰

2.10 Prior to the *Statute of Uses*, it had been held that a use upon a use was void because it was ‘repugnant to the first use, and they [could not] stand together’.²¹ This was followed in 1557 in *Tyrell’s Case*,²² even though the first use was deemed to be executed under the *Statute of Uses*.²³ Although *Tyrell’s Case* confirmed that a use upon a use was void, it nevertheless clarified that the second use was not executed by the *Statute of Uses*:²⁴

¹³ PH Pettit, *Equity and the Law of Trusts* (Oxford University Press, 11th ed, 2009) 13; GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [16.30].

¹⁴ 27 Hen 8, c 10.

¹⁵ G Watt, *Trusts and Equity* (Oxford University Press, 4th ed, 2010) 10; HJ Stephen et al, *Mr Serjeant Stephen’s New Commentaries on the Laws of England* (Butterworth, 15th ed, 1908) vol 1, 243.

¹⁶ Sir William Holdsworth, *A History of English Law* (Methuen and Sweet and Maxwell, first published 1924, 1945 ed) vol 4, 463. See [2.2] above.

¹⁷ *Ibid* 462–3.

¹⁸ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [16.35].

¹⁹ PH Pettit, *Equity and the Law of Trusts* (Oxford University Press, 11th ed, 2009) 13.

²⁰ See, eg, Sir William Holdsworth, *A History of English Law* (Methuen and Sweet and Maxwell, first published 1924, 1945 ed) vol 4, 467–73; HJ Stephen et al, *Mr Serjeant Stephen’s New Commentaries on the Laws of England* (Butterworth, 15th ed, 1908) vol 1, 246–7.

²¹ J Barr Ames, ‘The Origin of Trusts’ in *Lectures on Legal History* (Harvard University Press, 1913) 244.

²² 2 Dy 155a; 73 ER 336.

²³ J Barr Ames, ‘The Origin of Trusts’ in *Lectures on Legal History* (Harvard University Press, 1913) 243.

²⁴ *Ibid* 244.

the second use then being a nullity, both before and after the *Statute of Uses*, that statute could not execute it.

2.11 Although the precise origins and reasons are unclear, it is known that by the middle of the seventeenth century the second use was being recognised and enforced by the Court of Chancery.²⁵ Following the abolition of feudal dues in 1660,²⁶ the Court of Chancery began to enforce the second use as a trust in all cases.²⁷ It has been noted that, once feudal dues were abolished, ‘the Statute of Uses no longer served a beneficial purpose which could justify the rejection of passive trusts’.²⁸ One legal historian has observed:²⁹

The modern passive trust seems to have arisen for substantially the same reasons which gave rise to the ancient use. The spectacle of one retaining for himself a legal title, which he had received on the faith that he should hold it for the benefit of another, was so shocking to the sense of natural justice that the chancellor at length compelled the faithless legal owner to perform his agreement.

2.12 By the end of the 17th century, the usual practice was for land to be conveyed ‘unto and to the use of B and his heirs in trust for C’.

2.13 The *Statute of Uses* was eventually repealed in England by the *Law of Property Act 1925*.³⁰ In the meantime, the trust had grown to be a highly adaptable institution.³¹ As Pettit has observed, ‘the trust has become a much more highly developed institution than the use had ever been and has since been, and now is used for a wide variety of purposes’.³²

THE DEVELOPMENT OF THE MODERN TRUST

2.14 From the 17th century onwards, trusts have been used for a number of different purposes, including ‘for charitable purposes; for the payment of debts; to provide for the incapable; to give married women independent control of property, and in the settlement of family estates’.³³

²⁵ See, eg, *Sambach v Dalston* (1634) Tot 188; 21 ER 164. It has been suggested that cases where the second use was enforced before 1660 must be regarded as decisions on especially hard cases: HG Hanbury, *Modern Equity: The Principles of Equity* (Stevens & Sons, 8th ed, 1962) 12. Cf NG Jones ‘The Use Upon a Use in Equity Revisited’ (2002) 33 *Cambrian Law Review* 67, who suggests that the use upon a use was continually recognised in equity from 1560.

²⁶ *Tenures Abolition Act of 1660*, 12 Car II, c 24.

²⁷ Sir William Holdsworth, *A History of English Law* (Methuen and Sweet and Maxwell, first published 1924, 1945 ed) vol 4, 473.

²⁸ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 August 2009) [1.1030].

²⁹ J Barr Ames, ‘The Origin of Trusts’ in *Lectures on Legal History* (Harvard University Press, 1913) 247.

³⁰ In Queensland, the *Statute of Uses* was repealed by the *Property Law Act 1974* (Qld).

³¹ Sir William Holdsworth, *A History of English Law* (Methuen and Sweet and Maxwell, first published 1924, 1945 ed) vol 4, 473.

³² PH Pettit, *Equity and the Law of Trusts* (Oxford University Press, 11th ed, 2009) 14.

³³ N Jones, ‘Uses and Trusts, History of’ in P Cane and J Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press), Oxford Reference Online at 21 March 2012.

2.15 At first, the ‘settled land trust’ — designed to keep land and income within land-owning families for the use of future generations — dominated.³⁴

Like its ancestor the use, the trust started out by giving effect to a settlor’s wishes in family settlements, during his life or after his death. It was designed to keep the land in the family; it could establish successive interests in realty or in personalty which could not be created at law. It enabled the rich landowner to provide openly for his younger sons and daughters, his spendthrift children, for his animals, or for charity; and, secretly, for his illegitimate offspring.

2.16 The law in relation to settled land trusts was reformed in England by the *Settled Land Acts* of 1882 and 1925. In the wake of a period of agricultural depression, these Acts sought to liberate settled land from the strict legal restrictions that often made good management of the land impossible, and to allow for the greater alienability of land.³⁵

2.17 With industrialisation, trusts for the settlement of property other than land, such as stocks and shares, became more common.³⁶

The change in the dominant subject matter of trusts came with the change in the constitution of national wealth. The agrarian economy slowly became industrialized and along with it came new forms of wealth (in bank accounts, bonds and shares) and a new class of wealthy people — merchants and industrialists — who were as eager as landed families to preserve and transmit their newfound wealth with trusts.

2.18 ‘Trusts for sale’, whereby land was held by trustees for the purposes of selling it and holding the proceeds for the benefit of beneficiaries, also became increasingly common.³⁷

2.19 The trust ‘expanded from being principally a landholding device to an instrument for commercial activity’,³⁸ giving rise to the modern management trust:³⁹

Today’s trust has ceased to be a conveyancing device for land and has become, instead, a management device for holding a portfolio of assets.

2.20 Whereas trustees of strict settlements had only limited powers, trustees are now typically given broad powers of management. Similarly, there has been a shift from private trustees acting gratuitously to professional fee-paid trustees.⁴⁰

³⁴ G Fricke and OK Strauss, *The Law of Trusts in Victoria* (Butterworths, 1964) 103.

³⁵ Sir R Megarry and HWR Wade, *The Law of Real Property* (Steven & Sons, 5th ed, 1984) 311–24; WS Holdsworth, ‘The Reform of the Land Law: An Historical Retrospect’ (1926) 42 *Law Quarterly Review* 158, 175.

³⁶ MW Lau, *The Economic Structure of Trusts* (Oxford University Press, 2011) 3.

³⁷ Sir R Megarry and HWR Wade, *The Law of Real Property* (Steven & Sons, 5th ed, 1984) 314–15, 385–97. After 1925, trusts for sale were governed by the *Law of Property Act 1925*, 15 & 16 Geo 5, c 20. See also G Fricke and OK Strauss, *The Law of Trusts in Victoria* (Butterworths, 1964) 104; LA Sheridan and GW Keeton, *The Law of Trusts* (Barry Rose, 12th ed, 1993) 48.

³⁸ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [16.40].

³⁹ JH Langbein, ‘Rise of the Management Trust’ (2004) *Trusts & Estates* 52, 53.

⁴⁰ JH Langbein, ‘The Contractarian Basis of the Law of Trusts’ (1995) 105 *Yale Law Journal* 625, 638–40.

2.21 Throughout this time, rules began to develop in relation to the trustee's duty to manage, invest and distribute property.⁴¹ One commentator has noted that:⁴²

Only within the past century or so, as financial assets displaced ancestral land from the typical trust, have trustees come routinely to exercise the levels of discretion over trust property that bring the fiduciary standards of loyalty and care into frequent play. As a practical matter, trust fiduciary law has been twentieth century law.

2.22 The historical development of the trust confirms, as Sir Frederick Maitland observed, that the trust is 'an institute of great elasticity and generality'.⁴³

⁴¹ HG Hanbury, *Modern Equity: The Principles of Equity* (Stevens & Sons, 8th ed, 1962) 16; Law Commission of New Zealand, *Review of Trust Law in New Zealand: Introductory Issues Paper*, Issues Paper No 19 (2010) [2.30].

⁴² JH Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 *Yale Law Journal* 625, 643.

⁴³ FW Maitland, *Equity: A Course of Lectures* (Cambridge University Press, revised ed, 1947) 23. The modern uses of the trust are discussed in Chapter 3.

Chapter 3

The Nature, Classification and Use of Trusts

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THE NATURE OF A TRUST

3.1 A trust is not a legal entity with a separate legal personality, like a corporation.¹ Rather, the term ‘trust’ describes a particular type of relationship and set of obligations, with respect to property, that is recognised by, and enforceable in, equity.²

3.2 The central feature of a trust is ‘the holding of property by its legal owner (the “trustee”) for the benefit of others (the “beneficiary”)³ or for a purpose recognised at law⁴ — ordinarily a charitable purpose.⁵

¹ *Suncorp Insurance and Finance v Commissioner of Stamp Duties* [1998] 2 Qd R 285, 289 (Fitzgerald P); *Raffles Corporation Pty Ltd v Cech* [2001] QSC 129, [5] (Wilson J).

² As to the distinction between trusts and other legal relationships, such as bailment, debt and agency, see JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) ch 2; GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [16.50] ff.

³ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [16.05].

⁴ JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [101]. See also the definition in *Convention on the Law Applicable to Trusts and on Their Recognition*, opened for signature 1 July 1985, 1664 UNTS 311 (entered into force 1 January 1992) art 2.

⁵ Recognised charitable purposes for trusts include the relief of poverty, the advancement of education, the advancement of religion, and other purposes beneficial to the community within the spirit and intendment of the preamble of the *Statute of Charitable Uses 1601*, 43 Eliz 1, c 4: see the discussion in Chapter 13 below.

3.3 As a general rule, property cannot remain subject to a trust indefinitely. 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 vest⁶ within the required time.⁷ However, some particular types of trusts are exempt from the rule.⁸ For example, the ‘rules of law relating to perpetuities’ do not apply, and are taken never to have applied, to the trusts of any superannuation entity or of any fund or scheme for the benefit of any employee of a corporation.⁹

Elements and characteristics of a trust

3.4 The authors of *Jacobs’ Law of Trusts in Australia* identify the following ‘four essential elements present in every form of trust’:¹⁰

- one or more trustees, who may be individuals or corporations, in whom the trust property is vested;¹¹
- the trust property, which may be real or personal, tangible or intangible, legal or equitable, as long as it is sufficiently identified;

Trusts for other purposes, such as the maintenance of animals or graves, are generally regarded as anomalous and have been recognised by the courts only infrequently and with qualification: see JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) ch 11.

⁶ Vesting, in this context, refers to vesting in interest rather than vesting in possession and so refers to the accrual of ‘a present fixed right of future enjoyment’: see *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490, 496 (Griffith CJ). It requires that the person who takes the interest is ascertained, the extent of the interest is fixed, and there are no uncertain events that must occur before the interest can come into possession: see RP Meagher and WMC Gummow, *Jacobs’ Law of Trusts in Australia* (Butterworths, 6th ed, 1997) [940].

⁷ 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). For the other statutory modifications made to the rule against perpetuities, see *Property Law Act 1974* (Qld) ss 206–222. Similar provision to s 209(1) is made in a number of other Australian jurisdictions: see *Perpetuities and Accumulations Act 1992* (Tas) s 6(1); *Perpetuities and Accumulations Act 1968* (Vic) s 5(1); *Property Law Act 1969* (WA) s 101. In South Australia, the rule against perpetuities has been abolished: *Law of Property Act 1936* (SA) s 61. Instead, s 62 of the Act enables the court, in specified circumstances, to vary the terms of a disposition of property. If, 80 years or more after the date of a disposition of property, there remain interests in the property that have not vested, the court may vary the terms of the disposition so that the interests vest immediately: s 62(1). Further, the court may vary the terms of a disposition of property so that interests that cannot vest, or are unlikely to vest, within 80 years after the date of the disposition, will vest within that period: s 62(2).

⁸ JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [928].

⁹ *Superannuation Industry (Supervision) Act 1993* (Cth) s 343; *Corporations Act 2001* (Cth) s 1346. See also *Property Law Act 1974* (Qld) s 220(1)(d).

¹⁰ JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [104]–[110].

¹¹ Since a trust is not a separate legal entity, the trustee, as the legal owner of the trust property, is personally liable for debts incurred in performing the trust, subject to the trustee’s right to indemnity against the trust assets (or, in certain circumstances, against the beneficiaries personally) for expenses and liabilities properly incurred in the discharge of the trust: see *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties (Qld)* [1984] 1 Qd R 576, 584–5 (McPherson J); JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2102]. See also the statutory right of indemnity in *Trusts Act 1973* (Qld) s 72, discussed in Chapter 11 below.

- the beneficiaries, whether individuals or a class of individuals, who will benefit under the trust,¹² or the charitable purpose that is the object of the trust; and
- the personal obligation of the trustee, annexed to the trust property, to deal with the property for the benefit of the beneficiaries or the charitable purpose, as the case may be.

3.5 Beyond this, there are said to be two core characteristics of a trust:

- the separation of the legal title to, and the beneficial interests in, the trust property; and
- the existence of a fiduciary relationship.

Separation of legal title and beneficial interests

3.6 The first core characteristic of a trust is sometimes described as the separation of legal ownership from the beneficial enjoyment of the property. Absolute ownership confers full rights of possession, occupation, use, enjoyment, and alienation, the beneficial interests in the property being ‘absorbed’ by, rather than distinct from, the legal estate.¹³ When property becomes subject to a trust, however, ‘a separation between the legal ownership of property and the right to enjoy the benefits of that property’ is said to occur.¹⁴ That is, ‘in a trust arrangement what we normally associate with “legal ownership” becomes transformed into something else’.¹⁵ The legal owner, as trustee, is not free to exercise his or her rights of ownership for his or her own benefit, but — as previously noted — is under a ‘personal obligation’, which is annexed to the property, ‘to deal with the trust property for the benefit of the beneficiaries’.¹⁶ That obligation gives rise to a

¹² The trustee may be one of the beneficiaries, but, as a general rule, a person cannot be both sole trustee and sole beneficiary of the same property. 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). There are, however, statutory exceptions to this rule: see [3.44] below.

¹³ *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 706 (Lord Browne-Wilkinson); *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 511, 519 (Hope JA); *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431, 442 (Gibbs CJ), 463 (Aickin J), 473–4 (Brennan J).

¹⁴ M Conaglen, ‘Trusts’ in P Cane and J Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press), Oxford Reference Online at 21 March 2012. This has also been expressed in terms of ‘a duality of ownership’ or a ‘separation’ or ‘splitting’ of legal and equitable title: see, eg, GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [16.05]; KD Schenkel, ‘Trust Law and the Title-Split: A Beneficial Perspective’ (2009) 78(1) *University of Missouri-Kansas City Law Review* 181, 181 n 2 and the references cited there.

¹⁵ S Wilson, *Todd & Wilson’s Textbook on Trusts* (Oxford University Press, 10th ed, 2011) 7–8.

¹⁶ JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [110], quoted with approval in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 511, 519 (Hope JA). See also, eg, *O’Sullivan v Commissioner of Stamp Duties* [1984] 1 Qd R 212, 229 (Williams J). As stated at n 12 above, the trustee may be one of the beneficiaries, provided that the person is not both sole trustee and sole beneficiary.

corresponding right in the beneficiary (regarded in equity as equivalent to an interest in the property)¹⁷ to compel the trustee to perform the trust.¹⁸

Where the trustee is the owner of the legal fee simple, the right of the beneficiary, although annexed to the land, is a right to compel the legal owner to hold and use the rights which the law gives him in accordance with the obligations which equity has imposed upon him. The trustee, in such a case, has at law all the rights of the absolute owner in fee simple, but he is not free to use those rights for his own benefit in the way he could if no trust existed. Equitable obligations require him to use them in some particular way for the benefit of other persons.

3.7 In this way, the trust can be understood as a ‘hybrid of property and obligation’.¹⁹

3.8 Sometimes, the ‘separation’ is expressed more simply. It has been said, for example, that where trust property comprised of real estate vests in a new trustee, what is conferred on the trustee is ‘the legal title to the assets of the ... Trust. The equitable title to those assets [having] remained throughout where it always has been, which was in the beneficiaries themselves’.²⁰

3.9 The shorthand conceptualisation of the trust in terms of a ‘separation’ of legal ownership and beneficial interests reflects the historical development of trusts at a time when the common law and equitable jurisdictions were separate.²¹

Fiduciary relationship

3.10 The second core characteristic of a trust is that it puts the trustee in a fiduciary position with respect to the beneficiaries. The role of a fiduciary is characterised by an obligation to act in the interest of the other party.²² The classic

¹⁷ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [16.10]; *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490, 503 (Isaacs J); *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 511, 518 (Hope JA). It has been noted, however, that not all trusts involve beneficiaries in whom an equitable *proprietary* interest is vested. Notable exceptions are charitable trusts and discretionary trusts: see P Parkinson, ‘Reconceptualising the Express Trust’ (2002) 61(3) *Cambridge Law Journal* 657, 659–63. In such cases, legal ownership is said to be separated from the beneficial interests only in the sense that the trustee cannot use the property for his or her own benefit.

¹⁸ *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 511, 519 (Hope JA), quoted with approval in *O’Sullivan v Commissioner of Stamp Duties* [1984] 1 Qd R 212, 230 (Williams J).

¹⁹ G Watt, *Trusts and Equity* (Oxford University Press, 4th ed, 2010) 29.

²⁰ *Re Davies* [1989] 1 Qd R 48, 52 (McPherson J; Andrews CJ agreeing).

²¹ M Conaglen, ‘Trusts’ in P Cane and J Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press), Oxford Reference Online at 21 March 2012. The nomenclature of a separation of legal ownership and beneficial interests has been described as ‘a compact retrospective legal description’ or ‘fiction’: KD Schenkel, ‘Trust Law and the Title-Split: A Beneficial Perspective’ (2009) 78(1) *University of Missouri-Kansas City Law Review* 181, 190.

²² *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ), 137 (Gummow J). See also *Bristol and West Building Society v Mothew* [1998] Ch 1 in which Millett LJ stated (at 18) that ‘[t]he distinguishing obligation of a fiduciary is an obligation of loyalty’, cited with implicit approval in *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd* [2005] QSC 233, [579] (Chesterman J).

statement of the nature of the fiduciary relationship was provided by Mason J in *Hospital Products Ltd v United States Surgical Corporation*:²³

The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations (cf *Phipps v Boardman* [1967] 2 AC 46, at p 127), viz, trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions 'for', 'on behalf of', and 'in the interests of' signify that the fiduciary acts in a 'representative' character in the exercise of his responsibility, to adopt an expression used by the Courts of Appeal.

3.11 As well as the other duties that apply, a trustee is therefore subject to a number of fiduciary obligations. These include the obligation to avoid situations in which there may be a conflict between the fiduciary's personal interests and his or her duties as a fiduciary (the 'no conflict rule'), and the prohibition on receiving unauthorised profit or advantage by reason of his or her position as a fiduciary (the 'no profit rule').²⁴ As fiduciaries, trustees also have a general duty to act honestly and in good faith in the exercise of their discretionary powers.²⁵

CLASSIFICATION AND CREATION OF TRUSTS

3.12 Trusts can come into existence in a variety of ways and can be classified accordingly.²⁶

Express trusts

3.13 Most trusts are intentionally created by the original legal owner of the property. A trust created in this way, when there is an express declaration of an intention to create a trust, is referred to as an 'express trust'.²⁷

3.14 Thus, an express trust can be created when the legal owner of the property (the 'settlor') transfers, and entrusts, the property to another person with the express intention of making that person a trustee of the property. Alternatively,

²³ (1984) 156 CLR 41, 96–7, cited, eg, in *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1, 34–5 (French CJ, Gummow, Hayne, Heydon and Kiefel JJ); *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd* [2005] QSC 233, [576] (Chesterman J); *Benzlaw & Associates Pty Ltd v Medi-Aid Centre Foundation Ltd* [2007] QSC 233, [88] (Muir J); and *JM Kelly (Project Builders) Pty Ltd v Toga Development No 31 Pty Ltd* [2008] QSC 311, [59] (Daubney J).

²⁴ See, eg, GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [16.10], [22.70]–[22.115].

²⁵ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1608].

²⁶ See generally *ibid* [301]–[305].

²⁷ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [17.05].

an express trust can arise when the settlor makes an express declaration that he or she holds the property on trust, without transferring the property to another party. These are sometimes referred to as 'inter vivos' trusts because they are created during the settlor's lifetime.

3.15 An express trust can also arise after the settlor's death, by the terms of his or her will.²⁸ For example, the maker of a will (the 'testator') may include a provision in the will for part of his or her estate to be held on trust for his or her children. Trusts made in this way are often called 'testamentary' trusts.

3.16 A person who has been appointed as trustee by the settlor is not, however, required to accept the office of trustee. Provided that the person has not already accepted the office, the person may renounce or 'disclaim' the trusteeship either in writing or, sometimes, by conduct that indicates a clear refusal to accept. The disclaimer of office by a sole trustee will not cause the trust to fail; instead the trust property reverts in the settlor to hold as trustee.²⁹

The three certainties

3.17 To be valid, an express trust must satisfy 'the three certainties':³⁰

- certainty of intention to create a trust, rather than, for example, the intention to make an absolute gift of the property or the expression of a mere hope that the property will be used in a particular way;
- certainty of subject matter, where the trust property is defined and identified; and
- certainty of object, such that the trust is in favour of definite beneficiaries³¹ or a recognised (usually charitable) purpose so that there is someone who can enforce the trust.

3.18 Express trusts must also comply with particular statutory writing requirements.³² Where a trust is created and its terms are set out in writing, the written document is referred to as the 'trust instrument' or 'trust deed'.³³ A trustee is under a duty to follow the terms of the trust instrument.³⁴

28 Ibid.

29 See generally JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1502]; *Mallott v Wilson* [1903] 2 Ch 494, 503 (Byrne J).

30 GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [17.05] ff.

31 As to the certainty with which beneficiaries must be identified in the trust, see *O'Brien v Smith* [2012] QSC 166, [27]–[29] (M Wilson J).

32 GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) ch 18. See *Property Law Act 1974* (Qld) s 11; *Succession Act 1981* (Qld) ss 10, 18.

33 In the *Trusts Act 1973* (Qld), the 'instrument creating the trust' is defined to include 'any deed, will, agreement for a settlement, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act': s 5(1).

34 GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [22.15].

Fixed and discretionary trusts

3.19 The trust instrument might prescribe or fix the entitlement of the beneficiaries so that the trustee has no choice about who will benefit under the trust or what their interest will be (a 'fixed trust'). In a fixed trust, the beneficiaries have an equitable proprietary right in the trust property and can enforce the distribution of the trust.

3.20 More commonly, however, the trust instrument will give the trustee the discretion to determine the distribution of the trust (a 'discretionary trust'). In the case of a private trust, the trustee will typically have the discretion to select who, from a definite class of beneficiaries, will receive a distribution under the trust, as well as the timing and the amount of the distribution. In this type of trust, the beneficiaries can enforce the due administration of the trust but do not have any proprietary right in the trust property until the trustee determines to distribute to them.³⁵

Private and charitable trusts

3.21 If an express trust is intended for the benefit of an individual or individuals, it is classified as a 'private trust'. This is distinguished from a trust for a recognised public purpose, notably a charitable trust.³⁶

Resulting and constructive trusts

3.22 Although most trusts are created by the express intention of the original legal owner of the property, the courts also recognise trusts in other circumstances.

3.23 A 'resulting trust', where the property is held on trust for the settlor, is recognised when it appears that the settlor did not intend for the legal owner of the property to take the property beneficially.³⁷ It is ordinarily presumed, for example, that, if a person pays the purchase price of the property and directs that the title to the property be transferred into the name of another person, the transferee does not hold the property beneficially but on trust for the purchaser.³⁸ Similarly, if an express trust fails in some way or fails to dispose of the entire beneficial interest in the property, it is presumed that the settlor did not intend for the trustee to take the

³⁵ Ibid [16.15], [20.120]–[20.125].

³⁶ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [302]. See n 5 above.

³⁷ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 15 October 2008) [21.000], [21.010], [21.060].

³⁸ Ibid [21.060]; GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [26.60], citing, eg, *Calverley v Green* (1984) 155 CLR 242, 246 (Gibbs CJ); *Brown v Brown* (1993) 31 NSWLR 582, 588–9 (Gleeson CJ), 595 (Kirby P). The presumption may, however, be rebutted by evidence to the contrary. If the transferee is a person whom the purchaser is obliged to support, such as the purchaser's wife or child, an alternative presumption, that the transferee was intended to take the property beneficially, may arise (the 'presumption of advancement'). See GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [26.95], [26.110], [26.120] ff. But note the courts' wide powers to alter or adjust the property rights of spouses under the *Family Law Act 1975* (Cth) ss 79, 90SM and the *Property Law Act 1974* (Qld) s 286.

benefit of the property and it will instead be held on trust for the settlor.³⁹ Thus, it is sometimes said that the beneficial interest ‘results’ to the settlor, or that a trust ‘results’ from the circumstances of the case.⁴⁰

3.24 A ‘constructive trust’ is recognised in certain circumstances in which, according to equitable principle and often independently of any intention by the parties to create a trust, it would be unconscionable for a person to hold or apply the property without recognising another person’s beneficial interest.⁴¹ For example, a fiduciary may be held liable to account, as a constructive trustee, for a gain made in breach of his or her fiduciary duties.⁴² In the context of the breakdown of a joint endeavour, the legal owner of property acquired for that endeavour through disproportionate joint contributions may also be liable to hold or deal with the property as a constructive trustee in the proportion of the other person’s contribution.⁴³ It has been suggested that these are called ‘constructive trusts’ because the court ‘construes’ the circumstances as giving rise to a particular obligation of trust.⁴⁴

THE MODERN USE OF TRUSTS

3.25 As explained in the previous chapter, the trust was historically concerned predominantly with the settlement of land within families, but its flexibility enabled it to adapt to changing forms of wealth and to the interests of commerce. Use of the trust shifted from transfers of land, to trusts of other forms of property, particularly funds of financial assets requiring more active trustee management.⁴⁵ Today, the trust is used for a variety of private, investment and commercial purposes, as well as for charity and other purposes.

3.26 There are many reasons for the attractiveness of the trust. A key factor is that the trust involves a separation of legal and equitable title or, put another way, a separation of management and benefit. This allows some of the burdens or consequences of legal ownership to be diverted. For example, in some circumstances, it may provide limited protection from creditors in the event of

³⁹ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [26.15]–[26.35]; *Re Vandervell’s Trusts (No 2)* [1974] 1 Ch 269, 289, 291 (Megarry J).

⁴⁰ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [26.05]; *Anderson v McPherson (No 2)* [2012] WASC 19, [90]–[92] (Edelman J).

⁴¹ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 11 September 2012) [22.020], [22.580], [22.600]; *Muschinski v Dodds* (1985) 160 CLR 583, 612–17 (Deane J).

⁴² GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [38.10], [38.25] ff; *Chan v Zacharia* (1984) 154 CLR 178, 199 (Deane J).

⁴³ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [38.15], [38.155] ff; *Baumgartner v Baumgartner* (1987) 164 CLR 137. See also *Muschinski v Dodds* (1985) 160 CLR 583 in which it was held that the parties to a de facto relationship held their respective legal interests (as tenants in common) on trust to repay to each his or her respective contribution to the purchase and improvement of the property, with the residue held for both in equal shares.

⁴⁴ JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [308], [1301], citing *Giumelli v Giumelli* (1999) 196 CLR 101, 111 (Gleeson CJ, McHugh, Gummow and Callinan JJ).

⁴⁵ JH Langbein, ‘Rise of the Management Trust’ (2004) 143 *Trusts & Estates Magazine* 52, 52–3; MW Lau, *The Economic Structure of Trusts* (Oxford University Press, 2011) 3, 5.

bankruptcy or insolvency,⁴⁶ and it may facilitate the reduction of taxation liability.⁴⁷ The separation of legal and beneficial ownership also ‘makes the trust an appropriate device where the beneficiaries are infants or persons unfamiliar with or unsuited to managing financial affairs’.⁴⁸

3.27 The trust is also a flexible mechanism. It is not a fixed or separate entity like a company. It can be used to define property rights and obligations between parties either on its own or as part of more complex contractual arrangements. The trust may be used for a short-term goal, or for more enduring purposes.⁴⁹ It can also be used to achieve mixed purposes, for example, ‘[m]any trusts act simultaneously as a vehicle for carrying on business activities and as a conduit for the tax-efficient distribution of wealth among family members’.⁵⁰

3.28 In a commercial setting, it has also been suggested that the regime of fiduciary obligations imposed on trustees ‘can be likened to a system of ready-

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Generally, the property that is available to satisfy the claims of a person’s creditors in the event of bankruptcy is all ‘real or personal property of every description’ that ‘belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy, or has been acquired or is acquired by him or her, or has devolved or devolves on him or her, after the commencement of the bankruptcy and before his or her discharge’: *Bankruptcy Act 1966* (Cth) ss 5 (definition of ‘property’), 116(1)(a).

In the case of a *beneficiary* who is bankrupt, this would include the beneficiary’s proprietary interest under a fixed trust. Arguably, however, it would not extend to a beneficiary’s potential claim under a discretionary trust in which the beneficiary has no proprietary interest (unless and until a distribution from the trust is to be made to the beneficiary): see GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [27.110]; *Re Coleman* (1888) 39 Ch D 443, 451–2 (Cotton LJ; Fry and Lopes LJJ agreeing); *Dwyer v Ross* (1992) 34 FCR 463, 466 (Davies J).

In the case of a *trustee* who is bankrupt, the property divisible among the trustee’s creditors does not include property that the trustee holds on trust for another person: *Bankruptcy Act 1966* (Cth) s 116(2)(a).

However, creditors may be subrogated to the trustee’s right to be indemnified from the trust assets (or, in certain circumstances, from the beneficiaries personally) for expenses and liabilities properly incurred in the discharge of the trust. Moreover, the trustee’s right of indemnity is a beneficial proprietary right of the trustee, supported by a charge or lien over the trust assets, which will pass to the bankrupt trustee’s ‘trustee in bankruptcy’ or, in the case of an insolvent corporate trustee, to the liquidator, for distribution among the trustee’s creditors: *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367–8, 369–70 (Stephen, Mason, Aickin and Wilson JJ; Murphy J agreeing); *Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99, 102, 104 (King CJ; Jacobs and Matheson JJ agreeing).

The right of indemnity ordinarily applies only to liabilities properly incurred, and may be lost or reduced if the trustee was in breach of trust: *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* (2001) 188 ALR 566, 606 (Finkelstein J). Although the statutory right of indemnity against the trust assets cannot be excluded (see *Trusts Act 1973* (Qld) ss 65, 72), the trust instrument may limit or exclude the right to enforce the indemnity against the beneficiaries: HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 15 November 2010) [14.3990]. This is not uncommon in the case of corporate trading trusts: see, eg, *Rinbar Pty Ltd (in liq) v Nichevich* (1987) 11 ACLR 737, 738 (Rowland J).

In certain circumstances, the directors of a corporate trustee may be liable to discharge a liability incurred by the trustee that the corporation cannot discharge and in respect of which it is not entitled to be fully indemnified out of the trust assets because of, for example, a breach of trust: *Corporations Act 2001* (Cth) s 197; *Young v Murphy* [1996] 1 VR 279, 313–14 (JD Phillips J).

For a detailed discussion of the rights of trust creditors, see HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 15 November 2010) [14.010] ff; HAJ Ford, ‘Trading Trusts and Creditors’ Rights’ (1981) 13 *Melbourne University Law Review* 1.

47

See generally GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [27.125]–[27.200].

48

Ibid [16.45].

49

See, eg, M Bryan, ‘Reflections on Some Commercial Applications of the Trust’ in I Ramsay (ed), *Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford* (LexisNexis Butterworths, 2002) 205, 214–15.

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Ibid 207.

made “default rules”, saving the parties costs in structuring a commercial transaction’.⁵¹

3.29 The variety of uses to which the trust can be put, particularly in a commercial context,⁵² prevents a complete description. However, some of the more commonly identified modern uses of trusts are briefly described below.

Families and deceased estates

3.30 Although the principal subject matter has changed, trusts continue to be used for the successive transmission of family wealth.⁵³ Modern family settlement trusts tend to involve the distribution of income from a fund of financial assets and make use of the ‘discretionary trust’ to ensure the trustee can meet the changing needs and circumstances of the beneficiaries, including those who are not yet born.⁵⁴

3.31 Family trusts might also be used to protect property from depletion or waste by ‘improvident’⁵⁵ or ‘spendthrift’⁵⁶ beneficiaries. A ‘protective trust’, for example, provides for a beneficiary’s proprietary interest under a fixed trust to terminate on the happening of a nominated event, such as an attempt by the beneficiary to sell or charge the proprietary interest. The beneficiary’s terminated interest is thereafter held on discretionary trust by the trustee with the consequence that the beneficiary is left with a mere expectancy to receive payment from the trust, in the trustee’s discretion.⁵⁷ A mechanism for the creation of a protective trust is provided in section 64 of the *Trusts Act 1973* (Qld).⁵⁸

3.32 As mentioned earlier, the separation of management and benefit that is inherent in trusts means that they can also be used to provide for beneficiaries who lack the capacity to manage their own financial affairs.⁵⁹

3.33 In some circumstances, trusts can be used to reduce the impact of means testing rules for family members who are, or may be, entitled to support payments under the *Social Security Act 1991* (Cth) or *Veterans’ Entitlements Act 1986* (Cth). Provision is made in those Acts for ‘Special Disability Trusts’ under which

51 Ibid 210.

52 Ibid 205.

53 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 14 May 2012) [1.020]; GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [16.45].

54 PH Pettit, *Equity and the Law of Trusts* (Oxford University Press, 12th ed, 2012) 15–16.

55 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 14 May 2012) [1.020].

56 GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [27.115].

57 Ibid [27.115]–[27.120]. Depending on the wording of the trust instrument, a protective trust that nominates the beneficiary’s bankruptcy as the terminating event may be ineffective to terminate the beneficiary’s interest: see *Bankruptcy Act 1966* (Cth) s 302B(1); HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 3 September 2012) [7.6530]. See also [10.74] ff below.

58 *Trusts Act 1973* (Qld) s 64 is discussed in Chapter 10.

59 GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [16.45]; PH Pettit, *Equity and the Law of Trusts* (Oxford University Press, 12th ed, 2012) 15.

immediate family members and carers of a person with severe disability⁶⁰ can provide private financial support for the person's care and accommodation needs, and ancillary purposes.⁶¹ Provided that certain strict legislative requirements are met,⁶² Special Disability Trusts attract means test concessions for payments made under the *Social Security Act 1991* (Cth) and the *Veterans' Entitlements Act 1986* (Cth), and may also involve certain taxation concessions.⁶³

3.34 Trusts might also be used to reduce the overall taxation liability of a family by splitting income among family members who will be taxed at a lower rate than the family's main income-receiver.⁶⁴

3.35 As was explained earlier, a trust can be created by a testator's will, and it has been observed that many family trusts arise in this way.⁶⁵ Additionally, even in the absence of an express trust created by will, the role of the personal representative of a deceased person's estate will change to that of trustee. Once the personal representative has completed the duties of administration, but before final distribution of the assets has occurred, the personal representative holds the assets as trustee for the beneficiaries.⁶⁶

Commerce and investment

3.36 Professor Michael Bryan has explained that:⁶⁷

The commercial objectives to which the trust can be harnessed are so various, and the ensuing structures so complex, that they might be thought to defy any kind of summary or rationalisation.

3.37 That commentator has also pointed out the difficulty of distinguishing between family trusts and commercial trusts, since, as noted above, many trusts are created for dual purposes.⁶⁸ In general terms it has been suggested that, whereas traditional family trusts involve a 'donative transfer' from the settlor to the

⁶⁰ See *Social Security Act 1991* (Cth) s 1209M(2)–(4A); *Veterans' Entitlements Act 1986* (Cth) s 52ZZZWA(2)–(4A).

⁶¹ *Social Security Act 1991* (Cth) ch 3 pt 3.18A; *Veterans' Entitlements Act 1986* (Cth) pt IIIB div 11B.

⁶² See *Social Security Act 1991* (Cth) ss 1209L–1209T; *Veterans' Entitlements Act 1986* (Cth) ss 52ZZZW–52ZZZWG, which impose specific requirements on the number and eligibility of beneficiaries under the trust, who can be the trustee of the trust, the purposes of the trust, the trust property and trust expenditure, as well as reporting and auditing requirements.

⁶³ See generally Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs, *Guide to Social Security Law* (Version 1.192, 2 January 2013) [4.14.3.40] <http://guidesacts.fahcsia.gov.au/guides_acts/ssg/ssg-rn.html>; CCH, *Australian Federal Income Tax Reporter (ITAA 1997)* (24 May 2012) ¶768-370/50.

⁶⁴ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 14 May 2012) [1.020].

⁶⁵ PH Pettit, *Equity and the Law of Trusts* (Oxford University Press, 12th ed, 2012) 16.

⁶⁶ *Re Ponder* [1921] 2 Ch 59, 61 (Sargant J); *Pagels v MacDonald* (1936) 54 CLR 519, 526 (Latham CJ); *Re 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].

⁶⁷ M Bryan, 'Reflections on Some Commercial Applications of the Trust' in I Ramsay (ed), *Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford* (LexisNexis Butterworths, 2002) 205, 205.

⁶⁸ *Ibid* 207.

beneficiaries, commercial trusts arise from ‘the flexible interplay of contract and trust’⁶⁹ in which there tends to be a greater focus on the trustee’s function of holding the property.⁷⁰ Many commercial trusts are also subject to statutory regulation which supplements or modifies general trust principles.

3.38 Professor Bryan has suggested that commercial trusts can be loosely divided into two basic types: institutional commercial trusts; and facilitative commercial trusts.⁷¹ The distinction between these types arises from the intended duration of the trust and scope of the trustees’ duties.

3.39 Institutional commercial trusts, which are exemplified by superannuation and managed investment trusts, are those that are ‘designed to supply a stable, long-term structure for fund management or for investing the proceeds of an entrepreneurial activity’.⁷² The principal benefit of using a trust for collective investment arrangements is in the adoption of a ‘ready-made’ prudential regime of fiduciary and other trustee obligations which fill in the gaps that might be left by the trust instrument or applicable statutory regulation.⁷³ Also included in this category are private trading trusts.⁷⁴

3.40 Facilitative commercial trusts, on the other hand, are those that are more typically used for short-term purposes and as part of a wider commercial dealing. They are ‘no more than enabling machinery, to be discarded as soon as the immediate entrepreneurial aim has been accomplished’.⁷⁵ The intended scope of the trustees’ duties is also more limited, the main focus being on the duty to keep the trust property separate from the trustees’ own assets.⁷⁶ Included in this category are trusts used as security devices, nominee trusts, and custodian trusts.

Superannuation trusts

3.41 Most superannuation funds, including self-managed superannuation funds, are structured as express trusts in which the fund of contributions and investment earnings is administered by a trustee for the benefit of the members. The application of the general law of trusts in this context is supplemented by federal statutory regulation.⁷⁷

69 Ibid 213.

70 See P 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, 230–1, quoting K Sin, *The Legal Nature of the Unit Trust* (Clarendon Press, 1997) 105–6 on the contrast between traditional trusts and public unit investment trusts.

71 M Bryan, ‘Reflections on Some Commercial Applications of the Trust’ in I Ramsay (ed), *Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford* (LexisNexis Butterworths, 2002) 205, 214 ff.

72 Ibid 218.

73 Ibid 219.

74 Ibid.

75 Ibid 207.

76 Ibid 214.

77 See generally GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [28.50] ff.

3.42 The *Superannuation Industry (Supervision) Act 1993* (Cth) requires regulated superannuation funds to have a trustee,⁷⁸ who is licensed and not disqualified from holding that office as provided for in the Act.⁷⁹ The Act imposes several duties on superannuation trustees in addition to those that apply under the general law.⁸⁰

3.43 Superannuation funds regulated by the legislation are established as 'indefinitely continuing funds',⁸¹ and the Act provides, as an exception to the general law, that 'the rules of law relating to perpetuities do not apply, and are taken never to have applied, to the trusts of any superannuation entity'.⁸²

3.44 The Act also makes specific provision for 'self managed' superannuation funds, which are regulated by the Australian Taxation Office.⁸³ These are funds that have fewer than five members who are also trustees of the fund or directors of the corporate trustee of the fund.⁸⁴ They include single-member funds administered by a corporate trustee where the member of the fund is also the sole director of the corporate trustee.⁸⁵ In practical terms, this contrasts with the usual rule that a person cannot be both sole trustee and sole beneficiary of a trust.⁸⁶

Public unit trusts

3.45 Public unit trusts provide an alternative collective investment mechanism to public investment companies.⁸⁷ They allow small investors to pool their resources and so obtain the benefits of diversification.⁸⁸ In a public unit trust:⁸⁹

Investors subscribe for units in the trust that represent uniform fractions of the beneficial interest in trust property. The funds subscribed are held on trust by the responsible entity and invested to produce capital growth, income, or both for the members of the trust. The responsible entity charges a fee, collected from trust assets, in return for investment and management activities ...

⁷⁸ *Superannuation Industry (Supervision) Act 1993* (Cth) s 19(2).

⁷⁹ *Superannuation Industry (Supervision) Act 1993* (Cth) ss 29J, 126K.

⁸⁰ Eg, *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(2), pt 12. The duties imposed on superannuation trustees will be enlarged when sch 1 of the *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012* (Cth) commences on 1 July 2013.

⁸¹ *Superannuation Industry (Supervision) Act 1993* (Cth) s 10(1) (definition of 'superannuation fund' para (a)(i)). This applies to superannuation funds other than public sector superannuation schemes.

⁸² *Superannuation Industry (Supervision) Act 1993* (Cth) s 343. See [3.3] above.

⁸³ *Superannuation Industry (Supervision) Act 1993* (Cth) s 6(1)(e)–(f).

⁸⁴ *Superannuation Industry (Supervision) Act 1993* (Cth) s 17A.

⁸⁵ *Superannuation Industry (Supervision) Act 1993* (Cth) s 17A(2)(a)(i).

⁸⁶ See n 12 above.

⁸⁷ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 14 and 15 May 2012) [1.020], [1.7330].

⁸⁸ Ibid [1.020].

⁸⁹ 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, 228–9.

3.46 Public unit trusts are a type of ‘managed investment scheme’ that are regulated by the *Corporations Act 2001* (Cth).⁹⁰ Under Chapter 5C of that Act, a managed investment scheme that is registered⁹¹ under the Act must be operated by a responsible entity.⁹² Whether or not the managed investment scheme is structured as a trust,⁹³ the Act imposes a statutory trust on the responsible entity of the scheme by declaring that the scheme property is held on trust for the members.⁹⁴ The Act also supplements the general duties that apply to trustees with a number of statutory obligations imposed on responsible entities.⁹⁵

Trading trusts

3.47 Trading trusts are distinguished from other types of trusts in that the trust property is used in the conduct of a business.⁹⁶ This may arise under the terms of a will where the estate of the deceased person includes a business. Trading trusts created inter vivos are also a popular mechanism for the conduct of a business.

3.48 In the context of a family business, a trading trust will often be structured as a discretionary trust in which the classes of discretionary beneficiaries include the managers of the business, their families and associates. Where the business involves parties at arm’s length, use might instead be made of a fixed trust, for example, a unit trust. A combination of fixed and discretionary trust elements might also be employed.⁹⁷

3.49 Carrying on a business through a trust may provide limited protection against creditors in the event of bankruptcy.⁹⁸ In addition, the trustee may be a limited company enabling its members to take advantage of limited liability.⁹⁹ As

⁹⁰ Ibid 229. See *Corporations Act 2001* (Cth) s 9 (definition of ‘managed investment scheme’), which provides, in part, that a managed investment scheme is one in which people contribute money or money’s worth as consideration to acquire benefits under the scheme, the contributions are pooled or used in a common enterprise to produce benefits for the members, and the members do not have day-to-day control over the operation of the scheme. Several entities are expressly excluded from the definition, including superannuation funds regulated under the *Superannuation Industry (Supervision) Act 1993* (Cth).

⁹¹ A managed investment scheme must be registered with the Australian Securities and Investments Commission in certain circumstances, including when the scheme has more than 20 members or was promoted by persons in the business of promoting managed investment schemes: *Corporations Act 2001* (Cth) s 601ED.

⁹² *Corporations Act 2001* (Cth) ss 601EA(2)(a), 601EB(1)(d), 601FA–601FB. The responsible entity must be a public company holding an Australian financial services licence authorising it to operate a managed investment scheme: s 601FA.

⁹³ Not all managed investment schemes are structured as trusts. For example, some may be limited partnerships: see GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [28.230].

⁹⁴ *Corporations Act 2001* (Cth) s 601FC(2). See also HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 17 May 2012) [1.9650].

⁹⁵ *Corporations Act 2001* (Cth) ss 601FC(1), 601FD–601FE.

⁹⁶ See generally GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [27.10]; HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 14 May 2012) [1.020]; AM Millhouse, ‘Trading Trusts’ (1988) 18(6) *Queensland Law Society Journal* 443, 443.

⁹⁷ HAJ Ford and IJ Hardingham, ‘Trading Trusts: Rights and Liabilities of Beneficiaries’ in PD Finn (ed), *Equity and Commercial Relationships* (Law Book, 1987) 48, 50.

⁹⁸ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [27.15]. See n 46 above.

⁹⁹ Ibid [27.10]; HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 14 May 2012) [1.020].

was explained by one commentator:¹⁰⁰

In its original form, the concept of the trust was a passive device to enable a person to hold property for the benefit of another. However, where trust property was committed to trade or business activity, the trustee could hardly remain dormant. But, certain risks flowed where a trustee engaged in a trading activity. A trust is not a legal entity. Any trading is undertaken by the trustee who is personally liable for the debts and liabilities that are incurred. Therefore, a natural person trustee assumed considerable risk in acting as a trading trustee, but that risk was largely avoided if the business were conducted by a corporate trustee with limited liability and a nominal paid-up capital. This fusion produced the contemporary phenomenon of the trading trust.

3.50 Trading trusts might also offer advantages in taxation and flexibility in responding to changing circumstances.¹⁰¹

Trusts as security

3.51 One example of the use of the trust as a security measure is the 'debenture trust'. This enables a company, through the issue of debentures, to borrow money from multiple lenders without itself having to transact with each lender individually.¹⁰²

The lenders receive marketable securities issued by the trustee, which holds upon trust for the lenders the right to enforce repayment of the loan, as well as property provided by the borrower as security for the loan.

3.52 In certain circumstances, the *Corporations Act 2001* (Cth) requires a company that offers debentures to the public to appoint a trustee.¹⁰³ The trustee will hold the right to enforce the borrower's duties, including the duty to repay, and any charge or security for repayment in trust for the benefit of the debenture holders.¹⁰⁴

3.53 Another example is the use of a trust to establish a 'sinking fund' to ensure adequate funds are available to meet a company's anticipated future expenditures or claims over a given number years.¹⁰⁵

3.54 Commercial parties might also seek to advance money, subject to a trust, in order to protect their interests in the event of the borrower's bankruptcy.¹⁰⁶ For

¹⁰⁰ AM Millhouse, 'Trading Trusts' (1988) 18(6) *Queensland Law Society Journal* 443, 443.

¹⁰¹ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [27.15].

¹⁰² KA Byrne, 'Commercial uses of Bermuda trusts — some practical examples' (2003) 9(7) *Trusts and Trustees* 21, 22. See also D Hayton, 'The Uses of Trusts in the Commercial Context' in D Hayton (ed), *Modern International Developments in Trust Law* (Kluwer Law International, 1999) 145, 164; HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 14 May 2012) [1.020].

¹⁰³ *Corporations Act 2001* (Cth) s 238AA(1). Only certain bodies corporate may be trustees for this purpose: s 238AC(1).

¹⁰⁴ *Corporations Act 2001* (Cth) s 238AB(1).

¹⁰⁵ KA Byrne, 'Commercial uses of Bermuda trusts — some practical examples' (2003) 9(7) *Trusts and Trustees* 21, 22. See also D Hayton, 'The Uses of Trusts in the Commercial Context' in D Hayton (ed), *Modern International Developments in Trust Law* (Kluwer Law International, 1999) 145, 166.

example, in a ‘*Quistclose* trust’,¹⁰⁷ a lender may advance money on terms that it is to be used for a special purpose and with the intention that, unless and until the money is applied to the purpose, the borrower holds the money on trust so that, if the purpose fails, the money is transferred back to the lender:¹⁰⁸

For example, Z may lend to Y on terms that the money is to be used exclusively to pay X. It is possible for the parties to make an arrangement by which in the period before Y pays X the liability of Y to Z is not only as a debtor but also as a trustee and by which Y should remain a debtor to Z in the period after Y pays X. Such an arrangement can be advantageous to Z if before paying X, Y becomes bankrupt or, if Y is a corporation, goes into liquidation in insolvency.

3.55 For similar reasons, a contract for the supply of materials to a manufacturer might include an agreement for proceeds from future sales by the manufacturer to be held on trust in satisfaction of payment to the supplier.¹⁰⁹

Creditors’ trusts under deeds of company arrangements

3.56 Trusts are also sometimes used to accelerate an insolvent company’s exit from external administration.¹¹⁰ It is not uncommon for a deed of company arrangement¹¹¹ to be coupled with a ‘creditors’ trust’. These typically provide for the company’s obligations to creditors under a deed of company arrangement to be compromised and transferred to the trustee of a trust.¹¹² The creditors’ rights against the company are extinguished in return for a promise by the company, or a third party, to transfer payments or property to the trustee. The creditors are converted into beneficiaries under the trust. The trustee is solely responsible for

¹⁰⁶ M Bryan, ‘Reflections on Some Commercial Applications of the Trust’ in I Ramsay (ed), *Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford* (LexisNexis Butterworths, 2002) 205, 214, 215.

¹⁰⁷ Named after *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567. See also *Twinsectra Ltd v Yardley* [2002] 2 AC 164, 184 (Lord Millett); *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (in liq)* (1978) 141 CLR 335, 353 (Gibbs ACJ); *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491, 500–3 (Gummow J), discussed in *Quince v Varga* [2009] 1 Qd R 359, 375–7 (Douglas J).

¹⁰⁸ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 15 May 2012) [1.3910].

¹⁰⁹ Eg, *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588, 603–9 (Gaudron, McHugh, Gummow and Hayne JJ). Such an arrangement might be characterised as a charge and may be subject to personal property securities legislation: see M Bryan, ‘Reflections on Some Commercial Applications of the Trust’ in I Ramsay (ed), *Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford* (LexisNexis Butterworths, 2002) 205, 217–18. Subject to certain exceptions provided for in s 8(1), the *Personal Property Securities Act 2009* (Cth) applies to ‘security interests’, defined in s 12(1) as ‘interest[s] in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property)’.

¹¹⁰ Australian Securities and Investments Commission, ‘External administration: Deeds of company arrangement involving a creditors’ trust’, *Regulatory Guide 82* (May 2005) [1.1].

¹¹¹ Under ch 5 pt 5.3A of the *Corporations Act 2001* (Cth), one of the possible outcomes of administration of a company is the execution by the company and its administrator, on the resolution of the company’s creditors, of a ‘deed of company arrangement’ which specifies, among other things, the extent to which the company is to be released from its debts and the property that is to be available to pay the creditors’ claims: see *Corporations Act 2001* (Cth) ss 435C(2)(a), 444A; R Fisher et al, LexisNexis, ‘Voluntary Administration’ in *Australian Corporation Law Principles and Practice* (at April 2012) [5.3A.0495] ff.

¹¹² See generally *Re Beville Pty Ltd* (2011) 254 FLR 324, 333, 345–6 (Bergin CJ in Eq); F Assaf, ‘The resurgence of creditors’ trusts?’ (2011) 23(3) *Australian Insolvency Journal* 26; Australian Securities and Investments Commission, ‘External administration: Deeds of company arrangement involving a creditors’ trust’, *Regulatory Guide 82* (May 2005) [1.2]–[1.6].

discharging the obligations that were transferred to it, determining how much each beneficiary is entitled to receive, and making distributions from the trust assets. Provision is generally made for the deed of company arrangement to terminate on the creation of the trust, which usually occurs when the deed of company arrangement is executed. This brings the company's external administration to an end.¹¹³ As was explained in *Re Open Telecommunications Ltd (subject to deed of company arrangement)*:¹¹⁴

The mechanism proposed by the deed administrator is quite ingenious. It is for the adoption of an amended DCA [deed of company arrangement] coupled with a creditors' trust deed. This would remove the sums promised to creditors from the ambit of the DCA to the ambit of a deed of trust. When this is done, the DCA could be discharged; the company would no longer be subject to a DCA; and it is likely that it could be restored to the Stock Exchange board and the contemplated additional capital sums raised, both to feed the promised amounts into a scheme for the creditors and to restore the company to viability. Although this would take the management of the money outside the ambit of the [*Corporations Act 2001* (Cth)], it would be held and supervised in the creditors' interests according to the general law of trusts ...

Nominee and 'bare' trustees

3.57 A 'nominee trustee' may be used 'as a convenient stakeholder until a complex transaction is carried to its conclusion'.¹¹⁵ It is not uncommon, for example, for a party to a conveyancing transaction to give money, which is later to be advanced to the other party, to his or her solicitor on trust until the completion of the transaction.¹¹⁶ Nominee trustees are also often used to hold and transfer shares and other securities on behalf of others.¹¹⁷

The classic nominee situation is when a nominee shareholder is the registered shareholder who holds the bare legal title to the share and deals with the share for the benefit of another person. In such a case the nominee shareholder is a bare trustee whose sole duty is to maintain the trust property and convey the legal estate (ie, the share) to the beneficiary, if so requested.

3.58 These arrangements are said to provide both administrative convenience and financial privacy for the beneficial owner.¹¹⁸

113 Administration of a company ends on the execution of a deed of company arrangement: *Corporations Act 2001* (Cth) s 435C(1), (2)(a). However, a company that is subject to a deed of company arrangement must, except with the leave of the court and until the deed terminates, give notice of that fact in all public documents and negotiable instruments of the company: s 450E(2).

114 [2003] NSWSC 1198, [4] (Hamilton J).

115 M Bryan, 'Reflections on Some Commercial Applications of the Trust' in I Ramsay (ed), *Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford* (LexisNexis Butterworths, 2002) 205, 215.

116 Eg, *Target Holdings Ltd v Redferns* [1996] 1 AC 421. In Queensland, law practices that hold trust money are required to comply with the trust accounting requirements in the *Legal Profession Act 2007* (Qld) ch 3 pt 3.3.

117 DA Chaikin, 'Nominee shareholders: Legal, commercial and risk aspects' (2005) 18 *Australian Journal of Corporate Law* 288, 294.

118 *Ibid* 296–7.

3.59 Trusts of this sort are sometimes referred to as examples of ‘bare trusts’. The term ‘bare trust’ has no single, precise meaning. Where it is used in statute, its meaning depends on the particular statutory context.¹¹⁹ The authors of *Jacobs’ Law of Trusts in Australia* explain that a ‘bare trustee’ is:¹²⁰

a trustee who has no interest in the trust assets other than that existing by reason of the office of trustee and the holding of the legal title, and who never has had active duties to perform or who has ceased to have those duties with the result that in either case the property awaits transfer to the beneficiaries or at their direction. (note omitted)

3.60 The reference to ‘active duties’ means those duties imposed by the settlor, not the general duties imposed by law on all trustees, including the obligation to protect and maintain the trust property.¹²¹

Custodian trustees

3.61 Custodian trusteeship arrangements, which are generally more enduring than nominee trusts, are also sometimes used in commercial settings.¹²² This involves the division of legal title to the trust property (which vests in a corporate ‘custodian’ trustee) from the management of the trust property (which resides with the managing trustees).¹²³ The custodian trustee is obliged to deal with the trust property only in accordance with the directions of the managing trustees, but remains a trustee with fiduciary obligations toward the beneficiaries.¹²⁴

Charities

3.62 As explained earlier, property can be held on trust for a recognised charitable purpose, rather than for beneficiaries.¹²⁵ Although a charity is not required to take any particular legal form, trusts remain a popular way of structuring and providing for charities, and much of the law of charities today is influenced by

¹¹⁹ *Old Papa’s Franchise Systems Pty Ltd v Camisa Nominees Pty Ltd* [2003] WASCA 11, [54] (McLure J).

¹²⁰ JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [315], cited in *Byrnes v Kendle* (2011) 243 CLR 253, 264 (French CJ); and *Old Papa’s Franchise Systems Pty Ltd v Camisa Nominees Pty Ltd* [2003] WASCA 11, [56] (McLure J). See also, in similar terms, *CGU Insurance Ltd v One.Tel Ltd (In liq)* (2010) 242 CLR 174, 182 (French CJ, Heydon, Crennan, Kiefel and Bell JJ); and *Herdegen v FCT* (1988) 84 ALR 271, 281 (Gummow J).

¹²¹ See *Bruton Holdings v FCT* (2011) 193 FCR 442, 445, 446 (Stone, Jacobson and Edmonds JJ); *CGU Insurance Ltd v One.Tel Ltd (In liq)* (2010) 242 CLR 174, 182 (French CJ, Heydon, Crennan, Kiefel and Bell JJ); *Herdegen v FCT* (1988) 84 ALR 271, 281–2 (Gummow J), quoting DWM Waters, *Law of Trusts in Canada* (Carswell, 2nd ed, 1984) 27; P Stacey, ‘The GST treatment of bare trusts’ (2006) 9(1) *Journal of Australian Taxation* 36, 39.

¹²² M Bryan, ‘Reflections on Some Commercial Applications of the Trust’ in I Ramsay (ed), *Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford* (LexisNexis Butterworths, 2002) 205, 215; D Hayton, ‘Exploiting the Inherent Flexibility of Trusts’ in D Hayton (ed), *Modern International Developments in Trust Law* (Kluwer Law International, 1999) 319, 322–3.

¹²³ Custodian trustees are provided for in *Trusts Act 1973* (Qld) s 19, which is discussed in Chapter 5 below.

¹²⁴ *Re Brooke Bond & Co Ltd’s Trust Deed* [1963] 1 Ch 357, 363, 364–5 (Cross J).

¹²⁵ See [3.2] above.

their historical development as trusts.¹²⁶ Charitable trusts can be created, like private trusts, by will or by an inter vivos transfer or declaration.¹²⁷

3.63 A charitable trust has a purpose, rather than a beneficiary, as its object. Ordinarily, 'a purported trust which has no beneficiary is void',¹²⁸ since there is no one to enforce the trust.¹²⁹ However, a charitable trust will not fail as long as it is clear that the intended purpose is 'charitable', in which case the Attorney-General, as representative of the Crown, has the right and duty to enforce the trust.¹³⁰

3.64 It is also possible to create a charitable trust that endures indefinitely. Provided that the gift vests in the trustee within the perpetuity period, the property may be held indefinitely for the charitable purpose.¹³¹ This differs from non-charitable purpose trusts which are not permitted to endure longer than the perpetuity period.¹³²

3.65 Indefinite duration is a common characteristic of charitable trusts.¹³³ On the one hand, this facilitates the sustainability of the intended purpose.¹³⁴ On the other hand, circumstances may change with the passage of time to such an extent that the charitable purpose becomes impossible or impracticable to perform. For example, the Anzac Cottages Trust, which was formally established in 1918 to provide cottages for the accommodation of homeless widows and other female dependants or descendants of soldiers who had died while in service in World War I, had become, some 80 years later, 'impracticable of performance because of the large number of female descendants and the difficulty in discovering all members of the group'.¹³⁵ In such circumstances, application will need to be made

126 GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [17.1]–[17.2]. One of the earliest practices in the development of the 'use', in the 13th century, was the provision of housing for members of the Order of St Francis who were forbidden by their religious vows to own land but were permitted to use and enjoy land vested in others: JH Baker, *An Introduction to English Legal History* (Butterworths, 4th ed, 2002) 249; JH Langbein, RL Lerner and BP Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions* (Wolters Kluwer, 2009) 299. Charitable 'uses' were recognised and enforced by the ecclesiastical courts up to the 15th century and then by the Court of Chancery, and received legislative recognition in the *Statute of Charitable Uses 1601*, 43 Eliz 1, c 4: see GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [4.1]–[4.3].

127 GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [17.5].

128 JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [108].

129 *Morice v Bishop of Durham* (1804) 9 Ves Jun 399, 405; 32 ER 656, 658 (Grant MR).

130 GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [17.13], [14.23]–[14.24].

131 *Ibid* [6.10]; *Monds v Stackhouse* (1948) 77 CLR 232, 243 (Latham CJ).

132 See HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 5 September 2012) [7.14010]; JHC Morris and WB Leach, *The Rule Against Perpetuities* (Stevens & Sons, 2nd ed, 1962) 321–7; *Property Law Act 1974* (Qld) s 221.

133 *A-G (NSW) v Perpetual Trustee Co (Ltd)* (1940) 63 CLR 209, 223–4 (Dixon and Evatt JJ).

134 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* [20.050].

135 *Re Anzac Cottages Trust* [2000] QSC 175, [14] (Atkinson J). Atkinson J explained (at [9]–[10], [12]) that the trust property comprised a fund of some \$697 500 and one remaining Anzac Cottage, which had been vacant since 1998 and was in need of repair.

to the court to allow the property to be applied *cy pres*, that is, applied to a charitable purpose as near as possible to the original.¹³⁶

3.66 Charitable trusts might also be able to take advantage of various taxation concessions which apply to charities.¹³⁷

Trusts imposed by court order or statute

3.67 As explained earlier, the courts will sometimes recognise parties' property rights and obligations through the mechanism of a resulting or constructive trust.¹³⁸

3.68 Trusts are also sometimes employed to give effect to a particular statutory scheme.¹³⁹ One example which has already been mentioned is the statutory trust imposed on responsible entities of managed investment schemes under Chapter 5C of the *Corporations Act 2001* (Cth).¹⁴⁰ Another example is the provision, under the *Bankruptcy Act 1966* (Cth), for the estate of a person who is bankrupt to be administered by a trustee in bankruptcy.¹⁴¹ The trustee is subject to the duties imposed by the Act,¹⁴² and, except to the extent that it is modified by the legislation, the general law applying to trustees.¹⁴³

THE PREVALENCE OF TRUSTS

3.69 Although precise information is not available about the number of trusts in existence in Australia, available statistics give some indication of the prevalence and significance of the use of trusts.

Trusts as a percentage of household assets

3.70 Results from the Australian Bureau of Statistics' most recent *Survey of Income and Housing* indicate that, not including superannuation accounts, assets held in trusts make up approximately 2.5% of household assets in Australia.¹⁴⁴ This includes a range of trusts, such as family trusts, testamentary trusts, private unit trusts, and charitable trusts, which make up 2.1% of all household assets. It also includes public unit trusts, such as property trusts, mortgage trusts, and cash management trusts, which account for 0.4% of all household assets.

¹³⁶ See *Trusts Act 1973* (Qld) ss 105, 106, discussed in Chapter 13.

¹³⁷ See generally GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [7.2]–[7.17].

¹³⁸ See [3.22]–[3.24] above.

¹³⁹ See generally HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 15 May 2012) [1.050].

¹⁴⁰ See [3.46] above.

¹⁴¹ See generally *Bankruptcy Act 1966* (Cth) ss 5 (definition of 'the trustee' para (a)), 19(1), 58(1), 129, 134, 140, 145.

¹⁴² Eg, *Bankruptcy Act 1966* (Cth) ss 19(1), 155H(5); *Bankruptcy Regulations 1996* (Cth) reg 8.34A(1), sch 4A.

¹⁴³ *Ferella v Official Trustee in Bankruptcy (No 2)* [2011] FCA 619, [26] (Yates J); *Re Ladyman* (1981) 38 ALR 631, 643 (Rogerson J).

¹⁴⁴ Australian Bureau of Statistics, *Household Wealth and Wealth Distribution Australia 6554.0 2009–10* (2011) 39 (table 9), 97 (definitions of 'private trust' and 'public unit trust').

3.71 In Queensland, the percentage is slightly higher than the national average, with 2.9% of household assets being held in trusts.¹⁴⁵

3.72 Generally, those households with the highest net worth have a greater percentage of their assets in trusts compared with lower net worth households.¹⁴⁶

Trusts for which annual tax returns are lodged

3.73 An annual tax return must be lodged each year for every trust in Australia unless it is exempt from that requirement.¹⁴⁷ For the financial year 2008–09, returns for more than 663 000 trusts were lodged with the Australian Taxation Office, accounting for 4.5% of all returns lodged for that year. This compared with 85.2% for individuals, 5.2% for companies, 2.8% for partnerships and 2.5% for self-managed superannuation funds.¹⁴⁸ The vast majority (77%) of trusts for which returns were lodged were described as discretionary trusts. Others included various types of unit trusts (12.3%), ‘deceased estate’ trusts (6.4%), ‘hybrid trusts’ (1.4%), and ‘other fixed trusts’ (2.6%).¹⁴⁹

Trusts managed by trustee corporations

3.74 During 2010, more than A\$500 billion of assets were managed and administered by trustee corporations in Australia in respect of a range of trust activities, including personal and charitable trusts, superannuation funds, and managed investment schemes.¹⁵⁰

Trusts managed by the Public Trustee

3.75 In 2011–12, the Public Trustee of Queensland administered some 4470 trusts, as well as receiving more than 2300 deceased estate matters for administration.¹⁵¹ In the previous financial year, the Public Trustee had acted as trustee for more than 5600 trusts, including trusts for minors and testamentary trusts, with a combined asset value of more than A\$500 million.¹⁵²

¹⁴⁵ Ibid 64 (table 30).

¹⁴⁶ Ibid 39 (table 9). ‘Net worth’ is defined (at 95) as the value of a household’s assets less the value of its liabilities.

¹⁴⁷ Exempt trusts include trusts in which the beneficiary has an absolute, indefeasible entitlement to the capital and income of the trust. Some non-profit trusts whose income is exempt under div 50 of the *Income Tax Assessment Act 1997* (Cth) are also exempt from the requirement to lodge a tax return: R Deutsche et al, *Australian Tax Handbook 2012* (Thomson Reuters, 2012) [46 080].

¹⁴⁸ Commonwealth of Australia, *Taxation Statistics 2008–09* (Australian Taxation Office, 2011) 2, 76.

¹⁴⁹ Ibid 76.

¹⁵⁰ Financial Services Council, *The Trustee Services Industry: Statistics* (at 2010) <<http://www.fsc.org.au/policy/trustee-services/trustee-services-fact-sheets.aspx>>.

¹⁵¹ The Public Trustee of Queensland, *Annual Report 2011–2012* (2012) 10–11.

¹⁵² The Public Trustee of Queensland, *Annual Report 2010–2011* (2011) 60.

Self-managed superannuation funds

3.76 Superannuation accounts make up almost 14% of household assets in Australia.¹⁵³ Many of those accounts are held in self-managed superannuation funds.¹⁵⁴ For the year 2008–09, more than 355 000 tax returns were lodged for self-managed super funds, accounting for 2.5% of all tax returns lodged for that year.¹⁵⁵

Charitable trusts

3.77 Philanthropy Australia Inc, the peak national body for grant-making philanthropic trusts and foundations, estimates that there are several thousand such trusts and foundations in Australia.¹⁵⁶

3.78 Not all of these include charitable trusts. In a 2002 survey of 196 known philanthropic trusts and foundations in Australia, charities established as a corporate entity accounted for 36% of the survey respondents. In contrast, private charitable trusts, established by an individual family by trust deed or will, accounted for 17.5% of the respondents.¹⁵⁷

3.79 Recognised charitable trust funds and institutions can seek endorsement from the Australian Taxation Office for certain taxation concessions.¹⁵⁸ At the end of October 2010, there were more than 5600 active ‘tax concession’ charitable funds established under a trust instrument or will; additionally, there were some 37 000 active ‘tax concession’ charitable institutions, which may have included organisations established by trust or will as well as those structured as corporations or unincorporated associations.¹⁵⁹

153 Australian Bureau of Statistics, *Household Wealth and Wealth Distribution Australia 6554.0 2009–10* (2011) 39 (table 9).

154 See [3.44] above.

155 Commonwealth of Australia, *Taxation Statistics 2008–09* (Australian Taxation Office, 2011) 2, 56.

156 Philanthropy Australia Inc, *Survey of Australian Philanthropic Trusts and Foundations 2002* (2003) 5, 6; Philanthropy Australia Inc, *Statistics Overview* (19 March 2008) PhilanthropyWiki <<http://philanthropywiki.org.au/index.php/Category:Statistics>>.

157 Philanthropy Australia Inc, *Survey of Australian Philanthropic Trusts and Foundations 2002* (2003) 26.

158 See Commonwealth of Australia, *Tax Basics for Non-Profit Organisations* (Australian Taxation Office, 2011) 3-4.

159 Commonwealth of Australia, *Taxation Statistics 2008–20* (Australian Taxation Office, 2011) 109; Commonwealth of Australia, *Tax Basics for Non-Profit Organisations* (Australian Taxation Office, 2011) 6.

Chapter 4

Overview of the *Trusts Act 1973* (Qld)

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INTRODUCTION

4.1 The *Trusts Act 1973* (Qld) is the principal statute in Queensland concerned with the law relating to trusts. This chapter discusses the impetus for the reform of trustee legislation in Queensland, which resulted in the enactment of the *Trusts Act 1973* (Qld), as well as the scope and application of the current Act.

THE IMPETUS FOR REFORM

4.2 Before the passage of the *Trusts Act 1973* (Qld), the law for holding property for successive beneficiaries was complex.¹ There were a number of distinct methods of settling property, particularly land.

4.3 The first, and foremost, of these was the settlement of the legal estate in land. In its classical form, known as the 'strict settlement', it was used, particularly by the landed aristocracy in England, to keep land in the family for successive generations.² At its simplest, a strict settlement might comprise 'a gift by will to the testator's eldest son for life with remainder to that son's eldest son'.³ In practice, the person entitled in remainder (the 'remainderman') was usually persuaded, upon attaining majority or marrying, to relinquish the remainder, in exchange for a settlement of money, and to become a life tenant with a remainder to his or her heir.⁴ In this way, the legal estate in land was devolved by successive settlements of limited (usually life) estates in a manner that prevented the sale of the fee simple

¹ WA Lee, 'The Trusts Act 1973 — reforms accomplished and problems remaining to be resolved' in A Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice BH McPherson CBE* (Supreme Court of Queensland Library, 2006) 145, 147.

² This system of land-holding was developed in England in the 17th century to avoid the forfeiture of landed estates to the Crown: *ibid* 147–8.

³ RE Megarry and HWR Wade, *The Law of Real Property* (Stevens & Sons, 3rd ed, 1966) 288.

⁴ *Ibid* 289. See also WA Lee, 'The Trusts Act 1973 — reforms accomplished and problems remaining to be resolved' in A Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice BH McPherson CBE* (Supreme Court of Queensland Library, 2006) 145, 148.

by ensuring that it almost never became vested in the person with a beneficial entitlement to it.

4.4 Changing economic and social conditions in the 19th century, however, led to the passage, both in England and Australia, of legislation altering the treatment of settled land.

4.5 The *Settled Land Act 1886* (Qld) was designed to liberate settled land from legal or equitable limitations that restricted its alienation or hampered its improvement.⁵ The general scheme of the settled land legislation was to confer on the life tenant under the settlement wide powers to grant leases, to effect improvements, to sell the fee simple in the bulk of the land and to enable the proceeds of sale of any part of the land to be applied either in improving the land or in making authorised investments.⁶ The Act protected the interests of the beneficiaries by requiring that the proceeds of sale be paid into court or into the hands of at least two trustees, and preserved or invested for the remainderman.⁷ The Queensland Act largely reproduced the English settled land legislation,⁸ which had been a response to the demands of the industrial revolution and agricultural depression,⁹ and was intended to ‘release the land from the fetters of the settlement — to render it a marketable article notwithstanding the settlement’.¹⁰

4.6 In addition to the settlement of the legal estate, property could be held for successive beneficiaries on certain trusts, namely:¹¹ the trust of the settlement of the legal estate (where the proceeds of a sale of settled land by the tenant for life were held by trustees for the remaindermen); the trust of personalty (which enabled provision to be made for charities, and for widows, daughters and younger sons of the life tenant of settled land); and the trust for sale of land (which enabled real property to be settled as personalty through the equitable doctrine of conversion, making it ‘the symbiont of the settlement of the legal estate’ in land).¹² Each of

⁵ *Settled Land Act 1886* (Qld) Preliminary Note. See also Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 5.

⁶ *Settled Land Act 1886* (Qld) ss 10, 13, 33–34, 36.

⁷ *Settled Land Act 1886* (Qld) ss 30–31, 33, 61.

⁸ *Settled Land Act 1882*, 45 & 46 Vict, c 44. The subsequent English Act, the *Settled Land Act 1925*, 15 & 16 Geo 5, c 18, continued the policy of the 1882 Act, making certain extensions and alterations to the statutory powers of trustees.

⁹ WA Lee, ‘The Trusts Act 1973 — reforms accomplished and problems remaining to be resolved’ in A Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice BH McPherson CBE* (Supreme Court of Queensland Library, 2006) 145, 148; DE Allan, ‘A New Look for Trustees’ (1963) 1(6) *Tasmania University Law Review* 797, 802.

¹⁰ *Bruce v Ailesbury* [1892] AC 356, 361 (Lord Halsbury LC). See also at 363 (Lord Watson).

¹¹ See WA Lee, ‘The Trusts Act 1973 — reforms accomplished and problems remaining to be resolved’ in A Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice BH McPherson CBE* (Supreme Court of Queensland Library, 2006) 145, 147, 149–50.

¹² WA Lee, ‘The Trusts Act 1973 — reforms accomplished and problems remaining to be resolved’ in A Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice BH McPherson CBE* (Supreme Court of Queensland Library, 2006) 145, 150. Pursuant to the equitable doctrine of conversion, the beneficiaries’ interests under a trust for sale of land were deemed to be interests in personalty (that is, in the purchase money into which the land had to be converted), rather than interests in the land itself, even before the land was sold, since equity treats as done that which ought to be done: AJ Oakley, *A Manual of the Law of Real Property by the Rt Hon Sir Robert Megarry* (Sweet & Maxwell, 8th ed, 2002) 250. As such, a trust for sale enabled the land to be settled on successive beneficiaries, but without giving them the extensive powers

these methods involved the conferral of extensive management powers on the trustee. In Queensland, the main statute dealing with trustee powers prior to the introduction of the *Trusts Act 1973* (Qld) was the *Trustees and Executors Act 1897* (Qld).

4.7 Thus, a dual system of settled land on the one hand, and trusts (particularly trusts for sale) on the other, had developed. But, although settled land and trusts for sale were alternative modes for settling land,¹³ there were marked differences in the powers of administration and management that applied under the respective statutes in each instance.

4.8 As Professor Lee has observed, a significant feature of the settled land legislation was that the extensive management powers that were conferred on the life tenant were invariable; they could not be limited or abrogated.¹⁴ In contrast, the powers of trustees of trusts were subject to the instrument, if any, creating the trust,¹⁵ 'sometimes with undesirable consequences'.¹⁶ In practice, provisions were often inserted into trust instruments to give trustees the same management powers that tenants for life had under the settled land legislation.¹⁷ However, this made the preparation of trust instruments more costly, lengthy and cumbersome.¹⁸ Furthermore, where those powers were overlooked by the trust instrument, it left trustees in a difficult position:¹⁹

[It was] difficult for conscientious and competent trustees to act in the best interests of the trust and of the beneficiaries without either having to take personal risks themselves or having to embark on costly applications to the Court to secure for themselves special powers that should have lain in the discretion of trustees as a matter of course.

conferred on a tenant for life under the *Settled Land Act 1886* (Qld). Instead, the powers of management were exercised by the trustee. Because it was often the intention, however, that the land should not, in fact, be sold (at least not until after the usual life tenancy in the land), trusts for sale often gave the trustee a power to postpone the sale: WA Lee, 'The Trusts Act 1973 — reforms accomplished and problems remaining to be resolved' in A Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice BH McPherson CBE* (Supreme Court of Queensland Library, 2006) 145, 150.

13 JM Lightwood, 'Trusts for Sale' (1972) 3 *Cambridge Law Journal* 59, 72.

14 *Settled Land Act 1886* (Qld) s 53. WA Lee, 'The Trusts Act 1973 — reforms accomplished and problems remaining to be resolved' in A Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice BH McPherson CBE* (Supreme Court of Queensland Library, 2006) 145, 148–9. Another significant feature of the legislation was that any real property settled for successive beneficial interests was deemed to be settled land so that the administrative powers conferred on the life tenant could not be limited: *Settled Land Act 1886* (Qld) s 3(1).

15 See, eg, *Trustees and Executors Act 1897* (Qld) ss 14(2) (Power of trustee for sale to sell by auction, etc), 20(3) (Power for executors and trustees to compound, etc), and *Trustees and Executors Act Amendment Act 1902* (Qld) s 2(4) (Power to postpone sale and conversion in certain cases), which provided that those powers applied only if and so far as a contrary intention is not expressed in the instrument, if any, creating the trust.

16 WA Lee, 'The Trusts Act 1973 — reforms accomplished and problems remaining to be resolved' in A Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice BH McPherson CBE* (Supreme Court of Queensland Library, 2006) 145, 150.

17 JM Lightwood, 'Trusts for Sale' (1972) 3 *Cambridge Law Journal* 59, 72.

18 DE Allan, 'A New Look for Trustees' (1963) 1(6) *Tasmania University Law Review* 797, 799, referring to the comparable position in Western Australia.

19 *Ibid.*

4.9 In its 1971 Report, the Commission noted that one of the principal criticisms that had been made of the law of trusts at that time had been its tendency to move ‘towards rigidity and inflexibility’.²⁰ The Commission explained that legislative intervention had generally been confined to supplementing, rather than modifying, the powers given to trustees by the trust instrument, in contrast to the approach of the settled land legislation which enabled land to be disposed of ‘free of restrictions imposed in the past’.²¹

4.10 Having regard to the complexities and distinctions that applied in relation to the law relating to trusts of real property and trusts of personal property, the Commission considered that substantive changes should be made to improve and modernise Queensland trusts law.²² It recommended that ‘the policy of the settled land legislation’ should be extended to personal property,²³ with a view to assimilating the law relating to trusts of real property and trusts of personal property, and eliminating unnecessary distinctions between the two.²⁴

4.11 The Commission considered that this could be done only by conferring on all trustees (and existing life tenants) ‘defined statutory powers that may be exercised notwithstanding the absence of powers or even the presence of restrictions in the trust instrument itself’.²⁵ The purpose of conferring invariable powers was, in part, to ensure that third parties could rely on the powers conferred on trustees, particularly the powers of sale, and thereby secure the commercial viability of trusts.²⁶

We realise that some of the rigidity that has in the past crept into the law of trusts has been prompted in some cases by a desire to protect the interests of beneficiaries from what were believed to be the dangers implicit in allowing trustees to exercise wide powers. But we are satisfied that there is no substantial reason for supposing that a policy of limitation of trustee powers affords an effective safeguard against dishonesty, or that standards of trusteeship decline if wider powers are conferred. The truth is that the most prominent and direct consequence of limiting the powers of trustees is to place at risk those who deal with trustees who may unconsciously exceed their powers and to impose on such persons the not inconsiderable expense of investigating and ensuring that the limits of the power are not exceeded.

That is not to say the recommended statutory extension of trustee powers represents a novel or even a radical proposal. Indeed, the invariable practice in well-drawn trust instruments is to invest the trustees with powers at least as

20 Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 1.

21 Ibid.

22 Ibid.

23 In this context, the Commission was referring particularly to the policy of conferring invariable powers, following the precedent of the *Settled Land Act 1886* (Qld).

24 Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 1–2.

25 Ibid 2.

26 Ibid. See also WA Lee, ‘The Trusts Act 1973 — reforms accomplished and problems remaining to be resolved’ in A Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice BH McPherson CBE* (Supreme Court of Queensland Library, 2006) 145, 150–1.

extensive as those it is proposed should be conferred by statute. ... in the absence of such powers, there is the clearest evidence that in changing social and economic conditions rigidity and inflexibility work to the detriment not only of the individuals whom the trust is supposed to benefit but of the community as a whole.

4.12 The Commission's recommendations to extend the powers of trustees, and, in most cases, to make those powers invariable, were reflected in draft legislation contained in its Report. This approach marked a 'revolutionary' step by giving preference to the interests of beneficiaries over 'the settlor's dead hand',²⁷ and remains unique to Queensland. The draft legislation also included a range of other provisions to consolidate and improve the existing law.²⁸

4.13 With the enactment of the *Trusts Act 1973* (Qld), the Queensland Parliament largely implemented the recommendations made by the Commission in its 1971 Report, and reflected in its draft legislation.²⁹ The Act abolished the *Settled Land Act 1886* (Qld) and the primary trustee legislation in force at the time — the *Trustees and Executors Act 1897* (Qld) — as well as a number of other legislative provisions that had become of historical significance only.³⁰

4.14 One of the significant consequences, and the 'major theoretical achievement', of the *Trusts Act 1973* (Qld) was the unification of the law in relation to property held for successive beneficiaries, with the result that the trust became the sole vehicle for the creation of successive interests in both real property and personal property.³¹

4.15 Today, of course, trusts are no longer confined to the creation of successive interests in property but are employed in various contexts for a range of purposes.³²

²⁷ WA Lee, 'The Trusts Act 1973 — reforms accomplished and problems remaining to be resolved' in A Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice BH McPherson CBE* (Supreme Court of Queensland Library, 2006) 145, 151.

²⁸ Amongst other things, the draft legislation included provisions dealing with the powers of statutory trustees, the appointment and discharge of trustees, indemnities and protections of trustees, the powers of the court in relation to trusts, and remedies for the wrongful distribution of trust property.

²⁹ The Act did not implement the provisions of the Commission's draft legislation relating to the statutory power to invest in certain forms of security other than government stocks: see Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 99–101, Draft Bill cl 21(1)(f), (k)–(n), (3)–(9).

³⁰ Eg, the *Trustees and Incapacitated Persons Act 1867* (Qld), *Trustees (Housing Loans) Act 1967* (Qld), and *Trustees Protection Act 1931* (Qld), as well as two imperial statutes, the *Charitable Uses Act 1621*, 43 Eliz 1, c 4 and the *Charities Procedure Act 1812*, 52 Geo 3, c 101 (Sir Samuel Romilly's Act). Generally, those Acts were repealed because their provisions had been incorporated into the *Trusts Act 1973* (Qld) or because they no longer had any practical significance.

³¹ WA Lee, 'The Trusts Act 1973 — reforms accomplished and problems remaining to be resolved' in A Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice BH McPherson CBE* (Supreme Court of Queensland Library, 2006) 145, 147.

³² See Chapter 3.

THE SCOPE OF THE CURRENT ACT

4.16 The *Trusts Act 1973* (Qld) provides generally for the following:

- preliminary matters, including the application of the Act (Part 1);
- the appointment of trustees and the vesting of trust property, without a court order (Part 2);³³
- investments of trust property by trustees (Part 3);³⁴
- the general management and administrative powers of trustees (Part 4);³⁵
- the distributive powers of trustees including, in particular, powers to apply income or capital for the maintenance, education, advancement or benefit of a beneficiary (Part 5);³⁶
- particular indemnities and protections of trustees, and the barring of claims (Part 6);³⁷
- the powers of the court to oversee the administration of trusts, including orders to appoint, and vest property in, trustees (Part 7);³⁸
- certain matters relating to charitable trusts, including the circumstances in which the court may approve a *cy pres* scheme to vary the original purposes of a charitable trust (Part 8);³⁹
- gifts made by prescribed trusts for philanthropic purposes (Part 9);⁴⁰ and
- miscellaneous matters, including remedies for the wrongful distribution of trust property (Part 10).⁴¹

THE APPLICATION OF THE ACT

4.17 Section 4 of the *Trusts Act 1973* (Qld) sets out the provisions dealing with the application of the Act:

³³ The provisions in pt 2 of the Act are discussed in Chapter 5.

³⁴ The provisions in pt 3 of the Act are discussed in Chapter 6.

³⁵ The provisions in pt 4 of the Act are principally discussed in Chapters 8 and 9, but some provisions are discussed in Chapters 10 and 11.

³⁶ The provisions in pt 5 of the Act are discussed in Chapter 10.

³⁷ The provisions in pt 6 of the Act are principally discussed in Chapter 11, but some provisions are discussed in Chapter 10.

³⁸ The provisions in pt 7 of the Act are discussed in Chapter 12.

³⁹ The provisions in pt 8 of the Act are discussed in Chapter 13.

⁴⁰ The provisions in pt 9 of the Act are discussed in Chapter 13.

⁴¹ The provisions in pt 10 of the Act are discussed in Chapters 9, 11, 13 and 14.

4 Application

- (1) Except where otherwise provided, this Act applies to every trust, as defined in section 5, whether constituted or created before or after the commencement of this Act.
- (2) Nothing in this Act shall preclude a settlor from conferring on a trustee or other person exercising the powers of a trustee under this Act any powers additional to or larger than those conferred by this Act.
- (3) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, and unless a contrary intention is expressed in the instrument (if any) creating the trust, operate and be exercisable in the like manner and with all the like incidents effects and consequences as if conferred by this Act.
- (4) The powers conferred by or under this Act on a trustee are in addition to the powers given by any other Act⁴² and by the instrument (if any) creating the trust; but the powers conferred on the trustee by this Act, unless otherwise provided, apply if and so far only as a contrary intention is not expressed in the instrument (if any) creating the trust, and have effect subject to the terms of that instrument.
- (5) Except where otherwise provided by this Act, this Act does not affect the legality or validity of anything done before the commencement of this Act.
- (6) This Act binds the Crown not only in right of the State but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities. (note added)

4.18 The provisions of section 4(1), (5) and (6) concern the ambit of the Act.

Application to all trusts, whenever created

4.19 Section 4(1) provides that, generally, the Act applies to every trust,⁴³ whether constituted or created before or after the commencement of the Act.

Trust instrument may confer additional or larger powers on trustee

4.20 Section 4(2) ensures that a settlor may confer powers on a trustee (or any other person exercising the powers of a trustee under the Act) that are in addition to, or wider, than those conferred by the Act. Section 4(3) clarifies that any additional or wider powers so conferred are exercisable as if they were conferred by the Act, unless there is a contrary intention expressed in the instrument (if any) creating the trust.

⁴² See, eg, the *Public Trustee Act 1978* (Qld); *Trustee Companies Act 1968* (Qld). These Acts are discussed in Chapter 16.

⁴³ Under the *Trusts Act 1973* (Qld), the term 'trust' is defined to extend to implied, resulting, bare and constructive trusts, to cases where the trustee has a beneficial interest in the trust property, and to the duties incidental to the office of a personal representative, but does not include the duties incidental to an estate conveyed by way of mortgage: *Trusts Act 1973* (Qld) s 5(1).

The effect of a provision in the trust instrument excluding a particular power

4.21 Section 4(4) provides that the powers that are conferred on a trustee by the Act are in addition to any powers that may be conferred under another Act or by the trust instrument. However, section 4(4) also provides that the powers conferred on the trustee by the Act, *unless otherwise provided*, apply if and so far only as a contrary intention is not expressed in the trust instrument, and have effect subject to the terms of that instrument.

4.22 Consequently, unless another provision of the Act 'provides otherwise' in relation to the effect of a contrary intention in the trust instrument, the trust instrument prevails over the Act in relation to a provision that would otherwise confer a power on a trustee.

4.23 There are a number of provisions in the Act that create a relevant exception to section 4(4). For the most part, these are application provisions, located at the commencement of the parts of the Act that confer powers on trustees.⁴⁴ They provide that the statutory powers conferred on trustees under the relevant part of the Act are conferred 'whether or not a contrary intention is expressed in the instrument (if any) creating the trust'. An example of such a provision is section 31(1) of the Act, which deals with the application of the provisions of Part 4 of the Act dealing with the general management and administrative powers of trustees. In fact, most of the powers conferred on trustees by the Act are conferred on this basis; as a result, they cannot be varied or overridden by the trust instrument.⁴⁵ In particular, this includes powers of and relating to the sale of trust property.⁴⁶

4.24 In contrast, under the trustee legislation in the other Australian jurisdictions, most powers conferred on trustees, including powers of sale, apply subject to a contrary intention in the instrument (if any) creating the trust.⁴⁷

⁴⁴ There are also some individual provisions which are expressed to apply despite the terms of the trust instrument or notwithstanding anything to the contrary in the trust instrument: see, eg, *Trusts Act 1973* (Qld) s 28(2) (power to retain a dwelling house as residence for a beneficiary).

⁴⁵ See *Trusts Act 1973* (Qld) ss 10 (application of pt 2 dealing with the appointment and discharge of trustees), 20 (application of pt 3 dealing with investments), 31(1) (application of pt 4 dealing with trustees' general powers), 60 (application of pt 5 dealing with maintenance and advancement), 65 (application of pt 6 dealing with indemnities and protections of trustees), 111 (application of pt 10 dealing with miscellaneous provisions). Section 79 of the Act, which is in similar terms, applies to pt 7 of the Act, which deals with the exercise of powers by the Supreme Court.

⁴⁶ *Trusts Act 1973* (Qld) ss 31(1), 32(1)(a), (c), 34–37.

⁴⁷ See *Trustee Act 1925* (ACT) ss 6(15), 8(8), 21(5), 22(6), 23(2), 26(6), 27(3), 27B(1), 28(13), 31(2), 36(100), 37(6), 40(7), 41(4), 42(8), 43(11), 44(7), 45(9), 46(16), 49(4), 50(3), 51(5), 52(3), 53(6), 55(4), 56(3), 64(9); *Trustee Act 1925* (NSW) ss 6(13), 8(8), 21(6), 21A(3), 22(5), 23(2), 26(5), 27(3), 27B(1), 28(12), 31(2), 36(7), 37(6), 40(6), 41(4), 42(8), 43(10), 44(7), 45(9), 46(16), 49(4), 50(3), 51(5), 52(3), 53(6), 55(4), 56(3), 64(8); *Trustee Act* (NT) ss 5, 6(1), (3), 9(7), 10, 10A(1), 11(5), 12(3), 14(3), 17(6), 18(4), 19(3), 21(3), 24(3), 24A(2), 49(2), 52; *Trustee Act 1936* (SA) ss 6, 7(1), (3), 10(7), 11, 12(1), 14(5), 14A(7), 14B(4), 15(3), 17(1), 19(1), 20(3), 23A(13), 23C, 24(6), 25(12), 25B(5), 25C(6), 26(3), 28(3), 33(8), 33A(6), 35A(4), 35B(7), 50(2), 71; *Trustee Act 1898* (Tas) ss 6, 7(1), (3), 10(7), 11, 12(1), 13(5), 14(3), 16(2), 20(4), 21(3), 22(3), 24(3), 25AA(1), (2), 30(2), (3), 31, 52(2), 55(1), 64(2); *Trustee Act 1958* (Vic) s 2(3); *Trustees Act 1962* (WA) s 5(2), (3)(a).

It has been suggested that, in practice, the difference is 'not all that great': WA Lee, 'Current Issues for Trustee Legislation' (1990) 20 *University of Western Australia Law Review* 507, 510. Where a trust instrument denies power to a trustee which statute otherwise confers on him or her, it is open to the trustee to apply for the power to be conferred by the court.

Chapter 5

Capacity, Appointment and Discharge of Trustees

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INTRODUCTION

5.1 The original trustees of a trust are ordinarily appointed by the instrument creating the trust, in which case they are chosen by the settlor.¹ New trustees may be appointed in one of three ways:

- in accordance with the provisions of the trust instrument;
- under section 12 of the *Trusts Act 1973* (Qld), which, depending on the circumstances, enables specified persons to appoint a new trustee or trustees in substitution for, or in addition to, an existing trustee (sometimes referred to as ‘non-judicial’ or ‘out of court’ appointment of trustees); or
- by the Supreme Court exercising power under section 80 of the *Trusts Act 1973* (Qld) or in the exercise of its inherent jurisdiction.²

5.2 This chapter examines the provisions of the *Trusts Act 1973* (Qld) that deal with the appointment and discharge of trustees without recourse to the court. It also examines a number of related issues such as capacity to act as a trustee, the maximum number of trustees permitted under the Act, the vesting of trust property in new and continuing trustees, and the devolution of trust assets and trust powers on the death of a trustee.

CAPACITY TO BE A TRUSTEE

No general disqualifications

5.3 As a general principle, any person who is capable at law of holding property in his or her own right may be a trustee,³ and a settlor has the discretion to choose who to appoint. However, it may happen that a person who is appointed as a trustee is not able to act because the person lacks the capacity to exercise the discretions required by the office.⁴ For example:⁵

¹ The exception is where the trust arises by operation of law, as in the case of a constructive trust or a resulting trust.

² The appointment of trustees by the court is considered in Chapter 12.

³ JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1401].

⁴ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 March 2009) [8000]; GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [21.05].

⁵ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 March 2009) [8000].

Infants of tender years clearly lack that capacity and so even if the trust property happens to become vested in them they cannot act. Likewise a person of unsound mind may in fact be unable to exercise the trustee's discretions, even although not subject to any specific legally recognised statutory disability.

5.4 The *Trusts Act 1973* (Qld) does not restrict who may be appointed as a trustee. In this respect, it preserves a settlor's freedom to choose the trustees of a trust. Instead, the Act provides a mechanism for the removal and replacement of trustees, should the need arise. As explained later in this chapter, section 12(1) of the *Trusts Act 1973* (Qld) provides for the replacement of trustees in a number of circumstances, including, in paragraphs (f) and (g), where a trustee 'is incapable of acting' or 'is an infant'.⁶

5.5 The trustee legislation in all of the other Australian jurisdictions also provides for the appointment of trustees to replace a trustee who 'cannot act'⁷ or 'is incapable of acting' as trustee,⁸ and the legislation in most jurisdictions also provides for the replacement of a trustee who is a minor.⁹

Statutory disqualification of minors

5.6 As noted above, the *Trusts Act 1973* (Qld) does not disqualify a minor from being appointed as trustee, but a trustee who is 'an infant' is liable to be removed and replaced under section 12(1)(g).

5.7 At common law, 'infant' (or, in modern terminology, a 'minor') refers to a person who has not attained the age of majority,¹⁰ which is 18 years of age.¹¹ Generally, a contract entered into by a minor is not enforceable against the minor.¹² A minor may hold freehold land under the *Land Title Act 1994* (Qld),¹³ but is not eligible to apply for, buy or hold leasehold land under the *Land Act 1994* (Qld).¹⁴

⁶ The predecessor to s 12(1) of the *Trusts Act 1973* (Qld), s 10(1) of the *Trustees and Executors Act 1897* (Qld), did not provide for the appointment of a trustee or trustees in the place of an infant trustee. In its 1971 Report, the Commission noted that 'the general law, whilst not prohibiting an infant from being a trustee, prevents him from effectively doing any act which involves the exercise of a discretion, and because of this an infant trustee will be removed on application to the Court': Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 14.

⁷ *Trustee Act 1925* (ACT) s 6(2)(e).

⁸ *Trustee Act 1925* (NSW) s 6(2)(e); *Trustee Act* (NT) s 11(1); *Trustee Act 1936* (SA) s 14(1); *Trustee Act 1898* (Tas) s 13(1); *Trustee Act 1958* (Vic) s 41(1); *Trustees Act 1962* (WA) s 7(1)(f).

⁹ *Trustee Act 1925* (ACT) s 6(2)(f); *Trustee Act 1925* (NSW) s 6(2)(e); *Trustee Act 1958* (Vic) s 41(1); *Trustees Act 1962* (WA) s 7(1)(g).

¹⁰ *Thurgood v Director of Australian Legal Aid Office* (1984) 9 Fam LR 916, 922 (Wilcox J). Neither the *Trusts Act 1973* (Qld) nor the *Acts Interpretation Act 1954* (Qld) defines 'infant'.

¹¹ *Law Reform Act 1995* (Qld) s 17. See also the definitions of 'minor', 'child' and 'adult' in s 36 of the *Acts Interpretation Act 1954* (Qld).

¹² However, a minor does have some capacity to enter into contracts for 'necessaries' and beneficial contracts of services (such as apprenticeships or employment contracts): see *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 28; *Sale of Goods Act 1896* (Qld) s 5; and generally Queensland Law Reform Commission, *Minors' Civil Law Capacity*, Report No 50 (1996) ch 3 (Contracts).

¹³ A minor's date of birth will be recorded in the freehold land register: *Land Title Act 1994* (Qld) s 28(1)(d).

¹⁴ *Land Act 1994* (Qld) s 142. See further Thomson Reuters, *Property Law and Practice Qld* [L142.2]; SA Christensen, WM Dixon et al, *Land Contracts in Queensland* (Federation Press, 2004) [3.4.1.4].

5.8 The approach taken in the *Trusts Act 1973* (Qld) reflects the general principle that the appointment of a minor as a trustee is not void, but that the minor trustee is liable to be replaced because he or she has only a limited capacity to act.¹⁵

Although an infant trustee is subject to replacement ... , and although the court will normally appoint a replacement trustee as a matter of course, the appointment of an infant is not *ipso facto* void, and, pending removal, the appointment will stand. He may not, however, do any act as trustee which involves the exercise of a discretion, and he will not be bound if he acts imprudently.

5.9 In contrast, the trustee legislation in the ACT and New South Wales provides that the appointment of a minor as trustee is void, but that the appointment does not affect the power to appoint a new trustee to fill the vacancy.¹⁶ This is also the case in England.¹⁷ The fact that these provisions provide expressly that the vacancy may be filled makes it clear that, although the appointment of a minor as trustee is void, the trust does not fail. This reflects the general equitable principle that 'a trust will not be allowed to fail for want of a trustee'.¹⁸

5.10 However, the fact that the appointment of a minor is void means that no right can be reserved to the minor to act as trustee on attaining his or her majority.¹⁹

The exception in New South Wales and the Australian Capital Territory [to the general principle that a minor may hold the office of trustee] is that, since the introduction of s 151A of the *Conveyancing Act 1919* in each jurisdiction, the appointment of an infant to be a trustee of any trust is void but that is without prejudice to the power to appoint a new trustee to fill the vacancy. Before then, an original appointment of an infant as an express trustee was valid although the infant could not as trustee do any act which involved the exercise of a discretion. The court would appoint a new trustee in the place of the infant trustee, but such appointment would be made without prejudice to any application by the infant to be restored to the trusteeship on coming of age. Now, no such right is reserved to the infant where the appointment is void.

5.11 The Law Reform Commission of Ireland considered the position of minor trustees in its recent review of the law of trusts. It commented that, 'in order to protect the interests of the trust, the beneficiaries, and potential minor trustees, a trustee should not be permitted to act unless they have reached the age of eighteen'.²⁰ It therefore recommended that a minor (within the meaning of the *Age of Majority Act 1985*) should be prohibited from acting as a trustee, and that any

¹⁵ G Fricke and OK Strauss, *The Law of Trusts in Victoria* (Butterworths, 1964) 239.

¹⁶ *Trustee Act 1925* (ACT) s 7A; *Conveyancing Act 1919* (NSW) s 151A. It has been held that these provisions do not prevent a minor from being a trustee under a resulting trust or a constructive trust, for example, where money is deposited into a bank account in the name of an infant: see *Sanofi-Aventis Australia v Kartono* [2006] NSWSC 1284, [7] (Campbell J).

¹⁷ *Law of Property Act 1925*, 15 & 16 Geo 5, c 20, s 20.

¹⁸ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1502].

¹⁹ *Ibid* [1402].

²⁰ Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) [2.09].

purported appointment of a minor to act as trustee in relation to any settlement or trust should be void from when the appointment would take effect.²¹

5.12 However, the Law Reform Commission of Ireland also recommended that, where a minor is named in the original trust instrument and appointed in writing, he or she should be permitted to act as an additional trustee when he or she reaches the age of majority at 18 years of age (or by marriage).²² It considered that this qualification had 'greater compatibility with the fundamental principle of settlor autonomy'.²³

5.13 Apart from the issue of minority, that Commission did not recommend any other general categories of disqualified persons. It considered that 'policing disqualification in relation to general trusts would not be feasible' and did not make any recommendations in relation to the disqualification of trustees of non-charitable trusts.²⁴

5.14 The Law Commission of New Zealand is currently considering whether certain categories of persons should automatically be disqualified from acting as trustees.²⁵ It has noted that:²⁶

The question is really whether the law should automatically prohibit certain categories of persons from being appointed and continuing to hold office as trustee or whether it should continue to specify the categories of persons who may be removed from office by the continuing trustees or the court. If certain categories of persons are prohibited from holding office as a trustee, there could be difficulties in enforcing this law ...

5-1 Should the *Trusts Act 1973* (Qld) provide that the appointment of a minor (or other particular categories of persons) is void? Alternatively, is it sufficient that section 12(1) of the Act provides for the replacement of certain trustees, including minors?

LIMITATION ON THE MAXIMUM NUMBER OF TRUSTEES

An upper limit of four trustees

5.15 Section 11 of the *Trusts Act 1973* (Qld) imposes a mandatory²⁷ upper limit of four on the permissible number of trustees²⁸ of private trusts.

²¹ Ibid [2.12].

²² Ibid.

²³ Ibid [2.11]. However, given that the appointment is to be void from when it was to take effect, it is not clear what authority the minor would have to act as a trustee on attaining his or her majority.

²⁴ Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) [2.159]–[2.160].

²⁵ Law Commission of New Zealand, *The Duties, Office and Powers of a Trustee: Review of the Law of Trusts*, Issues Paper No 26 (2011) [4.23]–[4.24].

²⁶ Ibid [4.27].

5.16 Section 11(1) provides that, for trusts in existence at the commencement of the Act that have more than four trustees:

- no new trustees may be appointed until the number is reduced to less than four; and
- thereafter, the number of trustees is not to be increased beyond four.

5.17 Section 11(2) provides that, for trusts made or coming into operation after the commencement of the Act:

- the number of trustees must not in any case exceed four;
- where more than four persons are named as trustees, the four first named persons who are able and willing to act will alone be the trustees (and the other persons named will not be trustees unless appointed on the occurrence of a vacancy); and
- the number of trustees must not be increased beyond four.

5.18 Section 12 of the Act also provides that, on the appointment of a replacement trustee under section 12(1), or the appointment of an additional trustee under section 12(5), the number of trustees may not be increased beyond four.²⁹

5.19 In the absence of statutory intervention, there is no restriction at law on the maximum number of trustees that a trust may have. Two or more trustees might be appointed to improve accountability or to diversify the expertise of the trustees. However, because trustees of private trusts are generally required to exercise their powers jointly,³⁰ as the number of trustees increases, so does the complexity of trust administration:³¹

in practice a multiplicity of trustees is productive of considerable expense, delay and inconvenience, particularly where conveyancing is involved and where re-vesting of trust property is necessitated by successive deaths of trustees.

5.20 Section 11 was introduced to address this concern.³² It was modelled on the English trustee legislation, which provides for a maximum of four trustees of

²⁷ *Trusts Act 1973* (Qld) s 11 applies 'whether or not a contrary intention is expressed in the instrument (if any) creating the trust': s 10.

²⁸ This does not include 'custodian trustees': s 11(4). A custodian trustee, being a corporation, may be appointed under s 19 of the Act for the limited purpose of holding and dealing with trust property at the direction of the managing trustees: s 19(2)(c).

²⁹ *Trusts Act 1973* (Qld) s 12(2)(a), (5).

³⁰ *Luke v South Kensington Hotel Co* (1879) 11 Ch D 121, 125–6 (Jessel MR). This requirement does not apply if the trust instrument provides otherwise: GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [22.65]. Whether trustees should generally be required to act jointly is considered in Chapter 7.

³¹ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 13.

³² Queensland, *Parliamentary Debates*, Legislative Assembly, 5 April 1973, 3178 (WE Knox, Minister for Justice).

private trusts of land.³³ The Queensland provision extended this to all private trusts, whether of land or other property.

5.21 Section 11 is consistent with section 48 of the *Succession Act 1981* (Qld), which provides that a grant of probate or letters of administration must not be made to more than four persons at any time.³⁴

5.22 An upper limit of four trustees is also imposed, in certain circumstances, by the trustee legislation in the ACT and New South Wales,³⁵ Victoria³⁶ and Western Australia.³⁷

5.23 As noted earlier in this chapter, one of the arguments for imposing the current maximum number of four trustees is that, because of the requirement for trustees to exercise their powers jointly, a larger number of trustees would increase the complexity of the trust administration. If trustees of private trusts were not required to exercise their powers jointly, that might remove an argument for retaining the cap on the maximum number of trustees. However, the removal of the cap on the maximum number of trustees, in combination with a provision that allowed trustees generally to exercise their powers by majority, would arguably create the potential for trustees to make appointments that have the effect of 'stacking' the trustees — that is, appointing trustees who will support their own direction for the trust. At present, the requirement for trustees to exercise their powers jointly, which applies to the power to appoint new trustees, avoids that situation.

Exceptions

5.24 The limit of four trustees in section 11 of the Act is subject to two significant exceptions. Where these exceptions apply, there is no limit on the permissible number of trustees.

³³ *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 34(1)–(2). See also s 36(1)–(2), (6). Section 34(3) provides that the limit of four trustees applies only to 'settlements and dispositions of land', and does not apply:

- (a) in the case of land vested in trustees for charitable, ecclesiastical, or public purposes;
- (b) where the net proceeds of the sale of the land are held for like purposes; or
- (c) to the trustees of a term of years absolute limited by a settlement on trusts for raising money, or of a like term created under the statutory remedies relating to annual sums charged on lands.

³⁴ See also 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) vol 1, [4.285], Rec 4-19, where the National Committee recommended that the model Administration of Estates Bill provide for a maximum of four personal representatives.

³⁵ *Trustee Act 1925* (ACT) ss 6(6)(b)–(c), (15), 7(6)(b); *Trustee Act 1925* (NSW) ss 6(5)(b)–(c), (13), 7(5)(b). The limitation applies to the appointment of an additional trustee or, subject to a contrary intention in the trust instrument, a replacement trustee under the powers of appointment conferred by those Acts.

³⁶ *Trustee Act 1958* (Vic) ss 40, 41(2), (6), 42(1)(a)–(b). Section 40 is in virtually identical terms to the English provision and applies only to private trusts of land.

³⁷ *Trustees Act 1962* (WA) s 7(2)(a), (5). The limitation applies to the appointment of an additional trustee or a replacement trustee under s 7 of that Act. There is no statutory restriction on the maximum number of trustees in the remaining Australian jurisdictions or in New Zealand, but see, in Manitoba, *Trustee Act*, CCSM 1987, c T160, ss 8(4), 10(b).

5.25 The first exception — in section 11(3)(a) — is where the trust property is, or is to be, vested in the trustee(s) for charitable purposes. This follows the English approach,³⁸ which is mirrored in Victoria.³⁹ One suggested reason for this exception is that the difficulty of ensuring unanimity of decision does not arise in the case of charitable trusts since the trustees may act by majority.⁴⁰ It has also been noted that, although boards of trustees ought not to be ‘too big and unwieldy’, the appointment of multiple trustees for a charitable trust is ‘normally desirable ... so that there should be a check on possible abuses of discretion or inaction’.⁴¹

5.26 The second exception to the limit of four trustees — in section 11(3)(b) — is where the Minister⁴² gives a certificate in writing approving the number of trustees in whom the trust property is, or is to be, vested.⁴³ This exception was added in 1981⁴⁴ to facilitate the administration of superannuation funds.⁴⁵

- 5-2 Is the upper limitation of four trustees for private trusts appropriate?**
- 5-3 Should charitable trusts continue to be an exception to the limitation on the maximum number of trustees?**
- 5-4 Should the Minister retain the discretion to approve more than four trustees?**

THE APPOINTMENT OF REPLACEMENT AND ADDITIONAL TRUSTEES

Introduction

5.27 Section 12 of the *Trusts Act 1973* (Qld) is a lengthy provision, which deals with the power to appoint a new trustee or trustees in the place of an existing trustee or in addition to the existing trustees.⁴⁶ Section 12 has its origins in section 36 of the English *Trustee Act 1925*. That section was derived from section 10 of the

³⁸ See n 33 above.

³⁹ *Trustee Act 1958* (Vic) s 40(3)(a)–(b).

⁴⁰ *Re Whiteley* [1910] 1 Ch 600, 607–8 (Eve J). See also HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 March 2009) [8210].

⁴¹ H Picarda, *The Law and Practice Relating to Charities* (Bloomsbury Professional, 4th ed, 2010) 587. See also GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [17.20].

⁴² The relevant Minister is the Attorney-General and Minister for Justice: *Acts Interpretation Act 1954* (Qld) s 33(2)(a); *Administrative Arrangements Order (No 4) 2012* (Qld) s 2.

⁴³ See also *Trusts Act 1973* (Qld) s 12(5).

⁴⁴ *Trusts Act Amendment Act 1981* (Qld) ss 7, 8(b).

⁴⁵ Queensland, *Parliamentary Debates*, Legislative Assembly, 25 August 1981, 1756–7 (SS Doumany, Minister for Justice and Attorney-General).

⁴⁶ Some statutory schemes impose particular requirements in relation to the appointment and removal of trustees: see, eg, s 29J(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth), which imposes particular requirements for the appointment of a trustee of a registrable superannuation entity.

English *Trustee Act 1893*, which was in turn derived from *Lord Cranworth's Act*.⁴⁷ The purpose of that Act was:⁴⁸

to enlarge the powers possessed by testators and settlors by conferring a general power for the appointment of new trustees without resort to the Court in such a way as not to oust or destroy the special provisions of the particular instrument, but to be a substitute for such provisions if none existed, or an extension of them if they did not actually fit the events which had happened.

5.28 Provisions of this kind play an important role in minimising recourse to the courts for the appointment of new trustees:⁴⁹

Originally the primary source of the trustee's authority to act was the instrument, if any, creating the trust, and the secondary source was the court. Nowadays the primary source is still the instrument creating the trust; but the secondary is statutory authority, with recourse to the court as a comparatively exceptional event.

5.29 Section 12 of the *Trusts Act 1973* (Qld) provides:

12 Power of appointing new trustees

- (1) Where a trustee, whether original or substituted, and whether appointed by the court or otherwise—
- (a) is dead; or
 - (b) remains out of the State for more than 1 year without having properly delegated the execution of the trust;⁵⁰ or
 - (c) seeks to be discharged from all or any of the trusts or powers reposed in or conferred on the trustee; or
 - (d) refuses to act therein; or
 - (e) is unfit to act therein; or
 - (f) is incapable of acting therein; or
 - (g) is an infant; or
 - (h) being a corporation, has ceased to carry on business, is under official management, is in liquidation or has been dissolved;

then the person nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust, or if there is no such person or no such person able and willing to act, then the surviving or continuing trustee or trustees for the time being, or the personal representative of the last surviving or continuing trustee, may by writing appoint a person or persons (whether or not being the person or

⁴⁷ *Trustees, Mortgagees, etc Act 1860*, 23 & 24 Vict, c 145, s 27. See HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 March 2009) [8210].

⁴⁸ *Re Wheeler and De Rochow* [1895] 1 Ch 315, 320 (Kekewich J).

⁴⁹ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 March 2009) [8110].

⁵⁰ See the discussion in Chapter 9 of s 56 of the *Trusts Act 1973* (Qld) and the power to delegate.

persons exercising the power) to be a trustee or trustees in the place of the trustee first in this subsection mentioned.

- (2) On the appointment of a trustee or trustees for the whole or any part of the trust property—
 - (a) the number of trustees may, subject to the restriction imposed by this Act on the number of trustees, be increased; and
 - (b) a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part, and whether or not new trustees are or are to be appointed for any other part of the trust property; and any existing trustee may be appointed or remain 1 of the separate set of trustees; or if only 1 trustee were originally appointed, then 1 separate trustee may be so appointed for the part of the trust first in this paragraph mentioned; and
 - (c) it is not obligatory to fill up the original number of trustees where 2 or more trustees were originally appointed; but (except where only 1 trustee was originally appointed or where the trust instrument otherwise provides) a trustee is not discharged under this section unless—
 - (i) in the case of any trust (including a trust referred to in subparagraph (ii))—there will remain either a trustee corporation or at least 2 individuals to act as trustees of the trust; or
 - (ii) in the case of a trust for any charitable or public purpose or for any purpose of recreation or other leisuretime use or occupation—there will remain a local government to act as trustee of the trust; and
 - (d) 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.
- (3) Where a trustee has been removed under a power contained in the instrument creating the trust, a new trustee or new trustees may be appointed in the place of the trustee who is removed, as if that trustee were dead, or, in the case of a corporation, as if the corporation had been dissolved, and the provisions of this section shall apply accordingly.
- (4) The power of appointment given by subsection (1), or any similar previous enactment, to the personal representative of the last surviving or continuing trustee is and shall be deemed always to have been exercisable by the administrator for the time being of that trustee or the executor for the time being, whether original or by representation, of that surviving or continuing trustee who has proved the will of his or her testator without the concurrence of any executor who has renounced or has not proved.

- (5) Where, in the case of any trust, there are not more than 3 trustees (none of them being a trustee corporation or a local government), then—
- (a) the person or persons nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust; or
 - (b) where there is no person nominated for the purpose of appointing new trustees by the instrument creating the trust, or no such person able and willing to act, then the trustee or trustees for the time being;

may, by writing, appoint a person or persons (whether or not being the person or persons exercising the power) to be an additional trustee or additional trustees, but it shall not be obligatory to appoint any additional trustee unless the instrument (if any) creating the trust, or any statutory enactment, provides to the contrary; but (except where the Minister has given a certificate in writing that the Minister approves the appointment of the additional trustees) on any appointment of additional trustees under this subsection the number of trustees shall not be increased beyond 4.

- (6) Every new trustee appointed under this section has the same powers, authorities, and discretions and may in every respect act, as if the new trustee had originally been appointed a trustee by the instrument (if any) creating the trust, both before and after all the trust property becomes by law or by assurance or otherwise vested in the trustee.
- (7) The provisions of this section which are brought into effect by the circumstance that a person nominated trustee (whether sole or otherwise) in a will is dead are brought into effect whether the death of that person occurred before or after the death of the testator; and the provisions relative to a continuing trustee relate also to a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.
- (8) The provisions of this section relating to a person nominated for the purpose of appointing new trustees apply whether the appointment is made in a case specified in this section or in a case specified in the instrument (if any) creating the trust, but where a new trustee is appointed under this section in a case specified in that instrument, the appointment shall be subject to the terms applicable to an appointment in that case under the provisions of that instrument.
- (9) In this section—
- trustee** does not include a personal representative as such.
- (10) In this section—
- trustee corporation**—
- (a) includes the public trustee of another State, or a person in that State discharging functions similar to the public trustee of this State;
 - (b) includes a trustee corporation authorised by the laws of another State to administer the estate of deceased persons and other trust estates. (note added)

5.30 Most of the provisions in section 12 are concerned with the appointment of a trustee or trustees in the place of an existing trustee (whether original or substituted, and whether appointed by the court or not).⁵¹ The section does not limit the replacement of a trustee with a single trustee; on the contrary, section 12(1) provides for the appointment of ‘a person or persons (whether or not being the person or persons exercising the power)’ in the place of a trustee. Consequently, provided that the maximum number of trustees is not exceeded, the replacement of a trustee may result in an increased number of trustees.⁵²

5.31 Section 12(5) is concerned with the appointment of an additional trustee or trustees in circumstances that do not involve the replacement of a trustee.⁵³

5.32 The provisions of section 12 apply, subject to any exceptions contained in that section, whether or not a contrary intention is expressed in the instrument (if any) creating the trust.⁵⁴ In this respect, section 12 differs from the equivalent provisions in the other Australian jurisdictions, which are generally subject to any contrary intention expressed in the trust instrument.⁵⁵

Circumstances in which a trustee may be replaced

5.33 Section 12(1) of the *Trusts Act 1973* (Qld) specifies a range of circumstances in which a trustee or trustees may be appointed in the place of an existing trustee.⁵⁶

5.34 Additionally, section 12(3) provides that, if a trustee has been removed under a power contained in the trust instrument, a new trustee or trustees may be appointed in the place of the trustee who has been removed, as if that trustee were dead or, in the case of a corporation, as if the corporation had been dissolved. In effect, the subsection treats the trustee who has been removed as falling within section 12(1)(a) or (h).

5.35 The circumstances mentioned in section 12(1) and (3) are similar to the circumstances that apply under the trustee legislation in the other Australian jurisdictions.⁵⁷

⁵¹ See *Trusts Act 1973* (Qld) s 12(1)–(4), (7).

⁵² *Trusts Act 1973* (Qld) s 12(2)(a).

⁵³ In the ACT, New South Wales and South Australia, the equivalent provisions to s 12(5) of the *Trusts Act 1973* (Qld) are found in stand-alone sections of the relevant Acts: see *Trustee Act 1925* (ACT) s 7; *Trustee Act 1925* (NSW) s 7; *Trustee Act 1936* (SA) s 14B.

⁵⁴ *Trusts Act 1973* (Qld) s 10. The application of pt 2 of the Act is considered later in this chapter: see [5.265] ff below. See also the discussion of this issue in Chapter 4.

⁵⁵ *Trustee Act 1925* (ACT) s 6(15); *Trustee Act 1925* (NSW) s 6(13); *Trustee Act* (NT) s 11(5); *Trustee Act 1936* (SA) ss 14(5), 14B(4); *Trustee Act 1898* (Tas) s 13(5); *Trustee Act 1958* (Vic) ss 2(3), 41; *Trustees Act 1962* (WA) ss 5(2)–(3), 7.

⁵⁶ *Trusts Act 1973* (Qld) s 12 is set out at [5.29] above.

⁵⁷ *Trustee Act 1925* (ACT) s 6(2); *Trustee Act 1925* (NSW) s 6(2); *Trustee Act* (NT) s 11(1); *Trustee Act 1936* (SA) s 14(1); *Trustee Act 1898* (Tas) s 13(1); *Trustee Act 1958* (Vic) s 41(1)–(2); *Trustees Act 1962* (WA) s 7(1), (3). The trustee legislation in the Northern Territory, South Australia and Tasmania does not include an equivalent of the circumstances mentioned in s 12(1)(g) or (h) of the *Trusts Act 1973* (Qld).

5.36 The first clause of section 12(7) extends the application of section 12(1)(a) by enabling a trustee to be appointed where 'a person nominated as trustee (*whether sole or otherwise*) in a will is dead', even though the person nominated as trustee predeceased the testator (and therefore never assumed the office of trustee). The words 'whether sole or otherwise' are included in the equivalent provisions of the *Trustees Act 1962* (WA) and the *Trustee Act 1956* (NZ).⁵⁸ They did not, however, appear in the predecessor of section 12(7),⁵⁹ and do not appear in the equivalent provisions of the other Australian jurisdictions or in the equivalent English provision.⁶⁰

5.37 In *Nicholson v Field*,⁶¹ the question arose as to the application of the relevant English provision,⁶² which did not include these additional words. The two persons nominated as trustees in the will predeceased the testator. The executor of the last survivor of those persons purported to appoint new trustees to replace the persons who had predeceased the testator. Kekewich J held that the appointment was invalid.⁶³

The section contemplates a trustee dying in the lifetime of the testator, and there being a vacancy by reason of the death, and an appointment in that event. But the appointment is to be made by the 'surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee;' and it seems to me to be quite impossible to construe these words as meaning that the appointment is to be made by the survivor of two persons neither of whom ever was a trustee.

5.38 Commentators have suggested, citing *Nicholson v Field*, that the relevant statutory provisions allow for a new trustee to be appointed in the place of a person who is nominated as trustee, but who predeceases the testator, only if there is another person who survives the testator and becomes a trustee.⁶⁴

if there are two or more trustees named in a will and one of them dies before the testator, the persons having the right to appoint may appoint the new trustee in place of the trustee who has died before the testator. But the personal representatives of a sole trustee who has died before his testator are not able to appoint new trustees. So where all the trustees named in the will die before the testator, the personal representatives of the last survivor of the named trustees are not able to appoint new trustees, since a person who has never acted in the trust is not reckoned as a trustee. (note omitted)

5.39 The inclusion in section 12(7) of the *Trusts Act 1973* (Qld) of the words 'whether sole or otherwise' clarifies that the subsection applies even if there is no

58 *Trustees Act 1962* (WA) s 7(7); *Trustee Act 1956* (NZ) s 43(7).

59 *Trustees and Executors Act 1897* (Qld) s 10(5).

60 *Trustee Act 1925* (ACT) s 6(10); *Trustee Act 1925* (NSW) s 6(9); *Trustee Act* (NT) s 11(4) *Trustee Act 1936* (SA) s 14(4); *Trustee Act 1898* (Tas) s 13(4); *Trustee Act 1958* (Vic) s 41(8); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 36(8).

61 [1893] 2 Ch 511.

62 *Conveyancing and Law of Property Act 1881*, 44 & 45 Vict, c 41, s 31.

63 [1893] 2 Ch 511, 512.

64 G Fricke and OK Strauss, *The Law of Trusts in Victoria* (Butterworths, 1964) 245.

other person nominated as trustee who survives the testator and becomes a trustee.

Remaining out of the jurisdiction for a year

5.40 The trustee legislation in all Australian jurisdictions includes an equivalent of section 12(1)(b) of the *Trusts Act 1973* (Qld), which allows a trustee to be replaced if the trustee.⁶⁵

- (b) remains out of the State for more than 1 year without having properly delegated the execution of the trust; ...

5.41 Ford and Lee have suggested that the provision 'is not used as much today because of improved distance communications'.⁶⁶ The omission of this ground for replacement has recently been considered by two law reform commissions.

5.42 The Law Reform Commission of Ireland has recommended that its equivalent provision should be deleted.⁶⁷ The Commission explained:⁶⁸

In the Consultation Paper the Commission distinguished the situation where a trustee has left the jurisdiction and abandoned his or her duties from the situation where the trustee is participating fully from outside the jurisdiction. While the former situation clearly requires the replacement of the trustee, the latter may be entirely acceptable in our modern technological world. The Commission is therefore of the view that this is no longer an appropriate ground for the replacement of a trustee under the non-judicial power of appointment.

5.43 The Law Reform Commission of Ireland considered that, if a settlor or testator wished the trustees to reside within the jurisdiction, that requirement could be expressly specified in the trust instrument.⁶⁹ This would also be possible in Queensland.⁷⁰

5.44 The Law Commission of New Zealand has questioned the rationale for retaining its equivalent provision, although it acknowledged that there may be some residual benefit in retaining this ground for replacement:⁷¹

⁶⁵ In the ACT and New South Wales, the trustee legislation also includes, as an additional circumstance in which a trustee may be replaced, that the trustee remains out of the jurisdiction for two years: *Trustee Act 1925* (ACT) s 6(2)(c); *Trustee Act 1925* (NSW) s 6(2)(c).

⁶⁶ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 March 2009) [8150].

⁶⁷ Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) [2.54].

⁶⁸ *Ibid* [2.52].

⁶⁹ *Ibid* [2.53].

⁷⁰ Although s 12 of the *Trusts Act 1973* (Qld) applies whether or not a contrary intention is expressed in the trust instrument (s 10), that does not prevent a trust instrument from providing for the replacement of a trustee in circumstances that are in addition to those mentioned in s 12(1). In fact, s 12(3) and (8) contemplate that a trust instrument may provide for the replacement of a trustee in circumstances not mentioned in s 12(1).

⁷¹ Law Commission of New Zealand, *The Duties, Office and Powers of a Trustee: Review of the Law of Trusts*, Issues Paper No 26 (2011) [4.12]–[4.13].

It is questionable whether it should be possible to replace a trustee just because the trustee has been out of New Zealand for 12 months and has not delegated his or her powers under section 31 of the Act. Modern communication avoids the need for face to face meetings of trustees. It should be possible to remove a non-performing trustee irrespective of where the trustee lives. It does not follow just because a trustee lives overseas that he or she is not conscientiously carrying out his or her duties.

On the other hand, the power under section 43(1)(b) is discretionary. It is more likely to be exercised if the absence of the trustee is hindering the administration of the trust, rather than where a trustee is working effectively from abroad. From that perspective, there may be merit in retaining the provision to provide a line in the sand that allows a person with the power to act under section 43 to do so.

5.45 Section 12(1)(b) of the *Trusts Act 1973* (Qld) obviously served an important purpose at a time when a trustee's absence from the jurisdiction for a period of 12 months necessarily meant that the trustee was not able to perform the duties of trustee. However, in light of the variety of forms of communication that would now enable a trustee who is out of the jurisdiction to participate in the management of a trust, it cannot be assumed that a trustee's absence from the jurisdiction for a period of 12 months means that the trustee is not effectively performing that role. Accordingly, the Commission's preliminary view is that section 12(1)(b) should be omitted.

5.46 The Commission therefore invites submissions on the following proposal:

5-5 Section 12(1)(b) of the *Trusts Act 1973* (Qld), which provides for the replacement of a trustee who remains out of the State for more than one year without having properly delegated the execution of the trust, should be omitted from the Act.

5.47 The Commission also invites submissions on the following question:

5-6 Should any new ground be added to section 12(1) of the *Trusts Act 1973* (Qld) to enable a non-performing trustee to be replaced or are the present grounds in section 12(1) sufficient?

Circumstances not currently provided for in section 12

5.48 As explained earlier, the purpose of provisions like section 12 of the *Trusts Act 1973* (Qld) is to facilitate the appointment of new trustees without recourse to the court.⁷² In considering whether the section should include any new circumstances, the issue is whether the nature of a particular circumstance is such that it would be appropriate for the trustee to be removed by a non-judicial mechanism or whether it would be more appropriate for the question of removal in

⁷² See [5.27] above.

that circumstance to be decided by the court. As the Law Reform Commission of Ireland has observed:⁷³

The *Trustee Act 1893* contains statutory provisions in relation to both non-judicial and judicial appointment of trustees. The purpose of the statutory provisions is to facilitate the administration of the trust in circumstances where the trust instrument may be silent or deficient. In providing for both non-judicial and judicial mechanisms for appointment, it was evidently recognised that whereas some situations may not require a perhaps costly and time consuming application to court, others may demand a judicial direction for a resolution.

5.49 For example, the bankruptcy of a trustee does not of itself render the trustee liable to be replaced under section 12(1) of the *Trusts Act 1973* (Qld).⁷⁴ However, section 80(1) of the Act gives the court a wide power, whenever it is expedient to do so, to appoint a new trustee or trustees in substitution for, or in addition to, an existing trustee. Section 80(2) provides that, without prejudice to the generality of subsection (1), the court may appoint a new trustee in substitution for an existing trustee in a number of specific circumstances, including where the trustee is a bankrupt.

5.50 The Model Trustee Code⁷⁵ did not include the bankruptcy of a trustee in the provision dealing with the non-judicial appointment of new trustees. However, it did include, as a new circumstance in which a trustee may be replaced, that the trustee is disqualified from acting as a director of a company.⁷⁶

5.51 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.⁷⁷ Part 2D.6 includes a number of grounds of disqualification, including that the person is convicted of certain offences or is an undischarged bankrupt.⁷⁸ If section 12(1) were amended to provide that a trustee may also be replaced if the trustee becomes 'disqualified from managing corporations', that would have the effect of making the bankruptcy of a trustee a circumstance in which the trustee may be replaced.

⁷³ Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) [2.39].

⁷⁴ However, it may be possible, depending on the circumstances resulting in the bankruptcy, that the trustee could be replaced on the ground that he or she is 'unfit' to act in the execution of the trust: *Trusts Act 1973* (Qld) s 12(1)(e).

⁷⁵ The Model Trustee Code was prepared by a private working party in the 1980s, at the instigation of Mr WA (Tony) Lee, as a reference work for the legal community on the reform of Australian trustee legislation. Its members were the Hon Mr Justice Meagher (Supreme Court of New South Wales), the Hon Mr Justice Gummow (then of the Federal Court), Professor HAJ Ford, Dr Ian Hardingham, Professor Paul Finn, the Hon Justice Legoe (Supreme Court of South Australia), Mr Neville Crago (University of Western Australia), Mr Brian Ball (former General Manager of Queensland Trustees) and Mr WA Lee (University of Queensland); see WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989).

⁷⁶ WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 112 (cl 4.1(1)(f)).

⁷⁷ *Corporations Act 2001* (Cth) s 206A(2).

⁷⁸ *Corporations Act 2001* (Cth) s 206B. The Act also provides that, on application by the Australian Securities and Investment Commission, the court may disqualify a person from managing corporations for up to 20 years: *Corporations Act 2001* (Cth) s 206D. See s 58AA for the meaning of 'court'.

5.52 The Law Reform Commission of Ireland has recommended that ‘the non-judicial power of appointment should not be exercisable in circumstances where one of the trustees has been declared bankrupt’.⁷⁹ It stated:⁸⁰

Where the Commission is not recommending that bankrupt persons should be disqualified from acting as trustees, it does not consider it appropriate that the non-judicial power of appointment should be exercisable in circumstances where one of the trustees has been declared bankrupt. The Commission is of the view that where a question as to the fitness or suitability of a trustee arises by virtue of bankruptcy, it is more appropriate that an application be made to court.

5.53 The Commission considers it undesirable that it is currently necessary for an application to be made to the court for the removal of a trustee who is an undischarged bankrupt. Its preliminary view is that section 12(1) of the *Trusts Act 1973* (Qld) should be amended to provide that a trustee may be replaced if the trustee is an undischarged bankrupt.

5.54 The Commission therefore invites submissions on the following proposal:

5-7 Section 12(1) of the *Trusts Act 1973* (Qld) should be amended to provide that a trustee may be replaced if the trustee is an undischarged bankrupt.

5.55 The Commission also invites submissions on the following questions about other circumstances in which a trustee should be liable to be replaced:

5-8 Should section 12(1) of the *Trusts Act 1973* (Qld) be amended to provide that a trustee may be replaced if the trustee is disqualified from managing corporations under Part 2D.6 of the *Corporations Act 2001* (Cth) and is not given permission to manage the corporation under section 206F or 206G of that Act?

5-9 Apart from the matters mentioned in Proposal 5-7 and Question 5-8, are there any circumstances not currently provided for in section 12(1) of the *Trusts Act 1973* (Qld) in which it would be appropriate for an existing trustee to be replaced by the mechanism provided in section 12?

Persons who may appoint replacement trustees

5.56 Section 12(1) of the *Trusts Act 1973* (Qld) confers the power to appoint replacement trustees on the following persons:

⁷⁹ Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) [2.68].

⁸⁰ *Ibid* [2.67].

- the person nominated for the purpose of appointing new trustees (sometimes referred to as the 'appointor') by the instrument (if any) creating the trust;
- if there is no person nominated for the purpose of appointing new trustees by the trust instrument, or if there is no such person who is able and willing to act — the surviving or continuing trustee or trustees for the time being;
- if there are no surviving or continuing trustees — the personal representative of the last surviving or continuing trustee.

The person nominated by the trust instrument for the purpose of appointing new trustees

5.57 Under section 12(1) of the *Trusts Act 1973* (Qld), a person nominated by the trust instrument has the highest priority in relation to the power to appoint new trustees.

5.58 A trust instrument may nominate a person to appoint new trustees either generally or in specific circumstances. In the latter case, those circumstances might be wider or narrower than the circumstances mentioned in section 12(1). Before the enactment in 1860 of *Lord Cranworth's Act*,⁸¹ which was the first Act to provide a non-judicial power to appoint new trustees in the place of an existing trustee, it was necessary for the trust instrument 'to indicate seriatim the various events in which the power was to be exercised'.⁸² Subsequently, and in consequence of that Act:⁸³

it became the practice of conveyancers to insert, instead of the detailed power of appointing new trustees, a provision that the power of appointing new trustees should be vested in certain named 'persons'; ...

5.59 The English cases that considered the early statutory provisions held that, if a trust instrument nominated a person for the purpose of appointing new trustees in specific circumstances that were narrower than the circumstances in the statutory provisions, the donee of the power was restricted to exercising the power in the circumstances mentioned in the trust instrument.⁸⁴ Accordingly, where the trust instrument did not confer the specific power to appoint a new trustee in the place of a trustee who was unfit, the persons nominated in the trust instrument to appoint new trustees in other specified circumstances could not replace a trustee who was unfit.⁸⁵

5.60 In Queensland, section 12(8) of the *Trusts Act 1973* (Qld) extends the power of a person nominated for the purpose of appointing new trustees by enabling the person to appoint new trustees not only in the cases specified in the

⁸¹ See [5.27] above.

⁸² *Re Wheeler and De Rochow* [1895] 1 Ch 315, 320 (Kekewich J). Kekewich J observed that, in the absence of a statutory provision like s 27 of *Lord Cranworth's Act*, a provision simply appointing persons to have the power to appoint new trustees would have been meaningless.

⁸³ *Ibid.*

⁸⁴ *Re Wheeler and De Rochow* [1895] 1 Ch 315; *Re Sichel's Settlements* [1916] 1 Ch 358.

⁸⁵ *Ibid.*

trust instrument, but also in the cases specified in section 12. As a result, section 12(8) overcomes the restriction imposed by the earlier English decisions. However, the second part of section 12(8) provides that, if a new trustee is appointed under section 12 in a case specified in the trust instrument, the appointment must be subject to the terms applicable to an appointment in that case under the provisions of the instrument. Accordingly, if a trust instrument provided that the appointment of a new trustee was subject to a particular condition, such as a requirement that a specified person consents to the appointment, section 12(8) would preserve the application of that requirement.

When appointors are not able and willing to act

5.61 Under section 12(1), if there is no appointor, or no such person who is 'able and willing to act', the power to appoint replacement trustees is exercisable by the surviving or continuing trustee or trustees for the time being.

5.62 Section 12 does not provide expressly for the situation where the appointors are individually able and willing to act, but cannot agree on who should be appointed. It has been held, however, that, in that situation, the appointors are taken to be 'not able and willing to act', with the result that the power to appoint new trustees is then exercisable by the surviving or continuing trustees or the personal representative of the last surviving or continuing trustee.⁸⁶

5.63 In its report on the law of trusts, the Ontario Law Reform Commission recommended a new provision to the effect that, if 'jointly nominated persons are unable to agree in naming an appointee, they should be deemed to be unable to act within the terms of the section authorizing the non-judicial appointment of trustees'.⁸⁷

5.64 There may be some utility in providing expressly in the Act that, if persons jointly nominated for the purpose of appointing new trustees are unable to agree on the appointment of a new trustee, they are taken to be not 'able and willing' to exercise the power. Similarly, if persons are nominated for that purpose but with the power to appoint new trustees by majority, it may be useful to provide for the situation where they are deadlocked and there is no majority decision. The inclusion of such a provision would, in the Commission's view, clarify this situation, by confirming when the power to appoint replacement trustees shifts from the appointors to the surviving or continuing trustees.

5-10 Should section 12 of the *Trusts Act 1973 (Qld)* be amended so that it provides expressly that, if:

(a) two or more persons (the 'appointors') have the power under a trust instrument to appoint new trustees;

⁸⁶ *Re Sheppard's Settlement Trusts* [1888] WN 234.

⁸⁷ Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 98–9. This recommendation has not been implemented.

- (b) the trust instrument:**
 - (i) requires the appointors to exercise their power jointly; or**
 - (ii) is silent as to the manner in which the appointors are to exercise their power; and**
- (c) the appointors are unable to agree on the appointment of a new trustee;**

the appointors are taken to be not 'able and willing' to exercise the power?

5-11 Should section 12 of the *Trusts Act 1973* (Qld) be amended so that it provides expressly that, if:

- (a) more than two persons (the 'appointors') have the power under a trust instrument to appoint new trustees;**
- (b) the trust instrument requires the appointors to exercise their power by majority; and**
- (c) the appointors are unable to form a majority view on the appointment of a new trustee;**

the appointors are taken to be not 'able and willing' to exercise the power?

The surviving or continuing trustee or trustees

5.65 Section 12(1) of the *Trusts Act 1973* (Qld) provides that, if the trust instrument does not nominate any person for the purpose of appointing new trustees, or if there is no such person able and willing to act, the power to appoint new trustees may be exercised by 'the surviving or continuing trustee or trustees for the time being'. The Ontario Law Reform Commission has observed in relation to this expression that:⁸⁸

The concept behind this terminology is that a trustee who dies leaves 'surviving' trustees, if such exist, to carry on the trust and, likewise, that a trustee who retires or is removed leaves 'continuing' trustees.

5.66 It was originally held that the reference to a 'surviving or continuing trustee' in the original English provision did not include a trustee who would cease to hold office by virtue of the particular appointment proposed to be made.⁸⁹ However, the second clause of section 12(7) provides that a reference in the section to a 'continuing trustee' includes a refusing or retiring trustee if the refusing or retiring trustee is willing to act in the execution of the provisions of the section.

⁸⁸ Ibid 99.

⁸⁹ *Travis v Illingworth* (1865) 2 Dr & Sm 344, 346-7; 62 ER 652, 653 (*Kindersley V-C*).

An advantage of this provision is that it makes it 'possible for all existing trustees to retire, appointing new trustees at the same time'.⁹⁰ It also enables a sole trustee who wishes to be discharged to appoint a new trustee or trustees in his or her place.⁹¹

Exercise of power if more than one trustee

5.67 Because the power to appoint replacement trustees is given to 'the surviving or continuing trustee *or trustees*' and not to 'a surviving or continuing trustee', if there is more than one trustee, the trustees will be required to exercise the power in the same manner as the exercise of their other powers. As explained in Chapter 7, trustees of a private trust must ordinarily exercise their powers jointly, although a trust instrument may provide for trustees to exercise their powers by majority.

5.68 In either case, section 12 does not empower a single trustee, where there are two or more trustees, to appoint replacement trustees. If it were otherwise and a single trustee could act unilaterally to appoint new trustees, trustees could abuse the power of appointment by making appointments that would change the balance of power within the trustees.

5.69 If trustees are not able to make an appointment in the required manner (that is, either jointly or, where permitted, by majority), there is no effective decision and the status quo is maintained.⁹² In that situation, there is no further avenue under section 12 for the non-judicial appointment of trustees, and an order of the court will be required to effect a change in trustees.⁹³

The personal representative of the last surviving or continuing trustee

5.70 The third category of person who is authorised under section 12(1) of the *Trusts Act 1973* (Qld) to appoint a new trustee or trustees in the place of an existing trustee is 'the personal representative of the last surviving or continuing trustee'. Such a person may appoint a new trustee or trustees if:

- the trust instrument does not nominate a person for appointing new trustees or there is no such person who is able and willing to act; and
- there are no surviving or continuing trustees.

5.71 It has been held that, in this context, the reference to the 'last surviving or continuing trustee' means the 'deceased trustee who, immediately before his death,

⁹⁰ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 March 2009) [8180].

⁹¹ See [5.134] ff below as to whether more than one trustee must be appointed in these circumstances.

⁹² See [7.229] below in relation to trustees who are required to act jointly.

⁹³ The court has the power under s 80 of the *Trusts Act 1973* (Qld) to appoint new trustees, including in substitution for an existing trustee or trustees. Further, under s 6(1)(d) of the Act, the court may make an order, on the application of a person who has an interest in the trust property, about the persons or manner in which a power conferred on trustees may be exercised if the trustees cannot agree. The court also has wide powers under s 96 to give directions concerning the trust property. These powers are considered in Chapter 12.

was the only trustee who had not ceased, by reason of death or some other cause, to hold office as a trustee'.⁹⁴

5.72 Further, the effect of section 12(4) is that the reference in section 12(1) to a 'personal representative' of a last surviving or continuing trustee is a reference to a personal representative who has obtained a grant — that is, an executor who has obtained a grant of probate of the deceased's will (or who is the executor by representation of the deceased's will) or an administrator of the deceased's estate under a grant of letters of administration.

5.73 It has been a long-standing feature of trustee legislation to empower the personal representative of the last surviving or continuing trustee to appoint replacement trustees. That power was first conferred by *Lord Cranworth's Act* in 1860 and, in Queensland, by section 10(1) of the *Trustees and Executors Act 1897* (Qld). The Commission is not aware of any problems with the exercise of this power, although it might be queried whether a person who is the personal representative of the last surviving or continuing trustee has a sufficient nexus with the trust to exercise this power. The personal representative will not necessarily have a personal connection with the trust, although in some circumstances there may be a legal connection. If there was a cause of action subsisting against the trustee, that cause of action will survive against the deceased trustee's estate,⁹⁵ which is represented by the deceased's personal representative.

5.74 In the absence of a provision to this effect, it would be necessary, on the death of the last surviving or continuing trustee, for an application to be made to the court for the appointment of new trustees, with the associated cost and inconvenience of bringing such an application. For this reason, the Commission considers that section 12(1) of the *Trusts Act 1973* (Qld) should continue to provide that the personal representative of the last surviving or continuing trustee may appoint replacement trustees.

Exercise of power if more than one personal representative

5.75 Section 49(4) of the *Succession Act 1981* (Qld) provides that:

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

5.76 However, there is some uncertainty as to whether that requirement applies to the power conferred by section 12(1) of the *Trusts Act 1973* (Qld) on the personal representatives of the last surviving or continuing trustee.

5.77 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. That section provides:

⁹⁴ *Re Geelong Waterworks and Sewerage Trust* [1955] VLR 302, 308 (Smith J).

⁹⁵ *Succession Act 1981* (Qld) s 66(1).

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*. (emphasis added)

5.78 In relation to the real and personal estate of a deceased person, 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). However, the real and personal estate of a deceased person does not include property of which the deceased was trustee,⁹⁶ and the reference in section 49(1) to the *Trusts Act 1973* (Qld) would not include the power conferred by section 12(1) of the *Trusts Act 1973* (Qld), which is not a power that is exercisable in relation to the real and personal estate of the deceased.

5.79 Arguably, if the requirement imposed by section 49(4) to act jointly is referable to the powers mentioned in section 49(1), then that requirement will not apply to the power conferred on personal representatives by section 12(1) of the *Trusts Act 1973* (Qld).

5.80 The Commission's preliminary view is that it would be desirable for the *Trusts Act 1973* (Qld) to clarify that the power conferred on the personal representatives of a last surviving or continuing trustee, if exercised by them, must be exercised jointly.

5.81 The Commission invites submissions on the following proposal:

5-12 If section 12 of the *Trusts Act 1973* (Qld) continues to provide that the personal representative of the last surviving or continuing trustee may appoint replacement trustees, the section should also provide that, if there is more than one personal representative, the power must be exercised by the personal representatives jointly.

Persons not currently empowered to appoint replacement trustees

5.82 Some jurisdictions have additional categories of persons who may appoint new trustees. A number of law reform proposals have also been made in relation to this issue. In considering whether additional categories of persons should be able to exercise the power to appoint replacement trustees, it should be borne in mind that, in many cases, the appointment of replacement trustees will, in effect, result in the forced removal of a trustee.⁹⁷ The issue therefore is whether the particular category of person would be appropriate to exercise that power or whether, if there

⁹⁶ See *Succession Act 1981* (Qld) s 45(1).

⁹⁷ The exception is where a trustee is appointed under s 12(1)(d) of the *Trusts Act 1973* (Qld) to replace a trustee who seeks to be discharged from the trust.

is no other person who has the power to appoint replacement trustees, it would be more appropriate for replacement trustees to be appointed by the court.

Person appointed by the will (or another document) of a last surviving or continuing trustee

5.83 As mentioned earlier, section 12(1) of the *Trusts Act 1973* (Qld) enables the 'surviving or continuing trustee or trustees for the time being', by writing, to appoint replacement trustees. It has been held in relation to an earlier form of this provision that this part of the provision confers a power to appoint during the lifetime of the surviving or continuing trustees, and does not therefore enable a last surviving or continuing trustee, by will, to make an appointment that is to take effect on the trustee's death.⁹⁸ Instead, section 12(1) provides that, if a last surviving or continuing trustee has died, the appointment of replacement trustees may be made by the trustee's personal representative.⁹⁹ As explained earlier, such an appointment may be made by a personal representative only if he or she is acting under a grant.¹⁰⁰

5.84 In Ontario, the trustee legislation includes a provision in similar terms to section 12(1) of the *Trusts Act 1973* (Qld).¹⁰¹ Additionally, however, the legislation enables a sole trustee or a last surviving or continuing trustee to appoint a replacement trustee by will:¹⁰²

4 Authority of surviving trustee to appoint successor by will

Subject to the terms of any instrument creating a trust, the sole trustee or the last surviving or continuing trustee appointed for the administration of the trust may appoint by will another person or other persons to be a trustee or trustees in the place of the sole or surviving or continuing trustee after his or her death.

5.85 An appointment made under that provision would take effect immediately on the death of the sole or last surviving or continuing trustee, at which point there would again be an existing trustee. In that situation, it would seem that, unless the person appointed by the will disclaimed the trust, the personal representative of the deceased trustee would not be entitled to appoint replacement trustees, as he or she would no longer be the personal representative of 'the sole trustee or the last surviving or continuing trustee'.

5.86 In its review of the law of trusts, the Ontario Law Reform Commission considered that the provision enabling a sole trustee or the last surviving or continuing trustee to appoint a replacement trustee by will was a useful provision,

⁹⁸ *Re Parker's Trusts* [1894] 1 Ch 707, 719 (Kekewich J).

⁹⁹ See [5.70] ff above.

¹⁰⁰ *Trusts Act 1973* (Qld) s 12(4). See [5.72] above.

¹⁰¹ *Trustee Act*, RSO 1990, c T23, s 3.

¹⁰² *Trustee Act*, RSO 1990, c T23, s 4.

and recommended that the provision should be included in the proposed new Trustee Act.¹⁰³

5.87 The Commission is not aware of any other jurisdiction that makes provision for replacement trustees to be appointed by the will of a last surviving or continuing trustee.

5.88 However, the Model Trustee Code included a provision enabling a sole surviving trustee to make an appointment that would be effective on the trustee's death. The provision had a similar purpose to the Ontario provision discussed above, except that the proposed provision did not require the appointment to be made by will.¹⁰⁴

- (4) A sole surviving trustee, so far as he is empowered to appoint new trustees, may by revocable writing, whether admissible to probate as a will or not, appoint not less than two persons or a trustee corporation to be new trustees or a new trustee in his place, the appointment to take effect immediately on his death.

5.89 The authors of the Model Trustee Code explained their reasons for not requiring the appointment to be made by will:¹⁰⁵

First, since ordinarily an appointment of new trustees may be by writing, there is no justification in imposing upon the appointing trustee the formal requirements for execution relating to wills. Beneficial interests are not involved. Secondly, if it were required that an appointment should be admissible to probate as a will an interval of time would necessarily ensue before the will could be admitted to probate; and during that interval of time the trustee appointed by will would be in an uncertain position.

5-13 Should the *Trusts Act 1973* (Qld) be amended to provide that a last surviving or continuing trustee may make an appointment of replacement trustees that is to take effect on his or her death? Alternatively, is it sufficient that section 12(1) of the Act enables the personal representative of a last surviving or continuing trustee to appoint replacement trustees?

5-14 If the *Trusts Act 1973* (Qld) should be amended to enable a last surviving or continuing trustee to make an appointment of replacement trustees that is to take effect on his or her death:

- (a) should the Act require the appointment to be made by will; or
 (b) should it be sufficient if the appointment is made in writing?

¹⁰³ Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 102.

¹⁰⁴ WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 113 (cl 4.1(4)).

¹⁰⁵ Ibid 114–15.

Beneficiaries

5.90 It is a well-established principle that, if the beneficiaries of a trust have legal capacity and, as between them, are absolutely entitled to the trust property, they may bring the trust to an end.¹⁰⁶ In *Re Brockbank*,¹⁰⁷ however, the Court held that, if the beneficiaries choose to keep the trust on foot instead of terminating it, they cannot replace an existing trustee with a trustee of their own choice. The Court confirmed that the trust must continue to be executed by the trustees appointed by the trust instrument or in accordance with section 36 of the *Trustee Act 1925* (the English equivalent of section 12 of the *Trusts Act 1973* (Qld)).¹⁰⁸

5.91 In England, the effect of *Re Brockbank* has, to a large extent, been changed by the *Trusts of Land and Appointment of Trustees Act 1996* (UK), which enables beneficiaries, in specified circumstances, to direct that new trustees be appointed.

5.92 Section 19 of the *Trusts of Land and Appointment of Trustees Act 1996* (UK) applies in the case of a trust where:¹⁰⁹

- there is no person nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; and
- the beneficiaries under the trust are of full age and capacity and (taken together) are absolutely entitled to the property subject to the trust.

5.93 In those circumstances, the beneficiaries may give the following directions:¹¹⁰

- a written direction to a trustee or trustees to retire from the trust; and
- a written direction to the trustees or trustee for the time being (or, if there are none, to the personal representative of the last person who was a trustee) to appoint by writing to be a trustee or trustees the person or persons specified in the direction.

5.94 Under section 19, the beneficiaries' right to direct the retirement and appointment of trustees takes priority over the right of the surviving or continuing trustees under section 36(1)(b) of the *Trustee Act 1925*.¹¹¹ Provided that certain requirements have been satisfied, including that reasonable arrangements have

¹⁰⁶ *Saunders v Vautier* (1841) Cr & Ph 240; 49 ER 282.

¹⁰⁷ [1948] 1 Ch 206.

¹⁰⁸ *Ibid* 209 (Vaisey J).

¹⁰⁹ *Trusts of Land and Appointment of Trustees Act 1996* (UK) c 47, s 19(1). Unlike s 20(1)(b) of the *Trusts of Land and Appointment of Trustees Act 1996* (UK) c 47, s 19(1) of that Act does not impose, as a further requirement for the application of the section, that 'there is no person who is both entitled and willing and able to appoint a trustee' in place of the trustee who lacks capacity under s 36(1) of the *Trustee Act 1925*, 15 & 16 Geo 5, c 19.

¹¹⁰ *Trusts of Land and Appointment of Trustees Act 1996* (UK) c 47, s 19(2).

¹¹¹ Law Commission of England and Wales, *Transfer of Land: Trusts of Land*, Report No 181 (1989) [9.1].

been made to protect the outgoing trustee's rights in connection with the trust, the trustee must make a deed declaring his or her retirement. Section 19(3) provides:

- (3) Where—
- (a) a trustee has been given a direction under subsection (2)(a),
 - (b) reasonable arrangements have been made for the protection of any rights of his in connection with the trust,
 - (c) after he has retired there will be either a trust corporation or at least two persons to act as trustees to perform the trust, and
 - (d) either another person is to be appointed to be a new trustee on his retirement (whether in compliance with a direction under subsection (2)(b) or otherwise) or the continuing trustees by deed consent to his retirement,

he shall make a deed declaring his retirement and shall be deemed to have retired and be discharged from the trust.

5.95 Beneficiaries also have the power under section 20 of the *Trusts of Land and Appointment of Trustees Act 1996* (UK) to give a written direction that a specified person or persons be appointed to replace a trustee who lacks capacity within the meaning of the *Mental Capacity Act 2005* (UK) to exercise his or her functions as trustee.¹¹² Such a direction may be given where:¹¹³

- there is no person who is both entitled and willing and able to appoint a trustee in place of him or her under section 36(1) of the *Trustee Act 1925*;¹¹⁴ and
- the beneficiaries under the trust are of full age and capacity and (taken together) are absolutely entitled to the property subject to the trust.

5.96 The persons to whom the beneficiaries may give a written direction are:¹¹⁵

- a deputy appointed for the trustee by the Court of Protection;¹¹⁶

¹¹² In this situation, the mechanism provided by s 19 of the *Trusts of Land and Appointment of Trustees Act 1996* (UK) c 47 for appointing replacement trustees would not work because s 19(3) requires the outgoing trustee to make a deed declaring his or her retirement. A trustee who lacked capacity would not be able to comply with that requirement.

¹¹³ *Trusts of Land and Appointment of Trustees Act 1996* (UK) c 47, s 20(1).

¹¹⁴ *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 36(1) authorises trustees to be appointed by a person nominated for the purpose of appointing new trustees by the trust instrument or, if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees for the time being or the personal representative of the last surviving or continuing trustee.

¹¹⁵ *Trusts of Land and Appointment of Trustees Act 1996* (UK) c 47, s 20(2). It is implicit in the legislation that each of these persons then has the power to appoint the specified person or persons in the place of the incapable trustee, as the legislation does not confer express power on these persons to appoint replacement trustees at the direction of the beneficiaries. In fact, the *Mental Capacity Act 2005* (UK) c 9 provides that a deputy must not be given powers with respect to 'the exercise of any power (including a power to consent) vested in [the represented person] whether beneficially or as trustee or otherwise': s 20(3)(c).

- an attorney acting for him under the authority of an enduring power of attorney or lasting power of attorney registered under the *Mental Capacity Act 2005* (UK); or
- a person authorised for the purpose by the Court of Protection.

5.97 The Law Reform Commission of Ireland has recommended the enactment of provisions similar to sections 19 and 20 of the *Trusts of Land and Appointment of Trustees Act 1996* (UK).¹¹⁷

5.98 However, the provisional view of the Scottish Law Commission is that the English provisions giving beneficiaries the power to direct the appointment and retirement of trustees should not be adopted. In its view, the conferral of such powers on beneficiaries could inhibit the impartial administration of the trust and would affect the balance of rights and interests in the existing trust structure.¹¹⁸ It also considered that permitting beneficiaries to direct trustees in relation to their resignation or the appointment of new trustees 'confuses their respective roles'.¹¹⁹

5.99 In Australia, the authors of the Model Trustee Code recommended the following provision, which would enable the beneficiaries of a trust to appoint new trustees to replace a sole trustee who had become incapable:¹²⁰

- (2) Where a sole trustee becomes under a disability during the continuance of the trust and there is no person authorised by subsection (1) [the equivalent of section 12(1) of the *Trusts Act 1973* (Qld)] to appoint a trustee in his place such of the beneficiaries under the trust as are not under a disability may appoint at least two persons (whether or not being the persons exercising the power) to be new trustees in place of the trustee under a disability and such beneficiaries are trustees of the power conferred on them by this section.

5.100 The purpose of the model provision, like section 20 of the *Trusts of Land and Appointment of Trustees Act 1996* (UK), was to avoid the need for an application to be made to the court for the appointment of a new trustee where a sole trustee became incapable and there were no persons under the equivalent of section 12(1) of the *Trusts Act 1973* (Qld) to appoint new trustees. Unlike section 20 of the English legislation, the model provision would not require all of the beneficiaries to have legal capacity. While that would give the model provision a wider application, it raises the possibility, where some beneficiaries under a trust have legal capacity and some do not, that those with capacity might appoint trustees who would prefer their interests. Further, the model provision would allow

¹¹⁶ The Court of Protection is a superior court of record established by s 45 of the *Mental Capacity Act 2005* (UK) c 9. A 'deputy' is a person appointed by the Court of Protection to make certain decisions for an adult who lacks capacity to make decisions about his or her personal welfare or his or her property and affairs: s 16(1), (2)(b).

¹¹⁷ Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) [2.38], [2.137], Draft *Trustee Bill 2008*, cl 5(2)(e).

¹¹⁸ Scottish Law Commission, *Trustees and Trust Administration*, Discussion Paper No 126 (2004) [4.10].

¹¹⁹ Ibid [4.51].

¹²⁰ WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 112 (cl 4.1(2)).

the beneficiaries who have legal capacity to appoint themselves as trustees, which could create a conflict of interest for those trustee-beneficiaries.¹²¹

5-15 Should the *Trusts Act 1973* (Qld) make provision for beneficiaries to appoint new trustees or direct that new trustees be appointed and, if so, in what circumstances? For example, should beneficiaries have the power to appoint, or direct the appointment of, new trustees if:

- (a) all of the beneficiaries are of full age and capacity and, taken together, are absolutely entitled to the trust property; or
- (b) a sole or last surviving or continuing trustee has impaired capacity?

The administrator or attorney of a last surviving or continuing trustee

5.101 As explained earlier, if a last surviving or continuing trustee dies and there is no person nominated under the trust instrument for the purpose of appointing replacement trustees or no such person who is able and willing to act, section 12(1) of the *Trusts Act 1973* (Qld) authorises the personal representative of the last surviving or continuing trustee to appoint new trustees to replace the trustee who has died.¹²² However, if the last surviving or continuing trustee instead becomes incapable and there is no appointor who is able and willing to appoint replacement trustees, section 12(1) does not authorise any other person to appoint trustees to replace the incapable trustee. In that situation, it is necessary for an application to be made to the court for the appointment of a trustee in substitution for the incapable trustee.¹²³

5.102 This part of the chapter examines whether it would be desirable to amend either the *Trusts Act 1973* (Qld) or the guardianship legislation (the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld)) so that, if a last surviving or continuing trustee becomes incapable, the power to appoint replacement trustees may be exercised by a person who is the administrator, or the attorney for financial matters under an enduring power of attorney, of the incapable trustee.

Australia

5.103 The guardianship legislation in each of the Australian jurisdictions empowers a tribunal or board to appoint an ‘administrator’ or ‘manager’ for a person who is incapable of making decisions about his or her own financial

¹²¹ For beneficiaries to appoint themselves as trustees under the proposed power, it would be necessary that there are other beneficiaries who are not appointed as trustees, as the appointment of all of the beneficiaries as trustees would bring the trust to an end by reason of the merger of the legal and equitable interests in the trust property: see JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [107].

¹²² See [5.70] ff above.

¹²³ See *Trusts Act 1973* (Qld) s 80 (Power of court to appoint new trustees).

affairs.¹²⁴ The powers that may be conferred on administrators and managers are very wide, but generally relate to the *person's* estate. In most jurisdictions, the relevant legislation contains no express power for an administrator or manager to exercise the powers vested in the represented person as a trustee. However, such provision is made in Tasmania, Victoria, and Western Australia. The relevant provisions refer to a power vested in the represented person as trustee and are not limited to the power to appoint new trustees to replace an incapable trustee.

5.104 In Tasmania, an administrator may, in the name of the represented person and so far as may be specified in the administration order:¹²⁵

exercise any power, including a power to consent, vested in the represented person, whether beneficially, or as a trustee, or otherwise.

5.105 In Victoria, the *Guardianship and Administration Act 1986 (Vic)* provides for the exercise by an administrator of a power vested in a represented person as trustee:¹²⁶

If—

- (a) a power is vested in a represented person in the character of a trustee or guardian, or the consent of a represented person to the exercise of a power is necessary in the character of a trustee or guardian or as a check upon the undue exercise of the power; and
- (b) it appears to the administrator that the power should be exercised or the consent given—

the administrator may on behalf and in the name of the represented person exercise the power or give the consent in any manner the administrator thinks fit.

5.106 The Act further provides that the exercise by an administrator, under this provision, of a power to appoint a new trustee is to be taken to be the appointment of a new trustee within the meaning of section 45 of the *Trustee Act 1958 (Vic)*.¹²⁷ It is unclear whether the power of an administrator to exercise a power vested in the represented person as trustee may be exercised by any administrator appointed for the person or whether it is limited to an administrator with a plenary appointment.

5.107 In Western Australia, an administrator has such of the functions provided for by the *Guardianship and Administration Act 1990 (WA)* as the State Administrative Tribunal vests in him or her.¹²⁸ The Act provides that the Tribunal may vest plenary functions in an administrator, in which case the administrator may

¹²⁴ *Guardianship and Management of Property Act 1991 (ACT)* s 8; *Guardianship Act 1987 (NSW)* ss 25E, 25G, 25M; *Adult Guardianship Act (NT)* s 16; *Guardianship and Administration Act 2000 (Qld)* s 12(1); *Guardianship and Administration Act 1993 (SA)* s 35; *Guardianship and Administration Act 1995 (Tas)* s 51; *Guardianship and Administration Act 1986 (Vic)* s 46; *Guardianship and Administration Act 1990 (WA)* s 64.

¹²⁵ *Guardianship and Administration Act 1995 (Tas)* s 56(2)(t).

¹²⁶ *Guardianship and Administration Act 1986 (Vic)* s 58C(2).

¹²⁷ *Guardianship and Administration Act 1986 (Vic)* s 58C(3). As mentioned at [5.178] below, s 45 of the *Trustee Act 1958 (Vic)* deals with the vesting of trust property in new trustees.

¹²⁸ *Guardianship and Administration Act 1990 (WA)* s 69(1).

perform, in relation to the estate of the represented person, any function that the represented person could perform if he or she had full legal capacity.¹²⁹ Alternatively, the Tribunal may authorise an administrator to perform any specified function.¹³⁰ The Act further provides that:¹³¹

where a power is vested in a represented person in the character of a trustee or guardian, or the consent of a represented person to the exercise of a power is necessary in a similar character or as a check upon the undue exercise of the power, the State Administrative Tribunal may, upon the application of the administrator or any person interested in the exercise of the power or the giving of the consent, authorise the administrator to exercise the power or give the consent in such manner as the Tribunal may direct.

5.108 It appears that, in Western Australia, the granting of plenary powers to an administrator would not include the power to exercise a power vested in the represented person as trustee. Instead, a separate order must be made by the Tribunal to that effect.¹³² This means that the Tribunal must specifically consider whether the power to exercise the represented person's powers as trustee should be conferred on the administrator.

5.109 While it is possible for an administrator to be appointed in these jurisdictions with the power to exercise the powers vested in the represented person as trustee, it would be difficult to obtain the appointment of an administrator if that were the sole purpose of the appointment. In all three jurisdictions, the power of the Board or Tribunal to appoint an administrator may be exercised only if it is satisfied that, in addition to certain other matters, the adult is in need of an administrator of *his or her estate*.¹³³ Further, in Tasmania and Victoria, in determining whether or not a person is in need of an administrator of his or her estate, the Board or Tribunal must consider whether the needs of the proposed represented person could be met by other means less restrictive of the person's freedom of decision and action.¹³⁴ In Western Australia, the legislation provides, in similar terms, that an administration order must not be made if the needs of the person in respect of whom an application for such an order is made could, in the opinion of the Tribunal, be met by other means less restrictive of the person's freedom of decision and action.¹³⁵

5.110 The guardianship legislation of each of the Australian jurisdictions also enables a person (the principal) to make an 'enduring power of attorney' appointing an attorney to make financial decisions about the principal's property if he or she

129 *Guardianship and Administration Act 1990* (WA) s 71(1)–(2).

130 *Guardianship and Administration Act 1990* (WA) s 71(3).

131 *Guardianship and Administration Act 1990* (WA) s 72(1), sch 2 pt B item (h).

132 See, eg, *MS and YS* [2008] WASAT 72, [59], [62] where the Tribunal appointed two persons as 'joint plenary administrators' and by a further order authorised the administrators to exercise the power vested in the represented person in the character of a trustee of the discretionary family trust.

133 *Guardianship and Administration Act 1995* (Tas) s 51(1)(c); *Guardianship and Administration Act 1986* (Vic) s 46(1)(a)(iii); *Guardianship and Administration Act 1990* (WA) s 64(1)(b).

134 *Guardianship and Administration Act 1995* (Tas) s 51(2); *Guardianship and Administration Act 1986* (Vic) s 46(2)(a).

135 *Guardianship and Administration Act 1990* (WA) s 4(4).

has impaired capacity for a financial matter.¹³⁶ Although an attorney may be appointed with very wide powers in relation to the principal's property, no Australian jurisdiction makes express provision in its legislation for an attorney under an enduring power of attorney to exercise the powers vested in the principal as a trustee.

England

5.111 As noted earlier, section 20 of the *Trusts of Land and Appointment of Trustees Act 1996* (UK) provides that, if a trustee lacks capacity to exercise his or her functions as trustee and the beneficiaries are of full age and capacity and, taken together, absolutely entitled to the trust property, the beneficiaries may give certain persons a written direction to appoint replacement trustees. These include:

- a deputy appointed for the trustee by the Court of Protection; and
- an attorney acting for the trustee under the authority of an enduring power of attorney or lasting power of attorney registered under the *Mental Capacity Act 2005* (UK).

5.112 While the appointment is, in these circumstances, made by the trustee's deputy or attorney, the decision to replace the trustee and the choice of new trustees is that of the beneficiaries.

Whether the power to appoint replacement trustees should be able to be exercised by a trustee's administrator or attorney

GENERAL CONCERNS

5.113 As explained above, in Tasmania, Victoria and Western Australia, the guardianship legislation has been used as a vehicle to enable an administrator to exercise powers vested in the represented person as trustee, including presumably, the power to appoint replacement trustees under the equivalent of section 12(1) of the *Trusts Act 1973* (Qld).¹³⁷ However, there is an awkwardness in the concept of the administrator of an incapable trustee exercising the power under that section to replace that very trustee, as that is not something that the trustee could do if he or she had capacity (that is, replace himself or herself on the ground of incapacity).¹³⁸

5.114 The conferral of power on a trustee's administrator, as has been done in these jurisdictions, provides a pragmatic solution to the difficulty that arises when a

¹³⁶ *Powers of Attorney Act 2006* (ACT) s 13(2); *Powers of Attorney Act 2003* (NSW) s 19; *Powers of Attorney Act* (NT) s 13; *Powers of Attorney Act 1998* (Qld) s 32(1)(a); *Powers of Attorney and Agency Act 1984* (SA) s 6; *Powers of Attorney Act 2000* (Tas) s 31(1); *Instruments Act 1958* (Vic) s 115; *Guardianship and Administration Act 1990* (WA) s 104.

¹³⁷ See [5.104] ff above.

¹³⁸ The power to appoint trustees to replace an existing trustee is not exercisable at large but in specific circumstances. The same concern would not arise if the administrator of an incapable trustee was exercising the trustee's power to replace another trustee who was also incapable, as that is something that would clearly be within the power of the first trustee if he or she had capacity. A trustee may also be replaced if he or she seeks to be discharged, but an incapable trustee may not necessarily have the capacity to form that view or may, in fact, wish to remain as a trustee.

last surviving or continuing trustee has become incapable, and it would otherwise be necessary for an appointment to be made by the Supreme Court.

5.115 However, the effect of this mechanism is to enable a person, who may have no connection with the trust, to appoint replacement trustees of the trust (including the power to appoint himself or herself as trustee). This raises, as an issue of principle, whether the benefit of avoiding an application to the court for the appointment of new trustees is a sufficient reason to extend the range of persons who may appoint replacement trustees or whether, having exhausted the persons currently mentioned in section 12(1), it would be more appropriate for an application to be made to the court for the appointment of trustees.

5.116 While it might be said that a person who is an adult's attorney under an enduring power of attorney is a person in whom the adult has reposed his or her trust and confidence (even if the person has no connection with the trust of which the adult is trustee), the same cannot necessarily be said of persons who are appointed as administrators, who are chosen not by the adult concerned but by the Queensland Civil and Administrative Tribunal ('QCAT'). In addition to having little or no connection with the trust of which the adult is trustee, statistically, it is more likely that the person appointed as an adult's administrator will be the Public Trustee than a person who has a relationship with the adult.¹³⁹

SPECIFIC CONCERNS ABOUT THE GUARDIANSHIP LEGISLATION

5.117 There is also something artificial in providing the mechanism to appoint new trustees by way of the guardianship legislation, given the very particular focus of that legislation.

5.118 The central concern of the guardianship legislation is the promotion and safeguarding of the rights and interests of the adult with impaired capacity, rather than the interests of third parties. Relevantly, the *Guardianship and Administration Act 2000* (Qld) provides that an administrator may be appointed for a 'financial matter' for an adult.¹⁴⁰ Similarly, the *Powers of Attorney Act 1998* (Qld) provides that an adult may appoint an attorney to do anything in relation to one or more financial matters (or personal matters) for the adult that the adult could lawfully do by an attorney if he or she had capacity for the matter.¹⁴¹ Both Acts define 'financial matter', for an adult, to mean 'a matter relating to the *adult's* financial or property matters, including, for example,' various specified matters all of which relate to the adult's own property and financial affairs. Generally, however, unless a trustee is also a beneficiary under the trust,¹⁴² the exercise by the administrator or attorney of a trustee of the trustee's power to appoint replacement trustees would be an act relating to the property of third persons rather than the trustee's own property.

139

The Public Trustee's most recent Annual Report notes that the Public Trustee's appointment rate as an administrator for financial matters was 65% of the total cases in which administrators were appointed, and that its reappointment rate was 77% of total financial appointments made on requested and periodic reviews: Public Trustee of Queensland, *2011–12 Annual Report* (2012) 10.

140

Guardianship and Administration Act 2000 (Qld) s 12(1).

141

Powers of Attorney Act 1998 (Qld) s 32(1)(a).

142

For example, where A holds property on trust for A and B.

5.119 Further, in order for QCAT to appoint an administrator to make financial decisions for an adult, the Tribunal must be satisfied that:¹⁴³

- the adult has impaired capacity for the matter;
- there is a need for a decision in relation to the matter or the adult is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the *adult's* property; and
- without an appointment the *adult's* needs will not be adequately met or the *adult's* interests will not be adequately protected.

5.120 The definition of 'financial matter' could, of course, be amended to include something like 'exercising a power vested in the adult as a last surviving or continuing trustee to appoint a new trustee or trustees to replace the adult'. However, other requirements of the legislation would still not be apposite to the appointment of an administrator for this purpose, or to the exercise by an administrator or an attorney of the power to appoint replacement trustees.

5.121 For example, when deciding whether a person is appropriate for appointment as an administrator for an adult, the Tribunal must consider the 'appropriateness considerations' in section 15 of the *Guardianship and Administration Act 2000* (Qld), which include matters such as:¹⁴⁴

- the General Principles and whether the person is likely to apply them;¹⁴⁵
- whether the adult and the person are compatible including, for example, whether the person has appropriate communication skills or appropriate cultural or social knowledge or experience to be compatible with the adult; and
- whether the person would be available and accessible to the adult.

5.122 Further, when an administrator or an attorney is exercising power for a financial matter, he or she is required to apply the General Principles.¹⁴⁶ If the definition of 'financial matter' were amended as discussed at [5.120] above, an administrator or attorney would, technically, be required to apply the General Principles in making the appointment of new trustees, even though the content of the principles would not really be relevant to that decision.

¹⁴³ *Guardianship and Administration Act 2000* (Qld) s 12(1)(a)–(c).

¹⁴⁴ *Guardianship and Administration Act 2000* (Qld) s 15(1)(a), (d)–(f).

¹⁴⁵ The General Principles are found in sch 1 pt 1 of the *Guardianship and Administration Act 2000* (Qld) and in sch 1 pt 1 of the *Powers of Attorney Act 1998* (Qld). They give statutory recognition to the right of people with impaired decision-making capacity to respect for their human dignity. For example, General Principles 2, 3 and 4 recognise the right of all adults to the same basic human rights regardless of the particular adult's capacity; an adult's right to respect for his or her human worth and dignity; and an adult's right to be a valued member of society. General Principle 10 requires an adult's administrator (or guardian) to exercise power for a matter 'in a way that is appropriate to the adult's characteristics and needs'.

¹⁴⁶ *Guardianship and Administration Act 2000* (Qld) ss 11(1), 34(1); *Powers of Attorney Act 1998* (Qld) s 76.

5.123 Administrators and attorneys are also required to exercise their power 'honestly and with reasonable diligence to protect the *adult's* interests'.¹⁴⁷ If the adult was one of the beneficiaries, rather than the sole beneficiary, that could place the administrator or attorney in a position of conflict between his or her duty to the adult and his or her fiduciary duty to the beneficiaries as a whole.

5.124 Another issue that would need to be resolved is whether an administrator or attorney should be able to appoint new trustees if he or she had a limited appointment (that is, where he or she was not appointed with power in relation to all of the adult's financial matters). It seems incongruous that an administrator or attorney could exercise a power to which the terms of his or her appointment did not extend.

5.125 It might be possible to avoid many of these difficulties by conferring power on an administrator or attorney directly by the *Trusts Act 1973* (Qld), rather than by the guardianship legislation — for example, by amending section 12 of the Act to confer the power to appoint replacement trustees on the administrator, or attorney for financial matters, for the time being of a last surviving or continuing trustee who has impaired capacity for the exercise of his or her powers as trustee.¹⁴⁸

5.126 In this way, an administrator or attorney, as the case may be, would not be exercising power for a financial matter for the adult (the incapable trustee) under the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld). Instead, he or she would be exercising a power under the *Trusts Act 1973* (Qld) and would not, therefore, be required by either the *Guardianship and Administration Act 2000* (Qld) or the *Powers of Attorney Act 1998* (Qld) to apply the General Principles in exercising that power. This is similar to the approach taken in section 12 of the *Trusts Act 1973* (Qld) in relation to the personal representative of a last surviving or continuing trustee, who is given a power to appoint replacement trustees, but does not exercise that power as part of administering the deceased trustee's estate.

5.127 Further, because an administrator or attorney, in making an appointment, would not be 'exercising power for a financial matter for the adult', this approach would also obviate the need to ensure that such a power fell within the terms of a particular administrator's or attorney's appointment, although it would, of course, be open for the legislation to provide that the power may be exercised only by an administrator or attorney who has been appointed to exercise power for all financial matters for the adult (that is, who has a plenary appointment).

WHETHER THE POWER SHOULD BE EXTENDED TO BOTH ADMINISTRATORS AND ATTORNEYS

5.128 There is also an issue as to whether it would be appropriate to confer the power to appoint trustees in the place of an incapable trustee on both administrators and attorneys.

¹⁴⁷ *Guardianship and Administration Act 2000* (Qld) s 35; *Powers of Attorney Act 1998* (Qld) s 66(1).

¹⁴⁸ The provision would need to be framed so that the power may be exercised only if there is no person nominated by the trust instrument for the purpose of appointing new trustees or no such person able and willing to act.

5.129 An advantage of limiting the power to administrators is that the appointment of an administrator necessarily involves a finding that the represented person has impaired capacity for at least some aspects of his or her financial matters (although that is not of itself a finding that the adult is incapable of acting in the administration of the trust). Further, because the appointment of an administrator is evidenced by an order made by the Tribunal, there would be no uncertainty about whether the person who made the appointment had the authority to make it.

5.130 In contrast, no formal finding of impaired capacity is required before an attorney for financial matters may commence to exercise power for an adult. Further, because there may be some doubt as to whether a particular attorney has been appointed by what is the last enduring power of attorney made by the adult, third persons dealing with a trustee who has been appointed by the attorney, for example, in purchasing property, might be concerned about whether the trustee was properly appointed and, therefore, whether the trustee can pass good title. As explained later in this chapter, section 13 of the *Trusts Act 1973* (Qld) provides that, where an instrument appointing a new trustee contains a statement as to how the vacancy in the office of trustee occurred, that statement is conclusive evidence, in favour of a subsequent purchaser in good faith, of the circumstances under which the vacancy occurred.¹⁴⁹ Such a provision would apply to a statement in an instrument of appointment to the effect that the vacancy occurred because the trustee had become incapable. However, section 13 would not protect a purchaser against the risk that the person who purported to appoint the replacement trustee was not, in fact, the trustee's attorney for the reason that the trustee had made a later enduring power of attorney appointing a different attorney, which had the effect of revoking the earlier instrument.¹⁵⁰

5.131 However, the utility of any amendments may be limited if the power to appoint replacement trustees is not extended to attorneys for financial matters. Many adults who have impaired capacity for financial matters do not have the need to have an administrator appointed for the reason that they already have an enduring power of attorney for financial matters or that their financial affairs are able to be managed informally. In either of those cases, there would be no administrator who could make an appointment to replace the incapable trustee.

WHETHER THE POWER MUST BE EXERCISED JOINTLY

5.132 Finally, there is an issue about how the power should be exercised where the trustee has more than one administrator or attorney for financial matters. Under the *Guardianship and Administration Act 2000* (Qld), the Tribunal may appoint joint or several, or joint and several, appointees for a matter or all matters.¹⁵¹ Similarly, under the *Powers of Attorney Act 1998* (Qld) an adult may, under an enduring power of attorney, appoint joint or several, or joint and several, attorneys for a matter or all matters.¹⁵² Given the variety of ways in which administrators and

¹⁴⁹ *Trusts Act 1973* (Qld) s 13 is discussed at [5.154] ff below.

¹⁵⁰ See *Powers of Attorney Act 1998* (Qld) s 50.

¹⁵¹ *Guardianship and Administration Act 2000* (Qld) s 14(4)(f).

¹⁵² *Powers of Attorney Act 1998* (Qld) s 43(2)(f).

attorneys may be appointed to act, the simplest approach for the *Trusts Act 1973* (Qld) may be to require them to act jointly in exercising the proposed power, regardless of the manner in which their powers as administrators or attorneys may be exercised.

5-16 Should the *Trusts Act 1973* (Qld) be amended to confer, on either or both of the following, the power to appoint a person or persons in the place of a last surviving or continuing trustee who is incapable of acting in the administration of the trust:

- (a) a person who is the administrator of the trustee under the *Guardianship and Administration Act 2000* (Qld) or under the corresponding law of another Australian jurisdiction;
- (b) a person who is 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)?

5-17 Should an administrator or attorney for financial matters be able to exercise the power referred to in Question 5-16:

- (a) only if he or she has been appointed to exercise power for all of the trustee's financial matters; or
- (b) regardless of whether he or she has been appointed to exercise power for all, or only some, of the trustee's financial matters?

5-18 If an adult has more than one administrator or attorney for financial matters, should the *Trusts Act 1973* (Qld) provide that, in exercising the power referred to in Question 5-16, the administrators or attorneys must act jointly?

Discharge of outgoing trustee on appointment of replacement trustee

5.133 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.¹⁵³ However, once a trustee is discharged, he or she will not be liable for a breach of trust committed by the continuing and any 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'.¹⁵⁴ If 'retiring' trustees are not effectively discharged:¹⁵⁵

¹⁵³ 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 another trustee.

¹⁵⁴ LA Sheridan, *The Law of Trusts* (Barry Rose, 12th ed, 1993) 440, citing *Webster v Le Hunt* (1861) 9 WR 918.

¹⁵⁵ M Jacobs, 'Trustees — Obtaining an Effective Discharge on Retirement' (1986) *Trust Law & Practice* 16, 17.

They will remain trustees and liable if there is any loss to the trust funds, even if they assume the retirement was valid and cease to take part in the trusts' affairs. Conversely, the new trustee may be liable as a trustee de son tort if he acts as a trustee.

Minimum number and type of remaining trustees

5.134 The *Trusts Act 1973* (Qld) does not impose a requirement for a minimum number of trustees to be appointed on the creation of a trust. However, the effect of section 12(2)(c) of the Act is that, ordinarily, a trustee will not be discharged, that is, 'will not cease to be a trustee, unless there are trustees of adequate character and number to perform the trust thereafter'.¹⁵⁶

5.135 The first part of section 12(2)(c) clarifies that, where two or more trustees were originally appointed, it is not necessary to fill up the original number of trustees. Commentators have observed that, until a provision in these terms was first enacted by section 31 of the *Conveyancing and Law of Property Act 1881*:¹⁵⁷

it appears to have been doubtful whether under Lord Cranworth's Act, or under instruments which did not contain special provisions relating to the matter, one trustee could be appointed in place of two, or two in place of three ...

5.136 The second part of section 12(2)(c), which is the critical part of the provision in terms of a trustee's discharge, provides that a trustee is not generally discharged under the section unless:

- in the case of any trust — there will remain to act as trustees of the trust:
 - the Public Trustee or a person discharging similar functions in another Australian jurisdiction;¹⁵⁸
 - a trustee company under the *Trustee Companies Act 1968* (Qld) or under the laws of another Australian jurisdiction;¹⁵⁹ or
 - at least two individuals; or
- in the case of a trust for a charitable or public purpose or for any purpose of recreation or other leisuretime use or occupation — there will remain a local government to act as trustee.

5.137 The section provides for two exceptions to this requirement: the first is where only one trustee was originally appointed by the trust instrument; the second is where the trust instrument 'otherwise provides'. Unless either of those exceptions applies, a trustee will not be discharged under section 12 if that will leave a single

¹⁵⁶ Ibid.

¹⁵⁷ FG Champernowne and H Johnston, *The Trustee Act, 1893, and Other Recent Statutes Relating to Trustees With Notes* (William Clowes & Sons, 1904) 59.

¹⁵⁸ *Trusts Act 1973* (Qld) ss 5(1) (definition of 'trustee corporation'), 12(10)(a); *Acts Interpretation Act 1954* (Qld) s 33A.

¹⁵⁹ *Trusts Act 1973* (Qld) ss 5(1) (definition of 'trustee corporation'), 12(10)(b); *Acts Interpretation Act 1954* (Qld) s 33A.

trustee who is an individual or a single trustee that is a corporation but is not a trustee company (referred to in this chapter as a 'corporate trustee') or even two trustees that are corporate trustees.

5.138 The Queensland provision is consistent with the trustee legislation in Victoria, Western Australia and New Zealand.¹⁶⁰

5.139 In the other Australian jurisdictions, although a trustee will be discharged if there will remain two trustees, there is no additional requirement that those trustees must be individuals. In the ACT, New South Wales and South Australia, a trustee will be discharged if there will remain at least two trustees, the Public Trustee (in New South Wales, the NSW Trustee), or a trustee company to perform the trust.¹⁶¹ In the Northern Territory and Tasmania, there must be at least two trustees.¹⁶²

5.140 Originally, the provision of the English *Trustee Act 1893* dealing with the appointment of replacement trustees had provided that a trustee was not discharged on the appointment of new trustees unless there would be at least 'two trustees' to perform that trust.¹⁶³ There was no additional condition that the two trustees must be individuals. In 1922, that provision was amended to change the reference to 'two trustees' to 'a trust corporation or at least two *individuals*'¹⁶⁴ — a formulation that was subsequently included in 37(1)(c) of the English *Trustee Act 1925*.¹⁶⁵ In 1996, however, the English legislation was amended so that the condition for the discharge of a trustee is that there will be either 'a trust corporation or at least two *persons*' to act as trustees of the trust. That provision would allow a trustee to be discharged if there would remain two individual trustees, two corporate trustees, or an individual and a corporate trustee to perform the trust.

5.141 In its 1971 Report, the Commission considered that the requirement that there be at least two individuals as trustees was justified given the wide statutory powers that would be conferred by the new Act.¹⁶⁶ This approach has also been recommended by the Ontario Law Reform Commission.¹⁶⁷

5.142 The Law Reform Commission of Ireland has suggested that 'the proper administration of trusts in general would benefit from having more than one trustee in place'.¹⁶⁸ It therefore recommended that, 'in the case of private trusts, two

¹⁶⁰ *Trustee Act 1958* (Vic) s 42(1)(c); *Trustees Act 1962* (WA) s 7(2)(c); *Trustee Act 1956* (NZ) s 43(2)(c). These provisions were based on s 37(1)(c) of the *Trustee Act 1925*, 15 & 16 Geo 5, c 19 (Act as passed): see [5.140] below.

¹⁶¹ *Trustee Act 1925* (ACT) s 6(7); *Trustee Act 1925* (NSW) s 6(6); *Trustee Act 1936* (SA) s 14(2)(c).

¹⁶² *Trustee Act* (NT) s 11(2)(c); *Trustee Act 1898* (Tas) s 13(2)(c).

¹⁶³ *Trustee Act 1893*, 56 & 57 Vict, c 53, s 10(2)(c).

¹⁶⁴ *Law of Property Act 1922*, 12 & 13 Geo 5, c 16, s 110(9).

¹⁶⁵ *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 37(1)(c).

¹⁶⁶ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 14.

¹⁶⁷ Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 125.

¹⁶⁸ Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) [2.21].

trustees or a corporate trustee should be required'.¹⁶⁹ It did not recommend any additional condition that the two trustees must be individuals.

5.143 The argument for allowing a trustee to be discharged even though there will be only a sole continuing trustee is essentially one of convenience — namely, that it is sometimes difficult to find a person who is willing to be appointed as a trustee.

5.144 The issues that arise for consideration are:

- what the ordinary minimum requirements should be in terms of the number and type of trustees; and
- what, if any, exceptions, there should be to those requirements.

5.145 If the Act were amended to allow a trustee to be discharged even though there would be only one trustee remaining, there is a further issue as to whether the Act should require that that trustee be of a particular type, such as an individual. The appointment of a corporate trustee avoids the problem of further appointments that arises on the death of a trustee who is an individual, although there is nevertheless the risk that a corporate trustee may go into liquidation. Further, a corporate trustee may be less likely than an individual to have assets to which a beneficiary might have recourse in the event of a default by the trustee. However, given that trusts are now used in a wide range of commercial activities, it is expected that the number of trusts with a corporate trustee would substantially outweigh those with an individual as trustee.

5.146 As noted earlier, one of the exceptions in section 12(2)(c) applies if only one trustee was originally appointed. That exception appears to assume that, if a settlor created a trust with a sole trustee, that is an appropriate position for the duration of the trust, even if the original trustee is replaced. However, the section does not always allow the constitution of the remaining trustees to reflect the settlor's original intention. For example, if a settlor created a trust with two corporate trustees (that is, corporations that are not trustee companies) and one of the trustees wished to retire, the appointment of another corporate trustee would not currently enable the other corporate trustee to be discharged, even though the number and type of the remaining trustees would be the same as those that were originally appointed.

¹⁶⁹

Ibid [2.22]. Draft *Trustee Bill 2008*, cl 5(4)(b) provided that, except where only one trustee was originally appointed, 'a trustee shall not be discharged under this section from his or her trust unless there will be at least two trustees to perform the trust' (emphasis added). The draft provision did not require the trustees to be individuals.

5-19 What should be sufficient in terms of the number and type of remaining trustees for an outgoing trustee to be discharged? For example:

(a) should the current requirements of section 12(2)(c)(i) be retained or, alternatively, should those requirements be replaced with either (and, if so, which) of the following options:

(i) there will remain either a trustee corporation or at least two *trustees* (who need not be individuals);

(ii) there will remain at least one trustee (who need not be a trustee corporation);

(b) should the current requirements of section 12(2)(c)(ii) be retained?

5-20 What, if any, exceptions should there be to the ordinary requirements under section 12(2)(c) of the *Trusts Act 1973* (Qld) in terms of the number and type of remaining trustees?

Positive statement of discharge

5.147 It is implicit under section 12(2) that, if the requisite number or type of trustees will remain, the appointment of a new trustee or trustees in place of the existing trustee has the effect of discharging the outgoing trustee from that office. However, the legislation does not contain an express statement to that effect.

5.148 In contrast, the trustee legislation in the ACT and New South Wales includes a positive statement about the discharge of the trustee. Section 6(6) of the *Trustee Act 1925* (NSW) provides:

- (6) By the appointment a trustee in place of whom the new trustee is appointed shall be discharged from the trust, provided that, except where only one trustee was originally appointed, a trustee shall not be so discharged unless there will be left after the discharge at least two trustees, or the NSW Trustee, or a trustee company, to perform the trust. (emphasis added)

5-21 Should section 12 of the *Trusts Act 1973* (Qld) include a positive statement to the effect that, provided the requisite number or type of trustees will remain, the appointment of a new trustee or trustees in the place of an existing trustee discharges the trustee from that office?

Appointment of additional trustees without replacement

5.149 In addition to providing for the appointment of trustees in the place of an existing trustee, section 12 of the *Trusts Act 1973* (Qld) makes provision for the

appointment of new trustees in circumstances that do not involve the replacement of an existing trustee.

5.150 Under section 12(5), an appointment may be made where ‘there are not more than 3 trustees (none of them being a trustee corporation or a local government)’. The fact that an appointment may not be made if there are more than three trustees is consistent with section 11, which provides that the number of trustees may not generally exceed four. Section 12(5) also provides that, except where the Minister has approved the appointment of the additional trustee, the appointment of additional trustees under that provision must not be increased beyond four.

5.151 Section 12(5) further provides that it is not obligatory to appoint any additional trustee unless the instrument (if any) creating the trust or any statutory enactment provides to the contrary.

Same powers, authorities and discretions

5.152 Section 12(6) of the *Trusts Act 1973* (Qld) provides that every new trustee appointed under section 12 — that is, a replacement trustee appointed under section 12(1) or an additional trustee appointed under section 12(5) — has the same powers, authorities and discretions, and may in every respect act, as if the new trustee had originally been appointed a trustee by the instrument (if any) creating the trust.

EVIDENCE AS TO A VACANCY IN A TRUST

5.153 Where a replacement trustee has dealings with a third party, the issue may arise as to whether the trustee has been properly appointed:¹⁷⁰

A third party participating in any such transaction will wish to know whether the persons who purport to convey title, or to give a discharge for the receipt of purchase money, have been properly appointed trustees. In the case of original trustees, the trust instrument is available to a third party for this purpose. Further, where trustees have been judicially appointed ... the order of the court can be shown to a third party, and he is entitled to rely upon the order absolutely.

5.154 Section 13 of the *Trusts Act 1973* (Qld) protects a person who purchases trust property in good faith against the possibility that the trustee from whom the property is purchased has not been properly appointed. It provides:

¹⁷⁰

Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 127.

13 Evidence as to a vacancy in a trust

- (1) Where any instrument appointing a new trustee contains a statement as to how a vacancy in the office of trustee occurred, that statement is conclusive evidence, in favour of a subsequent purchaser in good faith, of the circumstances under which the vacancy occurred.
- (2) Any vesting of trust property consequent upon an appointment of a new trustee containing a statement as to how a vacancy in the office of trustee occurred is valid in favour of any subsequent purchaser in good faith.
- (3) The protection afforded to a purchaser by this section extends to the registrar or other person registering or certifying title.
- (4) This section applies to instruments of appointment signed either before or after the commencement of this Act.

5.155 Section 13 has its origins in section 38 of the English *Trustee Act 1925*, although the Queensland provision has a wider application than its English counterpart.¹⁷¹ Provisions having a similar purpose are also included in the trustee legislation in the ACT, New South Wales, Victoria, Western Australia and New Zealand.¹⁷²

5.156 While section 13 of the *Trusts Act 1973* (Qld) allows a purchaser of trust property to rely on a statement contained in an instrument about how a vacancy in the office of trustee arose, it does not afford similar protection to a debtor who would be similarly concerned to receive a valid receipt from the persons who appear to be the current trustees.

5.157 The Model Trustee Code included a provision to the effect of section 13 of the *Trusts Act 1973* (Qld), although that provision applied not only in relation to a statement contained in an instrument appointing a new trustee, but also to a statement contained in an instrument by which a trustee is discharged.¹⁷³ Because 'its thrust [was] the protection of third parties',¹⁷⁴ the provision was located in that part of the model legislation that dealt with the indemnities and the protection of third parties.

5-22 Are there any problems with the operation of section 13 of the *Trusts Act 1973* (Qld)?

¹⁷¹

Unlike s 13 of the *Trusts Act 1973* (Qld), the English provision does not cover all of the circumstances in which a trustee may be replaced. *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 38 does not apply where a new trustee is appointed to replace a trustee who has died, desires to be discharged, or is an infant (see Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 131). Further, while s 13 of the *Trusts Act 1973* (Qld) applies to a purchaser of trust property of any kind, the English provision applies only to the purchaser of the legal estate of land. Further, the English provision does not extend the protection afforded to a purchaser to the registrar or other person registering or certifying title to the trust property.

¹⁷²

Trustee Act 1925 (ACT) s 13; *Trustee Act 1925* (NSW) s 13; *Trustee Act 1958* (Vic) s 43; *Trustees Act 1962* (WA) s 8; *Trustee Act 1956* (NZ) s 44.

¹⁷³

WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 143 (cl 5.2.1).

¹⁷⁴

Ibid 143.

5-23 Should section 13 of the *Trusts Act 1973 (Qld)* also provide protection to persons other than purchasers in good faith of trust property and, if so, to whom? For example, should the protection afforded by section 13 extend to a debtor making a payment to trustees?

RETIREMENT OF TRUSTEE WITHOUT A NEW APPOINTMENT

5.158 As explained earlier in this chapter, a trustee who seeks to be discharged from a trust may be replaced by a new trustee under section 12(1)(d) of the *Trusts Act 1973 (Qld)*. A trustee may also retire from the trusteeship if the trust instrument expressly or impliedly authorises the trustee to do so, or if the court allows the trustee to retire.¹⁷⁵

5.159 Section 14 of the *Trusts Act 1973 (Qld)* provides a means by which a trustee may retire without needing the authorisation of the trust instrument or the court. Unlike section 12, retirement under section 14 does not involve the appointment of a new trustee. Section 14 provides:

14 Retirement of trustee without a new appointment

- (1) This section applies where a trustee declares by writing that the trustee is desirous of being discharged from all or any or any part of the trusts reposed in the trustee, and after the trustee's discharge there will be a trustee corporation or at least 2 individuals to act as trustees to perform the trust or part of the trust from which that trustee desires to be discharged.
- (2) In any case to which this section applies, if the co-trustees and such other person (if any) as is empowered to appoint trustees consent by writing to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, the trustee desirous of being discharged—
 - (a) shall be deemed to have retired from the trusts from which the trustee has declared the trustee desires to be discharged; and
 - (b) shall, by the writing by which consent is given to the trustee's discharge, be discharged from the trusts under this Act;

without any new trustee being appointed in his or her place.

5.160 Similar provisions are contained in the trustee legislation in all other Australian jurisdictions and in New Zealand.¹⁷⁶

¹⁷⁵ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1576].

¹⁷⁶ *Trustee Act 1925 (ACT)* s 8; *Trustee Act 1925 (NSW)* s 8; *Trustee Act (NT)* s 12; *Trustee Act 1936 (SA)* s 15; *Trustee Act 1898 (Tas)* s 14; *Trustee Act 1958 (Vic)* s 44; *Trustees Act 1962 (WA)* s 9(4); *Trustee Act 1956 (NZ)* s 45.

Minimum number and type of remaining trustees

5.161 A trustee may retire under section 14 of the *Trusts Act 1973* (Qld) only if, after the trustee's discharge, there will be, to perform the trust:

- the Public Trustee;¹⁷⁷
- a trustee company under the *Trustee Companies Act 1968* (Qld);¹⁷⁸ or
- at least two individuals.

5.162 This requirement reflects a similar policy to that which underpins section 12(2)(c) of the Act, although there are some differences between the two provisions as to what constitutes a sufficiency of remaining trustees:

- Section 14 does not include the wider definition of 'trustee corporation' that applies under section 12, which allows a trustee to be discharged if there will be an interstate Public Trustee or trustee corporation to act as trustee.
- Unlike section 12(2)(c)(ii), section 14 does not make provision, in the case of a trust for any charitable or public purpose or for any purpose of recreation or other leisure-time occupation, for a trustee to retire if, following the trustee's retirement, there will remain a local government to act as a trustee of the trust.
- Whereas section 12(2)(c) creates an exception where only one trustee was originally appointed or where the trust instrument otherwise provides, section 14 does not include a similar exception. Accordingly, even though a trust is created with a sole trustee, if that trustee is replaced by two trustees under section 12(1) or if an additional trustee is appointed under section 12(5), so that the trust then has two trustees, one of the two trustees cannot later retire under section 14 as that would leave a sole trustee remaining.

5.163 The provisions in the other Australian jurisdictions have a similar effect to section 14. In the ACT, New South Wales, Victoria and Western Australia, a trustee may retire if there will remain at least two trustees, or the Public Trustee or a trustee company to perform the trust.¹⁷⁹ In the Northern Territory, South Australia and Tasmania, the provision applies where there are more than two trustees,¹⁸⁰ which means that the retirement of a trustee under the provision will still leave at least two trustees.

¹⁷⁷ *Trusts Act 1973* (Qld) s 5(1) (definition of 'trustee corporation').

¹⁷⁸ *Trusts Act 1973* (Qld) s 5(1) (definition of 'trustee corporation').

¹⁷⁹ *Trustee Act 1925* (ACT) s 8(2); *Trustee Act 1925* (NSW) s 8(2) ('two continuing trustees, or the NSW Trustee, or a trustee company'); *Trustee Act 1958* (Vic) s 44(1); *Trustees Act 1962* (WA) ss 6(1) (definition of 'trustee corporation'), 9(1). In the ACT and New South Wales, the two trustees need not be individuals. In Victoria, s 44(1) refers to a trustee company or at least two individuals. The reference to a trustee company would include State Trustees Limited (*Trustee Companies Act 1984* (Vic) (Version No 051) s 6, sch 2; *State Trustees (State Owned Company) Act 1994* (Vic) s 20A), which is the equivalent of the Public Trustee in Queensland: see *State Trustees (State Owned Company) Act 1994* (Vic).

¹⁸⁰ *Trustee Act* (NT) s 12(1); *Trustee Act 1936* (SA) s 15(1); *Trustee Act 1898* (Tas) s 14(1).

5-24 What should be sufficient in terms of the number and type of remaining trustees for a trustee to retire under section 14 of the *Trusts Act 1973* (Qld)?

5-25 What, if any, exceptions should there be to the ordinary requirements under section 14 of the *Trusts Act 1973* (Qld) in terms of the minimum number and type of remaining trustees?

Discharge dependent on retiring trustee transferring trust property

5.164 In the ACT and New South Wales, the trustee legislation makes the discharge of the retiring trustee dependent on transferring any trust property that needs to be transferred to the continuing trustees. Section 8(4) of the *Trustee Act 1925* (ACT) and of the *Trustee Act 1925* (NSW) provide:

- (4) By the retirement the trustee shall be discharged from the trust, provided that, if in order to vest any part of the trust property in the continuing trustees alone, it is necessary that it should be duly transferred, the retiring trustee shall not be discharged in respect of that part until it is duly transferred.

5.165 A similar provision was included in the Model Trustee Code:¹⁸¹

The discharge of a trustee who seeks to be discharged under the provisions of this section shall be subject to his executing all such instruments and doing all such acts as are referred to in subsection (4) of section 4.3.

5.166 The authors of the Model Trustee Code commented that the new provision:¹⁸²

makes it clear that a trustee who is desirous of being discharged first executes all necessary transfers to ensure that all trust property is vested in the persons who become and are the trustees after his discharge.

5-26 Should section 14 of the *Trusts Act 1973* (Qld) include a provision to the effect of section 8(4) of the *Trustee Act 1925* (ACT) and of the *Trustee Act 1925* (NSW)?

Application to personal representatives

5.167 Section 5(1) of the *Trusts Act 1973* (Qld) provides that 'trustee' includes 'a personal representative'. However, section 12(9) of the *Trusts Act 1973* (Qld) provides that, for that section, 'trustee does not include a personal representative

¹⁸¹ WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 116 (cl 4.2).

¹⁸² Ibid 116.

as such'.¹⁸³ The effect of section 12(9) is that, while a personal representative is still completing his or her executorial duties,¹⁸⁴ he or she cannot be replaced by a new personal representative under the mechanism established by section 12.

5.168 Section 14 of the Act does not contain a similar provision to section 12(9).¹⁸⁵ However, the absence of such a provision would appear to be an oversight. If an executor under a grant of probate or an administrator under letters of administration wishes to retire, it is necessary for the grant to be revoked.¹⁸⁶ The Supreme Court has jurisdiction to revoke a grant under section 6 of the *Succession Act 1981* (Qld), and rule 642(1)(b) of the *Uniform Civil Procedure Rules 1999* (Qld) provides specifically for the making of an application for the revocation of a grant on the ground that the personal representative (that is, the executor or administrator) wants to retire.

5.169 The counterparts to section 14 in the trustee legislation in the ACT and New South Wales both include a provision in the following terms:¹⁸⁷

Nothing in this section shall authorise any retirement from the office of an executor or administrator.

5.170 In the Commission's view, a 'trustee', for the purposes of section 14 of the *Trusts Act 1973* (Qld), should not include a personal representative as such. However, later in this chapter, the Commission has proposed that a provision to that effect should apply for the whole of Part 2 of the *Trusts Act 1973* (Qld).¹⁸⁸ Accordingly, it is not necessary to make any proposal about that issue in relation to section 14.

VESTING OF TRUST PROPERTY IN NEW AND CONTINUING TRUSTEES

5.171 Section 15 of the *Trusts Act 1973* (Qld) deals with the vesting of trust property in new trustees and the divesting of trust property from a trustee who is discharged under section 14 of the Act. It provides:

¹⁸³ A similar provision appears in s 16(9) of the *Trusts Act 1973* (Qld).

¹⁸⁴ Under the general law, once a personal representative has completed his or her executorial duties (but before distributing the assets), the personal representative holds any assets of the estate as a trustee for the beneficiaries: *Re Davis' Trusts* (1871) LR 12 Eq 214, 216 (Malins V-C); *Re Ponder* [1921] 2 Ch 59, 61 (Sargent J); *Pagels v MacDonald* (1936) 54 CLR 519, 526 (Latham CJ); *In the Estate of Dunn* [1963] VR 165. See also RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (LBC Information Services, 1996) [48.08].

¹⁸⁵ In *In the Estate of Constantinou* [2012] QSC 332, the issue arose as to whether s 10 of the *Trustees and Executors Act* (PNG) — which is in similar terms to s 14 of the *Trusts Act 1973* (Qld) — applied to an executor. Dalton J held (at [49]) that the reference in the provision to a 'trustee' applies only to trustees *per se* and does not include an executor.

¹⁸⁶ Alternatively, an executor who does not have a grant of probate may renounce the executorship, even if he or she has intermeddled in the administration of the estate: *Succession Act 1981* (Qld) s 54(2). It is not necessary for the executor to comply with s 14 of the *Trusts Act 1973* (Qld).

¹⁸⁷ *Trustee Act 1925* (ACT) s 8(7); *Trustee Act 1925* (NSW) s 8(7).

¹⁸⁸ See [5.264], Proposal 5-40 below.

15 Vesting of trust property in new and continuing trustees

- (1) Where a new trustee is appointed the instrument of appointment vests, subject to the provisions of any other Act, the trust property in the persons who become and are the trustees as joint tenants without any conveyance, transfer or assignment.
- (2) Where a trustee is discharged in accordance with the provisions of section 14 the instrument of discharge divests the trust property from the discharged trustee and, subject to the provisions of any other Act, vests it in the continuing trustees as joint tenants without any conveyance, transfer or assignment.
- (3) Where, by reason of the provisions of any other Act or for the protection of any trust property, it is requisite that the vesting in a new trustee or 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 under that Act, the trustees shall—
 - (a) execute and produce to the registrar or such other person such instrument or instruments as may be necessary; and
 - (b) do such other act or acts as may properly be required by the registrar or such other person;

for the purpose of effecting such notification, registration or recording; and an instrument of appointment or discharge shall be deemed a conveyance from the persons in whom the trust property was previously vested to the persons in whom it vests by virtue of such instrument.
- (4) Where trust property has vested in the public trustee pursuant to section 16(2) it shall not be necessary to notify, register or record such vesting if the public trustee has not acted in regard to the trusts or if the only action taken by the public trustee has been the appointment of a new trustee.
- (5) Where the consent of any person is requisite to the conveyance, transfer or assignment of any trust property the vesting of that property in accordance with the provisions of this section is subject to that consent; but the consent may be obtained after the execution of the instrument of appointment or discharge by the persons who are then trustees.
- (6) An instrument of appointment or discharge shall not operate as a breach of covenant or condition or occasion any forfeiture of any lease, underlease, agreement for lease, or other property.

5.172 The effect of section 15(1) is that, subject to the provisions of any other Act, the ‘the appointment of new trustees operates as a statutory assignment of the trust property vesting it in the new trustees, and divesting it from the trustees whom they replace’.¹⁸⁹ Similarly, the effect of section 15(2) is that, subject to the

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HAI Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 March 2009) [8400].

provisions of any other Act, where a trustee is discharged under section 14, the instrument of discharge operates to divest the property from the discharged trustee.

5.173 Where the property, in order to be vested or divested, requires that the vesting in the new trustee must be notified, registered or recorded by the registrar or some other person, section 15(3) requires the trustees to take the necessary steps to have the vesting notified, registered or recorded, although section 15(4) provides that this requirement does not generally apply to property that vests in the Public Trustee under section 16(2).

5.174 In some cases, a trust instrument might require the consent of a specified person before the trust property can be transferred. To avoid the possibility that the vesting of property under section 15(1) or (2) before that consent is obtained might invalidate the vesting, section 15(5) 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 execution of the instrument of appointment or discharge.¹⁹⁰

5.175 Ford and Lee have 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'.¹⁹¹ For example:¹⁹²

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.

5.176 Section 15(6) ensures that an instrument of appointment or discharge that effects a change in trustees does not operate as a breach of covenant or occasion the forfeiture of any lease.

Vesting of property with specific transfer requirements

5.177 As mentioned earlier, section 15(1) and (2) of the *Trusts Act 1973* (Qld) are both expressed to apply 'subject to the provisions of any other Act'. That expression recognises that the transfer of some types of property, such as real property and shares, is subject to specific legislative requirements, and that the execution of an instrument appointing or discharging trustees does not override those requirements, or obviate the need to comply with those requirements, in order to vest or divest legal title in the relevant property. In addition, companies may, by their constitution, impose requirements for the registration of share transfers.¹⁹³ It is arguable whether those requirements, although permitted by the

¹⁹⁰ In *Perkins v Permanent Trustee Co Ltd* (1923) 23 SR (NSW) 358, Street CJ in Eq held (at 364) that there was no rigid rule that the consent must always be obtained before the trustee's power was exercised, especially where the power was exercised for the benefit of the person whose consent was required.

¹⁹¹ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 March 2009) [8430].

¹⁹² *Ibid.*

¹⁹³ See *Corporations Act 2001* (Cth) s 1072F (Registration of transfers). That provision is a replaceable rule within the meaning of s 135 of the Act for certain companies. As a result, it may be displaced or modified by the constitution of those companies.

Corporations Act 2001 (Cth), would fall within the expression ‘subject to the provisions of any other Act’.

5.178 Provisions dealing with the vesting and divesting of trust property are included in the trustee legislation of all of the other Australian jurisdictions, as well as New Zealand and England.¹⁹⁴ All of the provisions recognise that the primary provision dealing with the vesting of trust property cannot override other, more specific, requirements in relation to the vesting of particular types of property, although they do so in a lengthier way than the exceptions provided for in section 15(1) and (2) of the *Trusts Act 1973* (Qld).

5.179 In the ACT and New South Wales, the trustee legislation takes a detailed approach stating when particular kinds of property vest.¹⁹⁵ For example, section 9(3)–(5) of the *Trustee Act 1925* (NSW) provides:

- (3) In the case of land subject to the provisions of the *Real Property Act 1900*, the property shall not vest until either:
- (a) the appropriate transfer is executed and registered, so that the property is duly transferred, or
 - (b) an entry of the vesting is made by the Registrar-General.

Any such entry shall have the same effect as if the property were duly transferred.

- (3A) In the case of any property subject to the provisions of the Closer Settlement Acts, the *Crown Lands Act 1989*, the *Mining Act 1992* or the *Offshore Minerals Act 1999*, or any other Act relating to Crown lands, the property shall not vest until either:
- (a) the appropriate transfer is executed and registered so that the property is duly transferred, or
 - (b) an entry of the vesting is made in the appropriate register kept under the provisions of the Act to which such property is subject.

Any such entry shall have the same effect as if the property were duly transferred.

- (4) In the following cases the property shall not vest until the appropriate transfer is executed and registered so that the property is duly transferred, that is to say, in the case of:
- (a) any property comprised in a mortgage for securing money subject to the trust, where the property is not either land subject to the provisions of the *Real Property Act 1900* or land conveyed on trust for securing debentures or debenture stock,
 - (b) (Repealed)

¹⁹⁴ *Trustee Act 1925* (ACT) s 9; *Trustee Act 1925* (NSW) s 9; *Trustee Act* (NT) s 13; *Trustee Act 1936* (SA) s 16; *Trustee Act 1898* (Tas) s 15; *Trustee Act 1958* (Vic) s 45; *Trustees Act 1962* (WA) s 10; *Trustee Act 1956* (NZ) s 47; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 40.

¹⁹⁵ See *Trustee Act 1925* (ACT) s 9(3)–(6); *Trustee Act 1925* (NSW) s 9(3)–(5).

- (c) any property a conveyance of which is required to be registered by or under any Act, whether of this State or otherwise, other than the Acts mentioned in subsections (3) and (3A).
- (5) In the case of any property that is only transferable in books kept by a corporation company or other body, or in manner directed by or under any Act, whether of this State or otherwise, the property shall not vest until it is duly transferred.

5.180 In the Northern Territory, South Australia, Victoria and Western Australia, the provisions dealing with the vesting of trust property are expressed not to apply to land under, respectively, the provisions of the *Land Title Act (NT)*, the *Real Property Act 1886 (SA)*, the *Transfer of Land Act 1958 (Vic)* or the *Transfer of Land Act 1893 (WA)*; land conveyed by way of mortgage for securing money subject to the trust; or any property that is transferable only in books kept by a company or other body, or in the manner directed by or under an Act of Parliament.¹⁹⁶ The Tasmanian trustee legislation includes a similar provision, except that it does not refer to registered land.¹⁹⁷

5.181 Four jurisdictions — the ACT, New South Wales, Victoria and Western Australia — include a provision dealing with the rights conferred in relation to property that does not vest until transfer or registration.¹⁹⁸ Section 9(7) of the *Trustee Act 1925 (NSW)* provides:

If any property does not vest under this section until transfer or registration, the execution and registration of the deed of appointment, or of the deed or deeds of consent and retirement, as the case may be, shall nevertheless vest the right to call for a transfer of the property, and to sue for or recover the property.

5.182 The provision vests in the new trustee the right to call upon his or her predecessor to transfer the trust estate.¹⁹⁹

5.183 The authors of the Model Trustee Code considered that ‘it is not appropriate for trustee legislation to seek to make inroads into sophisticated statutory mechanisms which have been set in place for the transfer of property such as Torrens land, or company shares, debts and intellectual property’.²⁰⁰ In their view, ‘all that trustee legislation should do is to provide’:²⁰¹

- (a) that any vesting of property consequent upon a change of trusteeship is subject to the provisions of any other Act;²⁰²

¹⁹⁶ *Trustee Act (NT)* s 13(3); *Trustee Act 1936 (SA)* s 16(3); *Trustee Act 1958 (Vic)* s 45(3); *Trustees Act 1962 (WA)* s 10(3).

¹⁹⁷ *Trustee Act 1898 (Tas)* s 15(3).

¹⁹⁸ *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).

¹⁹⁹ *BL and M Grollo Homes Pty Ltd v Comptroller of Stamps* [1983] 1 VR 445, 447 (Tadgell J).

²⁰⁰ WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 118.

²⁰¹ *Ibid* 118–19.

²⁰² As explained above, this is the case under s 15(1)–(2) of the *Trusts Act 1973 (Qld)*.

- (b) that the instrument of discharge or appointment vests in the persons who become and are the trustees the right to call for a transfer of the title to all trust property which can be vested only under the provisions of another Act; and
- (c) that it is the duty of retiring and continuing trustees to secure the transfer of all trust property into the names of the persons who become and are the trustees. (note added)

5.184 Accordingly, their model provision included the following subsections (the first being similar to the ACT and New South Wales provision set out above):²⁰³

- (3) If any property does not vest under this section until transfer or registration or otherwise under any other Act any instrument whereby a new or additional trustee is appointed or any consent whereby a trustee is discharged vests in the persons who become and are the trustees the right to call for the vesting of the property, and to sue for recovery of the property.
- (4) Upon the discharge of a trustee and upon the appointment of a new or additional trustee—
 - (a) any trustee who is desirous of being discharged,
 - (b) any continuing trustees,
 - (c) any new or additional trustees, and
 - (d) any person in whom the trust property is vested in consequence of the death of a sole trustee

shall forthwith execute all such instruments and do all such acts as may be requisite or appropriate to secure the vesting by transfer or registration or otherwise under any Act of every part of the trust property in the names of the persons who become and are the trustees of the trust.

5.185 The authors of the Model Trustee Code commented that subsection (4) of the model provision ‘restates in more forthright language’ the provision found in a number of jurisdictions — in Queensland, section 12(2)(d) — that, upon the appointment of a new trustee, ‘any assurance or thing requisite for vesting of the trust property, or any part thereof ... shall be executed or done’.²⁰⁴

5-27 Does the expression ‘subject to the provisions of any other Act’ in section 15(1) and (2) of the *Trusts Act 1973 (Qld)* create an adequate exception for property that is the subject of specific legislative or other transfer requirements? If not, how should that exception be expressed?

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WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 117 (cl 4.3(3)–(4)).

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Ibid 119.

- 5-28** Should section 15 of the *Trusts Act 1973* (Qld) include a provision to the effect that, where property does not vest under that section until transfer or registration under another Act, the instrument by which new trustees are appointed or by which a trustee is discharged vests in the persons who are and will become the trustees the right to call for a transfer of the property and to sue for or recover the property?
- 5-29** Should section 15 of the *Trusts Act 1973* (Qld), instead of section 12(2)(d) and 15(3), include a provision imposing a more explicit duty on any trustee who wishes to be discharged, any continuing and new or additional trustees, and any person in whom the trust property is vested in consequence of the death of a sole trustee, to execute all such instruments and do all such acts to vest the trust property in the names of the persons who are and will become the trustees?

Vesting of property where the trustee who has been replaced is unable to execute the required transfers

5.186 In a recent Issues Paper, the Law Commission of New Zealand referred to the problems that may arise where a trustee is replaced due to unfitness or incapacity, 'since he or she may not be able to sign the required transfer documents'.²⁰⁵ It made the observation that, in that situation, the remaining trustees would need to apply to the New Zealand High Court for a 'vesting order'. In Queensland, the Supreme Court has the power, under section 82 of the *Trusts Act 1973* (Qld), to make a vesting order in a range of situations. Where a trustee was replaced under section 12 of the *Trusts Act 1973* (Qld) and was refusing or unable to sign any required transfer documents, it would be necessary for an application to be made for an order vesting the property in the persons who are the trustees.

5.187 The Law Commission of New Zealand raised the possibility of empowering the remaining trustees to sign the necessary documents. It suggested that it was 'hard to see the justification for requiring the court's intervention in what is essentially a machinery matter', although it recognised that 'without the court's oversight ... there may be a risk that there would not be sufficient safeguards to prevent abuse of power by the continuing trustees'.²⁰⁶

5.188 The Commission would be interested to know whether, where a trustee has been replaced under section 12, the need for a trustee to sign any required transfer documents has presented problems and, if so, whether it would be desirable to develop a mechanism to avoid the need to apply for a vesting order in these circumstances.

²⁰⁵ Law Commission of New Zealand, *The Duties, Office and Powers of a Trustee: Review of the Law of Trusts*, Issues Paper No 26 (2011) [4.49].

²⁰⁶ *Ibid* [4.48].

- 5-30** What problems, if any, exist with procuring the execution of transfer documents by a trustee who has been replaced under section 12 of the *Trusts Act 1973* (Qld) and is unable or unwilling to sign the documents?
- 5-31** Would it be desirable to develop a mechanism to avoid the need to apply to the court for a vesting order in these circumstances or is a vesting order the best way to safeguard the beneficiaries' interests?

DEVOLUTION OF TRUST ASSETS AND TRUST POWERS UPON DEATH

5.189 Section 16 of the *Trusts Act 1973* (Qld) deals with the vesting of trust powers on the death of one of two or more trustees, and with the vesting of both trust powers and trust property on the death of a sole trustee. It provides:

16 Devolution of trust assets and trust powers upon death

- (1) Where a power or trust is given to or imposed on 2 or more trustees jointly, the same may be exercised or performed by the survivors or survivor of them for the time being.
- (2) Upon the death of a sole trustee or, where there were 2 or more trustees, of the last surviving or continuing trustee, the trust property shall devolve to and vest in the public trustee and shall remain vested in the public trustee until—
 - (a) an appointment of a new trustee is made and (unless the appointment is made by the public trustee) notice in writing of the appointment is given to the public trustee, whereupon the trust property shall devolve to and vest in the person so appointed subject to and in accordance with the provisions of section 15; or
 - (b) if no such appointment is made—a grant of probate or letters of administration of the estate of the deceased trustee is made and notice in writing of such grant and of his or her intention to assume the trust of the trust property is given to the public trustee by the person to whom the grant was made, whereupon the trust property shall devolve to and vest in such person who shall be deemed to be the person appointed by the person nominated for the purpose of appointing new trustees.
- (3) Trust property vested by virtue of this section in the public trustee shall vest in the public trustee, notwithstanding the fact that no instrument has been executed appointing the public trustee as trustee, in the like manner and subject to the same provisions as trust property which vests in a new trustee by virtue of section 15.
- (4) Trust property vested by virtue of this section in a person to whom a grant of probate or letters of administration of the estate of a deceased trustee has been made shall vest in the person in like manner and subject to the same provisions as trust property which vests in a new trustee by virtue of section 15.

- (5) While the trust property is vested in the public trustee under this section the public trustee shall have the same powers, authorities and discretions, and may in every respect act, as if the public trustee had originally been appointed a trustee by the instrument (if any) creating the trust; but unless the court, in special circumstances, otherwise directs it shall not be obligatory for the public trustee to exercise any of such powers, authorities or discretions.
- (6) Where the trust property vests by virtue of this section in the person to whom a grant of probate or letters of administration of the estate of the deceased trustee is made that person shall have all the powers, authorities and discretions and in every respect act as if the person had originally been appointed a trustee by the instrument (if any) creating the trust.
- (7) Where by virtue of this section trust property is divested from the public trustee in consequence of an appointment of a new trustee or a grant of probate or letters of administration of the estate of the deceased trustee 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) in respect of any action taken by the public trustee with regard to the trust property shall cease; but any person who, but for this provision, would have had a remedy against the public trustee shall have the like remedy against the person in whom the trust property has vested pursuant to such appointment of new trustee or grant of probate or letters of administration.
- (8) Nothing in this section shall deprive the public trustee of any power which the public trustee has or may exercise under the *Public Trustee Act 1978*, section 62.
- (9) In this section—
- trustee** does not include a personal representative as such.
- trust property** includes any property vested in the trustee as mortgagee.

5.190 Section 16 does not apply to a personal representative as such.²⁰⁷ The vesting of property on the death of a sole executor or administrator is a matter of succession law.²⁰⁸

Death of one of two or more trustees

5.191 Section 16(1) deals with the vesting of a power or trust given to, or imposed on, two or more trustees jointly. On the death of one of the trustees, the power or trust may be exercised, or performed, by the survivor or survivors of the trustees.

5.192 The subsection does not provide for the vesting, in the surviving trustee or trustees, of trust property that is held by two or more trustees as joint tenants.²⁰⁹ It

²⁰⁷ *Trusts Act 1973* (Qld) s 16(9).

²⁰⁸ See 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) vol 1, ch 10.

is not necessary to make provision for that situation because property held by joint tenants (irrespective of whether the joint tenants are trustees) automatically passes, by operation of the right of survivorship (the *jus accrescendi*) to the surviving joint tenant or joint tenants.²¹⁰

Death of a sole trustee

5.193 The remainder of section 16 deals with the vesting of trust property and trust powers on the death of a sole trustee. Section 16(2) provides that initially, on the death of a sole trustee, the trust property vests in the Public Trustee. While the trust property is vested in the Public Trustee, the Public Trustee has, under section 16(5), the same powers, authorities and discretions as if the Public Trustee had originally been appointed a trustee of the property, although the Public Trustee is not generally required to exercise those powers, authorities or discretions.

5.194 Section 16(2)(a) provides that, once a new trustee is appointed²¹¹ and written notice of the appointment is given to the Public Trustee,²¹² the trust property vests in the new trustee in accordance with the provisions of section 15. Further, as explained earlier in this chapter, section 12(6) operates to confer on a new trustee who is appointed under that section the same powers, authorities and discretions as if the new trustee had been originally appointed by the trust instrument.²¹³

5.195 Section 16(2)(b) deals with the vesting of the trust property where there is no appointment of a new trustee. It provides that, if a grant of probate or letters of administration is made of the estate of the deceased trustee and the personal representative under the grant gives the Public Trustee written notice of the grant and of his or her intention to assume the trust of the trust property, the trust property vests in the personal representative. Section 16(6) further provides that the person to whom the grant was made has the same powers, authorities and discretions as if he or she had originally been appointed a trustee of the property.

5.196 The personal representative of a deceased trustee 'has an absolute right to decline to accept the position and duties of trustee if he chooses so to do'.²¹⁴ Section 16 avoids the situation that may occur in the other Australian jurisdictions where the trust property is vested in the personal representative of a deceased sole trustee even though the personal representative does not wish to perform the duties of trustee in relation to trust property held by the deceased trustee.

209 See [5.201] ff below for a discussion of the vesting of trust property held by two or more trustees as tenants in common.

210 Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (Sweet & Maxwell, 6th ed, 2000) [9-003].

211 An appointment may be made by any of the persons authorised by s 12(1) of the *Trusts Act 1973* (Qld). Additionally, because s 16(5) confers on the Public Trustee the same powers, authorities and discretions as if it had been appointed by the instrument (if any) creating the trust, the Public Trustee may, if there is no person nominated in the trust instrument for the purpose of appointing new trustees or no such person who is able and willing to act, exercise the power of a surviving trustee to appoint replacement trustees.

212 The requirement that written notice of the appointment is given to the Public Trustee does not apply if the appointment is made by the Public Trustee: *Trusts Act 1973* (Qld) s 16(2)(a).

213 See [5.152] above.

214 *Re Bennett* [1906] 1 Ch 216, 225 (Vaughan Williams LJ).

5.197 An important feature of the Queensland provision is that the person in whom trust property vests on the death of a sole trustee has the powers, authorities and discretions of a trustee in relation to the trust property.

5.198 That is not the case in all of the other Australian jurisdictions. With the exception of Queensland,²¹⁵ property of which a deceased person was trustee vests in the same manner as property to which the deceased person was beneficially entitled. However, the vesting of the trust property in the deceased trustee's personal representative (whether that occurs on the deceased's death or when a grant is made) does not, of itself, constitute the personal representative as a trustee of the relevant trust, as 'a person cannot have the powers authorities and discretions of a trustee unless that person has been appointed trustee by the person creating the trust or has been pointed to in some way as a person proper to exercise those powers authorities and discretions'.²¹⁶

5.199 In Tasmania, Victoria and Western Australia, legislation provides that, until new trustees are appointed, the personal representative of a sole or last surviving or continuing trustee may exercise or perform any power or trust that was given to, or was capable of being exercised by, the sole or last surviving or continuing trustee.²¹⁷ However, in the other Australian jurisdictions, unless the instrument by which the trust is created provides that 'the persons upon whom the trust assets will devolve upon the death of the sole trustee shall have all the powers discretions and authorities and be able to act in all respects as if they had been appointed trustees',²¹⁸ such persons will not be able to exercise trust powers with respect to that property.²¹⁹ They will simply hold the trust property as bare trustees until new trustees are appointed.²²⁰

5.200 The Commission considers that section 16 of the *Trusts Act 1973* (Qld) deals effectively with the vesting of trust property and powers, and should be retained.

Death of a trustee who holds trust property as tenant in common with one or more trustees

5.201 Ford and Lee have suggested that, where more than one trustee is appointed, 'the proper practice is to vest the trust property in all the trustees expressly as joint tenants, so that on the death of one trustee the trust property, as

215 See s 45(1) of the *Succession Act 1981* (Qld), which does not apply to the vesting of property that was held by a deceased person as trustee.

216 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 March 2009) [8600]. See also *Re Crunden and Meux's Contract* [1909] 1 Ch 690, 695 (Parker J).

217 *Conveyancing and Law of Property Act 1884* (Tas) s 34; *Trustee Act 1958* (Vic) s 22; *Trustees Act 1962* (WA) s 45.

218 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 March 2009) [8600].

219 *Robson v Flight* (1865) De GJ & S 608; 46 ER 1054; *Re Crunden and Meux's Contract* [1909] 1 Ch 690.

220 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 March 2009) [8600].

well as all trusts and powers, will devolve upon the surviving trustees'.²²¹ They note, however, that:²²²

some practitioners have, mistakenly, seen danger in the possibility that trust property will become vested in a sole trustee following the death, retirement or removal of co-trustees, and have vested trust property in the trustees as tenants in common, so precluding devolution by survivorship. But that solution produces as many problems as it solves ...

5.202 As explained above, if the deceased trustee's interest in the property vests in his or her personal representative, that creates problems if neither legislation nor the trust instrument confers on the personal representative the powers of a trustee. In that situation, the personal representative holds the title to the property as a bare trustee until new trustees are appointed, but is not able to exercise the powers of a trustee.²²³

5.203 In Queensland, however, that problem does not seem to arise. In *Re Livanos*, it was held that, where a deceased trustee had held property with another trustee as tenants in common, the deceased trustee's 'undivided moiety' (that is, half share) in the trust property was trust property vested in him solely. Accordingly, it devolved in accordance with the provisions of section 12 of the *Trustees and Executors Act 1897* (Qld).²²⁴ That provision dealt with the devolution, on the death of a person, of an estate or interest in property that was vested in the person solely on trust or by way of mortgage. As explained later in this chapter,²²⁵ section 12 of the *Trustees and Executors Act 1897* (Qld) was repealed by the *Trusts Act 1973* (Qld), where it was replaced by sections 16 and 17.

5.204 On the basis of *Re Livanos*, if trust property is held by trustees as tenants in common, on the death of one of the trustees, that trustee's interest in the property, being an interest in property held by the trustee solely, will vest in accordance with section 16(2) of the *Trusts Act 1973* (Qld). Further, as explained earlier, section 16 ensures that the person in whom trust property vests has the powers, authorities and discretions of a trustee in relation to the trust property.

5-32 Although it is not strictly necessary, would it be of any benefit for the *Trusts Act 1973* (Qld) to clarify that section 16(2) of the Act applies to the devolution and vesting of trust property held by a trustee as a tenant in common with another trustee?

221 Ibid [8590].

222 Ibid.

223 See [5.198]–[5.199] above. See also the discussion of this issue in GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [21.135].

224 [1955] St R Qd 362, 368 (O'Hagan J).

225 See [5.208] and n 232 below.

Vesting of trust property on the deregistration of a corporate trustee

5.205 A company ceases to exist on deregistration.²²⁶ The *Corporations Act 2001* (Cth) provides that, on the deregistration of a company, all property that the company held on trust immediately before deregistration vests in the Commonwealth.²²⁷ Similarly, if property is vested in a liquidator on trust immediately before deregistration, that property vests in the Commonwealth.²²⁸ Subject to its obligations as trustee of the trust, the Commonwealth has all of the powers of an owner over the trust property.²²⁹ The Commonwealth may continue to act as trustee or apply to a court for the appointment of a new trustee.²³⁰

DEVOLUTION OF MORTGAGE ESTATES ON DEATH

Introduction

5.206 Section 17 of the *Trusts Act 1973* (Qld) deals with the devolution of an estate or interest in property 'vested solely in any person (not being a trustee) by way of mortgage'. Although the provision is contained in the *Trusts Act 1973* (Qld), it is concerned with mortgage law, not trusts law.

5.207 Section 17 provides that, on the death of a sole mortgagee, the mortgagee's estate or interest in the mortgaged property vests initially in the public trustee and, once a grant is made in relation to the estate of the deceased mortgagee, in the person to whom the grant is made. The section also deals with the public trustee's powers while the property is vested in the public trustee:

17 Devolution of mortgage estates on death

- (1) An estate or interest in property vested solely in any person (not being a trustee) by way of mortgage shall upon the person's death devolve to and vest in the public trustee until a grant of probate or letters of administration to the estate of the deceased mortgagee is made when the mortgaged property shall devolve to and vest in the person to whom the grant is made.
- (2) While the property is vested in the public trustee under this section the public trustee shall have the same powers, authorities and discretions and may in every respect act, as if the public trustee were originally the mortgagee of the property.
- (3) Nothing in this section shall deprive the public trustee of any power which the public trustee has or may exercise under the *Public Trustee Act 1978*, section 61.

²²⁶ *Corporations Act 2001* (Cth) s 601AD(1). Deregistration most commonly occurs following the winding up of a company, but can also be voluntary. See generally *Corporations Act 2001* (Cth) ch 5A pt 5A.1.

²²⁷ *Corporations Act 2001* (Cth) s 601AD(1A).

²²⁸ *Corporations Act 2001* (Cth) s 601AD(1A). Under s 474(2) of the Act, the court may, on the application of the liquidator, order that all or any part of the property of the company vests in the liquidator.

²²⁹ *Corporations Act 2001* (Cth) s 601AD(3A).

²³⁰ *Corporations Act 2001* (Cth) s 601AE(1).

5.208 Section 12 of the *Trustees and Executors Act 1897* (Qld) previously provided for the vesting of both trust and mortgage estates in the public curator²³¹ on the death of a sole trustee or mortgagee.²³² As discussed earlier in this chapter, section 16 of the *Trusts Act 1973* (Qld) now deals with the vesting of trust property on the death of a sole trustee, or a last surviving or continuing trustee,²³³ and section 17 is confined to the vesting of an estate or interest in property on the death of a sole mortgagee.²³⁴

5.209 The other Australian jurisdictions do not have a provision that is equivalent to section 17 of the *Trusts Act 1973* (Qld). Instead, the administration and probate legislation of those jurisdictions has the effect that an estate or interest held in property by a mortgagee vests in accordance with the provisions that deal with the vesting of real and personal property generally,²³⁵ although several jurisdictions provide expressly that real property held by a person by way of mortgage (or in trust), and vesting under the relevant provision, vests subject to the trusts and equities affecting that property.²³⁶ Those provisions do not, however, vest the mortgage estate in a different person from other property of the deceased mortgagee.

Historical background

5.210 Section 17 of the *Trusts Act 1973* (Qld) has its origins in section 30 of the English *Conveyancing and Law of Property Act 1881*, which provided that, on the death of a sole trustee or sole mortgagee, the trust property or mortgage estate devolved to, and became vested in, the deceased's personal representative.

5.211 At the time, a mortgage of land was created by the conveyance of the freehold estate to the mortgagee, the mortgagor retaining an 'equity of redemption'.²³⁷ Further, on a person's death, the devolution of the property

231 The Public Curator of Queensland was continued in existence under the name and style of The Public Trustee of Queensland: *Public Trustee Act 1978* (Qld) s 7(1) (Act as passed).

232 See *Trustees and Executors Act 1897* (Qld) s 12. That section originally provided for the vesting of trust and mortgage estates in the deceased's personal representative. However, when the Public Curator was established by the *Public Curator Act 1915* (Qld), that Act also amended s 12 of the *Trustees and Executors Act 1897* (Qld) to vest trust and mortgage estates in the Public Curator. The Public Curator could renounce its rights in favour of the personal representative, at which point the estate or interest vested in the personal representative.

233 See [5.189] above.

234 In its 1971 Report, the Commission explained the reason for dealing separately with the vesting of these two types of property (Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 16):

in view of the possibility that trust property may vest in new trustees by appointment of new trustees — a possibility which cannot appertain to mortgaged property — it seems proper to make separate provisions for the devolution of mortgaged property.

235 See 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) vol 1, [10.11]–[10.22].

236 See *Administration and Probate Act 1929* (ACT) s 40; *Probate and Administration Act 1898* (NSW) s 45; *Administration and Probate Act* (NT) s 53; *Administration and Probate Act 1919* (SA) s 46.

237 The equity of redemption was, effectively, the mortgagor's right to a reconveyance of the mortgaged property on paying the money owing under the mortgage.

depended on whether the property was real or personal property: real property vested directly in the devisee if it was devised by will or, if the deceased died intestate, in the heir. Only personal property vested in the deceased's executor.

5.212 A mortgagee of freehold to whom the whole legal estate had been conveyed had two separate rights: the legal estate (which was real property) and the right to the money lent (which was personal property).²³⁸ The application of the vesting rules to these different rights resulted in an 'inconvenient arrangement' when a sole mortgagee died.²³⁹

At common law ... on the death of a sole mortgagee the right to the mortgage money passed to his personal representatives, and the legal estate passed to his devisee or heir, who held it on trust for the persons entitled to the money.

5.213 This problem was ultimately overcome by section 30 of the *Conveyancing and Law of Property Act 1881*, which ensured that the mortgage estate vested in the personal representative of a sole mortgagee. Section 30 was ultimately repealed by the *Law of Property Act 1925*,²⁴⁰ which provides that a mortgage of freehold cannot be created by conveyance of title.²⁴¹ This change had the effect that both the security and the debt created by a mortgage were in the nature of personal property.²⁴² Further, since the commencement of the *Land Transfer Act 1897*, it has been the position in England that, on a person's death, real property that was vested in the person without a right in any other person to take by survivorship has vested in the deceased's personal representative, rather than in the devisee of the property.²⁴³ These two changes meant that the original reason for the enactment of 30 of the *Conveyancing and Law of Property Act 1881* — to avoid the situation where the devisee or heir held the legal estate in the mortgaged property on trust for the persons entitled to the money secured by the mortgage — was no longer a consideration.

Current position in Queensland

5.214 Queensland was the last Australian jurisdiction to abolish the rule that real property that was devised by will vested directly in the devisee. At the time the *Trusts Act 1973* (Qld) was passed, Queensland still had different vesting rules for the vesting of real and personal property. However, section 45(1) of the *Succession Act 1981* (Qld) provides for all the property of a deceased person, both real and personal (other than property of which the deceased was a trustee) to vest in the

²³⁸ Sir Robert Megarry and HWR Wade, *The Law of Real Property* (Stevens & Sons, 5th ed, 1984) 981. See also *Thornborough v Baker* (1675) 3 Swans 628; 36 ER 1000, where Lord Nottingham held that the executor of the deceased mortgagee was entitled to the money secured by the mortgage on the basis that it was personal property.

²³⁹ Sir Robert Megarry and HWR Wade, *The Law of Real Property* (Stevens & Sons, 5th ed, 1984) 981.

²⁴⁰ *Law of Property Act 1925*, 15 & 16 Geo 5, c 20, s 207 sch 7.

²⁴¹ *Law of Property Act 1925*, 15 & 16 Geo 5, c 20, s 85.

²⁴² HG Hanbury, *The Law of Mortgages* (Stevens & Sons, Sweet & Maxwell, 1938) 215.

²⁴³ *Land Transfer Act 1897*, 60 & 61 Vict, c 65, ss 1(1), (5), 25.

deceased's executor or, if there is no executor able and willing to act, in the Public Trustee.²⁴⁴

5.215 Further, 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.²⁴⁵

5.216 The issue is whether, in light of these matters, there is any reason to retain section 17 of the *Trusts Act 1973* (Qld) or whether, on a person's death, any property held by the person by way of mortgage should simply vest in accordance with section 45 of the *Succession Act 1981* (Qld).

5.217 The authors of the Model Trustee Code suggested that section 17 should be retained in Queensland for convenience.²⁴⁶

Queensland has a provision not found in other States' trustee legislation to cover the case where a sole mortgagee dies. If the borrower wishes to pay off the mortgage he can do so by paying the Public Trustee. There are conveniences in Queensland for this rule which are not applicable elsewhere, namely the deceased estate does not devolve, in Queensland, on the Public Trustee but on the personal representatives. The delay which can occur in that context warrants this particular provision.

5.218 However, apart from section 17 of the *Trusts Act 1973* (Qld), section 61 of the *Public Trustee Act 1978* (Qld) enables the Public Trustee, in a range of circumstances, to sign a memorandum of discharge of mortgage in respect of moneys secured by the mortgage (or to execute a reconveyance of any mortgaged property). The circumstances in which the Public Trustee may exercise this power include the situation where the mortgagee of property:²⁴⁷

is dead and the mortgagee's estate has not been administered or, so far as appears to the public trustee, there is no person currently acting in the administration of the estate; ...

5.219 The Public Trustee must be satisfied after making reasonable inquiries that there is no person in Queensland authorised to give the discharge, and that the whole of the moneys payable under the mortgage have been paid. If the Public Trustee is not satisfied that the whole of the moneys have been paid, the Public Trustee may give the discharge on payment to the Public Trustee of such amount as the Public Trustee is satisfied is the whole amount outstanding.²⁴⁸ Moneys paid to the Public Trustee under the section are to be held by the Public Trustee on trust for the mortgagee or other person entitled to the moneys.²⁴⁹

²⁴⁴ Curiously, although s 45(1) of the *Succession Act 1981* (Qld) does not apply to the vesting of property that the deceased held as trustee, the section does not create a similar exception in relation to property held by the deceased by way of mortgage.

²⁴⁵ *Real Property Act 1861* (Qld) s 60 (repealed). See now *Land Title Act 1994* (Qld) s 74.

²⁴⁶ WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 2, 263.

²⁴⁷ *Public Trustee Act 1978* (Qld) s 61(1)(b).

²⁴⁸ *Public Trustee Act 1978* (Qld) s 61(1).

²⁴⁹ *Public Trustee Act 1978* (Qld) s 61(5).

5.220 As explained above, the rationale for the enactment of the original English provision from which section 17 of the *Trusts Act 1973* (Qld) is derived was to avoid the inconvenient result that occurred at a time when real property did not vest in a deceased person's executor, but in either the devisee under the deceased's will or in the deceased's heir where the deceased died intestate. Where the deceased was the mortgagee of real property, the deceased's interest in the legal estate (being real property) vested in either the devisee or heir who held it on trust for the person who was entitled, under the will or the relevant intestacy rules, to the repayment of the money secured by the mortgage (being personal property). However, in Queensland, as in England, real property no longer vests directly in the devisee or heir and, further, a mortgage of real property operates only as a charge and not as a transfer to the mortgagee of the legal interest in the property. For these reasons, the Commission's preliminary view is that section 17 of the *Trusts Act 1973* (Qld) is no longer needed and should be omitted from the Act.

5.221 In the absence of that provision, a deceased mortgagee's interest in the mortgaged property will vest, like all other property to which the deceased was, immediately before his or her death, beneficially entitled, in accordance with section 45 of the *Succession Act 1981* (Qld).

5.222 The Commission invites submissions on the following proposal:

5-33 Section 17 of the *Trusts Act 1973* (Qld), which provides for the vesting of property vested solely in a person by way of mortgage, is no longer required and should be omitted from the Act.

RENUNCIATION OF PROBATE BY PERSON APPOINTED AS EXECUTOR AND TRUSTEE

5.223 Section 18 of the *Trusts Act 1973* (Qld) provides that, in specified circumstances, a person who is appointed by will as both executor and trustee is deemed to have disclaimed the trust contained in the will. It provides:

18 Disclaimer of trusts on renunciation of probate

- (1) Where a person appointed by will both executor and trustee thereof renounces probate, or after being duly cited or summoned fails to apply for probate, the renunciation or failure shall be deemed to be a disclaimer of the trust contained in the will.
- (2) Where any person appointed by will both executor and trustee thereof—
 - (a) renounces probate;²⁵⁰ or

²⁵⁰

Renunciation is 'a formal act in writing by which a person having a right to probate or administration waives and abandons that right': JR Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (Sweet & Maxwell, 19th ed, 2008) [30-01]. See *Uniform Civil Procedure Rules 1999* (Qld) r 975 (Use of approved forms), Form 114 (Renunciation of probate or administration with the will).

- (b) after being duly cited²⁵¹ or summoned fails to apply for probate;
or
- (c) dies before probate is granted to the person;

and letters of administration with the will annexed are granted to any other person, the person who obtains the grant shall, by virtue of the grant and without further appointment, be deemed to be appointed trustee of the will in the place of the person who was appointed by the will. (notes added)

5.224 The circumstances mentioned in section 18 of the *Trusts Act 1973* (Qld) in which a person is deemed to have renounced a trust contained in a will correspond to the circumstances mentioned in section 46 of the *Succession Act 1981* (Qld) in which a person's right to the executorship of a will ends.

5.225 Section 46 of the *Succession Act 1981* (Qld) provides:

46 Cesser of right of executor to prove

Where a person appointed executor by a will—

- (a) survives the testator but dies without having taken out probate of the will; or
- (b) renounces probate; or
- (c) after being duly cited or summoned fails to apply for probate;

the person's rights in respect of the executorship shall wholly cease, and the representation of the testator and the administration of the testator's estate shall devolve and be committed in like manner as if that person had not been appointed executor.

5.226 The purpose of section 18 of the *Trusts Act 1973* (Qld) is to ensure that the person cannot hold the office of trustee if the person's right to the executorship of the will has ceased.

5.227 Section 18(1) deems the person's renunciation of probate, or failure to apply for probate after being cited or summoned, to be a disclaimer of the trust contained in the will.²⁵² Subsection 18(2) has the effect that, if letters of administration with the will annexed are granted to another person (including because the person appointed as executor and trustee died without obtaining a grant of probate),²⁵³ that person is automatically substituted as the trustee of the trust contained in the will.

251

A citation is an instrument issued by the court calling on the party cited (the 'citee') 'to take or renounce a grant, to propound testamentary papers, or to bring in a grant for the purpose of having it revoked': AA Preece, *Lee's Manual of Queensland Succession Law* (Lawbook, 6th ed, 2007) [8.510]. See *Uniform Civil Procedure Rules 1999* (Qld) r 975 (Use of approved forms), Forms 124 (Request for issue of citation), 125 (Citation to take probate).

252

It is not necessary for s 18(1) to refer to the death of the trustee, as s 18(2) does, because the death of the trustee will itself bring his or her trusteeship to an end: *Trusts Act 1973* (Qld) s 16.

253

Each of the three circumstances mentioned in s 18(2) of the *Trusts Act 1973* (Qld) operates under s 46 of the *Succession Act 1981* (Qld) to end the person's executorship of the will.

5.228 The trustee legislation in Victoria and Western Australia contains provisions in virtually identical terms to section 18.²⁵⁴ In the ACT and New South Wales, the trustee legislation contains similar provisions to section 18(1),²⁵⁵ but the provisions dealing with the substitution of the executor-trustee have a narrower application than section 18(2).²⁵⁶

5.229 The situations of renunciation of probate and failure to apply for a grant, which are referred to in section 46 of the *Succession Act 1981* (Qld) and section 18 of the *Trusts Act 1973* (Qld), are relevant where the named executor does not wish to assume the office of executor. In those circumstances, section 46 of the *Succession Act 1981* (Qld) facilitates the application by a person other than the named executor for a grant of letters of administration with the will annexed in common form — that is, without a hearing before a judge.²⁵⁷

5.230 Sometimes, however, the named executor may wish to retain that office and may in fact apply for a grant of probate, but the person's application is successfully contested by another person. Although every person nominated as the executor of a will is, prima facie, entitled to a grant of probate,²⁵⁸ the court has an inherent power, in certain limited circumstances, to pass over a named executor.²⁵⁹ The principle underlying the exercise of that power is that:²⁶⁰

the real object which the Court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto; ...

5.231 Executors have been passed over in a range of situations, including where:

- the executor had been convicted of murdering the testator and was serving a term of imprisonment;²⁶¹

²⁵⁴ *Trustee Act 1958* (Vic) s 46; *Trustees Act 1962* (WA) s 12.

²⁵⁵ *Trustee Act 1925* (ACT) s 10(1); *Trustee Act 1925* (NSW) s 10(1).

²⁵⁶ The relevant provisions provide for the substitution of the executor-trustee only if the public trustee (in New South Wales, the NSW Trustee) or a trustee company obtains a grant of probate of the will or letters of administration with the will annexed (or additionally, in the ACT, an order to collect and administer the deceased's estate): *Trustee Act 1925* (ACT) s 10(2)–(4); *Trustee Act 1925* (NSW) s 10(2).

²⁵⁷ Most applications made for a grant of probate or letters of administration are for a grant in common form. The relevant documentation is filed in the registry and the grant is made by the probate registrar or a registrar, pursuant to his or her delegated power: *Uniform Civil Procedure Rules 1999* (Qld) r 601(1). An application for a grant in common form 'is based on the assumption that there is no litigable issue arising respecting the admission of the will to probate or the grant of letters of administration': AA Preece, *Lee's Manual of Queensland Succession Law* (Lawbook, 6th ed, 2007) [8.420]. In contrast, a grant in solemn form is made after the court has heard evidence, pronounced for the validity of the will, and ordered the issue of the grant: at [8.420].

²⁵⁸ *Evans v Tyler* (1849) 2 Rob Ecc 128, 131; 163 ER 1266, 1267 (Sir Herbert Jenner Fust).

²⁵⁹ *Re Pedersen* (Unreported, Supreme Court of New South Wales, Holland J, 17 June 1977) 2; *Re Crane* (2005) 93 SASR 198.

²⁶⁰ *In the Goods of Loveday* [1900] P 154, 156 (Jeune P), applied in *Re Pedersen* (Unreported, Supreme Court of New South Wales, Holland J, 17 June 1977).

²⁶¹ *Re Pedersen* (Unreported, Supreme Court of New South Wales, Holland J, 17 June 1977).

- the executor was unlikely, because of a conflict of interest, to consent to the estate asserting rights in relation to particular assets,²⁶² and
- the grant of probate would indirectly result in the enforcement of a foreign claim to recover taxes.²⁶³

5.232 Section 18 does not currently apply 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. Section 18(1) does not deem the passing over of the person to be a disclaimer of the trust; nor does section 18(2) have the effect of substituting the person who is appointed as administrator for the executor who was passed over. The person who was named as executor, but who has been passed over, will still be the trustee, although it may be possible for the person to be replaced under section 12(1) or replaced by the court under section 80 (in the latter case, possibly as part of the proceedings in relation to the contested grant).

5-34 Should section 18 of the *Trusts Act 1973 (Qld)* be amended so that it also applies if the person who is appointed both executor and trustee by will is passed over by the court and letters of administration with the will annexed are granted to another person? Alternatively, are the current mechanisms for replacing the person sufficient?

CUSTODIAN TRUSTEES

Introduction

5.233 Section 19 of the *Trusts Act 1973 (Qld)* — which has its origins in section 4 of the English *Public Trustee Act 1906* and section 42 of the *Public Curator Act 1915 (Qld)*²⁶⁴ — makes provision for the appointment of corporate 'custodian trustees'.²⁶⁵ Similar provision is made in some of the other Australian jurisdictions,

²⁶² *Re Crane* (2005) 93 SASR 198, 206–7 (Besanko J), where the executor asserted that, shortly before the testator's death, the testator had transferred certain property to him.

²⁶³ *Bath v British & Malayan Trustees Ltd* [1969] 2 NSW 114.

²⁶⁴ Repealed and replaced by *Public Trustee Act 1978 (Qld)*.

²⁶⁵ Different provision is made in the *Superannuation Industry (Supervision) Act 1993 (Cth)* for the use of trustees (commonly referred to as 'holding trustees') in limited recourse borrowing arrangements and for the recognition of 'custodians'. Section 67 of that Act generally prohibits trustees of regulated superannuation funds from borrowing money except for specified temporary purposes. However, under s 67A, the trustee of a regulated superannuation fund (the 'RSF trustee') may borrow money for the purpose of acquiring an 'acquirable asset', provided that the acquirable asset is held on trust so that the RSF trustee acquires a beneficial interest in the asset; the RSF trustee has a right to acquire legal ownership of asset by making one or more payments after acquiring the beneficial interest; and the rights of the lender against the RSF trustee for any default on the borrowing are limited to rights relating to the acquirable asset. The Act also recognises the use of custodians in relation to superannuation funds. However, a custodian is not a trustee of the fund, but rather 'a person (other than a trustee of the entity) who, under a contract with a trustee or an investment manager of the entity, performs custodial functions in relation to any of the assets of the entity' (emphasis added); s 10(1) (definition of 'custodian').

and in New Zealand.²⁶⁶

5.234 When appointed, custodian trustees hold the title to the trust property, but may deal with it only in accordance with the instructions of the remaining ('managing') trustees. In *Re Brooke Bond & Co Ltd's Trust Deed*, Cross J explained the nature of a custodian trustee's role:²⁶⁷

It is apparent that the duties of a custodian trustee differ substantially from those of an ordinary trustee. If the trust instrument or the general law gives the trustees power to do this, that or the other, it is not for the custodian trustee to consider whether it should be done. The exercise of powers or discretions is a matter for the managing trustees with which the custodian trustee has no concern, and he is bound to deal with the trust property so as to give effect to the decisions and actions taken by the managing trustees unless what he is requested to do by them would be a breach of trust or would involve him in personal liability.

5.235 It is difficult to know the extent to which custodian trustees are used. In England, it has been suggested that they are not commonly used in relation to private trusts, but that their appointment is more popular for charitable trusts.²⁶⁸ When discussing the Trustee Bill 1956 (NZ), the Attorney-General commented on the expected use of custodian trustees:²⁶⁹

A further interesting provision is clause 50 which provides for a corporation trustee to be appointed as a custodian trustee. This will be of some use, particularly in the kind of continuing and permanent trusts which exist in societies of various types and in cultural and sporting bodies, or the type of trust which is set up for a superannuation fund, a sick benefit fund, and funds of that nature. The custodian trustee will hold the trust and administer the investment of the moneys, and the management committee of the trust will determine matters relating to actual administration.

5.236 Section 19 of the *Trusts Act 1973* (Qld) provides:

19 Custodian trustees

- (1) Subject to the provisions of this section and to the instrument (if any) creating the trust, any corporation may be appointed to be custodian trustee of any trust in any case where, and in the same manner as, it could be appointed to be trustee.
- (2) Subject to the provisions of the instrument (if any) creating the trust, where a custodian trustee is appointed of any trust—

²⁶⁶ *Public Trustee Act 1995* (SA) s 17; *Trustee Companies Act 1988* (SA) ss 3(1) (definition of 'trustee'), 5; *Public Trustee Act 1930* (Tas) ss 23–24; *Trustee Companies Act 1953* (Tas) s 18B(c); *Trustee Act 1958* (Vic) s 71; *Trustees Act 1962* (WA) s 15; *Public Trustee Act 1941* (WA) s 22; *Trustee Act 1956* (NZ) s 50; *Trustee Companies Act 1967* (NZ) s 7(2)(q).

²⁶⁷ [1963] 1 Ch 357, 363, quoted with approval in *Re Noosa Waters Pty Ltd* [1998] QSC 1 (Shepherdson J) and *Coral Vista Pty Ltd v Halkeas* [2010] QSC 449, [46] (Wilson J).

²⁶⁸ Law Reform Committee (UK), *Twenty-Third Report: The Powers and Duties of Trustees*, Cmnd 8733 (1982) 40.

²⁶⁹ New Zealand, *Parliamentary Debates*, House of Representatives, 11 October 1956, 2383–4 (J Marshall, Attorney-General).

- (a) the trust property shall be vested in the custodian trustee as if the custodian trustee were the sole trustee, and for that purpose vesting orders may, where necessary, be made under this Act; and
 - (b) the management of the trust property and the exercise of all powers and discretions exercisable by the trustee under the trust shall be and remain vested in managing trustees other than the custodian trustee (*the managing trustees*) as fully and effectually as if there were no custodian trustee; and
 - (c) the sole function of the custodian trustee shall be to get in and hold the trust property and invest its funds and dispose of the assets as the managing trustees in writing direct, for which purpose the custodian trustee shall execute all such documents and perform all such acts as the managing trustees in writing direct; and
 - (d) for the purposes of paragraph (c), a direction given by the majority of the managing trustees, where there are more than 1, shall be deemed to be given by all the managing trustees; and
 - (e) the custodian trustee shall not be liable for acting on any direction to which paragraph (c) refers; but if the custodian trustee is of opinion that any such direction conflicts with the trusts or the law, or exposes the custodian trustee to any liability, or is otherwise objectionable, the custodian trustee may apply to the court for directions in the matter; and any order giving directions shall bind both the custodian trustee and the managing trustees; and the court may make such order as to costs as it thinks proper; and
 - (f) the custodian trustee shall not be liable for any act or default on the part of any of the managing trustees; and
 - (g) all actions and proceedings touching or concerning the trust property shall be brought or defended in the name of the custodian trustee at the written direction of the managing trustees, and the custodian trustee shall not be liable for the costs thereof apart from any payable out of the trust property; and
 - (h) a person dealing with the custodian trustee shall not be concerned to inquire as to any direction, concurrence or otherwise of the managing trustees or be affected by notice of the fact that the managing trustees have not concurred; and
 - (i) the power of appointing new trustees, when exercisable by the trustee, shall be exercisable by the managing trustees alone, but the custodian trustee shall have the same power as any other trustee of applying to the court for the appointment of a new trustee.
- (3) On the application of the custodian trustee or of any of the managing trustees or of any beneficiary and on satisfactory proof that it is the general wish of the beneficiaries or that on other grounds it is expedient to terminate the custodian trusteeship, the court may make an order for that purpose and may also make such vesting orders and give such

directions as in the circumstances seem to the court to be necessary or expedient.

5.237 Section 19(1) of the *Trusts Act 1973* (Qld) provides that, where a corporation could be appointed to be trustee of a trust, the corporation may be appointed as custodian trustee.

5.238 Section 19(2) provides that, when a custodian trustee is appointed, the trust property is vested in the custodian trustee 'as if the custodian trustee were the sole trustee'.²⁷⁰ The 'sole function' of a custodian trustee is to hold the trust property, invest its funds, and dispose of the assets in accordance with the written directions of the managing trustees.²⁷¹ To that end, the custodian trustee must 'execute all such documents and perform all such acts as the managing trustees in writing direct'.²⁷²

5.239 Section 19(2) further provides that the managing trustees retain 'the management of the trust property and the exercise of all powers and discretions exercisable by the trustee under the trust'.²⁷³ For example, the power of a trustee to appoint new trustees is exercisable by the managing trustees alone.²⁷⁴

5.240 A custodian trustee is not liable for acting on a direction of the managing trustees, nor for any act or default of the managing trustees.²⁷⁵ Section 19(2) also empowers the custodian trustee to seek directions from the court if it considers that a direction given by the managing trustees 'conflicts with the trusts or the law, or exposes the custodian trustee to any liability, or is otherwise objectionable'.²⁷⁶

5.241 The provisions of section 19(1)–(2) are expressed to apply subject to the provisions of the trust instrument. As such they provide default rules which may be overridden by the settlor. This is similar to the position in Victoria, Western Australia and New Zealand.²⁷⁷

5.242 Section 19(3) — which applies whether or not a contrary intention is expressed in the trust instrument²⁷⁸ — empowers the court to terminate a custodian trusteeship on the application of the custodian trustee, or any of the managing trustees, or any beneficiary. It may make such an order, and may make such vesting orders or give such directions as seem to the court to be necessary or expedient in the circumstances, 'on satisfactory proof that it is the general wish of

²⁷⁰ *Trusts Act 1973* (Qld) s 19(2)(a).

²⁷¹ *Trusts Act 1973* (Qld) s 19(2)(c).

²⁷² *Trusts Act 1973* (Qld) s 19(2)(c). In addition, all actions or proceedings concerning the trust property are to be brought or defended in the custodian trustee's name, at the written direction of the managing trustees: s 19(2)(g).

²⁷³ *Trusts Act 1973* (Qld) s 19(2)(b).

²⁷⁴ *Trusts Act 1973* (Qld) s 19(2)(i). However, the custodian trustee has the same power as any other trustee to apply to the court for the appointment of a new trustee.

²⁷⁵ *Trusts Act 1973* (Qld) s 19(2)(e)–(f).

²⁷⁶ *Trusts Act 1973* (Qld) s 19(2)(e).

²⁷⁷ See *Trustee Act 1958* (Vic) ss 2(3), 71; *Trustees Act 1962* (WA) s 15(1); *Trustee Act 1956* (NZ) s 50(1).

²⁷⁸ See *Trusts Act 1973* (Qld) s 10.

the beneficiaries or that on other grounds it is expedient to terminate the custodian trusteeship’.

5.243 It has been held that, although a custodian trustee exercises a ‘lesser’ function which is differentiated from the functions of an ordinary trustee,²⁷⁹ a custodian trustee holds the trust property on trust for the beneficiaries and is subject to the same fiduciary obligations towards the beneficiaries as an ordinary trustee.²⁸⁰

5.244 The primary advantage of custodian trusteeship is that the inconvenience or difficulty of re-vesting the trust property whenever a trustee dies or a new trustee is appointed can be overcome since the property can be vested, for the entire duration of the trust, in a corporate entity.²⁸¹ Custodian trusteeship may also:

- reduce the risk of misappropriation by the trustees of the trust property, since title is not held by the managing trustees,²⁸² and
- provide a ‘brake’ on possible breaches of trust by the managing trustees where the custodian trustee is able to apply to the court for directions before carrying out the managing trustees’ instructions.²⁸³

5.245 It has been suggested that custodian trusteeship is perhaps most useful for charitable trusts that involve numerous trustees, and for trusts of large funds that are likely to endure for some time, such as pension fund trusts.²⁸⁴

5-35 Should the *Trusts Act 1973* (Qld) continue to make provision for custodian trustees or should section 19 of the Act be omitted?

5.246 If the *Trusts Act 1973* (Qld) continues to make provision for custodian trustees, the following issues arise for consideration.

Who may be appointed as a custodian trustee

5.247 Section 19(1) provides that ‘any corporation’ may be appointed as a custodian trustee of a trust.

²⁷⁹ *Forster v Williams Deacon’s Bank Ltd* [1935] Ch 359, 367 (Lord Hanworth MR), 372 (Clauson J).

²⁸⁰ *Re Brooke Bond & Co Ltd’s Trust Deed* [1963] 1 Ch 357, 363, 364–5 (Cross J).

²⁸¹ See, eg, *Coral Vista Pty Ltd v Halkeas* [2010] QSC 449, [46] (Wilson J); HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 March 2009) [8070]; Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 17.

²⁸² *Coral Vista Pty Ltd v Halkeas* [2010] QSC 449, [46] (Wilson J); HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 March 2009) [8070].

²⁸³ SG Maurice, ‘The Office of Custodian Trustee’ (1960) 24 *The Conveyancer and Property Lawyer* 196, 199, 204.

²⁸⁴ *Ibid* 203–4.

5.248 In contrast, in South Australia and Tasmania the appointment of a custodian trustee is limited to the Public Trustee or a trustee company,²⁸⁵ and in Victoria, to the State Trustees (the equivalent of the Public Trustee in that State) or an 'approved corporation'.²⁸⁶

5.249 In England, the *Public Trustee Act 1906* provides for the appointment, as a custodian trustee, of the public trustee, a banking or insurance company, or other body corporate entitled by rules made under that Act to act as a custodian trustee.²⁸⁷

5.250 As noted above, the main advantage of custodian trusteeship is that, by vesting the trust property in a corporate entity, it overcomes the inconvenience of re-vesting the trust property each time a trustee dies or a new trustee is appointed.

5-36 Should section 19(1) of the *Trusts Act 1973* (Qld) continue to provide that 'any corporation' may be appointed to be custodian trustee of a trust?

Circumstances in which a custodian trustee may be appointed

5.251 An appointment of a custodian trustee can be made under section 19(1) of the *Trusts Act 1973* (Qld) 'in any case where, and in the same manner as, [the corporation] could be appointed to be trustee'. This would seem to allow the appointment of a custodian trustee by the trust instrument,²⁸⁸ by an order of the court,²⁸⁹ or under section 12 of the Act by a person with the power to appoint a new trustee.

²⁸⁵ *Public Trustee Act 1995* (SA) s 17(1); *Trustee Companies Act 1988* (SA) ss 3(1) (definition of 'trustee'), 5; *Public Trustee Act 1930* (Tas) s 23; *Trustee Companies Act 1953* (Tas) s 18B(c).

²⁸⁶ *Trustee Act 1958* (Vic) s 71(3). Section 71(2) provides that an approved corporation is a body corporate that:

- (a) has been formed for the purpose of—
 - (i) promoting art science religion education charity or any other useful object; or
 - (ii) acting as trustee in respect of any trusts for the benefit of any body which has for or included in its principal objects the promotion of art science religion education charity or any other useful object; and
- (b) applies its profits (if any) or other income in promoting all or any of such purposes; and
- (c) is approved by Order of the Governor in Council published in the Government Gazette as a corporation which may be appointed custodian trustee pursuant to this section.

²⁸⁷ *Public Trustee Act 1906*, 6 Edw 7, c 55, s 4(1), (3). See also the discussion in Chapter 9 of the appointment of 'custodians' under s 17 of the *Trustee Act 2000* (UK) c 29. Section 17 of the *Trustee Act 2000* (UK) c 29 does not apply to any trust that already has a custodian trustee: s 17(4).

²⁸⁸ See, eg, *Re Permanent Trustee Nominees (Canberra) Ltd* (Unreported, Supreme Court of New South Wales, Young J, 24 June 1985) in which the trust instrument appointed a 'manager' on whom all the managerial powers of the trust were conferred and a separate 'trustee' who was given no managerial powers.

²⁸⁹ See, eg, *Re Noosa Waters Pty Ltd* [1998] QSC 1 (Shepherdson J) in which the Court removed the existing trustees, appointed the removed trustees as custodian trustees, and appointed separate managing trustees pursuant to ss 19 and 80(2) of the *Trusts Act 1973* (Qld).

5.252 The equivalent provisions in some of the other jurisdictions set out those circumstances expressly.²⁹⁰ For example, section 71(3) of the *Trustee Act 1958* (Vic) provides:

- (3) State Trustees or an approved corporation may be appointed custodian trustee by—
- (a) the trust instrument; or
 - (b) any person having power to appoint new trustees; or
 - (c) order of the Court on the application of a beneficiary or of any person on whose application the Court would have power to appoint a new trustee.

5.253 As explained earlier in this chapter, the power to appoint new trustees is dealt with in section 12 of the *Trusts Act 1973* (Qld). In addition to providing for the appointment of replacement trustees in a range of circumstances under section 12(1), section 12(5) allows for the appointment of an additional trustee where:

- there are not more than three trustees of the trust, none of them being a trustee corporation or a local government; and
- the appointment does not increase the number of trustees beyond four.²⁹¹

5.254 Although section 11 of the *Trusts Act 1973* (Qld) generally provides for a maximum of four trustees, a custodian trustee is not counted as a trustee for the purpose of that section.²⁹² However, the wording of section 12(5) suggests that a custodian trustee could not be appointed as an additional trustee under the power conferred by that provision if the trust already had four (or more) trustees.²⁹³

5-37 Should section 19(1) of the *Trusts Act 1973* (Qld) clarify who may appoint a custodian trustee and in what circumstances?

Property for which a custodian trustee may be appointed

5.255 Section 19(2)(a) provides that, when a custodian trustee is appointed, ‘the trust property’ is to be vested in the custodian trustee as if it were the sole trustee and that, where necessary, the court may make vesting orders for that purpose. The equivalent provisions in the other Australian jurisdictions are in similar

²⁹⁰ *Public Trustee Act 1995* (SA) s 17(1); *Public Trustee Act 1930* (Tas) s 23; *Trustee Act 1958* (Vic) s 71(3).

²⁹¹ The number may be increased beyond four if the Minister has given a certificate in writing approving the appointment: s 12(5).

²⁹² *Trusts Act 1973* (Qld) s 11(4).

²⁹³ In contrast, s 12(2)(a) of the *Trusts Act 1973* (Qld) provides that the appointment of a trustee or trustees (under s 12(1)) is subject to the restriction imposed by the Act on the number of trustees. The implied reference to s 11 of the Act would appear to have the effect that, in appointing replacement trustees under s 12(1), custodian trustees will not be counted in calculating the number of trustees following the appointment of additional trustees.

terms.²⁹⁴ It is not clear whether a custodian trustee may be appointed for a specific part, rather than for all, of the trust property.

5-38 Should section 19 of the *Trusts Act 1973* (Qld) clarify whether a custodian trustee may be appointed for the whole or a specific part of the trust property?

Directions of the managing trustees

5.256 As noted above, a custodian trustee is required to act in accordance with the written directions of the managing trustees and is protected from liability for acting on those directions. Under section 19(2)(d), a direction given by ‘the majority of the managing trustees’, if there are more than one, is to be deemed to be given by all of the managing trustees.

5.257 Similar provision, allowing the managing trustees to direct the custodian trustee by majority, is made in Western Australia and New Zealand.²⁹⁵ In Tasmania, if there are two managing trustees, directions must be given by both trustees, but where there are more than two managing trustees, the directions may be given by a majority.²⁹⁶

5.258 Section 19(2)(d) contrasts with the usual rule that, for private trusts, the decisions of trustees are to be made unanimously, rather than by majority.²⁹⁷ The appointment of two or more trustees who must act unanimously is said to provide ‘a safeguard against wanton or capricious exercises of trustee discretion’.²⁹⁸

5-39 Should section 19(2) of the *Trusts Act 1973* (Qld) continue to provide that directions to the custodian trustee may be given by a majority of the managing trustees?

MEANING OF ‘TRUSTEE’ FOR PART 2 OF THE *TRUSTS ACT 1973* (QLD)

5.259 As explained earlier in this chapter, two of the provisions in Part 2 of the *Trusts Act 1973* (Qld) — sections 12(9) and 16(9) — provide that, in those sections, ‘trustee does not include a personal representative as such’. Further, the Commission has expressed the view earlier in this chapter that a similar definition

²⁹⁴ *Public Trustee Act 1995* (SA) s 17(3)(a); *Public Trustee Act 1930* (Tas) s 24(a); *Trustee Act 1958* (Vic) s 71(4)(a); *Trustees Act 1962* (WA) s 15(2)(a). See also *Trustee Act 1956* (NZ) s 50(2)(a).

²⁹⁵ *Trustees Act 1962* (WA) s 15(2)(d); *Trustee Act 1956* (NZ) s 50(2)(d).

²⁹⁶ *Public Trustee Act 1930* (Tas) s 24(e).

²⁹⁷ The duty of trustees to act jointly is considered in Chapter 7.

²⁹⁸ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [22.65].

should apply for the purposes of section 14 of the Act (Retirement of trustee without a new appointment).²⁹⁹

5.260 However, the other provisions of Part 2 deal with matters that are addressed in other legislation in so far as they concern personal representatives or, because of the nature of the provisions, do not have any relevance to personal representatives.

5.261 For example, section 11 of the *Trusts Act 1973* (Qld) provides for a maximum number of trustees. In relation to personal representatives, the same maximum number is provided for by section 48 of the *Succession Act 1981* (Qld). Similarly, the vesting of property in personal representatives is provided for by sections 45 and 47 of that Act.

5.262 On the other hand, section 13 (Evidence as to a vacancy in a trust) seems to be relevant only to trustees appointed under section 12, which does not apply to personal representatives as such, and section 17 (Devolution of mortgage estates on death) does not apply where the mortgagee is a trustee. Further, the Commission has earlier in this chapter proposed that section 17 should be omitted from the Act.

5.263 In view of these matters, the Commission's preliminary view is that, instead of the specific provisions found in section 12(9) and 16(9) of the *Trusts Act 1973* (Qld), Part 2 of the Act should include a provision to the effect that, in that part, trustee does not include a personal representative as such. If this amendment is made, it will not be necessary for section 14 to include a similar provision.

5.264 The Commission invites submissions on the following proposal:

5-40 Part 2 of the *Trusts Act 1973* (Qld) should include a provision to the effect that, in that part, 'trustee does not include a personal representative as such' and, as a consequence of that amendment, sections 12(9) and 16(9) of the *Trusts Act 1973* (Qld) should be omitted.

APPLICATION OF PART 2 OF *THE TRUSTS ACT 1973* (QLD)

General approach to the effect of a contrary intention

5.265 The provisions discussed in this chapter appear in Part 2 of the *Trusts Act 1973* (Qld). Section 10 of the Act, which deals with the application of that part, provides that, except where otherwise provided in Part 2, the provisions of that part 'shall apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust'.³⁰⁰

²⁹⁹

See [5.170] above.

³⁰⁰

To the extent that the provisions of pt 2 of the *Trusts Act 1973* (Qld) confer powers on a trustee, s 10 of the Act creates an exception to s 4(4).

5.266 Section 10 was enacted in the terms recommended by the Commission in its 1971 Report.³⁰¹ In that Report, the Commission expressed the view that, subject to particular exceptions, it was undesirable that the provisions in that part should be able to be excluded by the trust instrument.³⁰²

The provisions of this Part are concerned with the mechanical and administrative problems and procedures associated with limitation of the numbers of trustees, extra-judicial appointment of new trustees, the vesting of trust property in such trustees, and retirement of trustees. Being of a non controversial nature, these provisions are, in any event, unlikely to be excluded by any reasonable settlor; but we consider it undesirable that such exclusion should be permitted in any case, and, accordingly, it is proposed that all the clauses contained in this Part should ... , be made to override the expression of any contrary intention in the trust instrument.

5.267 In particular, the Commission considered that section 14 of the Act, which provides for the retirement of a trustee without the appointment of a new trustee, should have effect regardless of the settlor's original intention.³⁰³

Section 9 of the Western Australian Act, from which this provision is in substance taken, makes the power of retirement subject to the terms of the trust instrument; but we consider it desirable that a trustee should be permitted to retire whatever may have been the settlor's original intention. If the services of a particular trustee are regarded by the settlor as of the essence of the trust, he may limit the trust to endure only so long as that person continues to act as trustee.

Exceptions

5.268 As discussed earlier in this chapter, the provisions of section 12(2)(c) and (5) of the *Trusts Act 1973* (Qld) create two exceptions to the general approach to contrary intention adopted in Part 2 of the Act.

5.269 If a trust instrument provides that a trustee may be discharged, even though there will be only one individual to act as trustee, section 12(2)(c) ensures that the provision in the instrument has effect, even though section 12(2)(c) would not otherwise allow the trustee to be discharged in those circumstances.³⁰⁴

5.270 Section 12(5) provides for the appointment of additional trustees if there are fewer than four trustees. It is not generally obligatory under that provision to appoint additional trustees unless the trust instrument provides to the contrary.³⁰⁵

301 Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971), Draft Bill cl 10.

302 Ibid 13.

303 Ibid 14.

304 See [5.137] above.

305 See [5.150] ff above.

Chapter 6

Investment: Trustees' Powers, Duties and Protections

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INTRODUCTION

6.1 Historically, trustee legislation has included a list of authorised investments, such as government stocks, debentures or securities guaranteed by the government or local authorities, first legal mortgages of land, and particular bank deposits.¹ A trustee was limited to the authorised investments specified in the statutory list, unless the trust instrument provided otherwise or the court approved another investment.

6.2 Apart from the lack of uniformity between the States and Territories, the statutory list approach had a number of disadvantages. The list was inflexible and ill-adapted to meet the demands of changing financial markets, or to cope with

¹ See, eg, *Trusts Act 1973* (Qld) s 21(1) (Reprint No 2C, 28 October 1999).

rapidly rising inflation.² It did not recognise modern economic theory (such as modern portfolio investment theory³) or modern economic products.⁴ Moreover, the list could lead to a false assumption that the authorised investments were safe investments,⁵ while effectively diverting the trustee from his or her responsibility for determining which investments are most prudent or suitable for the particular type of trust.⁶

6.3 Since 1995, all Australian jurisdictions have progressively abolished the statutory list of authorised investments and replaced it with the ‘prudent person’ doctrine, which enables a trustee to invest trust funds in any form of investment.⁷ In Queensland, the current Part 3 of the *Trusts Act 1973* (Qld) was substituted by the *Trusts (Investments) Amendment Act 1999* (Qld). That Act commenced on 3 February 2000,⁸ and applies to all trusts, whether created before or after its commencement.⁹

6.4 This chapter gives an overview of the provisions contained in Part 3 of the *Trusts Act 1973* (Qld), and raises a number of questions for consideration.

6.5 Apart from the investment powers conferred directly on trustees by Part 3 of the Act, section 94 makes provision for the court to confer on a trustee, either generally or in any particular instance, a power (including an investment power) that is expedient in the management or administration of the trust property or in the best interests of the persons, or a majority of the persons, beneficially interested under the trust.¹⁰

² HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 15 July 2009) [10.030]; Queensland, *Parliamentary Debates*, Legislative Assembly, 8 June 1999, 2178–9 (MJ Foley, Minister for Justice and Minister for the Arts); L Clarkson, ‘Trusts & the Prudent Person Rule’ (Paper presented at the Continuing Legal Education Teleconference, 20 March 2001) 2.

³ The modern portfolio theory of investment ‘emphasises that investments are best managed by balancing risk and return across the portfolio as a whole, rather than by looking at each investment in isolation’: Law Commission of England and Wales and Scottish Law Commission, *Trustees’ Powers and Duties*, Report No 260/72 (1999) [2.31].

⁴ T Cockburn, ‘Trustee Investment Law Reform — *Trusts (Investments) Amendment Act 1999*’ (2000) 20(4) *Proctor* 15.

⁵ PM McDermott, ‘Trustee Investment Law Reform’ (1996) 70 *Australian Law Journal* 801.

⁶ Queensland, *Parliamentary Debates*, Legislative Assembly, 8 June 1999, 2178–9 (MJ Foley, Minister for Justice and Minister for the Arts).

⁷ *Trustee Amendment Act 1999* (ACT); *Trustee Amendment (Discretionary Investments) Act 1997* (NSW); *Trustee Amendment (No 2) Act 1995* (NT); *Trusts (Investments) Amendment Act 1999* (Qld); *Trustee (Investment Powers) Amendment Act 1995* (SA); *Trustee Amendment (Investment Powers) Act 1997* (Tas); *Trustee and Trustee Companies (Amendment) Act 1995* (Vic); *Trustees Amendment Act 1997* (WA).

⁸ *Trusts (Investments) Amendment Act 1999* (Qld) s 2; Proclamation SL No 16 of 2000.

⁹ *Trusts Act 1973* (Qld) s 119.

¹⁰ See [6.12] below and the more detailed discussion of s 94 of the *Trusts Act 1973* (Qld) in Chapter 12.

THE MAIN INVESTMENT PROVISIONS

The general investment power

6.6 Instead of the list of authorised investments that previously applied, section 21 of the *Trusts Act 1973* (Qld) now confers very broad powers of investment on trustees. It provides:

21 Power of trustee to invest

A trustee may, unless expressly forbidden by the instrument creating the trust—

- (a) invest trust funds in any form of investment; and
- (b) 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.

6.7 A trustee may exercise the investment powers conferred by section 21 of the Act 'unless expressly forbidden' by the trust instrument.¹¹ As a result, it is possible for a settlor to exclude certain forms of investment and to forbid the variation of an investment or the realisation of an investment.

6.8 Where legislation confers investment powers on trustees 'unless expressly forbidden' by the trust instrument,¹² 'negative words' or an 'express veto' are required to exclude the statutory powers.¹³ It is not sufficient that the instrument directs the trust property to be invested in a certain way or, by implication, forbids certain investments.¹⁴

The words of the Act require not only a direction that the trustees shall invest in certain investments, but an express prohibition of any of the investments permitted by the Act which the testator wishes to exclude. ... It would in my opinion be wrong to introduce nice distinctions as to the application of the Act, because it was intended to give trustees a plain and safe guide. No doubt a very strong case may be made out that these investments are inferentially forbidden by the will before me, but they are not expressly forbidden.

6.9 Section 21 recognises a settlor's autonomy to set limits on a trustee's powers of investment, but sets a high bar for establishing those limits.

¹¹ Generally, the *Trusts Act 1973* (Qld), as passed, gave trustees the power to invest in any of the investments authorised by s 21 'if and so far only as a contrary intention is not expressed in the instrument (if any) creating the trust': s 20(1). However, s 20(2) provided that trustees could invest in certain investments 'whether or not a contrary intention is specified in the instrument (if any) creating the trust'. The investments that were subject to 20(2) were parliamentary stocks, public funds or government securities of the Commonwealth or of the State of Queensland (mentioned in s 21(a)) and investment on any interest bearing term deposits in any bank, on the security of a certificate of deposit issued by any bank, or on deposit in any savings bank (mentioned in s 21(e)).

¹² The expression 'unless expressly forbidden' was originally used in s 32 of the English *Law of Property and Trustees Relief Amendment Act 1859* ('*Lord St Leonards' Act*'), 22 & 23 Vict, c 35, which conferred powers of investment on trustees.

¹³ *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'.

¹⁴ *Re Burke* [1908] 2 Ch 248, 250 (Neville J).

6.10 The counterparts to section 21 in the other Australian jurisdictions also use the phrase ‘unless expressly forbidden’.¹⁵ In England, the broad general power of investment that is conferred on trustees by the *Trustee Act 2000* (UK) is subject to ‘any restriction or exclusion imposed by the trust instrument’.¹⁶

6.11 There are a variety of reasons why a settlor might wish to restrict the trustee’s powers of investment. A settlor might wish to exclude forms of investment that are considered to have a higher risk, or to ensure that trust funds are invested in what are now generally referred to as ‘ethical investments’. In the case of a charitable trust, the settlor might wish to exclude a form of investment that would be inconsistent with the objects of the trust — for example, where the object of the trust is to further cancer research, forbidding investment in tobacco companies.

6.12 It is possible, though, that the exclusion of a particular form or forms of investment could be to the detriment of the beneficiaries — for example, if the trust instrument took an extremely restrictive approach to the permissible forms of investment. Under section 94 of the *Trusts Act 1973* (Qld), however, the court has the power to confer additional powers on a trustee in order to effect a disposition or transaction (including any investment). The circumstances in which the court may confer additional powers include that the disposition or transaction cannot be effected because of the absence of any power for that purpose under the trust instrument. As explained in Chapter 12,¹⁷ this extends to the situation where the trustee lacks the relevant power because the exercise of the relevant power is prohibited by the trust instrument.¹⁸ There is, however, a degree of expense and inconvenience involved in making such an application.

6.13 In its review, the Law Reform Commission of Ireland considered a submission to the effect that ‘a power in a trust instrument which restricts the trustees’ right to invest in trustee securities should be void’.¹⁹ The Commission concluded that ‘it would be inappropriate to introduce such a provision as it would be contrary to the principle of settlor autonomy’,²⁰ which is fundamental to trust law.²¹ It considered that, in that situation, it was preferable for an application to be made to the court for conferral of the relevant power.²²

6.14 Section 21 takes a different approach to the effect of a settlor’s wishes from the various powers conferred by Part 4 of the Act. While there are some exceptions,²³ most of the powers conferred by that Part, including what might be

¹⁵ *Trustee Act 1925* (ACT) s 14; *Trustee Act 1925* (NSW) s 14A; *Trustee Act* (NT) s 5; *Trustee Act 1936* (SA) s 6; *Trustee Act 1898* (Tas) s 6; *Trustee Act 1958* (Vic) s 5; *Trustees Act 1962* (WA) s 17.

¹⁶ *Trustee Act 2000* (UK) c 29, s 6(1)(b).

¹⁷ See [12.75] ff below.

¹⁸ *Perpetual Trustees WA Ltd v A-G (WA)* (1992) 8 WAR 441, 445–6 (Wallwork J); *Stein v Sybmore Holdings Pty Ltd* [2006] NSWSC 1004, [63]–[64] (Campbell J); *Barry v Borlas Ltd* [2012] NSWSC 831, [19] (White J).

¹⁹ Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) [8.35].

²⁰ *Ibid.*

²¹ *Ibid* [8.22].

²² *Ibid* [8.35].

²³ See, eg, *Trusts Act 1973* (Qld) ss 57–58.

described as the transactional powers (the powers to sell, exchange, lease, mortgage), apply 'whether or not a contrary intention is expressed in the instrument (if any) creating the trust'.²⁴ Generally, those powers operate in different spheres, and the different approach to contrary intention is of no moment.

6.15 However, the effect of section 21(b) is that a trustee does not have the power to realise an investment of trust funds and reinvest the proceeds in another form of investment if that course is expressly forbidden by the trust instrument. In that situation, although the trustee has, under section 32(1)(a), the power to sell the trust property or any part of it (a power which cannot be excluded by the trust instrument), the power conferred by section 32(1)(a) would need to be read subject to the more specific provision in section 21, which was inserted later in time.

Constraints on the exercise of power

6.16 The powers conferred by section 21 of the *Trusts Act 1973* (Qld) are constrained by the following matters, which are discussed further below:

- the duty imposed by section 22 to exercise 'care, diligence and skill' in exercising a power of investment (generally referred to as the 'prudent person' rule);
- the preservation, by section 23, of the rules and principles of law or equity that impose a duty on a trustee exercising a power of investment; and
- the requirement imposed by section 24 for a trustee to take specified matters into account when exercising a power of investment.

6.17 The effect of these provisions has been described as follows:²⁵

It does not guarantee any securities to be 'safe' as the list arguably did. It specifically allows a portfolio, rather than an investment-by-investment approach to investing, which impliedly admits more sophisticated risk taking: ... Under it the focus of trustee law cannot be upon whether the trustees have exceeded their powers but upon whether they have exercised their powers in accordance with the requisite standard of care ... and have had regard to certain matters referred to in the legislation, in particular the purpose of the trust and the circumstances and needs of the beneficiaries ...

The prudent person rule (a statutory duty of care)

6.18 Section 22 of the *Trusts Act 1973* (Qld) provides:

22 Duties of trustee in relation to power of investment

- (1) A trustee must, in exercising a power of investment—
- (a) if the trustee's profession, business or employment is, or includes, acting as a trustee or investing money for other persons—exercise the care, diligence and skill a prudent

²⁴ *Trusts Act 1973* (Qld) s 31(1).

²⁵ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 15 July 2009) [10.2010].

person engaged in that profession, business or employment would exercise in managing the affairs of other persons; or

- (b) if the trustee's profession, business or employment is not, or does not include, acting as a trustee or investing money for other persons—exercise the care, diligence and skill a prudent person of business would exercise in managing the affairs of other persons.
- (2) A trustee must, in exercising a power of investment, comply with a provision of the instrument creating the trust that is binding on the trustee and requires the obtaining of a consent or approval or compliance with a direction for trust investments.
 - (3) A trustee must, at least once in each year, review the performance, individually and as a whole, of trust investments.

6.19 Section 22(1) 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. Under section 22(1)(a), a trustee has a duty to exercise 'the care, diligence and skill a prudent person of business would exercise in managing the affairs of other persons'. However, under section 22(1)(b), a different duty, imposing a higher standard of care, applies if the trustee's profession, business or employment is, or includes, 'acting as a trustee or investing money for other others'. In that case, the trustee must exercise 'the care, diligence and skill a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons'.

6.20 In referring to a prudent person, or prudent person of business, who is 'managing the affairs of other persons', section 22(1) expresses a trustee's duty in similar terms to the duty articulated by Lindley LJ in *Re Whiteley*.²⁶

6.21 Section 22(2) clarifies that a trustee must comply with any provisions in the trust instrument that are binding on the trustee and require the obtaining of consent or approval or compliance with a direction for trust investments. For example, a trust instrument might provide that a trustee may enter into a particular type of investment only if a nominated third party consents to the exercise of the power. Such a provision is sometimes used to provide oversight of the trustee's conduct. It does not, of itself, limit the forms of investment available to the trustee, but imposes a condition on the exercise of the trustee's power of investment.²⁷

6.22 Section 22(3) requires a trustee to review the performance of trust investments (individually and as a whole) at least once annually.

6.23 The *Trusts Act 1973* (Qld) makes no provision for the duties imposed by section 22 of the Act to be excluded.²⁸ Accordingly, those duties apply whether or not a contrary intention is expressed in the trust instrument.²⁹

²⁶ (1886) 33 Ch D 347, 355. See the discussion of this decision at [7.57] ff below.

²⁷ A similar provision was included in s 20 of the *Trusts Act 1973* (Qld) (Act as passed).

²⁸ *Trusts Act 1973* (Qld) s 4(4) applies to the powers conferred by the Act, but not to the duties imposed by the Act.

Preservation of rules and principles of law or equity

6.24 The duty imposed by section 22 of the *Trusts Act 1973* (Qld) is not the only duty to which trustees are subject when exercising a power of investment. Section 23(1) of the Act preserves all the rules or principles of law or equity that impose a duty on a trustee exercising a power of investment, except so far as they are inconsistent with the Act or another Act or the instrument creating the trust.³⁰

6.25 Section 23 provides:

23 Law and equity preserved

- (1) A rule or principle of law or equity imposing a duty on a trustee exercising a power of investment continues to apply except so far as it is inconsistent with this or another Act or the instrument creating the trust.
- (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 interests³¹ 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,³² and
 - (c) a duty to act impartially towards beneficiaries and between different classes of beneficiaries; and
 - (d) a duty to obtain advice.³³
- (3) A rule or principle of law or equity relating to a provision in an instrument creating a trust 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. (notes added)

²⁹ In contrast, the equivalent provisions in the other Australian jurisdictions have effect subject to the trust instrument: *Trustee Act 1925* (ACT) s 14A(1); *Trustee Act 1925* (NSW) s 14A(1); *Trustee Act* (NT) s 6(1); *Trustee Act 1936* (SA) s 7(1); *Trustee Act 1898* (Tas) s 7(1); *Trustee Act 1958* (Vic) s 6(1); *Trustees Act 1962* (WA) s 18(1).

³⁰ 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). For a discussion of the extent to which trustees' 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; P 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.

³¹ 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).

³² See *Learoyd v Whiteley* (1887) 12 App Cas 727, 733 (Lord Watson).

³³ 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 [7.31] ff below.

6.26 The drafting approach used in section 23(1)–(2) avoids the need to specify all of the rules and principles that apply to trustees when exercising a power of investment. For example, although the duty to exercise caution³⁴ is not mentioned in section 22(1), that duty would, subject to the exceptions mentioned in section 23(1), continue to apply to a trustee who was exercising a power of investment. However, because of its generality, section 23(1) inevitably leaves some uncertainty about whether particular rules and principles that were historically applied by the Courts of Equity continue to apply. The uncertainty arises in relation to two matters:

- whether a rule or principle would still be regarded as good law, which may be difficult to determine if the rule or principle has received little, or no, consideration by Australian courts; and
- whether a rule or principle is inconsistent with the Act (and, therefore, not preserved by section 23) if it imposes a higher standard for trustees than is imposed by the relevant duty under section 22.

6.27 This issue is discussed later in this chapter in relation to the protection given by section 30(1) of the Act and the particular rules to which that section was a response.³⁵

6.28 Section 23(3) confirms that a rule or principle of law or equity relating to a provision in an instrument creating a trust that purports to exempt, limit the liability of, or indemnify a trustee in relation to a breach of trust, continues to apply.³⁶

6.29 Section 23(4) clarifies that, if a trustee is under a duty to obtain advice, the reasonable cost of obtaining the advice is payable out of the trust funds.

Matters to be taken into account in exercising a power of investment

6.30 Section 24(1) of the *Trusts Act 1973* (Qld) includes a lengthy list of matters that a trustee must take into account when exercising a power of investment, ‘so far as they are appropriate to the circumstances of the trust’. Without limiting the matters that may be taken into account, the specified matters are:

- (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;

³⁴ See *ASC v AS Nominees Ltd* (1995) 62 FCR 504, 516–17 (Finn J), discussed at [7.60] ff below.

³⁵ See [6.162] ff below.

³⁶ For a discussion of the extent to which a trust instrument can exempt a trustee from liability for a breach of trust, see D Hayton, ‘The Irreducible Core Content of Trusteeship’ in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press, 1996) 47, 58 ff.

- (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 estate;
- (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.

6.31 The list is intended to provide guidance to trustees while allowing them necessary flexibility.³⁷ It is not exhaustive, as it does not limit the matters that a trustee may take into account. Nor is the list prescriptive, as a trustee must have regard to the matters only so far as they are appropriate to the circumstances of the trust. The relevance of particular matters in the list will vary depending on the type and purpose of the particular trust. For example, the desirability of diversification may not be relevant where a dwelling house has been left on trust for a beneficiary for the purpose of providing that beneficiary with a residence.³⁸ It has also been held, in relation to the similar requirement in earlier English legislation 'to have regard to the need for diversification of the investments of the trust', that 'the degree of diversification that is practicable and desirable for a large fund may plainly be impracticable or undesirable (or both) in the case of a small fund'.³⁹

6.32 The requirement for a trustee to take into account the matters mentioned in section 24(1) applies whether or not a contrary intention is expressed in the trust instrument.⁴⁰

6.33 Section 24(2) of the Act 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

³⁷ Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 1999, 5450 (MJ Foley, Minister for Justice and Minister for the Arts).

³⁸ This issue is discussed further at [6.100] ff below.

³⁹ *Cowan v Scargill* [1985] 1 Ch 270, 289 (Megarry V-C), referring to s 6(1)(a) of the English *Trustee Investments Act 1961*. That provision was repealed by the *Trustee Act 2000* (UK) c 29, s 40(3), sch 4 pt I.

⁴⁰ Similarly, in most of the other Australian jurisdictions, the legislation does not make provision for the equivalent to s 24(1) to be excluded by the trust instrument: *Trustee Act* (NT) s 8(1); *Trustee Act 1936* (SA) s 9(1); *Trustee Act 1958* (Vic) s 8(1); *Trustees Act 1962* (WA) s 20(1). In the ACT and New South Wales, a trustee must take the specified matters into account 'unless expressly forbidden by the trust instrument': *Trustee Act 1925* (ACT) s 14C(3); *Trustee Act 1925* (NSW) s 14C(3). In Tasmania, a trustee may have regard to the matters mentioned in s 8 of the *Trustee Act 1898* (Tas), but is not required to do so: s 8(1).

whom the trustee reasonably believes to be competent to give the advice. A trustee may pay, out of trust funds, the reasonable costs of obtaining the advice.

6-1 Subject to the issues raised below in relation to ‘total return investment’, do sections 21–24 of the *Trusts Act 1973* (Qld) provide sufficient flexibility and safeguards for an effective power of investment?

TOTAL RETURN INVESTMENT

Introduction

6.34 Trusts law distinguishes between capital and income.⁴¹

‘Income’ receipts traditionally describe what belongs to the life beneficiary and ‘income’ expenses are the life tenant’s liability. ‘Capital’ receipts or expenses refer to the assets or liabilities of remainder beneficiaries.

6.35 This distinction is of particular relevance to trusts with successive interests — that is, where there is a beneficiary who is entitled to the income of the trust property and a beneficiary who is entitled in remainder. In *Re Christmas’ Settlement Trusts*, McPherson J observed that ‘a conflict, or at any rate a tension’ exists between the interests of the equitable life tenants, who have an interest in the income of the trust, and the remaindermen, who have an interest in ensuring that the trust assets maintain a high and increasing capital value.⁴² His Honour further observed that ‘[s]uch conflicts are, however, common place in the law of trusts, and it is the function and duty of trustees in such circumstances to act fairly towards both classes of beneficiary’.⁴³

6.36 The general investment power in Part 3 of the *Trusts Act 1973* (Qld) enables trustees to apply the modern portfolio theory of investment.⁴⁴ However, it has been suggested that trustees of trusts with successive interests are still constrained in their investment decisions ‘by the combination of the rules that classify trust receipts as income or capital and the overarching duty to balance the interests of the life tenant and remainderman’.⁴⁵

Trustees must maintain the value of the trust capital while providing a proportionate income; they cannot invest wholly for capital growth, obviously, nor wholly for income return. Because they are bound by the form of the investment receipt, that balance between the successive interests must be

⁴¹ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 26 April 2012) [11.000].

⁴² [1986] 1 Qd R 372, 379.

⁴³ Ibid.

⁴⁴ See n 3 above.

⁴⁵ Law Commission of England and Wales, *Capital and Income in Trusts: Classification and Apportionment*, Report No 315 (2009) [3.4]. See also Law Commission of New Zealand, *The Duties, Office and Powers of a Trustee: Review of the Law of Trusts*, Issues Paper No 26 (2011) [5.24].

achieved by investing with a view to the likely form — capital or income — that returns from particular investments will take. This inevitably skews investment decisions; instead of investing for optimum return, trustees who have no power to override the form of the receipt are forced to invest to obtain the best possible balanced return which may be significantly lower than that which they could have obtained if investing freely.

6.37 The theory of total return investment — that is, the practice of making investments 'without regard to the expected classification of those returns as capital or income'⁴⁶ — developed in response to these concerns. Legislation to facilitate total return investment has been enacted in the United States, and has been considered by a number of overseas law reform bodies.⁴⁷

6.38 There are two main models for facilitating total return investment:

- discretionary allocation trusts (also known as the 'power of allocation' or 'power of adjustment'); and
- percentage trusts (or 'unitrusts').

Discretionary allocation trusts

6.39 Discretionary allocation trusts give trustees a power 'to allocate receipts and expenses between the income and capital beneficiaries in order to discharge their duty to balance'.⁴⁸ This enables trustees to make investment choices without having regard to whether the expected receipts will constitute income or capital.⁴⁹

The power of allocation would allow trustees, taking the trust's receipts over a given period, to allocate all or part of one or more trust receipts as necessary in order to ensure that a balance was kept between classes of beneficiaries entitled to capital and to income. The power would therefore allow trustees to overcome inappropriate classifications produced by the default rules (if there remained a net imbalance, looking at receipts as a whole over the period) and to maintain a balance where investments made with a view to income return or capital protection had not performed as expected. It would also enable trustees to ignore the likely form of receipt when making investment choices and so invest on a total return basis.

6.40 The Ontario Law Reform Commission has suggested, however, that 'the conferment upon trustees of a broad discretion does not remove the problem of

⁴⁶ Law Commission of England and Wales, *Capital and Income in Trusts: Classification and Apportionment*, Report No 315 (2009) [1.17].

⁴⁷ See, eg, British Columbia Law Institute, *Total Return Investing by Trustees*, Report No 16 (2001); Manitoba Law Reform Commission, *Trustee Investments: The Modern Portfolio Theory*, Report No 101 (1999) 32–3; Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 290–304; Law Commission of England and Wales, *Capital and Income in Trusts: Classification and Apportionment*, Report No 315 (2009). See also Law Commission of New Zealand, *The Duties, Office and Powers of a Trustee: Review of the Law of Trusts*, Issues Paper No 26 (2011) 74–6.

⁴⁸ Law Commission of England and Wales, *Capital and Income in Trusts: Classification and Apportionment*, Consultation Paper No 175 (2004) [5.39].

⁴⁹ Law Commission of England and Wales, *Capital and Income in Trusts: Classification and Apportionment*, Report No 315 (2009) [5.16].

allocation of receipts and outgoings between income and capital beneficiaries; rather, it shifts the problem to be dealt with at the accounting level'.⁵⁰

6.41 The Law Commission of England and Wales has observed that 'there is nothing in the current law to prevent the establishment of power of allocation trusts by express provision in the terms of the trust instrument', although it acknowledged that the uncertainty of the tax implications was a reason why such a power was not generally given.⁵¹

Percentage trusts

6.42 The percentage trust (or 'unitrust') model enables investment to be carried out on a total return basis. At the end of each year, a percentage of the net market value of the trust fund (the 'unitrust rate') is allocated to income and paid to the income beneficiary.⁵²

6.43 The Ontario Law Reform Commission referred to the various arguments that have been made in favour of the percentage trust:⁵³

It has been asserted that trustees can invest for gain, albeit prudently, and have no regard to whether receipts should be allocated to, or outgoings should be paid from, the income or capital account: that is, trustees have the freedom to invest both in low yield equities and high yield securities without producing rises and falls in the life tenant's income. The percentage trust also enables the income beneficiary to share in the inflationary growth of capital assets, and promotes better investment performance of the trust funds, while at the same time maintaining the life tenant's income at a constant level.

6.44 There are, however, disadvantages to the percentage trust, and it may not be suitable in all cases.

6.45 The Ontario Law Reform Commission considered that, because of the need for trustees 'to draw on capital in those years when the actual return on the trust investments is below the percentage that should be paid to the income beneficiary', the assets of the percentage trust should be 'readily marketable'.⁵⁴ In its view, certain types of assets, such as mortgages, income-producing real estate, and business interests, were 'best handled in the conventional manner of income and capital accounting'.⁵⁵ It noted that, where there was a mix of assets in the trust portfolio, this could result in liquidity problems. For this reason, it suggested that, in the main, 'a percentage trust is only worthwhile if the trust holds common stock that has a growth potential'.⁵⁶ It also commented that valuations of the trust assets

50 Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 301.

51 Law Commission of England and Wales, *Capital and Income in Trusts: Classification and Apportionment*, Report No 315 (2009) [3.27].

52 Ibid [3.17].

53 Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 301.

54 Ibid.

55 Ibid 302.

56 Ibid.

could be costly and difficult, and would need to be carried out relatively frequently.⁵⁷

6.46 Similarly, the Law Commission of England and Wales noted that:⁵⁸

The percentage trust model of total return investment is only appropriate where there is a range of investments. It would be wholly unsuitable for a trust with a handful of investments, still less for one with a single asset, for example a farm or a shareholding in a family company. Nor would it be suitable where the trust's assets were difficult to value.

6.47 The Law Commission of New Zealand considered that the percentage trust may not be suitable for 'discretionary trusts that give trustees a discretion whether to make distributions and, if so, how much'. Nor, in its view, would it be suitable for 'a trust the primary purpose of which is to allow for capital accumulation and distribution later on'.⁵⁹

American Uniform Principal and Interest Act

6.48 In the United States, most states have adopted the Uniform Principal and Interest Act 1997 (the 'UPIA').⁶⁰ The UPIA gives trustees a broad power to allocate receipts or disbursements to, or between, capital ('principal') and income, subject to the terms of the trust instrument and the trustees' fiduciary duties (including the duty to act impartially).⁶¹ Sections 103 and 104 provide:

SECTION 103. FIDUCIARY DUTIES; GENERAL PRINCIPLES

- (a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of [Articles] 2 and 3, a fiduciary:
- (1) shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this [Act];
 - (2) may administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this [Act];
 - (3) shall administer a trust or estate in accordance with this [Act] if the terms of the trust or the will do not contain a different

⁵⁷ Ibid.

⁵⁸ Law Commission of England and Wales, *Capital and Income in Trusts: Classification and Apportionment*, Report No 315 (2009) [3.22].

⁵⁹ Law Commission of New Zealand, *The Duties, Office and Powers of a Trustee: Review of the Law of Trusts*, Issues Paper No 26 (2011) [5.31]. See also British Columbia Law Institute, *Total Return Investing by Trustees*, Report No 16 (2001) 14.

⁶⁰ The Uniform Principal and Income Act was promulgated by the National Conference of Commissioners on Uniform State Law. It has been adopted, in whole or part, in 46 States plus the District of Columbia: see Uniform Law Commission, *Principal and Income Act* <[http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Principal and Income Act](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Principal%20and%20Income%20Act)>.

⁶¹ Unif Principal and Income Act §§ 103–104 (amended 2000).

provision or do not give the fiduciary a discretionary power of administration; and

- (4) shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and this [Act] do not provide a rule for allocating the receipt or disbursement to or between principal and income.
- (b) In exercising the power to adjust under Section 104(a) or a discretionary power of administration regarding a matter within the scope of this [Act], whether granted by the terms of a trust, a will, or this [Act], a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this [Act] is presumed to be fair and reasonable to all of the beneficiaries.

SECTION 104. TRUSTEE'S POWER TO ADJUST

- (a) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in Section 103(a), that the trustee is unable to comply with Section 103(b).
- (b) In deciding whether and to what extent to exercise the power conferred by subsection (a), a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:
- (1) the nature, purpose, and expected duration of the trust;
 - (2) the intent of the settlor;
 - (3) the identity and circumstances of the beneficiaries;
 - (4) the needs for liquidity, regularity of income, and preservation and appreciation of capital;
 - (5) the assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;
 - (6) the net amount allocated to income under the other sections of this [Act] and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;
 - (7) whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;

- (8) the actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and
 - (9) the anticipated tax consequences of an adjustment.
- (c) A trustee may not make an adjustment:
 - (1) that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;
 - (2) that reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;
 - (3) that changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;
 - (4) from any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;
 - (5) if possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;
 - (6) if possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;
 - (7) if the trustee is a beneficiary of the trust; or
 - (8) if the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly.
- (d) If subsection (c)(5), (6), (7), or (8) applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.
- (e) A trustee may release the entire power conferred by subsection (a) or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in subsection (c)(1) through (6) or (c)(8) or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (c). The release may be permanent or for a specified period, including a period measured by the life of an individual.
- (f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this

section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection (a).

6.49 Section 104(a) empowers trustees to make adjustments between principal and income, while section 104(b) sets out a list of factors to which the trustee must have regard, to the extent that they are relevant, in deciding whether, and to what extent, to exercise the power to adjust. The commentary to the UPIA provides guidance about how the power of adjustment under section 104 should be exercised:⁶²

The purpose of Section 104 is to enable a trustee to select investments using the standards of a prudent investor without having to realize a particular portion of the portfolio's total return in the form of traditional trust accounting income such as interest, dividends and rents ...

Section 104 does not empower a trustee to increase or decrease the degree of beneficial enjoyment to which a beneficiary is entitled under the terms of the trust; rather, it authorizes the trustee to make adjustments between principal and income that may be necessary if the income component of a portfolio's total return is too small or too large because of investment decisions made by the trustee under the prudent investor rule.

6.50 However, section 104(c) limits the trustee's power to adjust if the exercise of that power would jeopardise tax benefits that may have been an important purpose for creating the trust⁶³ or would have adverse tax consequences.⁶⁴ It also provides that a trustee may not make an adjustment if the trustee is a beneficiary of the trust, or if the adjustment would otherwise benefit the trustee directly or indirectly.⁶⁵

6.51 Furthermore, section 104(c)(e) enables a trustee to release all or part of the power to adjust 'in circumstances in which the possession or exercise of the power might deprive the trust of a tax benefit or impose a tax burden'.⁶⁶

6.52 Finally, section 104(f) is intended to clarify that an instrument executed before the adoption of the Act whose terms limit the power to adjust (for example, by describing 'the amount that may or must be distributed to a beneficiary by referring to the trust's income or that prohibit the invasion of principal or that prohibit equitable adjustments in general') is not to be construed as forbidding the use of the power to adjust under section 104(a) 'if the need for adjustment arises because the trustee is operating under the prudent investor rule'.⁶⁷

62 Unif Principal and Income Act (amended 2000), Comment 13.

63 Ibid 16.

64 Unif Principal and Income Act § 104(c)(5)–(6), (8) (amended 2000), Comment 16.

65 Unif Principal and Income Act § 104(c)(7)–(8) (amended 2000).

66 Ibid, Comment 16.

67 Ibid 17.

Proposals by overseas law reform bodies

6.53 A number of overseas law reform bodies have considered the issue of 'total return investment'.

England

6.54 The Law Commission of England and Wales was initially of the view that total return investment should be facilitated for private trusts by means of a statutory power of allocation.⁶⁸ The Law Commission remained of that view, except that it decided that the power should be available only on an 'opt-in basis'.⁶⁹

In light of concerns raised in consultation we no longer consider that the power should operate on an opt-out basis as we do not think that a power of this kind is appropriate for all trusts. We have in mind particularly the position of lay trustees, many of whom act for trusts implied on intestacy and who may not have investment expertise. We consider that a power of allocation should be a facility offered to settlors, not a power that all trustees are under a duty to exercise.

6.55 The Law Commission commented that the power 'would be framed so as to make it clear that it was administrative rather than dispositive', and that the exercise of the power 'should be reviewable by the court on the same basis as any other discretionary power conferred on trustees'. The Law Commission did not see any case for any statutory protection or immunity, and considered that 'an action for breach of trust should lie against trustees who failed to discharge their duty'.⁷⁰

6.56 The Law Commission stated that it would 'also like to see more work done in order to develop a model of percentage trust' for that jurisdiction,⁷¹ which it now considered was likely to be the more successful model for total return investment.⁷² The Law Commission noted that, following discussions with HM Revenue & Customs ('HMRC'), 'it became clear that any legislation to facilitate total return investment would probably have to include some percentage measure for the distribution of income'.⁷³ In its view, the percentage trust, 'while probably more alien at present to HRMC due to its unfamiliarity, is less inimical'⁷⁴ because it 'incorporates the elements of objectivity and predictability that would be important to HMRC'.⁷⁵

68 Law Commission of England and Wales, *Capital and Income in Trusts: Classification and Apportionment*, Consultation Paper No 175 (2004) [5.40].

69 Law Commission of England and Wales, *Capital and Income in Trusts: Classification and Apportionment*, Report No 315 (2009) [5.15].

70 Ibid [5.17].

71 Ibid [5.23].

72 Ibid [5.101].

73 Ibid.

74 Ibid.

75 Ibid [5.102].

6.57 Ultimately, however, the Law Commission could not make any recommendations for the implementation of total return investment for private trusts because of adverse tax consequences:⁷⁶

HMRC's position is the same for both the power of allocation and for percentage trusts. They take the view that if a trust opted into a power of allocation, or were to adopt a percentage trust format, its income would then be regarded as accumulated or discretionary income for income tax purposes and the trust fund as falling within the relevant property regime for inheritance tax purposes.

6.58 It did not consider it appropriate 'to make recommendations for reform which cannot be implemented without tax consequences — either for the Exchequer or for trusts and their trustees and beneficiaries'.⁷⁷

6.59 However, the Law Commission made recommendations to enable charitable trusts with a permanent endowment to invest on a total return basis.⁷⁸ It observed that, because charitable trusts are exempt from income tax and inheritance tax, total return investment does not generate the difficult taxation consequences that it does for private trusts.⁷⁹ However, it considered that the classification of rules about income and capital still caused difficulties for charitable trusts with a permanent endowment.⁸⁰

Where a charitable trust has a permanent endowment the trustees may spend the income produced by the trust on charitable purposes. The trustees are not, however, freely entitled to convert capital into income for expenditure. This creates a distinction between income available for current use and capital held to produce future income, and consequently a tension between the interests of the current recipients of charitable assistance and the future recipients. This tension is analogous to — albeit distinct from — that between beneficiaries interested in income and capital under private trusts.

6.60 The Law Commission described the effect of this tension on the trustees' investment strategies:⁸¹

If income alone can be spent on the charity's purposes, the charity's trustees must invest to produce enough income for a reasonable level of expenditure, while maintaining capital growth, and so would be unable to invest on a total return basis.

6.61 It also noted that, although 'the concept of total return investment is relatively straightforward, the mechanics of operating it are not'. In that regard, it considered it 'appropriate, and indeed necessary, that the Charity Commission design and provide support for a detailed total return investment scheme for charity

76 Ibid [5.72].

77 Ibid [5.10].

78 A charitable trust has a permanent endowment if 'its terms impose restrictions upon the expenditure of some or all of its capital': *ibid* [8.2].

79 Ibid [8.1].

80 Ibid [8.2].

81 Ibid [8.5].

trustees'.⁸² On that basis, the Law Commission recommended that 'there should be a general statutory power which would enable all charities to operate total return investment in accordance with regulations made by the Charity Commission'.⁸³ The Trusts (Capital and Income) Bill, which proposes amendments to the *Charities Act 2011* (UK), gives effect to the Law Commission's recommendations.⁸⁴

Ontario, British Columbia and Manitoba

6.62 In contrast to the position in England, the Ontario Law Reform Commission noted that the discretionary allocation trust is not unfamiliar to Canadian practice, as trust instruments often authorised trustees to allocate receipts between the income and capital beneficiaries at the trustee's discretion (subject to the trustee's duty of care and duty to act impartially).⁸⁵ That Commission recommended that the revised *Trustee Act* should include what it described as a 'facultative' provision, which a settlor or testator would be free to adopt or ignore, permitting the discretionary allocation of receipts between income and capital.⁸⁶ However, the power would apply 'only where the creator of the trust so provides in the trust instrument by the use of the words "on discretionary allocation trust"'.⁸⁷

6.63 The Ontario Law Reform Commission also endorsed 'the general concept of the percentage trust', although it appreciated that, having regard to the tax implications, 'not all settlors or testators may be attracted to its unique provisions'.⁸⁸ It therefore recommended the introduction of a 'facultative provision', which a settlor or testator would be free to adopt or ignore. In its view, the revised *Trustee Act* should set out a statutory percentage trust, which the drafter of a trust instrument could adopt 'solely by expressly employing the words, "on percentage trusts", in the trust instrument'.⁸⁹ The recommended provision was to the effect that:⁹⁰

where trustees are expressly directed by the trust instrument to hold assets 'on percentage trusts', they shall value the assets periodically and, instead of any income arising from the assets, pay to the person who would otherwise be the income beneficiary a percentage of that valuation in each year of the valuation period. In so doing, trustees should be required to maintain an even hand between income and capital beneficiaries. The Act should further provide that, where there are two or more income beneficiaries whose interests are vested in possession at the same time, the percentage should be divided equally among them, unless the trust instrument divides the percentage in

82 Ibid [8.70].

83 Ibid [8.72].

84 See UK Parliament, Bills before Parliament 2012–13, Public Bills, Trusts (Capital and Income) Bill <<http://services.parliament.uk/bills/2012-13/trustscapitalandincomebill.html>>.

85 Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 298.

86 Ibid 299. See also vol 2, Draft Bill: An Act to revise the *Trustee Act*, cl 41.

87 Ibid.

88 Ibid 303.

89 Ibid.

90 Ibid. See also vol 2, Draft Bill: An Act to revise the *Trustee Act*, cl 42.

another proportion, or makes other provision, including discretionary trusts, for the distribution of the percentage. In addition, we recommend that the percentage payment should be made from income arising during the accounting year and, so far as income is insufficient, from capital, and that any income of the trust arising during the accounting year in excess of the amount of the percentage payment should be added to capital. (notes omitted)

6.64 The British Columbia Law Institute and the Manitoba Law Reform Commission both followed the Ontario Law Reform Commission in recommending the introduction of a limited facultative provision allowing settlors to adopt a percentage trust model.⁹¹

6.65 The British Columbia Law Institute also recommended that, to cover cases where the percentage trust is not likely to be adopted, the legislation should contain a facultative provision permitting the settlor to adopt a statutory power to allocate or apportion receipts and outgoings between income and capital as the trustee considers just and equitable, without regard to the traditional legal categories, but subject to the duty to maintain an even hand between classes of beneficiaries.⁹²

6.66 Its later Report included a proposed new *Trustee Act*, which made provision for both discretionary allocation trusts and percentage trusts where they were expressly directed by the trust instrument:⁹³

Discretionary allocation trusts of receipts and outgoings

- 36.(1) A trustee who is expressly directed by the trust instrument to hold trust assets on discretionary allocation trusts, may allocate receipts and outgoings to the income and capital accounts as the trustee considers just and equitable in all the circumstances.
- (2) Despite section 35(4), if a trustee is expressly directed by the trust instrument to hold trust assets on discretionary allocation trusts, subsections 35(2) and (3) apply.⁹⁴ (note added)

Total return investment

- 37.(1) In this section
- (a) 'assets' means the capital of the trust property subject to a total return investment policy, plus the income arising from the trust property accumulated and accrued at the time of valuation,
- (b) 'stipulated percentage' means the percentage payable or to be applied under subsection (4),

⁹¹ Manitoba Law Reform Commission, *Trustee Investments: The Modern Portfolio Theory*, Report No 101 (1999) 33, Rec 19; British Columbia Law Institute, *Total Return Investing by Trustees*, Report No 16 (2001) 10, Recs 2, 3.

⁹² British Columbia Law Institute, *Total Return Investing by Trustees*, Report No 16 (2001) 15, Rec 6(1).

⁹³ British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) pt 2.

⁹⁴ Proposed *Trustee Act*, cl 35 dealt with the apportionment of outgoings between income and capital beneficiaries.

- (c) 'total return investment policy' means the investment of assets so as to obtain the optimal return without regard to whether the return is characterized as income or capital,
 - (d) 'trust property' includes the subject matter of a gift to a non-profit organization referred to in subsection (3),
 - (e) 'trustees' includes the directors of a non-profit organization referred to in subsection (3),
 - (f) 'valuation' means the fair market value of the assets less the liabilities outstanding at the time of valuation, and
 - (g) 'valuation period' means the period of time between one valuation and the next.
- (2) A settlor may, in a trust instrument, direct the trustees to adopt a total return investment policy with respect to trust assets and
- (a) the words 'on percentage trusts' or
 - (b) the words 'total return' with reference to investments
- constitute such a direction to the trustees.
- (3) The trustees of a charitable trust, with respect to trust assets, and the directors of a non-profit organization, with respect to assets that are endowments or similar gifts to the organization, may adopt a total return investment policy with respect to those assets whether or not the terms of the trust or gift contain a direction that they do so.
- (4) Where assets are invested in accordance with a total return policy the trustees must value the assets periodically and, instead of any income arising from the assets,
- (a) pay to the persons who would otherwise be the income beneficiaries, or
 - (b) apply to the purposes associated with income
- a stipulated percentage of that valuation in each year of the valuation period.
- (5) The payment to be made or applied under subsection (4) must be made from income arising during the accounting year and, if income is insufficient, from capital, and any income derived from the trust property during the accounting year that is in excess of the amount to be paid or applied must be added to capital.
- (6) The valuation period is the shorter of
- (a) three years,
 - (b) a period specified in the trust instrument, or
 - (c) a period selected by the trustees in their discretion
- running initially from

- (d) one year from the date of the testator's death in the case of a testamentary trust or gift made in a will, or
 - (e) in all other cases, the date of the settlement or the gift.
- (7) The stipulated percentage is
- (a) a percentage specified for this purpose in the trust instrument, or
 - (b) if no percentage is specified in the trust instrument, the discount rate fixed under section 56(2)(b) of the *Law and Equity Act* for the relevant period.
- (8) The valuation period set out in subsection (6)(a) and the stipulated percentage set out in subsection (7)(b) may be varied by regulation.

6.67 The law reform bodies in all three provinces acknowledged that, in relation to private trusts, the effectiveness of the recommended legislation would be limited by the federal *Income Tax Act*.⁹⁵ The Ontario Law Reform Commission observed that:⁹⁶

The central difficulty for the percentage trust, however, stems from the definition of 'income' in the *Income Tax Act* (Canada). This Act defines income not only to mean income as understood in the law of trusts, but also to include taxable capital gains. It follows, therefore, that the position of the income beneficiary under the percentage trust and under the federal Act will only coincide in this context when the percentage payable in any year is the same in amount as the actual income, plus the taxable capital gain. The preferred beneficiary election would still be useful, but often difficult to apply. Moreover, capital dispositions may be required, which may trigger capital gains, in a year when the trustees have to draw on capital to pay the income beneficiary's percentage. Further, because of the federal Act's definition of income, a spousal trust will be tainted if the actual income of the percentage trust is greater in any year than the percentage to which the income spouse beneficiary is entitled. (notes omitted)

6.68 The Manitoba Law Reform Commission commented:⁹⁷

[T]he Commission has reluctantly concluded, contrary to the decision in the United States of the NCCUSL [National Conference of Commissioners on Uniform State Law], the American Bar Association and already a number of enacting states, that authorization of total return investing, subject to express contrary intent, cannot be generally proposed for provincial legislation in Manitoba. Advantageous though the principle of total return might be, any statute to the same effect as the United States *Uniform Principal and Income Act*, which is now revised to include both modern portfolio theory and total return, runs into immediate problems with the provisions of the *Income Tax Act* (Canada). The donor can exclude even hand considerations; there is nothing he or she can do about the structuring of tax legislation by the state. In the Commission's view, the introduction of a statutory power, whereby all trustees of private trusts in Manitoba may (or must) invest for total return unless contrary

⁹⁵ *Income Tax Act*, RSC 1985, c 1.

⁹⁶ Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 302.

⁹⁷ Manitoba Law Reform Commission, *Trustee Investments: The Modern Portfolio Theory*, Report No 101 (1999) 32.

intent is expressed in the trust instrument, has to await the time when the *Income Tax Act* (Canada) provides for the taxation of 'total return'.

6.69 The British Columbia Law Institute expressed a similar view:⁹⁸

[T]he furthest that provincial trustee legislation could go in extending total return investment powers in the private trust context is to provide machinery facilitating the operation of trusts on a total return basis where the settlor or testator expressly authorizes investment on that basis. The power to invest on a total return basis and to ignore the income/capital distinction cannot be made automatic for all private trusts without a change in the income tax system at the federal level.

6.70 However, the British Columbia Law Institute noted that similar obstacles do not apply to charitable trusts. It recommended that:⁹⁹

The *Trustee Act* be amended to provide that the property of a charitable trust or the endowment fund of a charitable or non-profit organization may be invested, subject to the overriding duty of prudence, so as to obtain the maximum return without regard to the income or capital nature of the return, unless the terms of the trust or the document or legislation governing the use of the endowment fund provide otherwise.

6.71 None of the recommended provisions have been implemented.

Whether the *Trusts Act 1973* (Qld) should make provision for total return investment

6.72 Legislation to facilitate total return investment has the potential to maximise the return on trust investments. However, it also entails an increased level of complexity for trustees and, for the percentage trust model, the cost of having the trust assets valued on a regular basis.

6.73 Further, the conferral on trustees of the power, in their discretion, to allocate receipts to income or capital, or to pay income beneficiaries a fixed percentage of the value of the trust property, does not of itself change the original classification of the receipt. In particular, provisions to facilitate total return investment do not of themselves change the classification of receipts for taxation purposes. The original form of the receipt will necessarily dictate how it is treated for taxation purposes. For example, if there is insufficient income in a particular year to pay the 'income beneficiary' of a percentage trust the stipulated percentage, and it is necessary to sell a trust asset, the sale of the asset might create a liability in relation to any capital gain, even though the proceeds of the sale are to be distributed (in whole or part) to the income beneficiary.

6.74 Nevertheless, the Commission is interested to receive submissions on whether there is value in investigating the concept of total return investment and, in particular, whether there is a preferred model, even if it might be suitable for only some types of trusts.

⁹⁸ British Columbia Law Institute, *Total Return Investing by Trustees*, Report No 16 (2001) 9.

⁹⁹ *Ibid*, Rec 1(a).

6-2 Should the concept of total return investment be further investigated with a view to amending the *Trusts Act 1973* (Qld) to enable trustees to invest on that basis?

6-3 If so:

- (a) is there support for either or both of the percentage trust or discretionary allocation trust models;
- (b) should the particular model apply only where it is expressly directed by the trust instrument?

SPECIFIC INVESTMENT POWERS AND PROVISIONS

6.75 In addition to the general powers of investment conferred by section 21 of the *Trusts Act 1973* (Qld), Part 3 of the Act also includes a number of provisions relating to specific investment powers.

Power of trustee in relation to securities

6.76 Section 25 of the *Trusts Act 1973* (Qld) applies where a trustee holds shares in a corporation. The section 'confers powers of concurring in schemes of arrangements and takeovers and to take up rights issues'.¹⁰⁰ It provides:

25 Powers of trustee in relation to securities

- (1) If securities of a corporation are subject to a trust, the trustee may agree to a scheme or arrangement—
 - (a) for or arising out of the reconstruction, reduction of capital or liquidation of, or the issue of shares by, the corporation; or
 - (b) for the sale of all or part of the property and undertaking of the corporation to another corporation; or
 - (c) for the acquisition of securities of the corporation, or of control of the corporation, by another corporation; or
 - (d) for the amalgamation of the corporation with another corporation; or
 - (e) for the release, modification or variation of rights, privileges or liabilities attached to the securities, or any of them;

in the same way as if the trustee were beneficially entitled to the securities.

¹⁰⁰

Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 27.

- (2) The trustee may accept instead of, or in exchange for, the securities subject to the trust, securities of any denomination or description of another corporation that is party to the scheme or arrangement.
- (3) If a conditional or preferential right to subscribe for securities in a corporation is offered to a trustee for a holding in that corporation or another corporation, the trustee may, for all or any of the securities—
 - (a) exercise the right and apply capital money subject to the trust in payment of the consideration; or
 - (b) assign to any person, including a beneficiary under the trust, the benefit of the right, or the title to the right, for the best consideration that can be reasonably obtained; or
 - (c) renounce the right.
- (4) A trustee accepting or subscribing for securities under this section is, for any provision of this part, exercising a power of investment.
- (5) A trustee may retain securities accepted or subscribed for under this section for any period for which the trustee could properly have retained the original securities.
- (6) The consideration for an assignment made under subsection (3)(b) must be held as capital of the trust.
- (7) This section applies to securities whether acquired before or after the commencement of this section.

6.77 Section 25(1) ensures that the trustee has the same power to agree to a scheme or arrangement affecting the securities that the trustee would have if he or she were beneficially entitled to the securities. Further, section 25(2) provides that the trustee may accept instead of, or in exchange for, the securities subject to the trust, securities of any denomination or description of another corporation that is party to the scheme or arrangement.

6.78 Section 25(3) provides that, if a conditional or preferential right to subscribe for securities in a corporation is offered to a trustee for a holding in that corporation or another corporation, the trustee may, for all or any of the securities:¹⁰¹

- exercise the right and apply capital money subject to the trust in payment of the consideration; or
- assign to any person, including a beneficiary under the trust, the benefit of the right, or the title to the right, for the best consideration that can be reasonably obtained; or
- renounce the right.

101

Trusts Act 1973 (Qld) s 25(3).

6.79 The exercise of power under section 25(1) or (2) could have the effect that the trustee holds different securities from those previously held. Section 25(5) clarifies that the trustee may hold the new securities 'for any period for which the trustee could properly have retained the original securities'.¹⁰²

6.80 Before the substitution of Part 3 of the Act by the *Trusts (Investments) Amendment Act 1999* (Qld), similar provisions were included in section 30(3) and (4) of the Act. The Commission expressed the view in its 1971 Report that such powers are essential.¹⁰³ It also noted that a closely analogous power is conferred on trustee companies by section 28(1)(e) of the *Trustee Companies Act 1968* (Qld).¹⁰⁴

6.81 In Chapter 8, the Commission has proposed that the *Trusts Act 1973* (Qld) should be amended to provide that trustees have, in relation to the trust property, all the powers of an absolute owner of the property (the 'general property power'). If such an amendment is ultimately made, it would not, strictly, be necessary for the Act to continue to confer the powers that are currently the subject of section 25(1)–(3). However, it is arguable that, even if a provision conferring the powers of an absolute owner is enacted, the detailed content in section 25 would assist trustees to understand the full ambit of their powers.

6.82 It might also be possible for the powers currently specified in section 25(1)–(3) to be included in a provision that lists examples of specific powers conferred by the general property power. However, it would be difficult to shorten the list of powers appearing in section 25(1)–(3) without detracting from the utility of mentioning those powers specifically.

6.83 For example, section 4(1) of the *Trusts (Scotland) Act 1921* (Scot), which lists the specific powers of trustees, includes the following specific power, which is not substantially shorter than section 25 of the Queensland Act:

- (o) to concur, in respect of any securities of a company (being securities comprised in the trust estate), in any scheme or arrangement—
 - (i) for the reconstruction of the company,
 - (ii) for the sale of all or any part of the property and undertaking of the company to another company,
 - (iii) for the acquisition of the securities of the company, or of control thereof, by another company,
 - (iv) for the amalgamation of the company with another company, or
 - (v) for the release, modification, or variation of any rights, privileges or liabilities attached to the securities or any of them,

¹⁰² See also the related discussion of s 29 of the *Trusts Act 1973* (Qld) at [6.114] ff below.

¹⁰³ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 27.

¹⁰⁴ *Ibid.* See [16.23], Question 16-3 below in relation to the powers conferred by s 28 of the *Trustee Companies Act 1968* (Qld).

in like manner as if the trustees were entitled to such securities beneficially; to accept any securities of any denomination or description of the reconstructed or purchasing or new company in lieu of, or in exchange for, all or any of the first mentioned securities; and to retain any securities so accepted as aforesaid for any Period for which the trustees could have properly retained the original securities;

6-4 Should the powers conferred by section 25(1)–(3) of the *Trusts Act 1973* (Qld):

- (a) continue to be the subject of a stand-alone provision in the Act (whether or not the Act is amended as mentioned in paragraph (b)); or
- (b) if the Act is amended to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner (the 'general property power'):
 - (i) be omitted; or
 - (ii) be stated briefly in a provision that lists examples of specific powers conferred by the general property power?

The effect of a contrary intention in the trust instrument

6.84 Section 25 of the *Trusts Act 1973* (Qld) applies 'if and so far only as a contrary intention is not expressed in the instrument (if any) creating the trust, and [has] effect subject to the terms of that instrument'.¹⁰⁵

6.85 In contrast, the former section 30(3) and (4) of the Act, as passed, applied 'whether or not a contrary intention is expressed in any other Act or in the instrument (if any) creating the trust'.¹⁰⁶ That approach was consistent with the view expressed in the Commission's 1971 Report that the powers conferred by those provisions 'are essential'.¹⁰⁷

6.86 The Explanatory Notes to the Trusts (Investments) Amendment Bill 1999 (Qld) did not comment on the change in approach to the issue of 'contrary intention'.

6.87 The Commission considers that, where the trust property includes securities of a corporation, it could prejudice the management of the trust if the trustee does not have the powers that are currently the subject of section 25 of the *Trusts Act 1973* (Qld). While it is possible for a trustee to apply to the court for an

¹⁰⁵ *Trusts Act 1973* (Qld) s 4(4). Although s 20 of the Act provides that certain of the provisions in pt 3 'apply despite anything contained in the instrument creating the trust', s 20 does not refer to s 25.

¹⁰⁶ *Trusts Act 1973* (Qld) s 20(3) (Act as passed).

¹⁰⁷ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 27.

order conferring on the trustee a power that he or she lacks,¹⁰⁸ the Commission considers that trustees should have the power to make decisions relating to company reconstructions and to offers made in the context of company takeovers in a timely way, and without the need to have recourse to the court. For that reason, the Commission's preliminary view is that, if the *Trusts Act 1973* (Qld) continues to retain a provision to the effect of section 25, the Act should be amended so that the provision applies whether or not a contrary intention is expressed in the trust instrument.

6.88 The Commission invites submissions on the following proposal:

6-5 If the *Trusts Act 1973* (Qld) continues to include a provision to the effect of section 25, the Act should be amended so that the provision applies whether or not a contrary intention is expressed in the trust instrument.

Investment in securities under the Reserve Bank Information and Transfer System

6.89 Section 26 of the *Trusts Act 1973* (Qld) does not confer any particular power on a trustee. However, it clarifies the effect of a trustee's use of the electronic processes of the Reserve Bank Information and Transfer System ('RITS'). The Explanatory Notes to the Trusts (Investments) Amendment Bill 1999 (Qld) described the RITS system in the following terms:¹⁰⁹

RITS is the electronic system owned and operated by the Reserve Bank of Australia. It allows Commonwealth Government securities to be transferred and settled simultaneously on a trade for trade assured payments basis. 'Assured payments' means that neither the member selling securities nor the member paying the cash can recall the transaction once it is settled, and both members receive good title to the cash and securities exchanged at the moment of settlement. This is achieved by members appointing banks in the system to undertake payment obligations on their behalf.

6.90 Section 26(1) of the Act 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 *Trusts Act 1973* (Qld) and the instrument creating a trust, taken to be the same in all respects as the underlying security. Section 26(2) further provides that the holding or acquisition by a trustee of a chose in action mentioned in section 26(1) is taken to be an investment by the trustee in the underlying security.

Power of trustee as to calls on shares

6.91 The *Trusts Act 1973* (Qld) contains two separate provisions that empower a trustee to apply certain trust money in the payment of calls on shares.

¹⁰⁸ *Trusts Act 1973* (Qld) s 94.

¹⁰⁹ Explanatory Notes, Trusts (Investments) Amendment Bill 1999 (Qld) 5–6.

6.92 Section 27, which was inserted by the *Trusts (Investments) Amendment Act 1999* (Qld), provides that a trustee may apply capital money in payment of calls on shares subject to the same trust:

27 Power of trustee as to calls on shares

A trustee may—

- (a) apply capital money subject to a trust in payment of calls on shares subject to the same trust; and
- (b) if the trustee is a trustee corporation, exercise the power conferred by paragraph (a) despite the shares on which the calls are made being shares in the trustee corporation.

6.93 Section 33(1)(c), which has been included in the Act since it was passed, provides a slightly wider power. It permits a trustee to expend money (including capital money) in payment of calls on shares subject to the same trusts, subject to the trustee's power in section 33(1)(g) to apportion the expenditure between capital and income in the manner that the trustee considers equitable. Section 33(1)(c) and (g) provides:

33 Miscellaneous powers in respect of property

- (1) Every trustee, in respect of any trust property, may—

...

- (c) expend money (including capital money) subject to the same trusts, in payment of calls on shares subject to those trusts; and

...

- (g) subject to this Act and to any direction of the court, apportion any payment or expenditure made in pursuance of paragraphs (a) to (f) between capital and income or otherwise among the persons entitled thereto in such manner as the trustee considers equitable, with power, where the whole or part of the payment or expenditure is made out of capital moneys, to recoup capital from subsequent income, if that course would be equitable in all the circumstances; ...

6.94 The other Australian jurisdictions all have a provision in similar terms to section 27, although the provisions in the ACT and New South Wales do not have an equivalent of section 27(b).¹¹⁰

6.95 While it might be difficult for a trustee to form the view under section 33(1)(g) that it is equitable for a call on shares to be paid (in whole or in part) out of the trust income, that possibility remains open under that provision. Under section 27, however, the power is confined to the application of capital. Given that the payment of a call on shares is a payment made in relation to a capital asset, the

¹¹⁰

Trustee Act 1925 (ACT) s 23; *Trustee Act 1925* (NSW) s 23; *Trustee Act* (NT) s 10; *Trustee Act 1936* (SA) s 11; *Trustee Act 1898* (Tas) s 11; *Trustee Act 1958* (Vic) s 10; *Trustees Act 1962* (WA) s 23.

Commission prefers the approach taken by section 27. Accordingly, its preliminary view is that section 33(1)(c) of the Act should be omitted.

6.96 The Commission invites submissions on the following proposal:

6-6 In light of the power conferred by section 27 of the *Trusts Act 1973* (Qld), section 33(1)(c) of the Act should be omitted.

The effect of a contrary intention in the trust instrument

6.97 Sections 27 and 33(1)(c) and (g) take two different approaches in relation to the effect of a contrary intention in the trust instrument.

6.98 Section 27, which is contained in Part 3 of the Act, applies 'if and so far only as a contrary intention is not expressed in the instrument (if any) creating the trust'.¹¹¹ However, because section 33(1)(c) and (g) is contained in Part 4 of the Act, it applies 'whether or not a contrary intention is expressed in the instrument (if any) creating the trust'.¹¹²

6.99 Because section 27 is subject to a contrary intention in the trust instrument, it gives effect to a settlor's wishes about matters that affect the ultimate entitlements of the beneficiaries under the trust.

Power to purchase dwelling house as residence for beneficiary

6.100 Section 28 of the *Trusts Act 1973* (Qld) empowers a trustee to purchase or otherwise secure a dwelling house for use as a residence by a beneficiary, or to retain as part of the trust property a dwelling house for that purpose.¹¹³ Section 28(1)–(2) provides:

28 Power to purchase dwelling house as residence for beneficiary

- (1) A trustee may—
- (a) purchase a dwelling house for a beneficiary to use as a residence; or
 - (b) enter into an agreement or arrangement to secure for a beneficiary a right to use a dwelling house as a residence.
- (2) Despite the terms of the instrument 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.

¹¹¹ *Trusts Act 1973* (Qld) s 4(4).

¹¹² *Trusts Act 1973* (Qld) s 31(1).

¹¹³ *Trusts Act 1973* (Qld) s 28(5) defines 'dwelling house' to include 'a building or part of a building designed, or converted or capable of being converted, for use as a residence' and 'amenities or facilities for use in association with the use of a dwelling house'.

6.101 A dwelling house that is purchased, retained or otherwise secured for use by a beneficiary may be made available to the beneficiary for that purpose on the conditions that are 'consistent with the trust and the extent of the beneficiary's interest that the trustee considers appropriate'.¹¹⁴

6.102 The trustee may also retain a dwelling house, or any interest or rights in a dwelling house acquired under this section, after the use of the dwelling house by the beneficiary has ended.¹¹⁵

6.103 Before the substitution of Part 3 of the Act by the *Trusts (Investments) Amendment Act 1999* (Qld), a provision in similar terms was included in section 22 of the Act. These provisions overcame the narrow interpretation of 'investment', which had the effect that the purchase of a house for use and enjoyment, rather than for a financial purpose, was not considered to be an 'investment' because it did not generate a profit or income.¹¹⁶

6.104 It has also been observed that section 28 can relieve trustees of the duty to diversify investments:¹¹⁷

For instance if the only property of the trust is a house and the purpose of the trust is to provide a roof over the head of an impoverished beneficiary for life a decision of the trustee to sell the house and invest the proceeds of sale in a diversified fund, for the sake of diversification, could spell disaster for the beneficiary, who would have nowhere to live and whose entitlement for social security benefits might be compromised by the entitlement to the income arising from the investment. In such a case it is submitted that the trustees are justified in suffering the uncompensated risk of the single investment by the circumstances of the trust itself, as well as by specific permission of this legislation.

The effect of a contrary intention in the trust instrument

6.105 The powers conferred by section 28(1) to purchase a dwelling house, or to enter into an agreement or arrangement to secure a right to use a dwelling house, apply 'if and so far only as a contrary intention is not expressed in the instrument (if any) creating the trust, and have effect subject to the terms of that instrument'.¹¹⁸

6.106 However, the power conferred by section 28(2) to retain a dwelling house as part of the trust property for a beneficiary to use as a residence is expressed to apply 'despite the terms of the trust instrument', thus creating an exception to section 4(4) of the Act.

¹¹⁴ *Trusts Act 1973* (Qld) s 28(3).

¹¹⁵ *Trusts Act 1973* (Qld) s 28(4).

¹¹⁶ *Re Sherriff* [1971] NSWLR 438, 442–3 (Helsham J).

¹¹⁷ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 15 July 2009) [10.8060].

¹¹⁸ *Trusts Act 1973* (Qld) s 4(4). Although s 20 of the Act provides that certain of the provisions in pt 3 'apply despite anything contained in the instrument creating the trust', s 20 does not refer to s 28.

6.107 As a result, the powers conferred by section 28(1) may be excluded by the trust instrument, but the power conferred by section 28(2) may not.¹¹⁹

6.108 The former section 22 of the *Trusts Act 1973* (Qld), which was replaced by section 28, did not incorporate two different approaches to the effect of a contrary intention. As with the current section 28(1), the power to purchase a dwelling house under former section 22(1) was subject to a contrary intention in the trust instrument.¹²⁰ However, unlike the current section 28(2), the power conferred by former section 22(4) to retain a dwelling house that was already part of the trust estate was not expressed to apply despite the terms of the trust instrument. Instead, it simply provided that the trustee had the power 'notwithstanding any trust for conversion contained in the instrument creating the trust'.¹²¹

6.109 As explained in Chapter 8, historically, trusts for sale were often used simply to avoid the strict settlement of land. They enabled the land to be settled as personalty rather than as realty.¹²² The reference in former section 22(4) to the power to retain being able to be exercised 'notwithstanding any trust for conversion' meant that:

- the power to retain a dwelling house for use by a beneficiary could be excluded by a contrary intention in the trust instrument (pursuant to the general application provision in former section 20(1)); but
- where the property was held on trust for sale or conversion under the instrument, the existence of that trust did not, of itself, amount to a contrary intention that would exclude the trustee's power to retain the dwelling house for use by a beneficiary.

6.110 This differs from the position that arises under the current section 28(2). The words 'despite the terms' of the trust instrument would seem to be wider, and to have the effect that the power to retain the dwelling house applies despite any contrary intention expressed in the instrument.

6.111 In the Commission's view, it is undesirable that section 28(1) and (2) take different approaches to the effect of a contrary intention in the trust instrument. Under the current provision, the question of whether a trustee can provide a dwelling house for the use of a beneficiary turns, not on any issue of principle, but on whether a dwelling house happens to form part of the trust property. Obviously, there are competing arguments in relation to which approach should be adopted. The recognition of a settlor's autonomy favours making the provision subject to a contrary intention that is expressed in the trust instrument. On the other hand, it could be argued that, because the provision is a beneficial one for beneficiaries, it

¹¹⁹ The current provisions in the other Australian jurisdictions are expressed in similar terms, including with respect to contrary intention: *Trustee Act 1925* (ACT) s 14E; *Trustee Act 1925* (NSW) s 14DA; *Trustee Act* (NT) s 10A; *Trustee Act 1936* (SA) s 12; *Trustee Act 1898* (Tas) s 12; *Trustee Act 1958* (Vic) s 11; *Trustees Act 1962* (WA) s 24.

¹²⁰ See *Trusts Act 1973* (Qld) s 20(1) (Act as passed).

¹²¹ *Trusts Act 1973* (Qld) s 22 (Act as passed) was based on s 4(3) of the *Trustee Act 1958* (Vic) and s 17 of the *Trustees Act 1962* (WA), which also used the expression 'notwithstanding any trust for conversion' in the trust instrument.

¹²² See [4.6] above, [8.137] ff below.

should apply whether or not a contrary intention is expressed in the trust instrument.

6-7 Should the powers conferred by section 28(1)–(2) of the *Trusts Act 1973* (Qld) apply:

- (a) subject to a contrary intention in the trust instrument; or**
- (b) whether or not a contrary intention is expressed in the trust instrument?**

PROTECTION FROM LIABILITY

6.112 Part 3 of the *Trusts Act 1973* (Qld) contains a number of provisions (sections 29–30C) that protect a trustee from liability arising out of the exercise of a power of investment, or that limit a trustee's liability.¹²³

6.113 All of the provisions in Part 3 were inserted by the *Trusts (Investments) Amendment Act 1999* (Qld). However, several of those provisions — sections 29, 30 and 30A — were carried over from the Act, as passed, with only minor changes to update the drafting style. Given that those provisions have their origins in much earlier English legislation, enacted at a time when trustees had quite restricted powers of investment, this part of the chapter also examines the appropriateness of those provisions in light of the 'prudent person' approach to investment that has been adopted in the earlier provisions in Part 3 of the Act.

Protection of trustees who retain certain investments

6.114 Section 29 of the *Trusts Act 1973* (Qld) 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.

6.115 A provision in similar, but slightly simpler, terms was included in section 26 of the Act as passed.¹²⁴

¹²³ *Trusts Act 1973* (Qld) ss 29–30C apply 'despite anything contained in the instrument creating the trust': s 20.

¹²⁴ A provision in similar terms was previously included in s 8(3) of the *Trustees and Executors Act 1897* (Qld).

26 Power to retain investment which has ceased to be authorized

A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorized by the trust instrument or by this or any other Act.

6.116 That provision was recommended by this Commission in its 1971 Report. The Commission considered that the protection afforded by section 26 was needed because of its recommendation not to include, in the list of authorised investments in the proposed new Act, investment in real estate in the United Kingdom¹²⁵ (which was then an authorised investment under the *Trustees and Executors Act 1897* (Qld)). The provision would protect a trustee who continued to hold such an investment.¹²⁶

6.117 Former section 26 was replaced by section 29 when Part 3 of the Act was substituted by the *Trusts (Investments) Amendment Act 1999* (Qld). However, the redrafting of the provision has introduced some difficulties in section 29(b) and (c).

6.118 Section 29(b) applies if an investment has stopped being an investment that was ‘properly made’ by a trustee. However, if an investment was properly made, it cannot stop being one that was properly made — that is, the propriety of the investment at the time it was made is not a matter that can be changed by later events. The equivalent provision of the New Zealand legislation better captures what was intended by section 29(b) — an investment that has ceased to be ‘an investment that a trustee could properly make in exercising any power of investment’.¹²⁷

6.119 Similarly, in relation to section 29(c), an investment that was made under Part 3 of the Act, as previously in force from time to time, cannot stop being such an investment.¹²⁸ Section 29(c) affords protection in the circumstances mentioned at [6.116] above only if the expression ‘that has stopped being an investment’ does not actually apply in relation to that paragraph — that is, if the section is construed to apply where ‘the trustee continues to hold an investment ... made under this part as previously in force from time to time’.

6.120 Accordingly, if section 29 is retained, it should be recast to correct the current problems with paragraphs (b) and (c), for example:

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) that a trustee could properly make in exercising a power of investment;
or
- (c) authorised by this or another Act or the general law.

¹²⁵ This recommendation was implemented by s 21(1) of the *Trusts Act 1973* (Qld) (Act as passed).

¹²⁶ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 26.

¹²⁷ *Trustee Act 1956* (NZ) s 13H(b).

¹²⁸ The previous investment might be realised and the proceeds reinvested, but that is then a new investment.

6.121 Similar provisions to section 29 are included in the trustee legislation of the other Australian jurisdictions and New Zealand.¹²⁹

6.122 These provisions have their origins in section 4 of the English *Trustee Act 1893, Amendment Act 1894*, which was subsequently re-enacted as section 4 of the *Trustee Act 1925*. However, that provision has since been repealed by the *Trustee Act 2000* (UK),¹³⁰ which implemented a number of reforms recommended by the Law Commission of England and Wales, principally in relation to trustees' investment powers.¹³¹ The Law Commission considered that, in view of its recommendations, a number of the provisions in Part I of the *Trustee Act 1925* (which at the time included section 4) were no longer needed.¹³²

6.123 In Queensland, too, trustees' investment powers and duties have undergone some significant changes since the predecessor to section 29 was enacted in the *Trusts Act 1973* (Qld), as passed. As explained earlier, the list of authorised investments has been replaced by the power, under section 21, to invest in any form of investment (unless expressly forbidden by the trust instrument), and section 22(3) requires trustees to review the performance of the trust investments at least once a year. Trustees are also required to comply with the duty of care imposed by section 22. This raises the issue of whether the liability of a trustee who continues to hold an investment that has ceased to be authorised in one of the ways mentioned in section 29 of the *Trusts Act 1973* (Qld) should simply be determined according to the duty imposed by section 22 or whether there is value in retaining the specific protection afforded by section 29 or some modified form of that provision.

Extent of protection

6.124 The protection afforded by section 29 of the *Trusts Act 1973* (Qld) is limited by the words 'only because'. As Millett J observed in relation to the then English provision:¹³³

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.

6.125 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'.¹³⁴

¹²⁹ *Trustee Act 1925* (ACT) s 25; *Trustee Act 1925* (NSW) s 25; *Trustee Act* (NT) s 10B; *Trustee Act 1936* (SA) s 13; *Trustee Act 1898* (Tas) s 12A; *Trustee Act 1958* (Vic) s 12; *Trustees Act 1962* (WA) s 25; *Trustee Act 1956* (NZ) s 13H. The provisions in the ACT and New South Wales Acts are in virtually the same terms as former s 26 of the *Trusts Act 1973* (Qld) (Act as passed).

¹³⁰ *Trustee Act 2000* (UK) c 29, s 40(1), (3), sch 2 pt II para 18, sch 4 pt II.

¹³¹ Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999).

¹³² See [6.172] below.

¹³³ *Wright v Ginn* [1995] Pens LR 33, [4].

¹³⁴ AE Randall, *A Selection of Leading Cases in Equity with Notes* (Stevens & Sons, 1912) 198.

Background

6.126 Commentators on the original English provision observed that:¹³⁵

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.

6.127 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 an investment could arise in limited circumstances, including 'where the security of the fund demands such a course'.¹³⁶

6.128 The issue of when it would be a breach of trust under the general law for a trustee to retain investments that have ceased to be authorised, or that have ceased to be a proper investment, is a complex one, depending on the nature of the investment and the terms of the trust instrument.

Investments no longer authorised by the trust instrument

6.129 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.

6.130 Where trustees were specifically authorised to invest in a particular partnership and there was a change in partners, the loan to the new partnership was not an investment that was authorised by the trust instrument. As a result, the trustees were held to be under a duty to get in the money, and to have committed a breach of trust by not doing so.¹³⁷ Section 29 would not, however, relieve the trustees of the duty to call in the loan.¹³⁸

6.131 A similar situation arose where the trustees were authorised to retain, or to invest in, shares in a particular company, and there was a reconstruction of the company, resulting in the allotment of new shares (being of a different kind) or, in some cases, shares in a new company. Where the new company was essentially a 'reproduction' of the old company, the shares continued to be an authorised investment under the trust instrument, and the trustees were permitted to retain the

¹³⁵ FG Champernowne and H Johnston, *The Trustee Act, 1893, and Other Recent Statutes Relating to Trustees* (William Clowes & Sons, 1904) 176.

¹³⁶ *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'.

¹³⁷ *Re Tucker* [1894] 1 Ch 724, 733–4 (Romer J). See also *Smith v Patrick* [1901] AC 282, 290 (Earl of Halsbury LC), 292 (Lord Shand).

¹³⁸ See FG Champernowne and H Johnston, *The Trustee Act, 1893, and Other Recent Statutes Relating to Trustees* (William Clowes & Sons, 1904) 177.

shares.¹³⁹ However, where there was a substantial change in the nature of the investment, it was held that the new shares were not an investment authorised by the trust instrument, and that the trustees were required to convert the shares.¹⁴⁰ Section 29 would not relieve the trustees of the duty under the general law to convert the shares.¹⁴¹

6.132 However, as explained earlier in this chapter, section 21 now empowers trustees to invest in any form of investment and section 25(1) gives trustees wide powers to agree to a scheme or arrangement for the reconstruction of a company or other amalgamation as if the trustee were beneficially entitled to the shares. Furthermore, section 25(5) provides that trustees may retain shares accepted or subscribed for under that section for any period for which they could properly have retained the original shares.

Investment no longer a proper investment

6.133 Trustees are now subject to the duty, imposed by section 22(3) of the Act, to review the performance of the trust investments at least once in each year. Section 29 would not protect a trustee who failed to comply with that duty or who failed, in light of such a review, to take whatever steps a prudent person would take in order to comply with the duty of care imposed by section 22.

6.134 Where trust funds are lent on the security of real property and the property becomes insufficient to provide for the whole of the sum advanced, trustees have a duty to consider what should best be done for the estate.¹⁴² However:¹⁴³

There is no rule of law that compels the Court to hold that an honest trustee is liable to make good loss sustained by retaining an authorized security in a falling market, if he did so honestly and prudently, in the belief that it was the best course to take in the interest of all parties.

6.135 In *Re Chapman*,¹⁴⁴ the English Court of Appeal considered whether the trustees of a testamentary trust were in breach of trust by failing to call in certain mortgages of freehold land. Lindley LJ observed that:¹⁴⁵

The trustees had to consider, not whether they should invest money on a particular security, but whether they ought to get rid of a security of a kind which they were authorized to invest money upon. These two considerations are by no means practically the same.

¹³⁹ *Re Smith* [1902] Ch 667, 672–3 (Buckley J). See also *Perpetual Trustee Co Ltd v Noyes* (1925) SR (NSW) 226.

¹⁴⁰ *Re Morris* (1885) 54 LJ Ch 388, 390 (Pearson J). See also *Re Anson's Settlement* [1907] 2 Ch 424; *Re Kuhnel* [1922] SASR 410; *Re Mandelson's Will* (1894) 15 LR (NSW) Eq 160;

¹⁴¹ See FG Champernowne and H Johnston, *The Trustee Act, 1893, and Other Recent Statutes Relating to Trustees* (William Clowes & Sons, 1904) 177.

¹⁴² *Re Medland* (1889) 41 Ch D 476, 481 (North J).

¹⁴³ *Re Chapman* [1896] 2 Ch 763, 776 (Lindley LJ).

¹⁴⁴ [1896] 2 Ch 763.

¹⁴⁵ *Ibid* 773.

6.136 In that case, the Court held that the trustees were not in breach by retaining the mortgage investments. By the time the land ceased to be a satisfactory security, the mortgagors ‘were themselves in such difficulties that nothing could be got from them’.¹⁴⁶ Further, the Court held that foreclosure ‘would have cost money, and would have benefited no one’,¹⁴⁷ and there was no evidence that ‘it would have been a prudent or judicious step to try and sell’.¹⁴⁸ Lindley LJ stated that a ‘want of ordinary prudence on the part of the trustees’ would need to be proved to make them liable.¹⁴⁹

6.137 Section 29 is consistent with the general position that the mere retention of the mortgage investment is not a breach of trust, although the section would not protect a trustee who failed to consider whether steps should be taken to call in the mortgage.

Investments no longer authorised by the Trusts Act 1973 (Qld) or another Act

6.138 Ford and Lee have commented that section 29 ‘covers the case ... where particular investments (such as overseas securities) cease to be authorised’.¹⁵⁰ As mentioned earlier, this was also the Commission’s justification for recommending a provision to the effect of section 29.¹⁵¹

Whether section 29 should be retained

6.139 It is apparent from the above discussion that the protection afforded by section 29 is relevant in only a very limited range of circumstances. For the most part, it is not the mere retention of an investment that would expose a trustee to liability for a breach of trust, but some other omission — for example, failing to sell an investment that is no longer authorised by the trust instrument, failing to consider what steps should be taken in relation to a mortgage where the security has become insufficient or, more generally, failing to take proper steps following a review of the performance of the trust investments. This raises the issue of whether section 29 still serves a purpose, or whether it should be omitted.

6-8 Should the *Trusts Act 1973 (Qld)* continue to include a provision to the effect of section 29 or, alternatively, should section 29 be omitted?

¹⁴⁶ Ibid 775 (Lindley LJ).

¹⁴⁷ Ibid.

¹⁴⁸ Ibid 776.

¹⁴⁹ Ibid.

¹⁵⁰ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Lawbook, 2nd ed, 1990) 477, [1027].

¹⁵¹ See [6.116] above.

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

6.140 A trustee who is exercising a power of investment must comply with the duty of care imposed by section 22 of the *Trusts Act 1973* (Qld), together with such other rules or principles of law or equity as are preserved by section 23. Where a trustee lends money on the security of property, there is the potential for the trustee to be held liable for committing a breach of trust on the ground that the trustee did not exercise the requisite degree of care, diligence and skill in making the loan — in practical terms, that the trustee was not justified in lending the money on the security of the particular property given its value at the time.

6.141 Section 30(1) of the *Trusts Act 1973* (Qld) applies where a trustee lends money 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 amount of the loan with the value of the property at the time when the loan was made if the conditions in paragraphs (a) or (b) of the subsection are satisfied.¹⁵²

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

- (1) If a trustee lends an amount on the security of property, the trustee is not in breach of trust only on the ground of the comparison of the amount of the loan with the value of the property at the time when the loan was made—
- (a) if it appears to the court that—
 - (i) in making the loan, the trustee was acting on a report about the value of the property made by a person whom the trustee reasonably believed to be competent to give the report and whom the trustee instructed and employed independently of any owner of the property;¹⁵³ and
 - (ii) the amount of the loan was not more than two-thirds of the value of the property as stated in the report; and
 - (iii) the loan was made in reliance on the report; or
 - (b) 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 default of the borrower. (note added)

¹⁵² *Trusts Act 1973* (Qld) s 30(1) applies to transfers of existing securities as well as to new securities and to investments, whether made before or after the commencement of that section: s 30(3).

¹⁵³ Under s 209 of the *Land Valuation Act 2010* (Qld), a person may request the Valuer-General to assess the value of land or personal property. Section 210 provides that, if a trustee requests an assessment under s 209 for the purpose of lending money on the security of that property and the Valuer-General issues a certificate for the assessment, for the purpose of s 30(1)(a) of the *Trusts Act 1973* (Qld), the certificate is taken to be a report about the property's value, and the Valuer-General is taken to have been employed independently of the owner of the property and to have been competent to give the report.

6.142 Section 30(1) is a purely protective provision. It does not confer the power to lend money on the security of property. Nor does it restrict a trustee to lending two-thirds of the value of property.¹⁵⁴ However, if a trustee lends more than that proportion and the property proves to be an insufficient security, the trustee's liability will be determined without the benefit of the protection afforded by compliance with the provision.

6.143 Section 30 was inserted by the *Trusts (Investments) Amendment Act 1999* (Qld). However, the *Trusts Act 1973* (Qld), as passed, included a similar provision in section 27(1) of the Act.¹⁵⁵ Similar provisions are included in the trustee legislation of the other Australian jurisdictions and New Zealand.¹⁵⁶

6.144 These provisions have their origins in section 4(1) of the English *Trustee Act 1888*, which was replaced, with minor changes, by section 8 of the *Trustee Act 1893*.¹⁵⁷ That provision was in turn re-enacted as section 8 of the *Trustee Act 1925*, but has since been repealed.¹⁵⁸

Conditions for protection

6.145 Section 30(1)(a) of the *Trusts Act 1973* (Qld) is satisfied if it appears to the court that the loan was made by the trustee in reliance on a report made by an independent valuer, and the amount of the loan did not exceed two-thirds of the value of the property as stated in the report. The trustee must believe the valuer to be competent to give the report, and must employ and instruct the valuer independently of any owner of the property.¹⁵⁹

6.146 As a result, section 30(1)(a) does not protect a trustee who relies on a valuation obtained otherwise than by the trustee, for example, by the mortgagor of the property.¹⁶⁰ This does not mean that a trustee who relies on a valuation

¹⁵⁴ Cf *Trusts Act 1973* (Qld) s 36(1), which applies where a trustee sells freehold land. That provision confers the power to secure part of the purchase price by a mortgage over the property, but restricts the trustee to taking a mortgage of not more than two-thirds of the purchase price.

¹⁵⁵ The introductory words of s 27(1) of the *Trusts Act 1973* (Qld) (Act as passed) referred to the 'proportion borne by the amount of the loan to the value of the property', which perhaps made it clearer that the provision was referring to the lending margins applied by the Courts of Equity: see [6.151] ff below.

¹⁵⁶ *Trustee Act 1925* (ACT) s 18; *Trustee Act 1925* (NSW) s 18; *Trustee Act* (NT) s 10C(1); *Trustee Act 1936* (SA) s 13A(1); *Trustee Act 1898* (Tas) s 12B(1); *Trustee Act 1958* (Vic) s 12A; *Trustees Act 1962* (WA) s 26(1); *Trustee Act 1956* (NZ) s 13N. However, only the South Australian and Tasmanian provisions afford protection in the circumstances mentioned in s 30(1)(b) of the *Trusts Act 1973* (Qld). The New South Wales provision affords protection in similar, but slightly different, circumstances — namely, where the amount of the loan does not exceed 95% of the value of the property as stated in the report, the repayment of the loan is insured under a contract of insurance issued by a prescribed insurer, and the benefit of that contract has been assigned to the mortgagee.

¹⁵⁷ *Trustee Act 1893*, 56 & 57 Vict, c 53, s 8 still applies in Ireland. The Law Reform Commission of Ireland has recommended the retention of a provision in similar terms: Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) 203, Draft *Trustee Bill 2008*, cl 20(10).

¹⁵⁸ See [6.172] below.

¹⁵⁹ In *Re Solomon* [1912] 1 Ch 261, it was held that the valuer may be instructed by the solicitors for the trustees. Cf *Fry v Tapson* (1884) 28 Ch D 268, 281 (Kay J); *Smith v Hassall* (1899) 20 LR (NSW) Eq 165, 173 (AH Simpson CJ in Eq).

¹⁶⁰ *Re Walker* (1890) 59 LJ Ch 386; *Shaw v Cates* [1908] 1 Ch 389, 403 (Parker J); *Palmer v Emerson* [1911] 1 Ch 758, 765 (Eve J).

obtained by the mortgagor automatically commits a breach of trust, as there may be circumstances that would justify the trustee in doing so.¹⁶¹ It simply means that, in the circumstances of a particular loan, the trustee is not entitled to the protection of section 30(1)(a).

6.147 Section 30(1)(b) is satisfied if the trustee carries the relevant insurance against all loss that may arise because of the default of the borrower.

Limits of protection

6.148 Section 30(1) of the *Trusts Act 1973* (Qld) protects a trustee from liability for a breach of trust arising 'only on the ground of' the comparison of the amount of the loan with the value of the property at the time when the loan was made. The section does not protect a trustee from liability for lending where the investment is one that the trustee was not authorised to make¹⁶² or is inherently improvident or hazardous.¹⁶³

Background

6.149 The original English provision, section 4(1) of the *Trustee Act 1888*, was intended to 'relieve trustees from a burden previously cast upon them by the Court, and which the Legislature conceived was too heavy a burden to be cast on them'.¹⁶⁴ It has been described as a 'relieving section', and not a section that imposes further obligations on trustees.¹⁶⁵ Accordingly, trustees 'are not bound to take the precautions stated in the subsection. The Act merely says if they do so they shall not be liable by reason *only* of the proportion borne by the amount of the loan to the value of the property'.¹⁶⁶

6.150 At the time of its enactment, trustees were subject to a number of specific rules when lending money on the security of real property. Those rules related to several different matters: the lending margins that the Courts of Equity generally regarded as safe, the reliance that trustees could place on a report as to the value of the property, and other specific requirements in relation to valuations.

¹⁶¹ See *Palmer v Emerson* [1911] 1 Ch 758, 770 (Eve J).

¹⁶² See *Re Dive* [1909] 1 Ch 328. The trustee was authorised to invest in his own name, but instead invested in a contributory mortgage (a mortgage in the names of himself and another mortgagee). Warrington J held (at 342) that the 'trustee in this case ... is not protected by s 8 ... of the *Trustee Act, 1893*, because the breach of trust did not consist only of advancing more than the proper proportion of the value of the property' (emphasis added).

¹⁶³ See *Blyth v Fladgate* [1891] 1 Ch 337, where the trustees claimed the benefit of s 4(1) of the *Trustee Act 1888*, 51 & 52 Vict, c 59. Stirling J explained (at 353–4) why the provision would not protect the trustees, who had made a hazardous investment:

To that the answer is, that the trustees were not charged with a breach of trust 'by reason only of the proportion borne by the amount of the loan to the value of such property at the time when the loan was made'. They were so charged because the security was, in the language of Lord Watson in the case of *Learoyd v Whiteley*, one of a 'class which is attended with hazard'. (emphasis added)

¹⁶⁴ *Re Solomon* [1912] 1 Ch 261, 271 (Warrington J).

¹⁶⁵ *Palmer v Emerson* [1911] 1 Ch 758, 769 (Parker J).

¹⁶⁶ FG Champernowne and H Johnston, *The Trustee Act, 1893, and Other Recent Statutes Relating to Trustees* (William Clowes & Sons, 1904) 43.

Lending margins

6.151 The Courts of Equity have long applied certain lending margins when considering the prudence of loans made by trustees on the security of real property.¹⁶⁷ Depending on the nature of the property involved, the rule was that trustees could generally lend up to one-half, or two-thirds, of the value of the property.

6.152 In *Learoyd v Whiteley*,¹⁶⁸ which was decided by the House of Lords before the enactment of the *Trustee Act 1888*, Lord Watson referred to the guidance provided to trustees by the lending margins applied by the Courts of Equity:¹⁶⁹

The Courts of Equity in England have indicated and given effect to certain general principles for the guidance of trustees in lending money upon the security of real estate. Thus it has been laid down that in the case of ordinary agricultural land the margin ought not to be less than one-third of its value; whereas in cases where the subject of the security derives its value from buildings erected upon the land, or its use for trade purposes, the margin ought not to be less than one-half. I do not think these have been laid down as hard and fast limits up to which trustees will be invariably safe, and beyond which they can never be in safety to lend, but as indicating the lowest margins which in ordinary circumstances a careful investor of trust funds ought to accept. It is manifest that in cases where the subjects of the security are exclusively or mainly used for the purposes of trade, no prudent investor can be in a position to judge of the amount of margin necessary to make a loan for a term of years reasonably secure, until he has ascertained not only their present market price, but their intrinsic value, apart from those trading considerations which give them a speculative and it may be a temporary value. (emphasis added)

6.153 The rules in relation to lending margins have been described as ‘a restraint on speculative or careless dealings with trust property’.¹⁷⁰ Although they are not ‘hard and fast rules’, it was said that a trustee ‘who disregards the rules of the Court as to the amount which may be lent on mortgage of a property ... takes upon himself a great risk’.¹⁷¹

6.154 By the early twentieth century, however, the rules were ‘not so stringent as not to admit of exceptions based upon special circumstances’.¹⁷² In particular, the rule as to ‘one half margin of value ... was somewhat less stringent than the rule as to one third margin of value in the case of agricultural land’, although in either case ‘the onus of justifying a departure from the rule would probably lie on the trustee’.¹⁷³

¹⁶⁷ See *Stickney v Sewell* (1835) 1 My & Cr 8; 40 ER 280.

¹⁶⁸ (1887) 12 App Cas 727. In that case, the trustees lent £3000 on the security of a mortgage over a freehold brickfield. Although the loan, being an investment in ‘real security’, was within the powers conferred by the trust instrument, the House of Lords held that the trustees were not justified in investing on the security of a ‘hazardous’ or ‘speculative’ business, and that they had adopted the valuer’s report without sufficient care: at 730–1, 732 (Lord Halsbury LC), 735 (Lord Watson), 737 (Lord FitzGerald). As a result, the trustees were liable for the loss occasioned by their breach.

¹⁶⁹ Ibid 733–4.

¹⁷⁰ *Yeo v Rotton* (1865) SCR (NSW) Eq 110, 111 (Hargrave J).

¹⁷¹ *Re Salmon* (1889) 42 Ch D 351, 370 (Fry LJ).

¹⁷² *Shaw v Cates* [1909] 1 Ch 389, 397 (Parker J).

¹⁷³ Ibid.

Where trustees lent on the security of a property on which a business was conducted, the courts, instead of rigidly applying the one-half rule, tended to place a greater emphasis on the particular circumstances of the property (although still on the basis that those circumstances might justify a loan of up to two-thirds of the value of the property):¹⁷⁴

I think the cases which have been cited do come to this, that, if the security is really a business plus the premises upon which it is carried on, trustees are well advised to have nothing to do with it; and further, if the premises and the business are so inseparable that the discontinuance of the business must or may result in depreciation of the premises, then the trustees ought not to advance more than one half. But where you have a freehold property situate in a busy thoroughfare in an important city, adaptable for various sorts of business, although, at the moment, utilized and adapted for a particular kind of business then being carried on, I do not think there is any rule which says that in that state of things trustees are limited to advancing only a moiety of the amount of the valuation.

6.155 By protecting trustees who lent not more than two-thirds of the value of the mortgaged property, section 4(1) of the *Trustee Act 1888* gave statutory recognition to the one-third margin that was previously recognised by the Courts of Equity as a generally safe margin for trustees to adopt in lending on the security of agricultural land,¹⁷⁵ but applied that margin to loans 'upon any property of any tenure, whether agricultural or house or other property, on which the trustee can lawfully lend'.¹⁷⁶

Requirement for trustees to exercise their own judgment about the amount to lend

6.156 Before the enactment of section 4(1) of the *Trustee Act 1888*, trustees who lent money on the security of property 'were entitled to rely on expert advice as to the value of the property'.¹⁷⁷ However, having been advised as to value, the trustees 'had themselves to determine, and could not delegate it to a third party (even an expert) to determine, what amount they could prudently advance on the security in question'.¹⁷⁸ The effect of section 4(1), and the later provisions in similar terms, was that a trustee was:¹⁷⁹

justified in acting on expert advice, not only as to the value of the property, but also as to the amount he may properly advance thereon, provided the advice be given in such manner, and by such person, as is contemplated in the section, and that, whatever be the nature of the property, the amount advanced is not more than two thirds of its value.

¹⁷⁴ *Palmer v Emerson* [1911] 1 Ch 758, 766 (Eve J).

¹⁷⁵ See *Shaw v Cates* [1909] 1 Ch 389, 396–7 (Parker J).

¹⁷⁶ *Trustee Act 1888*, 51 & 52 Vict, c 59, s 4(1).

¹⁷⁷ *Shaw v Cates* [1909] 1 Ch 389, 396 (Parker J).

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid* 398.

6.157 Pettit has suggested that the greatest change effected by the section was to allow the valuer to determine the amount that the trustees 'could prudently advance on the security in question'.¹⁸⁰

Requirements as to valuation

6.158 Under the general law, trustees are generally required to obtain a valuation that would enable them to judge whether they are justified in lending the amount that they propose to lend.¹⁸¹

6.159 Trustees have been held to have taken insufficient precautions where they relied on a valuation prepared by a valuer employed by the mortgagor.¹⁸² The requirement for the valuer to be employed independently of the owner/mortgagor is reflected in section 30(1)(a)(i) of the *Trusts Act 1973* (Qld), where it is one of the conditions for protection under section 30(1)(a).

6.160 Trustees have also been held to be at fault in obtaining the valuation of a surveyor¹⁸³ who was not from the locality in which the mortgaged property was situated.¹⁸⁴

6.161 The requirement to use a local surveyor or valuer was addressed by section 4(1) of the *Trustee Act 1888*, where the protection given by the section applied 'whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere'. Those words have not been replicated in section 30(1)(a)(i). However, because it is not a condition for protection under section 30(1)(a) that the valuer does carry on business in the locality where the property is situated, section 30(1)(a) has the same effect as the original English provision.

Whether the older rules in relation to lending apply in Queensland

6.162 Pettit, writing before the repeal of section 8 of the English *Trustee Act 1925*, suggested that, in ascertaining the liability of a trustee who for any reason is unable to rely on the protection of section 8, 'the rules which applied to any investment on mortgage before the *Trustee Act 1888* will still be applicable'.¹⁸⁵ In that context, he referred to the requirements for a trustee personally to determine the amount that can prudently be lent on the security in question and to ensure that

¹⁸⁰ PH Pettit, *Equity and the Law of Trusts* (Butterworths, 8th ed, 1997) 401. See also JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1826] where a similar view is expressed.

¹⁸¹ *Re Olive* (1886) 34 Ch D 70, 73 (Kay J). However, there may be circumstances in which trustees are justified in departing from this requirement: see *Palmer v Emerson* [1911] 1 Ch 758, 770 (Eve J).

¹⁸² *Ingle v Partridge (No 2)* (1865) 34 Beav 411; 55 ER 694; *Fry v Tapson* (1884) 28 Ch D 268, 282 (Kay J); *Shaw v Cates* [1909] 1 Ch 389 (Parker J).

¹⁸³ At the time, it was common for valuations to be carried out by surveyors.

¹⁸⁴ *Budge v Gummow* (1872) LR 7 Ch App 719, 722 (James LJ; Mellish LJ agreeing); *Fry v Tapson* (1884) 28 Ch D 268, 279–80, 282 (Kay J). In both cases, a London surveyor was used.

¹⁸⁵ PH Pettit, *Equity and the Law of Trusts* (Butterworths, 8th ed, 1997) 401.

an expert having local knowledge is properly instructed to value the property, and to the lending margins applied by the courts.¹⁸⁶

6.163 Whether those older rules apply in Queensland depends on:

- whether the rules would be regarded as representing good law in Australia; and
- if so, whether the rules are preserved by section 23 of the *Trusts Act 1973* (Qld).

6.164 As explained earlier, section 23 preserves the rules or principles of law or equity that impose a duty on a trustee exercising a power of investment except so far as the rules or principles are inconsistent with the *Trusts Act 1973* (Qld) or another Act or with the instrument creating the trust.¹⁸⁷ Some specific rules and principles (which are not relevant for present purposes) are expressly preserved by section 23(2). However, the provision is silent as to the older rules discussed earlier, which prompted the enactment of section 4(1) of the English *Trustee Act 1888*.

6.165 Of those older rules, only the lending margins previously applied in England by the Courts of Equity have received judicial consideration by Australian courts.

6.166 In *Yeo v Rotton*, decided in 1865, Hargrave J of the Supreme Court of New South Wales accepted the application in the Colony of New South Wales of both the one-half and one-third lending margins for trustees.¹⁸⁸ However, by the late 1890s, as in England, the one-half margin was applied less stringently.

6.167 In *Hutchings v Snowden*, a'Beckett J of the Supreme Court of Victoria felt 'justified in adopting the two-thirds measure as the measure which, if they had observed it properly, would relieve [the trustees] from the personal liability sought to be enforced against them', even though the property in question was not agricultural land.¹⁸⁹ His Honour stated, however, that his observations were limited to the action before him.¹⁹⁰

6.168 Subsequently, in *Smith v Hassall*, AH Simpson CJ in Eq of the Supreme Court of New South Wales held that the rule regarding the 'half measure' was not binding in the colony, although '[t]he trustee must act as a prudent man would act'.¹⁹¹ In coming to that view, his Honour referred to the differences between the

186 *Ibid.*

187 *Trusts Act 1973* (Qld) s 23 is set out at [6.25] above.

188 (1865) SCR (NSW) Eq 110, 111–12.

189 (1897) 23 VLR 118, 127–8.

190 *Ibid* 128.

191 (1899) 20 LR (NSW) Eq 165, 172. AH Simpson CJ in Eq considered (at 172) that a trustee 'would not be justified in advancing up to the two thirds limit, except in buildings which may be regarded as having a substantially permanent value'.

conditions prevailing in England and New South Wales:¹⁹²

It does not follow that what is a rule of prudence in England is necessarily a rule of prudence here, and if so, the Court here is not, in my opinion, bound slavishly to follow the *cursus curiæ* in England. In a country which has been settled, and the soil cultivated for centuries which carries a dense population and is intersected by a network of railways and other means of communication, it may well be that freehold agricultural land is the best kind of security; but it does not follow that this is so in a newly settled country where the distances are much greater, the means of communication less, and the population sparse. Again, does 'agricultural land' mean uncleared land fit when cleared for agriculture, or only cleared land ready for the plough?

6.169 His Honour rejected the premise underlying the lending margins that agricultural land is a safer security than land on which a business is conducted:¹⁹³

Even if [agricultural land is] confined to [cleared land ready for the plough] it seems to me absurd to suppose that a loan up to the two-thirds margin on a piece of cleared land, a long distance from any market, and approached only by a bush road, would be a better security than first-class buildings in Pitt-street, let at a high rental.

6.170 In light of these decisions, it is unlikely that a court would find that a trustee was in breach of trust merely for lending more than half the value of a property that was not agricultural land if, in doing so, the trustee was not also in breach of the duty of care imposed by section 22 of the *Trusts Act 1973* (Qld). Even the House of Lords, in articulating these rules, acknowledged that the lending margins did not represent 'hard and fast' rules.¹⁹⁴ Similarly, it is doubtful that a trustee would be held to have committed a breach of trust by having a valuation conducted by a valuer who did not carry on business locally if the valuer was otherwise qualified to make the valuation. The cases where that was an issue do not put the requirement to have a local valuer as high as the commentary on those cases might suggest.¹⁹⁵

6.171 However, there is nothing to suggest that the requirement in the English cases for the trustee personally to determine the amount that may properly be lent is no longer good law in Australia. It is arguable that this requirement is not inconsistent with the *Trusts Act 1973* (Qld) and is, therefore, preserved by section 23.

Whether a provision to the general effect of section 30(1) should be retained

6.172 In England, section 8(1) of the *Trustee Act 1925* was repealed by the *Trustee Act 2000* (UK).¹⁹⁶ The repeal of that section implemented a

¹⁹² Ibid 171–2.

¹⁹³ Ibid 172.

¹⁹⁴ See [6.152] above.

¹⁹⁵ See the cases cited at n 184 above, where the failure to retain an expert with local knowledge was a breach in the circumstances of the particular case, but the retention of an expert with local knowledge was not expressed as a general rule. Cf, eg, PH Pettit, *Equity and the Law of Trusts* (Butterworths, 8th ed, 1997) 401, n 8, where it is suggested that the expert retained to value the property 'had to have local knowledge'.

¹⁹⁶ *Trustee Act 2000* (UK) c 29, s 40(1), (3), sch 2 pt II para 18, sch 4 pt II.

recommendation of the Law Commission of England and Wales, which considered that a number of provisions were rendered unnecessary by its proposed new investment provisions.¹⁹⁷ In its view, the provisions in Part I of the 1925 Act, including section 8, were out-dated and would not be required under the new regime. It commented that:¹⁹⁸

The new wide power of investments will encompass the specific cases mentioned in Part I of the 1925 Act. In addition, the somewhat unsatisfactory collection of trustee exemption provisions which it contains will be replaced with a new statutory duty of care ...

6.173 Similarly, in Ontario, the current *Trustee Act* no longer includes an equivalent provision.¹⁹⁹

6.174 The British Columbia Law Institute has also recommended the repeal of the equivalent provision in that province.²⁰⁰ In its view, the provision did not serve any purpose once the list of authorised trustee investments was abolished:²⁰¹

Sections 92(1) and (2) are spent, as their subject-matter is conceptually related to the list of authorized investments formerly found in s 15, which was repealed by the *Trustee Investment Statutes Amendment Act 2002*. The general prudential standard of care expressed in ss 6(2) and 28 of the proposed Act, together with s 29 and other trustee investment provisions of the proposed Act incorporating the main elements of portfolio theory, would supplant the few provisions relating to the repealed s 15 that remain in the present Act.

Whether section 30(1) is redundant

6.175 The recommendations made in other jurisdictions for the repeal of the equivalent of section 30(1) have generally linked its repeal to the enactment of new investment powers and, in particular, to the introduction of a statutory duty of care (similar to the duty of care imposed by section 22 of the *Trusts Act 1973* (Qld)). However, sections 22 and 30(1) of the *Trusts Act 1973* (Qld) do not have identical purposes.

6.176 Section 22 generally requires trustees, in exercising a power of investment, to exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of other persons.²⁰² If the property on which a loan is secured ultimately proves to be insufficient and the trustee has

¹⁹⁷ Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999) [2.27].

¹⁹⁸ Ibid [2.27], n 50.

¹⁹⁹ The provision contained in the previous Act, *Trustee Act*, RSO 1980, c 152, s 30, was not carried over when the *Trustee Act*, RSO 1990, c T 23 was passed. The 1990 Act abolished the list of authorised trustee investments, and instead permits a trustee to invest trust property in any form of property in which a prudent investor might invest: s 27(2).

²⁰⁰ *Trustee Act*, RSBC 1996, c 464, s 92(1), which is in similar terms to s 30 of the *Trusts Act 1973* (Qld), except that it refers to a loan that does not exceed 75% (rather than two-thirds) of the value of the property stated in the valuer's report.

²⁰¹ British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 110, n 23. This recommendation has not been implemented.

²⁰² As noted at [6.19] above, a higher standard applies if the trustee's profession, business or employment is, or includes, acting as a trustee or investing money for other persons: *Trusts Act 1973* (Qld) s 22(1)(a).

not met the standard imposed by section 22 or any of the rules or principles preserved by section 23, the trustee will have committed a breach of trust.

6.177 However, the purpose of including a provision like section 30(1) is not to establish particular standards in relation to lending, but to give trustees greater certainty at the time of making a loan that, provided that certain conditions are satisfied, they will not subsequently be held liable for a breach of trust. The duty imposed by section 22 is similar to the duty that previously applied under the case law,²⁰³ and the inclusion of that provision does not make it either easier or more difficult for a trustee to determine whether or not a loan of a particular amount constitutes a breach of trust. Further, compliance with the conditions in section 30(1) obviates the need for a trustee to be concerned with whether the old rules in relation to lending have been preserved by section 23.²⁰⁴

6.178 On that basis, it is arguable that section 30(1) is not redundant, and that its retention or omission depends on whether there are any policy objections to its retention.

Whether there are policy objections to the retention of section 30(1)

6.179 In Chapter 8, the Commission has proposed that the *Trusts Act 1973* (Qld) should confer on a trustee all the powers of an absolute owner of property (the 'general property power'). As explained previously, section 30(1) does not prevent a trustee from lending more than two-thirds of the value of property, but merely provides protection to a trustee who lends not more than two-thirds and who complies with the other conditions of the provision. Accordingly, if the Act is ultimately amended to introduce the general property power, the retention of section 30(1) would not be inconsistent with that approach.

6.180 In the absence of a provision to the general effect of section 30(1), a trustee who committed a breach of trust in relation to lending money could seek to be relieved from personal liability under section 76 of the *Trusts Act 1973* (Qld). That provision gives the court the power to relieve a trustee from personal liability for a breach of trust if it appears to the court that the trustee has acted honestly and reasonably and ought fairly to be excused.²⁰⁵

6.181 Of course, excusal from liability under section 76 is in the discretion of the court, whereas compliance with section 30(1) results in the automatic protection of the trustee. For that reason, while section 76 is an extremely beneficial provision for trustees, it does not give them the same level of assurance as section 30(1) about the potential for future liability.

203 See [7.56] ff below.

204 See [6.162] ff above.

205 *Trusts Act 1973* (Qld) s 76 is considered in Chapter 11.

6-9 Should the *Trusts Act 1973 (Qld)* continue to include a provision to the general effect of section 30(1) or is it sufficient that the court may, under section 76, relieve a trustee from personal liability for a breach of trust if it appears to the court that the trustee has acted honestly and reasonably, and ought fairly to be excused?

Whether section 30(1)(a), if retained, should provide the same, or a different, level of protection

6.182 Section 30(1) of the *Trusts Act 1973 (Qld)* protects a trustee who lends money on the security of property, provided that the trustee complies with certain conditions. Currently, the relevant condition in section 30(1)(a)(ii) is that the amount of the loan was not more than two-thirds of the value of the property stated in the valuer's report. The similar provisions in the other Australian jurisdictions also include a two-thirds limit.²⁰⁶

6.183 In contrast, the New Zealand provision is framed in slightly different terms, and does not refer to a fixed proportion of the value of the property.²⁰⁷

6.184 If the Act is to continue to include a provision that protects trustees in respect of loans made on the security of property, the key issue is how the condition that relates to the amount of the loan should be framed. It could, for example, be expressed as a fixed proportion of the value of the property (whether that remains at two-thirds or is changed to a different proportion) or it could adopt a different formulation altogether.

Protection where the loan does not exceed a fixed proportion of the value of the property

6.185 Section 30(1)(a) of the *Trusts Act 1973 (Qld)* does not prevent a trustee from lending more than two-thirds of the value of property and, in relation to a particular property, a trustee might well be justified in lending a higher proportion of its value. However, it does not necessarily follow that the two-thirds limit specified in section 30(1)(a) is too low.

6.186 The purpose of including a statutory provision that confers protection in certain circumstances is to give trustees an assurance that, if they satisfy the conditions in the provision, they will not be held liable for a breach of trust if the security proves to be insufficient.

6.187 Obviously, if the proportion of the value is too low, the provision will not afford any meaningful protection. However, if the proportion of the value is too high, the provision will give protection to trustees in circumstances where there is a real likelihood that the loan would otherwise amount to a breach of trust. For that

²⁰⁶ *Trustee Act 1925 (ACT)* s 18(2)(c); *Trustee Act 1925 (NSW)* s 18(3)(a); *Trustee Act (NT)* s 10C(1)(a)(ii); *Trustee Act 1936 (SA)* s 13A(1)(a)(ii); *Trustee Act 1898 (Tas)* s 12B(1)(a)(ii); *Trustee Act 1958 (Vic)* s 12A(1)(b); *Trustees Act 1962 (WA)* s 26(1)(b).

²⁰⁷ See *Trustee Act 1956 (NZ)* s 13N(1)(b), which is set out at [6.190] below.

reason, section 30(1)(a)(ii) of the *Trusts Act 1973* (Qld) and the equivalent provisions in the other Australian jurisdictions have adopted the historically 'safe' proportion of two-thirds.²⁰⁸

6.188 The Law Reform Commission of Western Australia, in its 1984 Report on the Administration of Estates, considered whether the two-thirds limit then mentioned in section 22 (now section 26) of the *Trustees Act 1962* (WA) should be increased. It noted that trustee companies had favoured an increase, while other respondents had opposed any change to that limit.²⁰⁹

The Trustee Companies suggested that the limitation of the protection given by section 22 to loans which do not exceed two-thirds of the value of the property limits significantly the range of persons to whom money can be lent and the type of property which can be financed. The relatively small sums that many trustees have available for investment on mortgage makes the housing market more suitable for them than commercial properties, which generally require larger amounts. However, the present provisions inhibit such trustee investment because in effect they require a house purchaser to have or borrow elsewhere a one-third deposit, whereas other lenders are prepared to lend a greater proportion. If money is thereby difficult to place on mortgage, trustees may invest in other, less attractive, fixed interest securities. The Trustee Companies also suggested that the effect of inflation on the value of real estate may increase the margin of security during the term of the loan, thus enhancing its safety.

The response of the commentators on the working paper varied. Some favoured increasing the proportion to as much as eighty percent, but others, including the Law Society, thought that the present two-thirds rule safeguarded trust funds and were against change.

6.189 The Western Australian Commission ultimately recommended against any change to that limit, preferring to retain a cautious approach to the protection conferred by the provision:²¹⁰

The Commission agrees with those commentators who consider that the present rule should not be altered. The rules embodied in the *Trustees Act* must operate through a wide range of economic circumstances and the present recession, which has seen land values in many areas of Perth fall significantly, has demonstrated the validity of a cautious approach. Accordingly, it recommends that there should be no general change to the two-thirds rule in section 22.

Other approaches

6.190 As mentioned earlier, the New Zealand provision does not refer to a two-thirds limit or to any other fixed proportion of the value of the property. The relevant condition for protection is that:²¹¹

208 See [6.155] above.

209 Law Reform Commission of Western Australia, *Trusts and the Administration of Estates: Part V — Trustees' Powers of Investment*, Report, Project No 34 (1984) [5.2]–[5.3].

210 Ibid [5.4].

211 *Trustee Act 1956* (NZ) s 13N(1)(b).

the amount of the loan does not exceed the proportion of the value of the property stated in the [valuer's] report as the maximum proportion that the valuer considers that it would be prudent to lend on that property.

6.191 If, for example, a valuer stated that it would be prudent for the trustee to lend not more than 50% of the value of the property, the New Zealand provision would protect the trustee only if he or she did not lend more than that percentage. In that respect, it adopts a flexible approach to the extent of the protection given, rather than relying on a fixed two-thirds proportion.

6.192 However, it is also possible that the provision could protect a trustee who lent 100% of the value of the property (if the valuer considered that it would be prudent to lend up to that proportion of the value of the property).

6.193 The effectiveness of the provision as a means of safeguarding the interests of the beneficiaries depends on the valuer building in an appropriate 'buffer' to mitigate against a possible depreciation in the value of the property. In contrast, the two-thirds proportion found in the Queensland provision, in practical terms, provides a one-third buffer against a depreciation in the value of the property. Given the variation that can occur between valuations by different valuers of the same property,²¹² the Queensland provision arguably operates as a greater safeguard of the beneficiaries' interests.

6-10 If the *Trusts Act 1973* (Qld) continues to include a provision to the general effect of section 30(1), should that section:

- (a) continue to include, as a condition for protection, that the loan was not more than 'two-thirds' of the value of the property stated in the valuer's report; or**
- (b) replace the reference to 'two-thirds' with a different proportion of the value of the property stated in the valuer's report (and, if so, what proportion); or**
- (c) not specify a fixed proportion of the value of the property, but recast the extent of the protection in some other way — for example, that the amount of the loan does not exceed the proportion of the value of the property stated in the valuer's report as the maximum proportion that the valuer considers that it would be prudent to lend on that property?**

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See, eg, *Ingle v Partridge (No 2)* (1865) 34 Beav 411, 413; 55 ER 694, 694 where Lord Romilly MR observed that valuations are 'mere matters of opinion'.

Limitation of liability of trustee for loss on improper investments

6.194 Section 30A of the *Trusts Act 1973* (Qld) limits the liability of a trustee who improperly lends trust money on a security that would have been a proper investment if the loan had been for a smaller amount. It provides:²¹³

30A Limitation of liability of trustee for loss on improper investments

- (1) If a trustee improperly lends trust money on a security that would have been a proper investment if the amount lent had been less than the actual amount lent—
 - (a) the security is to be taken to be a proper investment in relation to the lesser amount; and
 - (b) the trustee is only liable to make good the difference between the amount advanced and the smaller amount, with interest.
- (2) This section applies to investments whether made before or after the commencement of this section.

6.195 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'.²¹⁴ 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).

6.196 Section 30A(1) limits the trustee's liability to the difference between the amount advanced and the smaller amount that might properly have been lent, plus interest. For example, if the amount lent on the security of a mortgage was \$100 000 and the property is now sold for \$55 000, the loss to the beneficiaries is \$45 000. However, if the amount that might properly have been lent was \$80 000, the trustees' liability is \$20 000, being the difference between the amount actually lent and the amount that might properly have been lent. The trustees are not held liable to compensate the beneficiaries for that part of the loss (\$25 000) that results from the depreciation in value of the property. It has been noted that:²¹⁵

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.

²¹³ Before the substitution of pt 3 of the Act by the *Trusts (Investments) Amendment Act 1999* (Qld), a similar provision was included in s 28 of the *Trusts Act 1973* (Qld) (Act as passed) and, before that Act, in s 9 of the *Trustees and Executors Act 1897* (Qld).

²¹⁴ *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 504 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ), citing *Target Holdings Ltd v Redfern* [1996] AC 421, 437 (Lord Browne-Wilkinson).

²¹⁵ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1828].

6.197 In order to obtain the protection of section 30A, a trustee must 'establish the propriety of the investment independent of value'.²¹⁶ The section will not apply if the investment was improper otherwise than as to the amount advanced — for example, because the trustee made an investment that was not authorised,²¹⁷ or was of 'such a kind that it ought never to have been made at all for any amount large or small'.²¹⁸

6.198 Provisions in similar terms are found in the trustee legislation of the other Australian jurisdictions and New Zealand.²¹⁹

6.199 These provisions have their origins in section 5 of the English *Trustee Act 1888*, which was replaced by section 9 of the *Trustee Act 1893*, which was in turn re-enacted as section 9 of the *Trustee Act 1925*. That section has since been repealed by the *Trustee Act 2000* (UK),²²⁰ implementing a recommendation of the Law Commission of England and Wales. As mentioned earlier, the Law Commission considered that a number of provisions, including section 9 of the *Trustee Act 1925*, were rendered unnecessary by its proposed new investment provisions.²²¹

6-11 Should the *Trusts Act 1973* (Qld) continue to include a provision to the effect of section 30A?

Protection for dispensing with investigations of lessee's title

6.200 Section 30(2) of the *Trusts Act 1973* (Qld) applies where a trustee lends money on the security of leasehold property. It relieves the trustee from liability for breach of trust for dispensing with the production or investigation of the lessee's title. Section 30(2) provides:²²²

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

...

(2) If a trustee lends an amount on the security of leasehold property, the trustee is not in breach of trust only because the trustee dispensed,

²¹⁶ *Re Walker* (1890) 59 LJ Ch 386, 391 (Kekewich J).

²¹⁷ *Ibid.* See also *Re Dive* [1909] 1 Ch 328, 341–2 (Warrington J).

²¹⁸ *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, 542) that the trustees could not rely on s 9 of the *Trustee Act 1893*, 56 & 57 Vict, c 53 in respect of an investment that was 'most provident'.

²¹⁹ *Trustee Act 1925* (ACT) s 19; *Trustee Act 1925* (NSW) s 19; *Trustee Act* (NT) s 10A; *Trustee Act 1936* (SA) s 13B; *Trustee Act 1898* (Tas) s 12C; *Trustee Act 1958* (Vic) s 12B; *Trustees Act 1962* (WA) s 26A; *Trustee Act 1956* (NZ) s 13O.

²²⁰ *Trustee Act 2000* (UK) c 29, s 40(1), (3), sch 2 pt II para 18, sch 4 pt II.

²²¹ See [6.172] above.

²²² *Trusts Act 1973* (Qld) s 30(1) applies to transfers of existing securities as well as to new securities and to investments, whether made before or after the commencement of that section: s 30(3).

either completely or in part, with the production or investigation of the lessee's title when making the loan.

6.201 Before the substitution of Part 3 of the Act in 2000, a provision in similar terms was included in section 27(2) of the *Trusts Act 1973* (Qld), except that it referred to the production or investigation of the lessor's, rather than the lessee's, title.²²³

Background

6.202 The investigation of the title of a vendor was an important aspect of the conveyancing of 'old system' land. Whereas title to land under the *Land Title Act 1994* (Qld) is established by registration of the registered proprietor's interest in the freehold land register,²²⁴ title to old system land was established by 'the obtaining and presentation of evidence of the chain of instruments and events constituting the title'.²²⁵ Proof of title to old system land could be quite onerous.²²⁶

For practical reasons, the length of time over which a vendor is bound to adduce proof of these steps on each occasion was limited originally by the practice of conveyancers to sixty years, and thereafter by successive statutory modifications to forty years and thirty years. In each case it may be necessary to go back over a longer period in order to commence the investigation with what is called a 'good root of title'. (notes omitted)

6.203 In its 1971 Report, the Commission explained that clause 27(2) of its draft Bill was remedial 'in circumstances in which the trustee has in other respects acted reasonably'.²²⁷ It went on to observe that:²²⁸

a trustee is, in making an investment, always bound to act as 'a reasonably prudent man of business' (*Fouche v Superannuation Fund Board* (1952) 88 CLR at p 641), and the clause does not detract from the duty, nor does it confer an indemnity on a trustee who fails to investigate a lessor's title. The emphasis of the proposed provision falls on the word 'only' in cl 27(2), and its purpose is to alter the law, which, as it now stands, requires the most minute investigations of title irrespective of the particular circumstances of the case, and which, if title happens (even after proper investigations) to be in some degree defective, automatically renders the investment a breach of trust.

6.204 Section 27(2) was modelled on similar provisions in England, Western Australia, Victoria and New Zealand (all of which referred to the lessor's title).²²⁹

²²³ The Explanatory Notes to the Trusts (Investments) Amendment Bill 1999 (Qld) do not refer to this change in the wording between former s 27(2) and new s 30(2) of the *Trusts Act 1973* (Qld).

²²⁴ *Land Title Act 1994* (Qld) ss 27, 184.

²²⁵ BA Helmore, *The Law of Real Property in New South Wales* (Law Book, 2nd ed, 1966) 32.

²²⁶ *Ibid.*

²²⁷ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 26.

²²⁸ *Ibid* 27.

²²⁹ *Ibid.* See *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 8(2) (Act as passed); *Trustees Act 1962* (WA) s 22 (Act as passed); *Trustee Act 1958* (Vic) s 8(2) (Act as passed); *Trustee Act 1956* (NZ) s 10(2) (Act as passed), now s 13N(2).

6.205 These provisions had their origins in section 4 of the English *Trustee Act 1888*.²³⁰ At that time, trustees were required, when investing on leasehold security, to see that the title was in all respects a marketable one and, therefore, to investigate the lessor's title.²³¹ However, in practice, lease agreements, and the conditions under which the leaseholds were sold, often stipulated that production of the lessor's title should not be required. Further, the English *Vendor and Purchaser Act 1874* provided that, under a contract to grant or assign a term of years, whether derived out of a freehold or leasehold estate, the intended lessee or assignee was not entitled to call for the title of the freehold (that is, the lessor's title). Similarly, the English *Conveyancing and Law of Property Act 1881* provided that, under a contract to sell or assign a term of years derived out of a leasehold interest in land, the intended assignee was not entitled to call for the title to the leasehold reversion (that is, the interest remaining in the owner-lessor after granting the lease).²³² The effect was 'practically to debar trustees, unless they were willing to incur the liability of being charged as for a breach of trust, from investing on leasehold securities'.²³³ Section 4 of the *Trustee Act 1888* overcame this by relieving trustees from liability on the ground that they had dispensed with the production or investigation of the lessor's title.

6.206 However, as the Commission observed in its 1971 Report, the obligation to require production of the lessor's title was not absolutely removed by the provision.²³⁴

It must, however, be borne in mind by trustees that the obligation to require production of the lessor's title is not absolutely removed, but only where the title accepted is such as in the opinion of the Court a person acting with prudence and caution would have accepted. And it is conceived that, save perhaps in the case where the freehold title is very well known, a trustee would not be justified in advancing trust money upon the security of a recently granted lease, but should require such length of title to the leasehold interest as afforded, from lapse of time and other circumstances, a presumption that the lease is subsisting and unimpeachable.

Whether section 30(2) should be retained

6.207 In Victoria and Western Australia, the counterparts to section 30(2) were repealed in 1995 and 1997, respectively, when the trustee legislation was amended to include the new 'prudent person' investment provisions.²³⁵

6.208 The provisions in the Northern Territory, South Australia and Tasmania were reinserted (and renumbered) when the new investment provisions were

230 See [6.144] above.

231 AR Rudall and JW Greig, *The Law of Trusts and Trustees* (Jordan & Sons, 2nd ed, 1898) 42.

232 Ibid, referring to *Vendor and Purchaser Act 1874*, 37 & 38 Vict, c 78, s 2 and *Conveyancing and Law of Property Act 1881*, 44 & 45 Vict, c 41, s 13. In Queensland, similar provisions are contained in s 237(2)–(4) of the *Property Law Act 1974* (Qld). See also *Property Law Act 1974* (Qld) s 238. Those provisions are contained in pt 18 of the *Property Law Act 1974* (Qld) (Unregistered land).

233 AR Rudall and JW Greig, *The Law of Trusts and Trustees* (Jordan & Sons, 2nd ed, 1898) 42.

234 Ibid 43.

235 *Trustee and Trustee Companies Amendment Act 1995* (Vic); *Trustees Amendment Act 1997* (WA).

enacted in those jurisdictions in 1996, 1995 and 1998, respectively.²³⁶ As part of those amendments, the Tasmanian provision changed from referring to ‘lessor’s title’ to ‘lessee’s title’.

6.209 In England, the equivalent provision — section 8(2) of the *Trustee Act 1925*²³⁷ — was repealed by the *Trustee Act 2000* (UK), implementing a recommendation of the Law Commission of England and Wales.²³⁸ The Law Commission considered the provision to be unnecessary in view of its proposed new investment provisions.²³⁹

6.210 Given that there is no longer any old system land in Queensland,²⁴⁰ section 30(2) of the *Trusts Act 1973* (Qld) will be relevant only where a trustee lends on the security of a lease of old system land that remains in another jurisdiction. When section 4 of the English *Trustee Act 1888* was enacted, trustees were quite restricted in terms of the range of authorised investments, and it no doubt created practical difficulties if a trustee who was otherwise authorised to invest on the security of leasehold property was, for practical reasons, effectively ‘debarred’ from doing so.²⁴¹ However, in light of the wide powers of investment that may now be exercised by trustees and the rarity of old system land, it is arguable that a trustee’s liability for lending on the security of leasehold property should simply be determined according to whether the trustee has complied with the duty imposed by section 22 of the Act.

6.211 The Commission’s preliminary view is that section 30(2) of the *Trusts Act 1973* (Qld) is no longer needed and should be omitted. The Commission invites submissions on the following proposal:

6-12 Section 30(2) of the *Trusts Act 1973* (Qld) should be omitted.

Court may take into account investment strategy etc in action for breach of trust

6.212 Section 30B of the *Trusts Act 1973* (Qld) provides that, in an action for breach of trust in relation to a trustee’s power of investment, the court may, when considering the question of the trustee’s liability, take the following matters into account:

- the nature and purpose of the trust;

²³⁶ *Trustee Act* (NT) s 10C(2); *Trustee Act 1936* (SA) s 13A(2); *Trustee Act 1898* (Tas) s 12B(2).

²³⁷ However, s 8(2) of the *Trustee Act 1925*, 15 & 16 Geo 5, c 19 referred to the *lessor’s*, rather than the *lessee’s*, title.

²³⁸ See [6.172] above.

²³⁹ *Ibid.*

²⁴⁰ See [8.78] below.

²⁴¹ See [6.205] above.

- whether the trustee had regard to the matters set out in section 24 so far as 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 3 of the Act; 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.

Power of court to set off gains and losses arising from investment

6.213 Section 30C of the *Trusts Act 1973* (Qld) empowers the court, in an action for breach of trust, to set off gains and losses arising from investments, whether made in breach of trust or not. It 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.²⁴² The court's power is discretionary, and is in addition to any other powers of set off.²⁴³

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

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Trusts Act 1973 (Qld) s 30C(2).

Chapter 7

Trustees' Duties

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INTRODUCTION

The nature of trustees' duties

7.1 On assuming the office of trustee, a trustee becomes subject to a number of duties.¹ By their nature, duties are 'imperative' — that is, they compel a trustee to act, or prohibit a trustee from acting, in a particular way. Powers, on the other hand, are 'facultative' — that is, they 'enable a trustee to act in a certain way, but leave [the trustee] with a discretion as to whether he or she should so act'.²

7.2 Some duties are coupled with a power, in which case the trustee may usually exercise a discretion as to when and how to perform the duty.³ The effect of a duty coupled with a power has been described in the following terms:⁴

This is distinct from a mere power where the trustees have an initial discretion whether they will do the act or not. In the case of an imperative duty coupled with a discretionary power the court will compel the trustees to perform the duty, as any refusal to perform the duty is regarded as a repudiation of the power or discretion coupled with it. But if the trustees are willing to perform the duty, the court will not interfere with their decision as to how the power coupled with it is to be executed.

7.3 An example of a duty coupled with a discretionary power is where a trust instrument imposes on trustees the duty to sell particular trust property, but gives the trustees a discretionary power to postpone the sale.⁵

Sources of duties

7.4 As explained in Chapter 1, the *Trusts Act 1973* (Qld) does not codify the law of trusts. The law of trusts is found principally in the case law, and this is especially so in relation to trustees' duties.

7.5 The *Trusts Act 1973* (Qld) does not contain a general statement of the duties of trustees. To the extent that the Act addresses trustees' duties, it does so mainly in the context of trustees' investment powers. As explained in Chapter 6, section 22 of the Act imposes a duty of care on trustees when exercising a power of investment. Further, subject to certain exceptions, section 23 preserves the rules and principles of law and equity that impose a duty 'on a trustee exercising a power of investment', and section 24 requires trustees to take into account specified matters when exercising a power of investment.

7.6 In contrast, the *Succession Act 1981* (Qld) includes a brief statement of the key duties of personal representatives.⁶ However, this list of duties is by no

¹ A person who does not wish to accept an appointment as trustee can 'disclaim' the office: see [3.16] above.

² GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [22.05].

³ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1601].

⁴ *Ibid* [1616].

⁵ *Ibid*.

⁶ *Succession Act 1981* (Qld) s 52(1).

means exhaustive, and the content of the duties, especially the main duty 'to administer the estate according to law', is still derived from the case law.

7.7 In addition to the duties imposed by the general law and by statute, trustees are also subject to any duties imposed by the trust instrument itself.⁷

Just as the law of contract permits the parties to a contract to determine its terms, subject to any relevant legislation, the law of trusts permits the settlor or testator to determine the incidents of a trust.

Issues considered in this chapter

7.8 This chapter gives an overview of trustees' duties under the general law. It then examines whether:

- the *Trusts Act 1973* (Qld) should include a statutory duty of care (similar to the duty imposed by section 22 of the Act) that would apply to trustees generally in the administration of the trust, rather than being limited to the exercise of a power of investment;
- apart from a general statutory duty of care, any of the specific duties that apply under the general law should be incorporated into the Act as statutory duties;
- the Act should include specific provisions to clarify the duty of trustees in relation to the keeping of accounts and other records, and the associated duty to provide accounts and other information to beneficiaries or other persons; and
- the duty of trustees to act jointly should remain unchanged or whether the Act should make provision for trustees to act by majority decision.

THE GENERAL LAW

Specific duties

7.9 Trustees are fiduciaries and, therefore, subject to the same duties as other fiduciaries. However, many of the other duties to which they are subject are specific to their office as trustee.

Fiduciary duties

7.10 As fiduciaries, trustees are subject to the 'proscriptive fiduciary duties'⁸ — 'not to obtain any unauthorised benefit from the relationship and not to be in a

⁷ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1617]. See also JH Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 *Yale Law Journal* 625.

⁸ *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ). See generally P 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, 233–4.

position of conflict'.⁹ The purpose of these duties is 'to ensure that the trustee's loyalty to serve the interests of the trust, or the beneficiaries of the trust, is not distracted by a personal interest which conflicts with those interests'.¹⁰

7.11 The duties may be seen as arising from the fundamental duty of fiduciaries to 'give undivided loyalty to the persons whom they serve'.¹¹

Duty to become acquainted with the terms of the trust

7.12 The first duty of trustees is 'to become thoroughly acquainted with the terms of the trust and all documents, papers and deeds relating to or affecting the trust property as come into their possession and control'.¹²

Duty to get in the trust property

7.13 Trustees have a duty to 'get in all trust property, so the title to it is, if not in their names, at least in their control'.¹³ They must keep documents relating to trust property under their own control and in a safe place.¹⁴

[T]rustees must have their muniments of title, as well as their securities, under their own control. ... They are intrusted with the custody of them, and they are bound within reasonable limits to see that the deeds are kept in a safe place, and that no one else can take them away.

Duty to adhere to, and carry out, the terms of the trust

7.14 The duty to carry out or 'obey' the terms of the trust has been described as '[p]erhaps the most important duty of a trustee'.¹⁵ It has been observed that the duty to carry out the terms of the trust 'modifies all other rules because these other rules are applied subject to any provisions contained in the trust instrument itself'.¹⁶

7.15 The duty is, however, subject to a number of exceptions, and a trustee is not bound to carry out the terms of the trust if.¹⁷

⁹ *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ).

¹⁰ *Jones v AMP Perpetual Trustee Company NZ Ltd* [1994] 1 NZLR 690, 711 (Thomas J).

¹¹ *Breen v Williams* (1996) 186 CLR 71, 108 (Gaudron and McHugh JJ). See also at 95 (Dawson and Toohey JJ). See also *Bristol and West Building Society v Mothew* [1998] Ch 1, 18 (Millett LJ); HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 15 December 2009) [9.210].

¹² JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1701]. See *Hallows v Lloyd* (1888) 30 Ch D 686, 691 (Kekewich J).

¹³ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1702].

¹⁴ *Field v Field* [1893] 1 Ch 425, 429 (Kekewich J).

¹⁵ *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 498 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

¹⁶ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1704].

¹⁷ See JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1705]; GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [22.15].

- the trustee is directed to that effect by the beneficiaries, all of whom have full legal capacity, are absolutely entitled to the trust property, and act unanimously in giving the direction;
- the terms are incapable of being carried out or, if carried out, would result in illegality;
- legislation confers specific powers on trustees notwithstanding anything contained in the trust instrument,¹⁸ in which case the departure from the terms of the instrument is warranted; or
- the court sanctions a deviation from the trust.

Duty to keep and render proper accounts

7.16 It is the duty of a trustee to 'keep proper accounts, and to have them always ready when called upon to render them' to the beneficiaries.¹⁹ The duty carries with it 'a corresponding entitlement in the beneficiaries, albeit subject to some limitations, to information regarding the trust property and the management of the trust'.²⁰

7.17 The duty to keep proper accounts, and the corresponding entitlement of beneficiaries (and of the objects of a discretionary trust), are discussed in greater detail later in this chapter.²¹

Duty to act personally

7.18 Trustees are ordinarily required to act personally in administering the trust.²² This duty has a number of manifestations.

7.19 Unless they are authorised to do so,²³ trustees may not delegate the exercise of their duties or powers,²⁴ not even to a co-trustee.²⁵ Trustees are entitled to obtain advice from skilled persons in respect of matters in which they are not experienced, but must still exercise their own judgment about the matter.²⁶

¹⁸ See, eg, *Trusts Act 1973* (Qld) s 31(1).

¹⁹ *Kemp v Burn* (1863) 4 Giff 348, 349–50; 66 ER 740, 740–1 (Stuart V-C). See also *Pearse v Green* (1819) 1 Jac & W 136, 140; 37 ER 327, 329 (Plumer MR).

²⁰ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [22.35].

²¹ See [7.140] ff below.

²² *Turner v Corney* (1841) 5 Beav 515, 517; 49 ER 677, 678 (Lord Langdale MR).

²³ See *Pilkington v Inland Revenue Commissioners* [1964] AC 612, 634 (Viscount Radcliffe). See also s 56 of the *Trusts Act 1973* (Qld), discussed at [9.129] ff below, which permits a trustee, in specified circumstances, to delegate the trusts, powers, authorities and discretions vested in the trustee.

²⁴ *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).

²⁵ *Re Flower and Metropolitan Board of Works* (1884) 27 Ch D 592, 596 (Kay J). See [9.13] below.

²⁶ *Learoyd v Whiteley* (1887) 12 App Cas 727, 731 (Lord Halsbury LC).

7.20 Trustees must also ‘resist dictation’ — that is, they must not permit themselves to be directed as to the manner in which they exercise their discretion,²⁷ whether by the settlor, the beneficiaries or a third party.²⁸

7.21 Further, trustees must not fetter their discretion.²⁹ They must not bind themselves contractually to ‘exercise a trust in a specified manner to be decided by considerations other than [their] own conscientious judgment at the time as to what is best in the interests of those for whom [they are] trustee’.³⁰ The strict application of that principle has precluded the grant of an option to purchase, or renew a lease of, trust property.³¹ However, ‘the courts have not been so unyielding, and have accepted that in some circumstances a limited fetter can reflect the actions of an ordinary prudent business person’.³²

7.22 The obligation for co-trustees to act jointly is a further aspect of the duty of trustees to act personally.³³

Duty to act impartially

7.23 As a general rule, ‘trustees are bound to hold an even hand among their beneficiaries, and not favour one as against another’.³⁴

7.24 As noted in Chapter 6, this duty is of particular relevance to trusts with successive interests — that is, where there is a beneficiary who is entitled to the income of the trust property and a beneficiary who is entitled in remainder. In this context, it is relevant to ‘questions of distinguishing between capital and income, to the selection of investments, and to the realisation of wasting property or reversionary property’.³⁵ Where trust property is held for successive interests, ‘a conflict, or at any rate a tension’ exists between the interests of the equitable life tenants, who have an interest in the income of the trust, and the remaindermen, who have an interest in ensuring that the trust assets maintain a high and increasing capital value.³⁶

²⁷ *Re Brockbank* [1948] 1 Ch 206. See also JRF Lehane, ‘Delegation of Trustees’ Powers and Current Developments in Investment Funds Management’ (1995) 7 *Bond Law Review* 36, 45.

²⁸ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [22.40]. This issue is considered further at [8.158] below.

²⁹ *Re King* (1904) 29 VLR 793, 796 (Holroyd J).

³⁰ *Osborne v Amalgamated Society of Railway Servants* [1909] 1 Ch 163, 187 (Fletcher Moulton LJ).

³¹ *Clay v Rufford* (1852) 5 De G & Sm 768; 64 ER 1337; *Oceanic Steam Navigation Co v Sutherland* (1880) 16 Ch D 236; *Re Stephenson’s Settled Estates* (1906) 6 SR (NSW) 420; *Rawcliffe v Johnstone* [1921] NZLR 470.

³² GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [22.40].

³³ This requirement is considered in greater detail at [7.228] ff below.

³⁴ *Lloyds Bank PLC v Duker* [1987] 1 WLR 1324, 1330–1 (Mowbray QC). See also *Tanti v Carlson* [1948] VLR 401, 405 (Herring CJ); *Cowan v Scargill* [1985] 1 Ch 270, 286–7 (Megarry V-C).

³⁵ Law Commission of New Zealand, *The Duties, Office and Powers of a Trustee: Review of the Law of Trusts*, Issues Paper No 26 (2011) [1.36].

³⁶ *Re Christmas’s Settlement Trusts* [1986] 1 Qd R 372, 379 (McPherson J).

7.25 However, the duty to act impartially does not apply to the trustees of discretionary trusts in deciding which beneficiaries to benefit.³⁷

In relation to a discretionary power of that character it is, in my opinion, meaningless to speak of a duty on the trustees to act impartially. Trustees, when exercising a discretionary power to choose, must of course not take into account irrelevant, irrational or improper factors. But, provided they avoid doing so, they are entitled to choose and to prefer some beneficiaries over others.

7.26 The rules and principles preserved by section 23 of the *Trusts Act 1973* (Qld) when a trustee is exercising a power of investment include 'a rule or principle imposing a duty to act impartially towards beneficiaries and between different classes of beneficiaries'.³⁸ This duty continues to apply except so far as it is inconsistent with the *Trusts Act 1973* (Qld) or another Act or with the trust instrument.³⁹

7.27 Similar provision is made in the trustee legislation of the other Australian jurisdictions, including in relation to the effect of any inconsistency with the trust instrument.⁴⁰

Duty to invest (or to make the trust property productive)

7.28 Trustees have a duty to invest, even in the absence of a direction to that effect in the trust instrument.⁴¹ Ordinarily, however, trustees will have a discretion as to the manner in which that duty is carried out (subject to the trust instrument, statute and any court order).⁴²

Duty to pay the correct beneficiaries

7.29 Trustees are under a duty to pay the correct beneficiaries.⁴³ This duty could be considered as another aspect of the duty to carry out, or perform, the trust.

7.30 As a response to the strictness of this duty, several provisions of the *Trusts Act 1973* (Qld) 'lighten the heavy burden which was thrown on trustees'.⁴⁴ These include the provisions that give trustees certain relief from liability in respect of:

³⁷ *Edge v Pensions Ombudsman* [1998] Ch 512, 533 (Scott V-C), affd [2000] Ch 602.

³⁸ *Trusts Act 1973* (Qld) s 23(2)(c).

³⁹ *Trusts Act 1973* (Qld) s 23(1).

⁴⁰ *Trustee Act 1925* (ACT) s 14B(2)(c); *Trustee Act 1925* (NSW) s 14B(2)(c); *Trustee Act* (NT) s 7(1)(c); *Trustee Act 1936* (SA) s 8(1)(c); *Trustee Act 1898* (Tas) s 9(1)(b); *Trustee Act 1958* (Vic) s 7(2)(c); *Trustees Act 1962* (WA) s 19(1)(c).

⁴¹ *Adamson v Reid* (1880) 6 VLR 164, 167 (Molesworth J). See also *Byrnes v Kendle* (2011) 243 CLR 253, 277 (Gummow and Hayne JJ).

⁴² GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [22.175].

⁴³ *Barratt v Wyatt* (1862) 30 Beav 441, 444; 54 ER 960, 961 (Romilly MR); *Hilliard v Fulford* (1876) 4 Ch D 389.

⁴⁴ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1735]. The relevant provisions are discussed in Chapter 11.

- the claims of beneficiaries, creditors and other persons where trust property has been distributed after publishing a notice of intended distribution (section 67);
- unascertained liabilities under leases (section 66); and
- calls made on partly paid shares that have been distributed by a personal representative (section 75).

Duty to seek advice

7.31 The duty under the general law to take such care in making investments as an ordinary prudent person would take includes the further duty to seek advice on matters that the trustee does not understand.⁴⁵ In *Cowan v Scargill*, Megarry V-C observed that:⁴⁶

This requirement is not discharged merely by showing that the trustee has acted in good faith and with sincerity. Honesty and sincerity are not the same as prudence and reasonableness. ... Accordingly, although a trustee who takes advice on investments is not bound to accept and act on that advice, he is not entitled to reject it merely because he sincerely disagrees with it, unless in addition to being sincere he is acting as an ordinary prudent man would act.

7.32 Ford and Lee explain that the duty to seek advice is not absolute:⁴⁷

The duty to seek advice is part of the duty of prudence. The duty of prudence sometimes requires the trustee to seek advice, for instance where a particular decision is difficult and the trustee lacks the qualifications or experience to reach it unassisted. A trustee who does seek and obtain advice is under a duty to consider the advice obtained; but is not under a duty to 'take' it if that means that the trustee must act in accordance with the advice obtained. The trustee must decide what is the prudent course of action to take, in the light of the advice obtained. If the trustee were under a duty to act in accordance with the advice obtained, the trustee's discretion would be made subordinate to the adviser's and that would be contrary to principle.

7.33 The rules and principles preserved by section 23 of the *Trusts Act 1973* (Qld) when a trustee is exercising a power of investment include 'a rule or principle imposing a duty to obtain advice'.⁴⁸ This duty continues to apply except so far as it is inconsistent with the *Trusts Act 1973* (Qld) or another Act or with the trust instrument.⁴⁹

45 *Cowan v Scargill* [1985] 1 Ch 270, 289 (Megarry V-C).

46 [1985] 1 Ch 270, 289.

47 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 15 July 2009) [10.2030]

48 *Trusts Act 1973* (Qld) s 23(2)(d).

49 *Trusts Act 1973* (Qld) s 23(1).

7.34 Similar provision is made in the trustee legislation of the other Australian jurisdictions, including in relation to the effect of any inconsistency with the trust instrument.⁵⁰

7.35 In addition, section 24(2)(a) of the *Trusts Act 1973* (Qld) provides 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.⁵¹

7.36 Similar provisions to section 24(2)(a) are included in the trustee legislation of the other Australian jurisdictions.⁵²

7.37 In some situations, a trustee should also seek judicial advice and directions from the court.⁵³

Duty in relation to discretions

7.38 Trustees must exercise their discretions 'in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred'.⁵⁴ Trustees must not exercise their discretions to accomplish an ulterior purpose.⁵⁵

7.39 The requirement for 'real and genuine consideration' requires that there is an 'exercise of active discretion'.⁵⁶

7.40 The corollary to this duty is that, except where trustees disclose their reasons, 'the exercise of an absolute and unfettered discretion is examinable only as to good faith, real and genuine consideration and absence of ulterior purpose, and not as to the method and manner of its exercise'.⁵⁷

7.41 In relation to a 'mere power to appoint' — for example, where trustees hold the trust property for such persons as they may in their discretion appoint — the trustees are bound by the duties of their office in exercising the power 'to do so

⁵⁰ *Trustee Act 1925* (ACT) s 14B(2)(d); *Trustee Act 1925* (NSW) s 14B(2)(d); *Trustee Act* (NT) s 7(1)(d); *Trustee Act 1936* (SA) s 8(1)(d); *Trustee Act 1898* (Tas) s 9(1)(c); *Trustee Act 1958* (Vic) s 7(2)(d); *Trustees Act 1962* (WA) s 19(1)(d).

⁵¹ *Trusts Act 1973* (Qld) s 24(2).

⁵² *Trustee Act 1925* (ACT) s 14C(2)(a); *Trustee Act 1925* (NSW) s 14C(2)(a); *Trustee Act* (NT) s 8(2)(a); *Trustee Act 1936* (SA) s 9(2)(a); *Trustee Act 1898* (Tas) s 8(2)(a); *Trustee Act 1958* (Vic) s 8(2)(a); *Trustees Act 1962* (WA) s 20(2)(a). The ACT and New South Wales Acts require the trustee to comply with the section unless expressly forbidden by the trust instrument: *Trustee Act 1925* (ACT) s 14C(3); *Trustee Act 1925* (NSW) s 14C(3).

⁵³ See the discussion of the court's jurisdiction to give advice and directions at [12.97] ff below and, in particular, *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66.

⁵⁴ *Karger v Paul* [1984] VR 161, 164 (McGarvie J). In this context, 'good faith' has been equated with 'honesty': 164.

⁵⁵ *Cowan v Scargill* [1985] 1 Ch 270, 288 (Megarry V-C).

⁵⁶ *Karger v Paul* [1984] VR 161, 164 (McGarvie J), quoting *Partridge v Equity Trustees Executors and Agency Co Ltd* (1947) 75 CLR 149, 164.

⁵⁷ *Ibid* 166.

in a responsible manner according to its purpose'.⁵⁸ It is not enough for the trustees to 'refrain from acting capriciously'.⁵⁹ They must consider periodically whether or not to exercise the power, consider the range of objects of the power, and consider the appropriateness of individual appointments.⁶⁰

Duty to act with prudence (the duty of care)

7.42 Trustees are under a duty to act prudently in managing the trust, sometimes referred to as an 'equitable duty of care'.⁶¹ The duty has been described in the following terms:⁶²

It is old and accepted law that in managing a trust business the trustee should exercise the same care as an ordinary, prudent business person would exercise in conducting that business as if it were his or her own: *Speight v Gaunt* (1883) 9 App Cas 1; *Learoyd v Whiteley* (1887) 12 App Cas 727; *Knox v Mackinnon* (1888) 13 App Cas 753.

7.43 This duty is discussed in greater detail later in this chapter.⁶³

Classification

7.44 Different commentators have attempted to classify trustees' duties, and have done so in different ways.

7.45 A distinction is often drawn between proscriptive or negative duties, which require trustees to refrain from doing certain things, and prescriptive or positive duties, which require the performance of certain things. Trustees' fiduciary duties are often described in the former terms.⁶⁴ The authors of *Jacobs' Law of Trusts in Australia* point out, however, that 'duties may often be regarded as being in either category depending on the viewpoint adopted'.⁶⁵

⁵⁸ *Re Hay's Settlement Trusts* [1982] 1 WLR 202, 209 (Megarry V-C).

⁵⁹ *Ibid.*

⁶⁰ *Ibid* 210.

⁶¹ P 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, 235.

⁶² *ASC v AS Nominees Ltd* (1995) 62 FCR 504, 516 (Finn J), quoted in *Breen v Williams* (1996) 186 CLR 71, 137 (Gummow J).

⁶³ See [7.56] below.

⁶⁴ *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ). See generally P 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, 233–4.

⁶⁵ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1602].

7.46 On the other hand, Hanrahan has suggested that the duties imposed by equity on trustees of public unit trusts ('responsible entities') can be classified into four broad categories:⁶⁶

- those [proscriptive duties] that arise from the fiduciary relationship between the responsible entity and the members — the 'no conflicts' rule and the 'no profit' rule;
- those prescriptive duties that are imposed on the responsible entity as a trustee, comprising duties to perform the trust and duties relating to the trust property;
- an equitable duty of care; and
- duties relating to the exercise of the responsible entity's discretions, comprising a broad duty of good faith and a requirement that the responsible entity act for a proper purpose.

7.47 Going further, Ford and Lee have suggested that trustees' duties can be reduced to two main kinds: the duty of undivided loyalty; and the duty of care.⁶⁷

7.48 Similarly, Langbein has succinctly described the 'two central duties of trust fiduciary law' as loyalty and prudence.⁶⁸ He has further suggested that the many subrules of fiduciary administration are subsumed under those two duties.⁶⁹

Subrules of fiduciary administration abound — for example, the duties to keep and render accounts, to furnish information, to invest or preserve trust assets and make them productive, to enforce and defend claims, to diversify investments, and to minimize costs. All these rules are subsumed under the duties of loyalty and prudence, they are means of vindicating the beneficial interest. (notes omitted)

7.49 It has also been suggested that trustee duties can be categorised according to the standard of liability that will be imposed for a breach.⁷⁰

For example, liability will be imposed strictly where a trustee has failed to adhere to the trust's terms or has not paid the correct beneficiaries. On the other hand, other duties are regarded as 'fiduciary' in nature ... and liability will be imposed when the relevant fiduciary standard has been breached. Others still demand of trustees the exercise of 'skill, care and diligence', which is a different standard.

⁶⁶ P 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, 232. Public unit trusts are discussed in Chapter 3.

⁶⁷ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 9 January 2012) [9.010].

⁶⁸ JH Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 *Yale Law Journal* 625, 629. See also JH Langbein, 'The Secret Life of the Trust: The Trust as an Instrument of Commerce' (1997) 107 *Yale Law Journal* 165, 182.

⁶⁹ JH Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 *Yale Law Journal* 625, 656.

⁷⁰ AS Butler and DJ Flinn, 'What is the Least That We Can Expect of a Trustee? Exclusion of Trustee Duties and Exemption of Trustee Liability' (2010) 3 *New Zealand Law Review* 459, 466. See also *Nolan v Collie* (2003) 7 VR 287, 306 (Ormiston JA; Batt and Vincent JJA agreeing).

‘Core’ duties

7.50 Some of the duties of a trustee have been described as ‘core’ duties or ‘irreducible’ duties.⁷¹ The significance of duties being characterised in this way is that they cannot be effectively excluded by the trust instrument, as the exclusion of a duty of this kind would be repugnant to the existence of a trust.⁷²

7.51 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.⁷³

7.52 Professor Hayton has suggested that the core duties are:⁷⁴

- the interrelated duties ‘to disclose information and trust documents and to account to the beneficiaries for the trustees’ stewardship of the trust property’; and
- the duty to act in good faith.

7.53 In relation to the second of these duties, it was suggested that its exclusion would ‘make a nonsense of the trust relationship as an obligation of confidence’.⁷⁵

7.54 Ford and Lee have suggested a slightly longer list of core duties, being:⁷⁶

- the duty of loyalty;
- the duty to adhere to the terms of the trust;
- the duty to keep and render accounts; and
- the duty to act personally.

7.55 They have acknowledged, however, that these duties can be ‘alleviated’ by express words in the trust instrument.⁷⁷

71 Eg, HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 9 January 2012) [9.270]; D Hayton, ‘The Irreducible Core Content of Trusteeship’ in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press, 1996) 47.

72 D Hayton, ‘The Irreducible Core Content of Trusteeship’ in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press, 1996) 47, 57.

73 *Armitage v Nurse* [1998] Ch 241, 253–4 (Millett LJ), cited in *Rankine v Rankine* (Unreported, Supreme Court of Queensland, de Jersey CJ, 3 April 1998).

74 D Hayton, ‘The Irreducible Core Content of Trusteeship’ in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press, 1996) 47, 57.

75 Ibid.

76 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 9 January 2012) [9.270].

77 Ibid.

A GENERAL STATUTORY DUTY OF CARE FOR TRUSTEES

The general law

7.56 In *Re Speight*,⁷⁸ the English Court of Appeal held that 'a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee'.⁷⁹ That judgment was upheld by the House of Lords, where Lord Blackburn stated that:⁸⁰

as a general rule a trustee sufficiently discharges his duty if he takes in managing trust affairs all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own. There is one exception to this: a trustee must not choose investments other than those which the terms of his trust permit, though they may be such as an ordinary prudent man of business would select for his own money ...

7.57 Subsequently, in *Re Whiteley*, Lindley LJ in the English Court of Appeal explained that the duty to conduct the business of the trust in the same manner that an ordinary person of business would conduct his or her own is to be applied bearing in mind that — at least in the case of investment decisions — the 'business' being conducted is that of investing money for the benefit of others at a future time. In this respect, Lindley LJ appears to have reframed the duty as it applies in that context:⁸¹

a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee. ...; but in applying it care must be taken not to lose sight of the fact that the business of the trustee, and the business which the ordinary prudent man is supposed to be conducting for himself, is the business of investing money for the benefit of persons who are to enjoy it at some future time, and not for the sole benefit of the person entitled to the present income. The duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide. That is the kind of business the ordinary prudent man is supposed to be engaged in; and unless this is borne in mind the standard of a trustee's duty will be fixed too low ... (emphasis added)

7.58 Cotton and Lopes LJJ, in the same case, also incorporated the idea of caution and regard to the future interests of beneficiaries in the context of trustee investments.⁸²

⁷⁸ (1883) 22 Ch D 727, affd *Speight v Gaunt* (1883) 9 App Cas 1.

⁷⁹ Ibid 739 (Jessel MR). Bowen LJ (at 762) expressed a similar view.

⁸⁰ *Speight v Gaunt* (1883) 9 App Cas 1, 19.

⁸¹ (1886) 33 Ch D 347, 355. In *Cowan v Scargill* [1985] 1 Ch 270 Megarry V-C (at 289) adopted this standard of care.

⁸² (1886) 33 Ch D 347, 350 (Cotton LJ), 358 (Lopes LJ).

7.59 In *Learoyd v Whiteley*, the House of Lords affirmed the decision of the Court of Appeal. However, it did not expressly endorse the statement of Lindley LJ as to the trustee's duty being 'to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of *other people* for whom he felt morally bound to provide'. Only Lord Watson qualified the duty expressed previously in *Speight v Gaunt*.⁸³

As a general rule the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs. Yet he is not allowed the same discretion in investing the moneys of the trust as if he were a person sui juris dealing with his own estate. Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard. So, so long as he acts in the honest observance of these limitations, the general rule already stated will apply.

7.60 In Australia, the duty of care for trustees is usually expressed as the duty to exercise 'the same care as an ordinary, prudent business person would exercise in conducting that business as if it were his or her own', although with the addition of a 'requirement of caution' where the trustee is exercising a power of investment.⁸⁴

7.61 In *Australian Securities Commission v AS Nominees Ltd*, Finn J stated that he would have been prepared to apply a higher standard of care in the case of corporate trustees that held themselves out as having special knowledge, skills or experience on which they invited members of the public to rely when investing with them. However, on the facts of the case, his Honour was not required, in deciding whether the trustees had breached their duty of care, to apply a higher standard since the trustees fell far short of even the usual prudent business person standard.⁸⁵

7.62 Finn J noted that a higher standard was imposed on professional trustees in *Bartlett v Barclays Trust Co Ltd (No 1)*, and stated that he did not regard the observations of the High Court in *Fouche v Superannuation Fund Board*⁸⁶ in relation to the prudent business person standard 'as precluding the adoption of a different and higher standard' in particular circumstances.⁸⁷

Trusts Act 1973 (Qld)

7.63 The *Trusts Act 1973* (Qld) does not include a general duty of prudence or care for the exercise of all trustee powers. However, section 22(1) of the Act

⁸³ *Learoyd v Whiteley* (1887) 12 App Cas 727, 733.

⁸⁴ *ASC v AS Nominees Ltd* (1995) 62 FCR 504, 516 (Finn J).

⁸⁵ *Ibid* 517–18.

⁸⁶ (1952) 88 CLR 609.

⁸⁷ (1995) 62 FCR 504, 518, citing *Bartlett v Barclays Trust Co Ltd (No 1)* [1980] Ch 515.

imposes a statutory duty of care with respect to the exercise of a trustee's power of investment. That section provides:

22 Duties of trustee in relation to power of investment

- (1) A trustee must, in exercising a power of investment—
- (a) if the trustee's profession, business or employment is, or includes, acting as a trustee or investing money for other persons—exercise the care, diligence and skill a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons; or
 - (b) if the trustee's profession, business or employment is not, or does not include, acting as a trustee or investing money for other persons—exercise the care, diligence and skill a prudent person of business would exercise in managing the affairs of other persons.

7.64 Section 22(1) provides for two duties of care: one for trustees generally, and one for trustees whose profession or business includes 'acting as a trustee or investing money for other persons'. In this respect, it imposes a higher standard on professional trustees.

7.65 Section 22(1) also refers, in both paragraphs, to the care, diligence and skill that the relevant person would exercise 'in managing the affairs of other persons'. This part of the provision employs language similar to that used by Lindley LJ in *Re Whiteley*,⁸⁸ and places a greater emphasis on the fact that a trustee is not simply managing his or her own affairs.

7.66 Similar provisions are included in the trustee legislation of the other Australian jurisdictions.⁸⁹ However, whereas section 22(1) applies as an absolute duty under the Queensland Act, in the other Australian jurisdictions, the equivalent provisions apply subject to the trust instrument.⁹⁰

7.67 If it was thought desirable for the *Trusts Act 1973* (Qld) to include a duty of care for trustees generally, section 22 could be used as the basis for a provision of general application.

Commonwealth legislation relating to trustees

Superannuation entities

7.68 The *Superannuation Industry (Supervision) Act 1993* (Cth) prescribes a number of covenants that are taken to be included in the governing rules of a

⁸⁸ See [7.57] above.

⁸⁹ *Trustee Act 1925* (ACT) s 14A(2); *Trustee Act 1925* (NSW) s 14A(2); *Trustee Act* (NT) s 6(1); *Trustee Act 1936* (SA) s 7(1); *Trustee Act 1898* (Tas) s 7(1); *Trustee Act 1958* (Vic) s 6(1); *Trustees Act 1962* (WA) s 18(1).

⁹⁰ *Trustee Act 1925* (ACT) s 14A(1); *Trustee Act 1925* (NSW) s 14A(1); *Trustee Act* (NT) s 6(1); *Trustee Act 1936* (SA) s 7(1); *Trustee Act 1898* (Tas) s 7(1); *Trustee Act 1958* (Vic) s 6(1); *Trustees Act 1962* (WA) s 18(1).

superannuation entity.⁹¹ Effectively, these covenants impose a number of mandatory duties on the trustees of superannuation entities.⁹²

7.69 Currently, section 52(2)(b) provides that these covenants include a covenant by each trustee of a superannuation entity:

to exercise, in relation to all matters affecting the entity, the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide;

7.70 When schedule 1 to the *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012* (Cth) commences on 1 July 2013, the *Superannuation Industry (Supervision) Act 1993* (Cth) will include separate covenants for the trustees of registrable superannuation entities⁹³ and self-managed superannuation funds.

7.71 Under new section 52B(2)(b), a covenant to the effect of the current section 52(2)(b) will continue to apply to the trustees of a self-managed superannuation fund.

7.72 However, new section 52(2)(b) will include a covenant by each trustee of a registrable superannuation entity:

to exercise, in relation to all matters affecting the entity, 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; (emphasis added)

7.73 The Explanatory Memorandum to the amending Bill states that this change brings the duty 'into line with the existing State and Territory trustee legislation applying to professional trustees'.⁹⁴

Responsible entities of managed investment schemes

7.74 Under the *Corporations Act 2001* (Cth), the responsible entity of a managed investment scheme⁹⁵ must:⁹⁶

exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position; ...

⁹¹ *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(2).

⁹² See CCH Online, *Australian Superannuation Commentary* (at 7 August 2012) ¶12-810–¶12-815.

⁹³ 'Registrable superannuation entity' does not include a self-managed superannuation fund: *Superannuation Industry (Supervision) Act 1993* (Cth) s 10(1) (definition of 'registrable superannuation entity').

⁹⁴ Explanatory Memorandum, *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012* (Cth) [1.62].

⁹⁵ As explained at [3.46] above, whether or not a managed investment scheme is structured as a trust, the *Corporations Act 2001* (Cth) imposes a statutory trust on the responsible entity of the scheme by declaring that the scheme property is held on trust for the members: *Corporations Act 2001* (Cth) s 601FC(2).

⁹⁶ *Corporations Act 2001* (Cth) s 601FC(1)(b).

Reforms in England

7.75 A statutory duty of care is imposed on trustees by section 1 of the *Trustee Act 2000* (UK):⁹⁷

1 The duty of care

- (1) Whenever the duty under this subsection applies to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard in particular—
- (a) to any special knowledge or experience that he has or holds himself out as having, and
 - (b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.
- (2) In this Act the duty under subsection (1) is called 'the duty of care'.

7.76 The statutory duty of care applies to the exercise of various specified powers, including the powers to invest trust property, acquire land, appoint agents, nominees or custodians, compound liabilities, insure trust property, and exercise power in relation to reversionary interests not vested in the trustee.⁹⁸

7.77 Section 1 of the *Trustee Act 2000* (UK) implements the recommendations of the Law Commission of England and Wales in its 1999 report on trustee powers and duties.⁹⁹ The focus of that report was the reform of trustees' investment and related powers, including the power to delegate and employ agents. It was in the context of widening trustees' powers that the Law Commission considered the introduction of a statutory duty of care:¹⁰⁰

A recurrent theme of this Report is that the default powers which trustees have under the present law in the absence of express provision in the instrument creating the trust are insufficient to enable them to administer their trusts most effectively. However, in devising a scheme to confer wider administrative powers on trustees, an appropriate balance must be struck between extending the powers which trustees have as a matter of law, and the imposition of safeguards in an attempt to ensure that they act properly in exercising those powers.

7.78 The Law Commission considered that the introduction of a statutory duty of care applying to the exercise of trustees' discretionary powers relating to investment, delegation and insurance (which were the focus of its report)¹⁰¹ would

⁹⁷ See also *Trustee Act (Northern Ireland) 2001* (NI) s 1 in the same terms; and *Charities Act 2011* (UK) c 25, s 221(2) also in similar terms.

⁹⁸ *Trustee Act 2000* (UK) c 29, s 2, sch 1; *Trusts of Land and Appointment of Trustees Act 1996* (UK) c 47, s 9A(1), (5). See also *Settled Land Act 1925*, 15 & 16 Geo 5, c 18, s 107(1A)(d).

⁹⁹ Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999).

¹⁰⁰ *Ibid* [3.8].

¹⁰¹ *Ibid* [3.14]–[3.21].

provide ‘a clear and accessible statement of the standard of care to be expected from trustees’.¹⁰²

7.79 In its view, the standard imposed by the statutory duty of care would need to be both robust and flexible. It preferred the formulation that now appears in section 1 of the *Trustee Act 2000* (UK), which includes a subjective element and thereby imposes a higher standard on professional trustees.¹⁰³

Every trustee should be required to exercise such care and skill as is reasonable in the circumstances. However, the level of care and skill which is reasonable may *increase* if the trustee has special knowledge or skills, (or holds him or herself out as having such knowledge or skills), or if the trustee is acting in the course of a business or profession. (emphasis in original)

7.80 The statutory duty of care referred to in section 1 of the *Trustee Act 2000* (UK) may be excluded by the trust instrument. Schedule 1 of the Act provides that:¹⁰⁴

The duty of care does not apply if or in so far as it appears from the trust instrument that the duty is not meant to apply.

Irish law reform proposals

7.81 In its recent review of trust law, the Law Reform Commission of Ireland recommended the adoption of a statutory duty of care modelled on the English provision.¹⁰⁵ In its view, this ‘hybrid objective and subjective’ formulation ‘represents a refinement of the common law “prudent and reasonable man” test’.¹⁰⁶ It recommended that the duty should be of general application.¹⁰⁷

Scottish law reform proposals

7.82 The Scottish Law Commission, on the other hand, has proposed a different statement of the duty of care in a recent Discussion Paper. That Commission accepted that professional trustees should generally be subject to a higher standard of care and considered that, because of some uncertainty in the case law, this would require statutory reform.¹⁰⁸ It raised concerns, however, about the position of a trustee who has professional qualifications but is not acting as trustee in that professional capacity, and noted that the imposition of a duty to meet

102 Ibid [3.9].

103 Ibid [3.24].

104 *Trustee Act 2000* (UK) c 29, sch 1 para 7.

105 Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) [3.15]. That recommendation has not been implemented.

106 Ibid [3.13].

107 Ibid [3.26].

108 Scottish Law Commission, *Supplementary and Miscellaneous Issues Relating to Trust Law*, Discussion Paper No 148 (2011) [6.2].

a standard that is too onerous might discourage professionals from accepting office as trustee.¹⁰⁹

7.83 It proposed a graduated standard to the effect that, unless otherwise provided by statute:¹¹⁰

- (a) Every trustee should have to use the same care and diligence that a person of ordinary prudence would use in managing the affairs of others.
- (b) An unremunerated trustee who has professional qualifications or business experience should be subject only to the foregoing duty unless he or she is instructed to provide professional or other specialised advice to the trust. In the latter event, the trustee will be required to use any special knowledge or expertise that it is reasonable to expect of a member of his or her profession or business.
- (c) A trustee who provides professional trust services and is remunerated for doing so should be required to exercise the level of skill and care that it is reasonable to expect of a member of his or her profession or business.

Canadian law reform proposals

7.84 As part of its comprehensive review of trusts law in the 1980s, the Ontario Law Reform Commission recommended the adoption of a statutory duty of care that would apply to trustees in the discharge of their duties and the exercise of their powers.¹¹¹ It considered that the emphasis in the formulation of the duty should be on the 'moral responsibility of trusteeship',¹¹² and should therefore refer to the degree of care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property *of another person*.

7.85 That Commission also considered that, as a matter of principle, professional trustees who have, or hold themselves out as having, special skills should be held to a higher standard.¹¹³ It therefore recommended that the Act should provide that:¹¹⁴

'Professional' trustees, that is, trustees who in fact possess, or who because of their profession, business, or calling ought to possess, a particular level of knowledge or skill which in all the circumstances is relevant to the administration of the trust, should employ that particular level of knowledge or skill in the administration of the trust, in addition to the general duty of care applicable to all trustees ...

109 Ibid [6.6].

110 Ibid [6.11].

111 Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 79, Rec 1.

112 Ibid 25–6. See, in the context of investments, *Re Whiteley* (1886) 33 Ch D 347, 355 (Lindley LJ); and *Cowan v Scargill* [1985] 1 Ch 270, 289 (Megarry V-C).

113 Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 35.

114 Ibid 79, Rec 3.

7.86 The British Columbia Law Institute later recommended the introduction in that province of a general statutory duty of care in virtually the same terms.¹¹⁵

7.87 Those recommendations have not been implemented in Ontario or British Columbia.

7.88 However, the *Trustee Act* of Saskatchewan includes an express statement of trustees' general duty of care in similar, although not identical, terms:¹¹⁶

Duty of care and duty of good faith

- 7(1) In discharging his or her duties and exercising his or her powers, a trustee shall exercise that degree of care, skill and diligence that a person of ordinary prudence would exercise, having regard to the skill, experience and qualifications of the trustee.
- (2) If a trustee possesses, or because of his or her profession or business ought to possess, a particular level of knowledge or skill that in all the circumstances is relevant to the administration of the trust, the trustee shall employ that particular level of knowledge or skill in the administration of the trust.

7.89 That provision reflects, in part, a proposal of the Law Reform Commission of Saskatchewan. In its view, the scope of the duty was uncertain and in need of clarification.¹¹⁷ The provision applies in addition to the 'prudent investor' obligation imposed on trustees when investing trust property.¹¹⁸

7.90 On the other hand, in considering the reform of trustee investment powers, the Alberta Law Reform Institute rejected the adoption of a statutory duty of care. It considered the approach recommended by the Law Commission of England and Wales but expressed concern about deviating from a single, objective standard that all trustees must meet.¹¹⁹ Ultimately, the Alberta Law Reform Institute did not consider it necessary to include a duty of care imposing a higher standard on professionals in the legislation.¹²⁰

American Uniform Trust Code

7.91 The American Uniform Trust Code¹²¹ includes the following provisions

¹¹⁵ British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 31, Proposed *Trustee Act*, cl 6(2)–(3).

¹¹⁶ *Trustee Act*, SS 2009, c T-23.01, s 7(1)–(2).

¹¹⁷ Law Reform Commission of Saskatchewan, *Proposals for Reform of the Trustees Act*, Report (2002) Rec 1(1).

¹¹⁸ *Trustee Act*, SS 2009, c T-23.01, s 25.

¹¹⁹ Alberta Law Reform Institute, *Trustee Investment Powers*, Report No 80 (2000) [143].

¹²⁰ *Ibid* [144].

¹²¹ The Uniform Trust Code was promulgated by the National Conference of Commissioners on Uniform State Law: see Uniform Law Commission, *Trust Code* <http://www.uniformlaws.org/Act.aspx?title=Trust_Code>. It has been adopted, in whole or part, in 24 States plus the District of Columbia (and has been introduced, but not yet enacted, in one further State): see <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trust_Code>.

dealing with 'prudent administration':¹²²

804 Prudent Administration

A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

...

806 Trustee's Skills

A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.

7.92 Both of these sections may be excluded by the trust instrument.¹²³

Whether the *Trusts Act 1973* (Qld) should include a general statutory duty of care

7.93 A statutory duty of care, based generally on section 22(1) of the *Trusts Act 1973* (Qld), would clarify the duty of care owed by trustees generally and, in particular, the duty owed by professional trustees. By adopting language similar to that used by Lindley LJ in *Re Whiteley*,¹²⁴ it would place a greater emphasis on the fact that a trustee is not simply managing his or her own affairs, but those of another person. By dealing specifically with professional trustees, it would also ensure that those trustees who hold themselves out as having particular skills and expertise are held to a higher standard.¹²⁵

7.94 Further, in Chapter 8, the Commission has proposed that the *Trusts Act 1973* (Qld) should provide that trustees have, in relation to the trust property, all the powers of an absolute owner of the property. If that approach is ultimately recommended, the inclusion in the Act of a statutory duty of care could operate as a safeguard in relation to the exercise of what would be quite a broad power. As explained earlier, in England, a statutory duty of care was included in the *Trustee Act 2000* (UK) for this very reason.

7.95 A further issue is whether any new general statutory duty of care should be capable of being excluded by the trust instrument. As mentioned earlier, the *Trusts Act 1973* (Qld) does not make provision for the duty of care imposed by section 22(1) to be excluded. However, the statutory duty of care that applies under the *Trustee Act 2000* (UK) and the provisions in the American Uniform Trust Code that deal with prudent administration may be excluded by the trust instrument.¹²⁶

¹²² Unif Trust Code §§ 804, 806 (amended 2010).

¹²³ Unif Trust Code § 105(b) (amended 2010).

¹²⁴ See [7.57] ff above.

¹²⁵ See [7.61] above.

¹²⁶ See [7.80], [7.92] above.

Similarly, the provisions in the other Australian jurisdictions that are the counterparts to section 22(1) of the *Trusts Act 1973* (Qld) may be excluded by the trust instrument.¹²⁷

7.96 If the *Trusts Act 1973* (Qld) is amended to include a statutory duty of care for trustees, it will also be necessary to ensure that the duty is expressed in a way that does not limit the other duties that apply to trustees under the general law.

7-1 Should the *Trusts Act 1973* (Qld) include a statutory duty of care that applies to trustees in administering the trust and, if so, should that duty:

- (a) be based on section 22(1) of the *Trusts Act 1973* (Qld) or be expressed in some other way;
- (b) apply generally to a trustee in administering the trust or only to the exercise of specified powers (and, if so, which powers);
- (c) be absolute or, alternatively, should it apply only to the extent that a contrary intention is not expressed in the trust instrument?

WHETHER ANY SPECIFIC DUTIES SHOULD BE INCLUDED IN THE *TRUSTS ACT 1973* (QLD)

Introduction

7.97 As explained earlier, the Law Commission of England and Wales considered that the introduction of a statutory duty of care was an appropriate legislative safeguard in light of the wider powers that would be conferred on trustees by its recommendations.¹²⁸

7.98 This part of the chapter considers whether it would be desirable for any specific trustee duties (apart from a statutory duty of care) to be included in the *Trusts Act 1973* (Qld) in order to give greater guidance to trustees.¹²⁹

7.99 The Ontario Law Reform Commission considered that the trustee legislation in that province, although not a code, should draw trustees' attention to, and emphasise the importance of, a number of 'fundamental' trustee duties.¹³⁰ In its view, this would also provide the opportunity to clarify the scope of those duties.

¹²⁷ See [7.66] above.

¹²⁸ See [7.77] ff above.

¹²⁹ Separate consideration is given later in this chapter to the specific duties to keep accounts and other records and to provide accounts and other information to beneficiaries.

¹³⁰ Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 26–7, 62, 72.

7.100 It has also been suggested that, although trustee legislation supplements and does not replace the general law of trusts, the 'juxtaposition' of trustees' administrative powers with a statement of trustees' 'duty of integrity and standard of care, which underlie the exercise of all the statutory powers', would lend coherence to the legislation as a whole.¹³¹

7.101 However, the inclusion of statutory duties could also have the effect of 'unsettling the case law', resulting in some uncertainty.¹³² The Law Commission of New Zealand has noted, for example, that:¹³³

Encapsulating every single element of each duty in statutory form would not be possible and risks inhibiting judicial development.

7.102 In its recent Issues Paper on trustee duties and powers, that Commission pointed out that 'there is no definitive statement of all a trustee's duties'.¹³⁴ As well as differences in classification and terminology, 'there is considerable overlap' between different duties and 'considerably more involved' in the content and scope of trustee duties than is suggested by short statements of those duties.¹³⁵ Although that Commission considered that 'the general themes reflected in the case law' could be stated in the legislation to 'assist trustees in better understanding their role' and to give trustees' duties greater prominence, it suggested that this would need to be done 'simply and broadly' and in a way that did not replace the common law.¹³⁶

7.103 The Law Reform Commission of Saskatchewan has suggested that the proper basis for incorporating trustee duties into the legislation is where there is a need to clarify or modify a specific aspect of the law, rather than 'an attraction to codification for its own sake'.¹³⁷

7.104 If the inclusion of particular statutory duties in the *Trusts Act 1973* (Qld) was intended to be declaratory of the current law, rather than to change it, the Act would need to recognise that many trustee duties may be excluded, or at least modified, by the trust instrument.¹³⁸ Otherwise, the effect of including statutory duties would be to create absolute duties. However, the same issue would not arise

¹³¹ British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 10–11.

¹³² See Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 26–7, 62.

¹³³ Law Commission of New Zealand, *The Duties, Office and Powers of a Trustee: Review of the Law of Trusts*, Issues Paper No 26 (2011) [1.8].

¹³⁴ *Ibid* [1.3].

¹³⁵ *Ibid* [1.5]–[1.6].

¹³⁶ *Ibid* [1.8].

¹³⁷ Law Reform Commission of Saskatchewan, *Proposals for Reform of the Trustees Act*, Report (2002).

¹³⁸ See generally P 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; D Hayton, 'The Irreducible Core Content of Trusteeship' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press, 1996) 47.

if the statutory duties were limited to those duties that might be regarded as 'core duties' under the general law.¹³⁹

7.105 The following discussion examines the particular duties that apply in legislation in other jurisdictions or that have been the subject of law reform proposals.

Commonwealth legislation relating to trustees

Superannuation entities

7.106 The covenants that are taken to be included in the governing rules of a superannuation entity under the *Superannuation Industry (Supervision) Act 1993* (Cth) presently include covenants by each trustee:¹⁴⁰

- (a) to act honestly in all matters concerning the entity;
- ...
- (c) to ensure that the trustee's duties and powers are performed and exercised in the best interests of the beneficiaries.

7.107 Covenants to the same effect will continue to apply to trustees of registrable superannuation entities and self-managed superannuation funds under amendments to that Act that will take effect on 1 July 2013.¹⁴¹

7.108 However, those amendments will introduce additional covenants, dealing with conflicts of interest and the duty to act fairly, that will apply to trustees of registrable superannuation entities, but not to trustees of self-managed superannuation funds. The additional covenants that are included in new section 52(2) are:¹⁴²

- (d) where there is a conflict between the duties of the trustee to the beneficiaries, or the interests of the beneficiaries, and the duties of the trustee to any other person or the interests of the trustee or an associate of the trustee:
 - (i) to give priority to the duties to and interests of the beneficiaries over the duties to and interests of other persons; and
 - (ii) to ensure that the duties to the beneficiaries are met despite the conflict; and
 - (iii) to ensure that the interests of the beneficiaries are not adversely affected by the conflict; and

¹³⁹ See the discussion of 'core duties' at [7.50] ff above.

¹⁴⁰ *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(2)(a), (c).

¹⁴¹ *Superannuation Industry (Supervision) Act 1993* (Cth) ss 52(2)(a), (c), 52A(2)(a), (c), inserted by the *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012* (Cth) s 3, sch 1 item 12.

¹⁴² *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(2)(d)–(f), inserted by the *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012* (Cth) s 3, sch 1 item 12.

- (iv) to comply with the prudential standards in relation to conflicts;
- (e) to act fairly in dealing with classes of beneficiaries within the entity;
- (f) to act fairly in dealing with beneficiaries within a class;

7.109 The Explanatory Memorandum to the amending Bill explains that the new covenant in section 52(2)(d) is intended to regulate the management of conflicts where such conflicts would be permitted to continue under the general law:¹⁴³

The general law requires trustees to avoid conflicts of duties and interest, subject to certain exceptions that allow the trustee to act despite the conflict, for example by authorisation under the fund's governing rules. Where a conflict exists, and general law allows the trustee to proceed despite the conflict, there will be a number of additional requirements that must be met.

7.110 The prudential standards mentioned in section 52(2)(d)(iv) are those that may be developed by the Australian Prudential Regulation Authority under the powers given to it by the new sections 34B–34F of the *Superannuation Industry (Supervision) Act 1993* (Cth).¹⁴⁴

Responsible entities of managed investment schemes

7.111 Under the *Corporations Act 2001* (Cth), the responsible entity of a managed investment scheme is subject to a number of duties:¹⁴⁵

601FC Duties of responsible entity

- (1) In exercising its powers and carrying out its duties, the responsible entity of a registered scheme must:
 - (a) act honestly; and
 - (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position; and
 - (c) act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests; and
 - (d) treat the members who hold interests of the same class equally and members who hold interests of different classes fairly; and
 - (e) not make use of information acquired through being the responsible entity in order to:
 - (i) gain an improper advantage for itself or another person; or

¹⁴³ Explanatory Memorandum, *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012* (Cth) [1.51].

¹⁴⁴ *Superannuation Industry (Supervision) Act 1993* (Cth) ss 34B–34F, inserted by the *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012* (Cth) s 3, sch 2 pt 1.

¹⁴⁵ *Corporations Act 2001* (Cth) s 601FC(1)(a)–(e). The remaining duties in that provision are more specifically related to compliance issues under the legislation.

- (ii) cause detriment to the members of the scheme; ...

American Uniform Trust Code

7.112 In addition to the provisions discussed earlier in relation to prudent administration, the American Uniform Trust Code contains several provisions dealing with trustees' general duties. Sections 801–803 deal with the duty to administer the trust, the duty of loyalty and the duty to act impartially:

801 Duty to administer trust

Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this [Code].

802 Duty of loyalty

- (a) A trustee shall administer the trust solely in the interests of the beneficiaries.

...¹⁴⁶

803 Impartiality

If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

7.113 The commentary to the Code explains that section 801 confirms that 'a primary duty of a trustee is to follow the terms and purposes of the trust and to do so in good faith' and that 'a trustee does not have a duty to act until the trustee has accepted the trusteeship'.¹⁴⁷

7.114 It also observes, in relation to section 802, that the duty of loyalty is 'perhaps the most fundamental duty of the trustee'.¹⁴⁸

7.115 The commentary further explains, in relation to section 803, that:¹⁴⁹

The duty of impartiality is an important aspect of the duty of loyalty. ... The differing beneficial interests for which the trustee must act impartially include those of the current beneficiaries versus those of beneficiaries holding interests in the remainder; and among those currently eligible to receive distributions. ...

The duty to act impartially does not mean that the trustee must treat the beneficiaries equally. Rather, the trustee must treat the beneficiaries equitably in light of the purposes and terms of the trust.

¹⁴⁶ The remaining part of § 802 consists of a very detailed and lengthy provision about transactions involving conflicts of interest: Unif Trust Code § 802(b) (amended 2010).

¹⁴⁷ Unif Trust Code (amended 2010), Comment 130.

¹⁴⁸ Ibid 134.

¹⁴⁹ Ibid 139.

7.116 Generally, the Uniform Trust Code provides that the terms of the trust instrument prevail over a provision of the Code.¹⁵⁰ However, the Code creates a number of exceptions to this approach, including, relevantly, the duty of a trustee under section 801 to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.¹⁵¹ The rationale for this exception has been explained in the following terms:¹⁵²

The mandatory rule against bad faith trusteeship can be understood to operate as a presumption that trust terms authorizing bad faith must have been improperly concealed from the settlor or otherwise misunderstood by the settlor when propounded, because no settlor seeking to benefit the beneficiary would expose the beneficiary to the hazards of bad faith trusteeship.

7.117 However, the duties in sections 802 and 803 may be excluded by the trust instrument.

Ireland

7.118 In its recent report on trusts law, the Law Reform Commission of Ireland recommended that its proposed new trustee legislation should contain 'an express statement that a trustee, as a fiduciary, must perform the trust honestly and in good faith for the benefit of the beneficiaries'.¹⁵³ It considered this appropriate on the basis that trustees' fiduciary obligations underlie the exercise of all trustee powers and duties.

Canadian law reform proposals

Good faith

7.119 As part of its proposed modernised Trustee Act, the British Columbia Law Institute also recommended a statutory duty of good faith, in similar terms to section 801 of the American Uniform Trust Code:¹⁵⁴

A trustee must administer the trust in good faith and in accordance with its terms and purposes, the interests of the beneficiaries, and this Act.

7.120 Although that recommendation has not been implemented in British Columbia, a provision in the same terms has been included in the *Trustee Act* of Saskatchewan.¹⁵⁵

¹⁵⁰ Unif Trust Code § 105(b) (amended 2010).

¹⁵¹ Unif Trust Code § 105(b)(2) (amended 2010).

¹⁵² JH Langbein, 'Mandatory Rules in the Law of Trusts' (2004) 98 *Northwestern University Law Review* 1105, 1124.

¹⁵³ Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) [1.31]–[1.32]. That recommendation has not been implemented.

¹⁵⁴ British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 31, Proposed *Trustee Act*, cl 6(1).

¹⁵⁵ *Trustee Act*, SS 2009, c T-23.01, s 7(3).

Impartiality

7.121 In its report on the law of trusts, the Ontario Law Reform Commission recommended that the legislation should include ‘a concise statement’ of the general duty to act with impartiality in order to clarify, and reflect the contemporary view, that this principle applies in relation to all types of trust property.¹⁵⁶ It recommended a provision to the effect that:¹⁵⁷

trustees must act impartially as between income and capital beneficiaries, having regard to each item of trust property, whatever the nature of the property, and whether it is an original asset or an asset that is acquired subsequently, further to an authorization in the trust instrument or conferred by statute.

7.122 The Law Reform Commission of Saskatchewan proposed the inclusion of a similar provision,¹⁵⁸ which is now reflected in the *Trustee Act* of Saskatchewan.¹⁵⁹

Duty to act impartially

33(1) A trustee shall act impartially between income and capital beneficiaries, having regard to the trust property.

(2) The duty to act impartially mentioned in subsection (1) applies:

(a) whatever the nature of the trust property; and

(b) whether the trust property is an original asset or an asset acquired subsequently.

7.123 The British Columbia Law Institute also recommended the adoption of a provision confirming ‘the overriding duty of a trustee to act impartially as between different classes of beneficiaries in the administration of a trust’.¹⁶⁰

Conflicts of interest

7.124 In its review of the Saskatchewan trustee legislation, the Law Reform Commission of Saskatchewan proposed the adoption of a statutory conflict of interest rule. In its view, this would complement the statutory duty of care that it also proposed should be adopted and would bring the fundamental obligation of trustees to avoid conflicts of interest to trustees’ attention. It considered, however,

¹⁵⁶ Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 286.

¹⁵⁷ *Ibid* 311, Rec 52. This recommendation has not been implemented.

¹⁵⁸ Law Reform Commission of Saskatchewan, *Proposals for Reform of the Trustees Act*, Report (2002) Rec 2.6. See also that Commission’s related recommendations about the trustees’ discretion to apportion outgoings and allocate receipts: Recs 2.7, 2.8.

¹⁵⁹ *Trustee Act*, SS 2009, c T-23.01, s 33. See also the provisions dealing with trustees’ discretion to apportion outgoings and allocate receipts, which is subject to the duty to act impartially: ss 34–35.

¹⁶⁰ British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 51–2, Proposed *Trustee Act*, cl 33(a). This recommendation has not been implemented.

that 'the rule should not seek to change the existing law, or state it in such a way as to impede further development of the conflict of interest rule by the courts'.¹⁶¹

7.125 The *Trustee Act* of Saskatchewan now includes the following provisions dealing with trustees' duty to avoid conflicts of interest:¹⁶²

Conflicts of interest prohibited

- 9 A trustee shall discharge the trustee's duties and exercise the trustee's powers solely in the interests of the beneficiaries of the trust and, without limiting the generality of the foregoing, a trustee shall not knowingly permit a situation to arise:
- (a) in which the trustee's interest conflicts in any way with the discharge of the trustee's duties and the exercise of the trustee's powers; or
 - (b) in which the trustee may derive a personal benefit or a benefit for any other person, except so far as the law or the trust instrument expressly permits.

Court may allow conflicts of interest

- 10(1) On application to the court, if it is shown that it would not be detrimental to the trust or its beneficiaries, and whether or not any beneficiary withholds consent, the court may make an order:
- (a) permitting a trustee to act notwithstanding that a trustee may be in a position that contravenes the trustee's duty to avoid a conflict of interest; or
 - (b) excusing a trustee from liability notwithstanding that the trustee may be in breach of trust for having acted while in a position that contravened the trustee's duty to avoid a conflict of interest.
- (2) The court may impose any terms and conditions that the court considers just on an order made pursuant to this section.

7.126 The Saskatchewan provisions are in similar terms to provisions recommended initially by the Ontario Law Reform Commission¹⁶³ and later by the British Columbia Law Institute.¹⁶⁴ Although there are some differences in drafting, the provisions recommended in each of these three jurisdictions include a similar restatement of the general prohibition against conflicts and provide for the court to sanction, or relieve a trustee from liability for, a course of conduct involving a conflict of interest in particular circumstances.

¹⁶¹ Law Reform Commission of Saskatchewan, *Proposals for Reform of the Trustees Act*, Report (2002) Recs 2.3, 2.4.

¹⁶² *Trustee Act*, SS 2009, c T-23.01, ss 9–10.

¹⁶³ Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 62, 82, Recs 18–19. These recommendations have not been implemented.

¹⁶⁴ British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 38–9, Proposed *Trustee Act*, cl 11. That recommendation has not been implemented.

7-2 Apart from a general statutory duty of care, should the *Trusts Act 1973* (Qld) be amended to incorporate, as statutory duties, any of the specific duties that apply to trustees under the general law?

7-3 If so:

- (a) which duties should be included; and
- (b) should the statutory duties (or any of them) be absolute or, alternatively, should the statutory duties apply only to the extent that a contrary intention is not expressed in the trust instrument?

The position of directors of trustee companies and other corporate trustees

7.127 The focus of this chapter has been on the duties that trustees themselves owe to their beneficiaries. In many cases, a trustee will be a company — possibly a licensed trustee company under the *Corporations Act 2001* (Cth),¹⁶⁵ but not necessarily so. The trustee could simply be a private company.

7.128 Although the duties discussed in this chapter are primarily imposed on trustees, as explained below, the directors of a company that is a trustee may nevertheless incur liability in relation to conduct that constitutes a breach by the company of its duties as trustee.

General law

7.129 The directors of a company that is a trustee owe fiduciary (as well as statutory) duties to the company, but do not ordinarily owe fiduciary duties to the beneficiaries of the trust.¹⁶⁶

7.130 In *Australian Securities Commission v AS Nominees Ltd*, Finn J discussed the ‘accessorial liability’ of directors of corporate trustees for breaches of trust in which the directors are concerned or have participated.¹⁶⁷ Finn J noted that ‘there is a question whether the duty of care owed by directors of a [corporate trustee] to their company is owed as well to the beneficiaries of the trust’. His Honour went on to suggest, however, that, given his view in relation to the ‘accessorial liability’ of

¹⁶⁵ A ‘licensed trustee company’ is ‘a trustee company that holds an Australian financial services licence covering the provision of one or more traditional trustee company services’: *Corporations Act 2001* (Cth) s 601RAA (definition of ‘licensed trustee company’). On 6 May 2010, the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* (Cth) inserted a new ch 5D into the *Corporations Act 2001* (Cth), transferring the regulation of trustee companies from the States and Territories to the Commonwealth. The purpose of that change was to create ‘a national licensing regime for trustee companies, thereby reducing the regulatory burden on those companies’: Explanatory Memorandum, *Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009* (Cth) [2.2]. At the time, the majority of the private trustee companies in Australia were licensed and operated in multiple jurisdictions: [2.4].

¹⁶⁶ *ASC v AS Nominees Ltd* (1995) 62 FCR 504, 522 (Finn J).

¹⁶⁷ *Ibid* 517, 518–9, 523.

directors for breaches of trust by the company, there was no need to explore that question.¹⁶⁸

7.131 Finn J referred to 'what is known as the second (the "knowing assistance") limb of the rule in *Barnes v Addy*', which is 'a fault-based form of accessorial liability'.¹⁶⁹ For the purposes of the proceedings in that case, his Honour formulated the rule in the following 'conservative' terms:¹⁷⁰

For present purposes that liability rule can be formulated (conservatively) as one which exposes a third party to the full range of equitable remedy available against a trustee if that person knowingly or recklessly assists in or procures a breach of trust or of fiduciary duty by a trustee ... (references omitted)

7.132 Finn J explained that directors of a corporate trustee are 'peculiarly vulnerable to this rule' since 'it will be their own conduct in exercising the powers of the board which causes their company to commit a breach of trust'.¹⁷¹

Directors of licensed trustee companies

7.133 Under the *Corporations Act 2001* (Cth), officers of licensed trustee companies must 'act honestly' and 'exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position'.¹⁷² They are also subject to the more specific duties not to make use of information acquired through being an officer of the trustee company, or to make improper use of their position, for the purpose of gaining an advantage for themselves or another person or to cause detriment to the clients of the trustee company.¹⁷³

Directors of superannuation entities

7.134 At present, section 52(8) of the *Superannuation Industry (Supervision) Act 1993* (Cth) provides that a covenant by a superannuation entity to the effect of those in section 52(2) operates as a covenant by the directors of the entity to exercise a reasonable degree of care and diligence for the purpose of ensuring that the trustee carries out the covenant:

- (8) A covenant by a corporate trustee of a superannuation entity that is to the effect of a covenant referred to in subsection (2), or to the effect of a covenant prescribed by regulations referred to in subsection (5), also operates as a covenant by each of the directors of the trustee to exercise a reasonable degree of care and diligence for the purposes of ensuring that the trustee carries out the first-mentioned covenant, and so operates as if the directors were parties to the governing rules.

168 Ibid 518–9.

169 Ibid 523.

170 Ibid.

171 Ibid.

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

173 *Corporations Act 2001* (Cth) s 601UAA(1)(d).

7.135 Section 52(9) of the Act clarifies the standard of care that is to be exercised by a director:

- (9) The reference in subsection (8) to a reasonable degree of care and diligence is a reference to the degree of care and diligence that a reasonable person in the position of director of the trustee would exercise in the trustee's circumstances.

7.136 When amendments to the *Superannuation Industry (Supervision) Act 1993* (Cth) take effect on 1 July 2013, the Act will make more extensive provision in relation to the obligations of directors of corporate trustees of registrable superannuation entities.¹⁷⁴ Directors will be subject to the covenants provided for by new section 52A, which reflects many of the covenants that will apply to registrable superannuation entities under new section 52.¹⁷⁵ The Explanatory Memorandum to the amending Bill explains that:¹⁷⁶

The overall effect of these changes is to strengthen the covenants that apply to individuals, and to hold those individuals who are directors of corporate trustees of [registrable superannuation entities] to a higher standard.

7.137 In particular, new section 52A(2)(a)–(c) will require directors of corporate trustees of registrable superannuation entities:

- (a) to act honestly in all matters concerning the entity;
- (b) to exercise, in relation to all matters affecting the entity, the same degree of care, skill and diligence as a prudent superannuation entity director would exercise in relation to an entity where he or she is a director of the trustee of the entity and that trustee makes investments on behalf of the entity's beneficiaries;
- (c) to perform the director's duties and exercise the director's powers as director of the corporate trustee in the best interests of the beneficiaries;

7.138 It also provides, in new section 52A(2)(d), for covenants in relation to dealing with conflicts of duty. Further, new section 52A(3) clarifies that the obligations under section 52A(2)(d) override any conflicting obligations that a director may have under Part 2D.1 of the *Corporations Act 2001* (Cth) or Division 4 of Part 3 of the *Commonwealth Authorities and Companies Act 1997* (Cth).

7.139 The existing obligation under section 52(8) of the *Superannuation Industry (Supervision) Act 1993* (Cth) of directors to ensure compliance by the trustee with the covenants will continue to apply under new section 52A(2)(f).

¹⁷⁴ *Superannuation Industry (Supervision) Act 1993* (Cth) s 52A, inserted by the *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012* (Cth) s 3, sch 1 item 12. See also Explanatory Memorandum, *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012* (Cth) [1.123]–[1.141].

¹⁷⁵ See [7.70] ff, [7.107] ff above.

¹⁷⁶ Explanatory Memorandum, *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012* (Cth) [1.139].

DUTY TO KEEP ACCOUNTS AND OTHER RECORDS

Introduction

7.140 The duty of trustees to account to the beneficiaries for their stewardship of the trust property has been described as 'the essential ingredient of trusteeship'.¹⁷⁷ As Gummow J explained in *Re Simersall*:¹⁷⁸

One of the essential elements of a private trust is that the trustee is subject to a personal obligation to hold and deal with the trust property for the benefit of the beneficiaries, and a necessary incident of that obligation is the liability of the trustee to account to the beneficiaries for his stewardship of the trust property. That being so, a further necessary incident of the control of the trust property by the trustee is the trustee's obligation to keep proper accounts and to allow inspection of them by the cestui que trust ...

7.141 Thus, it is the first¹⁷⁹ and ordinary¹⁸⁰ duty of a trustee to 'keep proper accounts, and to have them always ready when called upon to render them' to the beneficiaries.¹⁸¹

7.142 Ford and Lee explain that 'the trust accounts relate the history of the creation and administration of the trust'.¹⁸² It has been said that 'proper accounts' are:¹⁸³

accounts that are unambiguous, clear and distinct so as to provide accurate information to the beneficiaries as to the state of the trust so as to include; inter alia, assets sold or purchased, liabilities incurred or discharged, income received and expenses paid out.

7.143 What is 'proper' will depend on the circumstances of the case, particularly the terms of the trust and the nature of the trust assets.¹⁸⁴ It has been suggested, for example, that formal accounts may be unnecessary in the case of small, uncomplicated trusts in which all the interested parties are closely related and in respect of which there is no conflict.¹⁸⁵ On the other hand, it has been noted that:¹⁸⁶

¹⁷⁷ D Hayton, 'The Irreducible Core Content of Trusteeship' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press, 1996) 47, 49. See also, for example, HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 10 January 2012) [9.4010].

¹⁷⁸ (1992) 35 FCR 584, 588–9. See also *Spellson v George* (1987) 11 NSWLR 300, 315–16 (Powell J).

¹⁷⁹ *Wroe v Seed* (1863) 4 Giff 425; 66 ER 773, 774 (Stuart V-C).

¹⁸⁰ *McDonald v Ellis* (2007) 72 NSWLR 605, 613 (Bryson AJ).

¹⁸¹ *Kemp v Burn* (1863) 4 Giff 348; 66 ER 740, 740–1 (Stuart V-C). See also *Pearse v Green* (1819) 1 Jac & W 136; 37 ER 327, 329 (Plumer MR).

¹⁸² HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 9 January 2012) [9.6210].

¹⁸³ *Jones v Estate of Farley* (Unreported, Supreme Court of New South Wales, Santow J, 10 October 1997).

¹⁸⁴ *Ibid.*

¹⁸⁵ *McDonald v Ellis* (2007) 72 NSWLR 605, 613 (Bryson AJ).

¹⁸⁶ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 9 January 2012) [9.6110].

The relatively simplified accounting that is appropriate for a portfolio of trustee securities, would be inadequate to represent the course of conduct of a trust of a sophisticated property such as a business, a farm or a large property.

7.144 In *Antill v Mostyn*, a case involving a testamentary trust of a share of the deceased's estate with income to the deceased's daughter for life with the remainder to her children, it was stated that:¹⁸⁷

A trustee's accounts prepared on a proper basis would have shown the assets of the trust at the opening and closing of each accounting period, valuations of assets by the trustees, dates and details of investments and disposals with amounts expended and realised, receipts and expenditures, allocations of receipts and expenditures to income or capital account and payments to beneficiaries.

7.145 Ford and Lee suggest that trustees must ordinarily maintain: a schedule of trust property listing the assets and liabilities of the trust;¹⁸⁸ separate capital and income accounts, if necessary having regard to the nature of the trust; a cash account of all actual cash transactions; vouchers or receipts for all substantial payments;¹⁸⁹ and a distribution account, drawn up at the termination of the trust.¹⁹⁰

7.146 Trustees should also maintain 'records or earmarks to effectively distinguish' the trust property from other property that the trustee owns or that is subject to another trust.¹⁹¹ It is a 'hallmark duty' of a trustee not to mix trust funds with other funds.¹⁹²

7.147 In addition to the trust accounts and the documents that elucidate them, documents of the trust for which the trustees are responsible include those that contain or provide evidence of the terms of the trust, any court orders that affect the trust, and title deeds and other documents relating to trust property.¹⁹³

7.148 Further, 'efficient trustees will collect together information that may be needed from time to time for the effective management of the trust', including

¹⁸⁷ [2010] NSWSC 587, [13] (Bryson AJ).

¹⁸⁸ If the trust involves 'an actively managed capital account', the trustees should keep: a list of the assets at both the commencement and end of the accounting period; a list of all asset sales and purchases; and an account of all costs and disbursements attributable to the management of the capital account: HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 9 January 2012) [9.6050].

¹⁸⁹ Where accounts are to be filed and passed by the court, oral evidence for disbursements might be allowed in the absence of vouchers: see *Christensen v Christensen* [1954] QWN 37.

¹⁹⁰ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 9 January 2012) [9.6050]–[9.6190]. See also GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [20.30]. See also the specific requirements with respect to trust records that must be kept by law practices and public accountants under the *Legal Profession Act 2007* (Qld) s 261 and the *Trust Accounts Act 1994* (Qld) s 6, respectively.

¹⁹¹ *Antill v Mostyn* [2010] NSWSC 587, [14] (Bryson AJ). See also *Freeman v Fairlie* (1817) 3 Mer 29; 36 ER 12, 16.

¹⁹² *Puma Australia Pty Ltd v Sportsman's Australia Pty Ltd (No 2)* [1994] 2 Qd R 159, 162 (McPherson ACJ). This rule may, however, be modified by statute or the express terms of the trust instrument: see *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588, 606 (Gaudron, McHugh, Gummow and Hayne JJ).

¹⁹³ See GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [20.30]; HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 9 January 2012) [9.6010]. The power of trustees to deposit documents relating to a trust, or to the trust property, with a financial institution or with certain corporations for safe custody in s 49 of the *Trusts Act 1973* (Qld) is discussed at [9.261] ff below.

records of the name, age and address of known beneficiaries, records of important dates, correspondence, copies of legal advice, and minutes of decisions taken at trustee meetings.¹⁹⁴

7.149 When the trustee retires, the accounts and other trust documents should be given to the continuing and any new trustees.¹⁹⁵ The accounts should not be destroyed at the termination of the trust, as they may be needed if a question or allegation about the administration of the trust is raised.¹⁹⁶

Provisions and proposals in other jurisdictions

7.150 The *Trusts Act 1973* (Qld) confers powers on trustees to engage accountants or other agents for the keeping of trust accounts, and to cause the accounts to be audited from time to time.¹⁹⁷ However, there is no statement in the *Trusts Act 1973* (Qld) of trustees' general duty to keep accounts or other records. The position is similar in most of the other Australian jurisdictions except South Australia, where quite detailed provisions apply.¹⁹⁸

7.151 In its recent report, the National Committee for Uniform Succession Laws considered the extent to which its model legislation for the administration of estates should set out the duties of personal representatives¹⁹⁹ to keep and file accounts. It recommended the inclusion of a statutory duty, whenever required to do so by the court, to file a statement of assets and liabilities and to file and pass accounts.²⁰⁰ It commented that this duty would encompass the obligation to keep documents for that purpose.²⁰¹ Nevertheless, it considered that it would be desirable to include an express statutory duty to keep the necessary documents as an explicit reminder of that obligation, particularly to non-professional personal representatives. It did not seek to prescribe what the particular documents should be, but instead recommended that the model legislation should provide that:²⁰²

a personal representative has a duty to maintain such documents as are necessary to prepare a statement of assets and liabilities of the estate or to render an account of the administration of the estate.

¹⁹⁴ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 9 January 2012) [9.6210].

¹⁹⁵ *Tiger v Barclays Bank* [1951] 2 KB 556, cited in HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 9 January 2012) [9.2210].

¹⁹⁶ See *Payne v Evens* (1874) LR 18 Eq 356, 367, cited in HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 10 January 2012) [9.4010].

¹⁹⁷ *Trusts Act 1973* (Qld) ss 54(1), 52. Those provisions are discussed in Chapter 9.

¹⁹⁸ See *Trustee Act 1936* (SA) s 84B(1), discussed below.

¹⁹⁹ Most of the provisions of the *Trusts Act 1973* (Qld) apply to personal representatives (being executors, original or by representation, or administrators for the time being of the estate of a deceased person) as well as trustees. See *Trusts Act 1973* (Qld) s 5(1) (definitions of 'trustee' and 'personal representative').

²⁰⁰ 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) vol 1, [11.77], [11.94], [11.149], Recs 11-3, 11-4.

²⁰¹ *Ibid* [11.181].

²⁰² *Ibid* [11.182], Rec 11-8.

7.152 It further recommended that those documents should be maintained for three years after the completion of the administration of the estate.²⁰³

7.153 The American Uniform Trust Code also includes a provision dealing with 'recordkeeping and identification of trust property'.²⁰⁴ Section 810 of the Code provides that a trustee 'shall keep adequate records of the administration of the trust' and 'shall keep trust property separate from the trustee's own property'.

7.154 In South Australia, a much more prescriptive approach is taken in the *Trustee Act 1936* (SA). Section 84B(1) of that Act requires a trustee to 'keep such records relating to his administration of the trust property as may be prescribed'.²⁰⁵ The records are prescribed in a comprehensive list in regulation 5 of the *Trustee Regulations 2011* (SA). They include such things as letters received and sent by the trustee, written instructions for the sale or transfer of trust property, reports received from investment advisers, minutes of trustee meetings, and 'other records that would enable the receipt and disposition of trust property to be conveniently and properly audited', including trust accounts prepared not less than annually. Regulation 5 provides:

5 Records to be kept by trustee

- (1) For the purposes of section 84B of the Act, the records that a trustee must keep relating to administration of the trust property are as follows:
- (a) each document authorising the trustee to act as trustee;
 - (b) each letter received by the trustee and a copy of each letter sent by the trustee;
 - (c) a copy of each statutory declaration and each affidavit made in the course of the administration of the trust;
 - (d) each deed, agreement or other instrument varying distribution of the trust property or a stamped duplicate of any such deed, agreement or instrument;
 - (e) a copy of all returns made as to any form of duty, charge or tax imposed on the trust by the Commonwealth or any State or Territory of the Commonwealth (including trust income tax returns and personal tax returns for beneficiaries where applicable);
 - (f) all written instructions for the sale or transfer of any trust property or any asset which forms or formed part of the trust property and any independent valuations obtained in relation to those assets;
 - (g) minutes of the proceedings of all meetings relating to administration of the trust at which the trustee was or was entitled to be present;

²⁰³ Ibid [11.187], Rec 11-9.

²⁰⁴ Unif Trust Code § 810 (amended 2010).

²⁰⁵ The maximum penalty for non-compliance with s 84B(1) is \$500.

- (h) a record of any insurance cover in respect of the assets which form or formed part of the trust property;
- (i) any report received from an investment adviser and a record of all decisions made in relation to such report;
- (j) a record of all reviews of investments;
- (k) other records that would enable the receipt and disposition of trust property to be conveniently and properly audited, including the following:
 - (i) a register of securities recording the following information in respect of all securities received and disposed of:
 - (A) the date of receipt or disposition;
 - (B) a description of the securities;
 - (C) the consideration passing for receipt or disposition;
 - (D) brief particulars of the purpose of the transaction;
 - (ii) a property register recording the following information in respect of all other property received and disposed of:
 - (A) the date of receipt or disposition;
 - (B) a description of the property;
 - (C) the consideration passing for receipt or disposition;
 - (D) brief particulars of the purpose of the transaction;
 - (iii) a register of all investments of income and capital funds (including redemptions and income accretions) recording the following information in respect of each investment:
 - (A) the date of investment;
 - (B) the amount of the funds invested;
 - (C) brief particulars of the investment;
 - (iv) a cash receipt book recording the following information in respect of each receipt of trust money:
 - (A) the date and reference number of each receipt;
 - (B) the name of the person from whom the money is received;

- (C) the trust name or reference to which the transaction relates;
 - (D) brief particulars of the purpose of the receipt;
 - (E) the amount of the receipt;
 - (F) the date the cash receipted is deposited in an ADI account (where applicable);
- (v) a cash payments book recording the following information in respect of each payment of trust money:
- (A) the date of the payment;
 - (B) if the payment was made by cheque—the cheque number;
 - (C) the name of the payee;
 - (D) the trust name or reference to which the transaction relates;
 - (E) brief particulars of the purpose of the payment;
 - (F) the amount of the payment;
- (vi) each ADI²⁰⁶ statement and passbook issued in relation to trust ADI accounts;
- (vii) trust statements, prepared not less than annually, showing the following for the period from the end of the last period for which a statement was prepared:
- (A) cash receipts and payments;
 - (B) other property received or transferred;
 - (C) assets and liabilities as at the last day of the statement period.
- (2) Where the trustee administers more than 1 trust, separate records must be kept, in accordance with this regulation, in relation to each trust administered by the trustee.
- (3) All records referred to in this regulation must be retained by the trustee, in a legible written form or so as to be readily convertible into such a form, for at least 5 years after the termination of the trust. (note added)

7.155 Ford and Lee express the view that this regulation ‘provides excellent guidance to trustees as to what records they should keep’.²⁰⁷ On the other hand, it may be overly prescriptive in the case of smaller trusts. In its attempt to be comprehensive, it might also inadvertently omit certain records that, in the

²⁰⁶ ‘ADI’ means an authorised deposit-taking institution within the meaning of the *Banking Act 1959* (Cth), that is, a body corporate authorised under that Act to carry on banking business in Australia: *Acts Interpretation Act 1915* (SA) s 4(1); *Banking Act 1959* (Cth) ss 5(1) (definition of ‘authorised deposit-taking institution’), 9(3).

²⁰⁷ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 9 January 2012) [9.6230].

circumstances of a particular case, should be kept. An obligation framed more generally, such as that proposed by the National Committee for Uniform Succession Laws, is likely to be more flexible, although it would not have the advantage of specifying the range of records that ought to be kept.

7-4 Should the *Trusts Act 1973* (Qld) include a provision requiring trustees to keep adequate records relating to the administration of the trust and, if so:

- (a) what particular records, if any, should be prescribed;
- (b) for what period, if any, should the records be required to be maintained; and
- (c) should the legislation also require trustees who are administering more than one trust to keep separate records in relation to each trust?

DUTY TO PROVIDE ACCOUNTS AND OTHER INFORMATION

Introduction

7.156 In addition to keeping proper accounts, a trustee must 'have them always ready when called upon to render them' to the beneficiaries.²⁰⁸ Further, it is the duty of a trustee to afford to the beneficiaries, on request, 'all reasonable and proper information in reference to the matters of the trust',²⁰⁹ and to allow the beneficiaries or their agent, at the beneficiaries' own cost,²¹⁰ to inspect the accounts of the trust and other trust documents.²¹¹ As Mahoney JA explained in *Hartigan Nominees Pty Ltd v Rydge*.²¹²

In general, a trustee is not obliged to volunteer documents or information to beneficiaries or possible beneficiaries. However, if a beneficiary requests it, a trustee is in general obliged to provide documents and information to the beneficiary, at his cost, in relation to the trust property and to provide an accounting in respect of the administration of it.

²⁰⁸ *Kemp v Burn* (1863) 4 Giff 348; 66 ER 740, 740–1 (Stuart V-C).

²⁰⁹ *Springett v Dashwood* (1860) 2 Giff 521; 66 ER 218, 221 (Stuart V-C), citing *Clarke v Ormonde* (1821) Jacob 108; 37 ER 791.

²¹⁰ *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 431 (Mahoney JA); *Re Fairbairn* [1967] VR 633, 640 (Gillard J).

²¹¹ *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 431 (Mahoney JA), 445 (Sheller JA). See also *Re Cowin* (1886) 33 Ch D 179, 185, 186–7 (North J); *Kemp v Burn* (1863) 4 Giff 348; 66 ER 740, 741 (Stuart V-C); *Ottley v Gilby* (1845) 3 Beav 602; 50 ER 237, 238 (Lord Langdale).

²¹² *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 431, cited with approval in *Colston v McMullen* [2010] QSC 292, [45] (White J); *Crowe v Stevedoring Employees Retirement Fund* [2003] VSC 316, [15] (Balmford J). The onus is on the trustee to 'provide a full rather than a reluctant response to requests for information' from the beneficiaries: *Re Whitehouse* [1982] Qd R 196, 201 (Macrossan J), cited with approval in *Green v Wilden Pty Ltd* [2005] WASC 83, [470] (Hasluck J); *Crowe v Stevedoring Employees Retirement Fund* [2003] VSC 316, [13] (Blamford J).

7.157 The trustee's obligation constitutes a 'positive duty of disclosure'.²¹³ It is often discussed in terms of beneficiaries' correlative rights to obtain information and to seek the court's assistance in enforcing the trustee's duty to account.²¹⁴

Beneficiaries' rights to information under the general law

7.158 The precise nature and scope of beneficiaries' rights to information under the general law in Australia is attended by some uncertainty.²¹⁵ Three different, sometimes overlapping, approaches to this issue are found in the cases.

7.159 One approach is attributed to the following statement of Lord Wrenbury in *O'Rourke v Darbishire*:²¹⁶

If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own.

7.160 This was taken 'quite literally' by some to mean that a beneficiary has an actual proprietary interest in the documents of the trust.²¹⁷ It was later said that the entitlement is 'proprietary' only in the sense that it arises because the beneficiary has a beneficial interest in the trust property.²¹⁸ Consistent with this approach, it is generally accepted that beneficiaries under a strict trust have a right (subject to exceptions) to information about the trust property.²¹⁹ This approach casts doubt, however, on the entitlement to information of persons under a discretionary trust, who do not have a beneficial interest in the trust property, and has been criticised on that basis.²²⁰

7.161 Another approach is found in the dissenting judgment of Kirby P in *Hartigan Nominees Pty Ltd v Rydge*.²²¹ Disapproving of the 'proprietary' approach, Kirby P adopted the view expressed by Ford and Lee that:²²²

213 *Green v Wilden Pty Ltd* [2005] WASC 83, [470] (Hasluck J).

214 See, eg, *O'Rourke v Darbishire* [1920] AC 581, 619 (Lord Parmoor), 626 (Lord Wrenbury); *Spellson v George* (1987) 11 NSWLR 300, 316 (Powell J).

215 *Re Maguire* [2010] 2 NZLR 845, 854 (Asher J); *Schreuder v Murray (No 2)* (2009) 260 ALR 139, 160 (Buss JA; McLure JA agreeing).

216 [1920] AC 581, 626.

217 *Rouse v IOOF Australia Trustees Ltd* (1999) 73 SASR 484, 498 (Doyle CJ; Perry and Martin JJ agreeing). See, eg, *Re Fairbairn* [1967] VR 633, 639 (Gillard J).

218 *Breen v Williams* (1996) 186 CLR 71, 89 (Dawson and Toohey JJ), adopted in *Schreuder v Murray (No 2)* (2009) 260 ALR 139, 155 (Buss JA; McClure JA agreeing) and *Rouse v IOOF Australia Trustees Ltd* (1999) 73 SASR 484, 498 (Doyle CJ; Perry and Martin JJ agreeing).

219 See [7.195] below.

220 See, eg, *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 421–2 (Kirby P), 444 (Sheller JA).

221 (1992) 29 NSWLR 405.

The beneficiary's rights to inspect trust documents are founded ... upon the trustee's fiduciary duty to keep the beneficiary informed and to render accounts.

7.162 That approach is traced to the earlier decision in *Spellson v George*, in which Powell J explained that the right to inspect the accounts and be provided with information is a corollary of the trustee's essential obligation to account to the person or group of persons for whose benefit the trust property is held.²²³ This 'provides a conceptual basis' for the prima facie entitlement of potential beneficiaries under a discretionary trust to information.²²⁴ That entitlement has been recognised in several cases.²²⁵

7.163 These two approaches recognise a prima facie entitlement, subject to exceptions.²²⁶

7.164 The third approach differs significantly. It arises from a recent decision of the Privy Council on an appeal from a division of the High Court of the Isle of Man. It concerned a claim for disclosure by a possible beneficiary under discretionary trusts. In *Schmidt v Rosewood Trust Ltd*, the Privy Council rejected the idea that access to information by a beneficiary rests on a 'transmissible' proprietary interest in the trust property. Instead, it expressed the view that:²²⁷

the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts.

7.165 It went on to state that:²²⁸

no beneficiary (and least of all a discretionary object) has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document.

7.166 Some subsequent Australian cases have followed the decision in *Schmidt*,²²⁹ but have limited its application to documents other than trust accounts. In *Avanes v Marshall*, in which access to documents was sought by a life tenant

222 Ibid 422, quoting HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Law Book, 2nd ed, 1990) [936.1]. See also *SC Land Richmond Pty Ltd v Dura (Australia) Constructions Pty Ltd* [2007] VSC 272, [10] (Dodds-Streeton J); *Morris v Morris* (1993) 9 WAR 150, 153 (Seaman J).

223 (1987) 11 NSWLR 300, 315–16.

224 *Jacobson v Dafna Nominees Pty Ltd* [1999] VSC 529, [95] (Ashley J).

225 See [7.196] below.

226 JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1716].

227 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, 729 ('*Schmidt*').

228 Ibid 734.

229 *Silkman v Shakespeare Haney Securities Ltd* [2011] NSWSC 148; *Avanes v Marshall* (2007) 68 NSWLR 595. See also, in New Zealand, *Re Maguire* [2010] 2 NZLR 845; *Foreman v Kingstone* [2004] 1 NZLR 841; and in England, *Breakspear v Ackland* [2009] Ch 32, 51 (Briggs J).

under a testamentary trust, Gzell J of the New South Wales Supreme Court stated that:²³⁰

In my view, the approach in *Schmidt* should be adopted by Australian courts. The decision should not be regarded as abrogating the trustee's duty to keep accounts and to be ready to have them passed, nor the trustee's obligation to grant a beneficiary access to trust accounts. But when it comes to inspection of other documents there should no longer be an entitlement as of right to disclosure of any document. It should be for the Court to determine to what extent information should be disclosed.

7.167 Other Australian judges have declined to follow *Schmidt*, at least in respect of beneficiaries of strict trusts, preferring the view that there is a prima facie right to information, subject to exceptions.²³¹ In *McDonald v Ellis*, Bryson AJ doubted the precedent value of *Schmidt*.²³²

An *obiter dictum* in the Privy Council about trust law in the Isle of Man has in my opinion very little claim to be followed at first instance in New South Wales where a different view has been accepted.

7.168 Bryson AJ also questioned the persuasiveness of the Privy Council's approach:²³³

A decision that all access to trust documents should be in the discretion of the Court is a drastic solution to whatever problems might be perceived in supposing a proprietary basis for discretionary interests, and whatever problems may be perceived in delimiting which documents should be treated as trust documents ...

... [The decision] would render the entitlement of the plaintiff in these proceedings to access the documents, to information, in short to accounts, a discretionary one ... There may be room for the view, on which the Privy Council acted, that such an entitlement is discretionary in the case of a beneficiary who is no more than the object of a discretionary trust and does not have the benefit of a favourable exercise of the trustee's discretion. The weight of opinion in New South Wales the other way on that issue is strong, but the plaintiff's position in the present case is even stronger, as her entitlement is not discretionary but rather vested in interest. Their Lordships' conclusion (at 734 [66]–[67]) would make the beneficiary's right to seek disclosure of trust documents an aspect of the Court's inherent jurisdiction to supervise and, where appropriate, intervene in the administration of trusts.

...

²³⁰ (2007) 68 NSWLR 595, 599, cited in *Silkman v Shakespeare Haney Securities Ltd* [2011] NSWSC 148, [21] (Hammerschlag J).

²³¹ *McDonald v Ellis* (2007) 72 NSWLR 605; *Murray v Schreuder* (2009) 1 ASTLR 340 (Newnes J), *affd* on a different ground in *Schreuder v Murray (No 2)* (2009) 260 ALR 139. See also, eg, *Loughran v Perpetual Trustees WA Ltd* [2007] VSC 50; *SC Land Richmond Pty Ltd v Dura (Australia) Constructions Pty Ltd* [2007] VSC 272; and *Yates v Halliday* [2006] NSWSC 1346 in which the Privy Council decision is referred to but not interpreted as overturning previous authorities to the effect that beneficiaries have a prima facie right to inspect the trust accounts and other trust documents.

²³² (2007) 72 NSWLR 605, 618.

²³³ *Ibid* 618–19.

In my opinion it is not a better rule, because it introduces discretion and promotes resistance and debate in substitution for a rule which is relatively concrete. The tendency will be that only the determined and litigious beneficiary will find out about his own affairs.

7.169 The authors of *Jacobs' Law of Trusts in Australia* also question whether *Schmidt* represents the law in Australia, noting that, if extended to strict trusts, it would have an 'unsatisfactory unsettling effect on received principles'.²³⁴

7.170 To date, the approach in *Schmidt* does not appear to have been judicially considered in Queensland, nor has the question whether *Schmidt* should be followed been determined by an Australian appellate court.²³⁵

7.171 The approach that is adopted has consequences both for the types of information or documents that must (or need not) be disclosed and the persons to whom disclosure must be made.

The information that must be provided

The general law

7.172 It is well established that trustees must provide, or allow inspection of, trust accounts.²³⁶ The cases also establish that trustees must, in general, provide 'information and documents in relation to trust property'.²³⁷

7.173 Under the 'proprietary' approach to disclosure, beneficiaries are said to have a prima facie entitlement to inspection of all 'trust documents'.²³⁸ The closest the cases have come to a definition of 'trust documents' is Lord Salmon's circular²³⁹ explanation in *Re Londonderry's Settlement*.²⁴⁰

²³⁴ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1716].

²³⁵ The Privy Council's decision was noted by the Court of Appeal of Western Australia in *Schreuder v Murray (No 2)* (2009) 260 ALR 139. Buss JA (McLure JA agreeing) noted (at 160) that:

The current state of the non-statutory law on this issue is attended by some uncertainty. It is unnecessary, in the present case, to express an opinion on these issues (including whether the approach of the Privy Council in *Schmidt* represents the law of Australia) ...

²³⁶ See, eg, *Kemp v Burn* (1863) 4 Giff 348; 66 ER 740, 741 (Stuart V-C); *Ottley v Gilby* (1845) 3 Beav 602; 50 ER 237, 238 (Lord Langdale); *Spellson v George* (1987) 11 NSWLR 300, 316 (Powell J); *Re Simersall* (1992) 35 FCR 584, 588 (Gummow J); *Yates v Halliday* [2006] NSWSC 1346, [49] (Lloyd AJ); *Avanes v Marshall* (2007) 68 NSWLR 595, 599 (Gzell J); *Fay v Moramba Services Pty Ltd* [2009] NSWSC 1428, [99] (Brereton J).

²³⁷ *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 431 (Mahoney JA), cited with approval in *Colston v McMullen* [2010] QSC 292, [45] (White J); *Crowe v Stevedoring Employees Retirement Fund* [2003] VSC 316, [15] (Balmford J).

²³⁸ See *O'Rourke v Darbishire* [1920] AC 581, 626 (Lord Wrenbury); *Re Londonderry's Settlement* [1965] Ch 918, 929 (Harman LJ), 937 (Salmon LJ).

²³⁹ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1716]; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 418 (Kirby P in dissent), 442–3 (Sheller JA).

²⁴⁰ [1965] Ch 918, 938. In *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, Sheller JA noted (at 443) that '[t]he expression "trust document" can have little more precise meaning than a document relating to the trust or its administration'.

The category of trust documents has never been comprehensively defined. Nor could it be—certainly not by me. Trust documents do, however, have these characteristics in common: (1) they are documents in the possession of the trustees as trustees; (2) they contain information about the trust which the beneficiaries are entitled to know; (3) the beneficiaries have a proprietary interest in the documents and, accordingly, are entitled to see them.

7.174 This approach involves a distinction between documents that are the property of the trust, and those prepared for the trustee's own purposes (such as notes made by the trustee of discussions with other beneficiaries) and which are not 'trust documents'.²⁴¹

7.175 To the extent that *Schmidt*²⁴² has been applied in Australia, there is no general entitlement to inspect any trust document other than the trust accounts themselves.²⁴³ Rather, it is a matter for the court to exercise its discretion in each case by balancing competing interests of different beneficiaries, the trustees and third parties.²⁴⁴ Nevertheless, in the exercise of its jurisdiction, the court must always be mindful of the trustees' fundamental obligation to be accountable to the beneficiaries.²⁴⁵

7.176 It has been suggested that a beneficiary's claim to trust documents is 'strongest where the subject matter is financial information about the administration of the trust'.²⁴⁶ Depending on the circumstances²⁴⁷ and subject to exceptions,²⁴⁸ the information or documents that a trustee may be required to disclose include:

- deeds or documents constituting or varying the terms of the trust;²⁴⁹
- information about the identity, appointment and retirement of trustees;²⁵⁰
- title deeds;²⁵¹
- information about investments of, and dealings with, the trust property;²⁵²

²⁴¹ *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 432–3, 435 (Mahoney JA).

²⁴² See *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709.

²⁴³ *Avanes v Marshall* (2007) 68 NSWLR 595, 599 (Gzell J).

²⁴⁴ *Ibid* 598; *Foreman v Kingstone* [2004] 1 NZLR 841, 857, 858 (Potter J).

²⁴⁵ *Foreman v Kingstone* [2004] 1 NZLR 841, 857, 858 (Potter J).

²⁴⁶ *Gray v Guardian Trust Australia* [2003] NSWSC 704, [37] (Austin J).

²⁴⁷ In *Re Londonderry's Settlement* [1965] Ch 918, Harman LJ observed (at 931) that 'it is almost impossible satisfactorily to define the obligations of the trustees in the air'. The nature of the trust may inform the trustee's obligation to provide information: see *SAS Trustee Corporation v Cox* (2011) 285 ALR 623, 645 (McColl JA); *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 436 (Mahoney JA).

²⁴⁸ See [7.209] ff below.

²⁴⁹ *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 419 (Kirby P in dissent), 445 (Sheller JA); *Foreman v Kingstone* [2004] 1 NZLR 841, 863 (Potter J).

²⁵⁰ *Foreman v Kingstone* [2004] 1 NZLR 841, 862–3 (Potter J); GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [20.55].

²⁵¹ *Re Cowin* (1886) 33 Ch D 179, 185–7 (North J).

- where the trust estate is invested on mortgage, the mortgage deeds;²⁵³
- actuarial reports;²⁵⁴ and
- income tax returns for the estate.²⁵⁵

7.177 There is also some authority for the proposition that trustees are obliged to inform beneficiaries, who on attaining majority are entitled to a share of the trust property, of their interests under the trust.²⁵⁶ It has been doubted, however, whether this would require trustees 'to inform all persons who may possibly take under a discretionary power of the nature and extent of that possibility'.²⁵⁷

Provisions and proposals in other jurisdictions

7.178 Detailed legislative provision is made in the *Uniform Civil Procedure Rules 1999* (Qld) for the filing and passing of trustee accounts by the court.²⁵⁸ However, there is no statement in the *Trusts Act 1973* (Qld) of trustees' general duty to provide accounts or other information to the beneficiaries.

252 *Spellson v George* (1987) 11 NSWLR 300, 316 (Powell J); *Re Dartnall* [1895] 1 Ch 474; *Re Tillott* [1892] 1 Ch 86, 88 (Chitty J).

253 *Re Tillott* [1892] 1 Ch 86, 88–9 (Chitty J).

254 *Crowe v Stevedoring Employees Retirement Fund* [2003] VSC 316, [39] (Balmford J), distinguishing *Tierney v King* [1983] 2 Qd R 580. See also *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 414 (Kirby P in dissent), 446 (Sheller JA).

255 *Yates v Halliday* [2006] NSWSC 1346, [63] (Lloyd AJ).

256 *Hawkesley v May* [1956] 1 QB 304, 322 (Havers J).

257 *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 432 (Mahoney JA).

258 *Uniform Civil Procedure Rules 1999* (Qld) ch 15 pt 10 (Assessment of estate accounts). Under r 645(1), a beneficiary may apply to the court for an order requiring the filing, assessment and passing of the trustee's 'estate account'. 'Beneficiary' is defined in r 644 to include a person with a beneficial interest in the estate and a right to obtain an account of the administration of the estate from the trustee. Under r 648(1), an 'estate account' must 'give an account of the property of the estate' and must include:

- clear and succinct particulars of all transactions that have occurred in respect of any bank or trust account relating to the estate;
- ...
- an inventory of the estate;
- all distributions under the will (including the will as varied by a court), trust instrument or intestacy for the estate;
- the value of all distributions and assets remaining on hand, reconciled to the net balance of the estate;
- the changes in any investments made in the course of administration; [and]
- details of any other dealings with the property of the estate.

Further, under r 657D(1), the court may order an account to be filed and passed if a trustee makes an application for commission. The provisions of ch 15 pt 10 of the *Uniform Civil Procedure Rules 1999* (Qld) apply to personal representatives as well as trustees: see r 644 (definition of 'trustee'). Section 52(1)(b) of the *Succession Act 1981* (Qld) also provides that a personal representative 'shall be under a duty', when required to do so by the court, to 'exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court'.

In addition, an application may be made to the Public Trustee under s 60 of the *Public Trustee Act 1978* (Qld) for 'an investigation and audit of the condition and accounts of a trust'.

7.179 In contrast, a number of other jurisdictions have introduced or proposed provisions concerning the provision of information to beneficiaries. Most of these focus on the duty to provide accounts on request.

7.180 Section 28 of the *Trustee Act 1898* (Tas) provides that a beneficiary may apply to the trustee for 'true and accurate accounts as to the state of the trust property' and 'of all receipts and payments'. It requires the trustee to comply with the request, at the beneficiary's expense, provided that no such accounts have been rendered in the preceding 12 months. It further provides that, if the trustee refuses or neglects to render the accounts as required, the trustee will be personally liable to pay the costs incident to obtaining the accounts upon an application to the court.²⁵⁹

7.181 A statutory duty to provide accounts is also imposed on licensed trustee companies under the *Corporations Act 2001* (Cth). Section 601SBB(1) of that Act provides that, on application by a person with a proper interest in the estate (including a beneficiary), the trustee company must provide the person with an account of:²⁶⁰

- (a) the assets and liabilities of the estate; and
- (b) the trustee company's administration or management of the estate; and
- (c) any investment made from the estate; and
- (d) any distribution made from the estate; and
- (e) any other expenditure (including fees and commissions) from the estate.

7.182 Under section 601SBB(3), the trustee company 'may charge a reasonable fee for providing an account'. Section 601SBB(4) further provides that, if the trustee company fails to provide a proper account, the court may make an order requiring the preparation and delivery of proper accounts.

7.183 In addition, Commonwealth legislation imposes disclosure obligations on superannuation entities and trustees of managed investment schemes as part of the specific regulatory framework that applies to those entities.²⁶¹ For example, one of the covenants included in the governing rules of a superannuation entity is a covenant 'to allow a beneficiary access to any prescribed information or any

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See also *Trustee Act 1925* (ACT) s 102; *Trustee Act 1925* (NSW) s 102; *Trustee Act 1907* (NT) s 8 which provide for the filing of trustee accounts in court in particular circumstances. The provisions in the ACT and New South Wales apply only in respect of trustees appointed by the court, and the provision in the Northern Territory applies with respect to testators' estates.

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Section 601SBB applies with respect to estates administered and managed by a trustee company including, but not limited to, estates for which the company is a trustee of any kind and deceased estates for which the company is acting as an executor or administrator. Section 601SBB also applies, with certain exceptions, when a trustee company is acting as: agent, attorney or nominee; receiver, controller or custodian of property; or otherwise as manager or administrator (including in the capacity as guardian) of the estate of an individual. See *Corporations Act 2001* (Cth) ss 601RAA, 601RAC(2) (definitions of 'estate that is administered or managed' and 'estate management functions'). Failure to comply with s 601SBB(1) is an offence against the Act with a maximum prescribed penalty of 50 penalty units: s 1311(1), (2); sch 3 item 173A.

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See *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(2)(h); *Corporations Act 2001* (Cth) ch 2M.

prescribed documents',²⁶² including 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.²⁶³

7.184 In New Zealand, the *Trustee Act 1956* (NZ) provides a limited right to examine trust accounts.²⁶⁴ Section 83A of that Act provides that a solicitor or accountant of a beneficiary is entitled to examine, at any reasonable time, the accounts of the estate, including the books, vouchers and documents of title relating to the estate. That provision applies, however, only in relation to trust estates administered by a trustee corporation.

7.185 The Law Reform Commission of Saskatchewan also recommended that statutory recognition be given to beneficiaries' right to 'an accounting'. It proposed that the legislation empower the court to order the trustee to pass accounts if the trustee has refused to comply in a reasonable and timely manner with a request for information concerning the trustee's accounts.²⁶⁵ Those recommendations are reflected in section 55 of the *Trustee Act* of Saskatchewan.²⁶⁶

7.186 The South Australian provision is more prescriptive and focuses on the disclosure of the full range of 'trust records' required to be maintained by the trustee. As explained earlier, under section 84B(1) of the *Trustee Act 1936* (SA), trustees are required to keep prescribed records relating to the administration of the trust property. The records are prescribed in regulation 5(1) of the *Trustee Regulations 2011* (SA) and include trust accounts prepared not less than annually, as well as a wide range of other documents.²⁶⁷ Under section 84B(2) of the Act, the trustee is required to produce those records for inspection at the request of a beneficiary, and to permit the beneficiary to examine and make copies of the records.²⁶⁸ Some of those records would be likely, under the general law, to be caught by the exceptions to disclosure.²⁶⁹

7.187 As mentioned earlier, the National Committee for Uniform Succession Laws recommended a statutory duty for personal representatives to maintain such documents as are necessary to prepare a statement of assets and liabilities or to render an account of the administration of the estate. It also recommended a provision to the effect that a beneficiary may, on giving reasonable notice to the personal representative, inspect and obtain copies of those documents, and that

²⁶² *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(2)(h).

²⁶³ *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 4.01; *Corporations Act 2001* (Cth) s 1017C(5)(a); *Corporations Regulations 2001* (Cth) reg 7.9.45(2)(b).

²⁶⁴ Provision is also made for a trustee or beneficiary to apply to the Public Trust for a solicitor or accountant to investigate and audit the accounts of the trust estate (other than an estate administered by a trustee corporation), after which every beneficiary is entitled to inspect and take copies of the accounts and the auditor's report: *Trustee Act 1956* (NZ) s 83B; *Trust Estates Audit Regulations 1958* (NZ).

²⁶⁵ Law Reform Commission of Saskatchewan, *Proposals for Reform of the Trustees Act*, Report (2002) Rec 2.10.

²⁶⁶ *Trustee Act*, SS 2009, c T-23.01, ss 54–56.

²⁶⁷ See [7.154] above.

²⁶⁸ The maximum penalty for non-compliance with s 84B(2) is \$500.

²⁶⁹ See the discussion at [7.209] ff below.

the personal representative must allow the beneficiary, or the beneficiary's agent, to inspect or obtain copies of the documents.²⁷⁰ The beneficiary would be required to pay the personal representative's reasonable costs of producing the copies of the documents sought,²⁷¹ and if the personal representative did not allow the inspection or give copies of the documents, the beneficiary would be entitled to apply to the court for an order requiring the personal representative to comply.²⁷²

7.188 The British Columbia Law Institute, although focusing mainly on accounts, recommended an annual reporting requirement, rather than an obligation to provide information when requested. It recommended a provision requiring trustees, 'for each calendar year in which the trust exists', to deliver a report to the beneficiaries of the trust assets and liabilities, the values of the trust assets, receipts and disbursements, and, upon request, the source documents evidencing that information.²⁷³ In addition, the provision would empower the court to order disclosure of information regarding the terms of the trust, the administration of the trust, or the trust assets, if a beneficiary's request was refused. The provision would not limit the common law duty to provide accounts or information.

7.189 The American Uniform Trust Code deals with trustees' duty to provide information in wider terms.²⁷⁴ Section 813(a) of the Code imposes a general duty on trustees to keep 'qualified beneficiaries'²⁷⁵ of the trust 'reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests', and to respond promptly to beneficiaries' requests for 'information related to the administration of the trust'.

7.190 Among other things, section 813(b) also requires trustees to provide beneficiaries with a copy of the trust instrument upon request, and to notify the beneficiaries in advance of any change in the rate of the trustee's compensation.

7.191 In addition, section 813(c) requires the trustee to provide a report, 'at least annually and at the termination of the trust' of:

the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values.

7.192 The commentary to the Code explains the drafters' preference for framing the provision in terms of 'reporting' rather than 'accounting':²⁷⁶

270 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) vol 1 [11.201]–[11.206], Recs 11-11, 11-12.

271 Ibid [11.206], Rec 11-13.

272 Ibid [11.207], Rec 11-14.

273 British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 33–4, Proposed *Trustee Act*, cl 8. That recommendation has not been implemented.

274 Unif Trust Code § 813 (amended 2010).

275 See [7.202] below in relation to 'qualified beneficiaries'.

276 Unif Trust Code (amended 2010), Comment 150.

The Uniform Trust Code employs the term 'report' instead of 'accounting' in order to negate any inference that the report must be prepared in any particular format or with a high degree of formality. The reporting requirement might even be satisfied by providing the beneficiaries with copies of the trust's income tax returns and monthly brokerage account statements if the information on those returns and statements is complete and sufficiently clear. The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests.

7.193 Generally, the Uniform Trust Code provides that the terms of the trust instrument prevail over a provision of the Code.²⁷⁷ However, the Code creates a number of exceptions to this approach, including relevantly:²⁷⁸

the duty under Section 813(a) to respond to the request of a [qualified] beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust.

The persons to whom information must be provided

The general law

7.194 In determining the entitlement of beneficiaries to information, the cases have traditionally drawn a distinction between beneficiaries of strict trusts and potential beneficiaries under discretionary trusts (that is, persons who are merely the objects of a discretionary trust).²⁷⁹

7.195 Under the 'proprietary' approach, beneficiaries of strict trusts, who have vested or contingent interests in the trust property, have been accorded a clear prima facie entitlement to such information.²⁸⁰

7.196 Potential beneficiaries of discretionary trusts have also been found to be entitled to information,²⁸¹ although their position has been described as less clear.²⁸² Their entitlement is based on the trustee's fundamental obligation to account to those for whose benefit the trust property is being held.²⁸³

7.197 In *Randall v Lubrano*,²⁸⁴ the potential beneficiaries under a discretionary

²⁷⁷ Unif Trust Code § 105(b) (amended 2010).

²⁷⁸ Unif Trust Code § 105(b)(9) (amended 2010).

²⁷⁹ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1716]; *Schreuder v Murray (No 2)* (2009) 260 ALR 139, 160 (Buss JA; McLure JA agreeing).

²⁸⁰ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1716]; *McDonald v Ellis* (2007) 72 NSWLR 605, 613 (Bryson AJ). See, eg, *Re Cowin* (1886) 33 Ch D 179; *Re Tillot* [1892] 1 Ch 86; *Yates v Halliday* [2006] NSWSC 1346.

²⁸¹ Eg, *Randall v Lubrano* (Unreported, Supreme Court of New South Wales Equity Division, Holland J, 31 October 1975), quoted in full as an annexure to *McDonald v Ellis* (2007) 72 NSWLR 605, 605, 621–3; *Spellson v George* (1987) 11 NSWLR 300; *Spellson v Janango Pty Ltd* (Unreported, Supreme Court of New South Wales, Hodgson J, 8 December 1987). See also *Chaine-Nickson v Bank of Ireland* [1976] IR 393.

²⁸² *McDonald v Ellis* (2007) 72 NSWLR 605, 614 (Bryson AJ). See also *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 425 (Mahoney JA).

²⁸³ See [7.161]–[7.162] above; *Spellson v George* (1987) 11 NSWLR 300, 315–16 (Powell J).

²⁸⁴ Unreported, Supreme Court of New South Wales, Holland J, 31 October 1975, quoted in full in *McDonald v Ellis* (2007) 72 NSWLR 605, 621–3.

trust sought accounts of the trust, with information as to the amount of the trust property and its investments. There were indications that the trustee may have misapplied some of the trust money, and the trustee had declined to provide any explanation. For the trustee, it was argued that the plaintiffs, as discretionary beneficiaries, had no relevant interest in the trust estate and accordingly no right to call upon the trustee for an account. It was also argued that such a right would be inconsistent with the trustee's wide discretionary powers. Holland J held, however, that the beneficiaries were entitled to the accounts:²⁸⁵

If the argument for the trustee is correct he could do as he pleases with the trust property and commit any breach of trust that he cared to commit. There may be no way of detecting it and no person could require him to reveal what he had been doing. It may be that with such wide powers as here, the trustee may not be obliged to account to discretionary beneficiaries in the sense of justifying investments of the trust property or recouping the trust fund for losses, but it is quite a different matter to say that he cannot be required to give an account of the trust property and what he has done or is doing with it.

In my opinion, on elementary principles of justice and on the basic principles on which trusts rest and are supervised by the Court, the plaintiffs have a right to know what the trust property is and how it has and is being administered by the trustee ...

7.198 That decision was followed in *Spellson v George*,²⁸⁶ in which it was held that potential objects of the exercise of a discretionary power of appointment in respect of a trust fund have a right to seek and obtain information concerning the management of the trust fund, and that the exercise of that right does not depend on any allegation of fraud or other breach of trust. Powell J explained:²⁸⁷

it is clear that the object of a discretionary trust, even before the exercise of the trustee's discretion in his favour, does have rights against the trustee — those rights, so it seems to me, are not restricted to the right to have the trustee bona fide consider whether or not to exercise his (the trustee's) discretion in his (the object's) favour, but extend to the right to have the trust property properly managed and to have the trustee account for his management ... (references omitted)

7.199 On the other hand, concerns have been raised about the obligation to provide information where the class of possible beneficiaries is very wide. For example, in *Hartigan Nominees Pty Ltd v Rydge*, Mahoney JA expressed the view that:²⁸⁸

it may be that such a right [to documents and information in relation to the trust property and to an accounting] does not exist where the request is made by a person who is only a possible beneficiary under a discretionary trust. At least, I would reserve the question whether one of a large number of possible beneficiaries may make such a request. In many cases, the class of possible beneficiaries may be extensive and, to an extent, the persons who are or may

285 Ibid 623.

286 (1987) 11 NSWLR 300.

287 Ibid 316.

288 (1992) 29 NSWLR 405, 432.

be a member of the class may not be clearly defined. In the present case, the definition of eligible beneficiaries includes not merely several groups of persons but, in addition, persons who are nominated in writing to the trustees by the father, his legal personal representatives, or the trustees themselves. As at present advised, I doubt that a person whose interest lies not in property but in possibility and is in respect of part but not all of the trust property may demand such information.

7.200 Such considerations would be relevant in the exercise of the court's discretion under the *Schmidt* approach.²⁸⁹ Under that approach, there is no prima facie entitlement as of right for any beneficiary to information. Instead, disclosure is a matter for the court's discretion. In *Schmidt*, the Privy Council explained that, under that approach, there is no need to 'draw any bright dividing line' between beneficiaries under strict trusts and the objects of discretionary trusts or powers.²⁹⁰ Nevertheless, it considered that the nature of the beneficiary's interest 'may be an important part of the balancing exercise' undertaken by the court and that.²⁹¹

In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief.

Provisions and proposals in other jurisdictions

7.201 The provisions in other jurisdictions that impose a statutory duty to provide accounts or other information generally require disclosure to 'a beneficiary'²⁹² or 'any person beneficially interested' in property subject to the trust.²⁹³ As such, those provisions would not extend to persons who have not acquired a beneficial interest in the trust property, such as potential beneficiaries under a discretionary trust.

7.202 As noted earlier, section 813(a) of the American Uniform Trust Code provides that trustees must keep the 'qualified beneficiaries' of the trust reasonably informed about the administration of the trust and the material facts necessary for them to protect their interests. A 'qualified beneficiary' is defined to mean 'a beneficiary who, on the date the beneficiary's qualification is determined':²⁹⁴

- (a) is a distributee or permissible distributee of trust income or principal;
- (b) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (a) terminated on that date without causing the trust to terminate; or

289 See *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709.

290 Ibid 734.

291 Ibid 734–5.

292 *Trustee Act 1936* (SA) s 84B(2)(c); *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(2)(h). Under the *Superannuation Industry (Supervision) Act 1993* (Cth) s 10(1), 'beneficiary' is defined to mean a person who has a beneficial interest in the fund, scheme or trust. The South Australian provision additionally requires the trust records to be given, on request, to the Public Trustee or another trustee of the trust: *Trustee Act 1936* (SA) s 84B(2)(a)–(b). See also *Trustee Act*, SS 2009, c T-23.01, s 55 which provides for accounts to be provided on the request of 'a beneficiary' or the beneficiary's 'property attorney or property guardian'.

293 *Trustee Act 1898* (Tas) s 28(1).

294 Unif Trust Code § 103(13) (amended 2010).

- (c) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

7.203 Other disclosure requirements under section 813 of that Code apply in respect of different persons. Under section 813(b), a copy of the trust instrument must be given to 'a beneficiary'²⁹⁵ upon request. Under section 813(c), the accounts to be provided each year and at the termination of the trust are to be given to 'the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it'.

7.204 The British Columbia Law Institute has similarly proposed that trust accounts be provided each year to every 'qualified beneficiary',²⁹⁶ being 'a beneficiary who, on the relevant date':²⁹⁷

- (i) has a vested beneficial interest in the trust property and is currently entitled to receive a distribution of trust income or capital; or
- (ii) has delivered to the trustee written notice that the beneficiary wishes to receive all notices, notifications and reports to which a qualified beneficiary is entitled under this Act.

7.205 The statutory duty imposed on trustee companies under the *Corporations Act 2001* (Cth) is the most prescriptive in terms of the persons to whom information must be given. It requires accounts to be given to 'a person with a proper interest in the estate'.²⁹⁸ This is defined to include:²⁹⁹

- (a) ASIC;³⁰⁰
- (b) in relation to a charitable trust:
- (i) the settlor, or one of the settlors, of the trust;
- (ii) a person who, under the terms of the trust, has power to appoint or remove a trustee of the trust or to vary (or cause to be varied) any of the terms of the trust;
- (iii) a Minister of a State or Territory who has responsibilities relating to charitable trusts;³⁰¹
- (iv) a person who is named in the trust instrument as a person who may receive payments on behalf of the trust;

295 Unif Trust Code § 103(3) (amended 2010) defines 'beneficiary' to mean a person who has a present or future beneficial interest in a trust, vested or contingent, or a person, in a capacity other than trustee, who holds a power of appointment over trust property.

296 British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 33–4, Proposed *Trustee Act*, cl 8(1).

297 Ibid 25, Proposed *Trustee Act*, cl 1(e).

298 *Corporations Act 2001* (Cth) s 601SBB(1).

299 *Corporations Act 2001* (Cth) s 601RAD(1).

300 The Australian Securities and Investments Commission has regulatory responsibilities with respect to trustee companies and other entities under the *Corporations Act 2001* (Cth).

301 As explained in Chapter 13, the Attorney-General, as representative of the Crown, has the right and duty to enforce charitable trusts.

- (v) a person who is named in the trust instrument as a person who must, or may, be consulted by the trustee(s) before distributing or applying money or other property for the purposes of the trust; or
- (vi) a person of a class that the trust is intended to benefit;
- (c) in the case of the estate of a deceased person:
 - (i) if the person died testate—a beneficiary under the person's will;
 - (ii) if the person died intestate—a person who has, or is entitled to, an interest in the deceased's estate;
- (d) in the case of any other trust:
 - (i) the settlor, or one of the settlors, of the trust;
 - (ii) a person who, under the terms of the trust, has power to appoint or remove a trustee or to vary (or cause to be varied) any of the terms of the trust;
 - (iii) a beneficiary of the trust;
- (e) in relation to an application to a court relating to the estate—a person that the court considers, in the circumstances of the case, has a proper interest in the estate;
- (f) a person prescribed by the regulations as having a proper interest in the estate;³⁰²
- (g) if a person covered by any of the above paragraphs is under a legal disability—an agent of the person. (notes added)

7.206 Although this definition is quite lengthy, it may not necessarily confer on the object of a discretionary power any greater entitlement to information than is available under the general law. 'Beneficiary' is not defined under the Act and, if given its usual meaning, may not include a person who is merely a potential beneficiary under a discretionary trust (especially if a distribution has never been made in the person's favour). Such a person would need to establish, in an application to the court, that the person has a 'proper interest in the estate'.³⁰³

7.207 A slightly different approach was recommended by the National Committee for Uniform Succession Laws in relation to the model administration of estates legislation. It recommended that, on reasonable notice, a beneficiary should be entitled to inspect the documents maintained by the personal representative and, at the beneficiary's cost, to obtain copies of the documents, either personally or by an agent. It also acknowledged that creditors and persons who are eligible to apply for family provision also have a proper interest in the estate of a deceased person. However, in recognition of the different nature of their interest, it recommended that, instead of an automatic right to inspect and copy documents,

³⁰² The regulations do not prescribe any persons.

³⁰³ *Corporations Act 2001* (Cth) s 601RAD(1)(e).

those persons should be entitled to apply to the court for access to the documents.³⁰⁴

7.208 The New Zealand provision, which applies in respect of trusts administered by trustee corporations, allows the trust accounts to be examined only by 'a solicitor or accountant authorised in writing by a beneficiary'.³⁰⁵

Exceptions to the disclosure of information

The general law

7.209 Although the general law recognises a prima facie entitlement to trust accounts and information, it also recognises a number of exceptions.

7.210 The first of these is where the document or information is not 'the property of the trust' as such, but has been prepared for the trustee's own use.³⁰⁶ This would include 'notes made for or by a trustee of discussions with other beneficiaries'.³⁰⁷

7.211 Secondly, there is no entitlement to documents or information that would reveal the trustee's reasons for exercising a discretionary power.³⁰⁸ It is a long-standing principle that, unless a lack of *bona fides* is alleged, 'trustees exercising a discretionary power are not bound to disclose to their beneficiaries the reasons actuating them in coming to a decision'.³⁰⁹ It has been held, therefore, that trustees are not obliged to disclose the minutes of trustee meetings or other documents relating to trustees' deliberations or reasons regarding the exercise of discretionary powers.³¹⁰

7.212 Thirdly, information may be withheld if it has been given to the trustee with an expectation that it be treated confidentially.³¹¹ This may apply to commercial obligations of confidentiality owed to third parties, as where the trustee is engaged in contractual negotiations or is conducting a business.³¹² It may also apply to

304 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) vol 1, [11.211]–[11.214], Recs 11-15 to 11-17.

305 *Trustee Act 1956* (NZ) s 83A.

306 *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 432–3, 435 (Mahoney JA).

307 *Ibid* 433.

308 *Ibid* 417 (Kirby P in dissent), 434 (Mahoney JA), 444–5 (Sheller JA).

309 *Re Londonderry's Settlement* [1965] Ch 918, 928 (Harman LJ).

310 *Ibid* 939. See also *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 444–5 (Sheller JA).

311 *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 418 (Kirby P in dissent), 436 (Mahoney JA), 445–6 (Sheller JA); *Rouse v IOOF Australia Trustees Ltd* (1999) 73 SASR 484, 499 (Doyle CJ; Perry and Martin JJ agreeing).

312 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 9 January 2012) [9.7027]; *Rouse v IOOF Australia Trustees Ltd* (1999) 73 SASR 484, 499 (Doyle CJ; Perry and Martin JJ agreeing). See, eg, *Morris v Morris* (1993) 9 WAR 150.

communications of a personal or private nature, particularly in the context of discretionary trusts, such as communications to or from a beneficiary or the settlor.³¹³

7.213 There is a particular concern that disclosure of such information — where it pertains to a trustee's discretion to distribute trust property among members of a class of potential beneficiaries — will cause embarrassment, family conflict, and animosity toward the trustees.³¹⁴ On the other hand, it has been noted that refusing a request for information may itself create suspicion and friction.³¹⁵

7.214 In *Hartigan Nominees Ltd v Rydge*, it was held that the trustees were not obliged to disclose a memorandum of wishes given to the trustees by the instigator of the trust, which was likely to have been given on a confidential basis.³¹⁶ In that case, Mahoney JA expressed the view that a family discretionary trust invariably involves considerations of privacy:³¹⁷

Such a trust is not a mere commercial document in which the public may have an interest. It is a private transaction, a disposition by the settlor of his own property, ordinarily voluntarily, in the manner which he is entitled to choose. Special cases apart, it is proper that his wishes and his privacy be respected.

In a discretionary trust of this kind, the settlor has placed confidence in his trustee and has on that basis transferred property to him. It has, I think, been the purpose of the law to respect that trust. It depends upon confidence and confidentiality. The settlor seeks to have the trustee resolve, without unnecessary abrasion, the conflicting claims of persons in an area, the family, where disputes are apt to be bruising. In case of this kind, if a settlor's wishes cannot be dealt with in confidence, the purpose of the trust may be defeated.

It has been the practice of the Chancery Courts to protect trustees from interference in the administration of such trusts. Thus, there is, it has been said, a general right of a beneficiary to have trusts administered by or under the supervision of the court. But rules have been evolved to ensure that, unless

Confidentiality has also been found to justify the withholding of legal communications from beneficiaries in certain circumstances: see *Rouse v IOOF Australia Trustees Ltd* (1999) 73 SASR 484, 500–1 (Doyle CJ; Perry and Martin JJ agreeing); *Avanes v Marshall* (2007) 68 NSWLR 595, 600 (Gzell J). Apart from a cause of action based on an alleged breach of the trustee's duty to provide information, however, the trustee's right to withhold disclosure of legal communications from a beneficiary in the course of litigation is to be determined by reference to the rules of legal privilege: *Schreuder v Murray (No 2)* (2009) 260 ALR 139, 143 (Pullin J), 159–60 (Buss JA; McLure JA agreeing); *Krok v Szaintop Homes Pty Ltd (No 1)* [2011] VSC 16, [14] (Judd J). If legal advice is obtained by the trustee concerning the proper administration or management of the trust, the trustee and beneficiary will have a joint privilege in the communications and the trustee will be unable to rely on the privilege to withhold disclosure from the beneficiary. However, the privilege will not be joint, and may be asserted against the beneficiary, if the communications relate to legal services obtained for the benefit of the trustee personally. See *Schreuder v Murray (No 2)* (2009) 260 ALR 139, 142 (Pullin J), 160–1 (Buss JA; McLure JA agreeing).

313 *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 433, 435 (Mahoney JA).

314 *Re Londonderry's Settlement* [1965] Ch 918, 931 (Harman LJ), 935 (Danckwerts LJ), 937 (Salmon LJ); *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 433, 436 (Mahoney JA), 442 (Sheller JA).

315 *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 420 (Kirby P in dissent). See also *Foreman v Kingstone* [2004] 1 NZLR 841, 860–1 (Potter J), in which it is suggested that the possibility that disclosure may cause friction and acrimony should not, of itself, be a reason for denying access to information to which the beneficiaries are otherwise entitled.

316 *Ibid* 437 (Mahoney JA), 446 (Sheller JA), Kirby P dissenting (at 419, 421). Contra *Breakspear v Ackland* [2009] Ch 32.

317 *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 436.

there be cause, there will be no interference with the administration of the trust by the trustee. As a matter of principle, the discretion of the trustee has been respected by the courts.

7.215 Mahoney JA noted that, in applying these principles to the present case, the Court faced the difficulty of being ‘asked to give a decision in general terms’ and ‘to do so without seeing the terms of the memorandum’.³¹⁸ Nevertheless, Mahoney JA found that the memorandum of wishes was ‘likely to have been given upon a confidential basis’ and that the disclosure of its contents may ‘be apt to give rise to family difficulties between the various parts of Sir Norman’s family’ and, on this basis, held that the plaintiff was not entitled to inspect the memorandum.³¹⁹

7.216 Sheller JA came to the same conclusion, but based his view on the circumstance that the instigator of the trust ‘did not disclose his wishes in, or in a document attached to, the deed of settlement’ but had instead ‘delivered a separate memorandum of wishes to the trustees’. Sheller JA considered that this ‘leads to the conclusion that it was his, and thus the settlor’s, intention that his wishes should remain confidential ... which bound the trustees not to disclose them to the respondent’.³²⁰ Sheller JA did not consider that there were any ‘countervailing’ circumstances, such as ‘a want of good faith on the part of the trustees’ or ‘some overriding public interest’, to call for the memorandum’s disclosure.³²¹

7.217 On the other hand, Kirby P (in dissent) took a different view and would have allowed the discretionary beneficiary to inspect the memorandum:³²²

If there is a category of ‘trust documents’ to which a beneficiary may undoubtedly have access and other documents (such as minutes, records of the trustees etc) to which access may be controlled or limited, the memorandum of wishes is clearly to be classified in the former rather than the latter category. This is because, as the letter from the solicitors for the trustees indicated, they were proceeding to interpret their trust functions with a regard to what the deed required, in the light of the memorandum of wishes of its instigator. Young J has held that that was a proper course for the trustees to take.³²³ I agree. In that sense, therefore, the memorandum of wishes was an essential component of, or companion to, the trust deed itself. It provided an understanding of the purposes of the establishment of the trust by the settlor at the instigation of the benefactor. Thus, no one would dispute that the beneficiary could have access to the trust deed itself. In my view, it is really enough to dispose of this case to say that that trust deed, being understood in the light of the memorandum of wishes, is effectively to be taken to be

318 Ibid 437. At the trial, the issues were treated as involving a question of legal principle for which the actual terms of the memorandum were not essential, the memorandum being placed in a sealed envelope and not inspected by the trial judge. On appeal, the Court declined to receive and read the memorandum, such inspection being opposed by the respondent beneficiary as amounting to an attempt to tender fresh evidence not presented at the trial. See *ibid* 409 (Kirby P dissenting); *Rydge v Hartigan Nominees Pty Ltd* (Unreported, Supreme Court of New South Wales, Young J, 10 October 1990).

319 *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 437.

320 Ibid 446.

321 Ibid 447.

322 Ibid 418–19.

323 See *Rydge v Hartigan Nominees Pty Ltd* (Unreported, Supreme Court of New South Wales, Young J, 10 October 1990).

supplemented by it. Then to deny the beneficiaries affected access to such a central document is undoubtedly to deny them access to one of the 'trust documents'. (note added)

7.218 Fourthly, it has been recognised that the terms of the trust instrument itself may impose a requirement of 'secrecy' as to particular information.³²⁴

7.219 Finally, it has been suggested that disclosure may be refused:³²⁵

when the trustee has reasonable grounds for considering that to do so will not be in the interests of the beneficiaries as a whole, and will be prejudicial to the ability of the trustee to discharge its obligations under the trust.

7.220 The trustee's duty to provide accounts and information must be balanced against the trustee's 'equally fundamental obligation' to administer the trust estate for the benefit of the beneficiaries as a whole.³²⁶ The discretion to refuse disclosure on this basis 'cannot', however, 'be used as an excuse for paternalism or to disregard the interests of beneficiaries'.³²⁷

7.221 Under the *Schmidt* approach,³²⁸ as explained above, there is no prima facie entitlement to the disclosure of information. Rather, the question of disclosure is a matter for the court's discretion, taking into account the competing interests of the parties and other matters, namely:³²⁹

- (a) Whether there are issues of personal or commercial confidentiality;
- (b) The nature of the interests held by the beneficiaries seeking access;
- (c) The impact on the trustees, other beneficiaries and third parties;
- (d) Whether some or all of the documents can be withheld in full or redacted form;
- (e) Whether safeguards can be imposed on the use of the trust documentation (for example, undertakings, professional inspection etc) to limit any use of the documentation beyond that which is legitimate; and
- (f) Whether (in the case of a family trust) disclosure would be likely to embitter family feelings and the relationship between the trustees and beneficiaries to the detriment of the beneficiaries as a whole.

³²⁴ Eg, *Tierney v King* [1983] 2 Qd R 580, discussed in *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 446 (Sheller JA).

³²⁵ *Rouse v IOOF Australia Trustees Ltd* (1999) 73 SASR 484, 500 (Doyle CJ; Perry and Martin JJ agreeing).

³²⁶ *Ibid* 499–500 (Doyle CJ; Perry and Martin JJ agreeing).

³²⁷ *Ibid* 500.

³²⁸ See *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709.

³²⁹ *Foreman v Kingstone* [2004] 1 NZLR 841, 859 (Potter J).

Provisions and proposals in other jurisdictions

7.222 Few of the provisions dealing with trustees' duty to provide accounts or other information deal with any exceptions to disclosure.

7.223 However, the duty to provide information to beneficiaries upon request under section 813 of the American Uniform Trust Code is subject to a 'reasonableness' qualification. Section 813(a) provides that:³³⁰

Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust. (emphasis added)

7.224 In *Gray v Guardian Trust Australia*, Austin J of the Supreme Court of New South Wales referred to the 'reasonableness' qualification in section 813 of the Uniform Trust Code, and expressed the view that:³³¹

the word 'reasonably' imports a limitation that must also exist in Australian law, for the principal task of a trustee or legal personal representative is to administer the trust estate for the benefit of the beneficiaries as a whole, rather than to respond to voluminous and lengthy queries from a particular beneficiary.

7.225 Austin J held that, even if (contrary to his view) the plaintiff-beneficiary was entitled to answers to every question he raised:³³²

his demands exceeded the permissible volume and frequency of a beneficiary's demands for information.

7.226 The British Columbia Law Institute took a more prescriptive approach. In recommending a statutory provision requiring trustees to deliver trust accounts to the beneficiaries each year, it also proposed that the provision should set out the circumstances in which the trustee may withhold information, namely, where, in the trustee's opinion, disclosure would:³³³

- (a) be detrimental to the best interests of any beneficiary,
- (b) be prejudicial to the trust assets,
- (c) conflict with any duty owed by a trustee as a company director,
- (d) reveal a trustee's reasons for the exercise of discretion conferred by the trust instrument,
- (e) place an unreasonable administrative burden on the trust, or

³³⁰ Unif Trust Code § 813(a) (amended 2010). See also the recommendation of the Law Reform Commission of Saskatchewan, discussed at [7.185] above, that the court be empowered to order disclosure if the trustee has refused to comply with a request in a reasonable manner.

³³¹ [2003] NSWSC 704, [39] (Austin J). In *Foreman v Kingstone* [2004] 1 NZLR 841, Potter J also noted (at 859) that:

what is a reasonable request for information is likely to be viewed differently by trustees conscious of their duties to administer the trusts for the benefit of all beneficiaries, and the particular beneficiaries seeking information.

³³² *Gray v Guardian Trust Australia* [2003] NSWSC 704, [39].

³³³ British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 33–4, Proposed *Trustee Act*, cl 8(5). That recommendation has not been implemented.

- (f) place the trustee in breach of obligation, properly assumed by the trustee, to maintain confidence.

7.227 It also recommended that the provision should empower the court, on the application of a beneficiary who has requested but been refused information, to order the disclosure of any information regarding the terms of the trust, the administration of the trust, or the trust assets.³³⁴

7-5 Should the *Trusts Act 1973* (Qld) include provisions to clarify the duty of trustees to provide accounts or other information in relation to the trust property to beneficiaries or other persons?

7-6 If so:

- (a) which persons should be entitled to receive information or inspect the documents on application to the trustee, for example:
- (i) a beneficiary;
 - (ii) the object of a discretionary power;
- (b) what information or documents, if any, should be prescribed;
- (c) should the trustee have a discretion to refuse disclosure of the information or documents in particular circumstances and, if so, what should those circumstances be?

DUTY TO ACT JOINTLY

The general law

7.228 It is a long standing principle that, unless the trust instrument provides otherwise,³³⁵ co-trustees of a private trust must act jointly.³³⁶

In the case of co-trustees of a private trust, the office is a joint one. Where the administration of the trust is vested in co-trustees, they all form, as it were, but one collective trustee and therefore must execute the duties of the office in their joint capacity. Sometimes, one of several trustees is spoken of as the active trustee, but the court knows of no such distinction: all who accept the office are in the eyes of the law active trustees. If any one refuse or is incapable to join, it is not competent for the other to proceed without him ...

³³⁴ Ibid 33–4, Proposed *Trustee Act*, cl 8(6). That recommendation has not been implemented.

³³⁵ *Dulhunty v Dulhunty* [2010] NSWSC 1465, [35] (Slattery J); *Rodney Aero Club v Moore* [1998] 2 NZLR 192, 195 (Hammond J).

³³⁶ *Re Just (No 1)* (1973) 7 SASR 508, 513 (Jacobs J). See also *Beath v Kousal* [2010] VSC 24, [55] (Kaye J); *Sky v Body* (1970) 92 WN (NSW) 934, 935 (Street J).

7.229 The obligation of trustees to act jointly means that an act of the majority cannot bind a dissenting minority or the trust estate.³³⁷ Thus, it is said that trustees ‘must act unanimously’.³³⁸ In the absence of unanimous agreement, the status quo will prevail unless the court intervenes.³³⁹ As Street J explained in *Sky v Body*:³⁴⁰

If conflicting business considerations lead to such a divergence that the trustees are not able to act unanimously, then the simple position is that they cannot act. Whether or not the Court should then interfere by appointing a receiver or otherwise making some adjustments in the personnel of the trusts is another matter. For present purposes it is sufficient to state that if the trustees are unable to agree upon a course of action then it is not open for the majority — if there be more than two — ... to make the executive decision.

7.230 When there is disagreement between the trustees, they may approach the court for directions.³⁴¹

7.231 The obligation to act jointly also means that, ordinarily, trust funds should be under the joint control of all trustees³⁴² and trust investments should be in the joint names of the trustees.³⁴³ In addition, the usual rule was that, to give a valid discharge to a purchaser, all the trustees had to join in giving a receipt.³⁴⁴ That rule has been modified by section 43 of the *Trusts Act 1973* (Qld).³⁴⁵

7.232 The obligation to act jointly is an aspect of the duty of trustees to act personally,³⁴⁶ pursuant to which ‘each individual has a separate responsibility to ensure that the terms of the trust are carried out’.³⁴⁷ As such, a trustee’s discretions must not be fettered,³⁴⁸ and a trustee’s duties and powers must not, ordinarily, be

³³⁷ *Luke v South Kensington Hotel Co* (1879) 11 Ch D 121, 125–6 (Jessell MR), 128 (James LJ), 129 (Bramwell LJ); *Phipps v Boardman* [1965] Ch 992, 1017 (Lord Denning MR); *Rodney Aero Club v Moore* [1998] 2 NZLR 192, 195 (Hammond J); *Dulhunty v Dulhunty* [2010] NSWSC 1465, [31] (Slattery J).

³³⁸ *Beath v Kousal* [2010] VSC 24, [18] (Kaye J). See also, eg, *Re Billington* [1949] St R Qd 102, 115 (Macrossan CJ).

³³⁹ *Dawson v Dawson* [1945] VLR 99, 103 (O’Byrne J); *Sky v Body* (1970) 92 WN (NSW) 934, 935 (Street J).

³⁴⁰ (1970) 92 WN (NSW) 934, 935–6.

³⁴¹ *Dulhunty v Dulhunty* [2010] NSWSC 1465, [34] (Slattery J); *Beath v Kousal* [2010] VSC 24, [55] (Kaye J); *Cowan v Scargill* [1985] Ch 270, 297 (Megarry V-C). See also *Re Just (No 1)* (1973) 7 SASR 508, 513 (Jacobs J). Under s 6(1)(d) of the *Trusts Act 1973* (Qld), the court may make an order, on the application of a person who has an interest in the trust property, about the persons or manner in which a power conferred on trustees may be exercised if the trustees cannot agree. The court also has wide powers under ss 80 and 96 of the *Trusts Act 1973* (Qld) to give directions concerning the trust property and to appoint new trustees. These provisions are discussed in Chapter 12.

³⁴² See *Walker v Symonds* (1818) 3 Swans 1; 36 ER 751; *Candler v Tillett* (1855) 22 Beav 257, 263; 52 ER 1106, 1109 (Romilly MR); *Re Flower and Metropolitan Board of Works* (1884) 27 Ch D 592, 596–7 (Kay J).

³⁴³ See *Lewis v Nobbs* (1878) 8 Ch D 591, 594–5 (Hall V-C).

³⁴⁴ See *Hall v Franck* (1849) 11 Beav 519; 50 ER 918; *Re Flower and Metropolitan Board of Works* (1884) 27 Ch D 592, 596–7 (Kay J); *Lee v Sankey* (1872) LR 15 Eq 204, 210 (Bacon V-C).

³⁴⁵ See [7.239] below, and the discussion in Chapter 9.

³⁴⁶ *Dulhunty v Dulhunty* [2010] NSWSC 1465, [31] (Slattery J).

³⁴⁷ *Re Mulligan* [1998] 1 NZLR 481, 502 (Panckhurst J).

³⁴⁸ See generally PD Finn, *Fiduciary Obligations* (Law Book, 1977) [28], [40]–[73].

delegated, either to a third party or a co-trustee.³⁴⁹ If trustees cannot delegate to a co-trustee, 'it must follow that they must all perform the duties attendant upon the execution of the trust'.³⁵⁰ As Underhill explained:³⁵¹

the settlor has trusted *all* the trustees, and it behoves each and every [one] of them to exercise his individual judgment and discretion on every matter, and not blindly to leave all questions to his co-trustees or co-trustee.

Exceptions to the general rule

7.233 The usual requirement for trustees to act jointly and unanimously does not apply if the trust instrument provides otherwise.³⁵² Further, the requirement to act unanimously applies only to private trusts — trustees of charitable trusts may act by majority.³⁵³

Reasons for the general rule

7.234 The requirement for trustees to act jointly and unanimously is said to give effect to the settlor's imputed intention in appointing more than one trustee. The authors of *Bogert's Trusts and Trustees* explain that:³⁵⁴

One who appoints several trustees to manage a trust is deemed to express a desire to have the benefit of the wisdom and skill of all in every act of importance under the trust.

7.235 Trustees might be appointed to take advantage of differing skills or expertise, to ensure all branches of a family are represented,³⁵⁵ or to provide 'a safeguard against eccentricity or misconduct'.³⁵⁶

7.236 A related reason given for the rule is that it ensures careful consideration of trustee decisions and, thereby, the protection of the trust property and the

³⁴⁹ *Rodney Aero Club v Moore* [1998] 2 NZLR 192, 195 (Hammond J). Limited provision for trustees to delegate their trusts, powers, authorities or discretions is made in s 56 of the *Trusts Act 1973* (Qld), which is discussed in Chapter 9.

³⁵⁰ *Rodney Aero Club v Moore* [1998] 2 NZLR 192, 195 (Hammond J). One trustee may sanction the actions of a co-trustee, but more than mere formal consent is required with each trustee being required to exercise his or her discretion: see *Re Jenner and Keighran's Contract* [1925] VLR 283 (Irvine CJ).

³⁵¹ A Underhill, *The Law Relating to Trusts and Trustees* (Butterworth, 7th ed, 1912) 306.

³⁵² See [7.228] above. See, eg, *Dulhunty v Dulhunty* [2010] NSWSC 1465, [36]–[37] (Slattery J); *Re Permanent Trustee Nominees (Canberra) Ltd* (Unreported, Supreme Court of New South Wales, Young J, 24 June 1985).

³⁵³ *Wilkinson v Malin* (1832) 2 Cr & J 636, 655–6; 149 ER 268, 275–6 (Lord Lyndhurst); *Perry v Shipway* (1859) 1 Giff 1, 9; 65 ER 799, 802 (Stuart V-C); *Re Whiteley* [1910] 1 Ch 600, 607–8 (Eve J).

³⁵⁴ GG Bogert, GT Bogert and AM Hess, Westlaw International, *Bogert's Trusts and Trustees* (at 2011) § 554. See also AI Ogus, 'The Trust as Governance Structure' (1986) 36 *University of Toronto Law Journal* 186 in which it is stated (at 210) that 'English law assume[s] that, where there is nothing to the contrary in the trust instrument, the settlor would prefer the unanimity rule'.

³⁵⁵ *R v Beeston* (1789) 3 TR 592, 595; 100 ER 750, 752 (Lord Kenyon CJ).

³⁵⁶ Unif Trust Code (amended 2010), Comment 116.

beneficiaries' interests.³⁵⁷ As Waddell CJ in Eq commented in *George v McDonald*.³⁵⁸

The appointment of two trustees, rather than one, is intended to protect the interests of the beneficiaries by ensuring that all relevant decisions are made jointly by the trustees each being properly informed as to all relevant considerations. It is not acceptable that the second trustee should ... be merely a figurehead.

7.237 If trustees must act jointly and unanimously, a breach of trust by one trustee is, prima facie, a breach of trust by them all for which they are jointly and severally liable.³⁵⁹ 'Consequently, there is an incentive for each trustee to veto a decision which involves a risk of breach of trust'.³⁶⁰

Australian trustee legislation

7.238 Neither the *Trusts Act 1973* (Qld) nor the trustee legislation in any of the other Australian jurisdictions contains any provisions of general application either restating or overriding the usual requirement for trustees to act jointly and unanimously.

7.239 However, there are some provisions that modify the rule in particular circumstances:

- In Queensland and Tasmania, trustees may authorise in writing any one or more of their number (or another person) to give receipts;³⁶¹
- In Queensland, Western Australia and Tasmania, where a corporate 'custodian trustee' has been appointed, directions may be given to the custodian trustee by a majority of the remaining 'managing' trustees;³⁶²
- In the ACT and New South Wales, 'the trustees or a majority acting together' may exercise the statutory power to compound liabilities;³⁶³ and
- In Queensland, and each of the other Australian jurisdictions, a trustee or trustees, or the majority of trustees, may pay money or securities belonging to the trust into court.³⁶⁴

³⁵⁷ See, eg, HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 January 2012) [9.11090]; GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [22.65].

³⁵⁸ (1992) 5 BPR 11 659, 11 668. See also *Beath v Kousal* [2010] VSC 24, [18] (Kaye J); *R v Beeston* (1789) 3 TR 592, 595; 100 ER 750, 752 (Lord Kenyon CJ).

³⁵⁹ See JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2204].

³⁶⁰ Al Ogus, 'The Trust as Governance Structure' (1986) 36 *University of Toronto Law Journal* 186, 210, citing Olson, *The Logic of Collective Action* (1971), 33–5.

³⁶¹ *Trusts Act 1973* (Qld) s 43; *Trustee Act 1898* (Tas) s 23. See the discussion of the power to give receipts in Chapter 9.

³⁶² *Trusts Act 1973* (Qld) s 19(2)(d); *Trustees Act 1962* (WA) s 15(2)(d); *Public Trustee Act 1930* (Tas) s 24(e). See also *Trustee Act 1956* (NZ) s 50(2)(d). See the discussion of custodian trustees in Chapter 5.

³⁶³ *Trustee Act 1925* (ACT) s 49(1); *Trustee Act 1925* (NSW) s 49(1). See the discussion of the power to compound liabilities in Chapter 9.

Provisions and proposals in other jurisdictions

7.240 In a number of jurisdictions, including Saskatchewan, Guernsey, Jersey and California, the trustee legislation includes a provision to the effect that, unless the trust instrument provides otherwise, trustees must act unanimously.³⁶⁵

7.241 The Ontario Law Reform Commission recommended the inclusion of a similar provision in the trustee legislation of that province.³⁶⁶ It proposed that the legislation should further provide that, if it appears that the trustees are unable to achieve unanimity, one or more of them may apply to the court for an order resolving the matter in any way that the court considers proper.³⁶⁷ That Commission explained:³⁶⁸

the unanimity rule now prevails in Ontario and, so far as we can ascertain, has not given rise to undue difficulties. Further, adoption of the majority rule would inevitably weaken the protection that trust beneficiaries now enjoy, without conferring upon them any compensating benefit. In the result, we have concluded that no case has been made for change in the present law.

7.242 In contrast, a number of American States have adopted the approach of the Uniform Trust Code, which enables trustees to act by majority in certain circumstances.³⁶⁹ Under section 703 of the Code, unless the terms of the trust provide otherwise, trustees may act by majority decision:³⁷⁰

703 Cotrustees

(a) Cotrustees who are unable to reach a unanimous decision may act by majority decision.

...

(d) If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

7.243 Section 703 also provides that a trustee who does not join in an action of another trustee is not generally liable for the action. The section also protects a dissenting trustee who joins in an action at the direction of the majority of the

³⁶⁴ *Trusts Act 1973* (Qld) s 102(1), (3); *Trustee Act 1925* (ACT) s 95(1)–(2); *Trustee Act 1925* (NSW) s 95(1)–(2); *Trustee Act* (NT) s 44(1), (3); *Trustee Act 1936* (SA) s 47(1), (4); *Trustee Act 1898* (Tas) s 48(1), (3); *Trustee Act 1958* (Vic) s 69(1), (3); *Trustees Act 1962* (WA) s 99(1), (3). See the discussion of payment into court in Chapter 12.

³⁶⁵ See *Trustee Act*, SS 2009, c T-23.01, s 41; *Trusts (Guernsey) Law, 2007*, s 28; *Trusts (Jersey) Law 1984*, art 22; Cal Prob Code § 15620 (2011); Iowa Code § 633.76 (2011).

³⁶⁶ Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 72.

³⁶⁷ *Ibid.* These recommendations have not been implemented.

³⁶⁸ *Ibid.*

³⁶⁹ See, eg, Fla Stat § 736.0703 (2012); Mo Rev Stat § 456.7-703 (2012); ND Cent Code § 59-15-03 (2011); Wyo Stat Ann § 4-10-703 (2012).

³⁷⁰ Unif Trust Code §§ 105(a)–(b), 703(a), (d) (amended 2010).

trustees (for example, by signing transfer documents that must be signed by all of the trustees):

- (f) Except as otherwise provided in subsection (g), a trustee who does not join in an action of another trustee is not liable for the action.
- (g) Each trustee shall exercise reasonable care to:
 - (1) prevent a cotrustee from committing a serious breach of trust; and
 - (2) compel a cotrustee to redress a serious breach of trust.
- (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.

7.244 The commentary to the Code explains that ‘the protections provided by subsections (f) and (h) no longer apply if the action constitutes a serious breach of trust’.³⁷¹

In that event, subsection (g) may impose liability against a dissenting trustee for failing to take reasonable steps to rectify the improper conduct.

7.245 The trustee legislation in some of the other American States provides for a majority of trustees to act where there are three or more trustees.³⁷²

7.246 The British Columbia Law Institute has also recommended that provision be made in that province for trustees to act by majority.³⁷³ In its view, this would promote ‘the efficient management of trust property’ and limit the need for court involvement.³⁷⁴ It proposed a provision in the following terms,³⁷⁵ which would apply except as otherwise provided in the trust instrument:³⁷⁶

- (1) If there is more than one trustee, the trustees may act by majority in the discharge of their duties and the exercise of their powers.
- (2) If trustees are deadlocked on a matter, one or more of them may apply to the court for an order resolving the matter.
- (3) A trustee who disagrees with a decision or act of the majority may state the disagreement in writing but, unless the decision or act is unlawful, must join with the majority in doing anything necessary to carry out the decision or act if it cannot be carried out otherwise.

³⁷¹ Unif Trust Code (amended 2010), Comment 118.

³⁷² Eg, Ill Comp Stat § 760.5/10; Ind Code § 30-4-3-4 (2012); SD Codified Laws §55-4-3 (2012); Wash Rev Code § 11.98.016 (2012).

³⁷³ British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 40. This recommendation has not been implemented.

³⁷⁴ Ibid.

³⁷⁵ Ibid Proposed *Trustee Act*, cl 12.

³⁷⁶ Ibid 29.

- (4) A trustee who states a disagreement with a decision or act of the majority in writing under subsection (3) is not liable for any breach of trust or any loss resulting from that decision or act even if that trustee has joined with the majority in compliance with subsection (3) in order to carry it out.

7.247 Like the American Uniform Trust Code, the provision proposed by the British Columbia Law Institute also provided that a dissenting trustee would not be liable for a breach of trust or any loss resulting from the decision of the majority, even if the trustee joined with the majority in order to carry out the decision.

7.248 In Scotland, the law has developed differently in that trustee decisions are effective if they are made by a 'quorum', without the concurrence of the other trustees but subject to a duty to consult with all trustees.³⁷⁷ At present, the Scottish trustee legislation provides that, unless the trust instrument provides otherwise, a 'quorum' is taken to be a majority of the trustees.³⁷⁸ The Scottish Law Commission has proposed that the legislation should be amended to provide that, in the absence of any contrary provision in the trust instrument, decisions 'must be made by a number of trustees at least equal to the majority of the trustees then acting', and that a trustee 'who has a personal interest in a decision' is to be disqualified from participating in the making of that decision.³⁷⁹

Whether the duty to act jointly should be retained or changed

7.249 As explained earlier, the duty to act jointly means that it is not open for a majority of the trustees of a private trust to make a decision that binds all the trustees. If unanimity cannot be achieved in relation to a particular decision, then (in the absence of court intervention) the status quo will prevail.

7.250 The rule provides a safeguard against imprudent decision-making. For example, in the context of trustees' investment powers, some trustees might, on a personal level, be less 'risk averse' than their co-trustees. However, it is necessary for all the trustees to be agreed on the investment strategy for the trust before an investment can be made.

7.251 However, just as a single trustee can operate as a 'brake' on his or her co-trustees, the capacity for a single trustee to create a deadlock, effectively paralysing the management of the trust, can give an individual trustee significant power.

7.252 As explained above, in jurisdictions where provision has been made or recommended for trustees to act by majority, provision has also been made to protect a dissenting trustee from liability for any loss resulting from a decision of the majority. Under the American Uniform Trust Code, however, that protection does not apply to a dissenting trustee who joins in an action at the direction of the

³⁷⁷ See Scottish Law Commission, *Trustees and Trust Administration*, Discussion Paper No 126 (2004) [2.12], citing *Alexander's Trustees v Dymock's Trustees* (1883) 10R 1189, 1195 (Inglis LP).

³⁷⁸ *Trusts (Scotland) Act 1921* (Scot) s 3(c).

³⁷⁹ Scottish Law Commission, *Trustees and Trust Administration*, Discussion Paper No 126 (2004) [2.22].

majority of the trustees if the decision of the majority constitutes a serious breach of trust.

7-7 Should it continue to be the case that, unless authorised by the trust instrument to act by majority, co-trustees of a private trust must act jointly? Alternatively, should the *Trusts Act 1973* (Qld) provide for trustees of a private trust to act by majority?

7-8 If the *Trusts Act 1973* (Qld) is amended to provide for trustees of a private trust to act by majority:

- (a) should that provision be subject to a contrary intention in the trust instrument;
- (b) what provision should be made for the protection of a dissenting trustee?

Chapter 8

Trustees' Management Powers

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INTRODUCTION

8.1 Part 4 of the *Trusts Act 1973* (Qld) deals with the general powers¹ of trustees.² The provisions in Part 4 confer two types of statutory powers — specific transactional powers exercised in the management of the trust property (such as

¹ Trustees' investment powers are considered in Chapter 6.

² A 'trustee' includes a personal representative, being the executor, original or by representation, or the administrator for the time being of the estate of a deceased person: *Trusts Act 1973* (Qld) s 5(1) (definitions of 'trustee', 'personal representative').

the power to sell, exchange, lease or mortgage etc) and what may broadly be described as administrative powers (such as the power to give receipts, settle claims, insure trust property etc).

8.2 This chapter deals with the provisions in Part 4 that confer specific powers to manage trust property. For the sake of brevity, these powers are referred to here as 'management powers'.

8.3 As explained in Chapter 4, the *Trusts Act 1973* (Qld) effected a number of significant reforms in the area of trust law. The Act removed the distinctions that had previously applied between trusts of real property and personal property, and abolished the settled land legislation. It also conferred on trustees the extensive management powers that had been previously exercisable by tenants for life of settled land, including a power of sale, and made those powers invariable, so that they could not be varied or overridden by the expression of a contrary intention in the trust instrument.

8.4 However, many of the provisions in the Act that confer management powers are largely derived from nineteenth-century English trustee legislation, which was enacted, amongst other things, to supplement the powers of trustees in cases where they had not been given adequate powers at the time the trust was created, and to confer protection, in particular circumstances, on trustees and third parties. These provisions, which are relatively lengthy and prescriptive, 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.³ In that era, 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.⁴

8.5 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.⁵ As mentioned in Chapter 3, trusts are now used for a range of purposes, including estate planning, commercial investment or trading, superannuation and charitable purposes. With the evolution of the modern trust, the tendency has been to enlarge a trustee's management powers both in the instrument and by statute.⁶

8.6 In the context of the development of modern trusts, there is an argument that many of the provisions in Part 4 of the *Trusts Act 1973* (Qld) that confer

³ JH Langbein, 'Why Did Trust Law Become Statute Law in the United States' (2007) 58(5) *Alabama Law Review* 1069, 1072.

⁴ WF Fratcher, *Scott on Trusts* (Little, Brown, 4th ed, 1988) vol 3, §186; JH Langbein, 'Why Did Trust Law Become Statute Law in the United States' (2007) 58(5) *Alabama Law Review* 1069, 1073.

⁵ JH Langbein, 'Rise of the Management Trust' (October 2004) 143 *Trusts & Estates* 52; GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [16.44].

⁶ WF Fratcher, *Scott on Trusts* (Little, Brown, 4th ed, 1988) vol 3, §186; PT Wendel, 'The Evolution of the Law of Trustee's Powers and Third Party Liability for Participating in Breach of Trust: An Economic Analysis' (2004–05) 35 *Seton Hall Law Review* 971, 985–6.

management powers could now be considered out-dated, overly complex or unduly restrictive.⁷

8.7 The Commission's terms of reference require it to consider whether there are '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'.⁸

8.8 This chapter considers whether the provisions in Part 4 that confer specific powers to manage trust property should be re-articulated. In particular, it considers whether, and to what extent, these provisions should be replaced by a general provision, referred to as the 'general property power', that deals with a trustee's powers in relation to the trust property (including management powers), with or without an additional provision that lists examples of specific powers conferred by the general property power. In relation to a trustee's investment powers, a similar approach was adopted in Queensland more than a decade ago when the Act was amended to abolish the statutory list of authorised investments and replace it with the 'prudent person' doctrine, which enables a trustee to invest trust funds in any form of investment.⁹

8.9 In addition to that general issue, the chapter considers whether there are any substantive issues that need to be addressed in relation to the scope of a trustee's management powers.

8.10 The chapter also raises the issue of whether, and to what extent, the general or specific powers that are conferred on trustees (as the case may be), should be subject to a contrary intention expressed in the instrument (if any) creating the trust.

8.11 The chapter further considers the provisions in Part 4 that deal with a trustee's powers in relation to the payment, apportionment and recoupment of certain trust property expenses, and the power of a trustee-mortgagee to apply income from the mortgaged land in the payment of interest due under the mortgage. These powers are referred to here as 'ancillary management powers'.

8.12 The provisions of Part 4 dealing with the other administrative powers of a trustee are discussed in Chapter 9.

7

WA Lee, 'The *Trusts Act 1973* — reforms accomplished and problems remaining to be resolved' in A Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice BH McPherson CBE* (Supreme Court of Queensland Library, 2006) 145, 147; WG Goodhart, 'Trust Law for the Twenty-First Century' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press, 1996) 257, 259. See, eg, *Trusts Act 1973* (Qld) s 32(1)(d), (e). Those subsections regulate the permissible terms of leases that can be granted under the Act.

8

The terms of reference are set out in full in Appendix A to this Discussion Paper.

9

See [6.3] above.

A PROPOSAL FOR REFORM

Introduction of a general property power (with or without a list of specific powers)

8.13 In reforming the law in this area, the simplest solution might be to amend the *Trusts Act 1973* (Qld) to provide that, when acting in his or her capacity as a trustee, a trustee has, in relation to the trust property, all the powers of an absolute owner. It is common for modern trust instruments to grant a similar general power.¹⁰

8.14 The provision of a general property power, however, would not give a trustee unlimited power to do what he or she likes with the trust fund or to commit any breach of trust.¹¹ A trustee is subject to controls that are absent in the case of ordinary owners; the trustee's exercise of a power would always be constrained by his or her duties as a trustee.¹²

In my opinion no matter how wide the trustee's discretion in the administration and application of a discretionary trust fund, and even if in all or some respects the discretions are expressed in the deed as equivalent to those of an absolute owner of the trust fund, the trustee is still a trustee. From this it follows that he may not, except under some authority in the trust, divest himself of the trust property; he may not apply it for purposes or give it to persons outside the purpose and objects of the trust; he may not, except as authorised by the trust, apply the trust fund for his own personal benefit; he must keep proper accounts. If the trust imposes duties on him he must perform them if they are capable of performance. If in respect of such duties he has a discretion as to the manner of performance or as to which of the objects of the trust should receive a benefit and the amount of the benefit, he must exercise that discretion and will not be permitted simply to do nothing for then he will be in breach of his duty.

8.15 A general property power would ensure that a trustee always has the power to undertake a particular transaction or other dealing with trust property, even if there were no specific power otherwise conferred by the trust instrument or by the Act.¹³ In trusts that are going to last for many years it is impossible to foresee the powers that the trustee may need in the future. New types of transactions or new legislative requirements may arise for which the trustee's powers might be inadequate. Although the court has power to confer additional powers where, in the opinion of the court it is expedient,¹⁴ an application for the conferral of an additional power would involve expense and inconvenience.

¹⁰ J Mowbray et al, *Lewin on Trusts* (Sweet & Maxwell, 18th ed, 2008) [36–03].

¹¹ *Elovalis v Elovalis* [2008] WASCA 141, [63] (Buss JA); *Randall v Lubrano* (2009) 72 NSWLR 621, 622 (Holland J). The judgment in *Randall v Lubrano* was delivered on 31 October 1975, but is not reported except as an annexure to *McDonald v Ellis* (2007) 72 NSWLR 605. See also 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) [43].

¹² *Randall v Lubrano* (2009) 72 NSWLR 621, 622 (Holland J).

¹³ The effect of a contrary intention expressed in the instrument (if any) creating the trust in relation to the proposed general property power is discussed at [8.271] ff below.

¹⁴ *Trusts Act 1973* (Qld) s 94.

8.16 However, the very general nature of such a provision could result in some uncertainty, particularly for a third party or a non-professional trustee, as to whether a trustee has a particular power. To remove any doubt in this regard, it would be possible for the Act to provide, without limiting the general property power, that the general property power includes certain specific powers. If any statutory list of specific powers included at least some of the 'core' management powers (for example, sale, exchange, lease, mortgage), it could be a useful aid for third parties and trustees alike.

8.17 It could also be argued that a general property power might confer too broad a power. This issue could be addressed by making provision in the Act for a specific power to be subject to a limitation. If it was considered desirable to preserve the settlor's autonomy in this regard, the power that was limited by the Act could be reinstated by an express provision in the trust instrument.¹⁵

8.18 There may also be some specific powers that, for various reasons, arguably should be dealt with separately from the general property power. Without being exhaustive, this may be because:

- the power only arises as a result of the special duties imposed on trustees (for example, the power to postpone the sale of trust property conferred by section 32(1)(c)); or
- the nature of the power requires that the settlor should have given consideration to its appropriateness and scope (for example, the power to carry on a business conferred by section 57).

8.19 A provision conferring a general property power has been adopted or proposed in England, New Zealand, British Columbia and the United States.¹⁶ Generally speaking, these provisions ensure that trustees have, in relation to the trust property, all the powers of an absolute owner of the property. In addition, they all apply subject to a contrary intention in the trust instrument. In British Columbia and the United States, the general property power is supplemented by a list of specific powers, which also applies subject to a contrary intention in the trust instrument.

8.20 In England, the *Trusts of Land and Appointment of Trustees Act 1996* (UK) gives trustees of land broad and flexible management powers. Section 6(1) of that Act¹⁷ provides that, 'for the purpose of exercising their functions as trustees,

¹⁵ This could be done either by the operation of s 4(3) of the *Trusts Act 1973* (Qld), which provides that 'Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, and unless a contrary intention is expressed in the instrument (if any) creating the trust, operate and be exercisable in the like manner and with all the like incidents effects and consequences as if conferred by this Act', or by making the statutory limitation subject to the expression of a contrary intention in the trust instrument.

¹⁶ The Scottish Law Commission is currently reviewing its trustee legislation. In its Discussion Paper on Trustees and Trust Administration, the Commission has raised several proposals for reform. These include the conferral of a general power to administer, invest and generally deal with the trust estate or, alternatively, amending the existing list of management powers by the inclusion of additional powers: Scottish Law Commission, *Trustees and Trust Administration*, Discussion Paper No 126 (2004) 28.

¹⁷ *Trusts of Land and Appointment of Trustees Act 1996* (UK) c 47, s 6(1) is based on the recommendations of the Law Commission of England and Wales: Law Commission of England and Wales, *Trusts of Land*, Report No 181 (1989) [10.4]–[10.5].

the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner'. To safeguard beneficiaries, a trustee who is acting under the power is subject to a statutory duty of care to exercise such care and skill as is reasonable in the circumstances, and must have regard to the rights of beneficiaries.¹⁸ A similar general property power is also conferred on trustees who acquire land pursuant to section 8 of the *Trustee Act 2000* (UK).¹⁹ Section 8(3) of that Act provides that, 'for the purpose of exercising his functions as a trustee, a trustee who acquires land under this section has all the powers of an absolute owner in relation to the land'.

8.21 The extent and scope of the statutory general property power is limited by the trustee's office as trustee.²⁰

An absolute owner may, of course, keep his own property for his own enjoyment, give it away or destroy it, but a trustee can do none of these things; what is meant is that trustees have the powers of an absolute owner for the purpose of exercising their functions as trustees and the statutory provision for trustees of land is expressly so qualified. It does not provide a defence for trustees charged with a breach of trust in failing to safeguard trust property.

8.22 The Law Commission of New Zealand has recently proposed that the existing provisions of the *Trustee Act 1956* (NZ) that confer management and administrative powers on a trustee should be replaced with a general provision that gives a trustee the same powers in relation to the trust property that the trustee would have if the property were vested in the trustee absolutely and for the trustee's own use.²¹ The proposed provision would also state that, while the trustee has competence to do all that a natural person can do with his or her own property, the trustee is subject to the trustee's duties and objects of the trust.²² The Commission explained that:²³

The proposals do give trustees wider powers to do things with trust property. The current limits on trustee powers may provide some protection for beneficiaries or a permitted purpose by potentially limiting the ability of trustees to engage in high risk activities or fail to protect trust property. But the limits imposed are specific and may inhibit what a trustee can do too much or in

¹⁸ *Trusts of Land and Appointment of Trustees Act 1996* (UK) c 47, s 6(5), (9). The statutory duty is the duty of care set out in s 1 of the *Trustee Act 2000* (UK) c 29. In addition, the powers conferred by s 6 must not be exercised in contravention of, or of any order made in pursuance of, any other enactment or any rule of law or equity: *Trusts of Land and Appointment of Trustees Act 1996* (UK) c 47, s 6(6). Where any other statutory provision confers on trustees authority to act subject to any restriction, limitation or condition, trustees of land may not exercise the powers conferred by s 6 to do any act which they are prevented from doing under the other enactment by reason of the restriction, limitation or condition: *Trusts of Land and Appointment of Trustees Act 1996* (UK) c 47, s 6(8).

¹⁹ *Trustee Act 2000* (UK) c 29, s 3(1) provides that a trustee 'may make any kind of investment that he could make if he were absolutely entitled to the assets of the trust'. However, s 3(3) states that the general power of investment does not permit a trustee to make investments in land other than in loans secured on land. Instead, s 8 gives trustees the power to acquire freehold or leasehold land in the United Kingdom as an investment or for occupation by the beneficiary or for any other reason.

²⁰ J Mowbray et al, *Lewin on Trusts* (Sweet & Maxwell, 18th ed, 2008) [36–03].

²¹ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 76 (Proposal P11(1)).

²² *Ibid.*

²³ *Ibid* [4.11].

unwanted ways. Increasing trustees' powers could give them the ability to make better choices in how the trust property is managed. We consider that the better way to ensure that trustees act appropriately in the beneficiaries' interests or for the trust's purpose is to give the duties of trustees prominence in the statute.

8.23 The Commission also proposed that the trustee legislation should include a schedule that sets out a non-exhaustive list of commonly-used powers that a trustee would have under the proposed new provision. Stated in general terms and without the restrictions that currently apply, these powers would include:²⁴

- powers to sell, exchange, let, partition, postpone, lease, purchase or build a house;
- powers to spend money repairing, maintaining, or developing; subdivide; grant easements; pay rates, insurance and other outgoings; or vary a mortgage;
- power to sell by auction or tender;
- power to sell by deferred payment;
- power to sell subject to depreciatory conditions;
- power to give receipts;
- power to compound liabilities;
- power to raise money by sale, conversion, calling in or mortgage;
- powers to insure and recover the costs of premiums; and
- specific business-related powers, including the power to carry on a business.

8.24 The British Columbia Law Institute, in its 2004 report on *A Modern Trustee Act for British Columbia*, proposed that the trustee legislation in that jurisdiction should include a general provision giving trustees the same powers in relation to trust property as he or she would have 'if the property were vested in the trustee absolutely and to the trustee's own use', subject to the obligations imposed on them by the trust.²⁵ The general property power would be supplemented by a list of specific powers, including powers to sell, lease, borrow or create a security interest in, trust property. The British Columbia Law Institute explained that:²⁶

The strategy of the section is to define the powers widely in [the proposed provision] by assimilating them to those of a vested legal owner of property. [The main power is elaborated on] by listing certain powers that will provide particular comfort to those dealing with the trustee ... or which may not clearly be caught by the general formulation ...

24 Ibid 76 (Proposal P11(2)).

25 British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004), Proposed *Trustee Act*, cl 39. These recommendations have not been implemented.

26 British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 59.

8.25 In the United States, section 815 of the Uniform Trust Code confers wide powers on trustees.²⁷ It provides that a trustee may, without the authorisation of the court, exercise ‘all powers over the trust property which an unmarried owner has over individually owned property’, except as limited by the terms of the trust. In addition, the trustee may exercise ‘any other powers appropriate to achieve the proper investment, management and distribution of the trust property’, and any other powers conferred by the Uniform Trust Code.²⁸

8.26 The general property power in section 815 is supplemented by a list of specific powers in section 816. These specific powers, which may also be limited by the terms of the trust, include the power to:

- (2) acquire or sell property, for cash or on credit, at public or private sale;
- (3) exchange, partition, or otherwise change the character of trust property;
- (4) deposit trust money in an account in a regulated financial-service institution;
- (5) borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;
- ...
- (8) with respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries;
- (9) enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;
- (10) grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;
- ...
- (12) abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;
- ...
- (15) pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust;
- ...

²⁷ See Chapter 7, n 121 above in relation to the promulgation and adoption of the Uniform Trust Code.

²⁸ Unif Trust Code § 815(a) (amended 2010).

- (18) make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans;
- (19) pledge trust property to guarantee loans made by others to the beneficiary;

...

8.27 The commentary to the Uniform Trust Code explains that section 815:²⁹

is intended to grant trustees the broadest possible powers, but to be exercised always in accordance with the duties of the trustee and any limitations stated in the terms of the trust.

8.28 The exercise of a power is subject to the trustee's fiduciary duties except as modified in the terms of the trust instrument.³⁰ As the commentary to the Uniform Trust Code explains:³¹

The existence of a power, however created or granted, does not speak to the question of whether it is prudent under the circumstances to exercise the power.

Retention of stand-alone provisions

8.29 A different approach would be to simplify and modernise the various specific management powers conferred by Part 4 of the *Trusts Act 1973* (Qld), and to leave the provisions conferring those powers as a series of stand-alone provisions (as is presently the case) or to replace those provisions with a succinct list of specific powers.

8.30 This approach, particularly if it continued to detail the core management powers of trustees, has the advantage of continuity with the current scheme. It would also enable a trustee to readily determine whether he or she has a particular power and to demonstrate to a third party that a transaction is within the trustee's power. A disadvantage of this approach, however, is that, if a specific power is not included in the Act, and is not provided for in the trust instrument, the trustee would need to apply to the court for the additional power. That problem would not arise under the general property power approach because the specific power (whether or not included in a series of stand-alone provisions or enumerated in a list) would always be covered by the general property power.

8.31 The Ontario Law Reform Commission has recommended the adoption of a list of specific powers.³² The list is intended to 'provide supportive and facultative powers for trustees', with many of the stand-alone provisions dealing with trustee powers reduced to a list of powers, the exercise of which would be subject to a

²⁹ Unif Trust Code (amended 2010), Comment 155.

³⁰ Unif Trust Code § 815(b) (amended 2010).

³¹ Unif Trust Code (amended 2010), Comment 156.

³² To date, these recommendations have not been implemented.

statutory duty of care, and that could be modified or overridden by the trust instrument.³³ These include the powers to:³⁴

- (b) sell trust property by public auction or private contract for cash or credit on appropriate security;
- (c) dispose of trust property by way of exchange for other property, or where the trust property consists of an undivided share, concur in the partition of the property in which the share is held;
- (d) as lessees, renew a lease held by the trust;
- (e) as lessors, grant or renew a lease or sublease of trust property for a term not exceeding:
 - (i) in the case of residential property, three years, or
 - (ii) in the case of any other type of property, seven years,
 or with the consent of the Court, grant or renew a lease or sublease of trust property for longer periods or grant an option to renew the lease or sublease or to purchase the reversion;
- (f) manage, maintain, repair, renovate, improve or develop trust property, including in the case of land subdividing, erecting buildings, dedicating for any public purpose, granting easements, *profits a pendre* or licences, and entering into agreements with respect to boundaries, party walls, fencing or other matters in connection with trust property;
- ...
- (j) surrender insurance policies, leases or other property subject to onerous obligations of such a nature that it would not be in the interests of the beneficiaries to retain the trust property;
- ...
- (l) borrow money and, as security, mortgage, pledge or otherwise charge any of the trust property.

Preliminary view

8.32 The Commission's preliminary view is that the *Trusts Act 1973* (Qld) should be amended to provide that, when acting in his or her capacity as a trustee, a trustee has, in relation to the trust property, all the powers of an absolute owner. The enactment of a provision conferring a general property power has the benefits of ensuring that the trustee has the widest possible powers to deal with the trust property, while also ensuring that the trustee, in exercising those powers, is subject to his or her duties as a trustee.³⁵

³³ Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 223; vol 2, Draft Bill: An Act to revise the *Trustee Act*, cl 35.

³⁴ *Ibid*, cl 35(b)–(f), (j), (l).

³⁵ The issue of whether the *Trusts Act 1973* (Qld) should include a statement of trustees' duties is discussed in Chapter 7.

8.33 If the *Trusts Act 1973* (Qld) is amended to confer a general property power, a further issue that arises is whether the Act should also be amended to include a statutory list of examples of specific powers conferred by the general property power. Given that the general property power would confer all the powers of an absolute owner, such a list would not enlarge the powers already conferred. It may, however, provide useful guidance to trustees and to third parties as to the specific nature and content of the range of powers conferred by the general property power.

8.34 Any proposal to reformulate the current scheme of management powers provided for in Part 4 of the Act will necessarily require a reconsideration of the effect of a contrary intention in the trust instrument. This issue is considered later in the chapter.³⁶

8.35 The Commission invites submissions on the following proposal:

8-1 The *Trusts Act 1973* (Qld) should be amended to provide that, when acting in his or her capacity as a trustee, a trustee has, in relation to the trust property, all the powers of an absolute owner.

8.36 The Commission also invites submissions on the following question:

8-2 If the *Trusts Act 1973* (Qld) is amended to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner (the 'general property power'), should the Act also be amended to include a provision that lists examples of specific powers conferred by the general property power?

THE CURRENT SCHEME OF MANAGEMENT POWERS

8.37 Part 4 of the *Trusts Act 1973* (Qld) confers on a trustee the range of basic management powers that would usually be required for the effective and efficient management of the trust property.

8.38 Section 32 of the Act sets out the powers of trustees to deal with trust property, by way of sale, lease, exchange, partition, or the postponement of the sale of trust property. It provides:

32 Powers to sell, exchange, partition, postpone, lease etc

- (1) Subject to the provisions of this section, every trustee, in respect of any trust property, may—
- (a) sell the property or any part of the property;

³⁶

See [8.271] ff below.

- (b) dispose of the property by way of exchange for other property in the State of a like nature and a like or better tenure, or, where the property consists of an undivided share, concur in the partition of the property in which the share is held, and give or take any property by way of equality of exchange or partition;
- (c) postpone the sale, calling in, and conversion of any property that the trustee has a duty to sell, other than property that is of a wasting, speculative or reversionary nature;
- (d) let or sublet the property at a reasonable rent for any term not exceeding 1 year, or from year to year, or for a weekly, monthly, or other like tenancy or at will; or enter into any sharefarming agreement with respect to the property on reasonable terms for any period not exceeding 1 year; and renew any such lease or tenancy or sharefarming agreement;
- (e) grant a lease or sublease of the property for any term not exceeding—
 - (i) in the case of a building lease—30 years; or
 - (ii) in the case of any other lease (including a mining lease)—21 years;

to take effect in possession within 1 year next after the date of the grant of the lease or sublease at a reasonable rent, with or without a fine, premium or foregift, any of which if taken shall be deemed to be part of and an accretion to the rental, and shall, as between the persons beneficially entitled to the rental, be considered as accruing from day to day and be apportioned over the term of the lease or sublease;

- (f) at any time during the currency of a lease of the property, reduce the rent or otherwise vary or modify the terms thereof, or accept, or concur or join with any other person in accepting, the surrender of any lease.
- (2) Any trustee may, on such conditions as the trustee thinks proper, rescind, cancel, modify or vary any contract or agreement for the sale and purchase of any land, or agree to do so, or compromise with or make allowances to any person with whom such a contract or agreement has been made, or who is the assignee thereof in respect of any unpaid purchase money secured on mortgage or otherwise; and without prejudice to the generality of this subsection, a trustee may, by writing, waive or vary any right exercisable by the trustee that arises from a failure to comply at or within the proper time with any term of any agreement for sale, mortgage, lease, or other contract.
- (3) In exercising any power of leasing or subleasing conferred by this section or by the instrument (if any) creating the trust, a trustee may—
- (a) grant to the lessee or sublessee a right of renewal for 1 or more terms, at a rent to be fixed or made ascertainable in a manner specified in the original lease or the original sublease, but so that the aggregate duration of the original and of the renewal terms shall not exceed the maximum single term that could be granted in the exercise of the power; or

- (b) grant a lease with an optional or compulsory purchasing clause; or
 - (c) grant to the lessee or sublessee a right to claim compensation for improvements made or to be made by the lessee or sublessee in, upon or about the property which is leased or subleased.
- (4) Where there is a power (whether statutory or otherwise) to postpone the sale of any land or authorised investment that a trustee has a duty to sell by reason only of a trust or direction for sale, then, subject to any express direction to the contrary in the instrument (if any) creating the trust, the trustee shall not be in any way liable merely for postponing the sale in the exercise of the trustee's discretion for an indefinite and unlimited period, whether or not that period exceeds the period during which the trust or direction for sale remains valid; nor shall a purchaser of the land or authorised investment be in any case concerned with any directions respecting a sale; but nothing in this subsection applies to any property of a wasting or speculative nature.

8.39 In addition to the power of sale conferred by section 32(1)(a) of the Act, the Act also confers a number of powers that are related to the power of sale. These are:

- powers relating to the mode and conduct of sale (section 34);
- the power of a trustee-vendor to secure part of the purchase price by mortgage (section 36);
- the power to sell trust property on terms, including deferred payment on the sale of the property (section 37); and
- the power to raise money by the sale, conversion, calling in, or mortgage of trust property (section 45).

8.40 Section 35 of the Act, which deals with the validity of sales made under depreciatory conditions, also supplements the power of sale.

8.41 Other management powers conferred by Part 4 include the power to:

- subdivide and undertake other development works (section 33(1)(e)–(f));
- grant easements (section 33(1)(h));
- renew, extend or vary a mortgage (section 33(1)(i));
- surrender life policies (section 33(1)(k));
- surrender onerous leases or property (section 38);
- renew leases (section 39);
- concur with co-owners of property (section 53);
- release the equity of redemption of mortgaged property (section 41); and

- carry on a business (section 57).

Application provisions

Limitations on exercise of management powers by a statutory trustee

8.42 Section 31(3) imposes limitations on the exercise of certain management powers by a statutory trustee (that is, a person who was an existing tenant for life immediately before the commencement of the *Trusts Act 1973* (Qld)).³⁷ It provides that a statutory trustee must not, except with the court's consent, exercise:

- any of the powers conferred by section 32(1), other than the powers of leasing conferred by section 32(1)(d); or
- the power to raise money conferred by section 45.³⁸

Duration of a trustee's management powers

8.43 Section 31(2) provides that the powers conferred on a trustee by Part 4 (including a trustee's management powers) are exercisable by the trustee 'notwithstanding any lapse of time, or that all the beneficiaries are absolutely entitled to the trust property and are not under a disability, except so far as such powers are expressly revoked by all such beneficiaries by notice in writing to the trustee'. Upon the termination of the trust,³⁹ the duties and powers of a trustee come to an end, and the trustee is in the position of a 'bare trustee'.⁴⁰ If, because a trust has terminated unexpectedly, the trustee has no active management powers to deal with the trust property, it 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 involving the property. Section 31(2) ensures that the statutory powers given to trustees by Part 4 will not be subject to termination except by the express direction of the persons entitled to call for the transfer of the trust property to them.

³⁷ 'Statutory trustee' is defined in *Trusts Act 1973* (Qld) s 5(1).

³⁸ Section 31(3) of the *Trusts Act 1973* (Qld), as originally enacted, did not include the words 'other than the power conferred by section 32(1)(d)'. The section was amended in 1981 to insert those words: *Trusts Act Amendment Act 1981* (Qld) s 14. The effect of the amendment is to allow statutory trustees to exercise the powers to lease trust property conferred by s 32(1)(d) of the *Trusts Act 1973* (Qld).

³⁹ A trustee's powers come to an end upon the termination of the trust at the time designated by the trust instrument or, applying the rule in *Saunders v Vautier* (1841) Cr & Ph 240; 41 ER 482, if all the beneficiaries under the trust being *sui juris* (of legal capacity) and together absolutely entitled to the trust property, call upon the trustees to transfer the assets of the trust to them. The trustee's powers also terminate if they pay the money or securities belonging to the trust into court: *Trusts Act 1973* (Qld) s 102. See also HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 11 March 2011) [12.130]. On the termination of the trust, the trustee's powers are said to be exhausted: *Re Hancock* [1896] 2 Ch 173, 183 (CA). See also HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 11 March 2011) [12.130].

⁴⁰ A bare trust exists where a person simply holds property for someone else of full age and mental capacity. A bare trustee generally has no active duties, other than to transfer the trust property to the beneficiary or as he or she directs.

The effect of a contrary intention in the trust instrument

Application of provisions in Part 4 of the Trusts Act 1973 (Qld)

8.44 As mentioned in Chapter 4, section 4(4) of the *Trusts Act 1973* (Qld) provides that the powers conferred by or under the Act on a trustee are in addition to those given by any other Act and by the instrument (if any) creating the trust. However, the subsection further provides that, *unless otherwise provided*, the powers conferred on the trustee by the Act 'apply if and so far only as a contrary intention is not expressed in the instrument (if any) creating the trust, and have effect subject to the terms of that instrument'.

8.45 The provisions considered in this chapter are found in Part 4 of the Act. Section 31(1), which deals with the application of those provisions, provides:

Except where otherwise provided in this part, the provisions of this part shall apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust.

8.46 With the exception of sections 47(3) and 57(1), the provisions discussed in this chapter, to the extent that they confer management powers on a trustee, do not create an exception to section 31(1). As a result, these powers are invariable; they cannot be excluded by the trust instrument.

8.47 A number of the provisions considered in this chapter do not simply confer powers, but also deal with other matters (for example, conferring protection in particular circumstances on the trustee or a third person⁴¹). Section 31(1) confirms that those parts of the provisions are also unaffected by a contrary intention in the trust instrument (although, given that section 4(4) applies only in relation to powers, this aspect of section 31(1) is not strictly necessary).

Relationship with investment powers

8.48 The provisions of Part 4 of the Act that confer management powers on a trustee are transactional in nature; they confer powers to undertake particular types of dealing with trust property (such as the sale, exchange, lease or mortgage of the property).

8.49 Section 21 of the *Trusts Act 1973* (Qld) confers a very broad investment power on trustees. Section 21(b) provides that, 'unless expressly forbidden by the trust instrument creating the trust', a trustee may, 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.

8.50 As explained in Chapter 6, the effect of section 21(b) is that a trustee does not have the power to realise an investment of trust funds and reinvest the proceeds in another form of investment if that course has been expressly forbidden by the trust instrument.⁴² In that circumstance, notwithstanding that the trustee has, under section 32(1)(a), an invariable power to sell the trust property or any part of

⁴¹ *Trusts Act 1973* (Qld) ss 32(4), 33(5), 34(3), 36(2), 37(6), 38, 41.

⁴² See [6.15] above.

it, the power conferred by section 32(1)(a) would need to be read subject to section 21(b). The position would be otherwise if the sale was for a purpose other than an investment purpose (for example, to realise particular trust property to pay the rates and other expenses on the property).

THE SPECIFIC MANAGEMENT POWERS

Power of sale

General power of sale

8.51 Under the general law, a trustee has no power to sell trust property, unless expressly or impliedly authorised by the trust instrument.⁴³ An express power to sell arises where, in the trust instrument, the settlor expressly permits a trustee to sell or retain the trust property at his or her discretion. Where the trust instrument is silent, a trustee has an implied power of sale if his or her duty to maintain an even hand between income and capital beneficiaries requires that the trustee sell wasting, hazardous, or speculative assets, or assets that unduly favour capital beneficiaries.⁴⁴

8.52 Section 32(1)(a) of the *Trusts Act 1973* (Qld) gives trustees a broad discretion to 'sell the trust property or any part of the trust property'. The power of sale is generally considered to be fundamental to the proper management of the trust property. While many trust instruments contain a power of sale, this is not always the case, and the lack of a statutory power governing the sale of trust property could make it difficult, or even impossible, to manage the trust property effectively. The ability of a trustee to sell a trust asset and to reinvest the proceeds of sale in another asset enables the trustee to vary the trust property to meet the exigencies and changing conditions of the times.

8.53 A statutory power of sale is also conferred under the trustee legislation in the ACT, New South Wales, Victoria and Western Australia.⁴⁵ In the ACT, New South Wales and Victoria, the power is conferred only on a 'trustee for sale', while, in Western Australia, the power is conferred on 'every trustee'.⁴⁶

⁴³ See JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2002]. *Trusts Act 1973* (Qld) s 94 also empowers the court, if it considers it expedient to do so, to confer additional powers (including a power of sale) on a trustee.

⁴⁴ Eg, where the rule in *Howe v Dartmouth* (1802) 7 Ves Jun 137; 32 ER 56 applies. This rule provides that, where residuary personalty is settled by will in favour of persons who are to enjoy it in succession, subject to a contrary provision in the will, all assets of a wasting, future or reversionary nature or which consist of unauthorised securities should be converted into property of a permanent or income bearing character.

⁴⁵ *Trustee Act 1925* (ACT) s 26(1)(a); *Trustee Act 1925* (NSW) s 26(1)(a); *Trustee Act 1958* (Vic) s 13; *Trustees Act 1962* (WA) s 27(1)(a).

⁴⁶ In New South Wales, a 'trustee for sale' is defined as a trustee in whom a trust for sale or a power of sale of property is vested: *Trustee Act 1925* (NSW) s 5. There is no definition of 'trustee for sale' in the ACT legislation. In Victoria, the statutory power of sale is conferred on a trustee where a trust for sale or power of sale is vested in the trustee: *Trustee Act 1958* (Vic) s 13(1).

8-3 Should the powers conferred by section 32(1)(a) of the *Trusts Act 1973* (Qld):

- (a) continue to be the subject of a stand-alone provision in the Act (whether or not the Act is amended as mentioned in paragraph (b)); or**
- (b) if the Act is amended to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner (the 'general property power'):**
 - (i) be omitted; or**
 - (ii) be stated briefly in a provision that lists examples of specific powers conferred by the general property power?**

Mode and conduct of sale

8.54 Section 34 of the *Trusts Act 1973* (Qld) relates to the mode and conduct of the sale of trust property. It provides:⁴⁷

34 Power of trustee to sell by auction etc

- (1) A trustee may sell or concur with any other person in selling all or any part of the trust property, either subject to prior encumbrances or not, and either together or in lots, by public auction, by public tender or by private contract, subject to any such conditions respecting title or evidence of title or other matters as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to resell, without being answerable for any loss.
- (2) A trust or power to sell or dispose of land includes a trust or power to sell or dispose of part thereof, whether the division is horizontal, vertical or made in any other way; and also includes a trust or power to sell or dispose of any building, fixture, timber or other thing affixed to the soil apart and separately from the land itself.
- (3) If a trustee joins with any other person in selling trust property and other property, the purchase money shall be apportioned in or before the contract of sale, and a separate receipt shall be given by the trustee for the apportioned share; but a contravention of this subsection does not invalidate and shall not be deemed to have invalidated any instrument intended to affect or evidence the title to the trust property, and no person being a purchaser, lessee, mortgagee, or other person who, in good faith and for valuable consideration, acquires the trust property or an interest in it or a charge over it, and neither the registrar of titles nor any other person registering or certifying title, shall be

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Trusts Act 1973 (Qld) s 34(1) replaced s 14 of the *Trustees and Executors Act 1897* (Qld).

affected by notice of, or be concerned to inquire whether there has been, a contravention of this subsection.

Exercise of power of sale

8.55 The overriding general law duty of a trustee, on a sale of trust property, is 'to sell the estate to the best advantage [he or she] can, that is, in the manner most beneficial to the [beneficiaries]'.⁴⁸ Historically, the duty included a duty to secure by every means in the trustee's power a proper competition for the trust property in order to obtain the best price.⁴⁹ As a corollary, a trustee has always had the discretion to conduct the sale of trust property either by public auction or private contract, 'as the one or the other mode may be most advantageous according to the circumstances of the case'.⁵⁰

8.56 A trustee also has the power to sell subject to any reasonable conditions of sale,⁵¹ provided that the conditions were not rendered actually unnecessary by the state of the title, or might depreciate the value of the property.⁵²

8.57 A trustee, when selling trust property, has an obligation to act fairly and impartially as between the beneficiaries, and must not make a sale with a view to advancing the particular purposes of one party interested in the execution of the trust at the expense of another:⁵³

Every trust deed for sale is upon the implied condition that the trustees will use all reasonable diligence to obtain the best price; and that in the execution of their trust they will pay equal and fair attention to the interests of all persons concerned. If trustees, or those who act by their authority, fail in reasonable diligence; if they contract under circumstances of haste and improvidence; if they make the sale with a view to advance the particular purposes of one party interested in the execution of the trust at the expense of another party, a Court of Equity will not enforce the specific performance of the contract, however fair and justifiable the conduct of the purchaser may have been.

8.58 A trustee who breaches his or her duty on the sale of trust property is personally liable for any loss caused to the beneficiaries.⁵⁴

⁴⁸ *Re Cooper and Allen's Contract for Sale to Harlech* (1876) 4 Ch D 802, 815 (Sir George Jessel MR). See also *Downes v Grazebrook* (1817) 3 Mer 200, 208; 36 ER 77, 80 (Eldon LC); *Ord v Noel* (1820) 5 Madd 438, 440; 56 ER 962, 963 (Leach V-C); *Permanent Trustee Co v Angus* (1917) 17 SR (NSW) 364, 366 (Harvey J); *Rousset v Antunovich* [1963] WAR 52, 60 (Hale J); *Clay v Clay* (1999) 20 WAR 427, 443–4 (Wallwork, Owen and Parker JJ); *Coral Vista v Halkeas* [2010] QSC 449, [24]–[31] (Wilson J); *Killearn v Lampson* [2011] EWHC 3775, [16] (Mr Jeremy Cousins QC).

⁴⁹ *Harper v Hayes* (1860) 2 Giff 210; 66 ER 88. Cf *Clay v Clay* (1999) 20 WAR 427.

⁵⁰ R Cozens-Hardy Horne, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 587, citing *Ex parte Dunman* (1814) 2 Rose 66; *Ex parte Hurlly* 2 D & C 681; *Ex parte Ladbroke* (1834) 1 Mont & A 384; and *Davey v Durrant* (1857) 1 De G & J 533.

⁵¹ *Hobson v Bell* (1839) 2 Beav 17; 48 ER 1084.

⁵² *Dunn v Flood* (1882) 28 Ch D 586; *Dance v Goldingham* (1873) LR 8 Ch App 902. See the discussion of the power to sell subject to depreciatory conditions at [8.70] ff below.

⁵³ *Ord v Noel* (1820) 5 Madd 438, 440; 56 ER 962, 963 (Leach V-C).

⁵⁴ See JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2012]; *Oliver v Court* (1820) 8 Price 127, 165; 146 ER 1152, 1166–7 (Richards LCB) (negligence of trustees as to price and as to obtaining payment of purchase money); *Ord v Noel* (1820) 5 Madd 438, 440; 56 ER 962, 963 (Leach V-C) (disadvantageous mode of sale); *Taylor v Tabrum* (1833) 6 Sim 281; 58 ER 599 (neglect of

8.59 Section 34(1) of the *Trusts Act 1973* (Qld), which has its origins in section 35 of the English *Conveyancing and Law of Property Act 1881*,⁵⁵ gives statutory effect to a standard list of powers relating to the sale of trust property that traditionally were included in trust instruments. The stipulation in section 34(1) that these powers may be exercised without the trustee 'being answerable for any loss' simply means that the mere exercise of the statutory powers alone will not constitute a breach of trust.

8.60 A provision in similar terms to section 34 is also found in the trustee legislation of the other Australian jurisdictions.⁵⁶

Scope of power to sell or dispose of land

8.61 Historically, trustees had no power to sell timber,⁵⁷ fixtures,⁵⁸ or minerals⁵⁹ separately from the land to which they were attached. The general principle was that the power of sale 'must be so exercised, as not to give the tenant for life more out of the property subject to the power than he would have had if the power had not been exercised'.⁶⁰ In *Cholmeley v Paxton*,⁶¹ a sale of the land by the trustee and the timber on the land by the tenant for life was set aside after half a century on account of a separation of the timber and the land. In that case, Best CJ observed that, by selling the timber, the tenant for life had obtained an advantage over the person entitled in remainder which he otherwise could not be permitted to obtain.⁶²

[Trustees] might sell different parcels of the estate at different times, and make separate conveyances of each parcel so sold; that is the extent of their authority. They cannot sell part of a parcel. They must not sell the land without the timber, or the timber without the land on which it grows. The sale of the one without the other would be a cause of confusion and litigation, which could not fail to be injurious to both the vendor and the vendee, and such a sale is a material departure from the power, injurious to the reversioner, and therefore altogether void.

trustees to sell as soon as conveniently might be after the testator's death and loss caused as a result); *Clay v Clay* (1999) 20 WAR 427, 443 (Wallwork, Owen and Parker JJ).

55 AR Rudall and JW Greig, *The Law of Trusts and Trustees* (Jordan & Sons, 2nd ed, 1898) 60.

56 *Trustee Act 1925* (ACT) s 31; *Trustee Act 1925* (NSW) s 31; *Trustee Act* (NT) s 14; *Trustee Act 1936* (SA) s 20; *Trustee Act 1898* (Tas) s 16; *Trustee Act 1958* (Vic) s 13(1); *Trustees Act 1962* (WA) s 31.

57 *Cholmeley v Paxton* (1825) 3 Bing 207; 130 ER 492 (affd with error in *Cockerell v Cholmeley* (1828) 10 B & C 564; 109 ER 560); *Davies v Wescomb* (1828) 2 Sim 425; 57 ER 847.

58 *Re Yates* (1888) 38 Ch D 112. In that case, it was held that the power to sell 'any part' of the trust property and to divide the property into lots did not authorise the mortgagee of a mill to sever the trade machinery from the land and sell it apart from the freehold: see 126 (Lindley LJ), 128–9 (Bowen LJ).

59 *Buckley v Howell* (1861) 29 Beav 546; 54 ER 739 (Sir John Romilly MR); *Re Chaplin and Staffordshire Potteries Waterworks* [1922] 2 Ch 824.

60 *Buckley v Howell* (1861) 29 Beav 546, 554; 54 ER 739, 742 (Sir John Romilly MR).

61 (1825) 3 Bing 207; 130 ER 492.

62 *Cholmeley v Paxton* (1825) 3 Bing 207, 213; 130 ER 492, 495. See also *Buckley v Howell* (1861) 29 Beav 546; 54 ER 739, in which the court held that a trustee had no power to sell the minerals separately from the trust land.

8.62 Section 34(2) of the *Trusts Act 1973* (Qld) is based on an English provision of long-standing.⁶³ It modifies the general law by enabling a trustee, who exercises a power to sell or dispose of trust land, to sell or dispose of any building, fixture, timber or other thing affixed to the soil separately from the land itself.⁶⁴ It also confers an express power on a trustee to sell or dispose of parts of the trust property, whether divided vertically or horizontally (including, for example, a unit within a strata title building).⁶⁵

Concurring with owners of other property in a joint sale

8.63 As mentioned earlier, under the general law, the primary duty of a trustee for sale is to sell the trust property under every possible advantage to the beneficiaries.⁶⁶ The performance of this duty can extend to the trustee joining with the owner of another property in selling both properties together, if that mode of sale would achieve a higher price for the trust property.⁶⁷

8.64 A trustee who sells trust property also has a general law duty to ensure that he or she receives the purchase money.⁶⁸ If a trustee does concur with another person in a sale, the trustee must, having taken proper advice as to the value of the property, apportion the trustee's share of the purchase money before the completion of the purchase, and obtain payment of the apportioned share.⁶⁹

8.65 Section 34(3) of the *Trusts Act 1973* (Qld) restates this obligation, and requires that a separate receipt be given by the trustee for the apportioned share. It also provides that a contravention of the subsection does not invalidate any instrument intended to affect or evidence the title to the trust property. It also provides protection for third parties by providing that no person being a purchaser, lessee, mortgagee, or other person who, in good faith and for valuable consideration, acquires the trust property or an interest in it or a charge over it, and neither the registrar of titles nor any other person registering or certifying title, shall be affected by notice of, or be concerned to inquire whether there has been, a contravention of the subsection.

63 *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 12. An earlier provision gave trustees, with the sanction of the court, the power to sell trust property with a reservation of minerals: *Confirmation of Sales Act 1862*, 25 & 26 Vict, c 108, s 2. That section was replaced by s 44 of the *Trustee Act 1893*, 56 & 57 Vict, c 53, which was then repealed by the *Trustee Act 1925*, 15 & 16 Geo 5, c 19. Under s 12(2) of the *Trustee Act 1925*, the sanction of the court is no longer required.

64 Previously, in Queensland, a similar power in respect of minerals applied to a tenant for life under settled land legislation: *Settled Land Act 1886* (Qld) s 22. A similar power was also conferred by the English settled land legislation: *Settled Land Act 1925*, 15 Geo 5, c 18, s 50 and, previously, *Settled Land Act 1882*, 45 & 46 Vict, c 38, s 17; *Re Mallin's Settled Estates* (1861) 3 Giff 126; 66 ER 351; *Milward's Estate* (1868) LR 6 Eq 248; *Re Gladstone* [1900] 2 Ch 101.

65 *Trusts Act 1973* (Qld) s 34(2) is in similar terms to s 35(1) of the *Trustees Act 1962* (WA). In recommending the enactment of the latter provision, in Western Australia, the Law Reform Sub-Committee of the Law Society (WA) commented that it 'should prove useful particularly in respect of the sale of flats and home units', and that 'it is becoming a usual provision in most other jurisdictions': Law Reform Sub-Committee of the Law Society (WA), *The Law of Trusts*, Report (1961), Supplement 28.

66 See [8.55] above.

67 *Rede v Oakes* (1864) 4 De G J & S 505; 46 ER 1015; *Re Cooper and Allen's Contract for Sale to Harlech* (1876) 4 Ch D 802, 815–16 (Sir George Jessel MR); *Re Wilkinson* [1924] SASR 47, 51–2 (Poole J).

68 *Re Cooper and Allen's Contract for Sale to Harlech* (1876) 4 Ch D 802, 815–16 (Sir George Jessel MR).

69 *Ibid.*

Section 34: Whether a more general approach should be adopted

8.66 An issue to consider is whether the powers in relation to the mode and conduct of sale conferred by section 34 of the *Trusts Act 1973* (Qld) should continue to be the subject of a stand-alone provision in the Act whether or not the Act is amended to confer a general property power on a trustee. If the Act is amended in this way, it would be unnecessary to continue to include a specific provision that deals with the mode and conduct of sale. On the other hand, it may be helpful to include a statement of these powers in the Act for the guidance of trustees.

8-4 Should the powers in relation to the mode and conduct of sale conferred by section 34 of the *Trusts Act 1973* (Qld):

- (a) continue to be the subject of a stand-alone provision in the Act (whether or not the Act is amended as mentioned in paragraph (b)); or
- (b) if the Act is amended to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner (the 'general property power'):
 - (i) be omitted; or
 - (ii) be stated briefly in a provision that lists examples of specific powers conferred by the general property power?

Power to concur with others

8.67 Section 53 of the *Trusts Act 1973* (Qld) deals with the situation where trust property includes an undivided share in any property. It provides:

53 Power to concur with others

Where trust property includes an undivided share in any property, the trustee may (without prejudice to any trust or power in relation to the entirety of the property) execute or exercise any trust or power vested in the trustee in relation to that share in conjunction with the persons entitled to, or having power in that behalf over, the other share or shares, and notwithstanding that the trustee or any 1 or more of several trustees may be entitled to or interested in any such share, either in his, her or their own right or in a fiduciary capacity.

8.68 Ford and Lee have explained that:⁷⁰

Where an undivided share in property is subject to a trust, statute permits the trustees to concur, in exercising their powers with respect to that property, with any person entitled to any other undivided share in the same property, notwithstanding that a trustee might be personally interested in the other share

⁷⁰

HAI Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 21 November 2012) [9.19330].

whether beneficially or as trustee. This enables trustees to deal with themselves because the ownership of the different undivided shares is accidental. The statutory provisions appear to envisage sale to a third party, not to one of the trustees.

8.69 This provision has been retained in the English *Trustee Act 1925*.⁷¹ A provision of similar effect also appears in the ACT, New South Wales, Victoria, Western Australia and New Zealand.⁷²

Power to sell subject to depreciatory conditions

8.70 As mentioned earlier, it is the duty of a trustee who sells trust property under a power of sale to use all reasonable diligence to obtain the best price for the property.⁷³ A corollary to that duty is the principle that a trustee must not do anything that would tend to make purchasers less ready to buy, or tend to make them offer less for, the property.⁷⁴ Hence, in the nineteenth century, the courts developed the equitable rule that a trustee is not justified in including conditions in a contract of sale that are not rendered actually necessary by the state of the title, or the circumstances under which the sale is made, and might depreciate the value of the property.⁷⁵ As explained by James LJ in *Dance v Goldingham*:⁷⁶

I have always understood it to be the law, consistently with authority and principle, that, however large may be the power of trustees under their trust deed to introduce conditions limiting the title, and other special conditions which have, or are calculated to have a depreciatory effect on the sale, they are bound to exercise them in a reasonable and proper manner — that they must not rashly or improvidently introduce a depreciatory condition for which there is no necessity.

8.71 A sale of trust property under unnecessarily depreciatory conditions is a breach of trust on the part of the trustees, entitling the beneficiaries to prevent the

⁷¹ *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 24.

⁷² *Trustee Act 1925* (ACT) s 56; *Trustee Act 1925* (NSW) s 56; *Trustee Act 1958* (Vic) s 29; *Trustees Act 1962* (WA) s 52; *Trustee Act 1956* (NZ) s 30.

⁷³ See [8.55] above. See also *Ord v Noel* (1820) 5 Madd 438; 56 ER 962, in which Leach V-C also observed that, in the execution of the trust, the trustees must pay equal and fair attention to the interest of all persons concerned.

⁷⁴ *Ord v Noel* (1820) 5 Madd 438; 56 ER 962; *Dance v Goldingham* (1873) LR 8 Ch App 902; *Dunn v Flood* (1885) 28 Ch D 586. See also JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2014]; G Fricke and OK Strauss, *The Law of Trusts in Victoria* (Butterworths, 1964) 368; AR Rudall and JW Greig, *The Law of Trusts and Trustees* (Jordan & Sons, 2nd ed, 1898) 66–8.

⁷⁵ *Dance v Goldingham* (1873) LR 8 Ch App 902 (in which a condition limiting the commencement of title to the trust instrument itself, and stipulating that no earlier title should be called for, was held to be improper); *Dunn v Flood* (1885) 28 Ch D 586 (in which a condition that the sale was made subject to the existing tenancies, restrictive covenants and other incidents of tenure, and there were no such tenancies, restrictive covenants and other incidents of tenure, was held to be improper). However, a trustee for sale is justified in imposing special conditions if the state of the title and the circumstances of the sale require it, and the conditions are reasonable and beneficial as a whole and are ones that a prudent owner would employ in the sale of his or her own property: *Falkner v Equitable Reversionary Society* (1858) 4 Drew 352; 62 ER 136; *Hobson v Bell* (1839) 2 Beav 17; 48 ER 1084.

⁷⁶ (1873) LR 8 Ch App 902, 909–10. In that case, where an earlier deed from 1819 could not be found, property was sold under a condition that the title should commence with the deed of 1858, and that no earlier title should be called for except at the purchaser's expense. It was held that the condition was calculated to depreciate the property at the auction, and was inserted without reasonable ground.

sale from being completed,⁷⁷ or to impeach the purchaser's title after completion,⁷⁸ and providing the purchaser with a good defence to an action for specific performance by the trustees.⁷⁹

8.72 Section 35 of the *Trusts Act 1973* (Qld), which has its origins in the English *Trustee Act 1888*,⁸⁰ modifies this equitable rule. It provides:

35 Power to sell subject to depreciatory conditions

- (1) A sale by a trustee shall not be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.
- (2) A sale by a trustee shall not, after the execution of the conveyance or transfer, be impeached as against the purchaser, upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.
- (3) A purchaser, upon any sale by a trustee, shall not be at liberty to make any objection against the title upon any of the grounds in this section mentioned.

8.73 Section 35, in essence, deals with the validity of a sale that has been made subject to a depreciatory condition.

8.74 A provision like section 35 of the *Trusts Act 1973* (Qld) is also included in the trustee legislation of the other Australian jurisdictions, New Zealand and England.⁸¹

8.75 Previously, the Courts of Equity, in deciding whether to give relief to the beneficiaries of a trust, or, on the application of the trustee or the purchaser, to enforce specific performance of the sale, had considered it sufficient to enquire whether a condition was calculated to depreciate the sale and if there were reasonable and proper grounds for its introduction.⁸² Section 35(1) ensures that a sale by a trustee cannot be impeached by a beneficiary on the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was rendered inadequate through the use of the alleged depreciatory conditions.

⁷⁷ *Dance v Goldingham* (1873) LR 8 Ch App 902.

⁷⁸ *Rede v Oakes* (1864) 4 De G J & S 505; 46 ER 1015; *Dance v Goldingham* (1873) LR 8 Ch App 902.

⁷⁹ *Dunn v Flood* (1885) 28 Ch D 586.

⁸⁰ *Trustee Act 1888*, 51 & 52 Vict, c 59, s 3.

⁸¹ *Trustee Act 1925* (ACT) s 30; *Trustee Act 1925* (NSW) s 30; *Trustee Act* (NT) s 15; *Trustee Act 1936* (SA) s 21; *Trustee Act 1898* (Tas) s 17; *Trustee Act 1958* (Vic) s 15; *Trustees Act 1962* (WA) s 32; *Trustee Act 1956* (NZ) s 18; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 13.

⁸² *Dance v Goldingham* (1873) LR 8 Ch App 902, 911 (James LJ). In that case, James LJ (at 909) also observed that the courts had always declined to enquire whether there was an actual depreciation, on the basis that it was a question that was impossible for a court to determine because the court could not know how many potential purchasers were deterred by such a condition from attending or bidding at the sale.

8.76 Section 35(2) modifies the general law by providing that, if a sale has been executed, the sale cannot be impeached as against the purchaser unless it appears that the purchaser acted in collusion with the trustee at the time when the contract for sale was made.

8.77 Because, under the general law, it was a breach of trust to sell under needlessly depreciatory conditions, the purchaser might have declined to complete and, on the other hand, could not have enforced the sale against the trustees.⁸³ Section 35(3) removes the purchaser's right to object to the title on the grounds of the stringency of the conditions of sale.

8.78 An issue is whether the *Trusts Act 1973* (Qld) should continue to include a provision to the general effect of section 35. The principal cases dealing with depreciatory conditions, and which gave rise to statutory provisions like section 35, involved 'old system land', which involved a purchaser of property being able to trace the sequence of historical transfers of title to the property.⁸⁴ In Queensland, unlike other Australian jurisdictions, all identified old system land has now been converted to Torrens Title land.⁸⁵ It may be that there is a residual benefit in retaining section 35 for situations where a trustee sells trust property subject to a condition that is not rendered actually necessary by the circumstances under which the sale is made (rather than the state of the title), and might depreciate the value of the property. However, it could also be said that a sale made under depreciatory conditions is a breach of trust, and there is nothing in the provisions to prevent a beneficiary from impeaching a sale, before completion, on the grounds that the terms are such that the sale price has been rendered inadequate,⁸⁶ or, where there has been a completed sale under depreciatory conditions to a bone fide purchaser, from making the trustee liable for any loss arising from the inadequacy of the consideration for the sale.⁸⁷

8-5 Should the *Trusts Act 1973* (Qld) continue to include a provision to the general effect of section 35?

⁸³ *Dance v Goldingham* (1873) LR 8 Ch App 902; *Dunn v Flood* (1885) 28 Ch D 586.

⁸⁴ The old system of recording land titles is based on English common law. Each time land was sold, leased or mortgaged a separate deed was signed by the parties and subsequent purchasers had to examine a whole series of deeds (for example, a grant, conveyance, mortgage, re-conveyance, acknowledgment, discharge of mortgage) known as 'a chain of title'. The Proclamation of the *Real Property Act 1861* (now repealed) on 7 August 1861 marked the introduction to Queensland of the Torrens System of registering interests in land. Freehold land granted by the Crown prior to that time was dealt with under the 'old system' of titling under the *Registration of Deeds Act 1843*: Department of Environment and Resource Management, *Land Title Practice Manual (Queensland)* (6 April 2009) Early History of Titling in Queensland [0.000] <<http://www.derm.qld.gov.au/property/titles/pdf/part00.pdf>>.

⁸⁵ Department of Environment and Resource Management, *Land Title Practice Manual (Queensland)* (6 April 2009) Early History of Titling in Queensland [0.000] <<http://www.derm.qld.gov.au/property/titles/pdf/part00.pdf>>.

⁸⁶ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Law Book, 1983) [1229.5]; *Dunn v Flood* (1885) 28 Ch D 586.

⁸⁷ See FG Champernowne and H Johnston, *The Trustee Act, 1893, And Other Recent Statutes Relating to Trustees With Notes* (William Clowes & Sons, 1904) 69–70; AR Rudall and JW Greig, *The Law of Trusts and Trustees* (Jordan & Sons, 2nd ed, 1898) 66–8.

Power of trustee-vendor to secure part of purchase price by mortgage

8.79 The *Trusts Act 1973* (Qld), as originally passed, permitted a trustee to invest trust funds in certain listed investments authorised under the Act.⁸⁸ The list of authorised investments included certain first legal or first statutory mortgages.⁸⁹ As explained in Chapter 6, that statutory list has since been omitted and section 21(a) of the Act now confers on trustees a general power to invest trust funds in any form of investment. That provision subsumes the previous power to invest trust funds in certain mortgages.

8.80 Section 36 of the *Trusts Act 1973* (Qld) permits a trustee, on a sale of trust land, to contract that any part, not exceeding two-thirds, of the purchase price, be secured by a first legal or statutory mortgage of the land sold. The provision is primarily concerned with the conferral of a limited power, although section 36(2) also includes a protective element. The section provides:

36 Mortgage on sale of land

- (1) Where a trustee sells land for an estate in fee simple, the trustee may, where the proceeds are liable to be invested, contract that the payment of any part, not exceeding two-thirds of the purchase money shall be secured by a first legal or first statutory mortgage of the land sold, with or without the security of any other property, and the mortgage shall, if any buildings or other improvements are comprised in the mortgage, contain a covenant by the mortgagor to keep them insured against loss or damage by fire and by storm and tempest to their full insurable value.
- (2) The trustee shall not be bound to obtain any report as to the value of the land or other property to be comprised in such a mortgage as is mentioned in subsection (1), or any advice as to the making of the loan, and shall not be liable for any loss that may be incurred by reason only of the security being insufficient at the date of the mortgage.
- (3) Where the sale referred to in subsection (1) is made under the order of the court, the powers conferred by that subsection shall apply only if and so far as the court may by order direct.

8.81 Historically, except in certain circumstances, a trustee, when selling trust property, was not authorised to accept any other consideration than the payment of money. However, where the trustee had a power of investment in the particular class of property being dealt with, he or she could take part of the purchase money in cash and could lend the rest on mortgage as an investment.⁹⁰ In these circumstances, it has been held that the trustee was simply carrying out the directions in the trust instrument.⁹¹

⁸⁸ *Trusts Act 1973* (Qld) s 21 (Act as passed).

⁸⁹ *Trusts Act 1973* (Qld) s 21(b) (Act as passed).

⁹⁰ *Permanent Trustee Co Ltd v Angus* (1917) 17 SR (NSW) 364. See also G Fricke and OK Strauss, *The Law of Trusts in Victoria* (Butterworths, 1964) 368.

⁹¹ *Permanent Trustee Co Ltd v Angus* (1917) 17 SR (NSW) 364, 366–7 (Harvey J). See also G Fricke and OK Strauss, *The Law of Trusts in Victoria* (Butterworths, 1964) 368.

8.82 This power has been restated, albeit in more prescriptive terms, in section 36 of the *Trusts Act 1973* (Qld). Section 36(1) enables a trustee, subject to various constraints, to take a mortgage back on the sale of trust land. In that case, two-thirds of the purchase price may be left on a mortgage, subject to a covenant on the part of the borrower to insure any buildings on the land. Section 36(2) provides that the trustee need not obtain a valuation report, and that the trustees are not liable for any loss that may be incurred by reason only of the security being insufficient at the date of the mortgage. It has been suggested that the reason for there being no requirement to obtain a valuation report is because the trustees, as the vendors of the property, 'know the value of the property'.⁹² Section 36(3) further provides that, where the sale is made under the order of the court, the powers conferred by section 36(1) apply 'only if and so far as the court may by order direct'.

8.83 A statutory power to take a mortgage for part of the purchase money is also provided in South Australia, Victoria and Western Australia.⁹³

8.84 Section 36, in permitting a trustee to secure not more than two-thirds of the purchase money by mortgage, applies the same 'one-third' lending margin that underpins section 30(1) of the Act.⁹⁴ As explained in Chapter 6, historically, the Courts of Equity recognised that, where trustees had a power to invest money by way of mortgage, it was generally safe for them to adopt a one-third margin, enabling them to lend up to two-thirds of the value of ordinary agricultural land.⁹⁵ That proportion was subsequently adopted in legislation, including in section 30(1) of the *Trusts Act 1973* (Qld), as the proportion in respect of which trustees who lent trust funds on the security of property of all kinds would, subject to satisfying certain other conditions, be protected from liability.

8.85 However, section 36 differs from section 30(1) in a fundamental respect. While section 30(1) protects a trustee who lends not more than two-thirds of the value of property, it does not impose any restriction on the amount that a trustee may lend on the security of property. In contrast, section 36 limits the proportion of the purchase price that a trustee-vendor may secure by taking a mortgage over the property sold, even though in some circumstances a mortgage of a higher proportion might be entirely consistent with the trustee's duty of prudence under section 22 (or under the general law where the trustee is not exercising an investment power).

8.86 Earlier in this chapter, the Commission raised the possibility of amending the Act to include a new provision that provides that a trustee has, in relation to the trust property, all the powers of an absolute owner of the property. Because section 36 confers a limited power (that is, a power subject to restrictions), it would not be generally consistent with such an approach to trustees' powers. That raises the issue of whether section 36 should be omitted altogether, or whether there is value in retaining the protective element in section 36(2) (which would obviously involve recasting the provision).

⁹² G Fricke and OK Strauss, *The Law of Trusts in Victoria* (Butterworths, 1964) 368.

⁹³ *Trustee Act 1936* (SA) s 23; *Trustee Act 1958* (Vic) s 16; *Trustees Act 1962* (WA) s 33.

⁹⁴ *Trusts Act 1973* (Qld) s 30(1) is considered at [6.141] ff above.

⁹⁵ See the discussion of this issue at [6.151] ff above.

8.87 If the Act were amended to confer on trustees the powers of an absolute owner and to omit section 36, a trustee-vendor would have the power to sell property and to secure such proportion of the purchase price by mortgage as was consistent with the trustee's duties. Depending on the circumstances, it could well be prudent for the trustee to secure a greater proportion than two-thirds of the purchase price. However, as explained in Chapter 6, it is generally considered prudent for a trustee to obtain a valuation of the property in order to judge the amount that may properly be lent.⁹⁶ At present, section 36(2) effectively relieves a trustee from this requirement, and from any potential liability arising from the omission to obtain a valuation — presumably on the basis that the contract price can be taken as the value of the property. Section 36(2) also gives an assurance to trustees that they will not be liable by reason only of the insufficiency of the security at the date of the mortgage.

8.88 If the Commission ultimately recommends the retention of section 30(1) of the Act, on the basis that there is value in giving an assurance to trustees about their potential liability for investing on the security of property, section 36 could be reframed as a purely protective provision. That would enable the benefits of the provision to be preserved, while removing the current restrictions imposed on trustees' power to invest money on the security of property. A provision in the following general terms would achieve these objectives:

- (1) This section applies if—
 - (a) a trustee sells land for an estate in fee simple; and
 - (b) the contract provides that the payment of a part, not exceeding two-thirds, of the purchase money is to be secured by a first legal or first statutory mortgage of the land sold, with or without the security of any other property.
- (2) The trustee is not liable for any loss that is incurred by reason only of the security being insufficient at the date of the mortgage.
- (3) This section applies whether or not the trustee obtains—
 - (a) a report about the value of the land or other property comprised in the mortgage; or
 - (b) any advice about the making of the loan.

8.89 At present, section 36 provides that the mortgage that secures part of the purchase price must contain a covenant by the mortgagor to keep any buildings or other improvements that are comprised in the mortgage insured against loss or damage by fire and by storm and tempest to their full insurable value. That requirement could be included as a specific condition for protection under any new provision, although it is not a condition for protection under section 30(1).

8.90 Because section 36 is inconsistent with the broad conferral of powers proposed earlier, the Commission's preliminary view is that the section should be omitted. The Commission invites submissions on the following proposal:

⁹⁶

See [6.158] above.

8-6 If the *Trusts Act 1973* (Qld) is amended to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner, section 36 of the Act should be omitted.

8.91 The Commission also invites submissions on the following questions:

8-7 If the *Trusts Act 1973* (Qld) is amended to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner (the 'general property power'), should any provision that lists examples of specific powers conferred by the general property power include the power of a trustee who sells land to secure part of the purchase price by a mortgage over the land?

8-8 If section 36 of the *Trusts Act 1973* (Qld) is omitted, should the Act include a new provision that:

- (a) provides that a trustee who sells land and secures not more than two-thirds of the purchase price by mortgage is not liable for any loss that is incurred by reason only of the security being insufficient at the date of the mortgage; and
- (b) ensures that the trustee is not required to obtain a report about the value of the land or any advice about the making of the loan?

8-9 Should it be a condition for protection under the provision mentioned in Question 8-8 that the mortgage contains a covenant by the mortgagor to keep any buildings or other improvements that are comprised in the mortgage insured against loss or damage by fire and by storm and tempest to their full insurable value?

Power to sell trust property on terms of deferred payment

8.92 Section 37 of the *Trusts Act 1973* (Qld) confirms the powers of a trustee to sell on terms of deferred payment and later to convert the sale into a sale upon mortgage:

37 Deferred payment on sale of property

- (1) A sale of property by a trustee, in exercise of any power vested in the trustee in that behalf by the instrument creating the trust or by or under this Act or any other enactment, may be on terms of deferred payment.
- (2) The terms of deferred payment may provide that the purchase money and interest (if any) shall be paid by instalments.

- (3) The terms upon which property is sold shall, in addition to such other provisions as the trustee may think proper, include provisions giving effect to the following, namely that—
 - (a) the part of the purchase money to be paid by deposit shall not be less than the sum which a person acting with prudence would, if the property were the person's own, have accepted in the circumstances in order to sell the property to the best advantage, and in any case shall not be less than one-tenth of the purchase money;
 - (b) the balance of the purchase money shall be payable by such instalments and shall bear interest payable half-yearly or oftener on the amount from time to time unpaid at such rate as a person acting with prudence would, if the property were the person's own, have accepted in the circumstances in order to sell the property to the best advantage, and in any case the whole purchase money shall be payable within a period not exceeding 10 years from the date of sale;
 - (c) if any instalment or interest or part thereof is in arrear and unpaid for 6 months, or for such less period as may be specified, the whole of the purchase money shall become due and payable;
 - (d) the purchaser shall maintain and protect the property, and, in the case of land, keep all buildings (if any) thereon insured against loss or damage by fire and by storm and tempest to their full insurable value.
- (4) Notwithstanding that the property has been sold on terms of deferred payment, the trustee may, at any time after one-third of the purchase money has been paid, convey the property and take a mortgage to secure payment of the balance of the purchase money and interest, with or without the security of any other property.
- (5) Whether the sale is made under the order of the court or otherwise, the court may make such order as it thinks fit as to the terms of deferred payment.
- (6) A trustee selling property on terms authorised by this section or by any order of the court shall not be affected by section 30 in respect of so much of the purchase money as is payable under an agreement for sale or is secured by a mortgage, and shall not be liable for any loss that may be incurred by reason only of the security being insufficient at the date of the agreement or mortgage.
- (7) For the purposes of any consent or direction required by the instrument (if any) creating the trust or by statute, a trustee selling property on terms of deferred payment shall be deemed not to be lending money or investing trust funds.

8.93 The practical effect of section 37 is to authorise the sale of trust property on terms of deferred payment in all cases, subject to the requirement in section 37(3) that the contract must include certain specified terms in relation to the deposit, payment of instalments and rate of interest, the effect of unpaid payments, and maintenance and insurance. Section 37(3)(a) and (b) both use a test of prudence in relation to the terms that may be accepted, referring to terms that 'a

person acting with prudence would, if the property were the person's own, have accepted in the circumstances in order to sell the property to the best advantage'.⁹⁷ That test applies a different standard from section 22 of the Act, which applies when a trustee exercises a power of investment.⁹⁸

8.94 Section 37(4) permits the trustee, after one-third of the purchase money has been paid, to convey the property and take a mortgage back to secure the balance of the purchase money and interest, with or without the security of any other property.

8.95 Section 37(6) provides that a trustee selling property on terms authorised by section 37 is not affected by section 30 in respect of so much of the purchase money as is payable under an agreement for sale or is secured by a mortgage and is not liable for any loss that may be incurred by reason only of the security being insufficient at the date of the agreement or mortgage.⁹⁹ Section 37(6) does not give any protection in relation to the trustee's original decision to sell on terms of deferred payment. Rather, the purpose of section 37(6) is to ensure that the taking of a mortgage once the purchaser has paid one-third of the purchase money is not treated as a loan or new investment by the trustee, so that the trustee is not subject to the various rules about lending developed by the Courts of Equity.¹⁰⁰

8.96 Similarly, section 37(7) ensures that a trustee's sale of property on terms of deferred payment is not treated as a loan, or the investment of money, for the purposes of any consent or direction required by the instrument (if any) creating the trust or by any Act.

8.97 Section 37 of the *Trusts Act 1973* (Qld) is based on a similar provision in the New South Wales trustee legislation.¹⁰¹ The trustee legislation in the ACT, South Australia, Victoria, Western Australia and New Zealand also gives trustees a statutory power to sell on terms of deferred payment.¹⁰²

8.98 Although section 37 applies to property generally, the power conferred by the section is most likely to be used in relation to the sale of land. The section contemplates a contract under which the purchaser makes a number of payments (apart from the deposit) without becoming entitled to receive a conveyance of the property. For that reason, a sale of land made under the power conferred by

97 However, the deposit must not be less than 10% of the purchase price and the whole purchase money must be paid within 10 years from the date of the sale: *Trusts Act 1973* (Qld) s 37(3)(a)–(b).

98 *Trusts Act 1973* (Qld) s 22 is set out at [6.18] above.

99 *Trusts Act 1973* (Qld) s 30(1) is considered at [6.141] ff above.

100 See [6.151] ff above.

101 *Trustee Act 1925* (NSW) s 28.

102 *Trustee Act 1925* (ACT) s 28; *Trustee Act 1936* (SA) s 23A; *Trustee Act 1958* (Vic) s 17; *Trustees Act 1962* (WA) s 34; *Trustee Act 1956* (NZ) s 17. The provisions in Western Australia and New Zealand extend to property other than land. As in Queensland, the Western Australian provision allows a trustee to convey title and take a mortgage back after one-third of the purchase money has been paid. In the ACT, New South Wales and South Australia, the amount is one-tenth, while in Victoria, the amount is two-fifths.

section 37 will ordinarily constitute an instalment contract within the meaning of the *Property Law Act 1974* (Qld) and be regulated by Part 6, Division 4 of that Act.¹⁰³

8.99 Section 72 of the *Property Law Act 1974* (Qld) restricts a vendor's right to rescind an instalment contract. A vendor cannot rescind a contract because of a purchaser's default in paying an instalment until the expiration of a period of 30 days after the vendor serves on the purchaser a notice explaining the effect of the purchaser's failure to remedy the default. In contrast, section 37(3)(c) of the *Trusts Act 1973* (Qld) applies a different timeframe and approach in relation to unpaid instalments.

8.100 Further, section 75 of the *Property Law Act 1974* (Qld) deals with the conveyance of the property once the purchaser has paid one-third of the purchase price. Section 75(2) is similar in effect to section 37(4) of the *Trusts Act 1973* (Qld), except with the addition of a notice requirement. It provides that a vendor who is not in default may serve on the purchaser a notice in writing requiring the purchaser to accept a conveyance of the land conditionally upon the purchaser, at the same time, executing a mortgage in favour of the vendor to secure payment of all further money payable under the contract.

8.101 Additionally, section 75(1) provides that a purchaser who is not in default may serve on the vendor a notice in writing requiring the vendor to convey the land to the purchaser conditionally upon the purchaser, at the same time, executing a mortgage in favour of the vendor to secure payment of all further money payable under the contract.

8.102 The *Property Law Act 1974* (Qld) also deals with other matters, such as the terms of the mortgage, the parties' liability to bear the cost of the preparation and registration of the mortgage, the payment of transfer duty, and the right of the purchaser to lodge a caveat.¹⁰⁴

8.103 The Commission has several concerns about section 37. The contractual terms required by section 37(3) are fairly prescriptive, and not generally consistent with the approach proposed earlier in this chapter of conferring on trustees the powers, in relation to the trust property, of an absolute owner of the property. In the circumstances of a particular case, it could, for example, be consistent with the trustee's duties to accept a deposit of less than 10% of the purchase price. The Commission also considers it undesirable that section 37(3)(a)–(b) uses a different standard of prudence from section 22 of the Act. Further, although the provisions of section 37 are not directly inconsistent with the provisions of the *Property Law Act 1974* (Qld) dealing with instalment contracts (in that compliance with both sets of provisions is possible), the Commission considers it preferable for the parties' rights in relation to the conveyance of the property to be regulated solely by the instalment contract provisions of the *Property Law Act 1974* (Qld).

¹⁰³ *Property Law Act 1974* (Qld) s 71 defines 'instalment contract' to mean 'an executory contract for the sale of land in terms of which the purchaser is bound to make a payment or payments (other than a deposit) without becoming entitled to receive a conveyance in exchange for the payment or payments'.

¹⁰⁴ *Property Law Act 1974* (Qld) ss 74, 75(3)–(8).

8.104 For these reasons, the Commission's preliminary view is that section 37 should be omitted. The Commission therefore invites submissions on the following proposal:

8-10 If the *Trusts Act 1973* (Qld) is amended to confer on trustees all the powers of an absolute owner of property, section 37 of the Act should be omitted.

8.105 The Commission also invites submissions on the following questions:

8-11 If the *Trusts Act 1973* (Qld) is amended to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner (the 'general property power', should any provision that lists examples of specific powers conferred by the general property power include the power of a trustee to sell property on terms of deferred payment (including the power to sell land under an instalment contract within the meaning of the *Property Law Act 1974* (Qld))?

8-12 If section 37 of the *Trusts Act 1973* (Qld) is omitted, should the Act preserve:

- (a) the protection currently afforded by section 37(6); or**
- (b) the clarification in section 37(7) that a trustee's sale of property on terms of deferred payment is deemed not to be the lending of money or the investment of trust funds for the purposes of any consent or direction required by the instrument (if any) creating the trust or by any Act?**

Power to raise money by sale, conversion, calling in or mortgage

8.106 Historically, trustees had limited power under the general law¹⁰⁵ or statute¹⁰⁶ to mortgage trust property.

¹⁰⁵

A trust for sale will not in general authorise a trustee to execute a mortgage of the trust property: *Devaynes v Robinson* (1857) 24 Beav 86; 53 ER 289; *Walker v Southall* (1887) 56 LT 882; *Stroughill v Anstey* (1852) 1 De G M & G 635; 42 ER 700; *Re Pearce* [1936] SASR 137. However, in limited circumstances, a trustee has power to mortgage to raise money for the payment of the debts charged or payable in respect of the trust estate: In *Stroughill v Anstey* (1852) 1 De G M & G 635; 42 ER 700, Lord St Leonards LC observed that 'A power of sale out and out for a purpose or with an object beyond the raising of a particular charge, does not authorize a mortgage: but that where it is for raising a particular charge and the estate itself is settled or devised subject to that charge, there it may be proper under the circumstances to raise the money by mortgage, and the Court will support it as a conditional sale, as something within the power, and as a proper mode of raising the money'. In the case where there is a trust for sale with power to postpone the sale and manage the trust property until sale, the trustee has an implied power to raise money, by way of mortgage, for the purposes specified in the trust instrument: *Re Bellinger* [1898] 2 Ch 534, 537 (Kekewich J) (where trust property held on trust for sale, with power to postpone sale, the trustees had power to raise money by mortgage or charge of the real estate for the purpose of repairing houses forming part of the real estate). See also *Permanent Trustee Pty Ltd v Angus* (1917) 17 SR (NSW) 364. A power to mortgage does not imply a power of sale: *Drake v Whitmore* (1852) 5 De G & Sm 619; 64 ER 1269.

8.107 To some extent, this lack of power was overcome by section 48 of the *Trustees and Executors Act 1897* (Qld), under which trustees could, with the sanction of the court, raise, by way of mortgage of the trust property, money that was necessary for the limited purposes of the preservation, improvement or insurance of the trust property or the discharge of any debts or liabilities charged upon the trust property or for the payment of which the trust property may be made available.¹⁰⁷

8.108 However, the use of section 48 of the *Trustees and Executors Act 1897* (Qld) was limited by its scope and the fact that it involved the expense and inconvenience of an application to the court.¹⁰⁸

8.109 Section 45 of the *Trusts Act 1973* (Qld) was enacted to address these issues. It provides:¹⁰⁹

45 Power to raise money by sale or mortgage

Where a trustee is authorised by the instrument (if any) creating the trust or by or under this Act or any other Act or by law to expend, pay or apply capital money subject to the trust for any purpose or in any manner, the trustee has and shall be deemed always to have had power to raise the money required by sale, conversion, calling in or mortgage of all or any part of the trust property for the time being in possession; and where a trustee, in the exercise of the trustee's powers in that behalf, purchases any property for the trust, the trustee has and shall be deemed always to have had power to make the purchase on terms of deferred payment or on mortgage of that property.

8.110 Thus, where a trustee is authorised by the trust instrument or by the *Trusts Act 1973* (Qld)¹¹⁰ or any other Act¹¹¹ or by law to expend, pay or apply capital

¹⁰⁶ *Settled Land Act 1886* (Qld) s 23 conferred on a life tenant a power to mortgage limited to raising equality money and s 28(1)(q) of the *Trustee Companies Act 1968* (Qld), as passed, permitted a trustee company to borrow on the security of a mortgage of trust property up to a limit of \$4000 and thereafter without limit but with the consent of the court or of the beneficiaries. The limit in the latter provision is now \$50 000.

¹⁰⁷ See, eg, *Re Trusts of Ann Street Presbyterian Church* [1902] QWN 90 (church authorised to borrow money on mortgage to purchase new church organ on the basis that it was an improvement of the property); *Re Paget* [1938] QWN 42 (trustee authorised to borrow money on mortgage for the preservation and improvement of the trust property, to pay debts incurred in the management of the trust property and charged upon the property); *Re Martin* [1956] QWN 2 (trustee authorised to borrow money on mortgage to support building construction undertaken to assist in business and to increase its efficiency).

¹⁰⁸ See Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 38–9.

¹⁰⁹ For the protection of a purchaser or a mortgagee paying or advancing money to the trustee on a sale or mortgage of trust property under s 45 (or any other power) of the *Trusts Act 1973* (Qld), s 46 of the Act provides that the purchaser or mortgagee shall not be concerned to see that such money is wanted, or that no more than is wanted is raised or otherwise as to the application thereof, or that the trustee has power to effect such sale or mortgage.

¹¹⁰ There are various provisions in the *Trusts Act 1973* (Qld) that presently authorise a trustee to expend, pay or apply capital money subject to the trust property: ss 27(a), 33(1)(a)–(f), 39(2), 47(3)(c)–(d), 62(1). These provisions authorise a trustee to pay calls on shares, carry out repairs, maintenance, improvements and development works, renew a lease, insure the property and make advances from capital for the maintenance, education, advancement or benefit of a beneficiary.

¹¹¹ See, eg, *Trustee Companies Act 1968* (Qld) s 28(1)(h), which provides that a trustee company may, subject to the consent of the court or the beneficiaries where the total sum to be expended exceeds \$50 000, expend a portion of the capital of any estate under its administration on the improvement or development of the estate, or in the purchase of livestock, machinery, plant, implements and other chattels, and for the like purposes advance money on the security of the estate.

money subject to the trust for any purpose or in any manner, the trustee also has the power under section 45 of the *Trusts Act 1973* (Qld) to raise the money required by the sale, conversion, calling in or mortgage of the trust property.¹¹²

8.111 A provision in virtually identical terms is contained in the trustee legislation in the ACT, New South Wales, South Australia, Victoria, Western Australia and England.¹¹³ In the ACT, New South Wales, South Australia, Victoria and England, the provision does not apply to trustees of property held for charitable purposes.¹¹⁴ There is no similar restriction in Queensland, Western Australia or New Zealand.

8.112 The provision has been construed narrowly. In the English case of *Re Suenson-Taylor's Settlement Trusts*,¹¹⁵ the trustees of a settlement were given wide investment powers. They held a large area of land for investment purposes. The trustees proposed to rely on the provisions of the settlement and/or the statutory power under section 16 of the English *Trustee Act 1925* (the equivalent of section 45 of the *Trusts Act 1973* (Qld)) to mortgage that land to raise money for the purpose of acquiring additional land by way of investment.

8.113 Foster J held that the provisions of the settlement could not be construed as authorising the borrowing of money by way of mortgage for the purpose of investing in additional land, as there was no capital money to be invested.¹¹⁶

8.114 Foster J then considered whether section 16 of the English *Trustee Act 1925* empowered the trustees to mortgage the trust property for that purpose. He observed that the conferral of power under that section was dependent on the trustee showing a purpose or manner for the application of capital money authorised by the instrument or by law.¹¹⁷

In order that the present transaction — that is to say the raising of money on existing property for the purposes of further investment in land — should be able to come within section 16 one must, I think, show a purpose or manner for the application of capital money authorised by the instrument or by law. In this case, as I have said, the purpose of borrowing money is for investment in further land. That raises the question, 'What payments or applications of capital money are authorised by a power of investment?'

112 Where all the beneficiaries are of full age and capacity they may authorise trustees continuing to manage the trust property to exceed the normal restrictions as to borrowing: *Re McTiernan* [1954] QWN 29. See also HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 11 March 2011) [12.10330].

113 *Trustee Act 1925* (ACT) s 38; *Trustee Act 1925* (NSW) s 38; *Trustee Act 1936* (SA) s 28B; *Trustee Act 1958* (Vic) s 20; *Trustees Act 1962* (WA) s 43; *Trustee Act 1956* (NZ) s 21; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 16.

114 *Trustee Act 1925* (ACT) s 38(3); *Trustee Act 1925* (NSW) s 38(2); *Trustee Act 1936* (SA) s 28B(3); *Trustee Act 1958* (Vic) s 20(2); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 16(2).

115 [1974] 1 WLR 1280.

116 *Ibid* 1283.

117 *Ibid*.

8.115 Foster J held that section 16 of the English Act does not empower a trustee to mortgage trust property in order to raise money to buy more property as an investment:¹¹⁸

It was submitted on behalf of the first two defendants [the infant beneficiaries] that a power of investment is a power to acquire investments in substitution for investments or capital moneys already held by trustees as part of the capital of the trust fund, and that it cannot be a power to acquire additional assets or investments. In that respect counsel for the plaintiff trustees referred me to four arguments in support of his argument for a wider interpretation of section 16. First he pointed out to me that under section 32 of the Act there is a power of advancement out of the capital; secondly, under section 11(2) there is a power given to apply capital for a payment of calls on shares; thirdly, under section 10(4) trustees are given power to apply capital to take up rights issues and further shares; and fourthly, under the *Settled Land Act 1925* power is given to raise money for improvements to property.

In my judgment, the last three instances point to a situation where the power is given in order to preserve the existing asset and is not given to acquire what is a new asset; and, in my judgment, the proposition which counsel for the first two defendants put forward is correct, that when one finds that the purpose is a purpose for further investment, then it does not come within section 16. If trustees are proposing to use section 16 to raise money, not to preserve assets or to advance capital but to purchase further and additional assets, in my judgment section 16 does not assist them.

8.116 Foster J also observed that the scope of the statutory power reflected the historical approach of conferring limited powers on trustees:¹¹⁹

This case is merely one asking that the power of investment should include a power to mortgage the existing property and to invest in further land. That, in my judgment, is not contemplated by section 16. It would be very odd if it did come within section 16, for one must remember that that section was passed as long ago as 1925 when, in those days, the powers given to trustees by law and by the terms of settlements were very restricted.

8.117 Thus, the power conferred on a trustee by section 45 of the *Trusts Act 1973* (Qld) is dependent on the trustee being 'authorised by the trust instrument or by the *Trusts Act 1973* (Qld) or any other Act or by law to expend, pay or apply capital money subject to the trust for any purpose or in any manner'. If the trustee is so authorised in any of one of these cases, he or she will automatically have power to mortgage all or any part of the trust property for the purpose concerned.

8.118 In the case of the *Trusts Act 1973* (Qld), the provisions that confer the requisite authority for the conferral of power under section 45 of the Act are ones that authorise the expenditure, payment or application of capital money for the limited purposes of the preservation of the trust property or for the maintenance,

118 Ibid.

119 Ibid 1284. Foster J also observed that, in exceptional cases, it might be necessary for the court to authorise a trustee to borrow money to purchase additional trust property in order to preserve the existing property (for example, where it is desirable to buy a small piece of land, which, if not purchased, and which if sold to somebody else, might materially damage the value of the existing land) but that was not the position in the present case.

education, advancement or benefit of a beneficiary.¹²⁰ The decision in *Re Suenson-Taylor's Settlement Trusts* suggests that, unless the requisite authority is found in the trust instrument or any other Act or law, section 45 does not permit a trustee to borrow money on the security of the trust property for some other purpose, such as the acquisition of additional trust property as an investment. In such circumstances, it would be necessary for the trustee to apply to the court for the conferral of an additional power to mortgage the trust property for that specified purpose. In this sense, section 45, when used as a statutory default provision, takes a conservative approach.

The scope of section 45

8.119 As mentioned above, section 45 confers on a trustee a limited statutory power to mortgage for a purpose authorised by the trust instrument, the Act or another law. The section does not permit a trustee to 'gear' the value of the trust fund, that is, to borrow money on the security of the existing trust property for the purpose of acquiring additional trust property by way of investment, unless the requisite authority is found in the trust instrument.

8.120 Ford and Lee have observed that:¹²¹

The reason is that such activity is speculative and may compromise the standard of prudence imposed on trustees.

8.121 Section 45 does, however, ensure that a trustee always has a power to mortgage the trust property where the purpose of the mortgage is generally consistent with the trustee's duties to protect the trust property and to act in the interests of the beneficiaries.

8.122 An issue to consider is whether the scope of the power conferred by section 45 of the *Trusts Act 1973* (Qld), and in particular the power to mortgage, is appropriate.

8.123 The mortgage of trust property to acquire more property as an investment is, in relative terms, a high risk investment activity. A mortgage is a more serious transaction than a sale because, in the case of default, trust assets other than the mortgaged property may also be put at risk. The present policy setting is that a trustee can mortgage trust property for that purpose only if authorised by the trust instrument. Because section 45 operates as a statutory default power, any change to that limitation may potentially affect any trust. If the limitation is removed, the exercise of the statutory power to mortgage would be subject to the trustee's general duties, including the duty to act prudently when making an investment decision.

8.124 If it is considered that the *Trusts Act 1973* (Qld) should be retained in its present form, an ancillary issue is whether section 45 should be amended to clarify

¹²⁰

See n 110 above. See also *Platzer v Commonwealth Bank of Australia* [1997] 1 Qd R 266, 282, in which McPherson JA observed that the purposes referred to in s 45 of the *Trusts Act 1973* (Qld) are primarily those specified in s 33(1) (such as the repair and improvement (including subdivision) of the trust property) and s 62 (relating to advances of capital for the maintenance, education and advancement of a beneficiary).

¹²¹

HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 11 March 2011) [12.10330].

the purposes for which the power conferred by the section may be exercised, for example, by referring to the specific purposes for which a trustee may be authorised under the Act to expend, pay or apply capital money. These purposes are not apparent on the face of the provision, and it may be of assistance, particularly to non-professional trustees, if the provision made reference to them.

8-13 Is the scope of the power conferred by section 45 of the *Trusts Act 1973* (Qld), and in particular the power to mortgage, appropriate?

8-14 Should section 45 of the *Trusts Act 1973* (Qld) be amended to clarify the purposes for which the power conferred by the section may be exercised, for example, by referring to the specific purposes under the Act for which a trustee may be authorised to expend, pay or apply capital money?

Power to renew, extend or vary mortgage

8.125 Section 33(1)(i) of the *Trusts Act 1973* (Qld) deals with a trustee's power to agree to renew, extend or vary a mortgage. It provides:

33 Miscellaneous powers in respect of property

(1) Every trustee, in respect of any trust property, may—

...

- (i) as mortgagor or mortgagee, agree to the renewal, extension or variation of the mortgage for such period and on such terms and conditions as the trustee thinks fit; but—
 - (i) the powers conferred by this paragraph may be exercised by a trustee as mortgagor for the purpose of raising additional money on the security of a mortgage of any property, where the trustee would have power under section 45 to raise money by a mortgage of the property, and not otherwise; and
 - (ii) nothing in this paragraph authorises any trustee to advance money on the security of any mortgage that would not be an authorised investment in respect of the amount advanced; ...

8.126 Section 33(1)(i) empowers a trustee who is a mortgagor or mortgagee to agree, subject to several limitations, to the renewal, extension or variation of the mortgage for such period and on such terms and conditions as the trustee thinks fit.

8.127 One such limitation applies where the trustee is a mortgagor. In that case, section 33(1)(i)(i) permits the trustee to renew, extend or vary the mortgage for the purpose of raising additional money on the security of a mortgage of trust property,

but only if the trustee would have power under section 45 to raise money by a mortgage of the property.¹²²

8.128 The other limitation applies where the trustee is a mortgagee. In that case, section 33(1)(i)(ii) provides that the trustee is not authorised to advance money on the security of any mortgage that would not be an authorised investment in respect of the amount advanced.

8.129 Western Australia is the only other Australian jurisdiction that includes a power to renew, extend or vary a mortgage.¹²³

8.130 An issue to consider is whether the *Trusts Act 1973* (Qld) should continue to include a provision to the general effect of section 33(1)(i). The provision is an adjunct provision to the provisions conferring the power to mortgage (section 45) and the power of investment (section 21). Its purpose is to ensure that the power to agree to renew, vary or extend a mortgage made under those other provisions is exercised in accordance with their specific requirements.

8-15 Should the *Trusts Act 1973* (Qld) continue to include a provision to the general effect of section 33(1)(i)?

Power to dispose of trust property by exchange or partition

8.131 Under the general law, there was previously some doubt about whether a trustee, under the power of sale and exchange, could authorise a partition. It was subsequently held that an ordinary power of sale and exchange is sufficient to enable a trustee to authorise a partition between two or more beneficiaries.¹²⁴

8.132 In Queensland, section 32(1)(b) of the *Trusts Act 1973* (Qld) confers on a trustee a power to dispose of trust property by way of exchange or partition. It provides:

32 Powers to sell, exchange, partition, postpone, lease etc

(1) Subject to the provisions of this section, every trustee, in respect of any trust property, may—

...

(b) dispose of the property by way of exchange for other property in the State of a like nature and a like or better tenure, or, where the property consists of an undivided share, concur in the partition of the property in which the share is held, and give or take any property by way of equality of exchange or partition;

¹²² *Trusts Act 1973* (Qld) s 45 is set out at [8.109] above.

¹²³ *Trustees Act 1962* (WA) s 30(1)(h). See also *Trustee Act 1956* (NZ) s 15(1)(g).

¹²⁴ *Re Thompson's Trusts* (1908) 9 SR (NSW) 38; *Re Frith and Osborne* (1876) 3 Ch D 618; *Bradshaw v Fane* (1856) 3 Drew 534; 61 ER 1006.

8.133 A similar statutory power is found in the Western Australian trustee legislation.¹²⁵

8-16 Should the powers of exchange or partition conferred by section 32(1)(b) of the *Trusts Act 1973* (Qld):

- (a) continue to be the subject of a stand-alone provision in the Act (whether or not the Act is amended as mentioned in paragraph (b)); or
- (b) if the Act is amended to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner (the 'general property power'):
 - (i) be omitted; or
 - (ii) be stated briefly in a provision that lists examples of specific powers conferred by the general property power?

Power to postpone sale of trust property

Introduction

8.134 Section 32(1)(c) and (4) of the *Trusts Act 1973* (Qld) deals with the power of a trustee to postpone the sale, calling in or conversion of property that the trustee has a duty to sell. It followed the earlier English provision then contained in the *Law of Property Act 1925*.¹²⁶

8.135 A duty to sell or convert trust property may arise in two main ways. First, a trustee will be under a duty, in particular circumstances, to convert certain types of property disposed of by will in accordance with the principle referred to as the first part of the rule in *Howe v Dartmouth*.¹²⁷ It requires that:¹²⁸

where there is a residuary bequest of personal estate to be enjoyed by several persons in succession, a Court of Equity, in the absence of any evidence of a contrary intention, will assume that it was the intention of the testator that his legatees should enjoy the same thing in succession, and, as the only means of giving effect to such intention, will direct the conversion into permanent investments of a recognised character of all such parts of the estate as are of a

¹²⁵ *Trustees Act 1962* (WA) s 27(1)(b).

¹²⁶ *Law of Property Act 1925*, 15 & 16 Geo 5, c 20, s 25. See now *Trusts of Land and Appointment of Trustees Act 1996* (UK) c 47, s 4(1). The English provisions are confined to trusts for sale of land. In Queensland, provision for the court to authorise the postponement of the sale of property held in trust for sale for infants was provided for in the *Trustees and Executors Act Amendment Act 1902* (Qld) s 2.

¹²⁷ (1802) 7 Ves Jun 137; 32 ER 56.

¹²⁸ *Macdonald v Irvine* (1878) 8 Ch D 101, 112 (Baggallay LJ). See also *Michael v Callil* (1945) 72 CLR 509, 517, 522 (Latham CJ), 526 (Rich J); JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1902].

wasting¹²⁹ or reversionary¹³⁰ character, and also all such other existing investments as are not of the recognised character and are consequently deemed to be more or less hazardous.¹³¹ (notes added)

8.136 Secondly, a trustee will be under a duty to sell trust property, or to convert it into a different form, if the trust instrument directs that the property must be sold or converted.¹³² Such a trust is called a ‘trust for sale’ and requires the trustee to sell the property ‘as soon as a fair price can be obtained’.¹³³ In contrast to a trust where the trustee is given a *power* to sell, a trust for sale or conversion:¹³⁴

imposes on the trustee an immediate binding duty to sell trust property, its object being to sell the property and use the proceeds as a fund for the benefit of the beneficiaries (usually the testator’s family) as a whole. ... A trust to sell ‘with all convenient speed’ is inconsistent with a power to postpone sale; the trustees are bound to sell at the first favourable opportunity. (notes omitted)

8.137 Historically, inter vivos trusts for sale developed as an alternative to the ‘strict settlement’ of land.¹³⁵ The trust for sale enabled the land to be settled as personalty rather than realty¹³⁶ and ensured that ‘when the time for division came, it should be possible to turn the land into money and divide the money instead of portioning the land’.¹³⁷ A typical settlement of personalty:¹³⁸

gave successive life interests to the husband and wife, and then ... gave the property to the adult children equally. The same trusts could readily be introduced into a settlement of land by means of a trust for sale, since, under the equitable doctrine of conversion, the land was at once turned into personalty. Further, whenever the ultimate object of a settlement was the

129 ‘Wasting’ property is property that, in its nature, perishes or becomes worn out from use or by lapse of time or that lasts for a limited time only, such as a leasehold estate or a terminating annuity: *Worrall v Commercial Banking Co of Sydney* (1917) 17 SR (NSW) 457, 463 (Street J).

130 ‘Reversionary’, in this context, refers to a right in property the enjoyment of which is deferred or, more simply, a future interest or estate.

131 Investments of an unrecognised, or unauthorised, character are also sometimes described as ‘speculative’: see, eg, Law Reform Committee (UK), *Twenty-Third Report: The Powers and Duties of Trustees*, Cmnd 8773 (1982) [3.28].

132 See also *Property Law Act 1974* (Qld) s 38, which empowers the court to appoint ‘statutory trustees for sale’ in respect of property (other than chattels personal) that is held in co-ownership. See, eg, *Stephens v Lamb* [2008] QSC 114 (PD McMurdo J).

133 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 11 March 2011) [12.2330]; GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [23.95]. See, eg, *Re Bridget Quigley’s Will* (1895) 16 LR (NSW) Eq 45, 47–8 (Manning J); *Cain v Watson* [1910] VLR 256, 267 (Cussen J).

134 GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [23.95].

135 AJ Oakley, *A Manual of the Law of Real Property by the Rt Hon Sir Robert Megarry* (Sweet & Maxwell, 8th ed, 2002) 250. Inter vivos trusts for sale became common during the 19th century, although they had been used in wills since the 17th century: JM Lightwood, ‘Trusts for Sale’ (1927) 3 *Cambridge Law Journal* 59, 60–3.

136 Pursuant to the equitable doctrine of conversion, the beneficiaries’ interests under a trust for sale were deemed to be interests in personalty (that is, in the purchase money into which the land had to be converted), rather than interests in the land itself, even before the land was sold, since equity treats as done that which ought to be done: AJ Oakley, *A Manual of the Law of Real Property by the Rt Hon Sir Robert Megarry* (Sweet & Maxwell, 8th ed, 2002) 250.

137 JM Lightwood, ‘Trusts for Sale’ (1927) 3 *Cambridge Law Journal* 59, 69.

138 *Ibid* 63.

division of land among children, there was a great advantage in effecting this by means of a trust for sale and for division of the proceeds.

8.138 However, although settlors may have wanted the land eventually sold and the proceeds divided, they often wished to maintain the usual life tenancy in the land first, which required a deferral or postponement of the duty to sell.¹³⁹ Thus, it became common practice for a power to postpone the sale of the land to be included in a trust for sale.¹⁴⁰ A power to postpone was subsequently implied by the *English Law of Property Act 1925*,¹⁴¹ filling any gap that might have been left by a trust instrument,¹⁴² and ultimately simplifying the drafting of trust deeds.

8.139 Where there is a power to postpone the sale of property, the trustee's obligation is to sell the property 'at a fair price within a reasonable time',¹⁴³ having regard to the settlor's or testator's intention.¹⁴⁴ The power to postpone 'must be exercised in good faith, with reference to relevant considerations including the rights of the beneficiaries *inter se*'.¹⁴⁵ As such, the trustee is not ordinarily permitted to postpone the sale 'arbitrarily to an indefinite period', so as to vary the relative rights of the tenant for life and remainderman.¹⁴⁶ Other considerations in postponing the sale may include economic conditions, and the difficulty of sale.¹⁴⁷

Section 32(1)(c), (4): The statutory power to postpone

8.140 Section 32(1)(c) of the *Trusts Act 1973* (Qld) gives trustees a general statutory power to postpone the sale. It provides that 'every trustee, in respect of any trust property, may':¹⁴⁸

- (c) postpone the sale, calling in, and conversion of any property that the trustee has a duty to sell, other than property that is of a wasting, speculative or reversionary nature;

139 Ibid.

140 Ibid. See also Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 32.

141 15 & 16 Geo 5, c 20, s 25.

142 R Cozens-Hardy Home, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 590–1.

143 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 11 March 2011) [12.2350]; GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [23.105]. See, eg, *Ward v Trustees, Executors & Agency Co Ltd* (1893) 14 ALT 274, 276 (a'Beckett J).

144 GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [23.105].

145 *Re Marden* [2008] SASC 312, [13] (Gray J), citing *Perpetual Trustee Co Ltd v Noyes* (1925) 42 WN (NSW) 226, 249 (Long Innes J).

146 T Lewin, *A Practical Treatise on the Law of Trusts and Trustees* (Maxwell & Son, 2nd ed, 1842) 329–30. See, eg, *Cox v Archer* (1964) 110 CLR 1, 6 (Kitto, Taylor and Owen JJ); *Walker v Shore* (1815) 19 Ves Jun 387; 34 ER 561, 563 (Grant MR). Contra *Re Crowther* [1895] 2 Ch 56, 61 (Chitty J).

147 GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [23.105]. See, eg, *Benjamin v Sanders* (1891) 17 VLR 68; *Re Charteris* [1917] 2 Ch 379, 393 (Eady LJ), 399 (Warrington LJ); *Stephens v Lamb* [2008] QSC 114 (PD McMurdo J).

148 *Trustee Companies Act 1968* (Qld) s 28(1)(j) also provides that a trustee company may, unless expressly prohibited by the trust instrument, 'from time to time postpone the conversion of any real or personal estate for such time as the trustee company determines is proper in the circumstances'. Similar provision is made in *Trustee Companies Act 1964* (NSW) s 15C(b).

8.141 Section 32(4) of the Act further enables the trustee, subject to any express direction to the contrary in the trust instrument, to postpone the sale of any land or authorised investment for ‘an indefinite and unlimited period’:

- (4) Where there is a power (whether statutory or otherwise) to postpone the sale of any land or authorised investment that a trustee has a duty to sell by reason only of a trust or direction for sale, then, subject to any express direction to the contrary in the instrument (if any) creating the trust, the trustee shall not be in any way liable merely for postponing the sale in the exercise of the trustee’s discretion for an indefinite and unlimited period, whether or not that period exceeds the period during which the trust or direction for sale remains valid ... but nothing in this subsection applies to any property of a wasting or speculative nature.

8.142 Similar provisions conferring a power to postpone the sale of trust property, and protecting the trustee from liability for postponing the sale for an indefinite period, are included in the trustee legislation in several of the other Australian jurisdictions¹⁴⁹ and in New Zealand.¹⁵⁰

8.143 The provisions in section 32 do not, however, extend to allow the trustee to postpone the sale of property ‘that is of a wasting, speculative or reversionary nature’. As such, section 32 preserves the operation of the duty of conversion under the rule in *Howe v Dartmouth*.¹⁵¹

8.144 Earlier in this chapter, the Commission has proposed that the Act should be amended to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner of the property (the ‘general property power’). That proposal reflects a general policy to ensure that trustees have wide powers to deal with the property for the benefit of the beneficiaries. A statutory power of postponement reflects the same policy, by providing the trustee with additional flexibility to ensure that the beneficiaries’ best interests are met. It also has the effect that ‘the position of trustees for sale [is] largely assimilated to that of trustees with a mere power of sale’.¹⁵²

8.145 The general property power would apply subject to the trustee’s duties. As explained above, a duty to sell trust property is imposed on a trustee whenever a direction to that effect is included in the trust instrument. Although the historical

¹⁴⁹ *Trustee Act 1925* (ACT) s 27B(1), (2)(a); *Trustee Act 1925* (NSW) s 27B(1), (2); *Trustee Act 1958* (Vic) s 13(5), (6); *Trustees Act 1962* (WA) s 27(1)(c), (5). In the ACT and New South Wales, specific provision is also made for the court to authorise trustees to postpone the sale of trust property: *Trustee Act 1925* (ACT) s 81(2)(b); *Trustee Act 1925* (NSW) s 81(2)(b). In Queensland, see *Trusts Act 1973* (Qld) s 94(1) under which the court may confer on trustees the necessary power for the ‘retention’ of trust property in certain circumstances.

¹⁵⁰ *Trustee Act 1956* (NZ) s 14(1)(c), (7). See also *Trusts of Land and Appointment of Trustees Act 1996* (UK) c 47, s 4(1).

¹⁵¹ (1802) 7 Ves Jun 137; 32 ER 56. See Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 32. In Western Australia, a trustee may postpone the sale of property of a wasting, speculative or reversionary nature but ‘for no longer than is reasonably necessary to permit its prudent realisation’: *Trustees Act 1962* (WA) s 27(1)(c). Similar provision is made in *Trustee Act 1956* (NZ) s 14(1)(c). The remaining jurisdictions that confer a statutory power to postpone sale are silent on this issue.

¹⁵² WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 54.

impetus for the creation of trusts for sale of land has fallen away,¹⁵³ trust instruments may still include a direction to sell or convert real or personal property the subject of the trust.¹⁵⁴

8.146 At present, section 32(1)(c) and (4) of the Act modifies that duty by conferring a power to postpone the sale. Arguably, the conferral of all the powers of an absolute owner would not automatically carry with it such a power of postponement.¹⁵⁵ That power is conferred as a direct response to the trustee's special duty, and is not generally consistent with the exercise of powers of an absolute owner.

8.147 The Commission considers, therefore, that the *Trusts Act 1973* (Qld) should continue to include provision to the general effect of section 32(1)(c) conferring a power to postpone the sale of property that the trustee has a duty to sell (other than property of a wasting, speculative or reversionary nature) and, to the extent it allows a trustee to postpone the sale of property for an indefinite period (subject to an express direction to the contrary in the trust instrument), a provision to the general effect of section 32(4).

Protection of purchasers

8.148 Section 32(4) of the *Trusts Act 1973* (Qld) also includes a protection for purchasers of the property where the trustee has a power to postpone the sale of any land or an authorised investment that the trustee has a duty to sell by reason of a trust or direction for sale. It relevantly provides:

- (4) ... nor shall a purchaser of the land or authorised investment be in any case concerned with any directions respecting a sale; ...

8.149 Similar protections are also given in the other jurisdictions.¹⁵⁶

8.150 A direction (or power) in a will or trust instrument to sell trust property was sometimes given on conditions precedent, for example, that the consent of the tenant for life be obtained before the sale could be made.¹⁵⁷ Where the trustees

¹⁵³ The *Settled Land Act 1886* (Qld) was repealed by the *Trusts Act 1973* (Qld) s 3(1) sch 1 (Act as passed).

¹⁵⁴ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 11 March 2011) [12.2050]; WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 54.

¹⁵⁵ See PH Pettit, 'Demise of trusts for sale and the doctrine of conversion?' (1997) 113 *Law Quarterly Review* 207, 208, discussing the *Trusts of Land and Appointment of Trustees Act 1996* (UK) c 47, which provides, in s 6, that trustees of land have all the powers of an absolute owner in relation to the land for the purpose of exercising their functions as trustees, subject to any rule of law or equity and the trustee's duty of care under s 1 of the *Trustee Act 2000* (UK), but which also separately and specifically includes, in s 4(1), a power, in every trust for sale of land, to postpone the sale.

¹⁵⁶ *Trustee Act 1925* (ACT) s 27B(2)(b); *Trustee Act 1925* (NSW) s 27B(2); *Trustee Act 1958* (Vic) s 13(6); *Trustees Act 1962* (WA) s 27(5). See also *Trustee Act 1956* (NZ) s 14(7). Those provisions refer, however, to directions respecting 'the postponement of sale'.

¹⁵⁷ J Hill, *A Practical Treatise on the Law Relating to Trustees, Their Powers, Duties, Privileges and Liabilities* (Stevens & Norton, 1845) 477–8.

made the sale in breach of such conditions or otherwise in breach of trust, the Courts of Equity had refused to enforce specific performance of the contract.¹⁵⁸

8.151 The provision in section 32(4) of the Act protects the purchaser in those circumstances.

8.152 However, section 46 of the *Trusts Act 1973* (Qld) includes a general protection for purchasers (and mortgagees) dealing with trustees. That section relevantly provides that:

A purchaser or mortgagee paying or advancing money to the trustee on a sale or mortgage of trust property shall not be concerned to see ... that the trustee has power to effect such sale or mortgage.

8.153 In Chapter 11, the Commission has proposed that section 46 of the Act should be retained. In view of that, the Commission considers that it is unnecessary for a separate provision to the effect of section 32(4) of the Act, to the extent that it confers protection on a purchaser, to be retained.

8.154 The Commission invites submissions on the following proposal:

8-17 In view of the protection given to purchasers by section 46 of the *Trusts Act 1973* (Qld), section 32(4) of the Act, to the extent that it confers protection on a purchaser, should be omitted.

Power to lease trust property

The general law

8.155 Unless authorised by the trust instrument or by statute, a trustee has limited leasing powers.

8.156 Under the general law, a trustee in whom the legal estate is vested and who has active management duties to perform could, notwithstanding an absence of express power, grant a lease on reasonable terms.¹⁵⁹ In *Fitzpatrick v Waring*,¹⁶⁰ FitzGibbon LJ made the observation that:¹⁶¹

a *reasonable* letting must be one reasonably necessary for the due execution of the trusts on behalf and in the interest, not of one, but of *all* the *cestuis que trust*. (emphasis in original)

¹⁵⁸ Ibid, citing *Ord v Noel* (1820) 5 Madd 438; 56 ER 962 (Leach V-C); *Adams v Broke* (1842) 1 Y & CCC 626; 62 ER 1046 (Knight Bruce V-C). See also R Cozens-Hardy Home, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 586–7.

¹⁵⁹ See C Montgomery White and MM Wells, *Underhill's Law Relating to Trusts & Trustees* (Butterworths, 11th ed, 1959) 411–12; *Attorney-General v Owen* (1805) 10 Ves Jun 555; 32 ER 960; *Naylor v Arnitt* (1830) 1 Russ & M 501; 39 ER 193; *Fitzpatrick v Waring* (1882) 11 LR Ir 35. Cf *Re Shaw's Trusts* (1871) LR 12 Eq 124; *Wood v Pattenon* (1847) 10 Beav 541; 50 ER 690; *Evans v Jackson* (1836) 8 Sim 217; 59 ER 87.

¹⁶⁰ (1882) 11 LR Ir 35.

¹⁶¹ Ibid 54.

8.157 A trustee has power to grant a lease for short periods of time — such as a year — where the lease is reasonable in the management of that kind of property.¹⁶² However, in some situations, the trustee is not necessarily in breach of trust if he or she grants a lease for a term of years.¹⁶³ In addition to economic and commercial considerations and the customary practice of management of such properties, another consideration in the trustee's decision concerning the duration of the lease is the period of time left before the end of the lease.¹⁶⁴

8.158 The onus is on the trustee, or the lessee, to show that the lease is reasonable and done in the fair management of the estate.¹⁶⁵

8.159 The duty to administer the trust personally requires that trustees should not commit themselves in advance as to their future conduct as trustees.¹⁶⁶ Therefore, in principle, trustees should not bind themselves contractually to exercise their discretion in a prescribed manner, to be decided by considerations other than their own judgment at the time, in relation to what is in the best interests of the beneficiaries.¹⁶⁷ The strict application of that principle precludes the grant of an option to purchase, or renew a lease of, trust property.¹⁶⁸ Nevertheless, the granting of an option to purchase or to renew a lease 'often occurs as a normal part of commercial arrangements',¹⁶⁹ and the courts have recognised that, in some circumstances, a limited fetter can reflect the actions of a prudent business person, and that trustees may legitimately grant options where it is proper and reasonable to do so.¹⁷⁰ It would appear that such an option would have to be of short duration

¹⁶² Eg, *Re Burgess* [1899] SALR 145 (FC) (where executors were allowed to lease real property for a term not exceeding the time when the youngest beneficiary under the will attained the age of 21); *Fitzpatrick v Waring* (1882) 11 LR Ir 35 (where a managing trustee of an agricultural holding was allowed to lease for one year). Cf: *Re Shaw's Trusts* (1871) LR 12 Eq 124; *Wood v Patteson* (1847) 10 Beav 541; 50 ER 690.

¹⁶³ Eg, *Naylor v Arnitt* (1830) 1 Russ & M 501; 39 ER 193 (where it was held that trustees were not restricted to leasing the land from year to year, but could grant a valid lease for a term of 10 years); *Re Mallen* [1929] SASR 154 (where it was held that, if it was proper from a business point of view to grant the lease, the trustee may do so notwithstanding that it would give the life tenants an advantage over the persons entitled in remainder).

¹⁶⁴ Eg, *Donely v Donely* [1998] 1 Qd R 602, where it was held that the granting of a lease for a term of 50 years was a breach of trust because the rent was grossly inadequate and the lease would not expire until the beneficiaries had reached 57 and 59 years of age respectively, whereas the trust was to mature upon the younger beneficiary reaching 25 years of age.

¹⁶⁵ *Fitzpatrick v Waring* (1882) 11 LR Ir 35, 45 (Law C), 54 (FitzGibbon LJ); *Attorney-General v Owen* (1805) 10 Ves Jun 555, 560; 32 ER 960, 962 (Lord Eldon LC).

¹⁶⁶ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2014].

¹⁶⁷ *Ibid.*

¹⁶⁸ *Clay v Rufford* (1852) 5 De G & Sm 768; 64 ER 1337; *Oceanic Steam Navigation Co v Sutherland* (1880) 16 Ch D 236; *Re Stephenson's Settled Estates* (1906) 6 SR (NSW) 420; *Rawcliffe v Johnstone* [1921] NZLR 470. See also G Fricke and OK Strauss, *The Law of Trusts in Victoria* (Butterworths, 1964) 371; GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [23.40]; HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 11 March 2011) [12.5710].

¹⁶⁹ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 11 March 2011) [12.5710].

¹⁷⁰ *Meek v Bennie* [1940] NZLR 1. See also *Rousset v Antunovich* [1963] WAR 52, 60 (Hale J). See also J Swil and R Forbes, 'Fettering the fiduciary discretion by agreement: Breach of duty or commercial reality?' (2010) 84 *Australian Law Journal* 32.

and a prudent transaction in all other respects.¹⁷¹ It has been held that, where a right of renewal is exercised, the aggregate periods of the original and the new terms should not exceed the maximum term for which the trustees are allowed to lease.¹⁷²

Legislative history in Queensland

8.160 In Queensland, the restrictive rules that applied under the general law in relation to powers of leasing were modified by the *Settled Land Act 1886* (Qld), the *Trustees and Executors Act of 1897 Amendment Act of 1898* (Qld) and the *Trustee Companies Act 1968* (Qld).

8.161 The *Trustees and Executors Act of 1897 Amendment Act of 1898* (Qld) enabled a trustee, with the sanction of the court, and notwithstanding any directions given by the trust instrument, to lease trust property if the court considered it necessary for the purpose of the preservation of the estate or improvement of the trust property, or its insurance against fire, or for the discharge of any debts or liabilities charged upon the trust property.¹⁷³

8.162 The *Settled Land Act 1886* (Qld) conferred on a life tenant the power to lease settled land for any term not exceeding 30 years in the case of a building lease, 20 years in the case of a mining lease and 10 years in the case of any other lease.¹⁷⁴

8.163 In addition, the *Trustee Companies Act 1968* (Qld) gave a trustee company the power to lease property for a term not exceeding 21 years and to renew the lease.¹⁷⁵ It also empowered a trustee company to enter into, and renew, a share-farming agreement.¹⁷⁶ The Act further enabled a trustee company to surrender or concur in surrendering any lease, and accept a new lease.¹⁷⁷ These provisions are still in force.¹⁷⁸

8.164 Many of the leasing powers conferred on trustees (including trustee companies) and life tenants under the historical Queensland legislation have now been assimilated into section 32(1)(d)–(f) and (3) of the *Trusts Act 1973* (Qld).

¹⁷¹ *Meek v Bennie* [1940] NZLR 1 (in which the Court held that the trustees, who were careful not to tie up the trust property for long periods, though from time to time they extended the options and received consideration for giving them, had not departed from their duty). See also Law Reform Commission of Western Australia, *Trusts and the Administration of Estates: Part V — Trustees' Powers of Investment*, Report, Project No 34 (1984) 32.

¹⁷² *Bellringer v Blagrove* (1847) 1 De G & Sm 63; 63 ER 972; *Magrane v Archbold* (1813) 1 Dow 107; 3 ER 639.

¹⁷³ *Trustees and Executors Act of 1897 Amendment Act of 1898* (Qld) s 2; *Trustees and Executors Act 1897* (Qld) s 48.

¹⁷⁴ *Settled Land Act 1886* (Qld) ss 13–14.

¹⁷⁵ *Trustee Companies Act 1968* (Qld) s 28(1)(l).

¹⁷⁶ *Trustee Companies Act 1968* (Qld) s 28(1)(l). Share-farming is defined as the system of tenant farmers receiving an agreed portion of farm profits from landowners in exchange for cultivating the land: *The New Shorter Oxford English Dictionary* (Clarendon Press, Oxford, 1993).

¹⁷⁷ *Trustee Companies Act 1968* (Qld) s 28(1)(m).

¹⁷⁸ See [16.23], Question 16-3 below in relation to the powers conferred by s 28 of the *Trustee Companies Act 1968* (Qld).

The leasing provisions under the Trusts Act 1973 (Qld)

8.165 The powers to lease trust property are set out in section 32(1)(d)–(f) and (3) of the *Trusts Act 1973* (Qld). Those subsections provide:

32 Powers to sell, exchange, partition, postpone, lease etc

- (1) Subject to the provisions of this section, every trustee, in respect of any trust property, may—

...

- (d) let or sublet the property at a reasonable rent for any term not exceeding 1 year, or from year to year, or for a weekly, monthly, or other like tenancy or at will; or enter into any sharefarming agreement with respect to the property on reasonable terms for any period not exceeding 1 year; and renew any such lease or tenancy or sharefarming agreement;
- (e) grant a lease or sublease of the property for any term not exceeding—
- (i) in the case of a building lease—30 years; or
 - (ii) in the case of any other lease (including a mining lease)—21 years;

to take effect in possession within 1 year next after the date of the grant of the lease or sublease at a reasonable rent, with or without a fine, premium or foregift, any of which if taken shall be deemed to be part of and an accretion to the rental, and shall, as between the persons beneficially entitled to the rental, be considered as accruing from day to day and be apportioned over the term of the lease or sublease;

- (f) at any time during the currency of a lease of the property, reduce the rent or otherwise vary or modify the terms thereof, or accept, or concur or join with any other person in accepting, the surrender of any lease.

...

- (3) In exercising any power of leasing or subleasing conferred by this section or by the instrument (if any) creating the trust, a trustee may—
- (a) grant to the lessee or sublessee a right of renewal for 1 or more terms, at a rent to be fixed or made ascertainable in a manner specified in the original lease or the original sublease, but so that the aggregate duration of the original and of the renewal terms shall not exceed the maximum single term that could be granted in the exercise of the power; or
 - (b) grant a lease with an optional or compulsory purchasing clause; or
 - (c) grant to the lessee or sublessee a right to claim compensation for improvements made or to be made by the lessee or sublessee in, upon or about the property which is leased or subleased.

8.166 Section 32(1)(d) of the Act deals with short leases. It empowers a trustee to let or sublet trust property at a reasonable rent for any term not exceeding a year, or from year to year or for shorter periodic tenancies, or to enter into a share-farming agreement for any period not exceeding a year.¹⁷⁹ It also enables a trustee to renew any such lease or tenancy or share-farming agreement.

8.167 Section 32(1)(e) concerns long leases. It empowers a trustee to grant a lease or sublease of trust property for any term not exceeding 30 years in the case of a building lease and 21 years in the case of any other lease (including a mining lease).

8.168 Section 32(1)(f) provides that, at any time during the currency of a lease of trust property, a trustee may reduce the rent or otherwise vary or modify its terms, or accept, or concur or join with any other person in accepting, a surrender of the lease.¹⁸⁰

8.169 Section 32(3) provides that, in exercising any power of leasing or subleasing of trust property conferred by section 32 of the *Trusts Act 1973* (Qld) or the trust instrument, a trustee may grant:¹⁸¹

- to the lessee or sublessee a right of renewal for one or more terms, but only to the extent that that the combined duration of the original and the renewal terms does not exceed the maximum single term that could be granted;
- a lease with an optional or compulsory purchase clause; or
- to the lessee or sublessee a right to claim compensation for improvements in, upon or about the property that have been made or are to be made by the lessee or sublessee.

8.170 The grant of a lease for a term longer than allowed under section 32(3) has been held to be valid for the term allowed but void as to the extent of the excess term.¹⁸²

8.171 Provisions conferring leasing powers are also included in the trustee legislation of the ACT, New South Wales, South Australia, Victoria, Western

179 Queensland is the only Australian jurisdiction that gives trustees an express power to enter into and renew share-farming agreements.

180 The powers in s 32(1)(f) of the *Trusts Act 1973* (Qld) previously were vested in a life tenant by ss 19 and 26(1)(d) of the *Settled Land Act 1886* (Qld) and on a trustee company by s 28(1)(m) of the *Trustee Companies Act 1968* (Qld).

181 In its 1971 Report, this Commission explained that these options were included in s 32(3) partly because 'such conditions and covenants are commonplace in commercial leases': Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 33.

182 *Washington Constructions Co Pty Ltd v Ashcroft* [1982] Qd R 776. In that case, a company agreed to lease land of which it was trustee for 15 years with an option of renewal for a further 15 years. Matthews J held (at 780; Douglas and Macrossan JJ agreeing) that the lease for 15 years was unaffected by the limitation in s 32 of the *Trusts Act 1973* (Qld) of a trustee's power to grant a lease for an aggregate term of 21 years. His Honour held that, if there was any illegality, it was only by the grant of the option, and the option clause could be severed or the lessees could elect not to claim the benefit of it.

Australia and New Zealand.¹⁸³ There are no similar provisions empowering trustees to grant leases or subleases in the trustee legislation of the Northern Territory or Tasmania.

8.172 The provisions in the ACT, New South Wales, South Australia, Western Australia and New Zealand all confer power to grant options to purchase or to renew leases of trust property.¹⁸⁴ In Western Australia, a trustee is not liable for breach of trust merely because the trustee granted an option to purchase of six months duration or less at a price fixed at the time of granting the option, provided that the price was considered reasonable by an independent licensed valuer.

Limitation on length of lease

8.173 Section 32 of the *Trusts Act 1973* (Qld) imposes various restrictions on the length of time for which certain types of lease may be granted. Under section 32(1)(d), a trustee may let or sublet property, or enter into a share-farming agreement, on a short lease of up to one year. Section 32(1)(e) enables a trustee to grant a lease or sublease for any term not exceeding 30 years in the case of a building lease and 21 years in the case of any other lease. Section 32(3) enables a trustee, when exercising any of the leasing powers under section 32, to grant a right of renewal for one or more terms, but only to the extent that the aggregate of the terms does not exceed the maximum single term that could be granted.

8.174 These leasing powers were largely modelled on statutory powers of leasing that had existed previously under the *Settled Land Act 1886* (Qld), the *Trustees and Executors Act of 1897 Amendment Act of 1898* (Qld) and the *Trustee Companies Act 1968* (Qld).

8.175 In Western Australia, building leases must not exceed a term of 30 years, whereas any other lease must not exceed a term of 10 years.¹⁸⁵ The New Zealand legislation does not distinguish between types of long leases but provides that the grant of a lease or a sublease must not exceed a term of 21 years.¹⁸⁶

8.176 The leasing provisions in the ACT, New South Wales and South Australia are in similar terms.¹⁸⁷ Where a trustee holds the land with power to manage the land or on trust for sale with an express power to postpone the sale, the trustee may lease the land for a maximum term of five years (or 10 years in South Australia). Where a trustee holds the land without power to manage the land, or on

¹⁸³ *Trustee Act 1925* (ACT) s 36; *Trustee Act 1925* (NSW) s 36; *Conveyancing Act 1919* (NSW) s 106(4)–(8), (10); *Trustee Act 1936* (SA) s 25C; *Property Law Act 1958* (Vic) s 35(1); *Settled Land Act 1958* (Vic) ss 41–42; *Trustees Act 1962* (WA) s 27(1)(e)–(f), (3); *Trustee Act 1956* (NZ) s 14(1)(d)–(f), (5).

¹⁸⁴ *Trustee Act 1925* (ACT) s 36; *Trustee Act 1925* (NSW) s 36; *Trustee Act 1936* (SA) s 25C(3); *Trustees Act 1962* (WA) s 27(3). See also *Trustee Act 1956* (NZ) s 14(5).

¹⁸⁵ *Trustees Act 1962* (WA) s 27(1)(e).

¹⁸⁶ *Trustee Act 1956* (NZ) s 14(1)(e).

¹⁸⁷ *Trustee Act 1925* (NSW) s 36(1); *Trustee Act 1925* (ACT) s 36(1); *Trustee Act 1936* (SA) s 25C(1). A trustee is not deemed to hold land with power to manage the same within the meaning of these provisions by reason only of the fact that it is proper to postpone sale in order to sell to the best advantage and in the meantime to manage the land: *Trustee Act 1925* (NSW) s 36(2); *Trustee Act 1925* (ACT) s 36(2); *Trustee Act 1936* (SA) s 25C(2).

trust for sale without an express power to postpone the sale, the trustee may lease the land for a maximum term of three years (or five years in South Australia).

8.177 In Victoria, a trustee for sale has all the powers of a tenant for life under the *Settled Land Act 1958* (Vic).¹⁸⁸ Section 41 of that Act confers a power to grant a building lease for a maximum term of 50 years, a mining lease for a maximum term of 60 years, and any other lease for a maximum term of 21 years.

Whether a more general approach should be adopted

8.178 Sections 32(1)(d)–(f) and (3)(b)–(c) of the *Trusts Act 1973* (Qld) were enacted before the Act was amended to confer a broad investment power on trustees. Their relatively prescriptive content, particularly in relation to the specific limits on the period of time for which a trustee may grant or renew particular types of leases, is arguably no longer necessary in light of the trustee’s power of investment and duties to act prudently when making investment decisions and in the interests of the beneficiaries. An issue to consider is whether, given those considerations, it is necessary to retain sections 32(1)(d)–(f) and (3)(b)–(c) in stand-alone provisions in the Act, whether or not the Act is amended to confer a general property power on a trustee as proposed earlier in this chapter.¹⁸⁹

8.179 If the Act is amended to confer a general property power, a further issue to consider is whether to omit the powers (on the basis that they would be subsumed by the general property power) or to restate them briefly in a provision that lists examples of specific powers conferred by the general property power. The latter approach has been adopted in the American Uniform Trust Code and proposed in New Zealand and British Columbia.¹⁹⁰

8.180 The American Uniform Trust Code expressly empowers a trustee to grant a lease ‘with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust’.¹⁹¹ That provision is contained in a list of specific powers that are listed as examples of a trustee’s general power in relation to the trust property. The grant of a lease on such terms could be a prudent investment decision on the part of a trustee if, in the particular circumstances, it has the effect of increasing the value of the property, and is otherwise in the interests of the beneficiaries. On the subsequent sale of the property, the property would be sold subject to the lease. A final issue to consider is whether the *Trusts Act 1973* (Qld) should be amended to expressly permit a trustee to grant a lease (with or without the option to purchase or renew) for a period within or extending beyond the duration of the trust.

¹⁸⁸ *Property Law Act 1958* (Vic) s 35(1).

¹⁸⁹ See [8.35], Proposal 8-1 above.

¹⁹⁰ See [8.23], [8.24] and [8.26] above.

¹⁹¹ Unif Trust Code § 816(9) (amended 2010).

8-18 Should the leasing powers conferred by section 32(1)(d)–(f) and (3)(b)–(c) of the *Trusts Act 1973* (Qld):

- (a) continue to be the subject of stand-alone provisions in the Act (whether or not the Act is amended as mentioned in paragraph (b)); or
- (b) if the Act is amended to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner (the 'general property power'):
 - (i) be omitted; or
 - (ii) be stated briefly in a provision that lists examples of specific powers conferred by the general property power?

8-19 Should the *Trusts Act 1973* (Qld) be amended to permit a trustee to grant a lease, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust?

Power to subdivide and undertake other development works

8.181 Section 33(1)(e) of the *Trusts Act 1973* (Qld) empowers a trustee to subdivide or apply for approval to subdivide trust land into blocks and, for that purpose, to construct and dedicate roads, streets, access roads, footpaths and sewerage and make all such reserves and do all other things.¹⁹²

8.182 Section 33(1)(f) further empowers a trustee to pay trust money as the trustee thinks reasonable by way of expenditure upon or contribution toward the construction and maintenance of such roads, streets, access ways, service lanes, and footpaths, and such sewerage, water, electricity, drainage and other works as are, in the opinion of the trustee, likely to be beneficial to the property, notwithstanding that they are intended to be constructed wholly or partly on land not subject to the same trusts, and dedicate trust land subject to the same trusts as roads, streets, access ways, service lanes and footpaths where, in the trustee's opinion, it is likely to be beneficial to the property.

8.183 In *Ryan v The Public Trustee of Queensland*, Williams J observed that the power of subdivision conferred by section 32(1)(e) of the *Trusts Act 1973* (Qld) would probably fall within the power to make improvements or developments conferred by section 33(1)(b) of the Act.¹⁹³

¹⁹² *Trusts Act 1973* (Qld) s 33(1)(e). See also the similar provisions in *Trustees Act 1962* (WA) s 30(1)(d); *Trustee Act 1956* (NZ) s 15(1)(c). In Queensland, the provision applies where the property is land, whereas in Western Australian and New Zealand the provision applies where the property is land 'and the land may be sold or let or leased or otherwise disposed of under any power of trust vested in the trustee'.

¹⁹³ [1998] 1 Qd R 679, 684.

Subsection 1(e) appears to have been inserted out of an abundance of caution to make it clear that in the case of subdivision the trustee has the power to expend trust moneys for the purposes therein specified. In other words, subdivision of land would probably be within the power conferred by s 33(1)(b), but the matter is put beyond doubt by the inclusion of subs (1)(e).

8.184 Notwithstanding the apparent overlap between section 33(1)(b) and (e), only subsection (b) imposes a monetary restriction on the expenditure of trust funds.

8-20 Should the powers conferred by section 33(1)(e) and (f) of the *Trusts Act 1973* (Qld) (including the powers to subdivide and undertake other development works):

- (a) continue to be the subject of stand-alone provisions in the Act (whether or not the Act is amended as mentioned in paragraph (b)); or
- (b) if the Act is amended to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner (the 'general property power'):
 - (i) be omitted; or
 - (ii) be stated briefly in a provision that lists examples of specific powers conferred by the general property power?

Power to grant easements etc

8.185 As part of the duty to use all reasonable diligence to obtain the best possible price for the sale of trust property, a trustee has a power, under the general law, to enhance the value of land by annexing to it an easement.¹⁹⁴

8.186 Section 33(1)(h) of the *Trusts Act 1973* (Qld) confers a broad power on all trustees to 'grant easements and profits a prendre and enter into party wall agreements and agreements that relate to fencing, and execute all necessary documents to give effect thereto'. A similar provision is included in the trustee legislation of Western Australia and New Zealand.¹⁹⁵ In New South Wales and the ACT, the trustee legislation provides that a trustee for sale may 'grant and sell any

¹⁹⁴

Cameron v Dalgety [1920] NZLR 155. See also HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 11 March 2011) [12.5720], in which the authors comment that 'a trustee may, upon sale of part of a trust property, grant an easement to the purchaser affecting the retained property, if the criteria of proper management warrant it; and the trustee may covenant with the purchaser to maintain the easement'.

¹⁹⁵

Trustees Act 1962 (WA) s 30(1)(f); *Trustee Act 1956* (NZ) s 15(1)(e).

easement, right or privilege of any kind over or in relation to the property'.¹⁹⁶ In South Australia, trustees of land with a power of sale may:¹⁹⁷

set apart or dedicate any land being a portion of trust property as roads, streets, passages, thoroughfares, squares, gardens and reserves in the Crown or any municipal corporation, municipal council, district council or in any public authority or other person, to be held by the Crown or corporation, council, public authority or person for the purpose for which it was set apart.

8.187 There are no equivalent provisions in the trustee legislation of the Northern Territory, Victoria or Tasmania.

8-21 Should the powers conferred by section 33(1)(h) of the *Trusts Act 1973* (Qld) (including the power to grant an easement):

- (a) continue to be the subject of a stand-alone provision in the Act (whether or not the Act is amended as mentioned in paragraph (b)); or
- (b) if the Act is amended to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner (the 'general property power'):
 - (i) be omitted; or
 - (ii) be stated briefly in a provision that lists examples of specific powers conferred by the general property power?

Power to execute all necessary documents

8.188 As mentioned above, in addition to giving trustees an express power to grant easements and the like, section 33(1)(h) of the *Trusts Act 1973* (Qld) also gives trustees an express power to 'execute all necessary documents to give effect thereto'. This overlaps with the power, conferred by section 33(1)(n), to 'do or omit all acts and things, and execute all instruments necessary to carry into effect the powers and authorities given by this Act or by or under the instrument creating the trust'. Given that section 33(1)(n) confers a broader power than section 33(1)(h) in this regard, the Commission's preliminary view is that section 33(1)(h) of the *Trusts Act 1973* (Qld) should be amended to omit the power to 'execute all necessary documents to give effect thereto'.

8.189 The Commission invites submissions on the following proposal:

¹⁹⁶ *Trustee Act 1925* (ACT) s 26(1)(c); *Trustee Act 1925* (NSW) s 26(1)(c).

¹⁹⁷ *Trustee Act 1936* (SA) s 20(2a).

8-22 Section 33(1)(h) of the *Trusts Act 1973* (Qld) should be amended to omit the power to execute all necessary documents to give effect to the powers otherwise conferred by that provision.

Power to surrender life policies

8.190 Section 33(1)(k) of the *Trusts Act 1973* (Qld) provides that a trustee may, where the property includes a life policy and there is no money or insufficient money available for the payment of premiums on the policy, surrender the policy for money or accept instead of the policy a fully paid-up policy or vary the terms of the policy in such manner as the trustee thinks fit.

8.191 A similar provision is included in the trustee legislation of Western Australia and New Zealand.¹⁹⁸

8.192 This provision was recommended by this Commission in its 1971 Report. It considered that:¹⁹⁹

This will prove a useful provision, since, in the absence of the power which it confers, unpaid premiums are liable to be debited against the surrender value of the policy under section 100(3) of the *Life Insurance Act 1945–1961* (Commonwealth).²⁰⁰ (note added)

8-23 Should the power to surrender life policies conferred by section 33(1)(k) of the *Trusts Act 1973* (Qld):

- (a) continue to be the subject of a stand-alone provision in the Act (whether or not the Act is amended as mentioned in paragraph (b)); or**
- (b) if the Act is amended to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner (the ‘general property power’):**
 - (i) be omitted; or**

¹⁹⁸ *Trustees Act 1962* (WA) s 30(1)(j); *Trustee Act 1956* (NZ) s 15(1)(i).

¹⁹⁹ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 35.

²⁰⁰ *Life Insurance Act 1945* (Cth) s 100 related to the non-forfeiture of ordinary policies in certain cases on non-payment of premiums. Section 100(3) of that Act provided that ‘the overdue premium and any interest charged on it under this section and unpaid shall for the purposes of this Act be deemed to be a debt owing to the company under the policy’. The *Life Insurance Act 1945* (Cth) has since been repealed and replaced by the *Life Insurance Act 1995* (Cth); *Life Insurance (Consequential Amendments and Repeals) Act 1995* (Cth) s 5. However, s 210(3) of the 1995 Act is in similar terms to s 100(3) of the 1945 Act.

- (ii) be stated briefly in a provision that lists examples of specific powers conferred by the general property power?

Power to surrender onerous leases or property

8.193 Section 38 of the *Trusts Act 1973* (Qld) confers power on a trustee to surrender a lease that is subject to onerous covenants or freehold property that is of an onerous nature, provided that the trustee complies with certain conditions:

38 Surrender of onerous leases or property

- (1) Where a leasehold is vested in a trustee and the property is subject to onerous covenants of such a nature that it would not be in the interests of the beneficiaries to retain the property, the trustee may surrender, or concur in surrendering, the lease; and the trustee shall not be chargeable with breach of trust nor shall the surrender be impeached by any beneficiary upon the ground only that the covenants were not of such a nature, if the trustee has acted bona fide and on the advice of a registered valuer, whom the trustee reasonably believed to be competent, instructed and employed independently of the lessor, whether the valuer carried on business in the locality where the property is situate or elsewhere.
- (2) Where a freehold is vested in a trustee and the property is of so onerous a nature that it would not be in the interests of the beneficiaries to retain the property, if the Crown agrees to accept the surrender of the freehold, the trustee may surrender, or concur in surrendering, it to the Crown; and the trustee shall not be chargeable with breach of trust nor shall the surrender be impeached by any beneficiary upon the ground only that the property was not of such a nature, if the trustee has acted bona fide and on the advice of a registered valuer, whom the trustee reasonably believed to be competent, whether that valuer carried on business in the locality where the property is situate or elsewhere.
- (3) A subsequent purchaser or the registrar or other person registering or certifying title shall not be concerned to inquire whether a surrender was authorised by this section.

8.194 There are similar provisions in the ACT, New South Wales, South Australia, Western Australia and New Zealand.²⁰¹ However, with the exception of the Western Australian provision, these provisions do not extend to the surrender of freehold land.²⁰²

²⁰¹ *Trustee Act 1925* (ACT) s 35; *Trustee Act 1925* (NSW) s 35; *Trustee Act 1936* (SA) s 26A; *Trustee Act 1958* (Vic) s 19(1)(h); *Trustees Act 1962* (WA) s 35; *Trustee Act 1956* (NZ) s 20(f).

²⁰² Section 35 of the *Trustees Act 1962* (WA), on which s 38 of the *Trusts Act 1973* (Qld) is based, extends to the surrender of freehold land in recognition of the fact that there may be circumstances in which freehold land could be rendered worthless (for example, in the case of a worked-out mining area): Western Australia, *Parliamentary Debates*, Legislative Council, 10 October 1962, 161 (AF Griffith, Minister for Justice).

8.195 In recommending the enactment of a provision to the effect of section 38 of the *Trusts Act 1973* (Qld), this Commission, in its 1971 Report, explained that:²⁰³

It sometimes happens that the trust property includes a lease or other property which is of little or no value but which casts expense or onerous obligations on the trust property as a whole, eg in the case of a lease of land subject to repairing covenants, or valueless land which is subject to municipal rates: cf *Re Mellish* (1935) 8 ABC 140. Trustees in bankruptcy and liquidators of companies have long had power to disclaim property of this kind, subject to a right of proof by persons injured by the disclaimer.

For obvious reasons a trustee of private property cannot be given powers as wide and far-reaching as those of a trustee in bankruptcy; but cl 38, following s 35 of the New South Wales and Western Australian Acts, will enable a trustee to surrender or concur in surrendering an onerous lease or other property which it would not be in the interests of the beneficiaries to retain, and he will not be chargeable with breach of trust for doing so if he has acted bona fide and on the advice of a registered valuer whom he reasonably believed to be competent.

8.196 A trustee has a duty to make the trust property productive, and would ordinarily be precluded from giving it away. Where, however, the trust property is of such an onerous nature that it is no longer in the interests of the beneficiaries or the trust as a whole to retain it, it may be prudent for the trustee to surrender it.

8.197 Section 38(1) and (2) empowers a trustee to surrender leasehold and freehold property that is of such an onerous nature that it would not be in the interests of the beneficiaries to retain the property.

8.198 A trustee in bankruptcy has an analogous statutory power to disclaim onerous property of a bankrupt person where.²⁰⁴

- any part of the property consists of land of any tenure burdened with onerous covenants, or property (including land) that is unsaleable or not readily saleable; or
- any part of the property consists of property other than land or an interest in land and it may reasonably be expected that the costs, charges and expenses that the trustee would incur in realising the property would exceed the proceeds of realising the property.

8.199 Earlier in this chapter, the Commission has proposed, similar to the approach that has been adopted in some overseas jurisdictions, that the *Trusts Act 1973* (Qld) should be amended to confer on trustees, in relation to the trust property, all the powers of an absolute owner (the 'general property power').²⁰⁵ This

²⁰³ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 36–7.

²⁰⁴ *Bankruptcy Act 1966* (Cth) s 133. A trustee is not entitled to disclaim a lease without the leave of the court unless the trustee has given to the lessor (or any sublessee or mortgagee), 28 days' written notice of his or her intention to disclaim the lease, and no person to whom the trustee has given notice has, within 28 days after it was given to the person, by written notice to the trustee, required the trustee to apply to the court for leave to disclaim the lease. A liquidator of a company has a similar power under s 568 of the *Corporations Act 2001* (Cth).

²⁰⁵ See [8.35], Proposal 8-1 above.

raises the issue of whether, in light of that power, it is necessary to retain stand-alone provisions to the general effect of section 38(1) and (2) or whether the powers currently conferred by those provisions might be stated briefly in a provision that lists examples of specific powers conferred by the general property power. The American Uniform Trust Code, for example, expressly empowers a trustee to 'abandon or decline to administer property of no value or of insufficient value to justify its continued collection or administration'.²⁰⁶

8.200 Section 38(1) and (2) also provides that, in specified circumstances, a trustee who surrenders a lease, or freehold property, will not be 'chargeable with breach of trust' and a beneficiary cannot impeach the surrender upon the ground only that the covenants in relation to the lease, or the freehold property, was not of an onerous nature. The protection is available where a trustee has acted bona fide and on the advice of a registered valuer (whom the trustee reasonably believed to be competent), whether the valuer carried on business in the locality where the property is situated or elsewhere.²⁰⁷

8.201 A trustee will always be required to act in good faith²⁰⁸ and in the interests of the beneficiaries when exercising his or her powers. Further, the trustee must always act with prudence in managing the affairs of the trust. Depending on the circumstances, this could include obtaining a valuation of the property to be surrendered. If a trustee exercises the power to surrender within these parameters, he or she is unlikely to breach his or her duties. In light of these considerations, there is an argument that the protective element in section 38(1) and (2) need not be retained.²⁰⁹

8.202 Section 38(3) of the *Trusts Act 1973* (Qld) provides protection from liability to a subsequent purchaser or the Registrar of Titles or other person registering or certifying title. However, the *Land Title Act 1994* (Qld) also provides protections that would be relevant in this context. A subsequent purchaser of trust property that has been previously surrendered could rely on the system of title by registration provided under the *Land Title Act 1994* (Qld), and the Registrar of Titles and the land registry staff have protection from civil liability in respect of acts done under the Act (for example, registering a title on the freehold land register).²¹⁰ In view of the availability of these other protections, the Commission considers it unnecessary for a separate provision to the effect of section 38(3) to be retained.

²⁰⁶ Unif Trust Code § 816(12) (amended 2010).

²⁰⁷ Under s 38(1) of the *Trusts Act 1973* (Qld), the valuer must be instructed and employed independently of the lessor.

²⁰⁸ In *Armitage v Nurse* [1998] Ch 241, 253–4, 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.

²⁰⁹ See also *Trusts Act 1973* (Qld) s 76, which gives the court the power to relieve a trustee from personal liability for a breach of trust.

²¹⁰ *Land Title Act 1994* (Qld) s 193.

8-24 Should the power to surrender onerous leasehold or freehold property conferred by section 38(1) and (2) of the *Trusts Act 1973* (Qld):

- (a) continue to be the subject of stand-alone provisions in the Act (whether or not the Act is amended as mentioned in paragraph (b)); or
- (b) if the Act is amended to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner (the 'general property power'):
 - (i) be omitted; or
 - (ii) be stated briefly in a provision that lists examples of specific powers conferred by the general property power?

8-25 Should section 38(1) and (2) of the *Trusts Act 1973* (Qld) continue to provide that the trustee is not chargeable with breach of trust and the surrender cannot be impeached by a beneficiary upon the ground only that the property was not of an onerous nature, if the trustee has acted bona fide and on the advice of a registered valuer?

Power to renew leases

8.203 Section 39 of the *Trusts Act 1973* (Qld) deals with situation where a renewable leasehold is held on trust for successive life tenants. It gives power to a trustee, as lessee, to renew the lease:

39 Power to renew leases

- (1) A trustee of any leasehold for life or lives or years which is renewable under any covenant or contract or by custom or usual practice may, if the trustee thinks fit, and shall, if thereto required by any person having any beneficial interest, present or future or contingent, in the leasehold, use the trustee's best endeavours to obtain from time to time a renewed lease of the same hereditaments on the agreed or reasonable terms, and for that purpose may from time to time make or concur in making a surrender of the lease for the time being subsisting, and do all such other acts as are requisite; but where, by the terms of the instrument (if any) creating the trust, the person in possession for the person's life or other limited interest is entitled to enjoy the same without any obligation to renew, or to contribute to the expense of renewal, this section does not apply unless the consent in writing of that person is obtained to the renewal.
- (2) A trustee obtaining a renewal of a lease under the powers conferred by this section or otherwise may pay or apply capital money subject to the trust, for the purpose of obtaining the renewal.

8.204 Similar provisions were originally contained in *Lord Cranworth's Act*.²¹¹ Prior to the passing of that Act, in the absence of a direction in the trust instrument, a trustee of renewable leaseholds was not bound to renew the lease.²¹² If, however, the trustee did renew, the renewed lease, although taken by the trustee in his or her own name, became subject to the trusts declared of the original term, and the trustee was liable to pay the rents and perform the covenants under the lease (although the trustee had a lien on the estate for the expenses of the renewal, and a right to be indemnified by the persons beneficially interested against any personal covenants which he or she may have entered into with the lessor).²¹³ If a trust instrument directed a renewal, but omitted to direct how the necessary expenses were to be levied, the duty of the trustee, unless the persons beneficially interested consented to advance the money for the renewal, would have been to raise the fine and other costs of the renewal by mortgage of the renewed term.²¹⁴

8.205 The English provisions provided that a trustee was not under any obligation to renew, unless a beneficiary required the trustee to do so. If the trustee did renew, and had no money in his or her hands for the purpose, the trustee could charge the money required on the property. The objective of these provisions was to remove the then existing liability of trustees, not to alter the general law as to how the expenses of the renewal are to be borne between the life tenant or the person entitled in remainder (which requires that the expenses be shared among them in proportion to their enjoyment of the estate).²¹⁵

8.206 Section 39 of the *Trusts Act 1973* (Qld) re-enacted section 18 of the *Trustees and Executors Act 1897* (Qld) which, in turn, was modelled on the earlier English provisions.²¹⁶ The provision has not been retained in England but an equivalent provision is still found in the trustee legislation of the ACT, New South Wales, the Northern Territory, South Australia, Tasmania and Western Australia.²¹⁷

8.207 Under the terms of section 39(1), a trustee of a renewable lease may, if he or she thinks fit, and must, if required by any person with a beneficial interest in the leasehold, use his or her best endeavours to obtain a renewal on reasonable terms. The written consent of the beneficiary in possession is required if, by the terms of

²¹¹ 23 & 24 Vict, c 145, ss 8–9. These provisions were replaced by *Trustee Act 1888*, 51 & 52 Vict, c 59, ss 10–11, which in turn were replaced by *Trustee Act 1893*, 56 & 57 Vict, c 53, s 19. There is no equivalent provision in *Trustee Act 1925*, 15 & 16 Geo 5, c 19.

²¹² AR Rudall and JW Greig, *The Law of Trusts and Trustees* (Jordan & Sons, 2nd ed, 1898) 77, citing *O'Ferrall v O'Ferrall* LI & G t P 79.

²¹³ *Keech v Sandford* (1726) Sel Cas T King 61; 25 ER 223; *Pickering v Vowles* (1783) 1 Bro CC 197; 28 ER 1080; *Giddings v Giddings* (1827) 3 Russ 241; 38 ER 567.

²¹⁴ *Buckeridge v Ingram* (1795) 2 Ves Jun 652; 30 ER 824; *Allan v Backhouse* (1813) 2 V & B 66, 72; 32 ER 243, 246.

²¹⁵ *Re Baring* [1893] 1 Ch 61, 64, 69–70 (Kekewich J).

²¹⁶ See n 211 above.

²¹⁷ *Trustee Act 1925* (ACT) s 37; *Trustee Act 1925* (NSW) s 37; *Trustee Act* (NT) s 19; *Trustee Act 1936* (SA) s 26; *Trustee Act 1898* (Tas) s 22; *Trustees Act 1962* (WA) s 36. In Victoria, a trustee for sale has, in relation to land, all the powers of a tenant for life and the trustees of a settlement under the *Settled Land Act 1958* (Vic): *Property Law Act 1958* (Vic) s 35(1). Under the *Settled Land Act 1958* (Vic), a tenant for life (and consequently a trustee for sale) has power to make a lease for giving effect to a covenant for renewal, the performance of which can be enforced against the owner for the time being of the land: ss 43(a), 52(3).

the trust instrument, that person is entitled to enjoy the same without any obligation to renew or to contribute to the expense of renewal. An issue to consider is whether the power to renew a renewable leasehold conferred by section 39(1) should continue to be the subject of a separate provision in the Act, whether or not the Act is amended to confer a general property power on a trustee (as proposed earlier in this chapter).²¹⁸ Arguably, the power to renew could be subsumed by the general property power, and the circumstances in which a trustee can, and ought, renew a renewable leasehold could be dealt with as part of the trustee's duties to act with prudence and in the interests of the beneficiaries.

8.208 Where a trustee does renew the lease, section 39(2) of the Act authorises the trustee to apply capital money subject to the trust for the purpose of obtaining the renewal. Because of this authorisation, the trustee is also deemed to always have had the power under section 45 of the Act to raise the money required for that purpose by the sale, mortgage, conversion or calling in of all or any of the trust property.²¹⁹ For that reason, even if the power to renew a renewable leasehold was subsumed by the general property power, it would be desirable, because of its relationship with section 45, to retain a provision to the effect of section 39(2).

8-26 Should the power to renew a renewable leasehold under section 39(1) of the *Trusts Act 1973* (Qld):

- (a) continue to be the subject of a stand-alone provision in the Act (whether or not the Act is amended as mentioned in paragraph (b)); or
- (b) if the Act is amended to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner (the 'general property power'):
 - (i) be omitted; or
 - (ii) be stated briefly in a provision that lists examples of specific powers conferred by the general property power?

8-27 Should the *Trusts Act 1973* (Qld) continue to include a provision to the general effect of section 39(2) (that is, to authorise the trustee to expend capital money for the purpose of renewing the lease)?

²¹⁸ See [8.32] above.

²¹⁹ See *Trusts Act 1973* (Qld) s 45, which is set out at [8.109] above. In the Northern Territory, South Australia and Tasmania, if the trustee has insufficient money in his or her hands for the purpose, the trustee may raise the money required by mortgage of the lands to be comprised in the renewed lease, or of any other lands for the time being subject to the uses or trusts to which those lands are subject: *Trustee Act* (NT) s 19(2); *Trustee Act 1936* (SA) s 26(2); *Trustee Act 1898* (Tas) s 22(2).

Power to purchase equity of redemption in lieu of foreclosure

8.209 Section 40 of the *Trusts Act 1973* (Qld) applies when the trustee is a mortgagee²²⁰ of land.²²¹ In the event of default by the mortgagor, section 40 empowers the trustee, in lieu of proceeding to foreclosure, to purchase the equity of redemption of the land with money that is subject to the same trusts as the mortgage debt. However, the purchase price must not exceed five percent of the amount due under the mortgage:

40 Power to purchase equity of redemption in lieu of foreclosure

A trustee may, in lieu of proceeding to foreclosure, purchase the equity of redemption of land the subject of a mortgage held by the trustee under which default has been made where the moneys expended in that purchase are subject to the same trusts as the mortgage debt; but in no case shall the moneys paid by way of consideration for such purchase exceed 5% of the amount due under the mortgage.

8.210 Section 40 was based on provisions in New South Wales and Western Australia.²²² Similar provision is also made in the ACT and South Australia.²²³

8.211 Under a mortgage of old system land, the land was conveyed to the mortgagee and held subject to the mortgagor's right to reconveyance upon full payment of the debt.²²⁴ Although legal ownership resided with the mortgagee, the Court of Chancery regarded the mortgagor, until foreclosure, as the equitable, or beneficial, owner of the land.²²⁵ The mortgagor's equitable estate in the land was referred to as the 'equity of redemption' and was itself capable of being transferred or dealt with like any other equitable proprietary interest.²²⁶

8.212 A mortgagor could, therefore, sell or release the equity of redemption to the mortgagee. Provided that the transaction was bona fide and entered into subsequently to, and independently of, the mortgage transaction, a mortgagee

²²⁰ 'Mortgagee' is defined in s 5(1) of the *Trusts Act 1973* (Qld) to include 'every person having an estate or interest regarded at law or in equity as merely a security for money and every person deriving title to the mortgage under the original mortgagee'.

²²¹ 'Land' is defined broadly in s 5(1) of the *Trusts Act 1973* (Qld), and does not appear to be limited to land situated in Queensland. Cf *Trustee Act 1925* (NSW) s 32A; *Trustee Act 1936* (SA) s 23C; *Trustees Act 1962* (WA) s 37 (which apply in respect of a mortgage of land *in the State*); and *Trustee Act 1925* (ACT) s 32A (which applies in respect of a mortgage of land *in Australia*).

²²² *Trustee Act 1925* (NSW) s 32A; *Trustees Act 1962* (WA) s 37.

²²³ *Trustee Act 1925* (ACT) s 32A; *Trustee Act 1936* (SA) s 23C.

²²⁴ See generally, AJ Oakley, *A Manual of the Law of Real Property by the Rt Hon Sir Robert Megarry* (Sweet & Maxwell, 8th ed, 2002) 493. Under an old system mortgage, the mortgagor had both a contractual right to reconveyance and an equitable 'right to redeem', upon full payment, which arose after the contractual date had passed and in relief of the forfeiture of the land absolutely to the mortgagee on breach of the condition for repayment at the fixed time. In the case of a Torrens mortgage, the mortgagor's 'right to redeem' is the right, upon payment of the debt, to have the mortgage discharged and removed from the register. See, eg, *Re CL Forrest Trust* [1953] VLR 246, 250, 254, 256–8 (Herring CJ).

²²⁵ SE Williams, *Coote's Treatise on the Law of Mortgages* (Stevens & Sons, Sweet & Maxwell, 8th ed, 1912) vol 1, 649–50.

²²⁶ *Ibid* 649–50, 655 ff; *Casborne v Scarfe* (1737) 1 Atk 603; 26 ER 377, 379 (Lord Hardwicke LC); *Krelinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, 48 (Lord Parker); *Re Wells* [1933] 1 Ch 29, 46 (Lord Hanworth MR), 52 (Lawrence LJ); *Re Australia and New Zealand Banking Group Ltd* [1993] 2 Qd R 477, 478 (McPherson ACJ).

could purchase the equity of redemption,²²⁷ saving the expense and uncertainty of foreclosure proceedings.²²⁸

8.213 In the absence of express provision, however, trustee-mortgagees were unable to purchase the equity of redemption as an authorised investment,²²⁹ and it was for this reason that section 40 was included in the Act.²³⁰ A trustee had power to choose only those investments that were expressly authorised by the trust instrument or the general law and, later, by statute.²³¹

8.214 In *Worman v Worman*,²³² part of the trust property under a settlement had been invested by the settlor in a second mortgage of certain freehold and leasehold property. The mortgagor was in financial difficulty and foreclosure or sale by the first mortgagees was imminent. To avoid the complete loss of the trust funds invested on the second mortgage, the trustees purchased the mortgagor's equity of redemption. Although it was found that the trustees had acted bona fide,²³³ the Court of Chancery held that the purchase was not an authorised investment and was made in breach of trust. The trustees' general power under the trust instrument to invest in the purchase of land was not wide enough to authorise the purchase of the equity of redemption, nor was there any express authorisation in the instrument for such a purchase.²³⁴

8.215 It has been suggested that provision in the specific terms of section 40 may now be overridden by the wide investment powers conferred on trustees.²³⁵ As explained earlier, section 21 of the Act provides that, unless expressly forbidden by the trust instrument, the trustee may invest trust funds in any form of investment, subject to certain duties in relation to the exercise of that power.²³⁶

227 SE Williams, *Coote's Treatise on the Law of Mortgages* (Stevens & Sons, Sweet & Maxwell, 8th ed, 1912) vol 1, 20–1, and the cases cited there including *Reeve v Lisle* [1902] AC 461.

228 An action for foreclosure 'is one that sets out to extinguish the mortgagor's title to the mortgaged property': *Australia and New Zealand Banking Group Ltd v Douglas Morris Investments Pty Ltd* [1992] 1 Qd R 478, 495 (McPherson J). This occurs with a two-stage judicial process involving an order *nisi* where an account is to be taken and the mortgagor given a certain time to make payment, followed by an order making foreclosure absolute if the mortgagor fails to make payment by the required time: see *Land Title Act 1994* (Qld) s 78(2)(c)(ii); *Stevens v Hoberg (No 2)* [1952] QWN 13. However, the court has power to order the sale of the property in lieu of foreclosure under s 99(2) of the *Property Law Act 1974* (Qld).

229 JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1833]; *Worman v Worman* (1890) 43 Ch D 296. See also JS Vaizey, *The Law Relating to the Investment of Trust Money* (Sweet & Maxwell, 1890) 223.

230 Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 37.

231 See JS Vaizey, *The Law Relating to the Investment of Trust Money* (Sweet & Maxwell, 1890) 44; A Underhill, *The Law Relating to Trusts and Trustees* (Butterworth, 7th ed, 1912) 269.

232 (1890) 43 Ch D 296.

233 *Ibid* 309–10 (Kekewich J).

234 *Ibid* 303–5.

235 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 14 October 2009) [45.32A40], [41.32A40], commenting on the provisions equivalent to s 40 of the *Trusts Act 1973* (Qld) in the ACT and New South Wales.

236 See *Trusts Act 1973* (Qld) ss 22–24.

Limit to old system mortgages

8.216 It appears that section 40 is limited in its terms to mortgages of old system land, of which there is none remaining in Queensland.²³⁷ Under a Torrens system mortgage, the mortgagor retains the legal title, subject to the mortgagee's charge against the land.²³⁸ The mortgagor does not merely hold an equitable interest in the land but remains the legal owner and, as such, cannot strictly be said to have an 'equity of redemption' in the land.²³⁹

8.217 In contrast, the South Australian trustee legislation defines 'equity of redemption' to include the mortgagor's estate in the land under a Torrens mortgage. Section 4(1) of the *Trustee Act 1936* (SA) relevantly provides that 'equity of redemption' includes:

- (b) the estate of the owner of any property which is subject to any legal or equitable mortgage, charge or encumbrance (including a mortgage or encumbrance under the *Real Property Act 1886*) created otherwise than by conveyance or assignment of the property;

8.218 Thus, the power given in section 23C of that Act to purchase the equity of redemption would enable the trustee-mortgagee to purchase the mortgagor's legal estate in the land.

Limit on price paid

8.219 As noted above, section 40 provides that the purchase price for the equity of redemption must not exceed five percent of the amount due under the mortgage. The same five percent cap applies in the ACT, New South Wales and Western Australia. A different approach is taken under section 23C of the *Trustee Act 1936* (SA), which provides that the purchase price must not exceed the value given by an independent valuer:

- (a) before purchasing any such equity of redemption the trustee shall obtain a report as to the value thereof from a person whom the trustee reasonably believes to be competent to give a report upon that value, and who is employed independently of the owner of the equity of redemption; and
- (b) the price paid for the equity of redemption shall not be more than the value thereof as so reported to the trustee.

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Queensland Department of Environment and Resource Management, *Administering Freehold Land* (2012) <http://www.derm.qld.gov.au/museum/surveying_history/freehold-land.html>. However, as explained in n 221 above, s 40 of the *Trusts Act 1973* (Qld) is not limited in its application to mortgages of land in Queensland. Some old system land still remains in some of the other Australian jurisdictions: see Thomson Reuters, *The Laws of Australia* (at 15 May 2012) 18 Finance, Banking and Securities, '9 Securities' [18.9.160].

238

Land Title Act 1994 (Qld) s 74.

239

See, eg, *Abigail v Lapin* [1934] AC 491, 501 (Lord Wright); *Chant v Deputy Commissioner of Taxation* (1991) 91 ATC 4435, 4437–8 (Young J); *Quint v Robertson* (1985) 3 NSWLR 398, 402 (Young J); *Windella (NSW) Pty Ltd v Hughes* (1999) 49 NSWLR 158, 161 (Santow J); *Paul Michael Pty Ltd v Urban Traders Pty Ltd* [2010] NSWSC 1246, [70] (White J).

Where it is used in relation to a Torrens mortgage, the phrase 'equity of redemption' generally refers to the mortgagor's 'right to redeem': see, eg, *Re Australia and New Zealand Banking Group Ltd* [1993] 2 Qd R 477, 478, 481 (McPherson ACJ). The right to redeem is the right to have the mortgage discharged upon satisfaction of the debt: see n 224 above.

Whether section 40 serves any further purpose

8.220 As explained above, section 40 of the *Trusts Act 1973* (Qld) was originally enacted to ensure that a trustee-mortgagee was not prevented from purchasing the equity of redemption because of the insufficiency of the investment powers conferred on the trustee.²⁴⁰ That situation is now unlikely to arise, given the breadth of the general investment power conferred by section 21 of the Act. Moreover, because section 40 is limited in its terms to old system land, it would be relevant only if the trustee was the mortgagee of land in another jurisdiction that still retained old system land.²⁴¹ For these reasons, the Commission is of the preliminary view that section 40 should be omitted from the Act.

8.221 The Commission invites submissions on the following proposal:

8-28 Section 40 of the *Trusts Act 1973* (Qld) should be omitted.

Power to release equity of redemption of mortgaged property

8.222 Section 41 of the *Trusts Act 1973* (Qld) applies where the trustee is a mortgagor of property. It enables the trustee to release the equity of redemption to the mortgagee in discharge of the whole or part of the mortgage debt, provided that the property is not of greater value than the amount of the debt. It protects the trustee if he or she acts bona fide and on the advice of an independent registered valuer.²⁴² It further provides that a subsequent purchaser, or the registrar of titles, need not be concerned to inquire whether the release was authorised under section 41:

41 Release of equity of redemption in discharge of mortgage debt

- (1) Where an equity of redemption is vested in a trustee and the mortgaged property is not of greater value than the amount of the mortgage debt, the trustee may release the equity of redemption to the mortgagee in discharge of the mortgage debt or part thereof; and the trustee shall not be chargeable with breach of trust nor shall the release be impeached by any beneficiary upon the ground only that the mortgaged property was of greater value than the amount of the mortgage debt or of the part thereof discharged, if the trustee has acted bona fide and on the advice of a registered valuer, whom the trustee reasonably believed to be competent, instructed and employed independently of the mortgagee, whether the valuer carried on business in the locality where the property is situate or elsewhere.
- (2) A subsequent purchaser or the registrar or other person registering or certifying title shall not be concerned to inquire whether a release was authorised by this section.

²⁴⁰ See [8.213]–[8.214] above.

²⁴¹ See [8.216] above.

²⁴² 'Registered valuer' is defined as a valuer registered under the *Valuers Registration Act 1992* (Qld): *Trusts Act 1973* (Qld) s 5(1).

8.223 As Ford and Lee put it, the provision enables trustees 'to unburden themselves of a "toxic" mortgage liability'.²⁴³

8.224 It has been suggested that, prior to statutory authorisation, there may have been some uncertainty whether trustee-mortgagors could release the equity of redemption in discharge of the debt.²⁴⁴ A statutory power, enabling the trustee to release the equity of redemption and thereby relinquish trust property, may have been necessary to overcome the trustee's usual duty to preserve²⁴⁵ the trust property in specie for the beneficiaries.

8.225 Section 41 was based on provisions in New South Wales and Western Australia.²⁴⁶ Similar provision is also made in the ACT and South Australia, although the South Australian provision does not include the protection given by section 41(2).²⁴⁷

8.226 As explained above, section 41 of the *Trusts Act 1973* (Qld) was originally enacted to address the uncertainty about whether trustee-mortgagors had the power to release the equity of redemption in discharge of the mortgage debt. Because this power would be relevant only in relation to a mortgage of old system land, the Commission is of the preliminary view that section 41 should be omitted from the Act.

8.227 The Commission invites submissions on the following proposal:

8-29 Section 41 of the *Trusts Act 1973* (Qld) should be omitted.

Power to carry on a business

8.228 Section 57 of the *Trusts Act 1973* (Qld) makes provision for trustees to continue to carry on a business that was being carried on, with trust property, by the settlor or testator when the trust commenced.

8.229 The case law, which has developed mainly in relation to the administration of deceased estates and testamentary trusts, has drawn a general distinction

²⁴³ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 12 June 2009) [61.4140].

²⁴⁴ See RP Meagher and PF Trevorah, *Jacobs' Law of Trusts in New South Wales* (Butterworths, 2nd ed, 1967) 513. Cf R Cozens-Hardy Horne, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 301 in which it is stated that:

Trustees of an equity of redemption of lands mortgaged for more than their value may, it is conceived, release the equity of redemption to the mortgagee rather than be made defendants to a foreclosure suit, the cost of which, so far as incurred by themselves, would fall upon the estate.

²⁴⁵ A Underhill, *The Law Relating to Trusts and Trustees* (Butterworth, 7th ed, 1912) 335; JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2002].

²⁴⁶ *Trustee Act 1925* (NSW) s 34; *Trustees Act 1962* (WA) s 39.

²⁴⁷ *Trustee Act 1925* (ACT) s 34; *Trustee Act 1936* (SA) s 28A.

between carrying on a business for the purpose of winding it up, and continuing it as a going concern.²⁴⁸

8.230 As a general rule, a personal representative or a trustee has power to carry on a business only for the limited purpose of winding it up. That is, executors or trustees are permitted to carry on a business forming part of the deceased's estate only 'for such reasonable time as is necessary to enable them to sell it as a going concern'.²⁴⁹ Power to carry on the business beyond that limited purpose, as a profit-making concern, requires specific authority, either in the trust instrument or from the court.²⁵⁰ To be conferred by the trust instrument, the power to carry on a business ordinarily requires 'distinct and positive authority and direction',²⁵¹ but a limited power to carry on may also be implied from an express power to postpone the sale and conversion of the business.²⁵²

8.231 Section 57 of the *Trusts Act 1973* (Qld) provides:

57 Power to carry on business

- (1) Subject to the provisions of any other Act and of the instrument (if any) creating the trust, where at the commencement of the trust the trust property or any part of it was being used by the settlor in carrying on any business, whether alone or in partnership, the trustee may continue to carry on that business for any 1 or more of the following periods, namely—
 - (a) 2 years from the commencement of the trust;
 - (b) such period as may be necessary for the winding-up of the business;
 - (c) such further period or periods as the court may approve.
- (2) In the exercise of the powers conferred by this section or by the instrument (if any) creating the trust, a trustee may—
 - (a) employ any part of the trust property which is subject to the same trusts; and
 - (b) from time to time increase or diminish the part of the trust property employed as provided by paragraph (a); and
 - (c) purchase stock, machinery, implements, and chattels for the purpose of the business referred to in subsection (1); and

²⁴⁸ AA Preece, *Lee's Manual of Queensland Succession Law* (Lawbook, 6th ed, 2007) [9.170].

²⁴⁹ R Cozens-Hardy Horne, *Lewin's Practical Treatise on the Law of Trusts and Trustees* (Sweet & Maxwell, 15th ed, 1950) 291; JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2043]. See also *Collinson v Lister* (1855) 20 Beav 355, 365; 52 ER 639, 643 (Sir John Romilly MR); *Re Quigley's Will* (1895) 16 LR (NSW) Eq 45, 47–8 (Manning J); *Re Hansford* [1949] St R Qd 143, 147 (Macrossan CJ).

²⁵⁰ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2042].

²⁵¹ *Kirkman v Booth* (1848) 11 Beav 273; 50 ER 821, 824 (Lord Langdale MR); *Hagan v Waterhouse* (1991) 34 NSWLR 308, 339 (Kearney J).

²⁵² *Re Chancellor* (1884) 26 Ch D 42; *Re Crowther* [1895] 2 Ch 56; *Southwell v Martin* (1901) 1 SR (NSW) Eq 32; *Re Hammond* (1903) 3 SR (NSW) 270; *Re Morish* [1939] SASR 304.

- (d) employ such managers, agents, employees, clerks, workers and others as the trustee thinks fit; and
 - (e) at any time enter into a partnership agreement to take the place of any partnership agreement subsisting immediately before the commencement of the trust or at any time thereafter and notwithstanding that the trustee was a partner of the settlor in the trustee's own right; and
 - (f) enter into sharefarming agreements.
- (3) Application to the court for leave to carry on a business may be made by the trustee or any person beneficially interested in the estate at any time, whether the business has been carried on before or after the commencement of this Act and whether or not any previous authority to carry on the business has expired; and the court may make such an order, and may make such order retrospective to any particular date, or may order that the business be not carried on, or be carried on subject to conditions, or may make such other order as, in the circumstances, it thinks fit.
- (4) Nothing in this section affects any other authority to do the acts thereby authorised to be done.
- (5) Where a trustee is in any manner interested or concerned in a trade or business, the trustee may make such subscriptions as it would be prudent for the trustee to make, if the trustee were acting for himself or herself, out of the income of the assets affected, to any fund created for objects or purposes in support of any trade or business of a like nature and subscribed to by other persons engaged in a like trade or business.²⁵³ (note added)

8.232 Section 57(1) gives a trustee (or personal representative)²⁵⁴ a general power to continue to carry on a business. The period for which the business may be carried on is limited to two years from the commencement of the trust, such period as may be necessary to wind-up the business, or such further period or periods as the court may approve.

8.233 Importantly, section 57(1) applies subject to the provisions of the trust instrument.²⁵⁵ Thus, the power to carry on a business is one of the few general trustee powers in Part 4 of the Act that may be overridden by the settlor.

8.234 The general power to carry on a business which is given by section 57(1) is also expressed to be subject to the provisions of any other Act. It was intended that this would preserve the effect of section 41(1) of the *Partnership Act 1891* (Qld) under which the surviving partners of a partnership that has been dissolved

²⁵³ Section 57(5), which was based on *Trustees Act 1962* (WA) s 55(5), itself based on *Trustee Act 1956* (NZ) s 32(5), is in similar terms to an earlier provision which had conferred power on the Public Trustee of New Zealand: *Public Trust Office Amendment Act 1921* (NZ) s 20(1)(w).

²⁵⁴ A 'trustee' includes a personal representative, being the executor, original or by representation, or the administrator for the time being of the estate of a deceased person: *Trusts Act 1973* (Qld) s 5(1) (definitions of 'trustee' and 'personal representative').

²⁵⁵ *Trusts Act 1973* (Qld) ss 31(1), 57(1), (4).

by the death of the one of the partners may carry on the partnership only for the limited purpose of winding it up.²⁵⁶

8.235 Section 57(2) and (5) confers additional, or incidental, powers on trustees who are authorised to carry on a business.²⁵⁷ Section 57(2) applies whether the power to carry on is derived from section 57 or from the trust instrument. The powers conferred on trustees under section 57(2) and (5) would seem to be intended to enlarge, but not to limit, the powers of a trustee in relation to the carrying on of a business. They apply 'whether or not a contrary intention is expressed in the instrument (if any) creating the trust',²⁵⁸ and 'in addition' to those given in the trust instrument.²⁵⁹ Section 57(4) further provides that nothing in section 57 'affects any other authority to do the acts thereby authorised to be done'.

8.236 Under section 57(3), the court is given wide powers to make orders on an application for leave to carry on a business.²⁶⁰ An application may be made by the trustee or any person beneficially interested in the estate. The court may give leave for the business to be carried on, or to be carried on subject to conditions, and may make such an order retrospectively.²⁶¹

8.237 Section 57 was based on similar provisions found in Western Australia and New Zealand.²⁶² Unlike section 57, however, those provisions are limited to deceased estates and do not apply to trusts generally. Nor do they allow the court to give retrospective authorisation. The powers conferred by those provisions apply subject to a contrary intention in the trust instrument.²⁶³

8.238 The New Zealand legislation also includes an additional provision empowering a trustee who is carrying on a business to acquire and retain shares in a co-operative company or enterprise if membership is 'essential or highly advantageous' to the carrying on of the business or marketing of its products.²⁶⁴

256 Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 45. See also, eg, *Trustee Companies Act 1968* (Qld) s 29(1)(e), which makes provision for a trustee company, in the administration of an intestate estate, to carry on a business forming part of the estate. In Chapter 16, the Commission has sought submissions on whether, in light of the power to carry on a business conferred by s 57 of the *Trusts Act 1973* (Qld), it is necessary or desirable to retain s 29 of the *Trustee Companies Act 1968* (Qld).

257 Although not expressly provided for in s 57(2), the power to carry on a business also includes the power to mortgage the business assets as necessary to carry on the business: HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 11 March 2007) [12.10330]; *Southwell v Martin* (1901) 1 SR (NSW) Eq 32, 35–6 (Walker J); *Re Hammond* (1903) 3 SR (NSW) 270, 272 (Simpson CJ in Eq).

258 *Trusts Act 1973* (Qld) s 31(1).

259 *Trusts Act 1973* (Qld) s 4(4).

260 Nothing in that provision affects any other authority the court may have to do those acts: *Trusts Act 1973* (Qld) s 57(4).

261 The court had a general power to give retrospective sanction to acts done by a trustee under *Trustees and Executors Act 1897* (Qld) s 54. See now, the general power to give retrospective authorisation under *Trusts Act 1973* (Qld) s 6(2).

262 *Trustees Act 1962* (WA) s 55; *Trustee Act 1956* (NZ) s 32.

263 *Trustees Act 1962* (WA) s 5(2), (3)(a); *Trustee Act 1956* (NZ) s 2(4), (5)(a). This differs from the Queensland approach under which it is only the general power to carry on a business that is subject to the trust instrument, whereas the additional powers given in s 57(2) and (5) apply whether or not a contrary intention is expressed in the instrument: see [8.233], [8.235] above.

264 *Trustee Act 1956* (NZ) s 32A.

The Law Commission of New Zealand has explained that this provision is likely to reflect the practical need for farming businesses to be shareholders in co-operative companies,²⁶⁵ such as a dairy co-operative.²⁶⁶

8.239 None of the other Australian jurisdictions includes provisions in like terms to section 57, although the trustee legislation in the ACT, New South Wales and South Australia specifically empowers the court to authorise a trustee to 'carry on a business forming part of the trust property during any period for which a sale may be postponed'.²⁶⁷

The extent and duration of the power to carry on a business

8.240 The extent and duration of the power to carry on a business forming part of the trust estate depends, at least in part, on its source. There appear to be three main scenarios in which the power to carry on a business arises:

- where the trust instrument confers an express power to carry on the business;
- where there is an implied power to carry on the business, which arises from an express power in the trust instrument to postpone the sale of the business; and
- where there is no express or implied power to carry on the business under the trust instrument, which raises the issue of the relationship between the statutory power to postpone conferred by section 32(1)(c) of the *Trusts Act 1973* (Qld) and the specific periods mentioned in section 57(1) for carrying on a business.

Express power in the trust instrument (trading trusts)

8.241 The first, and perhaps more common, scenario is where the trust instrument includes an express power to carry on a business. This includes both testamentary trusts, where the testator's estate includes a business that the testator directs to be continued,²⁶⁸ and trusts created *inter vivos* for the express purpose of carrying on a business²⁶⁹ — that is, 'trading trusts'.²⁷⁰

²⁶⁵ Law Commission of New Zealand, *The Duties, Office and Powers of a Trustee: Review of the Law of Trusts*, Issues Paper No 26 (2011) [5.41].

²⁶⁶ See generally Dairy Companies Association of New Zealand, *About NZ Dairy Industry* <<http://www.dcanz.com/about-nz-dairy-industry>>.

²⁶⁷ *Trustee Act 1925* (ACT) s 81(2)(c)–(d); *Trustee Act 1925* (NSW) s 81(2)(c)–(d); *Trustee Act 1936* (SA) s 59B(2)(c)–(d). In Queensland, see *Trusts Act 1973* (Qld) s 94(1) under which the Court may confer on trustees the necessary power for the 'retention' of trust property in certain circumstances.

²⁶⁸ See, eg, *Foti v Foti* [2008] QSC 284; *Hagan v Waterhouse* (1991) 34 NSWLR 308; *Re McAlister* [1966] SASR 22; *Kelly v Perpetual Trustee Co (Ltd)* (1963) 109 CLR 258; *Re Lees* (1915) 34 NZLR 1054; *Re Astill and Freeman* [1906] QWN 5; *Hill v Hill* (1901) 1 SR (NSW) Eq 228.

²⁶⁹ See, eg, *Ng v Van Der Velde* [2011] FCAFC 35; *Jones v Paldell Pty Ltd* [2011] WAIRC 344; *Nosic v Zurich Australian Life Insurance Ltd* [1997] 1 Qd R 67; *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties* [1984] 1 Qd R 576; *Re Orchid Investments Unit Trust* (Unreported, Supreme Court of Queensland, Ambrose J, 30 November 1990).

²⁷⁰ Trading trusts are described in Chapter 3.

8.242 In this scenario, the existence and scope of the trustee's power to carry on the business will be provided for by the trust instrument and will depend on its terms. For example, in one case, a testator directed his trustees to carry on his brick-making business until 21 years after the death of the survivor of the testator's two brothers and, at the termination of that period, to sell the business and divide the proceeds among certain beneficiaries.²⁷¹ In another example, a testator gave his personal property to his executors on trust to use in carrying on his press and telegrams agency for a period of 10 years, directing them to pay a salary and a share of the profits to the managers of the business.²⁷²

8.243 An example of an inter vivos trading trust appears from the facts of *Octavo Investments Pty Ltd v Knight*.²⁷³ In that case, a sum of money was settled on the trustee to hold the same, and any additions to it, on trust for certain named beneficiaries, to pay income to the beneficiaries in equal shares and to distribute the capital equally among the beneficiaries on the expiration of 80 years or such earlier date as the trustee might appoint.²⁷⁴ The trust deed authorised the trustee to carry on any business as the trustee thought fit and to employ the whole or part of the trust fund in carrying on the business.

8.244 Section 57 addresses this scenario by preserving the operation of the trust instrument,²⁷⁵ thereby creating an exception to section 31(1). As explained below, section 57(1) effectively operates as a default position in circumstances in which the trust instrument is silent as to the carrying on of the business. Thus, the two year or winding up limitation that appears in section 57(1) will not apply in the case of a trading trust where the trust instrument makes specific provision for a business to be continued or carried on for a particular period.

8.245 Section 57(3) also makes provision to allow a trustee to seek the court's approval to carry on a business for a longer period than is otherwise authorised.²⁷⁶

Implied power to carry on arising from an express power in the trust instrument to postpone sale

8.246 The second scenario is where there is an implied power arising from the trust instrument to carry on the business. This typically arises under a will where the testator gives his or her estate, including or comprising the testator's business, to the executor on trust for sale with an express power to postpone the sale.

8.247 Where the trust instrument contains an express power to postpone the sale of the business, the courts have held that there is an implied power to carry on

²⁷¹ *Edmundsen v Loudoun* [1947] NZLR 321. In that case, O'Leary CJ held (at 325–6) that the trustees were in breach of trust for carrying on the business after the expiration of the period nominated in the will without authority to do so.

²⁷² *Fomsgard v Fomsgard* [1912] VLR 209. The issue in that case was whether the trustees would be permitted to increase the salary of the managers.

²⁷³ (1979) 144 CLR 360, 363–4 (Stephen, Mason, Aickin and Wilson JJ).

²⁷⁴ As explained in Chapter 3, the *Property Law 1974* (Qld) s 209(1) allows an instrument to nominate, for the purpose of the rule against perpetuities, a perpetuity period of such number of years not exceeding 80 years.

²⁷⁵ *Trusts Act 1973* (Qld) s 57(1), (4).

²⁷⁶ See also the more general power of the court to confer powers on trustees in *Trusts Act 1973* (Qld) s 94(1).

the business during the period of postponement: 'To postpone the sale of the business ... involves the carrying it on in the meantime'.²⁷⁷

8.248 Thus, where a trust instrument gives a trustee an express power to postpone the sale of a business, the power to carry on is provided for by the trust instrument, arguably leaving no room for section 57(1) of the Act to operate.²⁷⁸

8.249 The period for which the business may be carried on in such cases will depend on the terms of the trust. If the power to postpone is for a particular period,²⁷⁹ the power to carry on would be similarly limited. Where, however, the power to postpone is in the trustee's discretion, the position is less clear.

8.250 In *Re Chancellor*, Cotton LJ suggested that a power to postpone the sale and conversion of the testator's estate 'for so long as the trustees thought fit', empowered the trustees to carry on the business 'not for the purpose of carrying it on to make profits, but to carry it on for such a reasonable period as would enable them to sell it profitably as a going concern'²⁸⁰ — mirroring the usual rule that applies in the absence of specific authority to carry on the business.²⁸¹ In that case, there was no suggestion that the trustees had acted improperly in having carried on the testator's wholesale business for two years before selling it.

8.251 That view was subsequently followed in *Re Morish*, in which the will gave the trustees a similarly worded power to postpone. Murray CJ held that it was the trustees' duty to look for a purchaser and that they were allowed a reasonable time only for that purpose. Having carried on the business for more than 10 years without authorisation from the Court, the trustees were held to be in breach of trust.²⁸²

8.252 On the other hand, in *Re Crowther*, Chitty J adopted a more liberal view of the trustees' power under the will to postpone the sale of the estate 'for such period as to them shall seem expedient'. In that case, the estate was to be held on trust for the testator's widow for life, and after her death for the testator's children at 21 years or marriage. The trustees had carried on the testator's businesses for some 22 years until the widow's death. Chitty J, in holding that the trustees were justified in having so acted, stated:²⁸³

When the estate becomes divisible, the power to postpone ceases, and comes to an end of itself; but when the power is existing, why such a power is not to be read so as to justify trustees in carrying on the testator's business, if they think right so to do, I am at a loss to understand.

²⁷⁷ *Re Chancellor* (1884) 26 Ch D 42, 47 (Cotton LJ). See also *Re Crowther* [1895] 2 Ch 56, 60 (Chitty J).

²⁷⁸ As explained earlier, s 57(1) applies subject to the provisions of the trust instrument: *Trusts Act 1973* (Qld) ss 31(1), 57(1), (4).

²⁷⁹ See, eg, *Benjamin v Sanders* (1891) 17 VLR 68 (in which the will gave a power to postpone sale for up to three years); *Ward v Trustees, Executors & Agency Co Ltd* (1893) 14 ALT 274 (in which the will gave a power to postpone sale for up to five years). In neither of those cases did the estate include a business.

²⁸⁰ (1884) 26 Ch D 42, 46 (Cotton LJ; Bowen and Fry LJJ agreeing).

²⁸¹ See [8.230] above.

²⁸² [1939] SASR 305, 314–15, 316.

²⁸³ [1895] 2 Ch 56, 60–1.

...

For myself, I cannot see, if a testator says his trustees may postpone the sale for as long as they deem it expedient, how this gives them only some undefined and limited power of postponement.

8.253 That approach was subsequently followed in *Re Hammond*, in which AH Simpson CJ in Eq held that the trustees, who had carried on the testator's grazing station for four years, could carry on the business for a further period of three years. His Honour observed that, as the testator's youngest daughter would have attained her majority by the expiration of the further period, that was the latest date contemplated under the will for the distribution of the estate.²⁸⁴

8.254 The authors of *Jacobs' Law of Trusts in Australia* express the view that this latter approach 'is logical in principle':²⁸⁵

It does seem reasonable to suppose that a testator, who had a business and expressly gave the executors complete discretion to postpone sale of that asset, intended that the executors should be able to exercise that power to the full and that they should not be limited to the time which it might take to find a purchaser ...

8.255 As explained earlier, section 57(1) applies '[s]ubject to the provisions of ... the instrument (if any) creating the trust'.²⁸⁶ Arguably, where the power to carry on a business arises from an express power in the trust instrument to postpone the sale of the business, the Act preserves the effect of that implied power, and the periods of time provided by section 57(1)(a)–(b) would not apply if the trust instrument authorised the trustee to postpone the sale of the business for a longer period.

8.256 An issue to consider is whether there is a need for the legislation to state more explicitly the effect of an implied power to carry on that arises from the trust instrument. One option might be to amend the introductory words of section 57(1), or to add a further subsection to the provision, to clarify that the reference in section 57(1) to 'the provisions of ... the instrument (if any) creating the trust' includes a provision of the trust instrument that confers on the trustee the power to postpone the sale of any trust property that was being used by the settlor in carrying on any business.

²⁸⁴ (1903) 3 SR (NSW) 270. AH Simpson CJ in Eq stated, however, (at 272) that he should not be understood to hold that the trustees have power to postpone conversion and carry on the business indefinitely.

²⁸⁵ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2043].

²⁸⁶ See [8.244] above.

8-30 Should section 57 of the *Trusts Act 1973 (Qld)* be amended to clarify that the reference in section 57(1) to 'the provisions of ... the instrument (if any) creating the trust' includes a provision of the trust instrument that confers on the trustee the power to postpone the sale of any trust property that was being used by the settlor in carrying on any business?

No express or implied power in the trust instrument

8.257 The third scenario is where 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. This 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.²⁸⁷

8.258 In this scenario, the usual rule, as stated earlier, is that the personal representative or trustee may carry on the business only for the reasonable period that is necessary to sell it as a going concern.²⁸⁸ This reflects the requirement for a personal representative to 'distribute the estate of the deceased, subject to the administration thereof, as soon as may be'.²⁸⁹ It also reflects the general principle that, in so doing, the personal representative has a reasonable discretion:²⁹⁰

If a reasonable discretion were to be denied to an executor, if it were to be laid down as an inflexible rule that he ought to convert the assets without waiting or considering how far it was for the interest of those who are beneficially entitled, there would of necessity be always an immediate sale; the executor would be bound to sell at whatever loss. Such a rule would be in its operation most injurious, and it has never been acted upon by the Court, which in cases of this kind has always considered what is for the interest of all parties concerned.

8.259 Although a period of one year has been a general rule of thumb for the administration of a deceased estate,²⁹¹ it is not possible to 'fix one period for selling every species of property',²⁹² and what is reasonable will depend on the circumstances. In the context of carrying on a business, the courts have sometimes suggested that a period of two years may be reasonable.²⁹³

8.260 In addition, the courts have sanctioned the carrying on of a business for a longer period where it has been beneficial or desirable to do so. For example, in *Calcino v Fletcher*, the Court authorised the carrying on by the executor of the

²⁸⁷ See, eg, *Re Benson* (1915) 34 NZLR 639; *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319.

²⁸⁸ *Collinson v Lister* (1855) 20 Beav 355, 365; 52 ER 639, 643 (Sir John Romilly MR); *Re Quigley's Will* (1895) 16 LR (NSW) Eq 45, 47–8 (Manning J); *Re Hansford* [1949] St R Qd 143, 147 (Macrossan CJ).

²⁸⁹ See *Succession Act 1981* (Qld) s 52(1)(d).

²⁹⁰ *Buxton v Buxton* (1835) 1 My & Cr 80; 40 ER 307, 311–12 (Sir Charles Pepys MR).

²⁹¹ For a discussion of the principle of the 'executor's year' see 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) vol 1, [11.217] ff.

²⁹² *Hughes v Empson* (1856) 22 Beav 181; 52 ER 1077, 1078 (Sir John Romilly MR).

²⁹³ *Edmundsen v Loudoun* [1947] NZLR 321, 326 (O'Leary CJ); *Re Chancellor* (1884) 26 Ch D 42.

testator's grazing partnership in circumstances in which a 'disastrous drought' had caused significant loss of livestock, none of the other continuing partners desired to sell the business, and the beneficiaries included four infants. The Court gave retrospective sanction for the six years the executor had already carried on the business and authorised a further three years to allow time for an advantageous sale.²⁹⁴

8.261 It is to this third scenario — where the trust instrument does not make express or implied provision for the carrying on of the business — that section 57 is principally directed. Section 57(1) effectively operates only in circumstances in which the trust instrument is silent as to the carrying on of the business.²⁹⁵ It generally reflects the default position that applies under the general law. It provides that the business may be carried on for two years from the commencement of the trust, or such period as may be necessary to wind up the business, or such further period(s) as the court may approve. As Ford and Lee note, the purpose of granting statutory powers to trustees to carry on a business 'is to relieve them of any duty to sell prematurely at an under price'.²⁹⁶

THE APPROPRIATE PERIOD UNDER SECTION 57(1)

8.262 As it is presently drafted, section 57(1) envisages a default period of two years or a longer period to wind up the business. The National Committee for Uniform Succession laws considered, however, that a period *no longer* than two years, except with the court's approval, would be more appropriate for the administration of deceased estates. It recommended the inclusion of a provision in terms similar to section 57(1) in its model Administration of Estates Bill, but modified so that it authorised a personal representative to carry on the business for:²⁹⁷

- the period, *up to* two years from the deceased's death, that is necessary or desirable for the winding up of the business; or
- the further period or periods that the court approves.

8.263 The authors of the Model Trustee Code, on the other hand, considered it unnecessary for the provision to include any reference to 'two years' at all. They instead preferred a provision that conferred a general power to continue a business for the purpose of selling it as a going concern or winding it up:²⁹⁸

²⁹⁴ [1969] Qd R 8, 28 (Hoare J) pursuant to *Trustees and Executors Act Amendment Act 1902* (Qld) s 2 and *Trustees and Executors Act 1897* (Qld) s 54. See also *Re May* [1948] QWN 5, in which the Court retrospectively sanctioned the carrying on of the deceased's farming business for approximately nine years; and *Re Halloran's Will* [1962] QWN 30, in which the Court sanctioned the carrying on of the testator's grazing business for seven years.

²⁹⁵ *Trusts Act 1973* (Qld) ss 31(1), 57(1), (4).

²⁹⁶ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 11 March 2011) [12.9670].

²⁹⁷ 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) vol 1, [11.279], Rec 11-21(a)(ii).

²⁹⁸ WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 66 (cl 3.11(1)). For an explanation of the origins of the Model Trustee Code and the membership of the working party that prepared it, see Chapter 5, n 75 above.

- (1) Where at the commencement of the trust the trust property or any part of it was being used by the settlor in carrying on any business, whether alone or in partnership, the trustee may continue to carry on that business for such reasonable period as may be necessary for the purpose of selling it or any part of it as a going concern, or for the purpose of winding it or any part of it up.

8.264 The issue for consideration is how long a trustee should be permitted by statute to continue to carry on a business that forms part of the trust estate in the absence of express or implied authority to do so in the trust instrument or approval from the court. The usual case will involve the administration of a deceased estate or a trust created by will. However, section 57(1) is capable of applying to all trustees where trust property was being used in the conduct a business at the commencement of the trust and the trust instrument is silent about carrying it on.

8-31 Should section 57(1)(a)–(b) of the *Trusts Act 1973* (Qld) remain in its present form so that, where there is no express or implied power in the trust instrument to carry on a business, the trustee may carry on a business for two years from the commencement of the trust or such other period as may be necessary to wind-up the business (which may be longer than two years)?

8-32 Alternatively, should one of the following options (and, if so, which one) replace section 57(1)(a)–(b) of the *Trusts Act 1973* (Qld) as the period for which a trustee is authorised to carry on a business:

- (a) the period *up to two years from the commencement of the trust*, that is reasonably necessary to wind-up the business; or
- (b) the period that is reasonably necessary to wind-up the business?

RELATIONSHIP BETWEEN SECTION 57(1) AND THE STATUTORY POWER TO POSTPONE

8.265 A further issue to consider is whether the legislation should clarify the effect of the statutory power of postponement found in section 32(1)(c) of the Act. That provision gives a trustee power to postpone the sale of property that the trustee has a duty to sell.²⁹⁹ It has been suggested that a power to carry on a business forming part of the trust estate can be inferred from this statutory power of postponement.³⁰⁰ If that is so, it is unclear how this is intended to operate with the power to carry on that is given in section 57.

8.266 Section 57(1) applies subject to the provisions of the trust instrument, thus allowing for the operation of an implied power to carry on where the *trust instrument* itself gives an express power to postpone sale. Section 57(1) also applies subject to the provisions of 'any other Act', but it is not expressed to apply subject to any

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Trusts Act 1973 (Qld) s 32(1)(c), (4) are discussed at [8.134] ff above.

³⁰⁰

JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2043]; GE Dal Pont, Thomson Reuters, *The Laws of Australia* (at 31 December 1999) [15.14.175].

other provisions of the *Trusts Act 1973* (Qld).³⁰¹ Arguably, section 57, being the more specific provision, is intended to govern the question of a trustee's statutory power to carry on a business.³⁰²

8-33 Should the *Trusts Act 1973* (Qld) clarify the relationship between sections 32 and 57(1) of the Act by ensuring that the statutory power to postpone the sale of trust property conferred by section 32 is subject to the specific power to carry on a business conferred by section 57(1)?

The part of the trust property that may be employed in carrying on the business

8.267 Another issue to consider is whether a trustee who is carrying on a business should be able to employ only a limited part of the trust property for that purpose. As noted above, section 57(2) provides that, in exercising a power to carry on a business, the trustee may employ any part of the trust property that is subject to the same trusts, and may increase or diminish the part of the property so employed from time to time.³⁰³

8.268 Ordinarily, unless the trust instrument expressly directs otherwise, a trustee with power to carry on a business was entitled to employ only those assets that were used by the testator or settlor in carrying on the business.³⁰⁴ In the context of deceased estates, this rule ensured that the administration of the estate was not delayed by the trustee retaining the whole estate for use in carrying on a business that formed only one part of the estate.³⁰⁵

8.269 The provision in section 57(2) widens the scope of the assets that may be utilised to those that are subject to the same trusts. Property that is left on other trusts, however, would still be beyond the reach of the trustee in carrying on the business.

8.270 In recommending a provision similar to section 57(2) of the *Trusts Act 1973* (Qld), the National Committee for Uniform Succession Laws proposed that the provision should enable the personal representative to employ any part of the deceased estate 'as is reasonably necessary'.³⁰⁶

³⁰¹ On the other hand, s 57(4) of the Act provides that nothing in s 57 affects 'any other authority' to do the acts authorised by s 57.

³⁰² That was the approach adopted by the authors of the Model Trustee Code: WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 67.

³⁰³ *Trusts Act 1973* (Qld) s 57(2)(a), (b).

³⁰⁴ See, eg, *M'Neillie v Acton* (1853) 4 De GM & G 744, 702–3 (Turner LJ); *Southwell v Martin* (1901) 1 SR (NSW) Eq 32, 35 (Walker J).

³⁰⁵ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Law Book, 1983) [1245].

³⁰⁶ 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) vol 1, [11.280], Rec 11-21(b).

8-34 Should section 57 of the *Trusts Act 1973 (Qld)* contain any additional qualification on the trust property that may be employed in carrying on a business — for example, that the trustee may employ any part of the trust estate 'as is reasonably necessary'?

THE EFFECT OF A CONTRARY INTENTION IN THE TRUST INSTRUMENT

The proposed general property power

8.271 Earlier in this chapter, the Commission has proposed that the *Trusts Act 1973 (Qld)* should be amended to include a new provision that provides that a trustee has, in relation to the trust property, all the powers of an absolute owner of the property (the 'general property power'). These powers concern both the management and administration of trust property.

8.272 The enactment of a general property power would confer on a trustee the full powers of an absolute owner. One of the consequences of conferring such a broad power on a trustee is that it would be impossible to identify all of the powers that would be conferred on a trustee. On a practical level, any exceptions to the general rule (as to the effect of contrary intention) would need to be carved out of the general power.

8.273 The Commission is of the preliminary view that, in light of these issues, the simplest and safest approach would be to provide that, if the *Trusts Act 1973 (Qld)* is amended to confer a general property power on a trustee, the general property power should apply subject to a contrary intention in the trust instrument. Careful and deliberate thought could then be given to the question of which powers (if any) should be made invariable by being listed as exceptions to the general policy. It is likely that many of the specific management powers conferred by Part 4 of the Act (and which are currently expressed to be invariable under the Act) would fall within this category.

8.274 If the position were reversed, so that a general property power, if enacted, applied whether or not a contrary intention was expressed in the trust instrument, it would mean that all of the powers conferred by the general property power would be invariable and that any powers that it was considered should apply subject to a contrary intention would need to be dealt with in the legislation as specific exceptions to the general power. The inherent risk in this approach is that a power that might usually be expected to be exercised in accordance with the settlor's wishes (if any), might be overlooked.

8.275 As mentioned earlier, a provision conferring a general property power has been adopted or proposed in several overseas jurisdictions. In each of these jurisdictions, the general property power applies subject to a contrary intention in the trust instrument.

8-35 If the *Trusts Act 1973* (Qld) is amended to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner (the ‘general property power’), should that power apply:

- (a) subject to a contrary intention in the trust instrument; or
- (b) whether or not a contrary intention is expressed in the trust instrument?

The specific management powers

8.276 As explained earlier, the provisions in Part 4 of the *Trusts Act 1973* (Qld) (including the provisions that confer specific powers to manage trust property) generally apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust.³⁰⁷ This approach — which is unique to the Queensland Act — renders these powers invariable so that they cannot be restricted by the trust instrument. The effect is to prevent legitimate dealings with the trust property from being frustrated, and to avoid any resultant need to apply to the court for the particular power to be conferred.

8.277 In the other jurisdictions considered in this chapter (both Australian and overseas), the provision or provisions that confer general or specific powers to manage trust property (as the case may be) largely apply subject to a contrary intention in the trust instrument. In this way, the wishes of the settlor as to the extent and scope of the powers conferred are paramount.

8.278 Part 4 of the Act confers a wide range of powers, including specific powers to manage trust property. Briefly stated, these are the powers:³⁰⁸

- to sell trust property (section 32(1)(a));
- to dispose of trust property by exchange or partition (section 32(1)(b));
- to postpone the sale of trust property (section 32(1)(c));
- to lease trust property (section 32(1)(d)–(f), (3));
- relating to the mode and conduct of sale (section 34);
- of a trustee-vendor to secure part of the purchase price by mortgage (section 36);³⁰⁹

³⁰⁷ See [8.46] above.

³⁰⁸ *Trusts Act 1973* (Qld) ss 40–41, which deal with the powers to purchase and release the equity of redemption in mortgaged property, are also contained in pt 4 of the Act. However, the Commission has proposed that these provisions should be omitted from the Act: see [8.221] and [8.227] above.

³⁰⁹ Although the Commission has proposed at [8.90] above that s 36 of the *Trusts Act 1973* (Qld) should be omitted, it has sought submissions on whether any provision that lists examples of specific powers conferred by the general property power should include the power of a trustee who sells land to secure part of the purchase price by a mortgage over the land.

- of a trustee-vendor to sell on terms of deferred payment (section 37);³¹⁰
- to renew, extend or vary a mortgage (section 33(1)(i));
- to raise money by the sale, conversion, calling in or mortgage of trust property (section 45);
- to subdivide and undertake other development works (section 33(1)(e)–(f));
- to grant easements (section 33(1)(h));
- to surrender life policies (section 33(1)(k));
- to surrender onerous leases or property (section 38);
- to renew leases (section 39);
- to concur with others (section 53); and
- to employ trust property and to exercise other powers for the purpose of carrying on a business (section 57(2)).

8.279 If the *Trusts Act 1973* (Qld) is amended to include a general property power, the power conferred by the provisions in Part 4 (including the provisions that confer specific powers to manage trust property) would be subsumed within the general property power. The Commission has not yet formed a view about whether some or all of the specific powers might also be included in a provision that lists examples of specific powers conferred by the general property power or, if there is a special reason for doing so, continue to be expressed as stand-alone provisions (as is presently the case).

8.280 An issue to consider is whether the current legislative policy of making the management powers conferred by Part 4 of the *Trusts Act 1973* (Qld) invariable should be continued or whether, and to what extent, the Act should permit the general property power (and any examples of specific powers conferred by the general property power), or any other power that may be conferred by a stand-alone provision, to be removed or restricted through the expression of a contrary intention in the trust instrument.

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Although the Commission has proposed at [8.104] above that s 37 of the *Trusts Act 1973* (Qld) should be omitted, it has sought submissions on whether any provision that lists examples of specific powers conferred by the general property power should include the power of a trustee to sell property on terms of deferred payment (including the power to sell land under an instalment contract within the meaning of the *Property Law Act 1974* (Qld)).

8-36 If the *Trusts Act 1973* (Qld) is amended to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner (the 'general property power'), should the Act continue to provide that the following powers apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust:³¹¹

- (a) the power to sell trust property (section 32(1)(a));
- (b) the power to dispose of trust property by exchange or partition (section 32(1)(b));
- (c) the power to postpone the sale of trust property (section 32(1)(c));
- (d) the power to lease trust property (section 32(1)(d)–(f), (3));
- (e) powers relating to the mode and conduct of sale (section 34);
- (f) the power of a trustee-vendor to secure part of the purchase price (section 36);
- (g) the power of a trustee-vendor to sell on terms of deferred payment (section 37);
- (h) the power to renew, extend or vary a mortgage (section 33(1)(i));
- (i) the power to raise money by the sale, conversion, calling in or mortgage of trust property (section 45);
- (j) the power to subdivide and undertake other development works (section 33(1)(e)–(f));
- (k) the power to grant easements (section 33(1)(h));
- (l) the power to surrender life policies (section 33(1)(k));
- (m) the power to surrender onerous leases or property (section 38);
- (n) the power to renew leases (section 39);
- (o) the power to concur with others (section 53);
- (p) the power to employ trust property and to exercise other powers for the purpose of carrying on a business (section 57(2))?

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The Commission has not yet formed a view as to whether some or all of these powers might be included in a provision that lists examples of specific powers conferred by the general property power or might continue to be expressed as stand-alone provisions.

Provision subject to a contrary intention in the trust instrument

8.281 Under section 57(1) of the *Trusts Act 1973* (Qld), the period of time for which a trustee may carry on a business that forms part of the trust is made subject to the provisions of the trust. As explained earlier in this chapter, that qualification enables trusts to be created for the express purpose of carrying on a business. Because of the specific context in which that section applies, the Commission does not propose any change to the way in which section 57(1) deals with the effect of the trust instrument.

ANCILLARY MANAGEMENT POWERS

The payment, apportionment and recoupment of trust property expenses

Introduction

8.282 In managing trust property, a trustee may sometimes wish to expend trust money to improve or preserve the property.

8.283 Under the general law, trustees had no power to effect 'improvements' of trust property, as distinct from 'repairs', unless expressly authorised by the trust instrument, the court or under statute.³¹² Even in the absence of express power in the trust instrument, however, the general law has historically recognised that a trustee with active powers of management has an obligation, and a corresponding power, to effect work in the nature of repairs to the trust property in order to preserve it from decay and in a good state of repair for the benefit of all of the beneficiaries.³¹³

8.284 Whether or not the act to be done is in the nature of a repair (or an improvement) is a question of degree.³¹⁴ In general, a repair:³¹⁵

does not involve reconstruction of the whole or substantially the whole of the subject matter, [but] it does involve restoration by renewal or replacement of subsidiary parts of a whole.

8.285 In effecting repairs and improvements, trustees will also sometimes need to distinguish between income and capital expenses and to balance the competing interests of income and capital beneficiaries (such as where the trust property is held for beneficial interests in succession). In the absence of express provision in

³¹² *Burnip v Jackson* [1905] VLR 16; *Re Broad* [1953] VLR 49.

³¹³ *Amos v Fraser* (1906) 4 CLR 78; *Wilkie v Equity Trustees Executors and Agency Co Ltd* [1909] VLR 277, 280 (Madden CJ, a'Beckett and Hodges JJ); *Roberts v Roberts* (1915) 16 SR (NSW) 6. See generally HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* [12.9110]. A trustee without any active duties to perform (that is, a bare trustee for a tenant for life in possession or for beneficiaries who are all of full age and capacity and entitled to call for the distribution of trust property to them) has no general power to apply money from the trust fund for the purpose of effecting repairs unless the court exercises its inherent jurisdiction to sanction expenditure out of capital on repairs for the salvage of trust property: *Wilkie v Equity Trustees Executors and Agency Co Ltd* [1909] VLR 277, 280 (Madden CJ, a'Beckett and Hodges JJ).

³¹⁴ *O'Neill v Coffill* (1920) 20 SR (NSW) 264, 268 (Street CJ in Eq), citing *Lurcott v Wakely* [1911] 1 KB 905, 924 (Buckley LJ).

³¹⁵ *Ibid.*

the trust instrument, the general law of trust expenses determines whether an expense incurred by the trustee is chargeable to capital or income.³¹⁶

8.286 Trust expenses of this kind can range from ‘ordinary recurring’ repairs and expenses (such as rates, taxes, insurance premiums, and painting or other recurrent repairs), to more permanent, structural repairs and improvements (such as compulsory fencing, making sewerage connections, or substantial development works).³¹⁷ Under the general law, expenses in the former category are of an income nature and are, accordingly, to be borne by the income beneficiaries (such as a life tenant); while expenses in the latter class are in the nature of capital and are to be borne by the capital beneficiaries (such as a person entitled in remainder).³¹⁸

8.287 However, some expenses (such as certain types of repairs) may fall into a ‘middle position’ between income and capital, in which case the trustee has power under the general law to apportion the expenses between capital and income:³¹⁹

First, [there are] those ordinarily recurring repairs which more fully appertain to the enjoyment of the tenant for life and which last only for a short time—such as papering and painting. Income must bear all such repairs. Secondly, where structural repairs are very great or considerable they are to be charged wholly to *corpus*, because the advantage obtained from them tells very much more in favour of the remainderman. Thirdly, there is a middle position where you have repairs which are structural in some degree, being more than the ordinary recurring repairs which a tenant, as between landlord and tenant ordinarily carries out—a class of repairs which is midway between the two classes indicated. The cost of these should be borne in due proportion by income and *corpus*. We think the rule is that trustees should be trusted in their discretion to appropriate the proportion which either should bear.

8.288 Factors such as the persons for whose benefit the expense is incurred will also be relevant in determining whether, and to what extent, the apportionment (or sharing) of the expense is required between capital and income, although it is often difficult to determine who benefits from a particular expenditure.³²⁰

8.289 Where questions of distinguishing between capital and income arise, trustees are under a duty to act impartially, that is, to hold an even hand among all of the beneficiaries.³²¹

³¹⁶ For the incidence of trust expenses or providing the trustees with a discretion to allocate them between the beneficiaries.

³¹⁷ *Wilkie v Equity Trustees Executors and Agency Co Ltd* [1909] VLR 277, 280–1 (Madden CJ, a’Beckett and Hodges JJ); HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* [11.3080].

³¹⁸ A Underhill, *The Law Relating to Trusts and Trustees* (Butterworth, 7th ed, 1912) 246–52. G Fricke and OK Strauss, *The Law of Trusts in Victoria* (Butterworths, 1964) 374; JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2032], citing *Re Barney* [1894] 3 Ch 562; *Re Lever* [1897] 1 Ch 32.

³¹⁹ *Wilkie v Equity Trustees Executors and Agency Co Ltd* [1909] VLR 277, 281–2 (Madden CJ, a’Beckett and Hodges JJ).

³²⁰ British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 53.

³²¹ See the discussion of this duty in Chapter 7.

Section 33(1)(a)–(f): Statutory power to expend trust money on trust property expenses

8.290 Trustees' powers to expend trust money on repairs and improvements have been clarified and, in some respects, extended by the *Trusts Act 1973* (Qld).

8.291 Section 33(1)(a)–(f) of the Act confers power on trustees, in respect of any trust property, to expend money from income or capital to pay for repairs, improvements, rates and taxes, calls on shares and development works (including subdivisions, roads, sewerage, water, electricity and drainage works) in relation to the trust property.³²² These provisions apply whether or not a contrary intention is expressed in the trust instrument.³²³

8.292 Section 33(1)(a)–(f) provides:

33 Miscellaneous powers in respect of property

- (1) Every trustee, in respect of any trust property, may—
- (a) expend money (including capital money) subject to the same trusts for the repair, maintenance, upkeep or renovation of the property, whether or not the work is necessary for the purpose of salvage of the property; and
 - (b) expend money (including capital money) subject to the same trusts, but not, except with the sanction of the court, exceeding \$10 000 in the improvement or development of the property; and
 - (c) expend money (including capital money) subject to the same trusts, in payment of calls on shares subject to those trusts; and
 - (d) pay out of money (including capital money) subject to the same trusts any rates, premiums, taxes, assessments, insurance premiums and other outgoings in respect of the property; and
 - (e) where the property is land—subdivide or apply for approval to subdivide the land into blocks and for that purpose construct and dedicate all such roads, streets, access ways, service lanes and footpaths and make all such reserves, and do all such other things and pay all such money (including capital money), as the trustee thinks necessary or as are required by, or under, any Act or local law relating to subdivisions; and
 - (f) pay out of money (including capital money) subject to the same trusts such sum as the trustee thinks reasonable by way of expenditure upon or contribution toward the construction and maintenance of such roads, streets, access ways, service lanes, and footpaths, and such sewerage, water, electricity, drainage and other works as are in the opinion of the trustee

³²²

Because s 33(1)(a)–(f) of the *Trusts Act 1973* (Qld) authorises a trustee to pay or expend capital money for specified purposes, the trustee is also deemed to always have had the power under s 45 of the Act to mortgage the trust property to raise the money required for those purpose by sale, mortgage, conversion or calling in of all or any of the trust property: *Trusts Act 1973* (Qld) s 45. Section 45 is set out at [8.109] above.

³²³

Trusts Act 1973 (Qld) s 31(1).

likely to be beneficial to the property, notwithstanding that they are intended to be constructed wholly or partly on land not subject to the same trusts and dedicate land subject to the same trusts as roads, streets, accessways, service lanes and footpaths where in the trustee's opinion it is likely to be beneficial to the property; ...

8.293 Under section 33(1)(a)–(f), a trustee may pay or expend money, including capital money, for the following trust property expenses:

- the repair, maintenance, upkeep or renovation of the property (whether or not the work is necessary for the purpose of salvage of the property);
- the improvement or development of the property (but not, except with the sanction of the court, exceeding \$10 000);
- the payment of calls on shares subject to those trusts;
- rates, premiums, taxes, assessments, insurance premiums and other outgoings in respect of the property;³²⁴
- the subdivision of land and related expenses;³²⁵ and
- the construction and maintenance of roads, streets, access ways, service lanes and footpaths, and sewerage, water, electricity, drainage and other works likely to be beneficial to the property.³²⁶

8.294 Those provisions modify the general law by empowering a trustee to expend either capital or income on the repairs or other works provided for in those subsections. As explained above, under the general law, the usual rule is that repairs are borne by income, and improvements are borne by capital.

8.295 Provision for expenditure on repairs and improvements is also made in the trustee legislation of some of the other Australian jurisdictions, and in New Zealand.³²⁷ The Queensland provisions are the broadest.³²⁸

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Virtually identical provisions are included in the trustee legislation of Western Australia and New Zealand: *Trustees Act 1962* (WA) s 30(g); *Trustee Act 1956* (NZ) s 15(1)(f). The South Australian legislation permits a trustee to 'pay and satisfy all rates taxes charges assessments or impositions (including arrears) assessed or imposed on or in respect of the trust property', unless prohibited by the terms of the trust: *Trustee Act 1936* (SA) s 25A(1)(b).

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The power of subdivision conferred by s 32(1)(e) of the *Trusts Act 1973* (Qld) would probably fall within the power to make improvements or developments conferred by s 33(1)(b) of the Act: *Ryan v The Public Trustee of Queensland* [1998] 1 Qd R 679, 684 (Williams J). Notwithstanding the apparent overlap between s 33(1)(b) and (e), only s 33(1)(b) imposes a monetary restriction on the expenditure of trust funds.

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Trusts Act 1973 (Qld) s 33(1)(e)–(f) empowers trustees to expend money from capital or income for the development of building or housing by arranging for the subdivision of land and the provision of roads and sewerage, electricity, water, electricity and drainage works: HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 11 March 2011) [12.9170].

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Trustee Act 1925 (ACT) ss 82(1), 83; *Trustee Act 1925* (NSW) ss 82, 82A; *Trustee Act 1936* (SA) s 25A(1); *Trustees Act 1962* (WA) s 30(1)(a)–(e), (g); *Trustee Act 1956* (NZ) s 15(1)(a)–(d), (f).

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For example, in the ACT and New South Wales, a trustee may expend money on repairs or improvements in certain circumstances without authorisation from the court only if the expenditure does not exceed a prescribed amount: *Trustee Act 1925* (ACT) s 83(1); *Trustee Act 1925* (NSW) s 82A(1)–(1A). See [8.301] below.

8.296 As explained earlier in this chapter, some other jurisdictions have enacted legislation or made proposals for trustees' specific powers to be replaced by a more general property power. In some of those provisions or proposals, the power to expend money on repairs and other similar expenses is either subsumed by, or included in a list that supplements, the more general property power. If the *Trusts Act 1973* (Qld) is amended to introduce a general property power, an issue to consider is whether the powers conferred by section 33(1)(a)–(f) should be retained, either as a stand-alone provision in its present terms, or in more general terms in any list of supplementary specific powers.

8-37 Should the powers conferred by section 33(1)(a)–(f) of the *Trusts Act 1973* (Qld):

- (a) continue to be the subject of a stand-alone provision in the Act (whether or not the Act is amended as mentioned in paragraph (b)); or
- (b) if the Act is amended to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner (the 'general property power'):
 - (i) be omitted; or
 - (ii) be stated briefly in a provision that lists examples of specific powers conferred by the general property power?

Payment of calls on shares

8.297 Section 33(1)(c) of the *Trusts Act 1973* (Qld) empowers a trustee to apply capital or income to pay calls on shares. Section 27(a) of the Act also deals with the payment of calls of shares. Whereas section 33(1)(c) permits a trustee to expend capital or income to pay calls on shares, section 27 limits such expenditure to capital. Because the payment of a call on shares is a payment made in relation to a capital asset, the Commission has proposed in Chapter 6 that section 33(1)(c) of the Act should be omitted.³²⁹

Limitation on expenditure on improvement or development of trust property

8.298 Section 33(1)(b) of the *Trusts Act 1973* (Qld) currently imposes a \$10 000 limit on the amount that a trustee is permitted to spend in the improvement or development of the trust property without court approval. This expenditure cap was set in 1973, when the Act was passed. There is no monetary limit imposed under section 33(1)(a), (d), (e) or (f) of the Act in relation to payments or expenditure arising from, or made in relation to, repairs, rates, taxes and development works (including subdivisions, roads, sewerage, water, electricity and drainage works), or

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See [6.96], Proposal 6-6 above.

subdividing, or constructing or maintaining roads, streets and other development works.

8.299 The trustee legislation in the ACT, New South Wales, and Western Australia also empowers a trustee to expend money for the purpose of making improvements.³³⁰ These provisions also impose a limitation on the amount that may be spent without court approval.

8.300 In Western Australia, the statutory limit is set at \$20 000. The limit increases to \$50 000 if the expenditure is made upon the advice of a person whom the trustee reasonably believes to be competent to give prudent advice concerning the proposed improvement or development.³³¹ These limits are the same as those recommended by the Law Reform Commission of Western Australia in its 1984 report on trustees' powers of investment.³³²

8.301 In the ACT, the statutory limit is \$25 000 or one-third of the value of the land, whichever is less.³³³ In New South Wales, the statutory limit is \$50 000 or 30% of the value of the land, whichever is greater.³³⁴ In both of these jurisdictions, the statutory limit also applies to expenditure on the repair of trust property.

8.302 The expenditure cap in section 33(1)(b) has remained in place, without amendment, for 40 years. This raises the question of whether, taking into account the contemporary costs of undertaking such works (and, if the amount concerned in any particular instance is more than \$10 000, the relative costs involved in making an application to the court), the current cap should be increased or removed altogether.

8.303 If it was considered that the expenditure cap should be increased, an issue is whether the new cap should be specified as a stated sum (as is presently the case) or as a proportion of the total value of the trust property.

330 *Trustee Act 1925* (ACT) ss 82–83; *Trustee Act 1925* (NSW) ss 82–82A; *Trustees Act 1962* (WA) s 30(1)(a), (c). In the Northern Territory, the court may, on application by a trustee or a beneficiary, authorise the expenditure by the trustee, out of the capital or income of the trust property or of the estate of the deceased person, 'such sum as the Court may think fit in repairing, reinstating or improving the trust property or estate': *Trustee Act* (NT) s 18(2). In Tasmania, a trustee may, with the sanction of the court, and notwithstanding any directions given by the trust instrument, raise, by way of mortgage of the trust property, money for the preservation or improvement of the property: *Trustee Act 1898* (Tas) s 55(1)(a). In South Australia, the court may, on the application of a trustee or a beneficiary, authorise the expenditure out of capital or income for building or rebuilding or repairing, reinstating, altering, adding to or in any way improving part or all of the trust property: *Trustee Act 1936* (SA) s 25B(1). In Victoria, the powers of trustees of settlements to make repairs and improvements authorised under the *Settled Land Act 1958* (Vic) is extended to trustees for sale by virtue of s 35 of the *Property Law Act 1958* (Vic).

331 *Trustees Act 1962* (WA) s 30(1)(c).

332 Law Reform Commission of Western Australia, *Trusts and the Administration of Estates Part V — Trustees' Powers of Investment*, Report, Project No 34 (1984) 63.

333 *Trustee Act 1925* (ACT) s 83(1).

334 *Trustee Act 1925* (NSW) s 82A(1A)(a). In the case of the NSW Trustee or a trustee company, s 82A(1A)(b) provides that the limit is whichever is the greater of:

- \$50 000 (or such other amount as may be prescribed by regulations) or 30% of the value of the land, whichever is the greater; or
- if all the persons beneficially interested in the land are able to give a good discharge, an amount agreed upon between the NSW Trustee or the trustee company and all those persons.

8.304 A stated sum would have the benefit of certainty. It would, however, be necessary to review it periodically and to increase it if warranted.

8.305 On the other hand, expressing the expenditure cap as a fixed proportion of the total value of the trust property³³⁵ would avoid the need to review or adjust a stated sum periodically, but would require the trustee to assess the value of the trust estate for the purpose of determining whether or not an amount proposed to be spent on improvements or development work was below the statutory proportion.

8.306 An alternative option would be to remove the expenditure cap altogether. This would avoid the problems inherent in specifying the cap in terms of a stated sum or as a proportion of the total value of the trust property. Although, under this option, there would be no fixed limit on the amount of trust money that could be spent on improvements or development work, a trustee would be constrained in exercising this power by his or her duties under the general law, including the duty to act with prudence in managing the trust property.³³⁶ This approach would also be consistent with the powers of a trustee to expend trust money for the purposes mentioned in section 33(1)(a) and (d)–(f), for which no expenditure cap applies.

8-38 If a provision in terms similar to section 33(1)(b) is retained in the *Trusts Act 1973* (Qld), should the statutory limit of \$10 000 on expenditure on the improvement or development of the trust property currently imposed under that section be:

- (a) increased; or
- (b) removed?

8-39 If the statutory limit of \$10 000 on expenditure on the improvement or development of the trust property currently imposed under section 33(1)(b) of the *Trusts Act 1973* (Qld) is increased, should it be expressed as:

- (a) a stated sum (and, if so, what amount); or
- (b) a proportion of the total value of the trust property (and, if so, what proportion)?

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For example, it has been suggested that the expenditure of capital money for specified outgoings, including improvement or development of the trust property, should not exceed one third of the value of the trust estate, except with the consent of the court: WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 77 (cl 3.17(3)).

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See [6.18] ff, [7.42] above.

Section 33(1)(g): Statutory power of apportionment and recoupment of trust property expenses

8.307 As explained above, the usual rule under the general law is that some types of expenses are borne by income, whilst others are borne by capital. This has been modified by section 33(1)(a)–(f) of the *Trusts Act 1973* (Qld), which allows the trustee to pay for various types of expenses out of either capital or income.

8.308 The general law also provided that a trustee could apportion expenses between capital and income if they were not clearly either capital or income in nature, but rather midway between them. This aspect of the general law is also modified by the *Trusts Act 1973* (Qld).

8.309 Section 33(1)(g) of the *Trusts Act 1973* (Qld) deals with the apportionment and recoupment of a trust property expense made under section 33(1)(a)–(f) of the Act. It provides that every trustee, in respect of the trust property, may:

subject to this Act and to any direction of the court, apportion any payment or expenditure made in pursuance of paragraphs (a) to (f) between capital and income or otherwise among the persons entitled thereto in such manner as the trustee considers equitable, with power, where the whole or part of the payment or expenditure is made out of capital moneys, to recoup capital from subsequent income, if that course would be equitable in all the circumstances;

...

8.310 Section 33(1)(g) confers two distinct powers on a trustee. First, it permits a trustee to apportion any payment or expenditure made under section 33(1)(a)–(f) between the capital and income or among the beneficiaries as the trustee considers equitable. Secondly, where the whole or part of any such payment or expenditure has been made out of capital, it 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.

8.311 Western Australia includes a similar provision.³³⁷ Although the Western Australian legislation give trustees power to expend money on virtually the same range and type of trust property expenses as section 33(1)(a)–(f) of the *Trusts Act 1973* (Qld),³³⁸ the powers of apportionment and recoupment that it confers have a much more limited scope.³³⁹

³³⁷ *Trustees Act 1962* (WA) s 30(1)(b). See also *Trustee Act 1956* (NZ) s 15(1)(a) on which the Western Australian provision was based: Law Reform Sub-Committee of the Law Society (WA), *The Law of Trusts*, Report (1961), Supplement 26. In the ACT and New South Wales, a power to 'throw upon the respective interests of the persons beneficially interested a proper proportion of the moneys so expended' is conferred on trustees where they have power to expend capital money on repairs or improvements up to the prescribed amount: *Trustee Act 1925* (ACT) s 83(2); *Trustee Act 1925* (NSW) s 82A(2). In South Australia, trustees are given power, in respect of repairs and unless prohibited by the terms of the trust, to 'debit the moneys so paid to capital or income or adjust the same between capital and income in such manner as to the trustee shall seem equitable': *Trustee Act 1936* (SA) s 25A(1)(d).

³³⁸ See *Trustees Act 1962* (WA) s 30(1)(a), (c)–(e), (g). The Western Australian provision does not expressly say, as the Queensland provision does, that the trustee may expend capital money, but it would appear that there is no limitation on the kind of money that may be expended under the Western Australian provision, except the limitation that the money must be subject to the same trusts.

³³⁹ See *Trustees Act 1962* (WA) s 30(1)(b).

8.312 Section 30(1)(a)–(b) of the *Trustees Act 1962* (WA) provides:

30 Property, miscellaneous powers as to

- (1) Every trustee, in respect of any property for the time being vested in him, may—
- (a) expend money subject to the same trusts for the repair, maintenance, upkeep or renovation of the property, whether or not the work is necessary for the purpose of the salvage of the property;
 - (b) subject to the rules of law applicable in such cases and to any direction of the Court to the contrary, apportion the cost of the work mentioned in paragraph (a) between capital and income or otherwise among the persons entitled thereto in such manner as he considers equitable, with power, where the whole or part of the cost of the work is charged to capital, to recoup capital from subsequent income, if that course would be equitable having regard to all the circumstances of the case; (emphasis added)

...

8.313 The powers of apportionment and recoupment given in section 30(1)(b) of that Act are expressed to apply 'subject to the rules of law applicable in such cases'. This would seem to preserve the general law limitation that applies regarding the apportionment of trust property expenses.

8.314 In addition, the powers of apportionment and recoupment given in that section apply only in respect of one class of expenses, namely, those for 'the repair, maintenance, upkeep or renovation of the property'. The same powers of apportionment and recoupment do not apply to the other expenses that the trustee is authorised to make under section 30(1) of that Act.

8.315 In recommending the inclusion of an apportionment and recoupment power in its 1971 Report, however, this Commission did not consider that those powers should be limited to the one class of authorised trust property expenses.³⁴⁰

We consider that this power should extend to other forms of expenditure authorised by clause 33(1), including expenditure on improvements, subdivisional works, etc. The restriction in the Western Australian Act to repairs and other matters covered by clause 33(1)(a) may be explicable on the footing that in other cases such expenditure ought only to be charged against capital. But it is difficult to reconcile this explanation with the provision for expenditure on maintenance of roads, etc, in WA section 30(1)(e), and we think it preferable to confer a complete power of appropriation on the trustee in the confident expectation that the power will be exercised in a manner which is just and equitable between all those interested.

8.316 The powers of apportionment and recoupment under section 33(1)(g) of the *Trusts Act 1973* (Qld) apply in relation to the full range of trust property expenses authorised under section 33(1)(a)–(f). Nevertheless, the scope of the

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Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 34–5.

recoupment power is limited in a different way. It enables a trustee, where the initial payment of an expense has been made from capital, to recoup the capital from subsequent income; 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 the income from capital.

8.317 In considering this issue in its recent report, the British Columbia Law Institute recommended the introduction of a recoupment power in wider terms. It would enable a trustee to transfer funds between the capital account and the income account to recover or reimburse an expense previously charged to the account that is to receive the transferred funds.³⁴¹

[The proposed provision] allows trustees to transfer funds between income and capital accounts to make necessary adjustments after paying expenses. For example, if the trustees wanted to charge the expense to capital account but paid for the expenses with funds from income account, they may later transfer funds from the capital account to the income account to reimburse the income beneficiaries.

8.318 This approach would give a much wider discretion to trustees in dealing with expenditure from the capital and income accounts.

8-40 Should the powers conferred by section 33(1)(g) of the *Trusts Act 1973* (Qld):

- (a) continue to be the subject of a stand-alone provision in the Act (whether or not the Act is amended as mentioned in paragraph (b)); or
- (b) if the Act is amended to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner (the ‘general property power’):
 - (i) be omitted; or
 - (ii) be stated briefly in a provision that lists examples of specific powers conferred by the general property power?

8-41 If the powers of apportionment and recoupment conferred by section 33(1)(g) are retained in the *Trusts Act 1973* (Qld), is their scope appropriate, or should they be changed in some way, for example, by extending the power of recoupment to allow expenditure under section 33(1)(a)–(f) that is made out of income to be recouped from capital if it would be equitable to do so in the all the circumstances?

³⁴¹

British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 53, Proposed Trustee Act, cl 35(2).

The payment of insurance premiums and the effect of a contrary intention in the trust instrument

8.319 Section 33(1)(a)–(g) of the *Trusts Act 1973* (Qld) is located in Part 4 of the Act, the provisions of which apply, except as otherwise provided in that Part, whether or not a contrary intention is expressed in the trust instrument.³⁴² Nothing in section 33(1)(a)–(g) provides otherwise. Thus, the powers to expend money on trust property expenses and to apportion such expenses between capital and income are not capable of being overridden by the settlor.

8.320 One of the powers conferred by those provisions is the power, in section 33(1)(d), to pay out of income or capital money any insurance premiums in respect of the property. Further, as explained above, section 33(1)(g) of the Act gives the trustee power to apportion such a payment between capital and income or otherwise among the persons entitled thereto in such manner as the trustee considers equitable.

8.321 A similar power is also conferred by section 47(3) of the Act. It provides, in more specific terms, that the trustee may, as he or she thinks fit, pay insurance premiums out of:³⁴³

- (a) the income of the property concerned; or
- (b) the income of any other property subject to the same trusts; or
- (c) any capital money subject to the same trusts; or
- (d) any 1 or more of paragraphs (a) to (c) in such proportions as the trustee considers equitable.

8.322 However, section 47(3) applies 'subject to any direction expressed in the instrument (if any) creating the trust'. Thus, although that section falls within Part 4 of the Act, unlike the provisions in section 33(1)(a)–(g), it may be modified by the settlor.

8.323 This creates an overlap and potential conflict as to the payment and apportionment of insurance premiums by the trustee. Since section 33(1)(g) is expressed to apply 'subject to this Act', it arguably applies subject to the more specific provision in section 47(3). If that is correct, any directions in the trust instrument concerning the apportionment of insurance premiums between capital and income would take precedence.

8.324 An issue to consider is whether section 47(3) of the Act should be retained as a separate provision or whether, in light of the general powers conferred by section 33(1)(d) and (g), section 47(3) is unnecessary and should be omitted.

³⁴² *Trusts Act 1973* (Qld) s 31(1).

³⁴³ *Trusts Act 1973* (Qld) s 47(1) gives trustees the power to insure any insurable property against loss or damage, and to insure against any risk or liability against which it would be prudent for a person to insure if the person were acting for himself or herself. Section 47(1)–(2) is discussed in Chapter 9.

8.325 A further issue to consider is how the power to pay and apportion insurance premiums, and other expenditure authorised under section 33(1)(a)–(g), should deal with a contrary intention in the trust instrument.

8.326 If the general approach of section 33(1)(a)–(g) were changed so that it applied *subject to* a contrary intention,³⁴⁴ this would allow the settlor to determine and direct which beneficiaries' entitlements are ultimately to be affected by the payment or expenditure. For example, a settlor might wish to relieve an income beneficiary (such as a life tenant) from the burden of bearing particular income expenses (such as rates) by requiring that those expenses be borne by the capital beneficiary (such as the person entitled in remainder).

8.327 On the other hand, the current approach ensures that the trustee has sufficient flexibility, in accordance with the duty to act impartially between the beneficiaries, to respond to changes in circumstances.

8-42 Should section 47(3) of the *Trusts Act 1973* (Qld) be retained as a separate provision or omitted?

8-43 If provisions in terms similar to section 33(1)(a)–(g) are retained in the *Trusts Act 1973* (Qld), should they:

- (a) continue to apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust; or
- (b) be amended to apply subject to a contrary intention in the trust instrument?

Application of income by trustee-mortgagee in possession

8.328 Section 42 of the *Trusts Act 1973* (Qld) governs the application of the income of mortgaged land received by a trustee-mortgagee in possession. It applies when the mortgage debt (rather than the land itself) is held on trust for successive beneficiaries.³⁴⁵ It provides:

42 Application of income by trustee-mortgagee in possession

- (1) Where a trustee is entitled, whether severally or as a co-mortgagee, to a debt secured by a mortgage of land in trust as to the whole or part of that debt for persons by way of succession, and the trustee is at the date of commencement of this Act, or at any time after that date becomes, mortgagee in possession of the mortgaged land, the trustee shall apply the net income of the mortgaged land received by the trustee after that date or after the trustee becomes mortgagee in possession—

³⁴⁴

This is the approach in South Australia, Western Australia and New Zealand: see *Trustee Act 1936* (SA) s 25A(1); *Trustees Act 1962* (WA) s 5(2), (3)(a); *Trustee Act 1956* (NZ) s 2(4), (5)(a). Cf *Trustee Act 1925* (ACT) s 83; *Trustee Act 1925* (NSW) s 82A.

³⁴⁵

Re KC Smart's Settlement (1933) 33 SR (NSW) 412, 415 (Harvey CJ in Eq); *Trust Company of Australia v Braid & Simmons* (Unreported, Supreme Court of Victoria, Eames J, 20 February 1998).

- (a) in discharge of all rents, taxes, rates, and outgoings affecting the mortgaged land; and
- (b) in payment of the premiums on any insurances properly payable on the mortgaged property; and
- (c) in keeping down all annual sums or other payments and the interest on all principal sums having priority to the mortgage in right whereof the trustee is in possession;

and subject to the rights of the mortgagor, the trustee shall hold the residue of the income so received by the trustee upon the trusts to which the mortgage debt is subject.

- (2) The rents, taxes, outgoings, premiums, costs, annual sums, payments and interest to be discharged, kept down and paid, pursuant to subsection (1), shall be those accruing due—
 - (a) after the date of the commencement of this Act, where the trustee is in possession of the mortgaged land at that date; and
 - (b) after the date of possession by the trustee, where the entry into possession is after the date of commencement of this Act;

but if at the date of commencement of this Act, or on the date of possession by the trustee, as the case may be, any rents, taxes, rates, outgoings, annual sums, payments, interest or premiums mentioned in subsection (1)(a) to (c) were or are due and unpaid, and such of those rents, taxes, rates, outgoings, annual sums, payments, and premiums as are periodic payments were payable wholly or in part in respect of any period subsequent to the date of commencement or to the date of possession, as the case may be, then the lastmentioned rents, taxes, rates, outgoings, annual sums, payments, and premiums shall, for the purpose of this section, be considered as accruing from day to day and shall be apportionable in respect of time accordingly.

- (3) On the recovery of the moneys secured by the mortgage, whether in whole or in part, and whether by repayment or on realisation of the security or otherwise, such part of the income applied by the trustee in the payments specified in subsection (1)(a) to (c) as would otherwise have been payable as interest to the person entitled to the interest of the mortgage debt shall, as between the persons respectively entitled to the income and corpus of the mortgage debt, be deemed to be arrears of interest payable without interest thereon and the amount received by the trustee shall be apportioned accordingly.
- (4) Notwithstanding anything in this section contained, the trustee may, if in the administration of the trust the trustee thinks it necessary so to do, apply income of the mortgaged property received by the trustee after the date of commencement of this Act in payment of any rents, taxes, rates, outgoings, premiums, costs, annual sums, payments and interest, affecting the mortgaged land other than those specified in subsection (2); but the person entitled to the interest on the mortgage debt shall be entitled to recoupment out of the capital of the mortgage debt of all payments made by the trustee under the authority conferred by this subsection.

8.329 Similar provisions are included in the trustee legislation of the ACT, New South Wales, South Australia and Western Australia.³⁴⁶

8.330 Prior to the enactment of those provisions, there were conflicting judicial authorities about 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.

8.331 In the case of *Farmer v Chard*,³⁴⁷ it was held that the income should first be paid in satisfaction of rates and taxes accruing on the property, then in paying the life tenant an amount for interest payable under the mortgage.

8.332 In the subsequent case of *Re KC Smart's Settlement*³⁴⁸ however, it was instead held that the trustee-mortgagee must firstly apply the income (that is, the gross income) in payment of the interest due to the tenant for life, and only then as far as the income will extend in payment of rates, taxes and repairs.

8.333 In that case, Harvey CJ in Eq considered, as a matter of principle, that, where a trustee-mortgagee of a mortgage held for persons in succession enters into possession of the property, the trustee is not in possession of settled property, but is in possession of a settled debt, and it is not until foreclosure occurs that the mortgaged property becomes trust property:³⁴⁹

One has to notice this fact, that the duties of the trustee with regard to the property are primarily those of a mortgagee in possession to his mortgagor. He goes into possession of a property over which there is an overriding charge to the local government authority for rates and taxes. He has no obligation to his mortgagor to pay those. His obligation to his beneficiaries to pay those is really determined by questions of salvage. Whether the mortgage did authorise him or not to pay the cost of rates and taxes and of necessary repairs and add them to the debt as a further charge, he has a right as against the mortgagor and a duty as against his beneficiaries to do both to the extent that he can charge the costs as a further advance. His rights as between himself and the mortgagor also determine the respective rights of the life tenants and remaindermen. As between them it has to be regarded as a problem whether it is advisable for the trustee to make a further advance on that mortgaged property; and any moneys, which are so advanced for the purpose of paying the overriding charges of rates and taxes or repairs in the nature of preservation of the property, must be regarded as a further investment of capital funds.

8.334 His Honour held that the error apparent in *Farmer v Chard* was that the judge, by directing that repairs to the mortgaged property be made in the first instance from capital and then recouped from income, had treated the mortgaged

³⁴⁶ *Trustee Act 1925* (ACT) s 39A; *Trustee Act 1925* (NSW) s 39A; *Trustee Act 1936* (SA) s 28C; *Trustees Act 1962* (WA) s 40.

³⁴⁷ (1905) 5 SR (NSW) 342, 343–4 (Simpson CJ in Eq).

³⁴⁸ (1933) 33 SR (NSW) 412 (Harvey CJ in Eq).

³⁴⁹ *Ibid* 415.

property itself, rather than the debt as protected by the mortgage, as being the asset which was settled under the trust.³⁵⁰ His Honour continued:³⁵¹

In my opinion there is no right under such circumstances to charge any portion of the repairs against the rents and profits. In my opinion the rents and profits have to be applied as between tenants for life and remaindermen in the same way as they have to be applied between the mortgagee-trustee and the mortgagor, that is to say, the rents and profits are first to be applied in payment of the interest on the mortgage. That is the amount which the tenant for life is entitled to receive. He is entitled to receive the income on the investment quite irrespective of what becomes of the mortgaged property, how much it has improved, or how much its rental value may increase in the hands of the trustee. Any increase of that sort enures to the benefit of the remaindermen, and not to the tenant for life. The tenant for life does not get any benefit from increased rents from the property. He is the tenant for life of a mortgage debt. His rights are limited to the interest payable on the mortgage debt; and, as between tenant for life and remaindermen under those circumstances, it seems to me that any moneys which have to be advanced by the trustee for rates and taxes and for repairs, which he is entitled to treat as a further advance on the mortgage moneys, must be treated as an advance solely made out of capital moneys not to be recouped out of income.

8.335 The approach adopted in *Re KC Smart's Settlement* has been followed with approval in the more recent decision of *Trust Company of Australia Ltd v Braid*.³⁵²

8.336 Section 42 of the *Trusts Act 1973* (Qld) is modelled on section 39A of the *Trustee Act 1925* (NSW). The latter provision was enacted in 1938³⁵³ ostensibly to give statutory effect to *Farmer v Chard* so that the interest payable to the life tenant is paid out of the net, and not the gross, income from the mortgaged land.³⁵⁴

8.337 This is reflected in section 42(1) of the *Trusts Act 1973* (Qld). It sets out the order in which the income received by a trustee-mortgagee after entering into possession is to be applied. It requires that the income be applied firstly in payment of outgoings (including rents, taxes and rates) and insurance premiums, and in keeping down all annual sums or other payments and the interest on all principal sums having priority to the mortgage. It then provides that, subject to the rights of the mortgagor, the residue of the income must be held upon the trusts to which the mortgage debt is subject (which would include the payment of interest payable to the life tenant).

350 Ibid 416.

351 Ibid 416–7.

352 Unreported, Supreme Court of Victoria, Eames J, 20 February 1998.

353 *Conveyancing, Trustee and Probate (Amendment) Act 1938* (NSW) s 5(k).

354 See New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 November 1938, 3104 (LO Martin, Minister of Justice). Section 115(8) of the *Conveyancing Act 1919* (NSW) provides that a receiver is entitled to pay rates, taxes and other outgoings out of income and to pay the balance only of income to the life tenant. The effect of s 39A of the *Trustee Act 1925* (NSW) is to assimilate the position of a trustee-mortgagee in possession to that of a receiver so far as the application of the income from the secured property is concerned.

8.338 However, this is modified by section 42(3) of the Act. It preserves the right of the life tenant to recoup, on the recovery of the moneys secured by the mortgage, any interest lost to him or her by the trustee making the payments of rates and other outgoings under section 42(1), such expenditure in payment of rents and so on to be treated as arrears of interest.³⁵⁵

8.339 Thus, it has been suggested that the effect of the legislative provision, as a whole, is consistent with the approach taken in *Re KC Smart's Settlement* — that is, that the life tenant's interest under the mortgage is to be derived from the gross, rather than the net, income of the property.³⁵⁶

8.340 The Commission considers that the *Trusts Act 1973* (Qld) should continue to include a provision to the effect of section 42. The provision clarifies the duties of a trustee-mortgagee in possession of mortgaged land with regard to the order in which the trustee should apply the 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.

³⁵⁵ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1959], in relation to s 39A(3) of the NSW legislation which is in similar terms to s 42(3) of the *Trusts Act 1973* (Qld).

³⁵⁶ *Trust Company of Australia Ltd v Braid* (Unreported, Supreme Court of Victoria, Eames J, 20 February 1998).

Chapter 9

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INTRODUCTION

9.1 This chapter examines the provisions of Part 4 of the Act¹ that confer what might be described as the administrative powers of trustees.² ‘Administrative’ is used in this context to distinguish these powers from the powers, considered in Chapter 8, that relate to the ‘management of trust property in the commercial or practical sense’.³

9.2 The powers considered in this chapter include the powers to give receipts (and the effect of a receipt), employ agents and delegate trusts, appoint valuers, cause the trust accounts to be audited, insure trust property, compound liabilities, deal with reversionary and other interests not vested in the trustee, and deposit documents for safe custody.

9.3 The exercise of these powers is subject to the provisions of section 31(2) of the Act. As explained earlier, section 31(2) ensures that the statutory powers given to trustees by Part 4 are exercisable despite the fact that all the beneficiaries are absolutely entitled to the property and are of full age and capacity. The powers will terminate only if they are expressly revoked by all such beneficiaries by notice in writing to the trustee.⁴

9.4 As well as conferring various administrative powers on trustees, some of the provisions considered in this chapter also provide that a trustee is not, in specified circumstances, responsible for any loss arising from the exercise of the power (or some similar formulation) or that a third party is exonerated from seeing to the application of trust funds. The protective elements of these provisions are also examined in this chapter.⁵

¹ *Trusts Act 1973* (Qld) ss 33(1)(j), (n), 43, 44, 47–52, 54, 56, 58–59.

² A ‘trustee’ includes a personal representative, being the executor, original or by representation, or the administrator for the time being of the estate of a deceased person: *Trusts Act 1973* (Qld) s 5(1) (definitions of ‘trustee’ and ‘personal representative’).

³ *Ballard v A-G (Vic)* (2010) 30 VR 413, 419–20 (Kyrou J). See [12.74] below.

⁴ See [8.43] above. *Trusts Act 1973* (Qld) s 31(3), which restricts the exercise of certain powers by a statutory trustee, does not affect the exercise of the particular powers considered in this chapter. See [8.42] above.

⁵ See also Chapter 11, which examines the main provisions in relation to indemnities and protection.

9.5 In Chapter 8, the Commission has proposed that the Act should be amended to confer on trustees, in relation to the trust property, all the powers of an absolute owner (the 'general property power').⁶ It has also examined whether, in view of that proposal, some of the specific management powers currently conferred by Part 4 should be omitted or restated more briefly in a provision that lists examples of specific powers conferred by the general property power or, alternatively, whether those management powers should continue to be the subject of stand-alone provisions. Where relevant, this chapter raises similar issues in relation to trustees' administrative powers.

POWER TO GIVE RECEIPTS AND THEIR EFFECT

Introduction

9.6 Section 43 of the *Trusts Act 1973* (Qld) deals with the effect of a receipt given by trustees, a person authorised by trustees, or any one or more of the trustees who have been authorised by their co-trustees. It provides:⁷

43 Power of trustee to give receipts

The receipt in writing of a trustee or of any person thereto authorised by the trustee in writing, or, where there are several trustees, of any person or of any 1 or more of such trustees thereto respectively authorised by the trustees in writing, for any money, securities, or other personal property or effects, payable, transferable, or deliverable to the trustee or them, as the case may be, under any trust or power is a sufficient discharge for the same, and effectually exonerates the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

9.7 The giving of receipts by an agent is also the subject of the general power conferred by section 54(1) of the *Trusts Act 1973* (Qld) and the more specific power conferred by section 54(3). As explained later in this chapter, section 54(1) enables trustees, instead of acting personally, to employ and pay an agent for a range of specified purposes, including 'the receipt ... of money'.⁸ Section 54(3) deals with the effect of receipts given, in particular circumstances, by a solicitor or financial institution.⁹

⁶ See [8.35], Proposal 8-1 above.

⁷ A provision in virtually identical terms was previously included in s 19 of the *Trustees and Executors Act 1897* (Qld). In its 1971 Report, the Commission commented on the usefulness of s 19, and recommended that it be retained: Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 38. *Trustees and Executors Act 1897* (Qld) s 19 was originally based on the wording of s 20 of the English *Trustee Act 1893*, 56 & 57 Vict, c 53, which, like the current English provision (*Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 14), did not make provision for a trustee to appoint an agent to give a receipt or, where there are several trustees, for the trustees to authorise one or more of the trustees to give a receipt. Those additional matters were inserted into s 19 by *Trustees and Executors Acts Amendment Act 1906* (Qld) s 3.

⁸ *Trusts Act 1973* (Qld) s 54(1) is set out at [9.32] below.

⁹ *Trusts Act 1973* (Qld) s 54(3) is set out at [9.48] below.

9.8 The *Trustee Act 1898* (Tas) includes a provision in the same terms as section 43 of the *Trusts Act 1973* (Qld).¹⁰

9.9 The trustee legislation of the other Australian jurisdictions and of New Zealand and England also includes a specific provision dealing with receipts,¹¹ although the legislation does not make provision for trustees to appoint a person to give receipts or to authorise one or more of the trustees to give receipts. However, some of these jurisdictions make provision for an agent to give receipts in their equivalent to section 54(1) of the *Trusts Act 1973* (Qld).¹²

Historical background

9.10 Prior to statutory intervention, the Courts of Chancery imposed strict rules in relation to the liability of persons paying money to trustees. Prima facie, to be effective, a receipt for money payable to a trustee needed to be signed by the beneficiaries as well as the trustee.¹³

It is a rule requiring no elucidation, that if a person have in his hands money or other property to which another person is entitled, he cannot discharge himself from liability but by payment or transfer to the rightful owner. If an estate be vested in A upon trust to sell and divide the proceeds between B and C, in a court of law the absolute ownership is in A, and his receipt, therefore, will discharge the purchaser; but in equity B and C, the *cestuis que trust*, are the true and beneficial proprietors, and A is merely the instrument for the execution of the settlor's purpose. The receipt, therefore, to be effectual, must be signed by B and C.

9.11 There was an exception where the settlor, in the trust instrument, directed 'in express terms that the receipts of A, the trustee, shall discharge the purchaser from seeing to the application of purchase money'.¹⁴ Further, under quite technical rules of equity, such an intention would be implied in relation to some types of trusts.¹⁵ However, in the absence of such an intention, whether express or implied, the receipt of trustees for money paid to them did not relieve the payee of the obligation to see to the application of the money.¹⁶

9.12 To avoid doubt as to when a receipt from trustees would relieve a person from the requirement to see to the application of the money paid,¹⁷ *Lord Cranworth's Act* provided, in section 29, that the receipt in writing of any trustees or

¹⁰ *Trustee Act 1898* (Tas) s 23.

¹¹ *Trustee Act 1925* (ACT) s 48; *Trustee Act 1925* (NSW) s 48; *Trustee Act* (NT) s 20; *Trustee Act 1936* (SA) s 27; *Trustee Act 1958* (Vic) s 18; *Trustees Act 1962* (WA) s 41; *Trustee Act 1956* (NZ) s 19; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 14.

¹² See *Trustee Act 1925* (ACT) s 53(1); *Trustee Act 1925* (NSW) s 53(1); *Trustee Act 1958* (Vic) s 28(1); *Trustees Act 1962* (WA) s 53(1); *Trustee Act 1956* (NZ) s 29(1). See also *Trustee Act 2000* (UK) c 29, s 11(1). These provisions are discussed later in this chapter: see [9.32] ff below.

¹³ T Lewin, *A Practical Treatise on the Law of Trusts and Trustees* (Maxwell & Son, 2nd ed, 1842) 341–2.

¹⁴ *Ibid* 342.

¹⁵ *Ibid* 342–8.

¹⁶ *Ibid* 348.

¹⁷ See *Balfour v Welland* (1809) 16 Ves Jun 151; 33 ER 941.

trustee for any money payable to them 'shall effectually exonerate the persons paying such money from seeing to the application thereof'. That provision formed the basis of the current English provision.¹⁸

9.13 In equity, the trustees' duty to act personally precluded them from delegating their duties or powers either to a stranger or to co-trustees, except in limited circumstances (such as in cases of necessity).¹⁹ As a general rule, trustees were 'not justified in authorizing their solicitors, or other agent, to receive purchase-money which ought to be paid personally to them'.²⁰ Similarly, if there were several trustees, the duty to act jointly meant that they were not justified in authorising one of them to receive and give a good receipt for trust moneys:²¹

The theory of every trust is that the trustees shall not allow the trust moneys to get into the hands of any one of them, but that all shall exercise control over them. They must take care that they are in the hands of all, or invested in their names, or placed in a proper bank in their joint names. ... The reason why more than one trustee is appointed, is that they shall take care that the moneys shall not get into the hands of one of them alone, that they shall take care that the trust moneys are always under the power and control of every one of them, and they have no right, as between themselves and the *cestuis que trust*, unless the circumstances are such as to make it imperatively necessary to do so, to authorize one of themselves to receive the moneys ...

9.14 Consequently, where money was paid to one of several trustees who misapplied the money, the receipt of that trustee did not constitute a valid discharge and the person who paid the money was personally liable to make good the loss that had resulted to the trust estate.²² Further, it had been held that persons purchasing real property from trustees had a right to insist that the trustees attend settlement personally to receive the purchase money or, alternatively, authorise the purchasers to pay the money into a joint bank account.²³

Scope of the Queensland provision

9.15 The giving of a receipt in accordance with section 43 of the *Trusts Act 1973* (Qld) exonerates the person paying, transferring, or delivering the money, securities or other personal property to the trustees from seeing to its application or being answerable for any loss or misapplication of the property. As explained above, before legislation to this effect was enacted, a person paying money to trustees would, in some circumstances, be bound to see that the money was properly applied and could be held liable for its misapplication.

¹⁸ *Trustees, Mortgagees, etc Act 1860*, 23 & 24 Vict, c 145 (*Lord Cranworth's Act*) s 29 was replaced by s 36 of the *Conveyancing and Law of Property Act 1881*, 44 & 45 Vict, c 41, which extended the scope of the provision by referring not to a receipt for money but to a receipt for 'money, securities, or other personal property or effects'. That provision was re-enacted as s 20 of the *Trustee Act 1893*, 56 & 57 Vict, c 53, which was in similar terms to s 14 of the current English Act (*Trustee Act 1925*, 15 & 16 Geo 5, c 19).

¹⁹ See A Underhill, *The Law Relating to Trusts and Trustees* (Butterworth, 7th ed, 1912) 293.

²⁰ *Re Bellamy and Metropolitan Board of Works* (1883) 24 Ch D 387, 400 (Cotton LJ), cited with approval in *Re Flower and Metropolitan Board of Works* (1884) 27 Ch D 592, 597 (Kay J).

²¹ *Re Flower and Metropolitan Board of Works* (1884) 27 Ch D 592, 596–7 (Kay J).

²² *Lee v Sankey* (1872) LR 15 Eq 204.

²³ *Re Flower and Metropolitan Board of Works* (1884) 27 Ch D 592.

9.16 Further, by implication, section 43 gives trustees the power, in writing, to authorise a person to give receipts and to authorise one or more of their number to give receipts. As explained above, those powers do not exist in equity.

Requirement for agent to be appointed in writing

9.17 Section 54(1) of the *Trusts Act 1973* (Qld) also authorises a trustee to appoint an agent for a range of purposes, including the 'receipt ... of money'. Unlike section 43 of the Act, section 54(1) does not require the agent's appointment to be made in writing.

9.18 The authors of the Model Trustee Code considered that a provision dealing with trustees' receipts should be included in the trustee legislation of all Australian jurisdictions, and that 'receipts given by agents of trustees should be as reliable as those given by agents of any principal'.²⁴ However, they considered that the requirement in section 43 of the Queensland Act (and in its Tasmanian counterpart) for the agent to be authorised by the trustees 'in writing' should be removed.²⁵

[T]he general power given to trustees to employ agents does not require writing,²⁶ and it is submitted that it is undesirable to require writing for the provision which enables agents to give effective receipts, because this means that nobody can ever rely on any agent's receipt until he has ascertained that the agent's principal was not a trustee, or if he was that he had authorised his agent by writing. (note added)

9.19 Unlike the Queensland provision, the Model Trustee Code did not make provision for one or more of several trustees to be authorised by the co-trustees to give a receipt. Where there was more than one trustee, the model provision would require the receipt to be given in writing by all the trustees.²⁷ Accordingly, the comment made that authorisation should not be required to be in writing was limited to the situation where an agent (rather than a co-trustee) is giving a receipt on behalf of the trustees.

9.20 Under the *Trustee Act 2000* (UK), trustees may authorise any person, including one or more of their number, to exercise 'delegable functions' as their agent.²⁸ Those functions would include the giving of receipts.²⁹ There is no general requirement for the authorisation to be made or evidenced in writing (unless the agent is to be authorised to exercise 'asset management functions', such as powers of investment, the acquisition of trust property or the management of trust

²⁴ WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 141. For an explanation of the origins of the Model Trustee Code and the membership of the working party that prepared it, see Chapter 5, n 75 above.

²⁵ Ibid 142.

²⁶ The authors of the Model Trustee Code were referring to s 54(1) of the *Trusts Act 1973* (Qld) and its counterparts in other jurisdictions, which do not require the appointment of an agent to be made in writing.

²⁷ WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 141 (cl 5.2).

²⁸ *Trustee Act 2000* (UK) c 29, ss 11–12.

²⁹ See *Trustee Act 2000* (UK) c 29, s 11(2)–(3).

property).³⁰ The Law Commission of England and Wales explained that 'the general law does not impose formality requirements on the appointment of agents and, for the most part, no such requirements will apply to the appointment of agents under the powers proposed in this Part'.³¹

9-1 Should section 43 of the *Trusts Act 1973* (Qld) continue to refer to a receipt given by a person authorised by the trustees *in writing* or should the requirement for the person to be authorised in writing be omitted?

9-2 Should section 43 of the *Trusts Act 1973* (Qld) continue to refer, where there are several trustees, to a receipt given by any one or more of the trustees authorised by the trustees *in writing* or should the requirement for the trustees to be authorised in writing be omitted?

POWER TO EMPLOY AGENTS

Introduction

Restrictions on delegation

9.21 Under the general law, trustees are ordinarily required to act personally.³² As a result, unless they are authorised to do so,³³ trustees may not delegate the exercise of their duties or powers,³⁴ not even to a co-trustee.³⁵ It has been said that:³⁶

[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.

³⁰ *Trustee Act 2000* (UK) c 29, ss 11, 15(1).

³¹ Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999) [4.18].

³² *Turner v Corney* (1841) 5 Beav 515, 517; 49 ER 677, 678 (Lord Langdale MR).

³³ See *Pilkington v Inland Revenue Commissioners* [1964] AC 612, 634 (Viscount Radcliffe).

³⁴ *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).

³⁵ *Re Flower and Metropolitan Board of Works* (1884) 27 Ch D 592, 596 (Kay J). See [9.13] above.

³⁶ *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).

The appointment of agents under the general law

9.22 It is a long-standing exception to the requirement for trustees to act personally that, in certain circumstances, they may appoint agents to perform an act in the administration of the trust.³⁷ In *Ex parte Belchier*, Lord Hardwick LC stated:³⁸

where trustees act by other hands, either from necessity, or conformable to the common usage of mankind, they are not answerable for losses.

9.23 This exception was subsequently confirmed by the House of Lords in *Speight v Gaunt*, where it was held to be in the usual course of business for trustees to appoint a broker to purchase securities for the trust and for the money for the securities to pass through the broker's hands.³⁹ Lord FitzGerald described the principle in the following terms:⁴⁰

I accept it then as settled law that although a trustee cannot delegate to others the confidence reposed in himself, nevertheless he may in the administration of the trust fund avail himself of the agency of third parties, such as bankers, brokers, and others, if he does so from a moral necessity or in the regular course of business. If a loss to the trust fund should be occasioned thereby, the trustee will be exonerated unless some negligence or default of his has led to that result.

9.24 Because the trustee, in that case, had taken 'all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own',⁴¹ he was held not to be liable for the default of the broker, who did not purchase the securities but instead appropriated the money to his own use.

9.25 However, a trustee must still exercise his or her discretion in selecting an agent,⁴² and should employ the agent to do only those acts that are within the usual scope of business of the agent.⁴³ A trustee is also 'under an obligation to be diligent in seeing that a duty given to an agent has been properly performed'.⁴⁴

9.26 The appointment of an agent does not involve a 'surrender or delegation' of the trustee's discretionary powers:⁴⁵

37 See generally JRF Lehane, 'Delegation of Trustees' Powers and Current Developments in Investment Funds Management' (1995) 7 *Bond Law Review* 36, 39–40.

38 (1754) Amb 218, 219; 27 ER 144, 145.

39 (1883) 9 App Cas 1, 10, 12 (Earl of Selborne LC), 22, 25 (Lord Blackburn), 29 (Lord FitzGerald).

40 Ibid 29. See also *Learoyd v Whiteley* (1887) 12 App Cas 727, 734 (Lord Watson).

41 (1883) 9 App Cas 1, 19 (Lord Blackburn).

42 *Re Weall* (1889) 42 Ch D 674, 677–8 (Kekewich J).

43 *Fry v Tapson* (1884) 28 Ch D 268, 280 (Kay J); *McMahon v Cooper* (1904) 4 SR (NSW) 433, 438 (AH Simpson CJ in Eq).

44 *Flynn v Mamarika* (1996) 130 FLR 218, 225 (Martin CJ). See also *Guazzini v Pateson* (1918) 18 SR (NSW) 275, 280 (Street CJ in Eq); *Re Lucking's Will Trusts* [1968] 1 WLR 866, 877 (Cross J).

45 JRF Lehane, 'Delegation of Trustees' Powers and Current Developments in Investment Funds Management' (1995) 7 *Bond Law Review* 36, 40.

What is ... quite plain is that the delegation contemplated is the 'doing by other hands' of something — the performance of a task or entering into a transaction — which the trustee either could not, or would not in accordance with accepted commercial practice be expected to, do personally. It is not a surrender of discretion or a delegation of a power to make decisions, except perhaps some of a minor kind arising in the course of the transaction for which the agent is employed, about the administration of the trust or the exercise or the trustee's powers.

Terminology

9.27 Many of the cases that consider the duty to act personally (and the corollaries to that duty) use the term 'delegate' in the context of the conferral (or purported conferral) by a trustee of a discretionary power.⁴⁶ Many commentators also use the term in this way.⁴⁷

9.28 In other instances, the term 'delegate' is used more broadly to encompass a trustee's power to appoint an agent in matters not necessarily involving the exercise of any discretion.⁴⁸

9.29 However, some commentators use the term only in the narrow sense with which it is used in section 56 of the *Trusts Act 1973* (Qld).⁴⁹ That section empowers a trustee, in specified circumstances, to delegate the execution of all or any of the trusts, powers, authorities and discretions vested in the trustee,⁵⁰ effectively appointing a person to stand in the shoes of the trustee for the relevant period.

9.30 This part of the chapter examines section 54 of the *Trusts Act 1973* (Qld),⁵¹ which provides for the appointment of an agent in three situations:

- generally, to transact any business or do any act required to be transacted or done in the execution of the trust or the administration of the trust property (section 54(1));
- to manage or administer any property in a place outside Queensland, including to exercise any discretion, trust or power vested in the trustee in relation to that property (section 54(2)); and

⁴⁶ See, eg *Speight v Gaunt* (1883) 9 App Cas 1, 29 (Lord FitzGerald); *Buckby v Speed* [1959] Qd R 30, 35 (Philp J); *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705, 717 (Robert Walker J).

⁴⁷ See, eg, JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1723]; GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [22.45].

⁴⁸ See, eg, *Rodney Aero Club Inc v Moore* [1998] 2 NZLR 192, 195, where Hammond J referred to the power to employ agents conferred by s 29 of the *Trustee Act 1956* (NZ) as an example of delegation that is authorised by statute.

⁴⁹ See HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 January 2012) [12.100], who prefer the concept of 'an extended form of agency' to refer to the situation where third parties are appointed to make investments on behalf of the trustees.

⁵⁰ *Trusts Act 1973* (Qld) s 56 is considered at [9.126] ff below.

⁵¹ *Trusts Act 1973* (Qld) s 54(1)–(2) is based, with minor modifications, on the former s 23(1)–(2) of the *Trustee Act 1925*, 15 & 16 Geo 5, c 19. Although s 54(3)–(4) is similar to the former s 23(3) of the English *Trustee Act 1925*, it has a longer lineage, both in Queensland and in England: see [9.52] below. However, s 23 of the English Act has since been repealed.

- the appointment of a solicitor or financial institution to receive, and give a discharge for, certain money payable to the trustee (section 54(3)–(4)).

9.31 This part of the chapter also examines whether the Act should be amended to enable trustees to appoint a third party (however described) to exercise certain of the trustees' discretions, as is now possible under the *Trustee Act 2000* (UK). As explained later in this chapter, such a power has been recommended in a number of overseas jurisdictions, particularly with a view to enabling trustees to appoint a person to exercise their powers of investment.

Power to appoint and pay an agent: section 54(1)

Scope of the statutory power

9.32 The main provision giving trustees the power to appoint agents is section 54(1) of the *Trusts Act 1973* (Qld), with the relevant definitions found in section 54(6). Those subsections provide:

54 Power to employ agents

- (1) A trustee may, instead of acting personally, employ and pay an agent, whether a solicitor, accountant, financial institution,⁵² trustee corporation, financial services licensee, regulated principal or other person, to transact any business or do any act required to be transacted or done in the execution of the trust or the administration of the trust property, including the receipt and payment of money, and the keeping and audit of trust accounts, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent employed in good faith and without negligence.

...

- (6) In this section—

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.

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. (note added)

9.33 Section 54(1) provides that a trustee may employ and pay an agent, including of the various kinds mentioned in the subsection, to transact any business or do any act required to be transacted or done in the execution of the trust or the administration of the trust property. This includes appointing an agent for the

⁵²

Acts Interpretation Act 1954 (Qld) s 36 defines 'financial institution' to mean 'an authorised deposit-taking institution within the meaning of the *Banking Act 1959* (Cwth), section 5'.

receipt and payment of money and for the keeping and audit of trust accounts.⁵³ The subsection also provides that the trustee is not responsible for the default of any such agent employed in 'good faith and without negligence'.⁵⁴

9.34 The trustee legislation of the ACT, New South Wales, Victoria, Western Australia and New Zealand contains a provision in similar terms.⁵⁵ However, the ACT and New South Wales provisions include an additional subsection not found in the Queensland provision. Section 53(5) of the ACT and New South Wales Acts provides:

- (5) Nothing in this section shall authorise a trustee to employ an agent in any case where a person acting with prudence would not employ the agent to transact the business or do the act, if the business or act was required to be transacted or done in such person's own affairs.

9.35 It has been held that the effect of this subsection is that a trustee's power to employ an agent is not enlarged by section 53, but remains subject to the limitations that apply under the general law.⁵⁶

9.36 In *Re Vickery*, Maugham J expressed the view that section 23(1) of the English *Trustee Act 1925* (which was in almost identical terms to section 54(1) of the Queensland Act) conferred a significantly broader power on trustees to employ agents than exists under the general law.⁵⁷

It is hardly too much to say that it revolutionizes the position of a trustee or executor as regards the employment of agents. He is no longer required to do any actual work himself, but he may employ a solicitor or other agent to do it, whether there is any real necessity for the employment or not.

9.37 However, in *Green v Whitehead*, Eve J took a more cautious view of the scope of that provision, stating that section 23 of the *Trustee Act 1925* 'no doubt gives to the trustees enlarged and somewhat wide powers of employing agents'.⁵⁸

9.38 It has been questioned whether the Australian provisions that are based on section 23 of the English *Trustee Act 1925* empower a trustee to appoint an agent whether it is necessary or not. Lehane considered that the New South Wales provision, because of section 53(5), did not have that effect.⁵⁹

The *Re Belchier* doctrine permitted delegation where it was necessary or where ('moral necessity') it was in accordance with ordinary prudent commercial practice. Is it really true, as Maugham J suggested ... , that in this respect the

53 See also the discussion of ss 43 (Power of trustee to give receipts) and 52 (Audit) of the *Trusts Act 1973* (Qld) at [9.6] ff above and [9.121] ff below.

54 The liability of a trustee for the default of an agent is considered in Chapter 11.

55 *Trustee Act 1925* (ACT) s 53(1); *Trustee Act 1925* (NSW) s 53(1); *Trustee Act 1958* (Vic) s 28(1); *Trustees Act 1962* (WA) s 53(1); *Trustee Act 1956* (NZ) s 29(1).

56 *In the Estate of Purton* (1935) 53 WN (NSW) 148, 149 (Nicholas J). As to the general law, see [9.22] above.

57 [1931] 1 Ch 572, 581.

58 [1930] 1 Ch 38, 45.

59 JRF Lehane, 'Delegation of Trustees' Powers and Current Developments in Investment Funds Management' (1995) 7 *Bond Law Review* 36, 43.

statutes effected a revolution and that an agent may now be appointed whether it is necessary, including morally so, nor not? In New South Wales, the answer is clearly 'no' because of section 53(5).

9.39 He also considered that, because of the general duty to act with prudence, the provisions in the other Australian jurisdictions would also be subject to the same limitation of necessity.⁶⁰

In the other states, it is suggested, the answer is equally 'no' although the statutes do not expressly say so. There is no good reason to suppose that the duty of care and prudence does not apply to the statutory power; and, more broadly, it may be suggested that to give the answer 'yes' is to confuse a trustee's formal power to do an act with the considerations relevant to a proper exercise of the power. (emphasis added)

9.40 Ford and Lee, on the other hand, consider that the duty of prudence might operate to enlarge the range of things that an agent might be appointed to do. They note that, in the 21st century, a prudent person of business 'will employ agents to do things that would not have been contemplated in 1883', such as employing 'an asset manager to manage investments'.⁶¹ In their view:⁶²

The statutory power if anything enlarges the scope of *Speight v Gaunt*. Certainly it should not be seen as restricting it. The Queensland provision is more expansive.

9-3 Should the *Trusts Act 1973 (Qld)* continue to include a provision to the general effect of section 54(1) or is there a need to clarify the administrative functions for which an agent may be appointed (and, if so, how)?

Appointment of agent or attorney to exercise discretions, trusts and powers in relation to property outside the jurisdiction: section 54(2)

9.41 Section 54(2) of the *Trusts Act 1973 (Qld)* is a more specific provision than section 54(1), applying only to trust property situated outside Queensland. However, it confers considerably wider powers than section 54(1):

- (2) A trustee may appoint any person to act as the trustee's agent or attorney for the purpose of selling, converting, collecting, getting in, and executing and perfecting assurances of, or managing or cultivating, or otherwise administering any property real or personal, movable or immovable, subject to the trust in any place outside the State, or executing or exercising any discretion or trust or power vested in the trustee in relation to any such property, with such ancillary powers, and with and subject to such provisions and restrictions, as the trustee may think fit, including a power to appoint substitutes, and shall not, by

⁶⁰ Ibid.

⁶¹ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 12 June 2009) [61.5440]. See, however, their comment at [9.57] below in relation to the limits of the fund manager's role.

⁶² Ibid.

reason only of the trustee having made any such appointment, be responsible for any loss arising thereby.

9.42 In addition to providing that a trustee may appoint an agent or attorney to administer any trust property situated outside Queensland, section 54(2) provides that the trustee may appoint an agent or attorney to execute or exercise any discretion, trust or power vested in the trustee in relation to such property. Further, it enables the trustee to appoint the agent or attorney with such ancillary powers as the trustee thinks fit, including the power to appoint a substitute.

9.43 The provision is declaratory of the general law.⁶³ It has been observed that it is one of the few exceptions to the rule that a trustee cannot effectively delegate his or her discretions.⁶⁴

9.44 A similar provision to section 54(2) is included in the trustee legislation of Victoria, Western Australia and New Zealand.⁶⁵

9.45 These provisions were based on section 23(2) of the English *Trustee Act 1925*, although that provision has since been repealed by the *Trustee Act 2000* (UK), which implements a new, broader scheme for the delegation of trustee functions.⁶⁶ The Law Commission of England and Wales initially considered that section 23(2) should be preserved 'so that trustees would retain a default power to delegate their distributive functions in relation to foreign property'.⁶⁷ However, on further consideration, the Law Commission concluded that section 23(2) was unnecessary:⁶⁸

As one respondent commented, the exception to the non-delegation rule is a relic of an age of slow communication. Now that global communication is instantaneous, and foreign property is much more commonly held by English trusts than it used to be, it would be anomalous to give trustees different powers merely because of the geographical location of the property concerned.

9.46 It therefore recommended that 'the present exception for foreign property should be abolished, so that the geographical location of trust property should no longer have any bearing on the trustees' powers of delegation'.⁶⁹

⁶³ See the obiter comments of Knight Bruce LJ in *Stuart v Norton* (1860) 14 Moo PC 17, 32–3; 15 ER 212, 218. It was unnecessary in that case to determine the position under English law, because the case was ultimately decided according to Roman Dutch law (being the law prevailing in British Guiana where the agent had been appointed). See also *Re Dunlop* (1925) 26 SR (NSW) 126, 132–3, where Long Innes J considered that *Stuart v Norton* correctly stated the law.

⁶⁴ R Cozens-Hardy Horne, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 186. Cf *Niak v Macdonald* [2001] 3 NZLR 334, where Keith, Fisher and Paterson JJ held (at 338) that s 29(2) of the *Trustee Act 1956* (NZ), which is in the same terms as s 54(2) of the *Trusts Act 1973* (Qld), 'does not empower trustees to make a general delegation of their powers'. Their Honours considered that s 29(2) 'is an empowering section which enables trustees to appoint agents to implement decisions once the trustees have, in accordance with the powers conferred by the trust instrument or law, made the appropriate decisions'.

⁶⁵ *Trustee Act 1958* (Vic) s 28(2); *Trustees Act 1962* (WA) s 53(2); *Trustee Act 1956* (NZ) s 29(2).

⁶⁶ See [9.60] ff below.

⁶⁷ Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999) [4.12].

⁶⁸ *Ibid* [4.13].

⁶⁹ *Ibid*. This recommendation was expressed to be 'subject to a saving [provision] to protect the validity of delegations made prior to the coming into force of any new legislation'.

9.47 Even in the absence of a provision to the effect of the new delegation power found in the *Trustee Act 2000* (UK), it is arguable that, with modern communication methods, the power conferred by section 54(1) of the *Trusts Act 1973* (Qld) would be sufficient to enable the appointment of an agent outside Queensland, who could give effect to the trustee's decisions, without needing the additional authority to exercise the discretions, trusts and powers of the trustee.

9-4 Is there a need to retain section 54(2) of the *Trusts Act 1973* (Qld) to enable a trustee to appoint an agent to exercise, in relation to property outside Queensland, the discretions, trusts and powers vested in the trustee in relation to that property or should section 54(2) be omitted?

Power to appoint a solicitor or financial institution to receive money payable to the trustee: section 54(3)–(4)

9.48 Section 54(3)–(4) of the *Trusts Act 1973* (Qld) empowers a trustee to appoint two specific kinds of agent — a solicitor and a financial institution⁷⁰ — to receive, and give a discharge for, certain money receivable by, or payable to, the trustee. It provides:⁷¹

- (3) Without limiting the generality of the powers conferred by subsections (1) and (2), a trustee may—
- (a) appoint a solicitor to be the trustee's agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed or instrument having in the body thereof or endorsed thereon a receipt for the money or valuable consideration or property, the deed or instrument being executed, or the endorsed receipt being signed, by the person entitled to give a receipt for that consideration; or
 - (b) appoint a financial institution or solicitor to be the trustee's agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of insurance, by permitting the financial institution or solicitor to have the custody of and to produce the policy of insurance with a receipt signed by the trustee;

and the production, by the solicitor, of any such deed or instrument as is mentioned in paragraph (a) shall have the same validity and effect as if the person appointing the solicitor had not been a trustee.

- (4) A trustee shall not be chargeable with a breach of trust, by reason only of the trustee having made, or concurred in making, any appointment such as is mentioned in subsection (3); but nothing in that subsection exempts a trustee from any liability that the trustee would have incurred

⁷⁰ See n 52 above for the meaning of 'financial institution'.

⁷¹ *Trusts Act 1973* (Qld) s 54(3)–(4) applies whether the money or valuable consideration or property was, or is, received before or after the commencement of the Act: s 54(5).

if this Act and any enactment replaced by this Act had not been passed, where the trustee permits any money, valuable consideration or property therein mentioned to remain in the hands or under the control of the financial institution or solicitor for a longer period than is reasonably necessary to enable the financial institution or solicitor, as the case may be, to pay or transfer it to the trustee. (emphasis added)

9.49 Section 54(3)(a) authorises the appointment of a solicitor as the trustee's agent to receive, and give a discharge for, any money, valuable consideration or property receivable by the trustee. Section 54(3)(b) authorises the appointment of a financial institution or solicitor to be the trustee's agent to receive, and give a discharge for, any money payable under an insurance policy. These provisions make it clear that a trustee can 'arm' his or her agent 'with receipts for property yet to be paid or transferred'.⁷²

9.50 Section 54(4) provides that a trustee is not liable for breach of trust by reason only of the appointment of an agent to receive money under section 54(3) — that is, the appointment does not of itself constitute a breach of trust. However, the provision does not exempt from liability a trustee who permits money or trust property to remain under the control of a solicitor or banker for longer than is reasonably necessary.⁷³ This is consistent with the liability of a trustee under the general law.⁷⁴ It has been observed that, in the circumstances contemplated by this part of the provision, 'there is no reason why the banker or the solicitor should do anything more than receive the money and pay the same to the trustee' or as the trustee may direct.⁷⁵

9.51 Provisions to the effect of section 54(3)–(4) of the *Trusts Act 1973* (Qld) are also found in the trustee legislation of the Northern Territory, South Australia, Tasmania, Victoria and Western Australia.⁷⁶ In the ACT and New South Wales, the trustee legislation does not include a provision in the same detail. However, the provisions in these jurisdictions that confer the general power to appoint an agent are expressed to extend:⁷⁷

- in the ACT, in the case of a bank (but not in any other case), to the receipt and payment of money; and
- in New South Wales, in the case of a bank, building society, credit union, Australian legal practitioner, stockbroker or real estate agent, or in the case of a prescribed person or a person of a prescribed class, to the receipt and payment of money.

⁷² LA Sheridan, *The Law of Trusts* (Barry Rose, 12th ed, 1993) 270.

⁷³ See *Robinson v Harkin* [1896] 2 Ch 415; *Wyman v Paterson* [1900] AC 271; *Re Sheppard* [1911] 1 Ch 50.

⁷⁴ See *Wood v Weightman* (1872) LR 13 Eq 434, 436 (Lord Romilly MR).

⁷⁵ *Re Vickery* [1931] 1 Ch 572, 581 (Maugham J).

⁷⁶ *Trustee Act* (NT) s 17; *Trustee Act 1936* (SA) s 24; *Trustee Act 1898* (Tas) s 20; *Trustee Act 1958* (Vic) s 28(3)–(4); *Trustees Act 1962* (WA) s 53(3)–(4). In the Northern Territory, South Australia and Tasmania, the legislation does not, however, include a provision to the effect of s 54(1) of the *Trusts Act 1973* (Qld), which provides for the appointment of an agent for 'the receipt and payment of money'.

⁷⁷ *Trustee Act 1925* (ACT) s 53(4); *Trustee Act 1925* (NSW) s 53(4).

Historical background

9.52 Section 54(3)–(4) substantially re-enacts section 16 of the *Trustees and Executors Act 1897* (Qld). In England, a provision to this effect was first enacted by the *Trustee Act 1888*.⁷⁸ That provision was subsequently re-enacted as section 17 of the *Trustee Act 1893*, which was in turn replaced by section 23(3) of the *Trustee Act 1925*. However, section 23 of the *Trustee Act 1925* (UK) has since been repealed by the *Trustee Act 2000* (UK).⁷⁹

9.53 These provisions were ‘introduced not to lay down any broad principles defining the circumstances in which trustees could delegate but to deal with specific practical problems, some of which had been thrown up by judicial decisions’.⁸⁰

9.54 Previously, it had been held that section 56 of the English *Conveyancing and Law of Property Act 1881* — which is in very similar terms to section 66 of the *Property Law Act 1974* (Qld)⁸¹ — did not apply where the vendor was a trustee, and did not enlarge the powers of a trustee to employ a solicitor. As a result, it was held that trustees could be required to attend a settlement so that they could personally receive the settlement proceeds.⁸² Further, if trustees allowed solicitors or other persons to receive trust money without sufficient cause, they would be liable for any loss caused, for example, if the solicitors misappropriated the funds.⁸³

78 *Trustee Act 1888*, 51 & 52 Vict, c 59, s 2.

79 *Trustee Act 2000* (UK) c 29, s 40(1), (3), sch 2 pt II para 23, sch 4 pt II.

80 Law Commission of England and Wales, *Trustees’ Powers and Duties*, Consultation Paper No 146 (1997) [3.34].

81 *Property Law Act 1974* (Qld) s 66 provides:

66 Receipt in instrument or endorsed authority for payment

(1) If a financial institution manager, a solicitor or a conveyancer produces an instrument, having in the body of the instrument or endorsed on the instrument a receipt for consideration money or other consideration, the instrument being executed, or the endorsed receipt being signed, by the person entitled to give a receipt for that consideration, or produces a duly executed instrument in respect of registered land, the instrument shall be a sufficient authority to the person liable to pay or give the same for the person’s paying or giving the same to the financial institution manager, solicitor, or conveyancer without the financial institution manager, solicitor or conveyancer producing any separate or other direction or authority in that behalf from the person who executed or signed the receipt or instrument.

(2) In this section—

conveyancer includes the agent of the conveyancer.

financial institution manager means the person performing the function of general manager or manager of a financial institution, and includes an agent of the financial institution manager.

instrument includes a discharge of mortgage.

solicitor includes the agent of the solicitor.

82 *Re Bellamy and Metropolitan Board of Works* (1883) 24 Ch D 387; *Re Flower and Metropolitan Board of Works* (1884) 27 Ch D 592. See also *McMillan v McMillan* (1891) 17 VLR 33.

83 See, eg, *Fry v Tapson* (1884) 28 Ch D 268, 280 (Kay J); *Bostock v Floyer* (1865) LR 1 Eq 26; *Rowland v Witherden* (1851) 3 Mac & G 568; 42 ER 379; *McMillan v McMillan* (1891) 17 VLR 33.

Whether section 54(3) is still required

9.55 The provisions that section 54(3) replaced were enacted well before section 54(1) was enacted, conferring a general power to appoint agents (including solicitors and financial institutions). This raises the issue of whether section 54(3), or any part of it, is still required. Although section 54(1) of the *Trusts Act 1973* (Qld) empowers a trustee to appoint an agent to do any act, including the receipt of money, unlike section 54(3), it does not specifically provide that the trustee can permit his or her agent to have the custody of an instrument endorsed with the trustee's receipt for money or property that is yet to be paid or transferred.⁸⁴

9-5 In view of the general power in section 54(1) of the *Trusts Act 1973* (Qld) for trustees to appoint agents, including for the receipt of money, is it necessary to retain any part of section 54(3)?

Whether the Act should enable trustees to appoint a third party to exercise some of their discretions

9.56 This part of the chapter considers whether the *Trusts Act 1973* (Qld) should make provision for trustees to be able to appoint a third party to exercise some of their discretions and, if so, whether such a power should be framed in broad terms (as has been done by the *Trustee Act 2000* (UK)) or whether the power should be confined to the exercise of the trustees' investment powers, which has been the main issue driving this debate in other jurisdictions.

9.57 The appointment of an agent, such as a fund manager, will not amount to an improper delegation of the trustee's discretion if the agent is carrying out the trustee's investment decisions.⁸⁵ However, Ford and Lee have observed that:⁸⁶

To the extent that the selection of investments for the trust requires the trustees to consider the purpose of the trust as a whole and beneficiaries' interests under it, trustees must act personally and unanimously. Agents can be employed to advise on such matters but not to decide them.

9.58 The Alberta Law Reform Institute has expressed the view that:⁸⁷

The traditional abhorrence of delegation of decision-making authority by trustees conflicts with the complicated realities of a modern-day trustee's investment responsibilities. A trust's beneficiaries may be better served if the unsophisticated trustee delegates day to day investment decisions to expert agents, rather than obtaining expert advice but then personally making all the

⁸⁴ *Trusts Act 1973* (Qld) s 54(1) is set out at [9.32] above. See also s 43, which is set out at [9.6] above.

⁸⁵ See, eg, *Jones v AMP Perpetual Trustee Company NZ Ltd* [1994] 1 NZLR 690, where Thomas J held (at 705) that the trustee had not improperly delegated its discretion by employing AMP as a fund manager because the decision as to how to invest the funds had not been delegated to AMP. The trustee company had made the decision to invest in a life insurance policy. The fact that, once the decision was made, AMP assumed responsibility for the management of the investment fund did not affect the situation.

⁸⁶ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 16 January 2012) [9.12450].

⁸⁷ Alberta Law Reform Institute, *Trustee Investment Powers*, Report No 80 (2000) [219].

investment decisions on the basis of that advice. A more realistic role for the average trustee is to exercise care in the selection of expert agents, to establish the objectives to which the agent's day to day investment activities should be directed, and to monitor the agent's activities with a view to ensuring that they are in accordance with the instructions the trustee has given to the agent.

9.59 As explained below, a number of overseas jurisdictions have enacted legislation, or made recommendations, to give trustees broader powers to delegate the exercise of certain of their decision-making functions (particularly in relation to the making of investments).⁸⁸

England

9.60 Section 23 of the English *Trustee Act 1925* — which was in similar terms to section 54 of the *Trusts Act 1973* (Qld) — was repealed by the *Trustee Act 2000* (UK).⁸⁹ The 2000 Act makes provision for the delegation of certain trustee functions (described in the Act as 'delegable functions') to 'agents'. It also includes very detailed provisions in relation to the persons who may be appointed as agents, the terms on which agents may be appointed, specific requirements for the appointment of agents to exercise the trustees' asset management functions, the requirements for trustees to review the appointment of an agent, and the liability of trustees for the default of the agent (or of any substitute appointed by the agent).

9.61 These provisions implemented the recommendations of the Law Commission of England and Wales.⁹⁰ The Law Commission was generally of the view that:⁹¹

Whilst certain limitations on trustees' powers of delegation are wholly appropriate, others now constitute a serious impediment to the administration of trusts. Trusteeship is an increasingly specialised task that often requires professional skills that the trustees may not have. Far from promoting the conscientious discharge of the obligations of trusteeship, the prohibition on the delegation of fiduciary discretions may force trustees to commit breaches of trust in order to achieve the most effective administration of the trust.

General power to appoint agent to exercise 'delegable functions'

9.62 Section 11(1) of the *Trustee Act 2000* (UK) provides that trustees may authorise 'any person to exercise any or all of their delegable functions as their agent'.

⁸⁸ See, eg, Law Commission of England and Wales, *Trustees, Powers and Duties*, Report No 260 (1999) pt IV; Law Reform Commission of Ireland, *Trusts Law: General Proposals*, Report No 92 (2008) ch 6; Law Commission of New Zealand, *Some Problems in the Law of Trusts*, Report 79 (2002) 1–3; Scottish Law Commission, *Trustees and Trust Administration*, Discussion Paper No 126 (2004) 11–15; Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 43–9; Alberta Law Reform Institute, *Trustee Investment Powers*, Report No 80 (2000) 84; British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 33.

⁸⁹ *Trustee Act 2000* (UK) c 29, s 40(1), (3), sch 2 pt II para 23, sch 4 pt II.

⁹⁰ Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999) pt IV.

⁹¹ *Ibid* [4.6].

9.63 'Delegable functions', for a private trust (that is, a trust other than a charitable trust), are defined in exclusionary terms. They consist of any function *other than*.⁹²

- (a) any function relating to whether or in what way any assets of the trust should be distributed,
- (b) any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital,
- (c) any power to appoint a person to be a trustee of the trust, or
- (d) any power conferred by any other enactment or the trust instrument which permits the trustees to delegate any of their functions or to appoint a person to act as a nominee or custodian.

9.64 'Delegable functions', for a charitable trust, are defined in positive terms: They are.⁹³

- (a) any function consisting of carrying out a decision that the trustees have taken;
- (b) any function relating to the investment of assets subject to the trust (including, in the case of land held as an investment, managing the land and creating or disposing of an interest in the land);
- (c) any function relating to the raising of funds for the trust otherwise than by means of profits of a trade⁹⁴ which is an integral part of carrying out the trust's charitable purpose;
- (d) any other function prescribed by an order made by the Secretary of State. (note added)

9.65 The Law Commission noted that some concern had been expressed by respondents 'as to whether there would be an adequate distinction between income generation activities carried on directly in pursuit of a trust's charitable purposes and other fund raising activities'.⁹⁵ However, it considered that this distinction was not a new one. It confirmed that fund raising should be a delegable activity 'unless the generation of profits arises from the conduct of a trade which is an integral part of carrying out the trust's charitable purpose'.⁹⁶

Persons who may be appointed as agents

9.66 Section 12 of the *Trustee Act 2000* (UK) provides that trustees may authorise one or more of their number to exercise functions as their agent, but may not authorise a beneficiary to exercise any function as agent (even if the beneficiary is also a trustee).⁹⁷ Further, the trustees may not authorise two or more persons to

⁹² *Trustee Act 2000* (UK) c 29, s 11(2).

⁹³ *Trustee Act 2000* (UK) c 29, s 11(3).

⁹⁴ See *Trustee Act 2000* (UK) c 29, s 11(4).

⁹⁵ Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999) [4.40].

⁹⁶ *Ibid.*

⁹⁷ *Trustee Act 2000* (UK) c 29, s 12(1), (3).

exercise the same function unless they are to exercise the function jointly.⁹⁸

Terms on which agents may be appointed

9.67 Section 14 of the *Trustee Act 2000* (UK) enables trustees, if it is reasonably necessary to do so, to appoint an agent on terms that permit the agent to sub-delegate, limit the agent's liability to the trustees or to any beneficiary, or permit the agent to act in circumstances giving rise to a conflict of interest:

14 Terms of agency

...

- (2) The trustees may not authorise a person to exercise functions as their agent on any of the terms mentioned in subsection (3) unless it is reasonably necessary for them to do so.
- (3) The terms are—
 - (a) a term permitting the agent to appoint a substitute;
 - (b) a term restricting the liability of the agent or his substitute to the trustees or any beneficiary;
 - (c) a term permitting the agent to act in circumstances capable of giving rise to a conflict of interest.

9.68 The Law Commission of England and Wales considered that this was 'a pragmatic approach', suggesting that trustees often had little option but to delegate on these terms.⁹⁹

If trustees wish to engage the services of a discretionary fund manager, for example, they are only likely to be able to do so by accepting their chosen fund manager's standard terms and conditions of business, which commonly include provision for sub-delegation and may limit the manager's liability. (note omitted)

9.69 Similarly, in relation to the term permitting conflicts of interest, the Law Commission recognised that 'this situation is inherently undesirable because it has the potential to remove the protection which equity's strict rules on fiduciaries' conduct provide for the objects of a trust',¹⁰⁰ but acknowledged that it was also necessary for practical reasons:¹⁰¹

Again, if trustees wish to employ a discretionary fund manager, for example, they may have little choice but to do so on terms which authorise the fund manager to enter into transactions in which it has a material interest and which may involve a potential conflict with its duty to the customer. Trustees cannot enter into arrangements which conflict with their fiduciary obligations, however, and it is by no means clear that the present law permits them to authorise others to do what they themselves have no power to do.

⁹⁸ *Trustee Act 2000* (UK) c 29, s 12(2).

⁹⁹ Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999) [4.26].

¹⁰⁰ *Ibid* [4.28].

¹⁰¹ *Ibid* [4.27].

9.70 The Law Commission therefore concluded that:¹⁰²

because there may be circumstances in which trustees have no practical choice but to contract on this basis if they wish to employ a particular fund manager, the law should not prevent them from doing so if it is in the best interests of the trust. However, the Commission does not consider that trustees should have an unfettered power to sanction conflicts of interest, given that they are at least as undesirable as sub-delegation or the limitation of agents' liability. Trustees should only be permitted to sanction conflicts of interest therefore in cases where it is reasonably necessary for them to do so.

Specific requirements in relation to the delegation of 'asset management functions'

9.71 Section 15 of the *Trustee Act 2000* (UK) imposes special restrictions on the appointment of a person to exercise the trustees' asset management functions:

15 Asset management: special restrictions

- (1) The trustees may not authorise a person to exercise any of their asset management functions as their agent except by an agreement which is in or evidenced in writing.
- (2) The trustees may not authorise a person to exercise any of their asset management functions as their agent unless—
 - (a) they have prepared a statement that gives guidance as to how the functions should be exercised ('a policy statement'), and
 - (b) the agreement under which the agent is to act includes a term to the effect that he will secure compliance with—
 - (i) the policy statement, or
 - (ii) if the policy statement is revised or replaced under section 22, the revised or replacement policy statement.
- (3) The trustees must formulate any guidance given in the policy statement with a view to ensuring that the functions will be exercised in the best interests of the trust.
- (4) The policy statement must be in or evidenced in writing.
- (5) The asset management functions of trustees are their functions relating to—
 - (a) the investment of assets subject to the trust,
 - (b) the acquisition of property which is to be subject to the trust, and
 - (c) managing property which is subject to the trust and disposing of, or creating or disposing of an interest in, such property.

¹⁰²

Ibid [4.29].

9.72 The Law Commission of England and Wales considered that, due to the special nature of these functions, ‘it is appropriate that the law should impose restrictions to ensure that trustees do not take decisions lightly as to their delegation’, and to encourage best practice.¹⁰³

9.73 Section 15(1) of the *Trustee Act 2000* (UK) requires the delegation of any asset management function to be evidenced in writing. The Law Commission considered that:¹⁰⁴

although certain functions (particularly those relating to purely administrative matters) may be delegated with very little formality, the terms on which asset management functions are delegated should always be spelt out clearly, and this is best achieved by an agreement made or evidenced in writing. (note omitted)

9.74 Section 15(2)–(4) requires trustees who wish to delegate their asset management functions to prepare a written policy statement to give guidance to the agent in relation to the exercise of these functions, and to obtain the agent’s agreement that he or she will secure compliance with the policy statement.

Review of arrangements

9.75 Section 22(1) of the *Trustee Act 2000* (UK) requires the trustees, while the agent continues to act for the trust, to keep under review the arrangements under which the agent acts and how those arrangements are put into effect. Further, if circumstances make it appropriate to do so, the trustees must consider whether there is a need to exercise any ‘power of intervention’¹⁰⁵ that they have and, if they consider that there is a need, they must exercise the power.

9.76 Section 22(2) applies specifically where an agent has been authorised to exercise asset management functions under section 15 of the Act. In that situation, the duty imposed by section 22(1) includes the following duties:

- (a) a duty to consider whether there is any need to revise or replace the policy statement made for the purposes of section 15,
- (b) if they consider that there is a need to revise or replace the policy statement, a duty to do so, and
- (c) a duty to assess whether the policy statement (as it has effect for the time being) is being complied with.

Duty of care

9.77 The *Trustee Act 2000* (UK) provides that the statutory duty of care created by section 1(1) of the Act applies to a trustee when:¹⁰⁶

103 Ibid [4.17].

104 Ibid [4.18].

105 *Trustee Act 2000* (UK) c 29, s 22(4) defines ‘power of intervention’ to include a power to give directions to the agent and to revoke the authorisation or appointment.

106 *Trustee Act 2000* (UK) c 29, s 2, sch 1 para 3. Section 1(1) of that Act is set out at [7.75] above.

- entering into arrangements under which a person is authorised under section 11 to exercise functions as an agent, which includes:
 - selecting the person to act;
 - determining any terms on which the person is to act; and
 - if the person is being authorised to exercise asset management functions, the preparation of a policy statement under section 15;
- entering into arrangements under which, under any other power, however conferred, a person is authorised to exercise functions as an agent; and
- carrying out his or her duties under section 22 in relation to the review of the agent's appointment.

Application of new powers of delegation

9.78 The Law Commission of England and Wales was strongly of the view that 'any new powers of delegation should apply to all trusts, whether or not created before the reforms are brought into force', on the basis that existing trusts would benefit most from these reforms.¹⁰⁷

Nowadays, most professionally drawn trusts expressly confer wide powers of delegation. It is existing trusts that are prejudiced by the narrowness of the present statutory powers of delegation.

9.79 However, it also recommended that the new powers of delegation should 'be subject to any restriction or exclusion imposed by the trust instrument or by or under any enactment'.¹⁰⁸ These recommendations were implemented by the *Trustee Act 2000* (UK).¹⁰⁹

Ireland

9.80 The Law Reform Commission of Ireland has recently recommended the introduction of legislation authorising trustees to delegate certain functions, in similar terms to section 11 of the *Trustee Act 2000* (UK).¹¹⁰ However, it considered that the scope of the non-delegable function in relation to the distribution of trust assets should be broadened, so that it would also prevent the delegation of functions relating to 'the utilisation of the assets by beneficiaries who, for example, might be given the benefit of residing in a residence which is owned by the trust'.¹¹¹

¹⁰⁷ Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999) [4.35].

¹⁰⁸ *Ibid* [4.36].

¹⁰⁹ *Trustee Act 2000* (UK) c 29, ss 26–27.

¹¹⁰ See Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008), Draft *Trustee Bill 2008*, cl 15.

¹¹¹ It therefore recommended the same non-delegable functions as appear in s 11(2) of the *Trustee Act 2000* (UK) c 29, with the addition of the underlined words below: Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) [6.19]–[6.20], Draft *Trustee Bill 2008*, cl 15(2)(a):

9.81 That Commission agreed with the approach adopted in the *Trustee Act 2000* (UK) in relation to allowing co-trustees to be appointed as agents, but prohibiting the appointment of beneficiaries.¹¹² It also agreed with the approach adopted in section 14 of the *Trustee Act 2000* (UK) in relation to the terms on which agents may be appointed.¹¹³

New Zealand

9.82 The Law Commission of New Zealand, when reviewing this issue in its earlier review of the law of trusts, expressed the view that the present law in relation to the appointment of agents was defective in two respects:¹¹⁴

First, the line between ministerial and other functions is less than hard-edged. Secondly, and more importantly, '[t]rusteeship is an increasingly specialised task that often requires professional skills that trustees may not have'. (note omitted)

9.83 It therefore recommended the adoption of a provision based on the *Trustee Act 2000* (UK), authorising trustees to exercise all or any of their delegable functions as their agent.¹¹⁵ It considered that the following functions should *not* be able to be delegated:¹¹⁶

- (a) any function relating to whether or in what way any assets of the trust should be distributed, used, possessed or otherwise beneficially enjoyed;
- (b) any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital;
- (c) any power to decide whether payments received by the trustees should be appropriated to income or capital;
- (d) any power to appoint a person to be a trustee of the trust;
- (e) any right to apply to the Court conferred by this Act; or
- (f) any power conferred by any other enactment or the trust instrument which permits the trustees to delegate any of their functions.

9.84 These recommendations led to the introduction of the Trustee Amendment Bill 2007 (NZ), which authorised trustees to employ and authorise agents to carry out 'administrative functions', but not 'trustee functions'.¹¹⁷ 'Trustee functions' was

-
- (a) any function relating to whether or in what way the assets of the trust should be distributed or otherwise dealt with during the period of the trust, ... (emphasis added).

112 Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) [6.21].

113 *Ibid* [6.29].

114 Law Commission of New Zealand, *Some Problems in the Law of Trusts*, Report No 79 (2002) 1, quoting Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999) [4.6].

115 *Ibid* 2, proposed s 29.

116 *Ibid*.

117 Trustee Amendment Bill 2007 (NZ) s 5, new ss 29–29E.

defined as:¹¹⁸

determining how capital and income should be distributed, deciding what fees should be paid out of capital or income, whether payments should be appropriated to capital or income, appointing new trustees, applying to the court, and exercising a power to delegate.

9.85 However, the select committee that considered the Bill recommended that the list of non-delegable 'trustee functions' should, in addition to the powers mentioned above, include removing a trustee, appointing and removing beneficiaries, appointing or changing a date of distribution, resettlement, and changing the terms of the trust.¹¹⁹

9.86 The Bill did not proceed, and the Law Commission of New Zealand is again considering this issue as part of its current review of the law of trusts.¹²⁰ As part of that review, it has raised the issue of whether, even if the provisions proposed by the earlier Bill are enacted, the trusts legislation should specifically allow trustees to delegate their duties and powers in relation to the investment of trust property.¹²¹ In that regard, it noted that it would still be possible for a settlor to exclude such a power in the trust instrument.¹²²

Canada

9.87 In Canada, the trustee legislation in Alberta, British Columbia, Nova Scotia, Ontario and Prince Edward Island currently authorises trustees to delegate to an agent the degree of authority with respect to the investment of trust funds that a prudent investor might delegate in accordance with ordinary investment practice.¹²³

9.88 Under the legislation, trustees must exercise prudence in selecting an agent, establishing the terms of the delegated authority, and monitoring the performance of the agent to ensure compliance with the terms of the delegation.¹²⁴

9.89 The British Columbia Law Institute, in its review of the law of trusts, considered that expanded powers of delegation should be given to trustees, especially in relation to investment,¹²⁵ and recommended the following provision:¹²⁶

¹¹⁸ Law Commission of New Zealand, *The Duties, Office and Powers of a Trustee: Review of the Law of Trusts*, Issues Paper No 26 (2011) [5.8].

¹¹⁹ *Ibid* [5.9].

¹²⁰ *Ibid* [5.10].

¹²¹ *Ibid* [5.34], [5.36].

¹²² *Ibid* [5.36].

¹²³ *Trustee Act*, RSA 2000, c T-8, s 5(2); *Trustee Act*, RSBC 1996, c 464, s 15.5(2); *Trustee Act*, RSNS 1989, c 479, s 3F(2); *Trustee Act*, RSO 1990, c T23, s 27.1(1); *Trustee Act*, RSPEI 1988, c T-8, s 3.5(2).

¹²⁴ *Trustee Act*, RSA 2000, c T-8, s 5(3); *Trustee Act*, RSBC 1996, c 464, s 15.5(3); *Trustee Act*, RSNS 1989, c 479, s 3F(3); *Trustee Act*, RSO 1990, c T23, s 27.1(4); *Trustee Act*, RSPEI 1988, c T-8, s 3.5(3).

¹²⁵ British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 33.

¹²⁶ *Ibid*, Proposed *Trustee Act*, cl 7.

Power to employ agents

- 7.(1) If it is reasonable and prudent to do so, a trustee may engage one or more persons as agents within or outside the province to carry out any act required to be done in the administration of the trust, including the execution of documents, the payment, transfer and receipt of money or other property, and the giving of discharges for receipts.
- (2) Subsection (1) does not authorize the delegation of authority to exercise any express, implied, or statutory discretion as to the transfer or distribution of trust property to or among the beneficiaries of the trust.
- (3) In engaging an agent, a trustee must personally select the agent, be satisfied of the agent's suitability to perform the act for which the agent is to be engaged, and carry out such supervision of the agent as is prudent and reasonable.
- (4) A trustee is liable for loss caused by the default of an agent engaged under subsection (1) only if the trustee is in breach of subsection (3) and the loss is a consequence of that breach.
- (5) A trustee must not engage a co-trustee as an agent under this section unless the engagement would have been reasonable and prudent if the co-trustee had not been a co-trustee.
- (6) A trustee who has engaged an agent under subsection (1) may authorize the agent in writing to engage another person to carry out any act for which the agent was engaged, unless the trust instrument expressly prohibits the trustee from authorizing the engagement of a sub-agent.

9.90 In explaining the effect of its proposed provision, the British Columbia Law Institute commented:¹²⁷

The common law generally prohibits delegation of a power that involves the exercise of discretion. The Act draws a distinction between administrative and dispositive powers. In our view, whether a power is delegable should depend on whether the power is administrative or dispositive and not on whether the power is discretionary. Dispositive powers are at the core of the trustee's duties and should not be delegable unless the trust terms provide otherwise.

9.91 This provision has not yet been enacted in British Columbia, but has been adopted in Saskatchewan.¹²⁸

Scotland

9.92 The Scottish Law Commission has considered this issue in a 2004 Discussion Paper, noting that '[m]uch of the pressure for reform or clarification in this area appears to come from the management of investments'.¹²⁹

¹²⁷ Ibid 33.

¹²⁸ *Trustee Act 2009*, SS 2009, c T-23.01, s 11.

¹²⁹ Scottish Law Commission, *Trustees and Trust Administration*, Discussion Paper No 126 (2004) [3.10].

9.93 It appeared to be of the view that 'administrative acts should be capable of delegation while discretionary and distributive functions must remain the province of the trustees', and considered the present issue to be 'whether it is possible to provide clearer guidance by way of new statutory provisions'.¹³⁰

9.94 The Scottish Law Commission considered the draft provision recommended by the British Columbia Law Institute (see [9.89] above), but saw problems with clause 7(2). In its view, that provision either created too narrow an exclusion or left open that there is a range of functions that are neither 'clearly delegable nor clearly non-delegable':¹³¹

If it is taken to mean that everything other than the non-delegable exclusions can be carried out by agents, then in our view it goes too far. Trustees should not be permitted to surrender every function other than distribution. Even if they hand over the day-to-day administration of the trust and its assets they should still decide basic policy, set guidelines, communicate them to agents and keep these matters under review. Not to do so would in our view amount to a breach of their duty of care. On the other hand, it should be open to trustees to authorise agents to act upon or implement distributive decisions made by the trustees. Another interpretation is that there remains a range of functions that are neither clearly delegable nor clearly non-delegable, so that the grey areas of the current law would remain unresolved. We are not attracted by this draft legislative formula.

9.95 It was also of the view that the range of functions that may be delegated under section 11 of the *Trustee Act 2000* (UK) was too wide:¹³²

Trustees should have to decide the basic strategy for carrying out the trust and whether to retain or dispose of substantial assets.

9.96 On the other hand, it considered that it would not be feasible, 'given the wide variety of trusts and the multitude of tasks that trustees have to perform', to set out the matters that trustees *may* delegate to an agent.¹³³

9.97 The Scottish Law Commission suggested that '[t]he current difficulties are not with the principles that limit delegation but in applying them to the wide variety of circumstances that are met in practice'.¹³⁴ It noted that, at present, it considered that 'it would be very difficult to frame rules applicable to all trusts that provided clearer guidance than the existing common law'.¹³⁵

The extent to which the Act should provide for the delegation of powers

9.98 As explained above, a number of overseas jurisdictions have enacted legislation, or made recommendations, to give trustees broader powers to delegate

130 Ibid [3.11].

131 Ibid [3.12].

132 Ibid [3.13].

133 Ibid [3.14].

134 Ibid.

135 Ibid.

the exercise of certain of their powers, with a particular focus on the exercise of their power of investment. This has generally involved a broad conferral of power, subject to various specified exceptions, such as the powers to distribute trust property or appoint (or remove) trustees.¹³⁶

9.99 If the main concern is that trustees should be able to appoint a third party to exercise their power of investment, a simpler approach might be to confer that specific power, as is done in the Canadian provinces discussed earlier. That approach avoids the need to identify each power that should *not* be capable of being delegated. It also avoids the potential for uncertainty in relation to the scope of individual exceptions.

9-6 Is there a need for the *Trusts Act 1973* (Qld) to be amended to allow trustees to delegate the exercise of certain of their powers to a third party?

9-7 If yes to Question 9-6:

- (a) should the Act provide a general power for trustees to delegate their powers to another person, subject to specified exceptions and, if so, what should those exceptions be;**
- (b) alternatively, should the Act make provision only for the delegation of trustees' power of investment;**
- (c) are there particular provisions of the *Trustee Act 2000* (UK) that should or should not be included in the Act, for example, the provisions:¹³⁷
 - (i) enabling trustees to authorise a person to act on terms that:

 - (A) permit the person to appoint a substitute;**
 - (B) restrict the liability of the person, or that of the substitute, to the trustees or to any beneficiary; or**
 - (C) permit the person to act in circumstances capable of giving rise to a conflict of interest;******

¹³⁶

See, eg, Law Commission of England and Wales, *Trustees, Powers and Duties*, Report No 260 (1999) pt IV; Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) ch 6; Law Commission of New Zealand, *Some Problems in the Law of Trusts*, Report 79 (2002) 1–3; Scottish Law Commission, *Trustees and Trust Administration*, Discussion Paper No 126 (2004) 11–15; Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 43–9; Alberta Law Reform Institute, *Trustee Investment Powers*, Report No 80 (2000) 84; British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 33.

¹³⁷

The provisions of the *Trustee Act 2000* (UK) c 29 in relation to the power to delegate are discussed at [9.60] ff above.

- (ii) requiring that the appointment of a person to exercise the trustees' power of investment be made in writing and accompanied by a statement that gives the person guidance about how the power should be exercised;
- (d) what safeguards should be included in the Act, for example, should the Act impose any specific duties on trustees in relation to any (or all) of the following:
 - (i) selecting the person;
 - (ii) determining the terms on which the person is appointed;
 - (iii) reviewing the arrangements under which the person is appointed?

VALUATIONS

9.100 Section 51 of the *Trusts Act 1973* (Qld) deals with the valuation of trust property and of property that a trustee is authorised to purchase or otherwise acquire. It provides:

51 Valuations

- (1) A trustee may, for the purpose of giving effect to the trust, or any of the provisions of the instrument (if any) creating the trust or of this Act or any other Act from time to time ascertain and fix the value of any trust property, or of any property which the trustee is authorised to purchase or otherwise acquire, in such manner as the trustee thinks proper; and where the trustee is not personally qualified to ascertain the value of any property the trustee shall consult a duly qualified person (whether employed by the trustee or not) as to that value; but the trustee shall not be bound to accept any valuation made by any person whom the trustee may consult.
- (2) Any valuation made by the trustee in good faith under this section is binding on all persons beneficially interested under the trust.

Power to ascertain the value of trust property or other property

9.101 Section 51(1) of the *Trusts Act 1973* (Qld) specifically empowers a trustee personally to 'ascertain and fix' the value of the relevant property. Additionally, it provides that, if the trustee is not personally qualified to ascertain the value of the property, he or she must consult a duly qualified valuer about the value, although the trustee is not bound to accept that valuation.

9.102 The power conferred by section 51 is of particular relevance to the exercise of a trustee's power of appropriation under section 33(1)(l) of the Act. That section provides that a trustee may, in respect of any trust property:¹³⁸

- (l) appropriate any part of the property in or towards satisfaction of any legacy payable thereout or in or towards satisfaction of any share of the trust property (whether settled, contingent or absolute) to which any person is entitled, and for that purpose value the whole or any part of the property in accordance with section 51; ... (emphasis added)

9.103 The trustee legislation in Western Australia and New Zealand includes a provision in virtually identical terms to section 51.¹³⁹ In contrast, the trustee legislation in the ACT, New South Wales, Victoria and England empowers a trustee, by duly qualified agents, to ascertain and fix the value of trust property, but does not confer any power on the trustee to carry out the valuation personally.¹⁴⁰

9.104 In recommending a provision to the effect of section 51 in its 1971 Report, this Commission preferred the Western Australian provision to the English provision.¹⁴¹

Section 22(3) of the English Act ... appears to assume that it is incumbent on the trustee to employ duly qualified valuers for this purpose: the Western Australian provision (section 50) allows the trustee greater liberty of action in this respect, by enabling him to carry out the valuation himself if qualified to do so, and by providing that the trustee shall not be bound to accept the valuation of any person whom he has consulted. The Western Australian section is thus more flexible and should, we consider, be adopted in preference to the United Kingdom provision.

The effect of a valuation made by the trustee

Valuations to which section 51(2) applies

9.105 Section 51(2) of the *Trusts Act 1973* (Qld) provides for the effect of a 'valuation made by the trustee in good faith' under section 51.

9.106 Section 51(1) does not use the expression 'valuation', but instead provides that a trustee may ascertain and fix the value of trust property in one of two ways: personally or after consulting a duly qualified person. Because the value, in either case, is ascertained by the trustee, the reference in section 51(2) to a 'valuation made by the trustee' does not appear to be limited to the situation where the trustee has personally ascertained the value of the property. While the Commission considers that this is the better construction of the section, in its view, the section should be redrafted to remove this ambiguity.

¹³⁸ *Trusts Act 1973* (Qld) s 33(1)(l) is considered in greater detail at [10.97] ff below.

¹³⁹ *Trustees Act 1962* (WA) s 50; *Trustee Act 1956* (NZ) s 28.

¹⁴⁰ *Trustee Act 1925* (ACT) s 52; *Trustee Act 1925* (NSW) s 52; *Trustee Act 1958* (Vic) s 26(3); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 22(3).

¹⁴¹ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 42.

9.107 The trustee legislation in New South Wales, Victoria, Western Australia and New Zealand also provides for the effect of a valuation made in 'good faith',¹⁴² while the ACT legislation provides for the effect of a valuation made 'honestly'.¹⁴³

Relevant valuation 'binding' on beneficiaries

9.108 Section 51(2) of the *Trusts Act 1973* (Qld) provides that a valuation made by the trustee in good faith under the section is 'binding on all persons beneficially interested under the trust'.

9.109 The provisions in the ACT, New South Wales, Victoria, Western Australia and New Zealand also provide that a relevant valuation is 'binding' on all persons interested (or beneficially interested) under the trust.¹⁴⁴

9.110 In England, section 22(3) of the *Trustee Act 1925* originally provided that a valuation made in good faith under the section was binding on all persons interested under the trust. However, the section now provides that the valuation is binding on such persons if the trustees have discharged the duty of care set out in section 1(1) of the *Trustee Act 2000* (UK).¹⁴⁵

9.111 Although these provisions all provide that the valuation is 'binding' on the beneficiaries, the provisions do not clarify whether the valuation is binding on the beneficiaries for all purposes or only for some purposes.

9.112 Suppose, for example, that a trustee appropriates certain property to a beneficiary in satisfaction of the beneficiary's share of the trust property and, for that purpose, values the appropriated property. The valuation is made in good faith, but the trustee negligently overvalues the property. As a result, the beneficiary to whom the property is appropriated receives less than his or her entitlement under the trust. It follows that the distribution of the remaining property to the other beneficiaries would result in their receiving more than their entitlement.

9.113 On the narrowest construction of section 51(2), it might be argued that the valuation binds the beneficiaries in terms of their rights as between themselves, but that the provision does not affect the rights between the beneficiaries and the trustee. On this construction, the distribution to the beneficiaries who received an overpayment would remain undisturbed, but the underpaid beneficiary would not be prevented from pursuing the trustee to recover his or her loss.

9.114 However, even on the narrowest construction of section 51(2), its effect in protecting the distributions made to the overpaid beneficiaries is not consistent with the policy underpinning section 113 of the Act, which deals with remedies for the wrongful distribution of trust property. While section 113 gives the court wide

¹⁴² *Trustee Act 1925* (NSW) s 52(2); *Trustee Act 1958* (Vic) s 26(3); *Trustees Act 1962* (WA) s 50(2); *Trustee Act 1956* (NZ) s 28. However, as explained above, the provisions in New South Wales and Victoria apply only to a valuation made by a valuer.

¹⁴³ *Trustee Act 1925* (ACT) s 52(2).

¹⁴⁴ *Trustee Act 1925* (ACT) s 52(2); *Trustee Act 1925* (NSW) s 52(2); *Trustee Act 1958* (Vic) s 26(3); *Trustees Act 1962* (WA) s 50(2); *Trustee Act 1956* (NZ) s 28.

¹⁴⁵ *Trustee Act 2000* (UK) c 29, s 1(1) is set out at [7.75] above.

powers in certain circumstances to make such orders as it considers to be just in all the circumstances, the section does not give absolute protection to beneficiaries or other persons who have received a wrongful distribution.¹⁴⁶

9.115 Another construction of section 51(2) is that, as a consequence of the valuation being 'binding' on all the beneficiaries (including the underpaid beneficiary), the underpaid beneficiary cannot pursue any claim against the trustee. This view is consistent with the obiter comments made by the Western Australian Court of Appeal in *Clay v Clay*,¹⁴⁷ where the Court considered the purpose of the equivalent Western Australian provision (section 50 of the *Trustees Act 1962* (WA)), although, on the facts, it had no application.¹⁴⁸ The Court of Appeal considered that section 50(1) is facilitative, while section 50(2) is protective:¹⁴⁹

s 50 would appear from its terms to be a permissive and facilitative provision which a trustee may call in aid in the performance of a trust. If the trustee does rely on s 50, and does observe its terms, then the trustee secures the advantage and protection of s 50(2) by which the value of property is determined and the beneficiaries are bound to that value. But if the trustee does not rely on s 50, or fails to observe the terms of s 50(1), the trustee loses the advantage and protection of s 50(2), and if the trustee's administration is challenged by a beneficiary the issue whether the trustee has duly administered the estate in the sale of assets falls to be determined according to the ordinary rules for administration and without the intervention of s 50.

9.116 If this second construction is correct, a further issue that arises is whether the trustee should be protected only when the trustee has ascertained the value after consulting a duly qualified person or whether the trustee should also be protected in circumstances where he or she has carried out the valuation personally. Where the trustee has relied on a duly qualified person to fix the value, the case for protecting the trustee is stronger than where the trustee has personally and negligently fixed the value.

9.117 Although the Model Trustee Code included a specific provision enabling trustees to 'employ a suitably qualified valuer',¹⁵⁰ it did not include a provision to the effect of section 51(2) of the Queensland Act. The authors of the Model Trustee Code considered that such a provision 'may not be all that desirable'.¹⁵¹ In their view:¹⁵²

146 *Trusts Act 1973* (Qld) s 113 is considered in Chapter 14.

147 (1999) 20 WAR 427. As far as the Commission is aware, this is the only decision that has considered this provision or any of its counterparts.

148 The executor relied on a valuation by the Valuer-General and did not have the property valued by a 'duly qualified valuer' in accordance with s 50(1) of the *Trustees Act 1962* (WA): (1999) 20 WAR 427, 441 (Wallwork, Owen and Parker JJ). Hence, s 50(2) had no application.

149 (1999) 20 WAR 427, 445 (Wallwork, Owen and Parker JJ). Although this decision was reversed on appeal to the High Court, the Court did not consider issues relating to s 50 of the *Trustees Act 1962* (WA): see *Clay v Clay* (2001) 202 CLR 410, 437 (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ).

150 WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 88 (cl 3.22).

151 *Ibid* 88.

152 *Ibid*.

If a trustee, in good faith, employs a valuer who either grossly undervalues property which the trustee contemplates selling or grossly overvalues property which the trustee contemplates acquiring it is submitted that such a valuation should not be binding upon the beneficiaries at least before it is acted upon. They should be able to restrain the trustee from acting on the valuation.

9.118 The authors of the Model Trustee Code considered that the inclusion of a provision like section 51(2) would conflict with the model provision that would give the court the discretion to relieve a trustee of liability for a breach of trust (similar to section 76 of the *Trusts Act 1973* (Qld)). They noted:¹⁵³

Section 6.23 enables the court to excuse the trustee if it thinks the trustee 'ought fairly to be excused'. But if a valuation made in good faith is 'binding on all persons interested under the trust' does that mean the court must excuse a trustee, in that context, wherever he can show that he acted in good faith?

If so it is submitted that it should be omitted, because good faith should never be, of itself, a complete defence: the court should not be trammelled by such a defence in its decision of whether a trustee ought fairly to be excused.

9.119 Where a trustee appropriates trust property in satisfaction of a beneficiary's interest under the trust, the efficient administration of the trust favours having finality in terms of valuations carried out in relation to the appropriated property. However, the Commission considers that there is an issue as to the extent to which it is appropriate for section 51 to prevent beneficiaries from challenging, or pursuing remedies in respect of, a valuation that might have been carried out in good faith, but negligently.

9-8 Should the *Trusts Act 1973* (Qld) continue to include a provision that deals with the effect of a valuation made under section 51(1) or, alternatively, should section 51(2) be omitted?

9-9 If the *Trusts Act 1973* (Qld) should continue to include a provision that deals with the effect of a valuation made under section 51(1):

(a) which valuations should the provision apply to — for example, a valuation made in 'good faith' or in some other specified way;

(b) what should be the effect of the valuation?

AUDIT OF TRUST ACCOUNTS

9.120 One of the duties of trustees is to keep proper accounts.¹⁵⁴ Under the general law:¹⁵⁵

¹⁵³ Ibid.

¹⁵⁴ *Kemp v Burn* (1863) 4 Giff 348; 66 ER 740. See the discussion of this duty in Chapter 7.

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.

9.121 Section 52 of the *Trusts Act 1973* (Qld) gives trustees the specific power to have the accounts of the trust property audited or examined by a public accountant.¹⁵⁶ It provides:

52 Audit

- (1) A trustee may, in the trustee's absolute discretion, from time to time, cause the accounts of the trust property to be examined or audited by a public accountant, and shall for that purpose produce such vouchers and give such information to that person as the trustee [sic]¹⁵⁷ may require.
- (2) The costs of the examination or audit, including the fee of the person making the examination or audit, shall be charged against the capital or income of the trust property, or partly in 1 way and partly in the other, as the trustee may in the trustee's absolute discretion think fit, but, in default of any direction by the trustee to the contrary in any special case, costs attributable to capital shall be borne by capital and those attributable to income by income.
- (3) Where the trustee or 1 of the trustees is the public trustee or a trustee corporation,¹⁵⁸ nothing in this section authorises, except in the case of a business forming part of the trust property, any costs or fee to be paid out of, or borne by, the capital or income of the trust property, unless the court approves of the costs or fee being so paid out or borne. (notes added)

9.122 The power conferred by section 52(1) applies in addition to the more general power conferred by section 54(1), which enables trustees, instead of acting personally, to employ and pay an agent for a range of specified purposes, including 'the keeping and audit of trust accounts'.¹⁵⁹ The Act does not deal with the relationship between sections 54(1) and 52 — in particular, whether the power of a

¹⁵⁵ 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 estate.

¹⁵⁶ 'Public accountant' is defined in s 5(1) of the *Trusts Act 1973* (Qld).

¹⁵⁷ This reference in s 52(1) of the *Trusts Act 1973* (Qld) to 'trustee' should be a reference to 'the person' (that is, the public accountant). When originally enacted s 52(1) provided:

- (1) A trustee may, in his absolute discretion, from time to time, cause the accounts of the trust property to be examined or audited by a public accountant, and shall for that purpose produce such vouchers and give such information to that person as he may require. (emphasis added)

The change from 'he' to 'the trustee' was made by Reprint No 1, and appears to have occurred in the course of making minor editorial changes allowed under the provisions of the *Reprints Act 1992* (Qld).

¹⁵⁸ *Trusts Act 1973* (Qld) s 5(1) defines 'trustee corporation' to mean 'the public trustee or a trustee company under the *Trustee Companies Act 1968*'. Accordingly, the reference in s 52(3) to the Public Trustee is redundant.

¹⁵⁹ *Trusts Act 1973* (Qld) s 54(1) is set out at [9.32] above.

trustee to retain an agent to prepare and audit trust accounts under section 54(1) should be subject to the restriction that applies under section 52(3) in the case of the Public Trustee and trustee companies.

9.123 Section 52(2) concerns the apportionment of the costs of the audit as between the capital and income accounts of the trust, and is relevant where the trust has both income and capital beneficiaries. It gives the trustee a discretion to charge the costs of the audit against the capital or income of the trust or partly against each. However, in the absence of any direction to the contrary by the trustee, the costs that relate to the capital of the trust are to be borne by the capital, and those costs that relate to the income of the trust are to be borne by the income.

9.124 Section 52(3) of the *Trusts Act 1973* (Qld) provides that the section does not authorise the Public Trustee or a trustee company, except in the case of a business forming part of the trust property, to pay any costs or fees out of the capital or income of the trust property unless the court approves of the payment. Ford and Lee have suggested that the subsection reflects the view that the Public Trustee and trustee companies are seen as sufficiently qualified to maintain appropriate accounts and that the costs of preparing accounts are included in the fees that they may charge.¹⁶⁰

9.125 Provisions in similar terms to section 52 of the *Trusts Act 1973* (Qld) are included in the trustee legislation in the ACT, New South Wales, Victoria and Western Australia.¹⁶¹ These provisions are based on section 22(4) of the English *Trustee Act 1925*, except that the English provision, unlike its Australian counterparts, provides that trustees may not cause the accounts to be examined or audited more than once in every three years 'unless the nature of the trust or any special dealings with the trust property make a more frequent exercise of the right reasonable'. In recommending a provision to the effect of section 52 of the *Trusts Act 1973* (Qld) in its 1971 Report, this Commission preferred the approach taken in the Australian provisions, which leaves the frequency of audits to the discretion of the trustee.¹⁶²

9-10 Subject to correcting the second reference to 'trustee' in section 52(1)¹⁶³ and omitting the redundant reference to the Public Trustee in section 52(3),¹⁶⁴ should the *Trusts Act 1973* (Qld) continue to include a provision to the effect of section 52 of the Act?

¹⁶⁰ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 12 June 2009) [61.5240].

¹⁶¹ *Trustee Act 1925* (ACT) s 51; *Trustee Act 1925* (NSW) s 51; *Trustee Act 1958* (Vic) s 27; *Trustees Act 1962* (WA) s 51, except that the provisions that are the counterparts of s 52(3) of the *Trusts Act 1973* (Qld) refer to an 'incorporated company', rather than to a 'trustee corporation'.

¹⁶² Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 42.

¹⁶³ See n 157 above.

¹⁶⁴ See n 158 above.

9-11 Should the *Trusts Act 1973 (Qld)* be amended to clarify the relationship between sections 52 and 54 and, if so, how should that be done?

POWER TO DELEGATE TRUSTS

Introduction

9.126 Trusteeship is an office of personal confidence.¹⁶⁵ For that reason, a trustee is not permitted to delegate the execution of the trust, unless authorised to do so by the trust instrument or statute.¹⁶⁶ The prohibition on delegation is an aspect of the duty to act personally.

9.127 In England, legislation was initially enacted during World War I to allow trustees, by power of attorney, to delegate the execution of their trusts during any period for which they were engaged on war service and for a further period of one month thereafter.¹⁶⁷ The power to delegate was later extended by the *Trustee Act 1925*. As originally passed, that Act enabled all trustees to delegate their trusts, powers and discretions if they were intending to remain out of the United Kingdom for a period exceeding one month.¹⁶⁸ Section 25 of the English Act now enables trustees to delegate in any circumstances, but only for a maximum period of 12 months.

9.128 The trustee legislation of all Australian jurisdictions and New Zealand also enables trustees, by power of attorney executed as a deed,¹⁶⁹ to delegate the execution of their trusts, powers, authorities and discretions.¹⁷⁰ There are, however, a number of differences between the provisions, which are considered below.

Section 56

9.129 Section 56 of the *Trusts Act 1973 (Qld)* provides:

56 Power to delegate trusts

- (1) A trustee who for the time being is out of the State or is about to depart therefrom, or who is, or may be about to become, by reason of physical infirmity, temporarily incapable of performing all duties as a trustee

¹⁶⁵ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 44.

¹⁶⁶ *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).

¹⁶⁷ *Execution of Trusts (War Facilities) Act 1914*, 5 Geo 5, c 13; *Execution of Trusts (War Facilities) Act 1915*, 5 & 6 Geo 5, c 70.

¹⁶⁸ *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 25 (Act as passed).

¹⁶⁹ In Queensland, see s 45 of the *Property Law Act 1974 (Qld)*.

¹⁷⁰ *Trustee Act 1925 (ACT)* s 64; *Trustee Act 1925 (NSW)* 64; *Trustee Act (NT)* sch 3 (*Trustee Act 1907* s 3); *Trusts Act 1973 (Qld)* s 56; *Trustee Act 1936 (SA)* s 17; *Trustee Act 1898 (Tas)* s 25AA; *Trustee Act 1958 (Vic)* s 30; *Trustees Act 1962 (WA)* s 54; *Trustee Act 1956 (NZ)* s 31.

may, subject to the provisions of this section, and notwithstanding any rule of law or equity to the contrary, by power of attorney executed as a deed, delegate to any person resident in the State the execution or exercise during the trustee's absence from the State or during the trustee's incapacity, as the case may be, of all or any trusts, powers, authorities, and discretions vested in the trustee as such trustee, whether alone or jointly with any other person or persons; but a person being the only other co-trustee and not being a trustee corporation shall not be appointed to be an attorney under this subsection.

- (2) Where any delegation has under this section been duly made to and accepted by any person and is for the time being in operation, that person has, within the scope of the delegation, the same trusts, powers, authorities, discretions, liabilities, and responsibilities (except the power of delegation conferred by this section) as the person would have if the person were then the trustee.
- (3) Every trustee shall be liable for the acts and defaults of every such delegate as if they were the trustee's own acts and defaults.
- (4) All jurisdictions and powers of any court apply to the donee of a power of attorney given under this section in the same manner, so far as respects the execution of the trust or the administration of the estate to which the power of attorney relates, as if the donee were acting in relation to the trust or estate in the same capacity as the donor of the power.
- (5) A power of attorney given under this section does not come into operation unless and until the donor is out of the State or is incapable of performing all the donor's duties as a trustee, and is revoked by the donor's return or by the donor's recovery of that capacity, as the case may be.
- (6) In favour of any person dealing with the donee of a power of attorney given under this section, any act done or instrument executed by the donee, is, notwithstanding that the power has never come into operation or has been revoked, whether by the act of the donor of the power or by operation of law, as valid and effectual as if the power had come into operation and remained unrevoked at the time when the act was done or the instrument executed, unless that person had at that time actual notice that the power had never come into operation or of the revocation of the power.
- (7) A statutory declaration by the donee of a power of attorney given under this section relating to any trust or estate that the power has come into operation or that in any transaction the donee is acting in the execution of the trust or the administration of the estate, is, in favour of a person dealing with the donee of the power, conclusive evidence of that fact.
- (8) The fact that it appears from any power of attorney given under this section, or from any evidence required for the purposes of any power of attorney or otherwise, that in any transaction the donee of the power is acting in the execution of a trust shall not affect with notice of the trust any person dealing in good faith with the donee.

9.130 Section 56(1) enables a trustee to delegate, by power of attorney executed as a deed, 'all or any trusts, powers, authorities and discretions' vested in the trustee in circumstances where the trustee is out of the State or is about to

depart from the State or is, or may be about to become, temporarily incapable of performing all duties as a trustee. The delegation may be made to any person resident in Queensland, but one of two trustees may not delegate to his or her co-trustee, unless the co-trustee is a trustee corporation.

9.131 Section 56(2) provides that the delegate has the same trusts, powers, authorities, discretions, liabilities and responsibilities as the trustee, except for the power to delegate that is itself conferred by section 56. This operates as a prohibition on subdelegation.¹⁷¹

9.132 A power of attorney given under section 56 takes effect when the trustee is out of the State or becomes incapable of performing his or her duties, and is revoked by the trustee's return to the State or recovery of physical capacity, as the case may be.¹⁷²

9.133 Section 56(6) protects third parties who deal with a delegate whose authority has not come into operation or has been revoked, provided that the third party did not have actual notice, at the time, that the power of attorney had not come into operation or had been revoked.

9.134 The power to delegate that is conferred by section 56 applies whether or not a contrary intention is expressed in the instrument (if any) creating the trust.¹⁷³ In contrast, the power to delegate is not invariable in the other Australian jurisdictions, but can be excluded by the trust instrument.¹⁷⁴ Assuming that the power continues to be an invariable one under the *Trusts Act 1973* (Qld), the fact that the power cannot be excluded by the trust instrument may be a factor in deciding the extent to which the power to delegate should be widened or otherwise changed.

Circumstances in which a trustee may delegate

9.135 The circumstances in which a trustee may delegate the execution of the trust are generally fairly narrow. This reflects the fact that the office of trustee is ordinarily one that should be exercised personally.

9.136 In Queensland and Western Australia, a trustee may delegate the execution of his or her trusts if he or she:

- is out of the State or is about to depart from the State; or

¹⁷¹ Similar provision is made in the trustee legislation of Victoria, Western Australia, New Zealand and England: *Trustee Act 1958* (Vic) s 30(8); *Trustees Act 1962* (WA) s 54(3); *Trustee Act 1956* (NZ) s 31(9); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 25(8).

¹⁷² *Trusts Act 1973* (Qld) s 56(5).

¹⁷³ *Trusts Act 1973* (Qld) s 31(1).

¹⁷⁴ *Trustee Act 1925* (ACT) s 64(9); *Trustee Act 1925* (NSW) s 64(8); *Trustee Act* (NT) sch 3 (*Trustee Act 1907* s 3(1)); *Trustee Act 1936* (SA) s 17(1); *Trustee Act 1898* (Tas) s 25AA(1); *Trustee Act 1958* (Vic) ss 2(3), 30; *Trustees Act 1962* (WA) ss 5(2)–(3), 54.

- is, or may be about to become, by reason of 'physical infirmity', temporarily incapable of performing all duties as a trustee.¹⁷⁵

9.137 In the ACT, New South Wales, the Northern Territory, Tasmania and Victoria, the power is more limited, applying only if the trustee is absent from, or about to leave, the jurisdiction.¹⁷⁶ The legislation does not provide for delegation in circumstances of anticipated physical incapacity.

9.138 In South Australia, however, the power to delegate is not limited to any particular circumstances.¹⁷⁷ As mentioned earlier, this is also the position in England. The circumstances in which trustees may delegate their trusts was widened in England 'in recognition that a trustee's inability to attend to trust affairs may arise for reasons other than absence abroad'.¹⁷⁸

9.139 The power to delegate was considered by the Law Commission of New Zealand in a recent Issues Paper. That Commission noted that the current position is 'widely thought to be too restrictive'.¹⁷⁹ It considered whether to remove all restrictions on when a trustee may delegate his or her powers, but rejected that approach. In its view, the 'desire for flexibility must be balanced against the need to ensure the power does not become overused'.¹⁸⁰

There are usually good reasons why a particular person is appointed as trustee, such as the skills and knowledge he or she brings to the role. It is therefore not desirable to make it too easy to allow someone to act in the trustee's place or for such a substitution to persist for a long period. We were not persuaded that it is necessary to greatly widen the circumstances when the power to delegate can be used by completely removing the criteria for when a delegation can be made.

9.140 However, the Law Commission of New Zealand proposed that the provision should be extended to cover temporary 'mental incapacity', in addition to temporary physical infirmity. It noted that the expansion of the circumstances of delegation to include temporary mental incapacity had been the most frequent comment made in the submissions. It observed, however, that the delegation would need to be made while the trustee still had capacity.¹⁸¹ Because the Commission also recommended that the delegation should not usually last for more than 12 months, the Commission's proposal would operate in fairly limited circumstances

¹⁷⁵ *Trusts Act 1973* (Qld) s 56(1); *Trustees Act 1962* (WA) s 54(1). In Western Australia, the power to delegate also applies if the trustee is a member of Her Majesty's forces. In New Zealand, although delegation is permitted in slightly wider circumstances than is possible under the Queensland legislation, the circumstances are still essentially concerned with absence from the jurisdiction and physical incapacity: *Trustee Act 1956* (NZ) s 31(1).

¹⁷⁶ *Trustee Act 1925* (ACT) s 64(1); *Trustee Act 1925* (NSW) 64(1); *Trustee Act* (NT) sch 3 (*Trustee Act 1907* s 3); *Trustee Act 1898* (Tas) s 25AA(1); *Trustee Act 1958* (Vic) s 30(1).

¹⁷⁷ *Trustee Act 1936* (SA) s 17(3)(b). See *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 25(2)(b).

¹⁷⁸ Law Commission of England and Wales, *Trustees' Powers and Duties*, Consultation Paper No 146 (1997) [3.35].

¹⁷⁹ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) [4.38].

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

and would not, for example, enable the delegate of a person with mental incapacity to act as a delegate on a long-term basis.

9.141 When the Law Commission of England and Wales originally considered this issue, it recommended that the proposed Enduring Powers of Attorney Bill should exclude delegation by a trustee under section 25 of the *Trustee Act 1925*. In its view, the 12 month limit on duration that the Act imposed ‘would contradict the inherent long-term nature of an enduring power’. It also considered that the *Trustee Act 1925* ‘already made provision for replacement of unfit or incapable trustees’.¹⁸² Thus, the original intention of the enduring powers of attorney legislation proposed by the Law Commission was that ‘no power of delegation by trustees should be exercisable by means of an enduring power of attorney’.¹⁸³

9.142 However, for reasons that do not apply in Queensland,¹⁸⁴ the Enduring Powers of Attorney Bill was amended during its passage through Parliament to allow trustees to delegate their trusts by an enduring power of attorney.¹⁸⁵ In 1999, the *Trustee Delegation Act 1999* (UK) was enacted to provide a different mechanism to address the problem that had prompted that amendment,¹⁸⁶ and the *Enduring Powers of Attorney Act 1985* (UK) was amended to remove the provision enabling trustees to delegate their trusts by an enduring power of attorney.¹⁸⁷ The Law Commission considered that it was generally undesirable for a trustee to be able to appoint a delegate to act while the trustee has impaired capacity, as the incapable trustee will not be able to supervise the delegate:¹⁸⁸

182 Law Commission of England and Wales, *The Law of Trusts: Delegation by Individual Trustees*, Report No 220 (1994) [2.15].

183 Ibid.

184 In England, co-owners of property hold their respective interests as trustees. This led to problems where one co-owner lost capacity and the property needed to be sold, as s 25 of the *Trustee Act 1925*, 15 & 16 Geo 5, c 19 did not allow a co-owner to delegate the trust to the other co-owner (being the sole co-trustee), and a general power of attorney that was given to a third party was revoked by the onset of incapacity: see Law Commission of England and Wales, *The Law of Trusts: Delegation by Individual Trustees*, Report No 220 (1994) [2.10].

185 *Enduring Powers of Attorney Act 1985* (UK) c 29, s 3(3) (Act as passed) provided:

(3) Subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any consent) execute or exercise all or any of the trusts, powers or discretions vested in the donor as trustee and may (without the concurrence of any other person) give a valid receipt for capital or other money paid.

This provision was inserted in response to the decision of the English High Court in *Walia v Michael Naughton Ltd* [1985] 1 WLR 1115: see Law Commission of England and Wales, *The Law of Trusts: Delegation by Individual Trustees*, Report No 220 (1994) [2.16]; Law Commission of England and Wales, *Trustees' Powers and Duties*, Consultation Paper No 146 (1997) [3.39] ff.

186 The Law Commission of England and Wales recommended that the donee of a power of attorney should not be prevented from acting in relation to land in which he or she had a beneficial interest, thereby reversing *Walia v Michael Naughton Ltd* [1985] 1 WLR 1115: Law Commission of England and Wales, *The Law of Trusts: Delegation by Individual Trustees*, Report No 220 (1994) [4.31]; Law Commission of England and Wales, *Trustees' Powers and Duties*, Consultation Paper No 146 (1997) [3.40], n 172. See also *Trustee Delegation Act 1999* (UK) c 15, s 1.

187 *Trustee Delegation Act 1999* (UK) c 15, ss 4, 12, sch (Act as passed).

188 See Law Commission of England and Wales, *The Law of Trusts: Delegation by Individual Trustees*, Report No 220 (1994) [3.8].

When someone is mentally incapable of exercising the functions of a trustee, those who have the power of appointing new trustees are entitled to remove and replace the incapable trustee. A trustee who, before losing capacity, appoints an attorney under an enduring power permits the continued exercise of the trustee functions, in his name, after he becomes incapable. In general trustee cases, this seems anomalous, and indeed it is also undesirable because the incapable trustee is not in a position to exercise any supervision over the attorney whom he appointed. (notes omitted)

9-12 Should section 56 of the *Trusts Act 1973* (Qld) provide, as an additional circumstance in which delegation is permitted, that the trustee may be about to become, by reason of 'impaired capacity', temporarily incapable of performing all duties as a trustee?

Duration of delegation

9.143 In Queensland, the delegation takes effect when the trustee leaves the State, or is incapable of performing his or her duties, and is revoked when the trustee returns to the State or recovers physical capacity.¹⁸⁹ However, there is no particular limitation on the period for which the delegation may subsist. Similarly, there is no limitation on the duration of the delegation in Western Australia or New Zealand.¹⁹⁰

9.144 In contrast, a number of other jurisdictions prescribe a maximum limit for the duration of the delegation. For example, in the ACT and New South Wales, the delegation automatically expires two years from the date of the deed.¹⁹¹ In the Northern Territory, the delegation may not exceed 12 months from the date of the power of attorney¹⁹² and, in South Australia, the power of attorney expires 12 months from the date on which it came into operation.¹⁹³ In England, a delegation cannot last for more than 12 months from its commencement.¹⁹⁴

9.145 The Law Commission of New Zealand has recently proposed the introduction of a 12 month limit on the duration of the delegation, with an option for the trustee to extend by a further 12 months. It considered that the imposition of such a restriction reflected the fact that the delegation of a trust is a temporary measure.¹⁹⁵

¹⁸⁹ *Trusts Act 1973* (Qld) s 56(5).

¹⁹⁰ *Trustees Act 1962* (WA) s 54; *Trustee Act 1956* (NZ) s 31.

¹⁹¹ *Trustee Act 1925* (ACT) s 64(5); *Trustee Act 1925* (NSW) s 64(4).

¹⁹² *Trustee Act* (NT) sch 3 (*Trustee Act 1907* s 3(1)).

¹⁹³ *Trustee Act 1936* (SA) s 17(3).

¹⁹⁴ *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 25(2).

¹⁹⁵ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) [4.39].

Several submitters suggested that this was a useful restriction on this power. The 12 month period would be a good indicator to a trustee considering delegating his or her powers of when delegation is appropriate and when it would be better to resign. We consider that a 12 month limit reflects the intention that a delegation is only temporary. We favour allowing the trustee to extend a current delegation by a further 12 months as this introduces an added flexibility when circumstances do not exactly fit the 12 month timeframe. (note omitted)

9.146 The British Columbia Law Institute expressed a similar view, noting that '[w]here a greatly extended period is contemplated, it may be preferable for the trustee to resign rather than engage in a full delegation'.¹⁹⁶ It considered that a limit on the effective duration of the power of attorney is an important safeguard, and recommended that the duration should be limited to 12 months.¹⁹⁷ The Ontario Law Reform Commission also recommended that delegation by power of attorney should be limited to a period not exceeding 12 months.¹⁹⁸

9.147 If the period of the delegation is to be restricted, a further issue is the date from which the relevant period should run. It would provide greater certainty for the period to run from the date of the power of attorney (as it does in the ACT and New South Wales). However, because the trustee might not leave the jurisdiction, or lose physical capacity, immediately, it would provide greater utility for the period to run from when the power of attorney comes into operation under section 56(5).¹⁹⁹ However, the exact date on which the trustee becomes incapable of performing all of his or her duties as a trustee is not likely to be a matter that can be identified with any certainty.

9-13 Should section 56 of the *Trusts Act 1973* (Qld) be amended to impose a 12 month (or some other) limitation on the duration of the delegation and, if so, should that period run from:

- (a) the date of execution of the power of attorney; or
- (b) the date when the power of attorney comes into operation under section 56(5)?

Liability of trustee for acts and defaults of delegate

9.148 In Queensland and most other Australian jurisdictions, a trustee is personally liable for the acts and defaults of his or her delegate, as if they were the trustee's own acts and defaults.²⁰⁰ This is also the position in England.²⁰¹ It has

¹⁹⁶ British Columbia Law Institute, *Statutory Powers of Delegation by Trustees*, Report No 11 (2000) 14.

¹⁹⁷ *Ibid.*

¹⁹⁸ Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 57.

¹⁹⁹ See [9.143] above.

²⁰⁰ *Trusts Act 1973* (Qld) s 56(3). See also *Trustee Act 1925* (ACT) s 64(8); *Trustee Act 1925* (NSW) 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).

been observed that, although 'this rule may be seen as harsh to the delegating trustee ... its purpose appears to be to deter trustees from exercising this power lightly'.²⁰²

9.149 In contrast, the trustee legislation in Western Australia and New Zealand provides that, if a beneficiary brings proceedings against the trustee in respect of any act or default of the delegate, it is a defence for the trustee to show that the delegate was appointed in good faith and without negligence.²⁰³

9.150 In its 1971 Report, this Commission declined to follow the Western Australian and New Zealand approach, stating that it was desirable to retain the requirement that the trustee shall be liable for the acts and defaults of the delegate.²⁰⁴

9.151 The Ontario Law Reform Commission also rejected the more lenient approach found in the New Zealand legislation. It considered that the 'concession' of the New Zealand provision to the trustee was understandable, but did 'not think that statute, as opposed to a trust instrument, should go this far'.²⁰⁵

9.152 Similarly, the British Columbia Law Institute expressed the view that imposing full liability on the trustee is an important safeguard in circumstances where the trustee can delegate the totality of his or her duties and powers.²⁰⁶

The safeguard to which we refer recognizes that with total delegation a great deal of care is called for in the selection of an attorney. We believe that the best way in which to ensure that the necessary level of consideration is given to that task is to place the risk of wrongful or negligent conduct by the attorney squarely on the appointing trustee rather than on the trust beneficiaries.

9.153 Recently, the Law Commission of New Zealand stated that it favoured maintaining the current approach in that jurisdiction in relation to the liability of a trustee for the acts and defaults of a delegate. Although some of its respondents had suggested that trustees should be liable for a delegate's actions, it considered that the current approach in that jurisdiction was fairer:²⁰⁷

[S]ome submitters did suggest that trustees should be liable for a delegate's actions. However, it is fairer to the trustee to limit liability to when they have not exercised good faith and reasonable care in the exercise of the delegation as they cannot easily do more than this when they are in the circumstances that allow a delegation. We are also unaware of any problems with this approach to the trustee's liability currently. Most submitters agreed with this approach.

201 *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 25(7).

202 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 January 2012) [9.12050].

203 *Trustees Act 1962* (WA) s 54(4); *Trustee Act 1956* (NZ) s 31(3).

204 Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 44.

205 Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 56.

206 British Columbia Law Institute, *Statutory Powers of Delegation by Trustees*, Report No 11 (2000) 14.

207 Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) [4.41].

9.154 It has been suggested that the current Queensland approach may be too harsh, when compared with the different approach that applies in respect of a trustee's liability for the acts and defaults of an agent:²⁰⁸

[I]n the case of a plenary power given to a substitute trustee, it is hard to charge the donor of the power. Such powers are executed because donors cannot act themselves — originally only if the donor were out of the jurisdiction. Why should a trustee who is unable to act for a proper reason be more liable for the acts of a delegate than a trustee usually is for the acts of an agent?

9.155 Under section 54 of the *Trusts Act 1973* (Qld), a trustee is not currently liable for the default of an agent if the trustee employed the agent in good faith and without negligence. In Chapter 11, the Commission has examined the issue of liability under section 54, and sought submissions on the circumstances in which a trustee should be protected from liability in respect of the acts or defaults of an agent — in particular, whether a trustee should be protected only if he or she exercises the care, skill and diligence of a prudent person in employing and supervising the agent or, alternatively, if the loss does not occur through the trustee's own default.

9.156 If section 56 is amended to enable a trustee to appoint a delegate to act during a period that the trustee has impaired capacity, the trustee would not, in those circumstances, be in a position to supervise the delegate. As a general proposition, however, the Commission is interested to receive submissions on whether a trustee's liability for the acts and defaults of a delegate should be made consistent with a trustee's liability for the acts and defaults of an agent.

9-14 Should section 56(3) of the *Trusts Act 1973* (Qld):

- (a) continue to provide that a trustee is liable for the acts and defaults of his or her delegate as if they were the trustee's own acts and defaults; or**
- (b) alternatively, should a trustee's liability for the acts and defaults of a delegate be made consistent with a trustee's liability for the acts and defaults of an agent (or changed in some other way)?**

Notification

9.157 In South Australia and England, the trustee legislation requires the trustee before, or within seven days after, giving a power of attorney to give written notice of the power to:²⁰⁹

- each person (other than himself or herself), if any, who has power to appoint a new trustee under the instrument creating the trust; and

²⁰⁸ WA Lee, 'Current Issues for Trustee Legislation' (1990) 20 *University of Western Australia Law Review* 507, 530.

²⁰⁹ *Trustee Act 1936* (SA) s 17(4); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 25(4).

- each of the other trustees.

9.158 The notice must specify the date on which the power comes into operation and its duration, the donee of the power, the reason why the power is given and, where some only are delegated, the powers, authorities and discretions delegated.²¹⁰ However, failure to comply with the notification requirements does not, in favour of a person dealing with a donee of the power, invalidate any act done or instrument executed by the donee.²¹¹

9.159 The Ontario Law Reform Commission recommended the adoption of notification provisions in terms similar to the English legislation.²¹² The British Columbia Law Institute went slightly further, additionally recommending that, if there were no other trustees or persons entitled to appoint and remove trustees to whom notice can be given, then notice should be given to:²¹³

- every adult beneficiary of the trust whose interest has vested and the guardian or committee of any minor or incapacitated beneficiary whose interest has vested; and
- if there is no such person to whom notification can be given, then to the public trustee.

9.160 The British Columbia Law Institute was concerned that, in the absence of these additional notification requirements, a requirement to notify co-trustees would afford no protection in the case of a trust with a sole trustee.²¹⁴

The possibility that concerns us is that a sole trustee be able and think fit to appoint an attorney to exercise any or all of the trustee powers, and notify no one.

9.161 The Law Commission of New Zealand also favoured the introduction of a notification requirement, although it acknowledged that compliance would take some time and effort on the trustee's part.²¹⁵

9-15 Should the *Trusts Act 1973 (Qld)* be amended to require a trustee who has delegated the execution of his or her trusts to notify particular persons, for example, any of the following:

- (a) a person with the power to appoint and remove a trustee; or**

²¹⁰ *Trustee Act 1936 (SA)* s 17(5); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 25(4).

²¹¹ *Trustee Act 1936 (SA)* s 17(6); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 25(4).

²¹² Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 57.

²¹³ British Columbia Law Institute, *Statutory Powers of Delegation by Trustees*, Report No 11 (2000) 17.

²¹⁴ *Ibid* 15.

²¹⁵ Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) [4.40].

- (b) co-trustees;
- (c) if there is no one under paragraph (a) or (b) who can be notified, particular beneficiaries?

Powers of Attorney Act 1998 (Qld) and power of attorney forms

9.162 Currently, a delegation under section 56 of the *Trusts Act 1973* (Qld) would need to be made by way of a general power of attorney under the *Powers of Attorney Act 1998* (Qld).²¹⁶ The approved form for a general power of attorney provides, in clause 6, that:²¹⁷

This power of attorney gives my attorney/s power to do, on my behalf, anything that I could lawfully do by an attorney (other than a personal/health matter), subject to the above terms.

9.163 The form does not make provision for a trustee/principal to delegate the execution of his or her trusts without also giving the attorney full authority in relation to the principal's personal financial matters (or, it seems, vice versa). Nor does it make provision for a trustee of more than one trust to delegate some, but not all, of the trusts. Presumably, this is because the form has been designed for the purpose of appointing an attorney to manage the principal's own financial matters, and not with a view to its application to any trusts of which the principal might be a trustee.

9.164 Further, because clause 6 is expressed in general terms, a principal might execute a general power of attorney without appreciating, or intending, that, in doing so, the general power of attorney would operate as a delegation of the execution of any trusts of which the principal is trustee. For this reason, it is arguable that, at the very least, the approved form for a general power of attorney should make separate provision for the appointment of the attorney as a delegate under section 56 of the *Trusts Act 1973* (Qld).

9.165 Another option would be to provide for a separate approved form for the delegation by the principal of the execution of any trusts of which the principal is a trustee. This option has been adopted in England, where section 25(5) of the *Trustee Act 1925* provides for the specific manner of delegation:

- (5) A power of attorney given under this section by a single donor—
 - (a) in the form set out in subsection (6) of this section; or
 - (b) in a form to the like effect but expressed to be made under this subsection,

²¹⁶ See *Powers of Attorney Act 1998* (Qld) pt 2 (Making a power of attorney other than an enduring power of attorney).

²¹⁷ A general power of attorney made under the *Powers of Attorney Act 1998* (Qld) must be in the approved form: s 11. The approved form for a general power of attorney provides, in cl 4, for the imposition of terms on the attorney's power.

shall operate to delegate to the person identified in the form as the single donee of the power the execution and exercise of all the trusts, powers and discretions vested in the donor as trustee (either alone or jointly with any other person or persons) under the single trust so identified.

9.166 Section 25(6) further sets out a short form that is to be used for the purposes of section 25(5):

THIS GENERAL TRUSTEE POWER OF ATTORNEY is made on [date] by [name of one donor] of [address of donor] as trustee of [name or details of one trust].

I appoint [name of one donee] of [address of donee] to be my attorney [if desired, the date on which the delegation commences or the period for which it continues (or both)] in accordance with section 25(5) of the Trustee Act 1925.

[To be executed as a deed].

9-16 Should there be a separate approved form for the appointment of an attorney as the principal's delegate under section 56 of the *Trusts Act 1973* (Qld)? Alternatively, should the approved form for a general power of attorney under the *Powers of Attorney Act 1998* (Qld) make separate provision for a principal to appoint an attorney as the principal's delegate under section 56 of the *Trusts Act 1973* (Qld)?

9.167 If 'impaired capacity' is added as a further circumstance in which delegation is permitted under section 56 of the *Trusts Act 1973* (Qld),²¹⁸ and a trustee wished to provide for the delegation of the trusts in that circumstance, the delegation could not be made by way of a general power of attorney, as such a power would be revoked as soon as the trustee became a person with impaired capacity.²¹⁹

9.168 The trustee would need to be able to make the delegation by way of an enduring power of attorney (so that the power is not revoked by the trustee becoming a person with impaired capacity for the matter).²²⁰

9.169 Currently, the *Powers of Attorney Act 1998* (Qld) enables an adult (the 'principal') to authorise an attorney to do anything in relation to one or more 'financial matters' for the principal that the principal could lawfully do by an attorney if the adult had capacity.²²¹ As explained in Chapter 5, the *Powers of Attorney Act 1998* (Qld) defines 'financial matter, for a principal' to mean 'a matter relating to the principal's financial or property matters, including, for example,' various specified

²¹⁸ See [9.140] ff, Question 9-12 above.

²¹⁹ *Powers of Attorney Act 1998* (Qld) s 18(1). In that case, the attorney would not have any further authority.

²²⁰ See *Powers of Attorney Act 1998* (Qld) s 32(2).

²²¹ *Powers of Attorney Act 1998* (Qld) s 32(1).

matters all of which relate to the principal's own property and financial affairs.²²² Generally, unless a trustee is also a beneficiary under the trust,²²³ the administration of the trust will not concern the trustee's *own* financial matters, but the financial matters of third parties (being the beneficiaries under the trust).

9.170 While the definition of 'financial matter' could be amended, somewhat artificially, to include the administration of any trust of which the principal is a trustee, it would also be necessary to ensure that the delegate, as an attorney appointed under the *Powers of Attorney Act 1998* (Qld), did not become subject to particular requirements of the legislation, such as the requirement to apply the General Principles, which would not be apposite to an attorney who is exercising the delegated powers of a trustee.²²⁴

9-17 If section 56 of the *Trusts Act 1973* (Qld) is amended to add the anticipation of 'impaired capacity' as an additional circumstance in which a trustee may delegate the execution of his or her trust, what provision should be made in the *Powers of Attorney Act 1998* (Qld) to accommodate the making of an enduring power of attorney for that purpose?

THE POWER TO INSURE TRUST PROPERTY

Background

9.171 Prior to the enactment of statutory provisions giving trustees the power to insure trust property, there was some uncertainty about whether, in the absence of a power in the trust instrument, trustees had a power to insure²²⁵ or, at least, where there was a life tenant, whether trustees could insure the property at the expense of the life tenant (that is, out of income) without first obtaining the life tenant's consent.²²⁶ It seems that, under the general law, it was necessary for a trustee to obtain the consent of the life tenant unless there was a covenant under which the life tenant was bound to insure the trust property.²²⁷

The tenant for life of leaseholds, the lease of which contains a covenant to insure, is bound to insure during the continuation of his interest, *re Gjers* (1899) 2 Ch 54; *re Betty* (1899) 1 Ch 821; but not if there be no covenant to insure, *re*

²²² *Powers of Attorney Act 1998* (Qld) sch 2 s 1. See also the discussion of this issue at [5.118] ff above.

²²³ For example, where A holds property on trust for A and B.

²²⁴ See [5.122] ff above.

²²⁵ *Re Bennett* [1896] 1 Ch 778, 786 (Kay LJ). Cf *Reid v Deane* [1906] VLR 138 where a Beckett J held (at 143) that the trustees had the power, at their discretion, to insure certain trust property that formed part of the residuary estate, and to pay the premiums out of the residuary estate.

²²⁶ CCM Dale, *Lewin's Practical Treatise on the Law of Trusts and Trustees* (Sweet & Maxwell, 9th ed, 1891) 649. See also *Pateman v Heyen* (1993) 33 NSWLR 188, 194 (Cohen J).

²²⁷ FG Champernowne and H Johnston, *The Trustee Act, 1893, And Other Recent Statutes Relating to Trustees With Notes* (William Clowes & Sons, 1904) 79.

Betty, at p 829. If there be no such obligation to insure the trust property, it would seem that a tenant for life, out of whose income the trustee acting under this section has paid insurance premiums, has a right to be recouped out of capital.

9.172 Section 7(1) of the English *Trustee Act 1888* and, subsequently, section 18 of the *Trustee Act 1893* empowered a trustee to insure trust property at the expense of the life tenant, without requiring the trustee to obtain the life tenant's consent before doing so.²²⁸

[T]he law as it stood before the *Trustee Act, 1888*, placed executors and trustees in a difficult position as regards insuring buildings and property against fire: for on the one hand, if they omitted to continue or renew a policy of insurance serious loss might be occasioned to the trust estate, while, on the other hand, if they did insure, the beneficiaries interested might raise objections. Moreover, in the case of trustees at least, persons entitled to the income might have to be consulted before the insurance could properly be effected. In the memorandum originally issued with the Bill for the *Trustee Act, 1888*, the object of the Section now under discussion was said to be to remove a doubt now existing in the profession whether a trustee could insist on having trust property insured at the expense of the tenant for life ... The Section, however, removes all difficulties, leaving it entirely in the discretion of the executor or trustee to insure or not as he thinks fit, without the necessity of consulting anyone interested in the income. The result in the case of the tenant for life will be that the trustee, if he insures, can throw the expense on him.

Current provision

9.173 Section 47 of the *Trusts Act 1973* (Qld) gives trustees a power to insure any insurable property. It provides:

47 Insurance

- (1) A trustee may insure against loss or damage, whether by fire or otherwise, any insurable property, and against any risk or liability against which it would be prudent for a person to insure if the person were acting for himself or herself.
- (2) The insurance may be for any amount, provided that, together with the amount of any insurance already on foot, the total shall not exceed the insurable value or liability.
- (3) Subject to any direction expressed in the instrument (if any) creating the trust or to any direction of the court, the trustee may, as the trustee thinks fit, pay the premiums out of—
 - (a) the income of the property concerned; or
 - (b) the income of any other property subject to the same trusts; or
 - (c) any capital money subject to the same trusts; or
 - (d) any 1 or more of paragraphs (a) to (c) in such proportions as the trustee considers equitable.

²²⁸

AR Rudall and JW Greig, *The Law of Trusts and Trustees* (Jordan & Sons, 2nd ed, 1898) 75.

9.174 Provisions conferring a power to insure are found in all other Australian jurisdictions, as well as in New Zealand and England.²²⁹ The statutory provisions confer a power to insure, but do not impose a duty to do so.²³⁰

9.175 In England, there has been some uncertainty about whether, in some circumstances, a duty to insure trust property may nevertheless arise under the general law. In *Re Betty*, North J suggested that the executor-trustee should insure certain trust property at the expense, and for the benefit, of the estate (that is, out of the capital).²³¹

9.176 Subsequently, in *Re McEacharn*, Eve J rejected the argument of the persons entitled in remainder that the trustees 'ought as prudent managers of the property to exercise the statutory power' conferred on them by section 18 of the *Trustee Act 1893*. In doing so, his Honour followed two older decisions in which trustees were not held guilty of wilful default for not insuring buildings that were destroyed by fire.²³² However, Eve J emphasised that, because the only point raised was whether the property should be insured at the expense of the life tenant, his judgment said 'nothing as to whether the trustees ought to insure the premises at the expense of the estate generally'.²³³ The Law Commission of England and Wales considered that this statement 'suggests that [Eve J] was mindful of North J's remarks in *Re Betty* that trustees have a common law obligation to insure trust property, meeting the cost out of *capital* at the expense of the estate'.²³⁴

9.177 In Australia, however, the courts have recognised that trustees may have a duty to insure the trust property. In *Pateman v Heyen*, Cohen J of the Supreme Court of New South Wales held that a trustee's duty to exercise prudence could give rise to a duty to insure trust property (provided that there was income available to pay the premiums). His Honour observed that:²³⁵

229 *Trustee Act 1925* (ACT) s 41; *Trustee Act 1925* (NSW) s 41; *Trustee Act* (NT) s 18A; *Trustee Act 1936* (SA) s 25(1)–(4); *Trustee Act 1898* (Tas) s 21; *Trustee Act 1958* (Vic) s 23; *Trustees Act 1962* (WA) s 46; *Trustee Act 1956* (NZ) s 24; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 19.

230 *Re McEacharn* (1911) 103 LT 900. See also FG Champernowne and H Johnston, *The Trustee Act, 1893, And Other Recent Statutes Relating to Trustees With Notes* (William Clowes & Sons, 1904) 78; A Underhill, *The Law Relating to Trusts and Trustees* (Butterworth, 7th ed, 1912) 268; R Cozens-Hardy Home, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 223; G Fricke and OK Strauss, *The Law of Trusts in Victoria* (Butterworths, 1964) 377. Note also that s 7 of the English *Trustee Act 1888*, 51 & 52 Vict, c 59 began with the phrase 'it shall be lawful for, but not obligatory upon, a trustee, ... to insure ...'.

231 [1899] 1 Ch 821, 829.

232 (1911) 103 LT 900, 902, referring to *Bailey v Gould* (1840) 4 Y & C Ex 222; 160 ER 987 and *Fry v Fry* (1859) 27 Beav 144; 54 ER 56. In *Re Gamble* (1925) 57 OLR 504, Mowat J held that *Re McEacharn* and *Bailey v Gould* should not be followed in Canada.

233 (1911) 103 LT 900, 902.

234 Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999), App C [41] (emphasis in original).

235 (1993) 33 NSWLR 188, 197–8. Cohen J also considered (at 195) that the two authorities referred to by Eve J in *Re McEacharn* 'did not establish a general principle that there is never a duty on the part of trustees to insure property under their control'. *Pateman v Heyen* has been followed in *South Australian Perpetual Forests Limited 1964 Trust Deed* (1995) 64 SASR 434, 448–9 (Bollen J); *Lehmann v Haskard* (Unreported, Supreme Court of New South Wales, Young J, 29 August 1996) 17–18.

It would be part of normal commercial practice for persons to insure their property, particularly buildings, against fire. A prudent person would normally take out fire insurance, the exact nature of which may depend on the circumstances. ... I see no reason why a trustee should not be required to act in respect of insurance in the same way as it would be expected that a prudent person would do in respect of his or her own property. There may of course be circumstances in which it would not be reasonable to expect the trustee to take out an insurance policy, as would be the case where there is no income available to pay the premiums. There may be other circumstances in particular cases. Where however a trustee is holding property for the benefit of other persons for a period of time and there may be a risk of suffering loss or damage by fire then, providing that funds are available to the trustee, he or she has a duty to act prudently and to effect that policy.

Scope of insurance that may be effected

9.178 Section 47(1) of the *Trusts Act 1973* (Qld) gives trustees the power:

- to insure any insurable property²³⁶ against loss or damage, whether by fire or otherwise; and
- to insure against any risk or liability against which it would be prudent for a person to insure if the person were acting for himself or herself.

9.179 There are similar provisions in the other Australian jurisdictions empowering trustees to insure 'any insurable property' (or, in the Northern Territory, South Australia and Tasmania, 'a building or other insurable property'²³⁷).²³⁸

9.180 With the exception of Tasmania,²³⁹ all jurisdictions give trustees a power to insure against:²⁴⁰

- any risk or liability against which it would be prudent for a person to insure if he or she were acting for himself (ACT, New South Wales); or
- loss or damage, whether by fire or otherwise, and any risk or liability against which it would be prudent for a person to insure if he or she were acting for himself (the Northern Territory, South Australia, Victoria and Western Australia).

²³⁶ In *South Australian Perpetual Forests Limited 1964 Trust Deed* (1995) 64 SASR 434, Bollen J held (at 444) that, under s 25 of the *Trustee Act 1936* (SA), 'insurable property' is not limited to property of which the trustee is the legal owner.

²³⁷ AR Rudall and JW Greig, *The Law of Trusts and Trustees* (Jordan & Sons, 2nd ed, 1898) 76: 'Other insurable property' would include chattels personal, even documents, but in practice the powers of the section will doubtless be used mainly for the purpose of insuring buildings.

²³⁸ *Trustee Act 1925* (ACT) s 41(1); *Trustee Act 1925* (NSW) s 41(1); *Trustee Act* (NT) s 18A(1); *Trusts Act 1973* (Qld) s 47(1); *Trustee Act 1936* (SA) s 25(1); *Trustee Act 1898* (Tas) s 21(1); *Trustee Act 1958* (Vic) s 23(1); *Trustees Act 1962* (WA) s 46(1).

²³⁹ Under the Tasmanian provision, which is based on the original form of the English provision, the power is limited to insurance against damage by fire: *Trustee Act 1898* (Tas) s 21(1).

²⁴⁰ *Trustee Act 1925* (ACT) s 41(1); *Trustee Act 1925* (NSW) s 41(1); *Trustee Act* (NT) s 18A(1); *Trusts Act 1973* (Qld) s 47(1); *Trustee Act 1936* (SA) s 25(1); *Trustee Act 1958* (Vic) s 23(1); *Trustees Act 1962* (WA) s 46(1).

Amount of insurance

9.181 Under section 47(2) of the *Trusts Act 1973* (Qld), the amount of the insurance, together with the amount of any insurance already on foot, must not exceed the insurable value or liability. The provisions in the ACT, New South Wales and Victoria, are expressed in similar terms.²⁴¹

9.182 The older English provisions limited trustees' power to insure to an amount not exceeding 'three equal fourth parts' of the full value of the property.²⁴² Victoria was the first Australian jurisdiction to empower trustees to insure for an amount not exceeding the full value of the property.²⁴³ New South Wales followed suit when the *Trustee Act 1925* (NSW) was passed,²⁴⁴ with Queensland following in 1973.

9.183 The provisions in the other jurisdictions are framed in slightly different terms.

9.184 In the Northern Territory and South Australia, the amount must not exceed the 'full value of the property', which is expressed so that it is not limited to the sale value, but may include the replacement cost as well as indemnity against loss of rent and other collateral risks.²⁴⁵ The Western Australian provision limits the amount to the full replacement value of the property.²⁴⁶

9.185 In Tasmania, the power to insure is limited to any amount not exceeding three equal fourth parts of the full value of the building or property.²⁴⁷ This is based on the form of the original English provision.²⁴⁸

9.186 In England, the requirement that insurance may be for any amount not exceeding three equal fourth parts of the full value was removed by the *Trustee Act 2000* (UK).²⁴⁹ The Law Commission of England and Wales was of the view that limiting a trustee's power to insure to three-quarters of the value of the property (and not up to market value or full replacement value) conflicted with the duty of a trustee to manage the trust property with reasonable care.²⁵⁰ It considered that there was 'an overwhelming case for providing a clear statutory power for trustees to insure the trust property as if they were the absolute owners of it'.²⁵¹ Section 19(1) of the *Trustee Act 1925*, as substituted by the *Trustee Act 2000* (UK), now provides that:

²⁴¹ *Trustee Act 1925* (ACT) s 41(2); *Trustee Act 1925* (NSW) s 41(2); *Trustee Act 1958* (Vic) s 23(2).

²⁴² See *Trustee Act 1893*, 56 & 57 Vict, c 53, s 18; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 19 (Act as passed).

²⁴³ See *Trusts Act 1896* (Vic) s 28.

²⁴⁴ *Trustee Act 1925* (NSW) s 41(2) (Act as passed).

²⁴⁵ *Trustee Act* (NT) s 18A(2); *Trustee Act 1936* (SA) s 25(2).

²⁴⁶ *Trustees Act 1962* (WA) s 46(1).

²⁴⁷ *Trustee Act 1898* (Tas) s 21(1).

²⁴⁸ *Trustee Act 1888*, 51 & 52 Vict, c 59, s 7; *Trustee Act 1893*, 56 & 57 Vict, c 53, s 18.

²⁴⁹ *Trustee Act 2000* (UK) c 29, s 34.

²⁵⁰ Law Commission of England and Wales, *Trustees' Powers and Duties*, Consultation Paper No 146 (1997) [9.11].

²⁵¹ Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999) [6.4].

- (1) A trustee may—
- (a) insure any property which is subject to the trust against risks of loss or damage due to any event, and
 - (b) pay the premiums out of the trust funds.²⁵² (note added)

Whether a more general approach should be adopted

9.187 In the American Uniform Trust Code,²⁵³ the power to insure the trust property against damage or loss is included as one of the many powers in the list of specific powers that supplement the general powers conferred on trustees.²⁵⁴

9.188 The Ontario Law Reform Commission has recommended that the power to insure trust property, which is presently contained in a stand-alone provision,²⁵⁵ should be included in a list of specific powers and that its current provision, which is of the older kind of insurance power discussed above,²⁵⁶ should be replaced by a provision in 'unqualified form'.²⁵⁷ It therefore recommended the inclusion of a provision to the effect that trustees may:²⁵⁸

insure against loss or damage to trust property and against any other risk or liability.

9.189 As explained previously, the British Columbia Law Institute has also proposed a general provision dealing with the powers of trustees, which is intended to replace and condense a number of stand-alone and more detailed powers.²⁵⁹ The provision it proposes would no longer include any specific reference to the power to insure trust property (although the draft Act still includes a stand-alone provision, similar to section 48 of the *Trusts Act 1973* (Qld), in relation to the disposition of insurance proceeds).²⁶⁰

9.190 In England, the *Trustee Act 1925* still includes a stand-alone provision (section 19) empowering a trustee to insure trust property. Although the *Trusts of Land and Appointment of Trustees Act 1996* (UK) provides that the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner,²⁶¹ that provision would not empower trustees to insure property other than land. Further, section 19 of the *Trustee Act 1925* does not simply confer the power

²⁵² *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 19(5) provides that, in that section, 'trust funds' means 'any income or capital funds of the trust'.

²⁵³ See Chapter 7, n 121 above in relation to the promulgation and adoption of the Uniform Trust Code.

²⁵⁴ Unif Trust Code § 816(11) (amended 2010).

²⁵⁵ *Trustee Act*, RSO 1990, c T 23, s 21.

²⁵⁶ See [9.182] above.

²⁵⁷ Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 243.

²⁵⁸ *Ibid* vol 2, Draft Bill: An Act to revise the *Trustee Act*, cl 35(g).

²⁵⁹ British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 102. See [8.24] above.

²⁶⁰ *Ibid* 58–9 (cl 39). Cf *Trustee Act*, RSBC 1996, c 464, s 8 (Power to insure property).

²⁶¹ *Trusts of Land and Appointment of Trustees Act 1996* (UK) c 47, s 6(1).

to insure, but also provides for the payment of premiums and for the effect of a direction by the beneficiaries not to insure trust property that is held on a bare trust²⁶² — matters that would not be suitable for incorporation in a list of specific powers.

9.191 The Law Reform Commission of Ireland has also recommended a stand-alone provision in relation to the power to insure, based on section 19 of the English *Trustee Act 1925*.²⁶³

9-18 Should the power to insure that is currently conferred by section 47(1)–(2) of the *Trusts Act 1973* (Qld):

- (a) continue to be the subject of a stand-alone provision in the Act (whether or not the Act is amended as mentioned in paragraph (b)); or
- (b) if the Act is amended to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner (the ‘general property power’):
 - (i) be omitted; or
 - (ii) be stated briefly in a provision that lists examples of specific powers conferred by the general property power?

Payment of premiums

9.192 Section 47(3) of the *Trusts Act 1973* (Qld) gives trustees a broad discretion to pay the premiums out of the income of the property concerned, the income of any other property subject to the same trusts, any capital money subject to the same trusts, or out of one or more of those funds in such proportions as the trustee considers equitable.²⁶⁴ This power is similar to the power conferred by section 33(1)(g) in relation to the apportionment of insurance premiums paid under section 33(1)(d).

²⁶² See [9.194] ff below.

²⁶³ Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008), Draft *Trustee Bill 2008*, cl 19. See generally ch 7 of that Report.

²⁶⁴ The legislation in the other jurisdictions generally gives trustees the power to pay the premiums out of the income of the property concerned or out of the income of any other property subject to the same trusts, but does not confer an express power to pay the premiums out of capital: *Trustee Act 1925* (ACT) s 41(3); *Trustee Act 1925* (NSW) s 41(3); *Trustee Act* (NT) s 18A(3); *Trustee Act 1936* (SA) s 25(3); *Trustee Act 1898* (Tas) s 21(1); *Trustee Act 1958* (Vic) s 23(3); *Trustees Act 1962* (WA) s 46(1). See, however, the discussion at [9.175] above of trustees’ power under the general law to pay insurance premiums out of capital.

9.193 In Chapter 8, the Commission has sought submissions on whether section 47(3) should be retained as a separate provision or whether, in light of the powers conferred by section 33(1)(d) and (g), section 47(3) should be omitted.²⁶⁵

Effect of a direction by beneficiaries not to insure

9.194 In England, beneficiaries who are of full age and capacity and absolutely entitled to the trust property may give the trustee a direction that the trust property is not to be insured or is not to be insured except on specified conditions. Section 19(2)–(4) of the *Trustee Act 1925*, as substituted by the *Trustee Act 2000* (UK), provides:

- (2) In the case of property held on a bare trust, the power to insure is subject to any direction given by the beneficiary or each of the beneficiaries—
 - (a) that any property specified in the direction is not to be insured;
 - (b) that any property specified in the direction is not to be insured except on such conditions as may be so specified.
- (3) Property is held on a bare trust if it is held on trust for—
 - (a) a beneficiary who is of full age and capacity and absolutely entitled to the property subject to the trust, or
 - (b) beneficiaries each of whom is of full age and capacity and who (taken together) are absolutely entitled to the property subject to the trust.
- (4) If a direction under subsection (2) of this section is given, the power to insure, so far as it is subject to the direction, ceases to be a delegable function for the purposes of section 11 of the *Trustee Act 2000* (power to employ agents).

9.195 Before its amendment in 2000, the statutory power to insure conferred by section 19 of the *Trustee Act 1925* did not apply 'to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so'.²⁶⁶ The current provision implemented a recommendation of the Law Commission of England and Wales, and enables trustees to insure property held on a bare trust, subject to a direction given by the beneficiaries that the trustees are not to insure the property.²⁶⁷

The Commission ... takes the view that, where there is either a bare trust or all the beneficiaries are of full age and capacity and, taken together, are absolutely entitled to the trust property, the beneficiaries should be at liberty to direct the trustees not to insure the trust property (or not to insure it except in accordance with specified conditions) if that is their unanimous wish. In such circumstances, the beneficiaries should be able to carry out the cost-benefit analysis involved in deciding whether or not to insure in the same way as an absolute owner.

²⁶⁵ See [8.324] ff, Question 8-42 above.

²⁶⁶ *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 19(2) (Act as passed).

²⁶⁷ Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999) [6.5].

9.196 The Law Commission noted that the beneficiaries' power to give a direction would relate only to the insurance of the trust property, and that beneficiaries would 'have no power, for example, to direct the trustees not to insure against third party liability'.²⁶⁸

9.197 The English provision takes a pragmatic approach to the question of risk. It does, however, raise the issue of whether it is appropriate for beneficiaries to be able to dictate, to the exclusion of a trustee's discretion, whether the trust property is to be insured. Arguably, given that the beneficiaries have chosen to keep the trust on foot instead of terminating it,²⁶⁹ the power conferred by the section is inconsistent with the nature of the trust relationship.

9-19 Should the *Trusts Act 1973* (Qld) be amended to provide that, if the beneficiaries of a trust are of full age and capacity and, taken together, are absolutely entitled to the trust property, they may direct the trustee not to insure the trust property or to insure it only on specified conditions?

APPLICATION OF INSURANCE MONEY

9.198 Under the general law, if there were successive interests in the trust property and either a life tenant was under an obligation to insure the property or the trustees had the power to insure, the money recovered under the insurance policy was for the benefit of the persons successively entitled and did not belong to any one of them.²⁷⁰ However, if the life tenant was not bound to insure and was not impeachable for waste, and had voluntarily insured his or her own interest and paid the premiums out of his or her own income, the life tenant was entitled to keep the money received under the insurance policy.²⁷¹ In the latter case, the life tenant's entitlement was, however, subject to the provisions of section 83 of the English *Fires Prevention (Metropolis) Act 1774*, which authorised insurers to apply the insurance money towards the rebuilding, reinstatement, or repair of trust property lost or damaged by fire, and required them to do so if requested by a person interested in, or entitled to, the house or buildings that were destroyed.²⁷²

9.199 The application of insurance money received in relation to trust property is now governed by section 48 of the *Trusts Act 1973* (Qld). That section provides:²⁷³

²⁶⁸ Ibid [6.5] n 12.

²⁶⁹ See *Re Brockbank* [1948] 1 Ch 206, discussed at [5.90] above.

²⁷⁰ *Re Bladon* [1911] 2 Ch 350, 354 (Neville J).

²⁷¹ *Warwick v Brentnall* (1883) 23 Ch D 188, 193 (Chitty J); *Gausson v Whatman* (1905) 93 LT 101, 103 (Kekewich J); *Reid v Fitzgerald* (1926) 48 WN (NSW) 25.

²⁷² *Re Quicke's Trusts* [1908] 1 Ch 887.

²⁷³ *Trusts Act 1973* (Qld) s 48 applies to trusts and policies created before or after the commencement of the Act, but only to money received after the commencement of the Act: s 48(8).

48 Application of insurance money

- (1) Where a policy of insurance against the loss or damage of any property subject to a trust, whether by fire or otherwise, has been kept up under any trust in that behalf, or under any power statutory or otherwise, or in performance of any obligation statutory or otherwise, the money receivable by a trustee under the policy shall be capital money for the purposes of the trust.
- (2) The money receivable shall be held upon trusts corresponding as nearly as may be with the trusts affecting the property in respect of which it was payable.
- (3) The money receivable or any part thereof may also be applied by the trustee or, if in court, under the direction of the court, in rebuilding, reinstating, replacing, or repairing the property lost or damaged.
- (4) Any application by the trustees under subsection (3) shall be subject to the consent of any person whose consent is required by the instrument (if any) creating the trust to the investment of money subject to the trust.
- (5) Nothing in this section shall prejudice or affect the right of any person to require the money or any part thereof to be applied in rebuilding, reinstating or repairing the property lost or damaged.
- (6) Nothing in this section shall prejudice or affect the rights of any mortgagee lessor or lessee, whether under any statute or otherwise.
- (7) This section applies only if and as far as a contrary intention is not expressed in the instrument (if any) creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (8) This section applies to trusts and to policies created or effected either before or after the commencement of this Act, but only to money received after the commencement of this Act.

9.200 Similar provision is made in the trustee legislation of most of the other Australian jurisdictions, New Zealand and England, although there are some differences.²⁷⁴

Insurance proceeds to be capital money under the trust

9.201 Section 48(1)–(2) of the *Trusts Act 1973* (Qld) provides that money received under an insurance policy of trust property is capital money for the purposes of the trust, and must be held on trusts corresponding with the trusts affecting the property in respect of which it is paid.

9.202 Similar provisions are included in the trustee legislation in the ACT, New South Wales, South Australia, Victoria, Western Australia, New Zealand and

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Trustee Act 1925 (ACT) s 42; *Trustee Act 1925* (NSW) s 42; *Trustee Act 1936* (SA) s 25; *Trustee Act 1958* (Vic) s 24; *Trustees Act 1962* (WA) s 47; *Trustee Act 1956* (NZ) s 25; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 20. The South Australian provision deals with a trustee's power to insure trust property in the same provision.

England,²⁷⁵ as well as additional provisions in relation to money receivable in respect of property held on trust for sale.²⁷⁶ However, one of the objectives of the *Trusts Act 1973* (Qld) was 'to place land held on trust for sale on the same footing as other trust property'.²⁷⁷ For that reason, the Commission recommended in its 1971 Report that the new provision, although based on section 42 of the *Trustee Act 1925* (NSW), should not include that part of the provision that dealt with trusts for sale.²⁷⁸

9.203 Further, the provisions in South Australia, Western Australia and New Zealand qualify their general provision so that, in certain circumstances, the money is to be regarded as income.

9.204 The South Australian provision provides that the money receivable under the policy of insurance:²⁷⁹

shall except to the extent to which it is receivable in respect of loss of rent or other collateral risk as aforesaid, be capital money for the purposes of the trust.

9.205 The Western Australian and New Zealand provisions are worded slightly differently, but have the same effect. They provide that the money:²⁸⁰

shall ... be capital for the purposes of the trust, except so far as it would be regarded as income under any rule of law.

9.206 The authors of the Model Trustee Code also included a similar provision.²⁸¹

Money recovered by the trustee under the insurance shall be capital money except to the extent to which it is recovered in respect of loss of income.

9.207 They considered that, 'in a commercial setting insurance against loss of income might well be prudent and moneys recovered under the insurance should not be credited to capital'.²⁸²

²⁷⁵ *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); *Trustee Act 1956* (NZ) s 25(1); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 20(1).

²⁷⁶ *Trustee Act 1925* (ACT) s 42(2); *Trustee Act 1925* (NSW) s 42(2); *Trustee Act 1936* (SA) s 25(6); *Trustee Act 1958* (Vic) s 24(3)(c); *Trustees Act 1962* (WA) s 47(3); *Trustee Act 1956* (NZ) s 25(3)(a); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 20(3)(c). These provisions provide that, if the money is receivable in respect of property held upon trust for sale, the same must be held upon the trusts and subject to the powers and provisions applicable to money arising by a sale under the trust. The provisions in Victoria and England also accommodate the settled land legislation, which has been repealed in Queensland: *Trustee Act 1958* (Vic) s 24; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 20.

²⁷⁷ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 5–6.

²⁷⁸ *Ibid* 41.

²⁷⁹ *Trustee Act 1936* (SA) s 25(5).

²⁸⁰ *Trustees Act 1962* (WA) s 47(1); *Trustee Act 1956* (NZ) s 25(1).

²⁸¹ WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 69 (cl 3.13(4)).

²⁸² *Ibid* 70.

9-20 Should section 48(1) of the *Trusts Act 1973* (Qld) be amended so that, if money is recovered under an insurance policy in respect of loss of income, it is to be treated as trust income rather than trust capital?

Preservation of rights of interested persons to require money to be applied to the reinstatement of the trust property

9.208 Section 48(5) of the *Trusts Act 1973* (Qld) preserves the right of an interested person to require the insurance money to be expended on the repair, reinstatement or repair of the property. That right was originally conferred by section 83 of the English *Fires Prevention (Metropolis) Act 1774*, and in Queensland is now conferred by section 58 of the *Property Law Act 1974* (Qld). The policy behind these provisions was to deter fraudulent persons from arson.²⁸³ Section 58 of the *Property Law Act 1974* (Qld) provides that, subject to specified exceptions, if a building is destroyed or damaged by fire, the insurer may, and must, on the request of a person interested in or entitled to the building, cause the insurance money to be laid out and expended, so far as it will go, towards rebuilding, reinstating or repairing the building.

Insurance proceeds payable to a person other than the trustee

9.209 In Victoria, Western Australia, New Zealand and England, the trustee legislation includes a provision that applies if the insurance money is receivable by a person other than the trustee of the trust.²⁸⁴ Section 24(2) of the *Trustee Act 1958* (Vic), which is typical, provides:

- (2) If any such money is receivable by any person, other than the trustees of the trust or settlement, that person shall use his best endeavours to recover and receive the money, and shall pay the net residue thereof, after discharging any costs of recovering and receiving it, to the trustees of the trust or settlement, or, if there are no trustees capable of giving a discharge therefor, into court.

9.210 The Model Trustee Code included a modified provision, based on the Victorian and Western Australian provisions, to deal with this situation. Clause 3.13(5) provided:²⁸⁵

- (5) Subject to the provisions of the *Insurance Contracts Act 1984* (Cth) where any person other than the trustee has kept on foot insurance which the trustee is empowered to keep on foot, that person shall recover any money recoverable under the insurance and shall pay the net residue thereof, after discharging any costs of recovering it, to the trustee, or if there is no trustee capable of giving a discharge into Court;

²⁸³ *Fires Prevention (Metropolis) Act 1774*, 14 Geo 3, c 78, s 83; *Sinnott v Bowden* [1912] 2 Ch 414, 420 (Parker J); *Kern Corporation Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164, 176 (Mason J).

²⁸⁴ *Trustee Act 1958* (Vic) s 24(2); *Trustees Act 1962* (WA) s 47(2); *Trustee Act 1956* (NZ) s 25(2); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 20(2).

²⁸⁵ WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 69.

and if that person for any reason does not recover the money the trustee may recover in that person's name and the insurer shall be liable to pay the trustee accordingly.

9.211 The authors of the Model Trustee Code explained the changes made to the current provisions.²⁸⁶

This modifies New South Wales s 42 and Victoria s 24(2) in an attempt to clarify it. The existing provisions do not really define what kind of insurance policy, taken out by a third party, is envisaged. A policy which it would be beyond the trustee's power to take out can hardly be intended to be included, so the policy is here defined as one which a trustee is empowered to keep on foot. An obvious example is the case where a life tenant insures the trust property which he is occupying and the trustee does not, perhaps because he has no spare trust income to effect insurance. The life tenant might well agree with the trustee to do this. If the insured event happens the beneficiary is obliged under this provision to pay insurance moneys recovered to the trustee, or the trustee may sue the insurance company direct and the insurance company is bound to pay. The *Insurance Contracts Act* (Cth) is relevant because s 49(3) of that Act requires the trustee, where another has taken out insurance, to notify the insurer. The Act is made subject to State legislation (s 7); but it does not, as this draft does, require the insurer to pay.

9.212 In contrast to the current provision, which requires the insured to use his or her 'best endeavours to recover and receive the money', the provision in the Model Trustee Code imposed an unqualified duty on the insured to recover the money.

9-21 Should section 48 of the *Trusts Act 1973* (Qld) be amended to include a provision in similar terms to section 24(2) of the *Trustee Act 1958* (Vic) or clause 3.13(5) of the Model Trustee Code (or a combination of those provisions)?

POWER TO COMPOUND LIABILITIES

9.213 Section 44 of the *Trusts Act 1973* (Qld), which has its origins in section 30 of *Lord Cranworth's Act*,²⁸⁷ gives trustees various powers to pay, compound or compromise debts and claims relating to the trust 'without being responsible for any loss occasioned by any act or thing so done by the trustee in good faith'. It provides:

44 Power to compound liabilities

A trustee may, if and as the trustee thinks fit—

²⁸⁶ Ibid 70–1.

²⁸⁷ *Trustees, Mortgagees, etc Act 1860*, 23 & 24 Vict, c 145, s 30 (Executors may compound, etc.). That provision was later replaced by *Conveyancing and Law of Property Act 1881*, 44 & 45 Vict, c 41, s 37(1), which was itself replaced by *Trustee Act 1893*, 56 & 57 Vict, c 53, s 21(1). The latter provision formed the basis for s 20(1) of the *Trustees and Executors Act 1897* (Qld), the predecessor to s 44 of the *Trusts Act 1973* (Qld).

- (a) accept any property, real or personal, before the time at which it is made transferable or payable; or
- (b) sever and apportion any blended trust funds or property; or
- (c) pay or allow any debt or claim on any evidence that the trustee thinks sufficient; or
- (d) accept, make or give any composition or any security, real or personal, for any debt or for any property, real or personal, claimed; or
- (e) allow any time for payment of any debt; or
- (f) compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the trust or to the trust property;

and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to the trustee seem expedient, without being responsible for any loss occasioned by any act or thing so done by the trustee in good faith.

9.214 Similar provisions are included in the trustee legislation of the other Australian jurisdictions, as well as New Zealand and England.²⁸⁸

9.215 In general terms, section 44 is 'concerned with what has been described as the first duty of a trustee, namely to get in the trust property and to place it in a state of security'.²⁸⁹ To that end, the provision confers 'wide and flexible powers of compromising and settling disputes'.²⁹⁰ As Ford and Lee explain:²⁹¹

Trustees would be at a disadvantage if every time they found themselves in a dispute with third parties or with a beneficiary or amongst themselves they were obliged to bring or force the bringing of litigation as far as judgment. They are therefore empowered, to put it briefly, to settle out of court.

9.216 Section 44 empowers trustees, if and as they think fit, to:

- accept property before the time at which it is made transferable or payable, that is, to 'advance a completion date'²⁹² for payment or transfer to the trust (section 44(a));
- sever and apportion any blended trust funds or property (section 44(b));
- pay or allow a debt or claim on evidence the trustee thinks sufficient (section 44(c));²⁹³

²⁸⁸ *Trustee Act 1925* (ACT) s 49; *Trustee Act 1925* (NSW) s 49; *Trustee Act* (NT) s 21; *Trustee Act 1936* (SA) s 28; *Trustee Act 1898* (Tas) s 24; *Trustee Act 1958* (Vic) s 19; *Trustees Act 1962* (WA) s 42; *Trustee Act 1956* (NZ) s 20; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 15.

²⁸⁹ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 41.

²⁹⁰ *Re Earl of Strafford* [1980] Ch 28, 47 (Buckley LJ).

²⁹¹ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 11 March 2011) [12.9810].

²⁹² *Ibid* [12.9870].

- accept, make or give any composition or security for a debt or property claimed (section 44(d)),²⁹⁴
- allow any time for payment of a debt (section 44(e));²⁹⁵
- compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the trust or the trust property (section 44(f)),²⁹⁶ and
- for any of those purposes, enter into, give, execute and do such agreements, instruments of composition or arrangement, releases, and other things as to the trustee seem expedient.

9.217 The introduction of a legislative provision to the effect of section 44 clarified and extended the powers of trustees and personal representatives.²⁹⁷ Previously, although a trustee in whom legal title to the trust property was vested was the proper person to bring actions *at law* relating to the property, and to release or compromise claims commensurate with that power, 'a trustee [would] not be suffered to exercise his legal powers to the prejudice of the *cestuis que trusts*'.²⁹⁸ Trustees and personal representatives could pay, release or compound debts, without being answerable for the amount of any loss to the trust estate, only if they could show sufficient justification,²⁹⁹ as where they had acted bona fide and

293 [T]he question to be decided is, not was the evidence on which he acted sufficient to justify him, but did he, in making the payment, in good faith think that a debt or claim binding on the estate was proved': FG Champernowne and H Johnston, *The Trustee Act, 1893, And Other Recent Statutes Relating to Trustees With Notes* (William Clowes & Sons, 1904) 84, on the equivalent provision then made in s 21(1) of the English *Trustee Act 1893*, 56 & 57 Vict, c 53. The discretion conferred by s 44(c) has been said to be justified 'because it may well be that the evidence which a personal representative may have will be more tenuous by reason of the absence of the principal witness of the transaction giving rise to the debt or claim namely the deceased': HAJ Ford and WA Lee, *Principles of the Law of Trusts* (1983) [1248.3].

294 A 'composition' is an arrangement by which partial payment in full satisfaction of a debt, or payment of a debt by instalments, is accepted, often in the case of an insolvent business: see CCH Australia Ltd, *The CCH Macquarie Dictionary of Law* (CCH Australia Ltd, rev ed, 1996) (definitions of 'composition' and 'scheme of arrangement'); LexisNexis, *Encyclopaedic Australian Legal Dictionary* (definition of 'composition'). Unlike its counterparts in the other jurisdictions, s 44(d) specifically gives trustees the power to 'make or give', as well as to accept, a composition or security. Similarly, the Model Trustee Code provided that a trustee may 'give or accept any security for any debt or claim': WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 89 (cl 3.23(c)).

295 In *Dwyer v The National Trustees Executors & Agency Co of Australasia Ltd (No 2)* [1939] VLR 417, Mann CJ held (at 427) that:

time can be allowed to a debtor of the deceased only when the circumstances make it reasonable to regard the giving of time as the best means of getting in the money. This may often be the case, particularly where the debt is unsecured and legal action is likely to lead to bankruptcy.

296 In exercising this power, the trustee should act on 'the balance of possibilities and apparent advantages': *Re Ezekiel's Settlement Trusts* [1942] Ch 230, 234 (Lord Greene MR). It has been held that the power in s 44(f) includes the power to compromise a dispute with a beneficiary relating to that beneficiary's entitlement to the trust property: *Re Irismay Holdings Pty Ltd* [1996] 1 Qd R 172 (Lee J), cited with approval in *Perpetual Trustees Australia Ltd v Wallace* [2007] FCA 527, [40] (Edmonds J); and JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2048]. Cf, in Victoria, *Dowling v St Vincent De Paul Society of Victoria Inc* [2003] VSC 454.

297 CCM Dale, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 9th ed, 1891) 667.

298 J Hill, *A Practical Treatise on the Law Relating to Trustees, Their Powers, Duties, Privileges and Liabilities* (Stevens & Norton, 1845) 503.

299 See generally T Lewin, *A Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 9th ed, 1891) 666.

to the benefit of the estate.³⁰⁰

Joint exercise of power

9.218 Section 44 confers powers on 'a trustee'. Where there is more than one trustee, this would seem to apply to the trustees acting together.³⁰¹

9.219 This is the position in most of the other jurisdictions,³⁰² where the equivalent provision is expressed to apply to 'two or more trustees acting together' or a 'sole acting trustee' where the trust instrument authorises a sole trustee to execute the trusts and powers thereof.³⁰³ (That expression was also used in the predecessor to section 44, and in the English provision from which it was derived.³⁰⁴)

9.220 In contrast, the equivalent provisions in the ACT and New South Wales confer the power to compound liabilities and compromise claims on 'the trustees or a majority acting together'.³⁰⁵ Ford and Lee argue that it is preferable for unanimity in the exercise of this power.³⁰⁶

Whether a more general approach should be adopted

9.221 In Chapter 8, the Commission has proposed, similar to the approach that has been adopted in some overseas jurisdictions, that the *Trusts Act 1973* (Qld) should be amended to confer on trustees, in relation to the trust property, all the powers of an absolute owner (the 'general property power'). This raises the issue of whether, in light of that power, it is necessary to retain a stand-alone provision to the general effect of section 44 or whether some or all of the powers currently conferred by section 44 might be stated briefly in a provision that lists examples of specific powers conferred by the general property power.

³⁰⁰ See, eg, *Blue v Marshall* (1735) 3 P Wms 381; 24 ER 1110; *Forshaw v Higginson* (1857) 8 De GM & G 827; 44 ER 609. It may have been advisable in some circumstances to seek directions from the court before taking such steps: see *Forshaw v Higginson* (1857) 8 De GM & G 827; 44 ER 609, 612 (Turner LJ).

³⁰¹ *Acts Interpretation Act 1954* (Qld) s 32C(a) provides that, in an Act, 'words in the singular include the plural'. Ford and Lee also argue that the reference to 'a trustee' in those provisions 'must mean that the trustees must act unanimously as otherwise one trustee could override all other trustees': HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 11 March 2011) [12.9810].

³⁰² It appears that the effect of the expression 'two or more trustees acting together' is that, where there are two or more trustees, the power must be exercised by all the trustees jointly: FG Champernowne and H Johnston, *The Trustee Act, 1893, And Other Recent Statutes Relating to Trustees With Notes* (William Clowes & Sons, 1904) 84; A Underhill, *The Law Relating to Trusts and Trustees* (Butterworth, 7th ed, 1912) 348; CCM Dale, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 9th ed, 1891) 667.

³⁰³ *Trustee Act* (NT) s 21(2); *Trustee Act 1936* (SA) s 28(2); *Trustee Act 1898* (Tas) s 24(2); *Trustee Act 1958* (Vic) s 19(1).

³⁰⁴ See *Trustees and Executors Act 1897* (Qld) s 20; and *Trustee Act 1893*, 56 & 57 Vict, c 53, s 21(2), which replaced *Conveyancing and Law of Property Act 1881*, 44 & 45 Vict, c 41, s 37(2) in the same terms.

³⁰⁵ *Trustee Act 1925* (ACT) s 49(1); *Trustee Act 1925* (NSW) s 49(1).

³⁰⁶ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 11 March 2011) [12.9850]. In Chapter 7, the Commission has sought submissions on whether the *Trusts Act 1973* (Qld) should be amended to permit co-trustees of a private trust to act by majority.

9.222 In the American Uniform Trust Code, for example, the power to compromise claims is included as one of many specific powers in a single list, rather than as a detailed, stand-alone provision. It provides that a trustee may:³⁰⁷

- (14) pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;

9.223 Similarly, in Scotland, where the legislation includes a list of default powers, rather than numerous stand-alone provisions, that list includes the power to 'compromise or to submit and refer all claims connected with the trust estate'.³⁰⁸ The Ontario Law Reform Commission has also recommended that the power to settle claims, which is presently contained in a stand-alone provision, should be included in a list of ancillary powers.³⁰⁹

9.224 The British Columbia Law Institute has proposed a general provision dealing with the powers of trustees, which is intended to replace and condense a number of stand-alone and more detailed powers (including the power to compound liabilities).³¹⁰ However, the provision it proposed does not include any specific reference to compounding liabilities or compromising claims.³¹¹

9.225 In contrast, a provision in virtually the same terms as section 44 of the *Trusts Act 1973* (Qld) has been proposed by the Law Reform Commission of Ireland.³¹²

9-22 Should the powers conferred by section 44 of the *Trusts Act 1973* (Qld):

- (a) continue to be the subject of a stand-alone provision in the Act (whether or not the Act is amended as mentioned in paragraph (b)); or
- (b) if the Act is amended to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner (the 'general property power'):
- (i) be omitted; or

³⁰⁷ Unif Trust Code § 816(14) (amended 2010).

³⁰⁸ *Trusts (Scotland) Act 1921* (Scot) s 4(1)(i).

³⁰⁹ Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 246; vol 2, Draft Bill: An Act to revise the *Trustee Act*, cl 35(m).

³¹⁰ British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 102. See [8.24] above.

³¹¹ Ibid 58–9, Proposed *Trustee Act*, cl 39. Cf *Trustee Act*, RSBC 1996 c 464, s 9 (Power to compound).

³¹² Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008), Draft *Trustee Bill 2008*, cl 21. See generally ch 9 of that Report.

(ii) be stated briefly in a provision that lists examples of specific powers conferred by the general property power?

Protection if powers exercised in good faith

9.226 Section 44 of the *Trusts Act 1973* (Qld) provides that a trustee may exercise any of the powers conferred by the provision 'without being responsible for any loss occasioned by any act or thing so done by the trustee in good faith'.

9.227 Almost all of the other Australian jurisdictions include the same provision.³¹³ In the ACT, the relevant provision requires the trustees to act 'honestly' rather than 'in good faith'.³¹⁴ The wording, including the reference to 'good faith', is derived from the earlier English statutes.³¹⁵

9.228 The requirement for good faith will not be established merely by proving an absence of bad faith. In speaking of an earlier version of the equivalent Victorian provision, Mann CJ stated:³¹⁶

The inaction resulting from these causes constituted in my opinion a breach of duty by the executors and was not the less a breach of duty by reason of the powers conferred by sec 15 of the *Trustee Act 1928*. That their actions in repeatedly allowing more time for payment were *bonâ fide* in the sense that they proceeded from no dishonest motive was fully conceded. But I cannot accept the view that 'good faith' in section 15 means no more than this. As I have already indicated I think that it requires a reasoned use of the powers towards the fulfilment of the trusts. The evidence satisfies me that this was lacking.

9.229 The original reference to 'good faith' in section 15 of the English *Trustee Act 1925* was omitted by the *Trustee Act 2000* (UK),³¹⁷ and the concluding words of section 15 now provide that the trustees are not responsible for any loss occasioned by any act or thing so done by them if 'they have discharged the duty of care set out in section 1(1) of the *Trustee Act 2000*'.³¹⁸ The effect of that amendment is to make the protection afforded by section 15 dependent on the

³¹³ *Trustee Act 1925* (NSW) s 49(3); *Trustee Act* (NT) s 21(2); *Trustee Act 1936* (SA) s 28(2)(d); *Trustee Act 1898* (Tas) s 24(2); *Trustee Act 1958* (Vic) s 19(1); *Trustees Act 1962* (WA) s 42.

³¹⁴ *Trustee Act 1925* (ACT) s 49(3).

³¹⁵ See *Trustee Act 1893*, 56 & 57 Vict, c 53, s 21(2), which replaced *Conveyancing and Law of Property Act 1881*, 44 & 45 Vict, c 41, s 37(2) in the same terms. However, the original English provision, which applied to executors only, did not include any condition of 'good faith' in the exercise of the powers it conferred: *Trustees, Mortgagees, etc Act 1860*, 23 & 24 Vict, c 145, s 30 (*Lord Cranworth's Act*).

³¹⁶ *Dwyer v The National Trustees Executors & Agency Co of Australasia Ltd (No 2)* [1939] VLR 417, 433–4. See also *Partridge v Equity Trustees Executors and Agency Co Ltd* (1947) 75 CLR 149, 164 (Starke, Dixon and Williams JJ), citing *Re Greenwood* (1911) 105 LT 509.

³¹⁷ *Trustee Act 2000* (UK) c 29, s 40(1), sch 2 pt II para 20. As to the application of the duty of care when a trustee exercises power under s 15 of the *Trustee Act 1925*, 15 & 16 Geo 5, c 19, see *Trustee Act 2000* (UK) c 29, s 2, sch 1 para 4.

³¹⁸ *Trustee Act 2000* (UK) c 29, s 1(1) is set out at [7.75] above.

exercise of a higher standard of care by the trustee — namely, compliance with the statutory duty of care.

9.230 However, because the standard of care required for a trustee's protection now coincides with the trustee's statutory duty of care, the amended English provision does not give a trustee any particular protection. If the trustee complies with the statutory duty of care in exercising a power under section 15, he or she will not be in breach of duty and will not need the protection given by the section; if the trustee does not comply with the statutory duty of care, the section will not afford any protection. Arguably, the same result could have been achieved by making section 15 just a statement of powers — that is, omitting that part of the provision that refers to a trustee's responsibility for loss occasioned by his or her acts.³¹⁹

9.231 In the absence of the 'good faith' protection in section 44 of the *Trusts Act 1973* (Qld), a trustee who committed a breach of trust in relation to the compounding of a claim could seek to be relieved from personal liability under section 76 of the *Trusts Act 1973* (Qld). As explained in Chapter 11, section 76 gives the court the power to relieve a trustee from personal liability for a breach of trust if it appears to the court that the trustee has acted honestly and reasonably and ought fairly to be excused from liability for the breach.³²⁰

9.232 Although section 76 is an extremely beneficial provision for trustees, the power to relieve a trustee from liability under that section is in the court's discretion. In contrast, section 44 operates automatically to ensure that a trustee who exercises power under that section 'in good faith' will not be responsible for any loss occasioned by the exercise of power.

9.233 Section 44 is one of a small number of provisions in the *Trusts Act 1973* (Qld) that afford protection from liability to a trustee who has acted in good faith.³²¹ For other powers, a trustee's liability depends on whether the trustee has acted in accordance with the standard of care that applies under the general law, subject to the court's power to relieve the trustee of liability under section 76.

9.234 The issue as to whether the 'good faith' protection in section 44 should be retained depends on whether there is any particular feature of the exercise of the power to compound claims that would justify taking a different approach for dealing with a trustee's liability for a breach of trust. In the absence of any specific justification, it is arguable that the good faith protection should be omitted from section 44, and that a trustee's liability should be determined having regard to the same principles that apply to other breaches of trust.

319 For example, the provision of the Model Trustee Code that dealt with the power to compound and compromise claims did not include any protection for a trustee who exercised the powers conferred by that provision. Instead, that Code included provisions of general application, which required trustees to 'act in a fiduciary manner' and to exercise their powers 'with care, skill, prudence and diligence'. See WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 22–4, 89 (cll 1.10, 1.11, 3.23).

320 See [11.219] ff below, where the Commission has raised issues in relation to the conditions for relief under s 76.

321 See also *Trusts Act 1973* (Qld) ss 50(1), 70. See also 54(1), which applies where a trustee has employed an agent 'in good faith and without negligence'.

9-23 If a provision to the general effect of section 44 of the *Trusts Act 1973* (Qld) is retained, is there any particular reason to retain the 'good faith' protection in that section?

REVERSIONARY INTERESTS

9.235 Section 50 of the *Trusts Act 1973* (Qld) gives trustees powers in relation to any share or interest in property that is not vested in possession in the trustees (such as reversionary interests and interests in remainder), the proceeds of sale of any such property, and things in action. It also relieves trustees of certain obligations in relation to such property before it falls into possession or becomes payable or transferable.

9.236 Section 50 provides:

50 Reversionary interests

- (1) Where trust property includes any share or interest in property not vested in the trustee, or the proceeds of sale of any such property, or any other thing in action, the trustee, on its or their falling into possession or becoming payable or transferable, may—
 - (a) agree or ascertain the amount or value thereof or any part thereof in such manner as the trustee thinks fit; and
 - (b) accept in or towards satisfaction thereof, at the market or current value, or upon any valuation or estimate of value that the trustee may think fit, any authorised investments; and
 - (c) allow any deductions for duties, costs, charges, and expenses that the trustee thinks proper or reasonable; and
 - (d) execute any release in respect thereof, so as effectually to discharge all accountable parties from all liability in respect of any matter coming within the scope of the release, without being responsible for any loss occasioned by any act or thing so done by the trustee in good faith.
- (2) The trustee shall not be under any obligation and shall not be chargeable with any breach of trust by reason of any omission—
 - (a) to give any notice in respect of, or apply for any charging or other like order upon, any securities or other property out of or on which the share or interest or other thing in action mentioned in subsection (1) is derived, payable or charged; or
 - (b) to take any proceedings on account of any act, default or neglect on the part of the persons in whom the securities or other property mentioned in paragraph (a) or any of them or any part of them are for the time being, or had at any time been, vested;

unless and until required in writing so to do by some person, or the guardian of some person, beneficially interested under the trust, and unless also due provision is made to the trustee's satisfaction for payment of the costs of any proceedings required to be taken.

- (3) Nothing in subsection (2) relieves the trustee of the obligation to get in and obtain payment or transfer of the share or interest or other thing in action upon its falling into possession.

9.237 Section 50 has its origins in section 22 of the English *Trustee Act 1925*. Similar provisions are included in the trustee legislation of the ACT, New South Wales, Victoria, Western Australia and New Zealand.³²²

Purpose of powers conferred by section 50(1)

9.238 Section 50(1) is designed to assist trustees in the discharge of their duty to get in the trust property.³²³ It achieves this by giving trustees:³²⁴

powers, which would automatically be enjoyed by a beneficial owner, of negotiation and agreement of the amounts of their claims where the trust property includes a share or interest in property not vested in the trustees, the proceeds of sale of such property or any other chose in action.

9.239 Although section 50(1) confers similar powers to section 44 (power to compound claims), it specifically concerns trust property that is not vested in the trustee (or the proceeds of sale of any such property), or any other thing in action, including any share or interest in such property.³²⁵

9-24 Should the powers conferred by section 50(1) of the *Trusts Act 1973* (Qld):

- (a) continue to be the subject of a stand-alone provision in the Act (whether or not the Act is amended as mentioned in paragraph (b)); or
- (b) if the Act is amended to provide that a trustee has, in relation to the trust property, all the powers of an absolute owner (the 'general property power'):
- (i) be omitted; or

³²² *Trustee Act 1925* (ACT) s 40; *Trustee Act 1925* (NSW) s 40; *Trustee Act 1958* (Vic) s 26(1)–(2); *Trustees Act 1962* (WA) s 49; *Trustee Act 1956* (NZ) s 27.

³²³ See, eg, Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 41–2; Law Reform Sub-Committee of the Law Society (WA), *The Law of Trusts*, Report (1961), Supplement 38; R Cozens-Hardy Horne, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 212–13.

³²⁴ LA Sheridan, *The Law of Trusts* (Barry Rose, 12th ed, 1993) 272.

³²⁵ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 42. The Commission noted that s 50 has particular reference to the case of a reversionary interest not vested in the trustee, which was not otherwise provided for in the Act at the time.

(ii) be stated briefly in a provision that lists examples of specific powers conferred by the general property power?

Protection if power exercised in good faith

9.240 When the *Trusts Act 1973* (Qld) was originally enacted, the protection that now forms part of section 50(1)(d) — ‘without being responsible for any loss occasioned by any act or thing so done by the trustee in good faith’ — applied in respect of each of the powers conferred by paragraphs (a)–(d). Section 50 has never been amended, and this change appears to have occurred in updating the formatting of the provision.³²⁶

9.241 If a provision to the general effect of section 50(1) is ultimately retained, the drafting of the subsection should be corrected so that the concluding words of section 50(1)(d) are not limited to that paragraph, but apply in relation to all of the powers conferred by section 50(1). However, there is an issue as to whether ‘good faith’ is the appropriate test for protection.

9.242 The provisions in New South Wales, Victoria, Western Australia and New Zealand also protect a trustee from liability in respect of acts done under the provision in ‘good faith’,³²⁷ while the ACT provision protects a trustee in respect of acts done ‘honestly’.³²⁸ As noted earlier in relation to section 44 of the *Trusts Act 1973* (Qld), good faith will not be established by simply proving an absence of bad faith. The protection requires an active exercise of the power.³²⁹

9.243 The equivalent English provision, section 22(1) of the *Trustee Act 1925*, originally protected a trustee in respect of acts done in good faith. However, the reference to ‘good faith’ was omitted by the *Trustee Act 2000* (UK),³³⁰ and the concluding words of section 22(1) now provide that the trustees are not responsible in any such case for any loss occasioned by any act or thing done by them ‘if they have discharged the duty of care set out in section 1(1) of the *Trustee Act 2000*’.³³¹

9.244 The effect of that amendment has been to make the protection afforded by section 22(1) of the English *Trustee Act 1925* dependent on the exercise of a

³²⁶ In the other jurisdictions that have an equivalent provision, the protection given by the provision applies in relation to all of the powers conferred by the provision: *Trustee Act 1925* (ACT) s 40(2); *Trustee Act 1925* (NSW) s 40(1); *Trustee Act 1958* (Vic) s 26(1); *Trustees Act 1962* (WA) s 49(1); *Trustee Act 1956* (NZ) s 27(1); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 22(1).

³²⁷ *Trustee Act 1925* (NSW) s 40(1); *Trustee Act 1958* (Vic) s 26(1); *Trustees Act 1962* (WA) s 49(1); *Trustee Act 1956* (NZ) s 27(1).

³²⁸ *Trustee Act 1925* (ACT) s 40(2).

³²⁹ See [9.228] above.

³³⁰ *Trustee Act 2000* (UK) c 29, s 40(1), sch 2 pt II para 22. As to the application of the duty of care when a trustee exercises power under s 22(1) of the *Trustee Act 1925*, 15 & 16 Geo 5, c 19, see *Trustee Act 2000* (UK) c 29, s 2, sch 1 para 6.

³³¹ *Trustee Act 2000* (UK) c 29, s 1(1) is set out at [7.75] above.

higher standard of care by the trustee — that is, compliance with the statutory duty of care. However, as explained earlier in relation to section 15 of the English *Trustee Act 1925*,³³² because the standard of care required for a trustee's protection now coincides with the trustee's statutory duty of care, the amended provision does not give a trustee any particular protection. Arguably, the same result could have been achieved by making section 22 just a statement of powers and omitting the protective element of that provision.

9.245 The authors of the Model Trustee Code suggested that the concluding words of section 50(1)(d), in referring to 'good faith', place too low a duty on the trustee. In their view, 'It is just as much [a trustee's] obligation to take care in dealing with reversions and things in action as any other property of the trust'.³³³ They considered that the reference to 'good faith' was outdated, and should be discarded in favour of the general duty proposed in the Code for a trustee to act with care, skill, prudence and diligence.³³⁴

9.246 The good faith protection in section 50(1)³³⁵ raises the same issue that has been raised above in relation to section 44 of the Act.³³⁶ In the absence of the 'good faith' protection in section 50(1), a trustee who committed a breach of trust in relation to his or her dealings with reversionary or other interests under that provision could seek to be relieved from personal liability under section 76 of the *Trusts Act 1973* (Qld).

9.247 However, the power to relieve a trustee from liability under section 76 is in the court's discretion, whereas the protection in section 50(1) operates automatically to ensure that a trustee who exercises power under that provision 'in good faith' will not be responsible for any loss occasioned by the exercise of that power.

9.248 As with section 44, the issue as to whether the 'good faith' protection in section 50(1) should be retained depends on whether there is any particular feature of the exercise of the powers conferred by that section that would justify taking a different approach for dealing with a trustee's liability for a breach of trust. In the absence of any specific justification, it is arguable that the good faith protection should be omitted from section 50(1)(d), and that a trustee's liability should be determined having regard to the same principles that apply to other breaches of trust.

9-25 If a provision to the general effect of section 50(1) of the *Trusts Act 1973* (Qld) is retained, is there any particular reason to retain the 'good faith' protection in that section?

³³² See [9.230] above.

³³³ WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 2, 226–7.

³³⁴ *Ibid* 227.

³³⁵ See [9.241] above in relation to the correction to be made to the drafting of s 50(1), if retained.

³³⁶ See [9.226] ff above.

Protection under section 50(2)

9.249 Under the general law, where the trust fund includes an equitable interest and the legal estate cannot be got in, trustees are said to be under a duty 'to give notice as soon as possible to the persons in whom the legal estate is vested, so that the trustees shall obtain priority over any subsequent incumbrance'.³³⁷

9.250 Trustees are also under a duty to press for the payment of debts and payments owing to the trust and, if they are not paid within a reasonable time, to commence legal proceedings to enforce payment. The only excuse for not taking action to enforce payment is a well-founded belief on the part of the trustees that such action would be fruitless; and the burden of proving the grounds of such a belief is on the trustees.³³⁸ However, trustees are not required, at their own expense, to bring proceedings to recover trust property.³³⁹

9.251 Section 50(2)(a) of the *Trusts Act 1973* (Qld) relieves trustees from any obligation to give notice, or to apply for a charging order, in respect of the property mentioned in section 50(1).

9.252 Section 50(2)(b) further relieves trustees of any duty 'to take proceedings in respect of any default or neglect of the former [or current] possessor, unless requested by a beneficiary and indemnified as to costs'.³⁴⁰ It does not, however, relieve the trustee of the obligation to get in the trust property once it falls into possession.³⁴¹

9.253 The authors of the Model Trustee Code suggested that the provision was directed to the type of situation that arose in *Tudball v Medlicott*.³⁴² In their view, however, the protection afforded by section 50(2) is too wide, and the provision should be omitted.³⁴³

It is hard to see how the retention of such a provision can be justified in the context of a modern revision of trustee legislation. If a reversionary interest or other property not in possession is in danger the trustee should act. He is justified in refraining from acting if there is doubt as to whether action would be fruitful, and particularly if he has no fund available from which to meet his costs of acting. If he finds himself in some sort of dilemma he can seek the advice of

³³⁷ LA Sheridan, *The Law of Trusts* (Barry Rose, 12th ed, 1993) 272, citing *Jacob v Lucas* (1839) 1 Beav 436; 48 ER 1009.

³³⁸ *Re Brogden* (1888) 38 Ch D 546. See also *Clack v Holland* (1854) 19 Beav 262; 52 ER 350; *Re Hurst* (1891) 63 LT 665; *Dwyer v The National Trustees Executors & Agency Co of Australasia Ltd (No 2)* [1939] VLR 417.

³³⁹ *Tudball v Medlicott* (1888) 59 LT 370, 374 (Kekewich J). In that case, trustees were sued (unsuccessfully) for failing to take action to prevent the assignee of a mortgage of trust property from selling the mortgaged property. The plaintiff argued that the trustees should have taken action to prevent the trust property from being sold in circumstances where they suspected that the mortgage deed was a forgery. Kekewich J rejected the argument that the trustees, with no property in their hands, ought to have brought an action 'at their own risk as regards costs and otherwise'.

³⁴⁰ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 1 November 2011) [18.810].

³⁴¹ *Trusts Act 1973* (Qld) s 50(3).

³⁴² WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 2, 226. See the discussion of *Tudball v Medlicott* (1888) 59 LT 370 at n 339 above.

³⁴³ WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 2, 227.

the Court; and if a beneficiary offers to indemnify him he may choose to act, although he might be justified, if no indemnification were offered, in refusing to act. But it is submitted that it is not desirable for statute to provide, as subsection (2) does, that he is not under any obligation 'to take any proceedings or account of any act default or neglect on the part of the person in whom the securities or other property ... are or at any time had been vested', unless requested to do so in writing with indemnification. That is going too far and is particularly unsuitable for the case of a trust of a business where litigation concerning choses in action may be commonplace. In effect the subsection virtually negatives his duty to get in trust property.

9.254 Although they accepted that there was merit in the provision 'to the extent that it permits a trustee to refrain from acting where there is uncertainty as to whether he will be able to recover out of pocket costs, for example if the trust estate consists solely of the right of reversion or chose in action out of possession, or if trust property in his hands could not cover the costs of litigation',³⁴⁴ they considered that it was more appropriate for that issue to be addressed more directly by their proposed provision dealing with the payment of expenses out of trust property.³⁴⁵

9-26 Does section 50(2)–(3) of the *Trusts Act 1973 (Qld)* still serve any purpose or should those subsections be omitted?

NOMINEES, CUSTODIANS AND THE DEPOSIT OF DOCUMENTS FOR SAFE CUSTODY

Background

9.255 As a general rule, trustees must keep documents relating to trust property under their own control and in a safe place. They must have 'their muniments of title, as well as their securities, under their own control'.³⁴⁶

They are intrusted with the custody of them, and they are bound within reasonable limits to see that the deeds are kept in a safe place, and that no one else can take them away. But to that obligation there must be reasonable limits.

9.256 In *Field v Field*, Kekewich J recognised that solicitors often needed to consult title deeds and other trust documents in order to conduct trust business, and held that the trustees were not acting unreasonably in leaving these documents in the custody of their solicitors. On that basis, his Honour refused the beneficiary's application for an injunction to restrain the trustees from permitting the deeds to remain in the custody of their solicitors. Kekewich J suggested, however,

³⁴⁴ Ibid.

³⁴⁵ Ibid 227–8. The authors recommended the inclusion of a provision in the following terms: 'Except under the direction of the Court a trustee is not under an obligation to incur personal liability in the administration of the trust where the trust property in his hands is insufficient to reimburse him'.

³⁴⁶ *Field v Field* [1894] 1 Ch 425, 429 (Kekewich J).

that, once there was no further need to refer to the deeds, 'then they could be put into a safe place'.³⁴⁷

9.257 However, in the case of co-trustees, it is not negligent for trustees to leave documents of title under the control of any one co-trustee, rather than in a place accessible only by all trustees jointly. In *Cottam v Eastern Counties Railway Co*, Wood V-C explained that:³⁴⁸

The reason is that the deeds must be held by some one person, unless they are deposited with bankers, or placed in a box secured by a number of different locks, of which each trustee should hold one of the keys; and negligence cannot be imputed to trustees for not taking such precautions as these.

9.258 Further, where the trust documents are not in jeopardy and are freely accessible by a trustee, the trustee cannot require his or her co-trustee to deposit the documents in a safety deposit box at a bank, so that the documents are accessible only by the trustees jointly.³⁴⁹

9.259 The duty of trustees in relation to trust documents was considered by the High Court in *Austin v Austin*.³⁵⁰ The trustees had allowed title deeds and an equitable mortgage to remain in the possession of the solicitors for the trust, and a member of the firm of solicitors (who was also one of the trustees) misappropriated part of the moneys that were secured by the mortgage. The High Court considered that the liability of the other trustee should be considered in light of the general rule expressed in *Speight v Gaunt* that:³⁵¹

a trustee sufficiently discharges his duty if he takes in managing trust affairs all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own.

9.260 The High Court held that the trustee was not guilty of any breach of trust, referring to the practice of leaving trust documents in the custody of trustees' solicitors.³⁵²

It is common knowledge that in Australia trustees do in fact habitually leave securities in the hands of their solicitors, and we do not know of any authority to show that this may not prudently be done in the case of equitable mortgages. Ordinarily an equitable mortgage will not be discharged by the mortgagor without a return of the security and an acknowledgment from the mortgagee, but the mere custody of a security does not afford any evidence of authority in

347 Ibid 430.

348 (1860) 1 J & H 243, 247; 70 ER 737, 739. See also *Welch v Bank of England* [1955] 1 Ch 508, 537 (Harman J). However, the courts have applied a stricter rule in relation to bearer securities because they are transferable by delivery: see *Mendes v Guedalla* (1862) 2 J & H 259; 70 ER 1054; *Lewis v Nobbs* (1878) 8 Ch D 591.

349 *Re Sisson's Settlement* [1903] 1 Ch 262. In that case, the documents had for many years been held in a safe at the office of the respondent's solicitor, but had recently been moved to the respondent's own house after he was advised that that was the proper course. Swinfen Eady J noted (at 264) that 'the applicant had been afforded every facility for inspecting the documents without charge'.

350 (1906) 3 CLR 516.

351 Ibid 525 (Griffith CJ, Barton and O'Connor JJ), citing *Speight v Gaunt* (1883) 9 App Cas 1, 19 (Lord Blackburn).

352 Ibid 526.

the custodian to receive the debt. It was attempted to draw an analogy between equitable mortgages and what are called 'bearer' securities, but the analogy fails for the reason just given, the possession of a bearer security being sufficient proof of authority to receive the debt evidenced by it.

Section 49

9.261 In Queensland, section 49 of the *Trusts Act 1973* (Qld) allows a trustee to deposit documents relating to a trust, or to the trust property, with a financial institution or with certain corporations for safe custody. The fees incurred are to be paid out of the income or, if necessary, the capital of the trust property. The section provides:

49 Deposit of documents for safe custody

A trustee may deposit any document held by the trustee relating to the trust, or to the trust property, with any financial institution³⁵³ or corporation whose business includes the undertaking of the safe custody of documents, and any sum payable in respect of any such deposit shall be paid out of the income of the trust property, and so far as there is no available income out of the capital of the trust property. (note added)

9.262 Similar provision is made in the ACT, New South Wales, Victoria, Western Australia and New Zealand.³⁵⁴

9.263 Section 49 of the *Trusts Act 1973* (Qld) was based on section 21 of the English *Trustee Act 1925*.³⁵⁵ In recommending the inclusion of section 49 in the *Trusts Act 1973* (Qld), this Commission commented:³⁵⁶

In Australia a practice has grown up, which has received judicial recognition in *Austin v Austin* ... of leaving title deeds and other similar documents in the custody of the solicitor for the trust. Without affecting the propriety of this practice in appropriate circumstances, cl 49 (which adopts a form of provision found in the United Kingdom and other legislation) will authorise the deposit, with a bank or corporation whose business includes the undertaking of safe custody of documents, of trust documents ...

9.264 The Law Reform Sub-Committee of the Law Society of Western Australia had earlier recommended that a similar provision be adopted in that State's trustee legislation.³⁵⁷

353 *Trusts Act 1973* (Qld) s 49 originally referred to any 'bank' rather than to any 'financial institution'. The section was amended in 1997 by substituting 'financial institution' for 'bank': *Miscellaneous Acts (Non-Bank Financial Institutions) Amendment Act 1997* (Qld) s 69. See n 52 above for the definition of 'financial institution'.

354 *Trustee Act 1925* (ACT) s 50; *Trustee Act 1925* (NSW) s 50; *Trustee Act 1958* (Vic) s 25(1); *Trustees Act 1962* (WA) s 48; *Trustee Act 1956* (NZ) s 26. The provisions in the ACT, Victoria, Western Australia and New Zealand refer to a 'bank' rather than to a 'financial institution'.

355 As explained at [9.266] below, s 21 of the *Trustee Act 1925*, 15 & 16 Geo 5, c 19 has since been repealed.

356 Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 41.

357 Law Reform Sub-Committee of the Law Society (WA), *The Law of Trusts*, Report (1961), Supplement 38.

Normally equity requires that title deeds and other documents affecting the trust property must be kept under the control of the trustees. If the trustees part with the custody or control of any such documents and any loss to the trust estate results, the trustees will be personally liable to make good that loss. This section therefore, subject to the special requirements in respect of bearer securities (see section 21 *supra*), authorizes trustees to deposit any documents relating to the trusts or trust property with any bank or with any corporation whose business includes undertaking the safe custody of documents. This is normally prudent practice and should be available to a trustee as to anybody else.

9.265 However, the Scottish Law Commission has suggested that the safe custody 'of documents of title is less important nowadays due to the availability of extracts and the widespread use of nominees to hold securities'.³⁵⁸

Nominees and custodians

9.266 Section 21 of the English *Trustee Act 1925*, which formed the basis for section 49 of the *Trusts Act 1973* (Qld), was repealed by the *Trustee Act 2000* (UK).³⁵⁹ Instead, the *Trustee Act 2000* (UK) makes provision for trustees to appoint 'nominees' and 'custodians' in relation to trust assets.³⁶⁰

9.267 The *Trustee Act 2000* (UK) implemented recommendations made by the Law Commission of England and Wales. The Law Commission considered that the power then conferred by section 21 of the *Trustee Act 1925* was 'very limited':³⁶¹

- (1) It is confined to *documents* that relate to the trust or to trust property. There is no power to vest *trust property* in a nominee.
- (2) The custodian must either be a banker or a company. There is no power to deposit documents with say, a partnership that undertakes the business of custodianship.
- (3) There is no power to charge the costs to capital.³⁶² (emphasis in original; note added)

9.268 The Explanatory Notes to the *Trustee Act 2000* (UK) outlined the limitations in the current law that the new provisions were intended to overcome:³⁶³

Under the present law the ability of trustees of private trusts to employ nominees and custodians is largely governed by two common law principles. The first is that a trustee is under a duty to take such steps as are reasonable to secure control of the trust property and to keep control of it. This prevents trustees from placing assets in the name of nominees or custodians and from

³⁵⁸ Scottish Law Commission, *Trustees and Trust Administration*, Discussion Paper No 126 (2004) [3.32].

³⁵⁹ *Trustee Act 2000* (UK) c 29, s 40(1), (3), sch 2 pt II para 21, sch 4 pt II.

³⁶⁰ *Trustee Act 2000* (UK) c 29, ss 16–17.

³⁶¹ Law Commission of England and Wales, *Trustees' Powers and Duties*, Consultation Paper No 146 (1997) [7.6].

³⁶² The last of these criticisms does not apply to s 49 of the *Trusts Act 1973* (Qld), which provides that the costs of the safe custody are to be paid out of capital if there is no available income.

³⁶³ Explanatory Notes, *Trustee Act 2000* (UK) [68].

using powers of delegation to disguise the appointment of a nominee or custodian. Second, where there are two or more trustees they have a duty to ensure that the title to the trust property is in their joint names so that it can only be transferred with the consent of all. It follows that in the absence of express authority in the trust instrument or statute trustees can neither vest property in nominees nor place trust documents in the custody of a custodian. To do so would result in breach of trust.

9.269 The Explanatory Notes further described how the ability to appoint nominees and custodians would facilitate modern investment management:³⁶⁴

The Law Commission considered that the present law was unduly restrictive. In particular it did not enable trustees to use nominees (a) to provide an administrative service in relation to investments; (b) to facilitate dealings by a discretionary fund manager; (c) as a method of using CREST; and (d) in relation to overseas investments traded by a computerised clearing system. In short the present law prevented many trustees from participating in the benefits of modern investment management.

9.270 The *Trustee Act 2000* (UK) does not define ‘nominee’, but section 16 provides that trustees may appoint a person to act as their nominee in relation to the trust assets (other than settled land) and may take such steps as are necessary ‘to secure that those assets are vested in a person so appointed’.

9.271 Section 17 provides that trustees may appoint a person to act as a custodian in relation to such of the trust assets as they determine. It further provides that a person is a ‘custodian’ for the purposes of the Act if he or she ‘undertakes the safe custody of the assets or of any documents or records concerning the assets’.

9.272 Sections 16 and 17 do not apply to any trust that already has a ‘custodian trustee’ or in relation to any assets vested in the official custodian for charities.³⁶⁵

9.273 A person may not be appointed as a nominee or custodian unless the person carries on a business that consists of, or includes, acting as a nominee or custodian; is a body corporate that is controlled by the trustees; or is a body corporate recognised under section 9 of the *Administration of Justice Act 1985* (UK) (essentially, an incorporated legal practice).³⁶⁶

9.274 The Act provides for the terms on which a nominee or custodian may be appointed, and also includes a number of safeguards in relation to the appointment of a nominee or custodian. These consist of similar, and in some cases, the same safeguards that apply to the appointment, under section 11 of the *Trustee Act 2000* (UK), of an ‘agent’ to exercise all or any of the delegable functions of the trustees. These safeguards are described earlier in this chapter in relation to the issue of whether trustees should be able to delegate their discretions. Briefly, the Act provides that:

364 Ibid.

365 *Trustee Act 2000* (UK) c 29, ss 16(3), 17(4).

366 *Trustee Act 2000* (UK) c 29, s 19(1)–(2). Whether a body corporate is controlled by trustees is to be determined in accordance with s 1124 of the *Corporation Tax Act 2010* (UK) c 4: *Trustee Act 2000* (UK) c 29, s 19(3).

- unless it is reasonably necessary for them to do so, trustees must not appoint a person to act as a nominee or custodian on terms that:³⁶⁷
 - permit the nominee or custodian to appoint a substitute;
 - restrict the liability of the nominee or custodian, or that of its substitute, to the trustees or to any beneficiary; or
 - permit the nominee or custodian to act in circumstances that are capable of giving rise to a conflict of interest;
- the trustees must keep under review the arrangements under which the nominee or custodian is appointed;³⁶⁸ and
- the trustees must comply with the statutory duty of care when entering into arrangements to appoint a nominee or custodian under sections 16 or 17, and when carrying out a review of the nominee's or custodian's duties under section 22.³⁶⁹

9.275 As explained in Chapter 5, the *Trusts Act 1973* (Qld) already makes provision, in section 19, for the appointment of custodian trustees. Under that section, trust property may be vested in a custodian trustee, and dealt with at the direction of the managing trustees. The Commission is interested to receive submissions on whether it is considered that trustees need additional powers, of the kind conferred by the *Trustee Act 2000* (UK), to appoint nominees and custodians.

9-27 Should the *Trusts Act 1973* (Qld) continue to include a provision to the general effect of section 49? If so, should there be any change to the types of entities with which trust documents may be deposited for safe custody?

9-28 Is there a need for trustees to have additional powers to appoint:

- (a) nominees (in whom trust property may be vested); or
- (b) custodians of trust property (to undertake the safe custody of trust assets, or of any documents or records concerning the trust)?

9-29 If yes to Question 9-28:

³⁶⁷ *Trustee Act 2000* (UK) c 29, s 20.

³⁶⁸ *Trustee Act 2000* (UK) c 29, s 22. See [9.75] above for a discussion of this same requirement in relation to an agent who has been appointed to exercise the trustees' delegable functions.

³⁶⁹ *Trustee Act 2000* (UK) c 29, s 2, sch 1 para 3. See [9.77] above for a discussion of these same requirements in relation to an agent who has been appointed to exercise the trustees' delegable functions.

- (a) are there particular provisions of the *Trustee Act 2000* (UK) that should or should not be included in the Act, for example, the provisions enabling trustees, if it is reasonably necessary for them to do so, to appoint a nominee or custodian on terms that:
- (i) permit the nominee or custodian to appoint a substitute;
 - (ii) restrict the liability of the nominee or custodian, or that of its substitute, to the trustees or to any beneficiary; or
 - (ii) permit the nominee or custodian to act in circumstances that are capable of giving rise to a conflict of interest;
- (b) what safeguards should be included in the Act, for example, should the Act impose any specific duties on trustees in relation to any (or all) of the following:
- (i) selecting the nominee or custodian;
 - (ii) determining the terms on which the nominee or custodian is appointed;
 - (iii) reviewing the arrangements under which the nominee or custodian is appointed?

POWER TO CONVERT A BUSINESS INTO A COMPANY

9.276 Section 58 of the *Trusts Act 1973* (Qld) makes provision for trustees to convert a business into a company limited by shares, to sell the business and its assets to a company formed for that purpose, and to accept as consideration for the sale, and retain as an authorised investment, shares or debentures of the company. As the authors of *Jacobs' Law of Trusts in Australia* have noted:³⁷⁰

in the circumstances of modern commerce and taxation provisions, it is often most convenient and desirable to conduct the business through the medium of a limited liability company.

9.277 Section 58 provides:

58 Power to convert business into a company

- (1) Subject to the provisions of the instrument (if any) creating the trust, a trustee may at any time, at the expense of the trust property, convert or join in converting any business into a company limited by shares in such manner, as the trustee thinks fit; and may, at the like expense, promote and assist in promoting a company for taking over the business; and may sell or transfer the business and the capital and assets and goodwill thereof, or any part thereof to the company, or to

³⁷⁰

JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2045].

any company having for its objects the purchase of such a business, in consideration, in either case, wholly or in part of ordinary or preference shares wholly or partially paid up of any such company, or wholly or in part of debentures, debenture stock, or bonds of any such company, and as to the balance (if any) in cash payable immediately, or by any instalments with or without security.

- (2) A trustee may retain as an authorised investment of the trust any shares, debentures, debenture stock or bonds received by the trustee in consequence of the exercise by the trustee of any power conferred by subsection (1).

9.278 Previously, such action would have required the authorisation of the court, unless it was provided for by the trust instrument. The court exercised its general administrative jurisdiction to give authorisation only where there were peculiar or special circumstances, which were not foreseen or provided for by the settlor, making it desirable for the benefit of the estate and the interests of all the beneficiaries that the trustees be given the power.³⁷¹ Statute now also gives the court discretion in certain circumstances to confer powers on trustees that they do not otherwise have.³⁷²

9.279 Section 58 avoids the need for recourse to the court. However, it applies subject to the provisions of the trust instrument³⁷³ and so, like the general power to carry on a business conferred by section 57(1), can be overridden by the settlor.³⁷⁴

9.280 Section 58 was modelled on provisions in Western Australia and New Zealand, which also apply subject to a contrary intention in the trust instrument.³⁷⁵ None of the other Australian jurisdictions makes express provision for these powers.

9-30 Should the *Trusts Act 1973 (Qld)* continue to include a provision to the effect of section 58?

POWER TO MAKE INQUIRIES OF BENEFICIARIES

9.281 Section 33(1)(j) of the *Trusts Act 1973 (Qld)* provides that a trustee may:

- (j) make such inquiries, by way of advertisement or otherwise, as the trustee thinks necessary for the purpose of ascertaining the next of kin or beneficiaries; ...

³⁷¹ *Re New* [1901] 2 Ch 534, 544–5 (Romer LJ); *Re Crago* (1908) 8 SR (NSW) 269; *Re Lees* (1915) 34 NZLR 1054; *McCarthy v McCarthy* (1919) 19 SR (NSW) 122.

³⁷² *Trusts Act 1973 (Qld)* s 94, which is discussed in Chapter 12.

³⁷³ *Trusts Act 1973 (Qld)* ss 31(1), 58(1).

³⁷⁴ *Trusts Act 1973 (Qld)* s 57 is discussed in Chapter 8.

³⁷⁵ See *Trustees Act 1962 (WA)* ss 5(2), (3)(a), 56; *Trustee Act 1956 (NZ)* ss 2(4), (5)(a), 33.

9.282 Section 115 of the Act further provides that, unless a contrary intention appears in the instrument (if any) creating the trust, the costs of those inquiries are to be paid out of the legacy, money or distributive share of the person or persons in respect of whom the inquiries were made.

9.283 Similar provision is made in the trustee legislation of Western Australia and New Zealand.³⁷⁶

POWER TO DO OR OMIT ALL ACTS AND EXECUTE ALL INSTRUMENTS

9.284 Section 33(1)(n) of the *Trusts Act 1973* (Qld) confers a general catch-all power on trustees to 'do or omit all acts and things, and execute all instruments necessary to carry into effect the powers and authorities given by this Act or by or under the instrument creating the trust'.³⁷⁷

9.285 Similar provision is made in the trustee legislation of Western Australia and New Zealand.³⁷⁸

9.286 In *Ryan v Public Trustee of Queensland*, Williams J commented on the usefulness of section 33(1)(n) in the context of the development of real estate by trustees:³⁷⁹

These days many steps which would result in the improvement or development of real estate requires an application to a local authority or other statutory authority for consent. In that regard s 33(1)(n) should not be overlooked; ... Clearly the trustee would have power to make all necessary applications for consent prerequisite to the proposed development of the property. Where it was a necessary prerequisite of the proposed development that the land be rezoned then the trustee would have, as incidental to the power to develop the property, the power to apply for rezoning.

9.287 The Ontario Law Reform Commission also considered that, while trustees are generally entitled to execute all acts or instruments that are necessary to implement any of their powers, an express provision to this effect was desirable.³⁸⁰

TRUSTEE MAY SUE HIMSELF OR HERSELF IN A DIFFERENT CAPACITY

9.288 Section 59 of the *Trusts Act 1973* (Qld) provides that a trustee may sue himself or herself in a different capacity. It provides:

³⁷⁶ *Trustees Act 1962* (WA) ss 30(1)(i), 108; *Trustee Act 1956* (NZ) s 15(1)(h).

³⁷⁷ Similar provision had previously been included in s 57(2) of the *Settled Land Act 1886* (Qld) with respect to the exercise of a power of sale, exchange, partition, leasing, mortgaging, charging, or other power by a tenant for life, or by the trustees of a settlement.

³⁷⁸ *Trustees Act 1962* (WA) s 30(1)(m); *Trustee Act 1956* (NZ) s 15(1)(l).

³⁷⁹ [1998] 1 Qd R 679, 684.

³⁸⁰ Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 249.

59 Trustee may sue himself or herself in a different capacity

Notwithstanding any rule of law or practice to the contrary, a trustee of any property in that capacity may sue, and be sued by, himself or herself in any other capacity whatsoever, including the trustee's personal capacity; but in every such case the trustee shall obtain the directions of the court in which the proceedings are taken as to the manner in which differing interests are to be represented.

9.289 The provision is procedural only.³⁸¹ It provides an exception to the general rule that a person may not be both plaintiff and defendant in the same action.³⁸² The Commission explained in its 1971 Report that:³⁸³

It is a slowly vanishing rule of practice that in legal proceedings a party may not appear on both sides of the record, ie may not appear both as plaintiff and defendant in the same action. This sometimes creates difficulties, eg where a person, who is an (or the only) executor or trustee of an estate, is also a beneficiary and wishes in that character to enforce a claim against the estate: cf: *Rubin v McNamara* [1969] QWN 18. Clause 59 will enable such proceedings to be instituted, provided, however, that the trustee takes directions as to the manner in which differing interests are to be represented.

9.290 Similar provisions are included in the trustee legislation of Western Australia and New Zealand.³⁸⁴

THE EFFECT OF A CONTRARY INTENTION IN THE TRUST INSTRUMENT

Introduction

9.291 Section 4(4) of the *Trusts Act 1973* (Qld) provides that the powers conferred by or under the Act on a trustee are in addition to those given by any other Act and by the instrument (if any) creating the trust. However, the subsection further provides that, *unless otherwise provided*, the powers conferred on the trustee by the Act 'apply if and so far only as a contrary intention is not expressed in the instrument (if any) creating the trust, and have effect subject to the terms of that instrument'.

³⁸¹ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 15 May 2012) [1.6410].

³⁸² 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.

³⁸³ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 46.

³⁸⁴ *Trustees Act 1962* (WA) s 57; *Trustee Act 1956* (NZ) s 33A. In addition, the public trustee legislation in most Australian jurisdictions and New Zealand provides that the public trustee, acting in one capacity, may sue himself or herself in another capacity: *Public Trustee Act 1985* (ACT) s 26; *NSW Trustee and Guardian Act 2009* (NSW) s 21; *Public Trustee Act* (NT) s 75; *Public Trustee Act 1978* (Qld) s 137; *Public Trustee Act 1995* (SA) s 5(3); *Public Trustee Act 1941* (WA) s 52; *Public Trust Act 2001* (NZ) s 120.

9.292 The provisions considered in this chapter are found in Part 4 of the Act. Section 31(1) of the Act, which deals with the application of those provisions, provides:

Except where otherwise provided in this part, the provisions of this part shall apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust.

9.293 Consequently, unless a provision in Part 4 of the Act states otherwise, the provision, to the extent that it confers powers on a trustee, creates an exception to section 4(4), and the powers conferred by the provision will apply whether or not a contrary intention is expressed in the trust instrument.

9.294 A number of the provisions considered in this chapter do not simply confer powers, but also deal with other matters, for example, the protection in particular circumstances of the trustee or a third party.³⁸⁵ As a drafting device, section 31(1) is useful in confirming that those parts of the provisions are also unaffected by a contrary intention in the trust instrument. However, given that section 4(4) deals only with the effect of a contrary intention in relation to a power conferred by the Act (and does not apply to the protections provided by the Act), this aspect of section 31(1) is not strictly necessary.

Provisions that are not subject to a contrary intention in the trust instrument

9.295 The majority of the provisions discussed in this chapter do not create an exception to section 31(1). As a result, the powers conferred by the provisions (and the provisions in their entirety) apply whether or not a contrary intention is expressed in the trust instrument:

- the power to give receipts (section 43);
- the power to employ agents (section 54);
- the powers to value the trust property and to cause the accounts of the trust property to be audited (sections 51(1) and 52(1));
- the power to delegate trusts (section 56);
- the power to insure trust property (section 47(1));
- the power to compound liabilities (section 44);
- the power to deal with reversionary and other interests not vested in possession in the trustee (section 50(1));
- the power to deposit documents relating to trust property for safe custody (section 49);
- the power to make inquiries of beneficiaries (section 33(1)(j));

³⁸⁵

See, eg, *Trusts Act 1973* (Qld) ss 43, 44, 50(1)(d), (2).

- the power to do or omit all acts and execute all instruments necessary to carry into effect the trustee's powers and authorities (section 33(1)(n)); and
- the power to sue himself or herself in a different capacity (section 59).

9.296 In relation to trustees' power to compound liabilities, Ford and Lee have suggested that the approach taken in Queensland, where the power is not subject to a contrary intention, is preferable:³⁸⁶

It is most unfortunate that in the Australian Capital Territory, New South Wales, South Australia and Tasmania this power is made subject to any contrary provision in the trust instrument. A settlor should never attempt to limit so vital an administrative power.

9.297 In the Commission's view, given the nature of the powers referred to at [9.295] above, it is appropriate that the *Trusts Act 1973* (Qld) does not enable those powers to be excluded by the trust instrument. If the position were otherwise, trustees would be hindered in carrying out their duties and, in some cases, trust property, or the documents in relation to trust property, might be put at risk.

Provisions that are subject to a contrary intention in the trust instrument

9.298 Two of the provisions discussed in this chapter create an exception to section 31(1) of the *Trusts Act 1973* (Qld). As a result, the effect of these provisions can be modified, or excluded, by a contrary intention in the trust instrument.

Application of insurance money

9.299 Section 48 provides that the money receivable by a trustee under an insurance policy is capital money for the purposes of the trust. Section 48(7) provides that the section applies 'only if and as far as a contrary intention is not expressed in the instrument (if any) creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained'.

9.300 Section 48(7) gives effect to a settlor's wishes about matters that affect the ultimate entitlements of the beneficiaries under the trust. Because of the specific context in which section 48 applies, the Commission does not generally propose any change to the way in which it deals with the effect of the trust instrument. However, it is arguable that section 48(7) should not apply to the whole of the provision but only to those parts that deal with how the insurance proceeds are to be held. It should not, for example, be possible for a trust instrument to exclude section 48(6), which provides that 'nothing in the section shall prejudice or affect the rights of any mortgagee lessor or lessee, whether under any statute or otherwise'.

Power to convert business into a company

9.301 Section 58 gives trustees the power to convert a business into a company, and is presently expressed to apply 'subject to the provisions of the instrument (if

³⁸⁶

HAI Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 11 March 2011) [12.9810].

any) creating the trust'. Given the nature of that provision, it is arguable that it should reflect the position taken in relation to contrary intention that is ultimately recommended in relation to trustees' investment powers. As noted previously, trustees have wide powers of investment under section 21 of the *Trusts Act 1973* (Qld) 'unless expressly forbidden by the instrument creating the trust'.

Possible new powers

9.302 In this chapter, the Commission has sought submissions on whether the *Trusts Act 1973* (Qld) should be amended to enable trustees:

- to delegate the exercise of certain of their powers to a third party;³⁸⁷ and
- to appoint nominees (in whom trust property may be vested) or custodians of trust property (to undertake the safe custody of trust assets, or of any documents or records concerning the trust).³⁸⁸

9.303 If ultimately recommended, these powers (and, in particular, the power to delegate the exercise of the trustees' powers) would create significant exceptions to the usual duty to act personally. As explained earlier in this chapter, the powers to delegate the exercise of certain powers and to appoint nominees and custodians are now conferred by the *Trustee Act 2000* (UK). However, the exercise of those powers is subject to any restriction or exclusion imposed by the trust instrument.³⁸⁹

9-31 If the *Trusts Act 1973* (Qld) is amended to give trustees the power to appoint any or all of the following:

- **third parties to exercise certain of the trustees' powers;**
- **nominees;**
- **custodians;**

should those powers apply:

- (a) subject to a contrary intention in the trust instrument; or**
- (b) whether or not a contrary intention is expressed in the trust instrument?**

³⁸⁷ See [9.98] ff, Question 9-6 above.

³⁸⁸ See [9.266] ff, Question 9-28 above.

³⁸⁹ *Trustee Act 2000* (UK) c 29, s 26(b).

Chapter 10

Trustees' Distributive Powers

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INTRODUCTION

10.1 This chapter examines the provisions of Part 5 of the *Trusts Act 1973* (Qld)¹ dealing with trustees' powers of maintenance and advancement, and protective trusts. It also considers some of the provisions in Parts 4 and 6 of the Act that confer other powers relating to the distribution of trust property,² in particular, the powers to deliver chattels to life tenants and infants and to appropriate trust property to beneficiaries.

¹ *Trusts Act 1973* (Qld) ss 61–64.

² *Trusts Act 1973* (Qld) ss 33(1)(l)–(m), (2)–(5), 73–74.

POWER TO APPLY INCOME FOR THE MAINTENANCE AND ADVANCEMENT OF A BENEFICIARY

Introduction

10.2 The court has always had an inherent jurisdiction to make an order authorising trustees to apply income (or capital)³ for the maintenance of a beneficiary who is a minor.⁴ Where property was held on trust absolutely, but subject to defeasance, the court could, in its inherent jurisdiction, make an order for the payment of maintenance by the trustee.⁵ However, the court did not generally have the power under its inherent jurisdiction to apply trust property for the maintenance of a minor where the minor's interest in the property was contingent, rather than vested.⁶

10.3 In England, a statutory power enabling trustees to apply income for the maintenance of infant beneficiaries was first introduced by *Lord Cranworth's Act* in 1860.⁷ That provision was repealed and replaced by section 43 of the *Conveyancing and Law of Property Act 1881*, and then by section 31 of the *Trustee Act 1925*, which remains in force today.

10.4 With the exception of Tasmania, the trustee legislation of all Australian jurisdictions gives trustees a broad power, where property is held on trust for a beneficiary who is a minor, to apply the income for the maintenance of the beneficiary.⁸ The legislation also makes provision for the accumulation of any surplus income during the minority of the beneficiary. In addition, the legislation in Queensland, South Australia, Victoria and Western Australia makes provision for the application of income for the maintenance of adult beneficiaries who have a contingent interest in trust property. The various provisions are based, with some modifications, on section 31 of the English *Trustee Act 1925*.

Section 61

10.5 Section 61 of the *Trusts Act 1973* (Qld) provides:

³ *Re Lawrence* (1908) 25 WN (NSW) 79.

⁴ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2057].

⁵ *Parker v Dowling* (1916) 16 SR (NSW) 234.

⁶ *Re Lesser* [1954] VLR 435, 445 (Dean J for the Court). There are, however, some complex exceptions in relation to dispositions by a parent or person standing *in loco parentis* to the minor: see *Re Greaves' Settled Estates* [1900] 2 Ch 683, 686 (Farwell J); 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) vol 2, [18.127].

⁷ *Trustees, Mortgagees, etc Act 1860*, 23 & 24 Vict, c 145, s 26. This provision applied where property was held on trust for an infant either absolutely, or contingently on attaining twenty-one years, or on the occurrence of some event before that age.

⁸ *Trustee Act 1925* (ACT) s 43; *Trustee Act 1925* (NSW) ss 43–43A; *Trustee Act* (NT) s 24; *Trusts Act 1973* (Qld) s 61; *Trustee Act 1936* (SA) 33; *Trustee Act 1958* (Vic) s 37; *Trustees Act 1962* (WA) s 58. See also *Trustee Act 1956* (NZ) s 40; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 31. Although there is no equivalent in the *Trustee Act 1898* (Tas), the Public Trustee does have power to apply income or capital for the maintenance of an infant beneficiary: *Public Trustee Act 1930* (Tas) s 34.

61 Power to apply income for maintenance etc and to accumulate surplus income during a minority

- (1) When any property is held by trustees in trust, whether absolutely or contingently for a beneficiary who is an infant, the trustee may, at the trustee's absolute discretion, pay to the infant's parent or guardian (if any) or otherwise apply for or towards the infant's maintenance, education (including past maintenance or education) advancement or benefit, the income of that property or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education or not.
- (2) During the infancy of any such person, if the person's interest so long continues, the trustee shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income thereof from time to time in authorised investments, and shall hold those accumulations as follows—
 - (a) if any such person—
 - (i) attains full age, or marries under that age, and the person's interest in such income during the person's infancy or until the person's marriage is a vested interest; or
 - (ii) on attaining full age or on marriage under that age becomes entitled to the property from which income arose in fee simple, absolute or determinable, or absolutely, or for an entailed interest;

the trustee shall hold the accumulations in trust for such person 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, and so that the receipt of such person after marriage, and though still an infant, shall be a good discharge;
 - (b) in any other case—the trustee shall, notwithstanding that such person had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accumulations arose, and as 1 fund with such capital for all purposes;

but the trustee may, at any time during the infancy of such person if the person's interest so long continues, apply those accumulations, or any part thereof, as if they were income arising in the then current year.
- (3) Where any property is held by a trustee in trust for a beneficiary of full age who has a contingent interest in that property, the trustee may, at the trustee's sole discretion, pay to such beneficiary or otherwise apply for or towards the beneficiary's maintenance, education (including past maintenance or education) advancement or benefit, the income of that property or any part thereof.
- (4) This section shall apply in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property, but it applies to a future or contingent legacy by the parent of, or a person standing in loco parentis to, the legatee, if and for such period as, under the general law, the legacy carries interest for the maintenance

of the legatee, and in any such case as last aforesaid the rate of interest shall (if the income available is sufficient, and subject to any rules of court to the contrary) be 4% per annum; and where in the case of a contingent interest the limitation or trust would, but for the operation of a protective trust (whether created or statutory) carry the intermediate income of the property, that limitation or trust shall for the purposes of this subsection be deemed notwithstanding the protective trust to carry the intermediate income.

- (5) This section applies to a vested annuity in like manner as if the annuity were the income of property held by a trustee in trust to pay the income thereof to the annuitant for the same period for which the annuity is payable, save that in any case accumulations made during the infancy of the annuitant shall be held in trust for the annuitant or the annuitant's personal representative absolutely.
- (6) This section does not apply where the instrument (if any) under which the interest arises came into operation before the commencement of this Act.
- (7) 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).

10.6 It has been observed that the Australian provisions are necessarily lengthy, as they 'reflect a number of complexities which are inherent in the situation with which the trustee has to deal, in particular the situation where the infant may not survive to attain a vested interest'.⁹ Section 61 deals with a highly technical and complex subject matter. Nevertheless, the Commission considers that, apart from any changes that might be recommended in relation to the matters raised below, the section would benefit from being redrafted in a more modern style. In particular, subsections (2) and (4) are very dense provisions, and subsection (2) still refers to 'entailed interests'.¹⁰ Further, section 61 refers to an 'infant', whereas legislation would now refer to a 'minor'.

Minor beneficiaries

Application of income

10.7 Section 61(1) of the *Trusts Act 1973* (Qld) applies where any property is held on trust, whether absolutely or contingently, for a beneficiary who is an 'infant' (or, in modern terminology, a 'minor') — that is, for a beneficiary who has not attained the age of majority,¹¹ which is 18 years of age.¹²

⁹ WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 103. See also the observations of the Ontario Law Reform Commission, which initially favoured a simpler statutory power but noted that, on reflection, 'it became evident that, if a statutory power is to be introduced, it must provide a solution to the range of possible questions that might arise': Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 2, 337–8.

¹⁰ See *Property Law Act 1974* (Qld) s 22, which abolished estates tail.

¹¹ *Thurgood v Director of Australian Legal Aid Office* (1984) 9 Fam LR 916, 922 (Wilcox J). Neither the *Trusts Act 1973* (Qld) nor the *Acts Interpretation Act 1954* (Qld) defines 'infant'.

¹² *Law Reform Act 1995* (Qld) s 17. See also the definitions of 'minor', 'child' and 'adult' in s 36 of the *Acts Interpretation Act 1954* (Qld).

10.8 It empowers the trustee, in his or her absolute discretion, to pay to the minor's parent or guardian, or otherwise apply for, or towards, the minor's 'maintenance, education (including past maintenance or education), advancement or benefit', the income of that property, in whole or in part.

10.9 Section 61(1) provides that the trustee may exercise this power whether or not there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education.¹³

10.10 Although the power to apply income is expressed broadly, in the case of a contingent interest, it is subject to the limitations contained in section 64(4).¹⁴

10.11 As noted above, similar provision is made in all of the other Australian jurisdictions, except for Tasmania.¹⁵ However, the ACT and New South Wales provisions differ slightly from the Queensland provision. Section 43(1) of the New South Wales Act, which is in virtually the same terms as the ACT provision, provides:

- (1) Where any property is held in trust for a person who is for the time being an infant for any interest whatsoever, whether vested or contingent, and whether absolute or liable to be divested, the trustee may at the trustee's sole discretion pay to the parent or guardian, if any, of the infant, or to the person with whom the infant is for the time being residing, or otherwise apply to the whole or any part of the income of the property, for or towards the maintenance education or benefit of the infant. (emphasis added)

10.12 Section 61 of the Queensland Act refers to property that is held in trust, whether 'absolutely or contingently'. Where an interest is vested, but is liable to be divested, it is arguable that it would not fall within the meaning of property held in trust 'absolutely' for the beneficiary. In contrast, the ACT and New South Wales provisions clearly apply to a vested interest that is liable to be divested.

10.13 Further, in addition to enabling the income to be paid to the parent or guardian of a minor beneficiary, the ACT and New South Wales provisions enable the income to be paid to 'the person with whom the child is for the time being residing'.

10-1 Should section 61(1) of the *Trusts Act 1973* (Qld) be amended:

- (a) to apply where property is held on trust for any interest, 'whether vested or contingent, and whether absolute or liable to be divested'; and**

¹³ Prior to this enactment, it was said that, 'where the father of an infant is alive, trustees should, in granting maintenance, bear in mind that the court never allows a father maintenance out of his children's property without a previous inquiry as to his ability to maintain them himself': R Cozens-Hardy Horne, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 305.

¹⁴ *Trusts Act 1973* (Qld) s 61(4) is discussed at [10.27] ff below.

¹⁵ *Trustee Act 1925* (ACT) s 43(1); *Trustee Act 1925* (NSW) s 43(1); *Trustee Act* (NT) s 24(1); *Trustee Act 1936* (SA) 33(1)(c)(i); *Trustee Act 1958* (Vic) s 37(1)(a); *Trustees Act 1962* (WA) s 58(1)(a).

- (b) to enable income to be paid not only to the parent or guardian of a minor beneficiary, but also to a person with whom a minor beneficiary is for the time being residing?**

Accumulation of the residue of the income

10.14 Although section 61(1) of the *Trusts Act 1973* (Qld) confers a power to apply the trust income for specified purposes, the trustee may choose to apply only part of the income, in which case there will be a residue of income.

10.15 Section 61(2) provides that, during the minority of the beneficiary, the trustee 'shall accumulate all the residue of income in the way of compound interest by investing the same and the resulting income thereof from time to time in authorised investments'. It also requires the trustee to hold the accumulations in specified ways.

10.16 Similar provision is made in most of the other Australian jurisdictions.¹⁶

10.17 The general tenor of these provisions is to ensure that only beneficiaries who survive to attain full age (or who marry under that age) will receive any accumulations. Otherwise, the accumulations accrue to, and follow, the capital fund that produced them.¹⁷ The provisions also empower the trustee, during the minority of the beneficiary, to apply the accumulations, or any part of them, as if they were income arising in the then current year.

10.18 The equivalent provisions of the ACT legislation are also lengthy, but are arguably clearer than section 61(2) of the Queensland Act. Unlike section 61(2), they do not include any reference to the marriage of the beneficiary before attaining his or her majority.¹⁸ Section 43(5)–(9) of the *Trustee Act 1925* (ACT) provides:

- (5) During the childhood, if the interest of the child so long continues, the trustee shall accumulate all the residue of the income in the way of compound interest by investing the same, and the resulting income from time to time on securities on which he or she is by the trust instrument or by law authorised to invest the trust money.
- (6) During the childhood, if the interest of the child so long continues, the trustee may at any time, if he or she thinks fit, apply the accumulations or any part of them as if the same were income arising in the then current year.
- (7) In the following cases the trustee shall hold the accumulations absolutely for the child:

¹⁶ *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); *Trustee Act 1958* (Vic) s 37(2); *Trustees Act 1962* (WA) s 58(2).

¹⁷ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 11 March 2011) [12.12300]. See also GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [23.115].

¹⁸ Nor do the provisions in New South Wales, the Northern Territory or South Australia refer specifically to marriage: see *Trustee Act 1925* (NSW) s 43(4)–(8); *Trustee Act* (NT) s 24(2); *Trustee Act 1936* (SA) s 33(4)–(6).

- (a) if otherwise than by virtue of this section the child is entitled to the income which has been accumulated;
 - (b) if, under the provisions of the trust instrument, the child is entitled on reaching 18 years old or on the happening of an earlier event to a vested interest, whether absolute or liable to be divested, or in full ownership in the property from which the income arose, and the child in fact becomes entitled to such vested interest.
- (8) Any accumulations held in trust in accordance with subsection (7) do not affect the provisions of any settlement made by the child under a Territory law during his or her childhood.
- (9) Except in the cases mentioned in subsection (7), and notwithstanding that the person for whom the property is held in trust had a vested interest in the income by virtue of this section, the trustee shall hold the accumulations as an accretion to the capital of the property from which the accumulations arose, and as a single fund with such capital for all purposes.

10.19 In England, section 31(2) of the *Trustee Act 1925* has been amended by omitting the words 'in the way of compound interest by investing the same and the resulting income thereof'.¹⁹ That provision now reads:

During the infancy of any such person, if his interest so long continues, the trustees shall accumulate all the residue of that income by investing it, and any profits from so investing it, from time to time in authorised investments, ... (emphasis added)

10-2 Apart from modernising the drafting of section 61(2) of the *Trusts Act 1973 (Qld)* — including omitting the reference to 'entailed interests' — are there any particular improvements that could be made to the provision? For example, should section 61(2) of the *Trusts Act 1973 (Qld)* be amended to omit the reference to a beneficiary who marries before attaining the age of majority?

Adult beneficiaries

10.20 Section 61(3) of the *Trusts Act 1973 (Qld)* applies where property is held on trust for an adult beneficiary who has a contingent interest in the property. It provides that the trustee may, in his or her 'sole discretion',²⁰ pay the income of that property, or any part of it, or otherwise apply the income for, or towards, the beneficiary's 'maintenance, education (including past maintenance or education) advancement or benefit'. This power is subject to the limitations contained in section 64(4).²¹

¹⁹ *Trustee Act 2000 (UK)* c 29, s 40(1), sch 2 pt II para 25.

²⁰ Cf *Trusts Act 1973 (Qld)* s 61(1), which refers to the trustee's 'absolute discretion'.

²¹ *Trusts Act 1973 (Qld)* s 61(4) is discussed at [10.27] ff below.

10.21 The authors of *Jacobs' Law of Trusts in Australia* have commented, in relation to the Queensland provision, that:²²

The result, apparently, is that in Queensland a trustee has statutory power to apply trust income towards the maintenance of an adult beneficiary where his interest is contingent but not where it is vested. Such a result could hardly be intended.

10.22 However, if the provision applied to a vested interest it would be necessary to ensure that the power did not prejudice a person with a prior life or other interest. For example, if trust property is held for a life tenant, and for another beneficiary in remainder, the person entitled in remainder has a vested interest (being vested in interest, but not in possession). However, it is the life tenant who is entitled to the income produced by the property, and it would be inconsistent with the rights of the life tenant to permit an application of income to be made to the person entitled in remainder.

10.23 The other jurisdictions that make provision for income to be paid to, or on behalf of, an adult beneficiary are all framed slightly differently.

10.24 In Victoria and Western Australia, if, upon attaining the age of majority, the beneficiary does not have a vested interest in the income of the property, the trustee is required, subject to any prior interests, to pay the income to the adult beneficiary (rather than having a discretion as to payment).²³ Section 58(1)(b) of the *Trustees Act 1962* (WA) provides:

- (1) Where any property is held by a trustee in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property—

...

- (b) if the person on attaining the age of 18 years has not a vested interest in that income, the trustee shall thenceforth pay the income of that property and of any accretion thereto, under subsection (2), to him until he either attains a vested interest therein or dies, or until failure of his interest;

10.25 In South Australia, if an adult beneficiary has a contingent interest in trust property, the trustee has a discretion to pay the whole, or any part, of the income to, or on behalf of, the adult beneficiary 'or to some person (selected or approved by the trustee)'.²⁴

10.26 The British Columbia Law Institute recommended a provision enabling the trustee to pay income for maintenance to a person other than the beneficiary — namely, to a spouse or child of the beneficiary, if the trustee considers the

²² JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2065].

²³ *Trustee Act 1958* (Vic) s 37(1)(b); *Trustees Act 1962* (WA) s 58(1)(b). See also *Trustee Act 1956* (NZ) s 40(1)(b).

²⁴ *Trustee Act 1936* (SA) s 33(1)(c)(ii).

circumstances appropriate and to the benefit of the beneficiary.²⁵ This followed an earlier recommendation of the Ontario Law Reform Commission to the same effect.²⁶

An area of uncertainty for trustees, where the vesting of an interest is delayed until well after a beneficiary attains majority, is whether maintenance payments for the benefit of that beneficiary may also be applied for the benefit of his spouse and children. In England, trustees are permitted to make such payments by creating sub-trusts in the furtherance of their power to 'benefit' the beneficiary ... We are of the opinion that trustees should have this power where adult beneficiaries are involved; but rather than structuring the power exclusively in the form of a sub-trust for a spouse or child of the adult beneficiary, we have concluded that trustees should also be permitted to make direct payments, if they consider the circumstances to be appropriate.

10-3 What, if any, changes should be made in relation to a trustee's power under section 61(3) of the *Trusts Act 1973* (Qld) to apply income for the maintenance, education, advancement or benefit of an adult beneficiary, for example:

- (a) should the provision apply to vested, as well as contingent, interests;**
- (b) should the trustee have a discretion as to the payment of income or should the trustee be required to pay the income?**

Contingent interests

10.27 Section 61(4) of the *Trusts Act 1973* (Qld) qualifies a trustee's power to apply income in the case of a beneficiary who has a contingent interest in the trust property. Generally, it provides that section 61 applies in the case of a contingent interest only if the 'limitation or trust carries the intermediate income of the property'. In other words, the power does not apply if, on the happening of the contingent event, the beneficiary would only be entitled to the legacy without interest.²⁷ The 'intermediate income' is the income generated between the time the trust comes into effect and the time when the beneficiary's interest ultimately vests.²⁸

10.28 Since the enactment of the *Succession Act 1981* (Qld), that Act has provided (originally in section 62 and now in section 33H) that:

A contingent, future or deferred disposition of property, whether specific or residuary, includes any intermediate income of the property that has not been disposed of by the will.

²⁵ British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 64–5.

²⁶ Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 2, 340–1.

²⁷ *Re Dickson* (1885) 29 Ch D 331.

²⁸ Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) 151. See also at 152.

10.29 That provision, which was enacted after the *Trusts Act 1973* (Qld), has enlarged the circumstances in which the power to pay or apply income under section 61 will be exercisable.

10.30 Section 61(4) also provides that section 61 will apply in the case of a future or contingent legacy by the parent of, or a person standing in *loco parentis* to, the beneficiary, if and for such period as, under the general law, the legacy carries interest for the maintenance of the beneficiary.

10.31 Generally, where a legacy is payable at a future date, interest is payable on the legacy from the date on which it becomes payable.²⁹ However, that rule is subject to several exceptions.³⁰ Relevantly, for the purposes of section 61(4), there is an exception that applies in relation to legacies given by a parent or person *in loco parentis* to a minor beneficiary. Where such a legacy is given (including a vested legacy the payment of which is postponed and a contingent legacy) and the will does not make any provision for the maintenance of the minor beneficiary, the legacy carries interest from the testator's death.³¹ The rationale for the rule is to create a provision for the minor's maintenance.³² However, this exception does not apply where the testator's will provides for the maintenance of the minor, as the reason for allowing interest on the legacy (namely, to provide maintenance for the minor) fails.³³

10.32 Section 61(4) also provides that where, in the case of a contingent interest, the limitation or trust would, but for the operation of a protective trust (whether created or statutory), carry the intermediate income of the property, that limitation or trust shall be deemed, notwithstanding the protective trust, to carry the intermediate income.

10.33 Similar provision is made in the trustee legislation of Victoria and Western Australia.³⁴

10.34 The provisions in the ACT, New South Wales and South Australia do not make any reference to legacies to a minor by a parent or person standing *in loco parentis* to the minor. Instead, they deal with the issue of the intermediate income more directly.³⁵ Section 43(4) of the *Trustee Act 1925* (ACT), which is in similar

²⁹ *Donovan v Needham* (1846) 9 Beav 164, 167; 50 ER 306, 307 (Lord Langdale MR).

³⁰ See 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) vol 2, [18.125] ff.

³¹ *A-G v Thompson* (1712) Prec Ch 337; 24 ER 158; *Beckford v Tobin* (1749) 1 Ves Sen 308; 27 ER 1049; *Gleeson v Gleeson* (1886) 12 VLR 783.

³² *Beckford v Tobin* (1749) 1 Ves Sen 308, 310; 27 ER 1049, 1050 (Lord Hardwicke LC); *Gleeson v Gleeson* (1886) 12 VLR 783, 787 (Webb J).

³³ *Donovan v Needham* (1846) 9 Beav 164, 167; 50 ER 306, 307 (Lord Langdale MR).

³⁴ *Trustee Act 1958* (Vic) s 37(3); *Trustees Act 1962* (WA) s 58(3).

³⁵ *Trustee Act 1925* (ACT) s 43(4); *Trustee Act 1925* (NSW) s 43(3). In *Permanent Trustee Co of NSW Ltd v Pym* (1938) 39 SR (NSW) 1, Long Innes CJ in Eq suggested (at 9) that s 43(3) of the *Trustee Act 1925* (NSW) was undoubtedly drafted to avoid the difficulties that had resulted from a line of English authorities including *Re Dickson* (1885) 29 Ch D 331. In the latter case, the Court held that the provision empowering a trustee to apply income of property held on trust towards the maintenance of a minor applied only where the legacy was set apart by the direction of the testator, so that the income of the legacy went to the minor on

terms to section 43(3) of the *Trustee Act 1925* (NSW), provides for the child's interest to carry the intermediate income in particular circumstances, including where it has not be expressly or specifically disposed of:

- (4) Where the interest for which the property is held in trust for the child is future or contingent, and the trust for the child would not, apart from this section, carry the intermediate income, and the intermediate income is not expressly or specifically disposed of but would pass to some other person only because of an interest to which he or she is entitled under a residuary or a general gift in the trust instrument, or in the absence of such a gift then as upon intestacy or as upon a resulting trust, the trust for the child shall, during the childhood, if the interest of the child so long continues, be deemed to carry the intermediate income, and the interest of such person shall not be deemed to be a prior interest within the meaning of this section. (emphasis added)

10.35 The South Australian provision is worded slightly differently. Section 33(3) of the *Trustee Act 1936* (SA) provides:

- (3) The power conferred by this section shall not be capable of being exercised so as to prejudice any interest in or charge over the property which is prior to that of the infant or other beneficiary: Provided that where the interest of the infant or other beneficiary is not vested, and would not apart from the power given by this section permit any participation in the intermediate income, but such intermediate income is not specially disposed of and would pass to some other person only under a residuary or general gift of property in the instrument (if any) creating the trust or in the absence of such gift as upon intestacy or as upon a resulting trust, then the intermediate income shall be available for the exercise of the power given by this section and the interest of such person as lastly mentioned in the intermediate income shall not be deemed prior to that of the infant or other beneficiary for the purposes of this section. (emphasis added)

10.36 These provisions would arguably provide a simpler way to deal with the issue of contingent interests and intermediate income.³⁶

fulfilling the contingency. In the absence of such a direction, the Court took the view that, even where the trustees had, for convenience, set apart an amount sufficient to meet the general legacies, the trustees did not hold any property on trust for the minors; rather, they held the property on trust for the residuary beneficiaries who would be entitled to the fund if the contingent legacies never became payable and who would, in any event, be entitled to the income produced by the fund in the meantime.

36

Further, the National Committee for Uniform Succession Laws recommended that its model legislation should not preserve any of the exceptions that apply under the general law under which certain general legacies carry interest from the date of the deceased's death, rather than from the date when they are payable: 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) vol 2, Rec 18-9. The National Committee therefore recommended that the model legislation should not include a provision to the effect of s 52(1A) of the *Succession Act 1981* (Qld). If that recommendation were enacted, it would abolish the exception in relation to the carrying of interest by legacies by parents and persons in *loco parentis* to the beneficiary. This provides a further reason to adopt a different approach in relation to contingent interests and the application of intermediate income.

10-4 Should section 61(4) of the *Trusts Act 1973* (Qld) be replaced with a provision to the effect of section 43(4) of the *Trustee Act 1925* (ACT), so as to provide that, if:

- (a) the interest for which the property is held in trust for the minor is future or contingent;
- (b) the trust for the minor would not otherwise carry the intermediate income; and
- (c) the intermediate income is not expressly or specifically disposed of, but would pass to some other person only because of an interest to which he or she is entitled under a residuary or a general gift in the trust instrument or, in the absence of such a gift, then as on intestacy or as on a resulting trust;

the trust for the minor, during his or her minority, is deemed to carry the intermediate income, and the interest of such person is not a prior interest for the purposes of section 61 of the Act?

Vested annuities

10.37 Finally, section 61(5) of the *Trusts Act 1973* (Qld) provides that the power to apply income applies to vested annuities in like manner, except that accumulations made during the infancy of the annuitant are to be held in trust for the annuitant or the annuitant's personal representative absolutely.

10.38 Similar provision is made in most of the other Australian jurisdictions.³⁷

The effect of a contrary intention

10.39 Generally, section 61 of the *Trusts Act 1973* (Qld) applies whether or not a contrary intention is expressed in the instrument (if any) creating the trust.³⁸ However, section 61(7) creates an exception in relation to section 61(2), which makes the requirement to accumulate income, and to hold accumulations of income in particular ways, subject to a contrary intention in the trust instrument.³⁹

10.40 In the other jurisdictions, the statutory power to apply income for maintenance (and not just the power that applies under the counterpart to section

³⁷ *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).

³⁸ *Trusts Act 1973* (Qld) s 60.

³⁹ *Trusts Act 1973* (Qld) s 61(7) 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)'.

61(2)) applies only if and so far as a contrary intention is not expressed in the trust instrument.⁴⁰

10-5 Apart from section 61(2) of the *Trusts Act 1973 (Qld)*, should section 61 continue to apply whether or not a contrary intention is expressed in the trust instrument?

POWER TO APPLY CAPITAL FOR THE MAINTENANCE AND ADVANCEMENT OF A BENEFICIARY

Introduction

10.41 A statutory power to pay or apply capital for 'the advancement or benefit' of a beneficiary was first included in section 32 of the English *Trustee Act 1925*. It was based on the form of advancement clause commonly included in trust instruments, which was designed to enable trustees:⁴¹

in a proper case to anticipate the vesting in possession of an intended beneficiary's contingent or reversionary interest by raising money on account of his interest and paying or applying it immediately for his benefit. By so doing they released it from the trusts of the settlement and accelerated the enjoyment of his interest (though normally only with the consent of a prior tenant for life); and, where the contingency upon which the vesting of the beneficiary's title depended failed to mature or there was a later defeasance or, in some cases, a great shrinkage in the value of the remaining trust funds, the trusts as declared by the settlement were materially varied through the operation of the power of advancement.

10.42 The trustee legislation of each of the Australian jurisdictions, New Zealand and England includes a statutory power of advancement, subject to various restrictions.⁴²

Section 62

10.43 Section 62 of the *Trusts Act 1973 (Qld)* gives trustees a discretionary power to apply capital for the 'maintenance, education (including past maintenance or education), advancement or benefit' of a beneficiary, subject to certain limitations. It provides:

⁴⁰ *Trustee Act 1925 (ACT)* s 43(11); *Trustee Act 1925 (NSW)* s 43(10); *Trustee Act (NT)* s 24(3); *Trustee Act 1936 (SA)* s 33(8); *Trustee Act 1958 (Vic)* ss 2(3), 37; *Trustees Act 1962 (WA)* ss 5(2)–(3), 58.

⁴¹ *Pilkington v Inland Revenue Commissioners* [1964] AC 612, 633 (Viscount Radcliffe).

⁴² *Trustee Act 1925 (ACT)* s 44; *Trustee Act 1925 (NSW)* s 44; *Trustee Act (NT)* s 24A; *Trusts Act 1973 (Qld)* s 62; *Trustee Act 1936 (SA)* s 33A; *Trustee Act 1898 (Tas)* s 29; *Trustee Act 1958 (Vic)* s 38; *Trustees Act 1962 (WA)* s 59; *Trustee Act 1956 (NZ)* s 41; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 32.

62 Power to apply capital for advancement etc

- (1) Where under a trust a person is entitled to the capital of the trust property or any share thereof, the trustee, in such manner as the trustee in the trustee's absolute discretion thinks fit, may from time to time out of that capital pay or apply for the maintenance, education (including past maintenance or education), advancement or benefit of that person, an amount not exceeding in all \$2000 or one-half that capital (whichever is the greater) or with the consent of the court an amount greater than that amount.
- (2) The power conferred by this section may be exercised whether the person is entitled absolutely or contingently on the person attaining any specified age or on the occurrence of any other event, and notwithstanding that the interest of the person so entitled 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.
- (3) The power conferred by this section may be exercised whether the person is so entitled in possession or in remainder or in reversion.
- (4) Any money so paid or applied shall be brought into account as part of the share in the trust property to which the person is or becomes absolutely or indefeasibly entitled.
- (5) No payment or application pursuant to this section shall be made so as to prejudice any person entitled to any prior life or other interest whether vested or contingent, in the money paid or applied unless that person is in existence and of full age and consents in writing to the payment or application, or unless the court, on the application of the trustee, so orders.
- (6) For the purposes of this section the trustee may raise money by sale, mortgage or exchange of the trust property.

10.44 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.⁴³

10.45 A payment under the power of advancement must be made for a definite purpose, and not merely to put money into a person's 'pocket'.⁴⁴

10.46 The statutory power may be exercised in favour of any person entitled to the whole or part of the capital of the trust property, whether the person is entitled absolutely or contingently (and notwithstanding that the interest of the person so

⁴³ [1964] AC 612, 634–5 (Viscount Radcliffe; Lords Reid, Jenkins, Hodson and Devlin agreeing).

⁴⁴ *Roper-Curzon v Roper-Curzon* (1871) LR 11 Eq 452, 453 (Lord Romilly MR).

entitled 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), and whether the person is so entitled in possession or in remainder or in reversion.⁴⁵

10.47 All jurisdictions, including Queensland, provide that, if the person is, or becomes, absolutely or indefeasibly entitled, any money paid or applied must be brought into account as part of the person's share.⁴⁶

10.48 All of the jurisdictions also provide that no payment or application may be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless that person is in existence and of full age and consents in writing to the payment or application, or (in Queensland, Western Australia and New Zealand) unless the court, on the application of the trustee, so orders.⁴⁷ The consent of any person interested under a discretionary trust is not required.⁴⁸

Monetary limit

10.49 All of the jurisdictions impose a monetary limit on the amount that may be advanced.

10.50 In Queensland, the Northern Territory, Victoria and Western Australia, the amount must not exceed \$2000 or half of the beneficiary's share, whichever is the greater.⁴⁹ The reference to '\$2000' reflects the age of the provisions, and would be relevant as the 'cap' only where the beneficiary's share was less than \$4000. In Queensland, the Northern Territory and Victoria, there is, however, provision for the trustee to pay or apply a greater amount with the consent of the court.

10.51 In the ACT, New South Wales, South Australia and Tasmania, the amount must not exceed more than half of the value of the person's share in the trust property.⁵⁰ In New South Wales, the power is subject to the further restriction that

⁴⁵ *Trusts Act 1973* (Qld) s 62(2)–(3). See also *Trustee Act 1925* (ACT) s 44(2)–(3); *Trustee Act 1925* (NSW) s 44(2)–(3); *Trustee Act* (NT) s 24A(4); *Trustee Act 1936* (SA) s 33A(2); *Trustee Act 1898* (Tas) s 29(1); *Trustee Act 1958* (Vic) s 38(2)–(3); *Trustees Act 1962* (WA) s 59; *Trustee Act 1956* (NZ) s 41; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 32(1).

⁴⁶ *Trustee Act 1925* (ACT) s 44(4); *Trustee Act 1925* (NSW) s 44(4); *Trustee Act* (NT) s 24A(5); *Trusts Act 1973* (Qld) s 62(4); *Trustee Act 1936* (SA) s 33A(3); *Trustee Act 1898* (Tas) s 29(1)(b); *Trustee Act 1958* (Vic) s 38(4); *Trustees Act 1962* (WA) s 59(1)(b); *Trustee Act 1956* (NZ) s 41(b); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 32(1)(b).

⁴⁷ *Trustee Act 1925* (ACT) s 44(5); *Trustee Act 1925* (NSW) s 44(5); *Trustee Act* (NT) s 24A(6); *Trusts Act 1973* (Qld) s 62(5); *Trustee Act 1936* (SA) s 33A(4); *Trustee Act 1898* (Tas) s 29(1)(c); *Trustee Act 1958* (Vic) s 38(5); *Trustees Act 1962* (WA) s 59(1)(c); *Trustee Act 1956* (NZ) s 41(c); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 32(1)(c).

⁴⁸ *Re Beckett's Settlement* [1940] Ch 279.

⁴⁹ *Trusts Act 1973* (Qld) s 62(1); *Trustee Act* (NT) s 24A(1); *Trustee Act 1958* (Vic) s 38(1); *Trustees Act 1962* (WA) s 59(a).

⁵⁰ *Trustee Act 1925* (ACT) s 44(1); *Trustee Act 1925* (NSW) s 44(1); *Trustee Act 1936* (SA) s 33A(1); *Trustee Act 1898* (Tas) s 29(1)(a). See also *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 32(1)(a).

the trustee cannot exercise the power of advancement for the maintenance or education of a child beneficiary if his or her share exceeds \$4000.⁵¹

10.52 In New Zealand, the total amount paid or applied by the trustee under the power of advancement must not exceed half of that person's interest in the trust property, where the value of that share or interest exceeds \$15 000, or \$7500 in any other case.⁵² The Law Commission of New Zealand has recently made the preliminary proposal that the current monetary limit should be removed.⁵³

10.53 In Scotland, there is currently no general statutory power enabling trustees to pay or apply capital for advancement, although the court may authorise trustees to do so.⁵⁴ The Scottish Law Commission proposed, in a 2004 Discussion Paper, the adoption of a statutory power of advancement, but queried whether there should be a statutory limit on the amount that may be advanced. It observed:⁵⁵

In England and Wales trustees may not advance more than one half of the beneficiary's share. Further advances cannot be made once this limit is reached, even if the trust estate thereafter increases in value. In Scotland there is no statutory limit but any advance has to be authorised by the courts who have always approached the question of advances with great caution. Trustees would, we think, adopt the same prudent attitude because advancing a large portion of a prospective beneficiary's share might lead to a breach of trust claim should the non-vested right become payable to other beneficiaries. A statutory limit might be thought arbitrary and could be unduly restrictive, as for example where the beneficiary is due to be paid in the near future but is in urgent need of money.

10.54 However, the Law Reform Commission of Ireland has recommended a provision based on section 32 of the English *Trustee Act 1925*, including the requirement that the amount advanced may not exceed half of the presumptive or vested share of the beneficiary.⁵⁶

10.55 Similarly, the Ontario Law Reform Commission, in its 1984 Report, recommended a limit of \$10 000 or half the value of the person's interest, whichever is the greater.⁵⁷ The British Columbia Law Institute, in its 2004 Report, also recommended a monetary limit of \$10 000 or half the value of the person's interest, whichever is greater. It commented that:⁵⁸

51 *Trustee Act 1925* (NSW) s 44(1A).

52 *Trustee Act 1956* (NZ) s 41(a), which also permits the advancement of a greater amount with the consent of the court.

53 Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) 80.

54 *Trusts (Scotland) Act 1921* (Scot) s 16.

55 Scottish Law Commission, *Trustees and Trust Administration*, Discussion Paper No 126 (2004) [6.18].

56 Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) [10.26]–[10.28].

57 Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 2, 352.

58 British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 67.

Limiting the amount a trustee may pay out from capital protects remainder interests of the trust in case the capital-receiving beneficiary's interest divests or never vests.

The effect of a contrary intention

10.56 Section 62 of the *Trusts Act 1973* (Qld) applies whether or not a contrary intention is expressed in the instrument (if any) creating the trust.⁵⁹

10.57 In contrast, in the ACT, New South Wales, the Northern Territory, South Australia, Victoria and Western Australia, the statutory power to apply capital for advancement applies only if and so far as a contrary intention is not expressed in the trust instrument.⁶⁰ In Tasmania, the statutory power may not be exercised if the trust instrument expressly forbids the trustee to exercise the power.⁶¹

10.58 These jurisdictions give effect to a settlor's wishes as to whether, or the circumstances in which, an advance of capital may be made. Ford and Lee have commented that careful drafting is required to avoid uncertainty about whether the power has been excluded or modified:⁶²

In *Re Patterson* [1941] VLR 233 it had been held that a power to apply capital for the advancement or benefit of a person might be used to educate that person but not maintain him, although according to Pape J in *Re Gertsman* [1966] VR 45 at 57 that decision should be regarded as limited by the context of the statutory language. In *Re Gertsman* [1966] VR 45 it was held that a provision defining the payments that might be made out of income for the maintenance and education of a beneficiary excluded the statutory powers of maintenance and education out of capital, but did not exclude those powers so far as they related to advancement and benefit. Such cases indicate that the draftsman should take great care wherever it is decided to modify any statutory powers, because an express power may exclude or modify a statutory power if it is inconsistent with it and may become a matter for litigation: *Inland Revenue Commissioners v Bernstein* [1961] Ch 399; [1961] 1 All ER 320 at 325 (All ER) per Lord Evershed MR.

10-6 Should section 62 of the *Trusts Act 1973* (Qld):

- (a) continue to provide a limit on the amount that may be advanced and, if so, how should that limit be expressed;
- (b) continue to apply whether or not a contrary intention is expressed in the trust instrument?

⁵⁹ *Trusts Act 1973* (Qld) s 60.

⁶⁰ *Trustee Act 1925* (ACT) s 44(7); *Trustee Act 1925* (NSW) s 44(7); *Trustee Act* (NT) s 24A(2); *Trustee Act 1936* (SA) s 33A(6); *Trustee Act 1958* (Vic) ss 2(3), 38; *Trustees Act 1962* (WA) ss 5(2)–(3), 59.

⁶¹ *Trustee Act 1898* (Tas) ss 29, 64(2).

⁶² HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 11 March 2011) [12.12550].

CONDITIONAL ADVANCES OF INCOME AND CAPITAL

10.59 As discussed earlier in this chapter, sections 61 and 62 of the *Trusts Act 1973* (Qld) empower trustees to make payments from the income of trust property or, subject to certain conditions, from the capital for the maintenance, education, advancement or benefit of a beneficiary.

10.60 Section 63 of the *Trusts Act 1973* (Qld) gives trustees, when exercising those powers, the authority to impose conditions, 'whether as to repayment, payment of interest, giving security, or otherwise'. It provides:

63 Conditional advances for maintenance etc

- (1) Where a power to pay or apply any property for the maintenance, education, advancement, or benefit of any person, or for any 1 or more of those purposes, is vested in a trustee, the trustee when exercising the power shall have authority to impose on the person any condition, whether as to repayment, payment of interest, giving security, or otherwise; and at any time after imposing any such condition, the trustee may, either wholly or in part, waive the condition or release any obligation undertaken or any security given by reason of the condition.
- (2) In determining the amount or value of the property that a trustee who has imposed a condition pursuant to subsection (1), may pay or apply in exercise of the power, any money repaid to the trustee or recovered by the trustee shall be deemed not to have been so paid or applied by the trustee.
- (3) Nothing in this section shall impose upon a trustee any obligation to impose any condition pursuant to subsection (1); and a trustee, when imposing any condition as to giving security, shall not be affected by any restrictions upon the investment of trust funds, whether imposed by this Act or by any rule of law or by the trust instrument (if any).
- (4) A trustee shall not be liable for any loss which may be incurred in respect of any money that is paid or applied under this section, whether the loss arises through failure to take security, or through the security being insufficient, or through failure to take action for its protection, or through the release or abandonment of the security without payment, or from any other cause.

10.61 Section 63 was based on the similar provisions in Western Australia and New Zealand.⁶³

10.62 Section 63(1) enables a trustee to impose conditions and, subsequently, to waive the condition or release any obligation undertaken or any security given.

10.63 Section 63(2) is relevant to a trustee's power to advance capital under section 62. It clarifies that the value of any money that is repaid in accordance with a condition imposed under section 63(1), or that is recovered by the trustee, is to be ignored in determining the maximum amount that the trustee may advance under section 62.

⁶³

Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 48. See *Trustees Act 1962* (WA) s 60; *Trustee Act 1956* (NZ) s 41A.

10.64 Section 63(3) further clarifies that a trustee is not under any obligation to impose conditions, and that the normal restrictions governing trustee securities do not apply to any condition that the trustee imposes for the giving of security.

10.65 Finally, section 63(4) relieves the trustee from liability for any loss in respect of any money that is paid or applied under the section.

10.66 Under the general law, an advancement is 'neither a loan nor a debt to be repaid'.⁶⁴ However, Ford and Lee have observed that section 63 would be useful in special circumstances, for example, where the amount of a proposed advance may be approaching the upper limit of the permitted amount, and there is difficulty in ascertaining the value of the beneficiary's prospective share for the purpose of establishing what the upper limit is, or a doubt as to whether a consent is required:⁶⁵

In such a case it might be prudent for the trustee to impose a requirement of repayment should the amount advanced prove to be excessive, since it has been held that where a trustee does make an excessive advancement the beneficiaries advanced cannot be compelled to repay. This is not to say, however, that the trustee should use this power to justify advancing more than a proper sum. (note omitted)

10.67 Both the Ontario Law Reform Commission and the British Columbia Law Institute have recommended the introduction of provisions in similar terms to section 63 of the Queensland Act.⁶⁶ The Ontario Law Reform Commission considered that, in some cases, the inclusion of a statutory power to impose conditions could prevent considerable loss of sums advanced.⁶⁷

As the law stands, *In re Pauling's Settlement Trusts* [1964] Ch 303 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.

PROTECTIVE TRUSTS

10.68 Under a protective trust, the protected beneficiary 'receives a proprietary interest in specified trust property, commonly by way of a life or lesser interest in that property, which is expressed to terminate on the occurrence of a specified event', such as the bankruptcy of the beneficiary or an attempt by the beneficiary to

⁶⁴ *Re Gerbich* [2002] 2 NZLR 791, 797 (Hammond J), citing *Re Hall* (1887) 14 OR 557, 559.

⁶⁵ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Lawbook, 2nd ed, 1990) [1265].

⁶⁶ 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.

⁶⁷ Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 2, 353. The British Columbia Law Institute expressed a similar view: British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 69.

mortgage or alienate his or her interest.⁶⁸ On the happening of that event, the beneficiary's interest ends, and the property is held by the trustee on a discretionary trust.⁶⁹ Protective trusts are used as a vehicle for the settlor to protect the trust property from dissipation by a spendthrift beneficiary.⁷⁰

10.69 Section 64 of the *Trusts Act 1973* (Qld) contains a statutory form of protective trust, which may be incorporated into a trust instrument by a direction that certain income is to be held 'on protective trusts'. It provides:⁷¹

64 Protective trusts

- (1) Where any income, including an annuity or other periodical income payment, is directed to be held on protective trusts for the benefit of any person (***the principal beneficiary***) for the period of the principal beneficiary's life or for any less period, then, during that period (***the trust period***) the income shall, without prejudice to any prior interest, be held on the following trusts, namely—
- (a) upon trust for the principal beneficiary during the trust period or until the principal beneficiary, whether before or after the termination of any prior interest, does or attempts to do or suffers any act or thing, or until any event happens, other than an advance under any statutory or express power, whereby if the said income were payable during the trust period to the principal beneficiary absolutely during that period, the principal beneficiary would be deprived of the right to receive the same or any part thereof, in any of which cases, as well as on the termination of the trust period, whichever first happens, this trust of the said income shall fail or determine;
- (b) if the trust to which paragraph (a) refers fails or determines during the subsistence of the trust period, then, during the residue of that period, upon trust for the application thereof for the maintenance, education (including past maintenance or education), advancement or benefit, of all of any 1 or more exclusively of the other or others of the following persons (that is to say)—
- (i) the principal beneficiary and his or her wife or husband (if any), and his or her issue (if any);
- (ii) if there is no wife or husband or issue of the principal beneficiary in existence, the principal beneficiary and the persons who would, if the principal beneficiary were actually dead, be entitled to the trust property or the income thereof or to the annuity fund (if any), or arrears of the annuity, as the case may be—

⁶⁸ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [27.115]. See also *Re Sartoris's Estate* [1891] 1 Ch 11; *Re Richardson's Will Trusts* [1958] Ch 504; *McQuade v Morgan* (1927) 39 CLR 222.

⁶⁹ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [27.115].

⁷⁰ *Ibid.* See also HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 12 June 2009) [61.6440].

⁷¹ *Trusts Act 1973* (Qld) s 64 applies whether or not a contrary intention is expressed in the instrument (if any) creating the trust: s 60.

as the trustee in the trustee's absolute discretion, without being liable to account for the exercise of such discretion, thinks fit.

- (2) Nothing in this section operates to validate any trust which would, if contained in the instrument creating the trust, be liable to be set aside.

10.70 Similar provision is made in the trustee legislation of most of the other Australian jurisdictions, New Zealand and England.⁷²

10.71 A provision to the effect of section 64 was first included in section 33 of the English *Trustee Act 1925*, which remains in force today:⁷³

Clauses creating protected life interests were formerly so frequently found in trust instruments that the *Trustee Act, 1925*, contains provisions enabling wills and settlements to be shortened by substituting a reference to 'protective trusts' in place of the usual lengthy clause.

10.72 In *Re Wilcox*, Green CJ explained the effect of the Tasmanian provision dealing with protective trusts:⁷⁴

The effect of the protective trusts set out in the *Trustee Act 1898*, s 30, ... is to provide that upon the happening of certain events including any attempted alienation of their interests by defendants, their right to receive the income will determine and the income will then become available for the maintenance, support or benefit of the defendants or various other persons in the absolute discretion of the trustees. Trusts of this kind combine the incidents of determinable interests in income and discretionary trusts. The validity of such trusts is not derived from the Act: apparently such clauses were commonly found in settlements in England before the enactment of the *Trustee Act 1925*, s 33(1) ... Section 30 does no more than provide a convenient means for testators to set up protective trusts by reference to standard form provisions which do not need to be set out in full in the will.

10.73 Section 64(2) of the *Trusts Act 1973* (Qld) provides that nothing in the section 'operates to validate any trust which would, if contained in the instrument creating the trust, be liable to be set aside'. In that respect, it ensures that the section does not change the general law as to the validity of trusts. As the Law Reform Sub-Committee of the Law Society of Western Australia noted:⁷⁵

Thus a settlement by a person on himself until his own bankruptcy and then on discretionary trusts will still be invalid (*Higinbotham v Holme* [1812] 19 Ves 82; *Re Detmold* (1889) 40 Ch D 585; *Re Burroughs-Fowler* [1916] 2 Ch 251). The purpose of this section is not to validate any trust which would otherwise be invalid under the bankruptcy laws, but merely to avoid the need for setting out lengthy and complicated provisions in the trust instrument.

⁷² *Trustee Act 1925* (ACT) s 45; *Trustee Act 1925* (NSW) s 45; *Trustee Act 1898* (Tas) s 30; *Trustee Act 1958* (Vic) s 39; *Trustees Act 1962* (WA) s 61; *Trustee Act 1956* (NZ) s 42; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 33.

⁷³ R Cozens-Hardy Home, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 118.

⁷⁴ [1978] Tas SR 82, 83–4.

⁷⁵ Law Reform Sub-Committee of the Law Society (WA), *The Law of Trusts*, Report (1961), Supplement 54.

The effect of the *Bankruptcy Act 1966* (Cth)

10.74 Generally, a protective trust is not considered to be a fraud on the bankruptcy laws.⁷⁶

Under the general law, it is a fraud on the bankruptcy laws for parties to provide that property which has already vested in the debtor is to divest or be forfeited on the occurrence of bankruptcy or that security is to be given to a creditor, or an existing security to be increased, in the event of the debtor's bankruptcy. Such provisions are void as being contrary to public policy.

On the other hand, provisions which merely qualify or limit the property interest taken, even though the qualification or limitation is related to the event of bankruptcy, do not constitute a fraud on the bankruptcy laws ... Thus, provision that property shall be held by the recipient until the recipient's bankruptcy, on which event it shall pass to another ... or that a life interest in a trust fund shall determine in the event of bankruptcy of the interest holder ... has been held not to constitute a fraud on the bankruptcy laws. However, a bankrupt cannot qualify his or her own interest in this way ... and in all cases such provisions are construed strictly ... (citations omitted)

10.75 However, section 302B(1) of the *Bankruptcy Act 1966* (Cth) provides:

302B Certain provisions in trust deeds void

- (1) A provision of a trust deed is void to the extent that it has the effect of:
- (a) cancelling, reducing or qualifying a beneficiary's interest under the trust; or
 - (b) allowing the trustee to exercise a discretion to the detriment of a beneficiary's interest;
- if the beneficiary becomes a bankrupt, commits an act of bankruptcy or executes a personal insolvency agreement under this Act.

10.76 Dal Pont has suggested that, although, under the general law, there could be no objection to an interest granted 'until bankruptcy', this has been modified by section 302B of the *Bankruptcy Act 1966* (Cth), which 'essentially serves to oust a role for protective trusts premised on bankruptcy as a relevant determining event'.⁷⁷

Whether the Act should retain a provision dealing with protective trusts

10.77 The authors of *Drafting Trusts & Will Trusts in Australia* have described the protective trust as an old-fashioned solution, noting that it has significant disadvantages. They consider that the preferred solution is the discretionary trust.⁷⁸

⁷⁶ G Bigmore QC (ed), LexisNexis, *Bankruptcy Law and Practice* (at October 2008) [14.0010].

⁷⁷ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [27.115].

⁷⁸ J Kessler QC and M Flynn, *Drafting Trusts & Will Trusts in Australia* (Lawbook, 2008) [4.15]–[4.20]. The *Australian Encyclopaedia of Forms and Precedents* suggests that 'the discretionary trust may well be preferable to the protective trust': LexisNexis, *The Australian Encyclopaedia of Forms and Precedents* (at November 2011) [510-716].

There may sometimes be doubts whether the life tenant's interest has been forfeited. More significantly, under the standard form, the discretionary trust arises automatically if the beneficiary tries to dispose of his interest. A life tenant may have good reasons to dispose of his interest but the 'protection' makes this difficult. In the 1940s and 1950s protective trusts were created as a matter of routine; they caused such difficulties in England that the *Variation of Trusts Act 1958* (UK) was required to allow the protection to be overridden, though at considerable trouble and expense.

...

The best solution is also a simple one: either the beneficiary should not have any fixed interest in the trust fund or the beneficiary's interest should be *terminable at the trustees' discretion*. That is, the trust should be a discretionary trust in which the beneficiary is only one among a number of potential objects or under which the trustee has power to defeat the beneficiary's interest in favour of other beneficiaries. (emphasis in original)

10.78 The Ontario Law Reform Commission expressed a similar view, in recommending against the introduction of a statutory protective trust in that province. It considered that a settlor or testator who was concerned that a beneficiary may prove incapable of managing his or her assets could create 'a discretionary trust of income and capital in favour of the beneficiary, and confer upon another person a gift over should the fund not be totally expended upon the beneficiary in the beneficiary's lifetime'.⁷⁹

10.79 The authors of the Model Trustee Code suggested that protective trusts were rarely used, having been displaced by the discretionary trust. They also considered that the provisions perform 'no substantial function', but merely simplify the task of drafters by enabling them to 'create a protective trust by using a short hand expression'. In the absence of a statutory provision, a settlor could still create a protective trust. In their view, the current statutory provisions should be omitted.⁸⁰

10.80 However, the Law Commission of New Zealand noted in a recent Issues Paper that it has been 'told that protective trusts do not raise any issues in New Zealand'.⁸¹

10-7 Should the *Trusts Act 1973* (Qld) continue to make provision in section 64 for protective trusts or, alternatively, should section 64 be omitted?

⁷⁹ Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 2, 362. It also noted that there were other ways in which a settlor or testator could put 'different degrees of control upon the beneficiary's receipt'.

⁸⁰ WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 2, 228–9. For an explanation of the origins of the Model Trustee Code and the membership of the working party that prepared it, see Chapter 5, n 75 above.

⁸¹ Law Commission of New Zealand, *Review of Trust Law in New Zealand: Introductory Issues Paper*, Issues Paper No 19 (2010) [2.74].

DELIVERY OF CHATTELS TO LIFE TENANTS AND INFANTS

Delivery of chattels to life tenants

10.81 Section 73 of the *Trusts Act 1973* (Qld) provides for the delivery of chattels to a life tenant or person with another limited interest, and is relevant where the chattels are held on trust for persons with successive interests. The section provides:

73 Delivery of chattels to life tenant

Where any chattels are included in the trust property the trustee may, at the request of any beneficiary entitled to a life or other limited interest therein, deliver such chattels to that beneficiary upon the beneficiary signing and delivering to the trustee an inventory of all such chattels.

Abolition of settled chattels

10.82 Before the enactment of the *Trusts Act 1973* (Qld), chattels could be settled on trust to devolve with settled land. The *Settled Land Act 1886* (Qld) provided that the tenant for life could sell the chattels, but only with the consent of the court.⁸² Furthermore, the proceeds of sale were deemed to be 'capital money' arising under the *Settled Land Act 1886* (Qld), and were required to be paid, invested, applied or otherwise dealt with in the same manner as capital money, or used to purchase other chattels that were to be held on the same trusts.⁸³

10.83 In its 1971 Report, the Commission considered that the law in relation to chattels no longer represented modern needs.⁸⁴ It therefore recommended that the law relating to the settlement of chattels should be abolished and assimilated to the general law relating to chattels held on trusts.⁸⁵

Requirements for the delivery of chattels

10.84 Under the general law, a trustee is required to have an inventory made and signed before handing property over to a life tenant.⁸⁶ The trustee is not under an obligation to take a security unless there is a danger that justifies it.⁸⁷ As the Commission explained in its 1971 Report:⁸⁸

⁸² *Settled Land Act 1886* (Qld) s 64(1), (3).

⁸³ *Settled Land Act 1886* (Qld) s 64(2).

⁸⁴ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 54.

⁸⁵ *Ibid* 55.

⁸⁶ *England v Downs* (1842) 6 Beav 269; 49 ER 829.

⁸⁷ *Foley v Burnell* (1783) 1 Bro CC 274; 28 ER 1125; *Temple v Thring* (1887) 56 LT 283; *Re Lazarus* (1898) 24 VLR 567.

⁸⁸ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 55.

Where the trust property includes chattels it may be appropriate for the trustee to hand over the trust chattels to the beneficiary for the time being (eg the life tenant). This is clearly within the settlor's intention where, for instance, a house and its contents are left to a beneficiary for life with a gift over. In such case the law is that the trustee's duty is performed if he makes an inventory of the trust chattels, which should be receipted by the person to whom he hands them over (per Lord Langdale MR in *England v Downs* (1842) 6 Beav 269, at p 279; 49 ER 829, at p 834). There is no general duty placed upon the trustee to take a security from such tenant for life unless there is a risk (*Temple v Thring* (1887) 56 LT 283), and accordingly a trustee is protected, notwithstanding his failure to obtain a security, if a life tenant sells the trust chattels, although clearly the life tenant will be accountable to the trust for any loss.

10.85 Section 73 was intended simply to 'state the law as it now stands' in relation to the delivery of chattels.⁸⁹

10.86 Western Australia and New Zealand also make express provision for the delivery of chattels in their trustee legislation.⁹⁰

Delivery of chattels to infants

Background

10.87 Under the general law, a minor is not ordinarily capable of giving a discharge for money paid to him or her.⁹¹ However, there is an exception if the instrument of donation (such as a trust or will) provides that the minor's receipt shall be a discharge or directs payment of a legacy before the minor attains the age of majority.⁹²

10.88 Nor can the parent or guardian of a beneficiary who is a minor ordinarily give a valid receipt for the payment of a legacy.⁹³ There is, however, an exception where the trust or will expressly authorises payment to the parent or guardian.⁹⁴

Section 74

10.89 Section 74 of the *Trusts Act 1973* (Qld) deals with the delivery of chattels to which a minor is beneficially entitled.⁹⁵ It provides:

89 Ibid 56.

90 *Trustees Act 1962* (WA) s 72; *Trustee Act 1956* (NZ) s 39A.

91 AH Simpson and GW Knowles, *A Treatise on the Law of Infants* (Sweet & Maxwell, 4th ed, 1926) 41.

92 Ibid; J McGhee QC (ed), *Snell's Equity* (Sweet & Maxwell, 32nd ed, 2010) [35–014]. See also *Re Deneker* [1895] WN 28; *Re Mears* (1905) 5 SR (NSW) 140; *Re Somech* [1957] Ch 165. Even though a will may direct the payment of a legacy to a minor before he or she attains the age of majority, the minor does not have an absolute right to the payment of the legacy, as the trustee still retains a discretion whether or not to make the payment to the minor: *Re Somech* [1957] Ch 165, 169 (Upjohn J).

93 AH Simpson and GW Knowles, *A Treatise on the Law of Infants* (Sweet & Maxwell, 4th ed, 1926) 41. See also *Dagley v Tolferry* (1715) 1 P Wms 286; 24 ER 391; *Rotheram v Fanshaw* (1748) 3 Atk 628; 29 ER 1161.

94 *Cooper v Thornton* (1790) 3 Bro CC 96; 29 ER 430.

74 Delivery of chattels to infant

- (1) A trustee may in the trustee's discretion deliver to an infant, or to the guardian or any of the guardians of an infant, any chattels to which the infant is beneficially entitled, and the receipt of the infant or guardian shall be a complete discharge to the trustee for any chattels so delivered.
- (2) The powers conferred by this section are in addition to the powers conferred by section 62 and, for the purposes of section 62(1), the value of the chattels delivered pursuant to this section shall not be taken into account in any way.

10.90 Section 74(1) gives trustees the power, in their discretion, to deliver to a minor, or the guardian of a minor, any chattels to which the minor is beneficially entitled.

10.91 Section 74(2) clarifies that the power to deliver chattels to an infant applies in addition to the power, under section 62 of the Act, to apply capital for the maintenance, education, advancement or benefit of a person who is entitled to the capital of the trust property or any share thereof.

10.92 Similar provision is also made in the trustee legislation of Western Australia and New Zealand.⁹⁶

10.93 In its 1971 Report, the Commission expressed the view that the proposed provision, as it relates to the delivery of chattels to a minor, is declaratory of the existing law.⁹⁷ The Commission noted, however, that executors and trustees could not generally discharge themselves by paying a legacy to a minor's parent.⁹⁸ It considered that it would nevertheless be beneficial to allow trustees to discharge their obligation by delivering chattels to a minor's parents:⁹⁹

It appears quite reasonable ... to allow a trustee to discharge his obligation by delivering trust chattels to the infant's parents — the example of a musical instrument, or books comes to mind — and accordingly a specific provision to this effect is desirable.

10.94 Ford and Lee suggest that 'it is beneficial that certain chattels left to an infant should be transferred to the infant, particularly if they have an educational function, such as books or musical instruments or a computer'.¹⁰⁰ They note that

95 If chattels are given by will to an adult with impaired capacity, a valid discharge for the chattels can be given by an attorney who has been appointed under an enduring power of attorney to exercise power for the adult's financial matters, or by an administrator who has been appointed by the Queensland Civil and Administrative Tribunal to exercise power for the adult's financial matters: *Powers of Attorney Act 1998* (Qld) s 32(1)(a), sch 2 s 1(c); *Guardianship and Administration Act 2000* (Qld) s 33(2), sch 2 s 1(c).

96 *Trustees Act 1962* (WA) s 73; *Trustee Act 1956* (NZ) s 39B.

97 Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 56.

98 *Ibid* 57.

99 *Ibid*.

100 HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* [16.240].

trustees would be justified in handing over such chattels in cases where it is for the infant's benefit and reflects the settlor's intention:¹⁰¹

the provisions mentioned would seem to legitimise the common practice of trustees where the handing over is clearly for the infant's benefit. The argument would be that in giving property of that kind to an infant the settlor intended the infant to have the most beneficial use of it.

10.95 Section 74 does not extend to authorising the payment of a pecuniary legacy to the guardian of a minor. However, once the administration of a deceased estate has been completed and the personal representative holds the legacy as trustee for the minor beneficiary, the trustee may appoint trustees of the legacy and could appoint the minor's parents.¹⁰²

Trustee's discretion

10.96 It has been observed that a trustee's power to deliver chattels to a life tenant or to a beneficiary who is a minor is discretionary, and is subject to the trustee's fiduciary duties. It has further been observed that there may be cases where it would not be appropriate to hand over chattels without taking further precautions (for example, if the property consisted of a valuable painting):¹⁰³

The power given is fiduciary and the trustee may feel obligated in certain cases, eg of valuable chattels, to impose safeguards, such as obligations to insure, repair and return to the trustee if called upon to do so. But sometimes it will be appropriate merely to hand over the chattels without more — eg household electrical appliances, ordinary ornaments etc, without imposing conditions.

10-8 Are there any problems with the powers conferred by sections 73 and 74 of the *Trusts Act 1973* (Qld) to deliver chattels to a life tenant or to the parent or guardian of a beneficiary who is a minor?

POWER TO APPROPRIATE TRUST PROPERTY TO BENEFICIARIES

Introduction

10.97 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'.¹⁰⁴ It amounts, in effect, 'to a sale of assets by

¹⁰¹ Ibid. Those authors also note (at [61.7440]) that, in jurisdictions that do not expressly provide for the delivery of chattels to infants, 'trustees may allow an infant to use the subject matter of a trust, eg a piano or educational apparatus, under maintenance powers that allow trust property to be applied for the education or benefit of infants'.

¹⁰² AA Preece, *Lee's Manual of Queensland Succession Law* (Lawbook, 6th ed, 2007) [9.210].

¹⁰³ WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 101.

¹⁰⁴ *Long v Comptroller of Stamps* [1964] VR 796, 801 (Adam J).

the trustee to a beneficiary in or towards satisfaction of his share'¹⁰⁵ and a set-off of the price against the beneficiary's share in the estate.¹⁰⁶

10.98 Under the general law, a trustee or personal representative who holds the property on trust for sale and conversion may agree with the beneficiary to appropriate assets in specie, at a valuation, in part or whole satisfaction of the beneficiary's legacy or share of the residuary estate.¹⁰⁷ This avoids the need to convert the property into money, particularly when 'the beneficiary may be desirous immediately to reinvest in the property which has just been sold'.¹⁰⁸

Where ... there is no trust to convert, but simply a gift of property amongst certain parties, appropriation would seem easy; the parties are to have the property unconverted, and the executors must arrive at equality as best they can. Where there is a trust for conversion, what is the principle? Under a trust for conversion each person is entitled of course to money, and the principle, I apprehend, is this: that where the trustee is directed to convert and to pay the beneficiary money, it must be competent for him to agree with the beneficiary that he will sell the beneficiary the property against the money which otherwise he would have to pay to him; but it is not necessary to go through the form of first converting the property and then giving the beneficiary the money which the beneficiary may be desirous immediately to reinvest in the property which has just been sold.

10.99 Trustees and personal representatives could also, in certain circumstances, 'appropriate', or set aside, a part of the estate sufficient to secure an annuity payable out of the estate.¹⁰⁹

In the ordinary case of an annuity given by a will, and followed by a gift of residue, the rights [of the annuitant] have been ascertained by the practice of the Court. The mode of dealing with such a case is pointed out by North J in the case of *In Re Parry* (42 Ch D 570) and, summing up the whole of the law, he says (42 Ch D 584): 'I think the annuitants are entitled to have such a security as will make it practically certain that the annuities will be fully paid. Of course, the appropriation of part of the assets will not release the rest of the estate. Recourse might still be had, if necessary, to the rest of the estate. ...'

10.100 This would enable the rest of the estate to be distributed and so prevent the distribution from being delayed indefinitely.¹¹⁰

105 Ibid 802.

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

107 *Re Lepine* [1892] 1 Ch 210, 219 (Fry LJ); *Re Beverley* [1901] 1 Ch 681, 685 (Buckley J); *Wigley v Crozier* (1909) 9 CLR 425, 438 (Griffith CJ).

108 *Re Beverley* [1901] 1 Ch 681, 685 (Buckley J).

109 *Harbin v Masterman* [1896] 1 Ch 351, 355 (Stirling J), affd on appeal at 362. In that case, the annuity was to be paid solely out of the income of the residuary estate and not from the capital. Applying the general principle, Stirling J held (at 356) that the annuitant was entitled 'to have such a portion of the corpus appropriated for the payment of her annuity as would make it practically certain that her annuity would be paid by means of the income of that portion'.

110 *Harbin v Masterman* [1896] 1 Ch 351, 362 (Lindley LJ); HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 11 March 2011) [16.200].

10.101 A validly made appropriation was 'final and conclusive and binding on all parties',¹¹¹ at the valuation made at the time of the appropriation,¹¹² and the trustee was not liable for any subsequent inequality or loss.¹¹³

10.102 To be valid, the appropriation had to be made with either the consent of the beneficiary (or annuitant) concerned, or the authorisation of the court.¹¹⁴ Further, although the consent of the other beneficiaries was not required, an appropriation had to be made 'fairly and impartially'¹¹⁵ with consideration for the interests of the other beneficiaries.¹¹⁶

10.103 A number of other limiting rules were also applied, including that:

- the appropriation of securities was valid only if the securities were both authorised and sufficient at the date of the appropriation;¹¹⁷
- a trustee or personal representative could appropriate towards his or her own legacy or share,¹¹⁸ provided the appropriated property had 'a definitely ascertainable or market value and is not appropriated at his [or her] own figure';¹¹⁹ and
- there was no power to make an appropriation in respect of a contingent legacy which does not carry the intermediate income.¹²⁰

10.104 Following provisions introduced in England (for personal representatives) — which, it was thought, 'removed many of the difficulties which formerly stood in the way of appropriation' by personal representatives¹²¹ — a number of Australian jurisdictions have sought to set out and clarify the powers of appropriation in statute.¹²²

111 *Re Waters* [1889] WN 39, 39 (Kay J).

112 *Re Gollin's Declaration of Trust* [1969] 3 All ER 1591; *Re Chirnside* [1974] VR 160.

113 A Underhill, *Underhill's Trusts and Trustees* (7th ed, 1913, Special Australasian edition) 222, 226–8; *Re Nickels* [1898] 1 Ch 630; *Re Lepine* [1892] 1 Ch 210.

114 JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2069]; *Re Salomons* [1920] 1 Ch 290, 295 (Eve J); *Harbin v Masterman* [1896] 1 Ch 351.

115 *Re Gamble* (1915) 32 WN (NSW) 121, 122 (Street J). See also, eg, *Barclay v Owen* (1889) 60 LT 220, 223 (Kay J); *Re Lepine* [1892] 1 Ch 210, 219 (Fry LJ).

116 JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2069].

117 R Cozens-Hardy Home, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 294, 300; *Re Waters* [1889] WN 39.

118 *Re Richardson* [1896] 1 Ch 512; *Re Gamble* (1915) 32 WN (NSW) 121, 122 (Street J).

119 R Cozens-Hardy Home, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 293.

120 *Ibid* 296; *Re Hall* [1903] 2 Ch 226.

121 R Cozens-Hardy Home, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 296.

122 See, in England, *Administration of Estates Act 1925*, 15 & 16 Geo 5, c 23, s 41, which continues to provide a statutory power to make appropriations 'as to the personal representative may seem just and reasonable'. No similar provision applying to trustees is found in the English trustee legislation.

Powers of appropriation under section 33(1)

10.105 In Queensland, trustees' statutory powers of appropriation are found in section 33(1)(l)–(m) of the *Trusts Act 1973* (Qld).¹²³ They also apply to personal representatives.¹²⁴

10.106 These provisions were modelled on provisions in virtually the same terms in Western Australia, which were in turn based on provisions in New Zealand.¹²⁵ The legislation in the ACT, New South Wales and Victoria also contains provisions, in slightly different terms, dealing with trustees' (and personal representatives') powers of appropriation.¹²⁶ In addition, the administration of estates legislation in the Northern Territory and Tasmania includes a statutory power of appropriation for personal representatives.¹²⁷

10.107 Section 33(1)(l)–(m) of the *Trusts Act 1973* (Qld) was intended to extend 'the inherent power of trustees to effect appropriations and ... reduce unnecessary verbiage in wills and trust deeds'.¹²⁸ The provisions deal separately with appropriations for legacies and annuities.

10.108 The provisions in section 33 of the *Trusts Act 1973* (Qld) apply whether or not a contrary intention is expressed in the trust instrument.¹²⁹ In contrast, the equivalent provisions in the other jurisdictions apply subject to the trust instrument.¹³⁰ Additionally, the Victorian provision states that it 'shall not prejudice any other power of appropriation conferred by law or by the instrument (if any) creating the trust'.¹³¹

¹²³ See also *Trusts Act 1973* (Qld) s 33(2)–(5), which relates to the powers of appropriation given in s 33(1)(l)–(m).

¹²⁴ A 'trustee' includes a personal representative, being the executor, original or by representation, or the administrator for the time being of the estate of a deceased person: *Trusts Act 1973* (Qld) s 5(1) (definitions of 'trustee' and 'personal representative').

¹²⁵ *Trustees Act 1962* (WA) s 30(1)(k)–(l), (3); *Trustee Act 1956* (NZ) s 15(1)(j)–(k). See Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 36; Law Reform Sub-Committee of the Law Society (WA), *The Law of Trusts*, Report (1961), Supplement 26. The New Zealand provision was in turn 'suggested by' provisions then applying to the Public Trust Office in that jurisdiction: see Explanatory Note, Trustee Bill 1956 (NZ) 5; *Public Trust Office Act 1908* (NZ) s 29, as amended by *Public Trust Office Amendment Act 1913* (NZ) s 21(w) and *Public Trust Office Amendment Act 1921* (NZ) s 20(1)(l).

¹²⁶ *Trustee Act 1925* (ACT) s 46; *Trustee Act 1925* (NSW) s 46; *Trustee Act 1958* (Vic) s 31.

¹²⁷ *Administration and Probate Act 1935* (NT) s 81; *Administration and Probate Act 1935* (Tas) s 40. See also *Administration and Probate Act 1958* (Vic) s 46.

¹²⁸ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 36.

¹²⁹ *Trusts Act 1973* (Qld) s 31(1).

¹³⁰ *Trustee Act 1925* (ACT) s 46(16); *Trustee Act 1925* (NSW) s 46(16); *Trustee Act 1958* (Vic) ss 2(3), 31; *Trustees Act 1962* (WA) ss 5(2)–(3), 30(1)(k)–(l), (3); *Trustee Act 1956* (NZ) ss 2(4)–(5), 15(1)(j)–(k).

¹³¹ *Trustee Act 1958* (Vic) s 31(14).

Section 33(1)(l): Appropriation in satisfaction of a legacy or share

10.109 Section 33(1)(l) and (2)–(4) of the *Trusts Act 1973* (Qld) sets out a trustee's power to appropriate trust property in satisfaction of any legacy or share, subject to certain constraints. It provides that:

- (1) Every trustee, in respect of any trust property, may—
...
 - (l) appropriate any part of the property in or towards satisfaction of any legacy payable thereout or in or towards satisfaction of any share of the trust property (whether settled, contingent or absolute) to which any person is entitled, and for that purpose value the whole or any part of the property in accordance with section 51; but—
 - (i) the appropriation shall not be made so as to affect adversely any specific gift; and
 - (ii) before any such appropriation is effectual, notice thereof shall be given to all persons not under a disability who are interested in the appropriation, and to the parent or guardian of any infant who is interested in the appropriation, and to the person having the care and management of the estate of any person who is not of full mental capacity, and any such person may within 1 month after receipt of the notice or, upon the person's application to the court within that month, within such extended period as the court may allow, apply to the court to vary the appropriation, and the appropriation shall be conclusive save as varied by the court;
...
- (2) Nothing in subsection (1)(l) shall be read as requiring a trustee to give to himself or herself, in some other capacity, notice of an appropriation; but, where a trustee would, but for this subsection, be obliged to give to himself or herself such a notice, the appropriation is not effectual until it has been approved by all the beneficiaries being persons not under a disability, or by the court on the ex parte application of the trustee or otherwise.
- (3) Any notice which is to be served in accordance with subsection (1)(l) may be served—
 - (a) by delivering it to the person for whom it is intended or by sending it by prepaid registered letter addressed to that person at the person's usual or last known place of abode or business; or
 - (b) in such other manner as may be directed by the court.
- (4) Where a notice is sent by post as provided by this section, it shall be deemed to be served at the time at which the letter would have been delivered in the ordinary course of post.

10.110 Section 33(1)(l) provides that the trustee may appropriate any part of the trust property in or towards the satisfaction of a legacy or share to which a person is entitled, provided that, pursuant to section 33(1)(l)(i), the appropriation is not made so as to affect adversely any specific gift.

10.111 Section 33(1)(l) further provides that, for the purpose of making the appropriation, the trustee may value the whole or part of the property in accordance with section 51 of the Act — that is, either personally in such manner as the trustee thinks proper, or, if the trustee is not personally qualified to ascertain the value, by consulting a duly qualified person as to the value.¹³²

10.112 To this extent, the provisions largely reflect the general law.

10.113 With respect to consent and notice, however, the provisions modify the usual rules that would otherwise apply.

10.114 Under these provisions, it is no longer ordinarily necessary to obtain the consent of the beneficiary concerned (or the court) before making an appropriation. Instead, however, section 33(1)(l)(ii) provides that the trustee must give certain notices, including to ‘all persons not under a disability who are interested in the appropriation’, who are then entitled to apply to the court to vary the appropriation. Section 33(3)–(4) deals with the service of those notices.

10.115 Section 33(2) clarifies that the trustee is not required to give notice to himself or herself in some other capacity. However, it goes on to provide that, if such notice would otherwise be required, the appropriation is not effectual until it has been approved by either all of the beneficiaries or the court.

10.116 On the one hand, the provisions alleviate the necessity for consent that previously applied under the general law. However, by the requirements for notice in section 33(1)(l)(ii) and for the consent of *all* of the beneficiaries or the court in certain circumstances under section 33(2), the provisions impose restrictions beyond those that applied under the general law.

10.117 Those provisions are mirrored in Western Australia and, to some extent, in New Zealand.¹³³ In contrast, the provisions in the ACT, New South Wales and Victoria impose the following consent (but not notice) requirements:¹³⁴

- an appropriation of property must not be made for the benefit of a person absolutely or beneficially entitled in possession, unless the person is of full age and capacity and consents in writing; and

¹³² *Trusts Act 1973* (Qld) s 51 is discussed in Chapter 9.

¹³³ *Trustees Act 1962* (WA) s 30(1)(k)(ii), (3); *Trustee Act 1956* (NZ) s 15(1)(j).

¹³⁴ *Trustee Act 1925* (ACT) s 46(1)(b), (5)–(6); *Trustee Act 1925* (NSW) s 46(1)(b), (5)–(6); *Trustee Act 1958* (Vic) s 31(1)(b), (5)–(6). Where the person is not of full age or capacity, or the person cannot be found or ascertained, the legislation provides an alternative means for obtaining consent (for example, from the person’s parent or guardian, or by the court), or dispenses with the requirement altogether in certain circumstances: see *Trustee Act 1925* (ACT) s 46(7)–(8); *Trustee Act 1925* (NSW) s 46(7)–(8); *Trustee Act 1958* (Vic) s 31(7)–(8).

- an appropriation shall not be made in respect of any settled legacy, share or interest unless either the trustee thereof (if any and not being also the trustee making the appropriation) or the person who is for the time being entitled to the income consents in writing.

10.118 There may be scope to simplify section 33(1)(l), (2)–(4) of the *Trusts Act 1973* (Qld) in the interests of facilitating the efficient administration and distribution of trust property and estates.

10.119 Although the measures for notice and consent under section 33(1)(l)(ii) and (2) provide a safeguard for the interests of the beneficiaries, they might be viewed as unnecessarily restrictive impediments to the final distribution of the property or estate.

10.120 As a drafting matter, it might additionally be considered unnecessary to continue to include the detailed service provisions in section 33(3)–(4), given the general provisions for service of documents that are made in the *Acts Interpretation Act 1954* (Qld).¹³⁵

10-9 Should the power of appropriation in section 33(1)(l), (2)–(4) of the *Trusts Act 1973* (Qld) be simplified or otherwise changed and, if so, how?

Section 33(1)(m): Appropriation for payment of annuity

10.121 Section 33(1)(m) of the *Trusts Act 1973* (Qld) sets out a trustee's power to appropriate trust property to meet annuities. It provides that every trustee, in respect of any trust property, may:

- (m) where provision is made in any instrument creating a trust for payment of an annuity or other periodic payment, and notwithstanding that the annuity or payment may by the instrument be charged upon the trust property or upon any part thereof—set aside and appropriate out of property available for payment of the annuity and invest a sum sufficient in the opinion of the trustee at the time of appropriation to provide out of the income thereof the amount required to pay the annuity or periodic payment, and so that after the appropriation shall have been made—
 - (i) the annuitant shall have the same right of recourse to the capital and income of the appropriated sum as the annuitant would have had against the trust property if no appropriation had been made; and
 - (ii) the trustee may forthwith distribute the residue of the trust property and the income thereof (which residue and income shall no longer be liable for the annuity) in accordance with the trusts declared of and concerning the same; ...

¹³⁵

See *Acts Interpretation Act 1954* (Qld) pt 10.

10.122 Section 33(5) further provides for the trustee to notify the registrar in the case of a distribution of land following such an appropriation:¹³⁶

- (5) Where a trustee desires to distribute, under the provisions of subsection (1)(m)(ii), any land subject to the provisions of the *Land Title Act 1994*, or any other Act, the trustee shall in writing notify the registrar or other person (if any) having the duty or function of registering or recording dealings under such Act, that the land is, by reason of an appropriation made in pursuance of subsection (1)(m)(ii), distributable, and the registrar or such other person shall not be concerned to make any inquiry as to the sufficiency of the appropriated sum.

10.123 As explained above, the appropriation of trust property to meet annuities was previously possible only with the consent of the annuitant or the court. Under section 33(1)(m), consent is no longer required.

10.124 These provisions were intended to allow a trustee to set aside a sum 'sufficient in the opinion of the trustee' to provide an income for payment of the annuity, with the annuitant retaining a right of recourse to the capital and income of the appropriated sum, leaving the trustee free to distribute the residue in accordance with the terms of the trust.¹³⁷

10.125 Apart from the legislation in Western Australia and New Zealand, which mirrors the Queensland provision,¹³⁸ the provisions in the other jurisdictions take a slightly different approach. They provide for the same consent requirements that are imposed where an appropriation is made towards a legacy or share,¹³⁹ except that the annuitant's consent is not required if the fund set apart to answer the annuity is invested in certain government securities. For example, section 46(9) of the *Trustee Act 1925* (ACT) provides that:¹⁴⁰

the consent of the annuitant shall not be necessary in any case in which the trustee, after having set apart a fund to answer the annuity, which fund at the time of appropriation would be sufficient, if it were invested in government securities of the Commonwealth at par, to provide an income exceeding the annuity by at least 20%, has actually invested the fund in such securities.

10-10 Are there any problems with the power, in section 33(1)(m) and (5) of the *Trusts Act 1973* (Qld), to appropriate property for the payment of an annuity?

¹³⁶ Provision to protect the registrar of titles is also included in some of the other jurisdictions: see *Trustee Act 1925* (ACT) s 46(13); *Trustee Act 1925* (NSW) s 46(12); *Trustee Act 1958* (Vic) s 31(12).

¹³⁷ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 36.

¹³⁸ *Trustees Act 1962* (WA) s 30(1)(l); *Trustee Act 1956* (NZ) s 15(1)(k).

¹³⁹ See [10.117] above.

¹⁴⁰ *Trustee Act 1925* (ACT) s 46(9). See also *Trustee Act 1925* (NSW) s 46(8A); *Trustee Act 1958* (Vic) s 31(9) in virtually identical terms.

Chapter 11

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INTRODUCTION

11.1 As explained in Chapter 1, the *Trusts Act 1973* (Qld) is not a code. It does not attempt to set out the basis for establishing the liability of a trustee for a breach of trust or the liability of a third party for participating in a breach of trust,¹ or to set out the remedies that may be available in those circumstances. In that regard, the High Court has observed that:²

Equity provides a range of remedies for breach of express, resulting, implied and constructive trust and apprehended and repeated breach. ... The nature of that remedy may vary to reflect the terms of the trust, and the breach of which complaint is made. Generalisations may mislead.

11.2 However, the Act includes a number of provisions that provide an indemnity or protection from liability for trustees and third parties (or that limit their liability in particular circumstances). This chapter examines the provisions found in Part 6 of the Act,³ as well as several provisions found in other parts of the Act that also deal with the issue of indemnity and protection.⁴

11.3 Trustees might also be protected from liability under the terms of the particular trust instrument. In that case, the protection afforded by the *Trusts Act 1973* (Qld) will apply in addition to any other protection that might be available to the trustee. The statutory provisions are of particular relevance where the trust instrument does not include any provisions exempting the trustees from liability for breach.

¹ See *Barnes v Addy* (1874) LR 9 Ch App 244 in relation to the liability of third parties for participating in a breach of trust.

² *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 499 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

³ *Trusts Act 1973* (Qld) ss 65–72, 75–78. Sections 73 and 74 are considered in Chapter 10.

⁴ *Trusts Act 1973* (Qld) ss 54(1), 55.

LIABILITY FOR THE DEFAULTS OF CO-TRUSTEES AND AGENTS AND FOR CERTAIN LOSSES

Introduction

11.4 Section 71 of the *Trusts Act 1973* (Qld) provides an indemnity to trustees in relation to certain losses to the trust estate:⁵

71 Implied indemnity of trustees

A trustee shall be chargeable only for money and securities actually received by the trustee, notwithstanding the trustee signing any receipt for the sake of conformity; and shall be answerable and accountable only for the trustee's own acts, receipts, neglects or defaults, and not for those of any other trustee, nor those of any financial institution, broker or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the insufficiency, deficiency or loss occurs through the trustee's own default.

11.5 The section deals with a trustee's liability in relation to four distinct matters:

- liability for money or securities for which the trustee has signed a receipt;
- liability for a loss caused by the breach of trust of a co-trustee;
- liability for a loss caused by a financial institution, broker or other person with whom trust money or securities are deposited; and
- liability for the insufficiency or deficiency of any securities or other loss.

11.6 Section 71 has its origins in section 31 of the *Law of Property and Trustees Relief Amendment Act 1859* ('*Lord St Leonards' Act*'), which provided:⁶

Every Deed, Will, or other Instrument creating a Trust either expressly or by Implication shall, without Prejudice to the Clauses actually contained therein, be deemed to contain a Clause in the Words or to the Effect following; that is to say, 'That the Trustees or Trustee for the Time being of the said Deed, Will, or other Instrument shall be respectively chargeable only for such Moneys, Stocks, Funds, and Securities as they shall respectively actually receive notwithstanding their respectively signing any Receipt for the sake of Conformity, and shall be answerable and accountable only for their own Acts, Receipts, Neglects, or Defaults, and not for those of each other, nor for any Banker, Broker, or other Person with whom any Trust Moneys or Securities may be deposited, nor for the Insufficiency or Deficiency of any Stocks, Funds, or Securities, nor for any other Loss, unless the same shall happen through their own wilful Default respectively; and also that it shall be lawful for the Trustees or Trustee for the Time being of the said Deed, Will, or other Instrument to reimburse themselves or himself, or pay or discharge out of the Trust Premises all Expenses incurred in or about the Execution of the Trusts or Powers of the said Deed, Will, or other Instrument.

⁵ *Trusts Act 1973* (Qld) s 71 was preceded by s 25 of the *Trustees and Executors Act 1897* (Qld).

⁶ The latter part of this provision, which provides for the reimbursement of the trustee, is reflected in s 72 of the *Trusts Act 1973* (Qld). See the discussion of that provision at [11.64] ff below.

11.7 Section 71 is a very dense provision, and is still framed in the drafting style of the 1850s. Apart from the reference in section 71 to ‘default’ (instead of ‘wilful default’), the section is relatively unchanged from the original provision in *Lord St Leonards’ Act*. A provision in similar terms to section 71 is included in the trustee legislation of most other Australian jurisdictions and New Zealand.⁷

11.8 Section 31 of *Lord St Leonards’ Act* gave statutory force to the indemnity clause that was commonly included in trust instruments.⁸ It was said to be merely declaratory of the existing rules of equity⁹ and not to otherwise enlarge the protection of trustees from liability.¹⁰ One commentator noted that, while the clause had value because it ‘informed the trustee of the general doctrine of the Court’, it in fact ‘added nothing to his security against the liabilities of the office’.¹¹

11.9 Section 31 of *Lord St Leonards’ Act* was re-enacted by section 24 of the *Trustee Act 1893*,¹² which was subsequently replaced by section 30(1) of the *Trustee Act 1925*. However, as explained later, section 30(1) of the *Trustee Act 1925* has since been repealed by the *Trustee Act 2000* (UK), and replaced by a new, more limited, provision that deals only with the liability of a trustee for the default of an agent.¹³ As a result, the legislation no longer deals specifically with a trustee’s liability for money or securities in respect of which the trustee has signed a receipt, for a loss caused by a co-trustee, or for the insufficiency or deficiency of any securities.

11.10 This part of the chapter examines whether the Queensland Act should continue to provide an indemnity in respect of each of the matters that is currently addressed in section 71 and, if so, what the test for that indemnity should be.

11.11 If the content of section 71 is generally retained, the comprehensibility of the provision would be much improved by redrafting, including by replacing the current provision with provisions that deal separately with the various elements of the current provision.

⁷ *Trustee Act 1925* (ACT) s 59; *Trustee Act 1925* (NSW) s 59; *Trustee Act* (NT) s 26; *Trustee Act 1898* (Tas) s 27; *Trustee Act 1958* (Vic) s 36; *Trustees Act 1962* (WA) s 70; *Trustee Act 1956* (NZ) s 38. In South Australia, s 35 of the *Trustee Act 1936* (SA) deals with the liability of trustees, but is framed in different terms.

⁸ *Re Brier* (1884) 26 Ch D 238, 243 (Earl of Selborne LC; Cotton and Fry LJJ agreeing).

⁹ JS Vaizey, *Lord St Leonards’ Act With Notes* (Wildy & Sons, 1860) 109–11; T Lewin, *A Practical Treatise on the Law of Trusts and Trustees* (Maxwell & Son, 3rd ed, 1857) 317; *Dawson v Clarke* (1811) 18 Ves Jun 248; 34 ER 311.

¹⁰ JS Vaizey, *Lord St Leonards’ Act With Notes* (Wildy & Sons, 1860) 111; T Lewin, *A Practical Treatise on the Law of Trusts and Trustees* (Maxwell & Son, 3rd ed, 1857) 317.

¹¹ R Cozens-Hardy Horne, *Lewin’s Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 200. See also FG Champernowne and H Johnston, *The Trustee Act, 1893, And Other Recent Statutes Relating to Trustees With Notes* (William Clowes & Sons, 1904) 93.

¹² *Trustee Act 1893*, 56 & 57 Vict, c 53, s 24 still applies in Ireland. See Irish Statute Book, *British Public Statutes Affected* (accessed 20 November 2012) <<http://www.irishstatutebook.ie/isbc/bps1893.html>>. The Law Reform Commission of Ireland recommended the retention of a provision in similar terms to s 24 of the *Trustee Act 1893*: Law Reform Commission of Ireland, *Trust Law: General Proposals*, Report No 92 (2008) [6.13], Draft *Trustee Bill 2008*, cl 27.

¹³ *Trustee Act 2000* (UK) c 29, s 23. See [11.37] ff below.

Liability for joining in receipts for the sake of conformity

11.12 At law, trustees were required to join in the signing of receipts and were prima facie all considered to have received the money.¹⁴ However, the rule of the Courts of Equity was that ‘the mere circumstances of a trustee joining in a receipt for the sake of conformity, without receiving the moneys to which such receipt relates, is not sufficient to charge him in the event of a misapplication by the trustee who actually receives’.¹⁵ The equitable rule arose because:¹⁶

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.

11.13 Section 71 of the *Trusts Act 1973* (Qld) provides that a trustee is ‘chargeable only for money and securities actually received by the trustee, notwithstanding the trustee signing any receipt for the sake of conformity’.¹⁷ In this respect, the provision is declaratory of the general law.¹⁸

11.14 In South Australia, this issue is addressed by a more general provision. Section 35(1) of the *Trustee Act 1936* (SA) provides:¹⁹

35 Liability of trustees

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

11.15 As explained later, the expression ‘wilful default’ has been given a narrow meaning in England, which has been the subject of much criticism.²⁰ The reference in the South Australian provision to ‘wilfully or negligently’ ensures that ‘it is within

¹⁴ *Brice v Stokes* (1805) 11 Ves Jun 319, 324; 32 ER 1111, 1113 (Lord Eldon LC).

¹⁵ AR Rudall and JW Greig, *The Law of Trusts and Trustees* (Jordan & Sons, 2nd ed, 1898) 87.

¹⁶ R Cozens-Hardy Horne, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 195.

¹⁷ For example, the approved form of transfer (Form 1) under the *Land Title Act 1994* (Qld) states:

The Transferor transfers to the Transferee the estate and interest described in item 1 for the consideration and in the case of monetary consideration acknowledges receipt thereof. (emphasis added)

The usual practice is for the transferors to sign the transfer before settlement, so that it can be assessed for stamp duty and then exchanged at settlement for the settlement proceeds. In the case of trustees, if one of their number absconded with the settlement proceeds, the other trustees would not be treated as having received the proceeds merely because it was necessary for them to sign the transfer document, which incorporated a receipt.

¹⁸ The trustee is, however, required to prove that he or she did not actually receive the money, and that he or she joined in signing for the sake of conformity: *Brice v Stokes* (1805) 11 Ves Jun 319; 32 ER 1111.

¹⁹ A provision in similar terms, based on the South Australian provision, was recommended by the authors of the Model Trustee Code: WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 144 (cl 5.2.2)

²⁰ See [11.32] ff below.

the context of [the trustee's] obligations under the trust that the trustee's conduct must be considered'.²¹

11.16 In England, as a result of the omission of section 30(1) of the *Trustee Act 1925*, there is no longer a provision that specifically indemnifies a trustee who has signed a receipt for the sake of conformity, but has not actually received the trust money.²²

11.17 It is arguable, however, that, although this part of section 71 is declaratory of the general law, it may nevertheless be desirable for the Act to continue to provide specifically for this issue for the reason that it makes the law more accessible.

11-1 Should the *Trusts Act 1973* (Qld) continue to include a provision to the general effect that a trustee is accountable only for trust property actually received by the trustee, notwithstanding that the trustee has, for the sake of conformity, signed a receipt for the property? If so, should the provision:

- (a) continue to be expressed in terms of the first clause of section 71 of the *Trusts Act 1973* (Qld); or
- (b) be expressed in more general terms, such as section 35(1) of the *Trustee Act 1936* (SA)?

Liability for the default of a third party with whom trust money or securities are deposited

11.18 Section 71 of the *Trusts Act 1973* (Qld) deals with the liability of a trustee for the acts, receipts, neglects or defaults of a financial institution, broker or other person with whom trust money or securities have been deposited. It provides that the trustee:

shall be answerable and accountable only for the trustee's own acts, receipts, neglects or defaults, and not for those of any other trustee, nor those of any financial institution, broker or other person with whom any trust money or securities may be deposited, ... unless the ... loss ... occurs through the trustee's own default. (emphasis added)

11.19 Most of the judicial and other consideration of this provision has centred on its application where trust money has been deposited with an agent. However, the provision also applies where trust money has been deposited with a financial institution. These situations are considered separately below.

²¹ WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 144.

²² As explained later, s 23 of the *Trustee Act 2000* (UK) c 29 deals generally with the liability of a trustee for the act or default of an agent, who could, under s 12(1), be one of their number.

Liability in respect of agents

11.20 As explained in Chapter 9, a trustee may under the general law appoint an agent to perform an act in the administration of the trust where the appointment arises from 'a moral necessity or in the regular course of business'.²³ If a loss to the trust fund is occasioned by the default of the agent, the trustee 'will be exonerated unless some negligence or default of [the trustee] has led to that result',²⁴ for example, by leaving trust money or securities in the hands of the agent for longer than was reasonably necessary.²⁵

11.21 A trustee must still exercise discretion in selecting an agent,²⁶ and should employ the agent to do only those acts that are within the usual scope of business of the agent.²⁷ A trustee is also 'under an obligation to be diligent in seeing that a duty given to an agent has been properly performed'.²⁸

Queensland provisions

11.22 The *Trusts Act 1973* (Qld) includes two provisions that deal with the liability of a trustee for the default of an agent — sections 71 and 54(1).

11.23 Section 71 provides that a trustee will not be answerable for the acts or defaults of an agent unless the loss occurs through the trustee's own 'default'.

11.24 Section 54(1), which gives trustees a general statutory power to employ agents,²⁹ provides that the trustee shall not be responsible for the default of an agent employed in 'good faith and without negligence'.

11.25 Section 71 differs from the former section 30(1) of the English *Trustee Act 1925* by referring to the trustee's 'default', rather than 'wilful default'.

11.26 Similarly, section 54(1) differs from the former section 23(1) of the English *Trustee Act 1925* by limiting the trustee's protection to where the agent has been employed 'in good faith and without negligence' and not merely 'in good faith'. In recommending a provision to the effect of section 54(1), the Commission noted in its 1971 Report that it was following the Western Australian provision.³⁰ That jurisdiction had included the additional requirement for the appointment to be made

²³ See *Speight v Gaunt* (1883) 9 App Cas 1, discussed at [9.23] ff above.

²⁴ *Ibid.*

²⁵ AR Rudall and JW Greig, *The Law of Trusts and Trustees* (Jordan & Sons, 2nd ed, 1898) 87–8.

²⁶ *Re Weall* (1889) 42 Ch D 674, 677–8 (Kekewich J).

²⁷ *Fry v Tapson* (1884) 28 Ch D 268, 280 (Kay J); *McMahon v Cooper* (1904) 4 SR (NSW) 433, 438 (AH Simpson CJ in Eq).

²⁸ *Flynn v Mamarika* (1996) 130 FLR 218, 225 (Martin CJ). See also *Guazzini v Pateson* (1918) 18 SR (NSW) 275, 280 (Street CJ in Eq); *Re Lucking's Will Trusts* [1968] 1 WLR 866, 877 (Cross J).

²⁹ *Trusts Act 1973* (Qld) s 54(1). See also s 54(3)–(4) in relation to the employment of solicitors and financial institutions.

³⁰ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 43.

without negligence to ensure that a trustee would not avoid liability ‘for an honest but foolish appointment’.³¹

Other Australian jurisdictions

11.27 A provision in similar terms to section 71 of the *Trusts Act 1973* (Qld) is included in the trustee legislation of most Australian jurisdictions.³² However, the provisions in the ACT and New South Wales refer to the trustee’s ‘wilful neglect or default’,³³ while the provisions in the Northern Territory, Tasmania, Victoria and Western Australia refer to the trustee’s ‘wilful default’.³⁴

11.28 A provision in similar terms to section 54(1) of the *Trusts Act 1973* (Qld) is included in the trustee legislation of the ACT, New South Wales, Victoria and Western Australia. The Western Australian provision (like the Queensland provision) protects a trustee where the agent is employed ‘in good faith and without negligence’.³⁵ In contrast, the provisions in New South Wales and Victoria refer to an agent employed ‘in good faith’,³⁶ while the ACT provision refers to an agent who is employed ‘honestly’.³⁷

11.29 In South Australia, the trustee legislation does not include a counterpart to section 54(1) of the Queensland Act. However, section 35(1a) of the *Trustee Act 1936* (SA) deals with the matters that are provided for by the second clause of section 71 of the *Trusts Act 1973* (Qld):³⁸

35 Liability of trustees

(1) ...

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

- (a) the loss occurred as a result of his own wrongful or negligent act or omission; or
- (b) the loss occurred as a result of circumstances that the trustee could reasonably be expected to have foreseen and to have avoided.

³¹ See Law Reform Sub-Committee of the Law Society (WA), *The Law of Trusts*, Report (1961), Supplement 41.

³² *Trustee Act 1925* (ACT) s 59; *Trustee Act 1925* (NSW) s 59; *Trustee Act* (NT) s 26; *Trustee Act 1898* (Tas) s 27; *Trustee Act 1958* (Vic) s 36; *Trustees Act 1962* (WA) s 70. See also *Trustee Act 1956* (NZ) s 38.

³³ *Trustee Act 1925* (ACT) s 59(2); *Trustee Act 1925* (NSW) s 59(2).

³⁴ *Trustee Act* (NT) s 26; *Trustee Act 1898* (Tas) s 27(1); *Trustee Act 1958* (Vic) s 36(1); *Trustees Act 1962* (WA) s 70. See also *Trustee Act 1956* (NZ) s 38(1).

³⁵ *Trustees Act 1962* (WA) s 53(2).

³⁶ *Trustee Act 1925* (NSW) s 53(3); *Trustee Act 1958* (Vic) s 28(1). See also *Trustee Act 1956* (NZ) s 29(1), which is in the same terms.

³⁷ *Trustee Act 1925* (ACT) s 53(3).

³⁸ *Trustee Act 1936* (SA) s 35(1) is set out at [11.14] above.

England

11.30 In *Re Vickery*, Maugham J considered the effect on the liability of a trustee of sections 23(1) and 30(1) of the English *Trustee Act 1925*. His Honour noted that the requirement in section 23(1) to act 'in good faith' was subject to the trustee's obligation to exercise discretion in selecting an agent, and to employ agents only to act within the usual course of their business.³⁹ However, because section 30(1) was applicable, this being a case of trust funds deposited with an agent, Maugham J held that:⁴⁰

since s 30, sub-s 1, expressly refers to the defaults of bankers, brokers, or other persons with whom any trust money or other securities may be deposited, I am unable — dealing here with the more limited case — to escape the conclusion that the trustee cannot be made liable for the default of such a person unless the loss happens through the 'wilful default' of the trustee.

11.31 Maugham J further held that, because a trustee was protected under section 30(1) unless the loss occurred as a result of the trustee's 'wilful default', the executor in that case:⁴¹

will not be liable for a loss of the money occasioned by the misconduct of the agent unless the loss happens through the wilful default of the executor, using those words as implying, as the Court of Appeal have decided, either a consciousness of negligence or breach of duty, or a recklessness in the performance of a duty. (emphasis added)

11.32 This decision has been criticised for adopting too narrow a definition of 'wilful default',⁴² in contrast to decisions in which wilful default has been held to be constituted by an 'ordinary want of prudence'.⁴³

11.33 Sir William Holdsworth, however, suggested that the decision in *Re Vickery* showed that the legislature had 'gone too far in whittling away the liabilities of trustees'.⁴⁴ In his view, the standard of care in all cases should be the standard observed by a person of 'ordinary prudence'.⁴⁵

11.34 Pettit, writing before the omission of sections 23(1) and 30(1) of the English *Trustee Act 1925*, noted the difficulty of reconciling the protection afforded by section 23 of the *Trustee Act 1925*, which applied where the employment was

³⁹ [1931] 1 Ch 572, 581.

⁴⁰ Ibid 582.

⁴¹ Ibid 584.

⁴² See, eg, G Jones, 'Delegation by Trustees: A Reappraisal' (1959) 22 *Modern Law Review* 381, 391; GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [24.100].

⁴³ See, eg, *Re Chapman* [1896] 2 Ch 763, 775 (Lindley LJ), quoted at [11.60] below. See also *Dalrymple v Melville* (1932) 32 (NSW) 596.

⁴⁴ Sir William Holdsworth, 'Notes' (1931) 47 *Law Quarterly Review* 463, 465.

⁴⁵ Ibid. See also HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 16 January 2012) [9.14210].

made 'in good faith', with the narrow construction of 'wilful default' in section 30(1).⁴⁶

TRUSTEE ACT 2000 (UK)

11.35 The Law Commission of England and Wales considered that the reference in section 30(1) of the *Trustee Act 1925* to 'wilful default' was unsatisfactory in relation to the duty of care required by trustees in employing and supervising agents. It noted that the legislation was not coherent, as other provisions imposed different standards of care, in particular, section 23(1) of the Act, which protected trustees from liability for the default of agents who were employed 'in good faith'.⁴⁷

By virtue of section 30(1), trustees will seldom be liable for loss caused by an agent, unless they are guilty of 'wilful default' (which, in this context, has been held to have its literal meaning of a conscious breach of duty or a reckless performance of a duty). However, there are some cases of delegation that are not covered by section 30(1), and in such cases a higher standard of conduct is required of the trustees: they will be liable if they fail to act with reasonable prudence. There may therefore be cases where different standards of care apply to the initial appointment of the agent by the trustees and their subsequent control of him or her, even though there is no clear boundary between the two events. (notes omitted)

11.36 The Law Commission's recommendations were implemented by the *Trustee Act 2000* (UK), which repealed sections 23(1) and 30(1) of the *Trustee Act 1925*.⁴⁸ Instead of those provisions, the 2000 Act includes quite detailed provisions in relation to the appointment of agents, including the appointment of agents to exercise the 'delegable functions' of the trustees.⁴⁹

11.37 The *Trustee Act 2000* (UK) deals with the issue of liability for loss occasioned by an agent by imposing specific duties on a trustee and relieving the trustee of liability if the trustee complies with those duties. As explained in Chapter 9, the statutory duty of care created by section 1(1) of the Act applies to a trustee when entering into arrangements under which an agent is authorised under section 11 to exercise the trustees' delegable functions and when carrying out the trustee's duties under section 22 to review the arrangements under which the agent is appointed.⁵⁰

11.38 Section 23(1) provides that a trustee is not liable for any act or default of the agent unless the trustee has failed to comply with the duty of care that applies to the trustee when entering into the abovementioned arrangements or when carrying out his or her duties under section 22.

⁴⁶ PH Pettit, *Equity and the Law of Trusts* (Butterworths, 8th ed, 1997) 433–4.

⁴⁷ Law Commission of England and Wales, *Trustees' Powers and Duties*, Report No 260 (1999) [3.7]. See also Law Commission of England and Wales, *Trustees' Powers and Duties*, Consultation Paper No 146 (1997) [4.29]–[4.31].

⁴⁸ *Trustee Act 2000* (UK) c 29, s 40(1), (3), sch 2 pt II paras 23–24, sch 4 pt II.

⁴⁹ These provisions are considered in Chapter 9.

⁵⁰ See [9.75], [9.77] above for a discussion of the review requirements and the trustee's duty of care.

11.39 Section 23(2) applies where a trustee has agreed to a term under which the agent is permitted to appoint a substitute. It provides that the trustee is not liable for any act or default of the substitute unless the trustee has failed to comply with the duty of care applicable under the Act:

- (a) when agreeing that term, or
- (b) when carrying out his duties under section 22 in so far as they relate to the use of the substitute.

Canada

11.40 A similar approach has been adopted in a number of Canadian provinces in relation to a trustee's liability for an agent's default in exercising a delegated investment power. The legislation authorises trustees to delegate to an agent 'the degree of authority with respect to the investment of trust funds that a prudent investor might delegate in accordance with ordinary investment practice'.⁵¹ As a corollary to that power, the legislation provides that:⁵²

- a trustee must exercise prudence in selecting an agent, establishing the terms of the delegated authority, and monitoring the performance of the agent to ensure compliance with the terms of the delegation; and
- a trustee is not liable for the decisions or actions of an agent, provided that the trustee has complied with the duties that apply in relation to the selection, appointment and monitoring of the agent.

11.41 The Alberta Law Reform Institute considered that, although a provision in these terms reflected the general law, it was desirable for the Act to be 'explicit on this point':⁵³

not so much because it makes it clear that the trustee is not vicariously liable for the agent's wrongful actions, but because it makes it clear that the trustee may incur liability for failing to exercise prudence in regard to the selection, instruction and monitoring of the agent.

Standardising the provisions dealing with liability for an agent

11.42 In Queensland, a trustee is protected under section 54(1) of the *Trusts Act 1973* (Qld) if the agent was employed 'in good faith and without negligence' and under section 71 if the loss did not occur through the trustee's 'default'. Because neither provision would protect a trustee who had failed to act with prudence, the Queensland provisions have not produced the same difficulties as their English counterparts.

⁵¹ *Trustee Act*, RSA 2000, c T-8, s 5(2); *Trustee Act*, RSBC 1996, c 464, s 15.5(2); *Trustee Act*, RSPEI 1988, c T-8, s 3.5(2); *Trustee Act*, RSNS 1989, c 479, s 3F(2).

⁵² *Trustee Act*, RSA 2000, c T-8, s 5(3)–(4); *Trustee Act*, RSBC 1996, c 64, s 15.5(3), (5); *Trustee Act*, RSPEI 1988, c T-8, s 3.5(3), (5); *Trustee Act*, RSNS 1989, c 479, s 3F(3), (5).

⁵³ Alberta Law Reform Institute, *Trustee Investment Powers*, Report No 80 (2000) [226].

11.43 Nevertheless, it would be desirable for the Act to adopt a single test for determining the liability of a trustee for the default of an agent, rather than providing for this issue in separate provisions with different tests.

11.44 The authors of the Model Trustee Code noted the inconsistencies in the language used in the various Australian provisions that deal with the liability of a trustee for the defaults of an agent, and suggested that the issue should be addressed in a single provision.⁵⁴

Good faith, wilful default and default impose quite different standards of liability. It is arguable that the earlier section in each Act was intended to replace the later section, or perhaps vice versa, but that for some reason both provisions, though incompatible, were left in. It is submitted that it is quite out of the question that more than one should be retained, and that the standards implied by the phrases 'in good faith' and 'wilful default' give insufficient protection to the beneficiary. The word 'default' has therefore been retained ...

11-2 In what circumstances should a trustee be protected from liability in respect of the acts or defaults of an agent, for example:

- (a) if the trustee exercises the care, skill and diligence of a prudent person in employing and supervising the agent; or**
- (b) if the loss does not occur through the trustee's own default?**

Liability in respect of financial institutions

11.45 Section 71 of the *Trusts Act 1973* (Qld), as passed, referred to a 'banker' with whom any trust money or securities may be deposited. It was amended in 1997 to refer to a 'financial institution'.⁵⁵

11.46 Under the general law, a trustee was justified in 'depositing moneys for temporary purposes in the hands of bankers of good credit',⁵⁶ provided that the trustee did not improperly omit to invest the funds and did not mix them with other moneys.⁵⁷ In these circumstances, a trustee was not liable if the trust money was lost as a result of the failure of the bank.⁵⁸ However, where executors left money on deposit with a bank, in breach of their duty under the will to invest the funds with all

⁵⁴ WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 95. For an explanation of the origins of the Model Trustee Code and the membership of the working party that prepared it, see Chapter 5, n 75 above.

⁵⁵ *Miscellaneous Acts (Non-bank Financial Institutions) Amendment Act 1997* (Qld) s 72. See Chapter 9, n 52 above for the meaning of 'financial institution'.

⁵⁶ AR Rudall and JW Greig, *The Law of Trusts and Trustees* (Jordan & Sons, 2nd ed, 1898) 87, citing *Rowth v Howell* (1797) 3 Ves Jun 565; 30 ER 1157; *Wilks v Groom* (1856) 3 Dr 584, 592; 61 ER 1026, 1029 (Kindersley V-C); *Swinfen v Swinfen (No 5)* (1860) 29 Beav 211; 54 ER 608.

⁵⁷ *Wilks v Groom* (1856) 3 Dr 584, 592; 61 ER 1026, 1029 (Kindersley V-C). See also *Re Marcon's Estate* [1871] WN 148.

⁵⁸ See *Wilks v Groom* (1856) 3 Dr 584; 61 ER 1026; *Re Marcon's Estate* [1871] WN 148.

convenient speed, they were held liable for the loss of the money when the bank failed.⁵⁹

11.47 The older cases were decided at a time when trustees could not invest money with a bank unless specifically authorised by the trust instrument, but could deposit money for temporary purposes, for example, pending the distribution of an estate or finding a suitable investment for the trust fund. Even then, however, it was not a breach of trust *per se* to deposit money with a bank.

11.48 Now, if money was deposited with a financial institution by way of investment, the trustee's liability would be determined in accordance with section 22 of the *Trusts Act 1973* (Qld). If it were deposited other than by way of investment, the trustee's liability would be determined having regard to the trustee's duty to safeguard the trust property and to exercise prudence in carrying out that duty.

11.49 As mentioned earlier, the English *Trustee Act 1925* no longer includes a provision that deals with this aspect of section 71.⁶⁰

11-3 Is it necessary or desirable for the *Trusts Act 1973* (Qld) to state when a trustee is not answerable or accountable for the loss of money or securities deposited with a financial institution? If so, should the provision:

- (a) state that a trustee is not liable for the loss unless it occurs through the trustee's own default; or
- (b) be expressed in some other way (and how)?

Liability for the default of another trustee

11.50 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'.⁶¹

11.51 Section 71 of the *Trusts Act 1973* (Qld) gives effect to this position. It provides that a trustee:

shall be answerable and accountable only for the trustee's own acts, receipts, neglects or defaults, and not for those of any other trustee, ... unless the ... loss occurs through the trustee's own default. (emphasis added)

⁵⁹ *Moyle v Moyle* (1831) 2 Russ & M 710; 39 ER 565.

⁶⁰ See [11.9] above.

⁶¹ 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) 196, 302; *Townley v Sherborne* (1633) J Bridg 35; 123 ER 1181.

11.52 However, 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'.⁶² 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.⁶³

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. Where one out of two trustees commits a breach of trust, the other trustee will only be liable if he personally has broken his duty to the beneficiaries, eg 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.

11.53 If co-trustees are each guilty of a breach of trust, they will be jointly and severally liable.⁶⁴

11.54 In England, as a result of the omission of section 30(1) of the *Trustee Act 1925*, there is no longer a provision that specifically provides that a trustee is not answerable or accountable for the acts, receipts, neglects or defaults of another trustee.⁶⁵

11.55 Although this part of section 71 is declaratory of the general law, it may nevertheless be desirable for the Act to continue to provide specifically for an issue as fundamental as the liability of a trustee for a breach of trust of another trustee.

11-4 Is it necessary or desirable for the *Trusts Act 1973* (Qld) to state when a trustee is not answerable or accountable for a breach of trust of another trustee? If so, should the provision:

- (a) state that a trustee is not liable for the loss unless it occurs through the trustee's own default; or**
- (b) be expressed in some other way (and how)?**

⁶² FG Champernowne and H Johnston, *The Trustee Act, 1893, And Other Recent Statutes Relating to Trustees With Notes* (William Clowes & Sons, 1904) 93.

⁶³ G Fricke and OK Strauss, *The Law of Trusts in Victoria* (Butterworths, 1964) 422.

⁶⁴ Ibid 425. See also JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2204]; GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [24.95].

⁶⁵ See [11.9] above. *Trustee Act 2000* (UK) c 29, s 23 would be relevant if the co-trustee was the agent of the other trustees.

Liability for the insufficiency or deficiency of securities, or for any other loss

11.56 Section 71 of the *Trusts Act 1973* (Qld) provides that a trustee is not answerable for the 'insufficiency or deficiency of any securities, nor for any other loss, unless the insufficiency, deficiency or loss occurs through the trustee's own default'.⁶⁶

11.57 In *Re Vickery*, Maugham J considered the scope of section 30(1) of the English *Trustee Act 1925* and, in particular, the reference in that provision to 'any other loss' (which also appears in the Queensland provision). Maugham J held that the provision did not protect trustees generally from *any* loss caused to the trust, but was confined to:⁶⁷

losses for which it is sought to make the trustee liable occasioned by his signing receipts for the sake of conformity or by reason of the wrongful acts or defaults of another trustee or of an agent with whom trust money or securities have been deposited, or for the insufficiency or deficiency of securities or some other analogous loss. (emphasis added)

11.58 Maugham J noted that, if the phrase 'any other loss' was not so limited, there would be no need for the court's power in section 61 of the English legislation to relieve a trustee from liability for a breach of trust.⁶⁸

11.59 This part of section 71 is again declaratory of the general law. As stated by Lindley LJ in *Re Chapman*.⁶⁹

a trustee is not a surety, nor is he an insurer; he is only liable for some wrong done by himself, and loss of trust money is not per se proof of such wrong.

11.60 In that case, the issue was whether the trustees of a testamentary trust were in breach of trust by failing to call in certain mortgages of freehold land. The English Court of Appeal held that the trustees were not liable to make good the loss sustained through the fall in value of the land:⁷⁰

To throw on the trustees the loss sustained by the fall in value of securities authorized by the trust, wilful default, which includes want of ordinary prudence on the part of the trustees, must be proved; but it is not proved in this case.

11.61 The provision does not protect a trustee if the investment, when made, was not authorised and proper.⁷¹

⁶⁶ Similarly, Unif Trust Code § 1003(b) (amended 2010) provides that 'Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit'. See Chapter 7, n 121 above in relation to the promulgation and adoption of the Uniform Trust Code.

⁶⁷ [1931] 1 Ch D 572, 582.

⁶⁸ Ibid. The equivalent Queensland provision, s 76 of the *Trusts Act 1973* (Qld), is considered at [11.219] ff below.

⁶⁹ [1896] 2 Ch 763, 775.

⁷⁰ Ibid 776.

⁷¹ FG Champernowne and H Johnston, *The Trustee Act, 1893, And Other Recent Statutes Relating to Trustees With Notes* (William Clowes & Sons, 1904) 94.

11.62 In England, as a result of the omission of section 30(1) of the *Trustee Act 1925*, there is no longer a provision to this effect.⁷²

11.63 Whereas the parts of section 71 discussed earlier deal with a trustee's liability for a loss arising from the default of a third party, this part of section 71 deals with a loss arising from the trustee's own conduct. As explained in Chapter 6, section 22 of the Act requires a trustee, in exercising a power of investment, to comply with the duty of care imposed by that section. A trustee who does not comply with that duty commits a breach of trust and will be liable for the resulting loss. Conversely, a trustee who complies with that duty does not commit a breach of trust, even if the investment depreciates in value. For this reason, the argument for retaining this part of section 71 is not as strong as in relation to the other parts of the provision discussed earlier.

11-5 Is it necessary or desirable for the *Trusts Act 1973* (Qld) to state when a trustee is not answerable or accountable for the insufficiency or deficiency or any securities, or for any other loss? If so, should the provision:

- (a) state that a trustee is not liable for the insufficiency, deficiency or loss unless it occurs through the trustee's own default; or
- (b) be expressed in some other way (and how)?

REIMBURSEMENT OF TRUSTEE OUT OF TRUST PROPERTY

11.64 Section 72 of the *Trusts Act 1973* (Qld) gives statutory recognition to a trustee's right under the general law to be indemnified out of trust property for expenses incurred in the proper performance of the trust.⁷³ It provides:

72 Reimbursement of trustee out of trust property

A trustee may reimburse himself or herself for or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers.

11.65 Similar provision is made in all other Australian jurisdictions and in New Zealand.⁷⁴

11.66 In England, section 30(2) of the *Trustee Act 1925*, which was in similar terms to section 72 of the Queensland Act, was repealed by the *Trustee Act 2000*

⁷² See [11.9] above.

⁷³ *Trusts Act 1973* (Qld) s 72 applies whether or not a contrary intention is expressed in the instrument (if any) creating the trust: s 65. See also *RJK Enterprises v Webb* [2006] 2 Qd R 593, 595 (Douglas J).

⁷⁴ *Trustee Act 1925* (ACT) s 59(4); *Trustee Act 1925* (NSW) s 59(4); *Trustee Act* (NT) s 26; *Trustee Act 1936* (SA) s 35(2); *Trustee Act 1898* (Tas) s 27(2); *Trustee Act 1958* (Vic) s 36(2); *Trustees Act 1962* (WA) s 71; *Trustee Act 1956* (NZ) s 38(2). These provisions have their origins in s 31 of *Lord St Leonards' Act*: see [11.6] above. A provision in similar terms was included in s 25(2) of the *Trustees and Executors Act 1897* (Qld).

(UK).⁷⁵ It was replaced by section 31 of the *Trustee Act 2000* (UK), which makes express provision for trustees to be reimbursed for, or to pay, out of the trust funds, 'expenses properly incurred [by the trustee] when acting on behalf of the trust'. The section also applies to a trustee when acting as an agent of the trustees, or as a nominee or custodian.

Background

11.67 A trustee who, in discharge of his trust, 'enters into business transactions is personally liable for any debts that are incurred in the course of those transactions'.⁷⁶ However, under the general law, a trustee has a right to be indemnified out of the trust assets for all costs, expenses and liabilities properly incurred in the execution of the trust.⁷⁷ This long-standing rule of equity is based on the principle that, because a trustee carries on the trust for the benefit of the beneficiaries, the trustee should be 'saved harmless' from obligations that are attached inseparably to that office.⁷⁸

11.68 Under the right to indemnity, a trustee may either reimburse himself or herself out of the trust estate 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 estate (the 'right of exoneration').⁷⁹ The trustee's right is secured by an equitable lien over the whole trust estate — both income and capital⁸⁰ — which arises by operation of law, and confers a proprietary interest that is a first charge on the trust property.⁸¹

⁷⁵ *Trustee Act 2000* (UK) c 29, s 40(1), (3), sch 2 pt II para 24, sch 4 pt II.

⁷⁶ *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367 (Stephen, Mason, Aickin and Wilson JJ). See also *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319, 324 (Latham CJ), 335 (Dixon J); *JA Pty Ltd v Jonco Holdings Pty Ltd* (2000) 33 ACSR 691, 705 (Santow J).

⁷⁷ See, eg, *Balsh v Hyham* (1728) 2 P Wms 453; 24 ER 810; *Worrall v Harford* (1802) 8 Ves Jun 4, 8; 32 ER 250, 252 (Lord Eldon LC); *A-G v The Mayor of Norwich* (1837) 2 My & Cr 406, 424; 40 ER 695, 702 (Lord Cottenham LC); *Re Raybould* [1900] 1 Ch 199; *Hardoon v Bellios* [1901] AC 118, 123–5 (Lord Lindley); *National Trustees Executors and Agency Co of Australasia Ltd v Barnes* (1941) 64 CLR 268, 274 (Starke J), 277 (Williams J); *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319, 335 (Dixon J); *Ron Kingham Real Estate Pty Ltd v Edgar* [1999] 2 Qd R 439, 441 (McPherson JA); *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties* [1984] 1 Qd R 576, 584 (McPherson J); *Re Alsop Wilkinson v Neary* [1996] WLR 1220, 1226 (Lightman J); *Arjon Pty Ltd v Commissioner of State Revenue* (2003) 8 VR 502, 523–4 (Phillips JA).

⁷⁸ *Balsh v Hyham* (1728) 2 P Wms 453, 455; 24 ER 810, 810 (Lord King LC); *Re The Exhall Coal Co Ltd* (1866) 35 Beav 449, 453; 55 ER 970, 971–2 (Lord Romilly MR); *Hardoon v Bellios* [1901] AC 119, 125 (Lord Lindley).

⁷⁹ See, eg, *Re Blundell* (1888) 40 Ch D 370, 376–7 (Stirling J); *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties* [1984] 1 Qd R 576, 585 (McPherson J); *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226, 245–6 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Arjon Pty Ltd v Commissioner of State Revenue* (2003) 8 VR 502, 523–4 (Phillips JA); *Zen Ridgeway Pty Ltd v Adams* [2009] QSC 117, [10] (Wilson J).

⁸⁰ *Stott v Milne* (1884) 25 Ch D 710, 715 (Earl of Selborne LC; Cotton and Lindley LJJ agreeing); *Jeffray v Webster* (1895) 1 ALR 65, 67 (Hodges J).

⁸¹ See, eg, *Stott v Milne* (1884) 25 Ch D 710, 715 (Earl of Selborne LC; Cotton and Lindley LJJ agreeing); *Dowse v Gorton* [1891] AC 190; *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319, 335 (Dixon J); *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367, 370 (Stephen, Mason, Aickin and Wilson JJ); *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226, 245–6 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

11.69 If the trustee becomes bankrupt or insolvent, the trustee's right to indemnity vests in either the trustee in bankruptcy or liquidator (as the case may be).⁸²

11.70 If the trust estate is insufficient, and the beneficiary is an adult with full legal capacity, then the trustee's right to be indemnified out of the trust property extends further, and imposes on the beneficiary a personal obligation enforceable in equity to indemnify the trustee.⁸³ This right is based on the principle that the beneficiary who 'gets all the benefit of the property should bear its burden' unless he or she can show some good reason why the trustee should bear the burden.⁸⁴

Requirement for expenses to be 'reasonably incurred'

11.71 The right to indemnity has traditionally been limited to expenses 'properly incurred'. In *Re Beddoe*, 'properly incurred' was held to mean 'not improperly incurred', or 'reasonably as well as honestly incurred'.⁸⁵ In commenting on that decision, Ormiston JA held in *Nolan v Collie* that:⁸⁶

In my opinion the use of the negative is intended to show that what is 'proper' and 'improper' must be answered by reference to the circumstances and in particular by reference to the duty with which a trustee was obliged to comply or the power which a trustee is intending to exercise. The content of trustees' duties vary considerably, as do the obligations taken on when a power is exercised. A significant number of trustees' duties requires strict compliance so that failure to comply with that duty will necessarily lead to the conclusion that a particular cost, expense or liability has not been properly incurred. On the other hand, the more day to day functions of a trustee in the management of a trust require only that the trustee 'exercise the same care as an ordinary, prudent person of business would exercise in the conduct of that business were it his or her own' ...

11.72 Section 72 of the *Trusts Act 1973* (Qld) applies in relation to expenses 'reasonably incurred' in the execution of the trust.⁸⁷ In *Ron Kingham Real Estate Pty Ltd v Edgar*, McPherson JA equated that requirement with the general law principle that the expenses are 'properly incurred'.⁸⁸

⁸² See, eg, *Jennings v Mather* [1902] 1 KB 1, 5 (Collins MR), 7 (Stirling LJ), 9 (Mathew LJ); *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367–8 (Stephen, Mason, Aickin and Wilson JJ); *Re Enhill Pty Ltd* [1983] VR 561, 569 (Lush J); *Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99, 109 (King CJ; Jacobs and Matheson JJ agreeing); *JA Pty Ltd v Jonco Holdings Pty Ltd* (2000) 33 ACSR 691, 706 (Santow J).

⁸³ *Hardoon v Belillios* [1901] AC 118, 124 (Lord Lindley). See also, eg, *Jervis v Wolferstan* (1874) LR 18 Eq 18; *Ron Kingham Real Estate Pty Ltd v Edgar* [1999] 2 Qd R 439, 441–2 (McPherson JA).

⁸⁴ *Hardoon v Belillios* [1901] AC 118, 123 (Lord Lindley).

⁸⁵ [1893] 1 Ch 547, 558 (Lindley LJ), 562 (Bowen LJ).

⁸⁶ (2003) 7 VR 287, 306 (Ormiston JA; Batt and Vincent JJA agreeing). See, however, *Gatsios Holdings Pty Ltd v Kritharas Holdings Pty Ltd (in liq)* [2002] NSWCA 29, where the former trustee was held to be entitled to be indemnified in respect of its liability to pay an award of damages of \$400 000 for a breach of s 52 of the *Trade Practices Act 1974* (Cth), especially at [15]–[21] (Spigelman CJ), [47] (Meagher JA).

⁸⁷ *Trustees Act 1962* (WA) s 71 is in the same terms.

⁸⁸ [1999] 2 Qd R 439, 441–2 (McPherson JA), citing *Re Beddoe* [1893] 1 Ch 547, 558 (Lindley LJ).

11.73 In other jurisdictions, the statutory provisions simply refer to ‘expenses incurred’ in or about the execution of the trustee’s trusts or powers. In *RWG Management Ltd v Commissioner for Corporate Affairs*, Brooking J stated that provisions ‘which refer to “expenses incurred” without some such qualifying adverb as “properly”, are accepted as doing no more than giving effect to the rule of equity’.⁸⁹

11.74 A trustee may lose the right to be indemnified through his or her impropriety, for example, by acting outside the relevant power, in bad faith, or with an absence of care and diligence.⁹⁰ However, in *CB Darvall & Darvall v Moloney*, Wilson J observed, in relation to the meaning of ‘reasonably incurred’ in section 72 of the Queensland Act, that:⁹¹

Mere breach of trust or even acting in contravention of a statutory requirement for registration may not necessarily deprive a trustee of his right of indemnity: it is a matter of assessing the gravity of the trustee’s misconduct and whether the trustee, acting in good faith, benefited the trust estate by incurring the liability. (notes omitted)

Creditor’s right to be subrogated to the trustee’s right to indemnity

11.75 The creditor of a trustee does not have direct recourse against the trust estate,⁹² but only against the trustee personally. However, a creditor may be subrogated to the trustee’s right to be indemnified out of trust property.⁹³ As Jessel MR explained in *Re Johnson*:⁹⁴

The trust assets having been devoted to carrying on the trade, it would not be right that the *cestui que trust* should get the benefit of the trade without paying the liabilities; therefore the Court says to him, You shall not set up a trustee who may be a man of straw, and make him a bankrupt to avoid the responsibility of the assets for carrying on the trade: the Court puts the creditor, so to speak, as I understand it, in the place of the trustee.

11.76 However, the creditor’s right derives from, and is strictly limited to, the trustee’s right.⁹⁵ Consequently, if the trustee is not entitled to be indemnified out of the trust property, whether by reason of breach of trust or otherwise, the creditor’s

89 [1985] VR 385, 399 (Brooking J). See also *Holding and Management Ltd v Property Holding and Investment Trust Plc* [1989] 1 WLR 1313, 1324 (Nicholls LJ).

90 *Nolan v Collie* (2003) 7 VR 287, 308 (Ormiston JA; Batt and Vincent JJA agreeing). See also *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385, 394, 396 (Brooking J); *Gatsios Holdings Pty Ltd v Kritharas Holdings Pty Ltd (in liq)* [2002] NSWCA 29, [14] (Spigelman CJ).

91 (2006) 236 ALR 796, 808.

92 *Jennings v Mather* [1902] 1 KB 1, 5 (Collins MR); *Re Enhill Pty Ltd* [1983] VR 561, 567 (Lush J). See HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 15 November 2010) [14.6010].

93 *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319, 328 (Latham CJ), 335 (Dixon J); *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367, 370 (Stephen, Mason, Aickin and Wilson JJ).

94 (1880) 15 Ch D 548, 552.

95 *Ibid.*

rights are similarly restricted:⁹⁶

Therefore, if he is (by reason of breach of trust or otherwise) himself indebted to the trust estate to an extent exceeding his claim to indemnity, then, inasmuch as he cannot be entitled to an indemnity except upon the terms of making good his own indebtedness to the trust, the creditors are in no better position, and can have no claim against the estate.

PROTECTION OF TRUSTEES BY MEANS OF ADVERTISEMENTS

Background

11.77 Under the general law, a personal representative is liable for the deceased person's debts to the extent of the assets that have come into the personal representative's hands.⁹⁷ It is generally not a defence that the personal representative has, in good faith and without notice of a debt, distributed the assets to the beneficiaries.⁹⁸

11.78 It has been said that, before 1859, 'no executor could safely distribute the assets of his testator except under the direction of this Court'.⁹⁹ This 'involved great expense, and frequently great delay',¹⁰⁰ as it required a decree from the court in an administration suit. The court's procedure for dealing with unknown claimants was described in *David v Frowd* (in relation to the distribution of an intestate estate):¹⁰¹

The person who takes out administration to his estate, in most cases, cannot know who are his creditors, and may not know who are his next of kin, and the administration of his estate may be exposed to great delay and embarrassment. A Court of Equity exercises a most wholesome jurisdiction for the prevention of this delay and embarrassment, and for the assistance and protection of the administrator.

Upon the application of any person claiming to be interested, the Court refers it to the Master to inquire who are creditors, and who are the next of kin, and for that purpose to cause advertisements to be published in the quarters where creditors and next of kin are most likely to be found, calling upon such creditors and next of kin to come in and make their claims before the Master within a reasonable time stated; and when that time is expired, it is considered that the best possible means having been taken to ascertain the parties really entitled, the administrator may reasonably proceed to distribute the estate amongst those who have, before the Master, established an apparent title. Such

⁹⁶ A Underhill, *The Law Relating to Trusts and Trustees* (Butterworth, 7th ed, 1912) 439–40. See further HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 15 November 2010) [14.6030]; JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2112].

⁹⁷ RF Atherton and P Vines, *Australian Succession Law: Commentary and Materials* (Butterworths, 1996) [18.9.4].

⁹⁸ L Handler and R Neal, LexisNexis, *Mason and Handler Succession Law and Practice NSW* [1469.1]. See *Norman v Baldry* (1834) 6 Sim 621; 58 ER 726; *Hill v Gomme* (1839) 1 Beav 540, 550–1; 48 ER 1050, 1054 (Lord Langdale MR).

⁹⁹ *Clegg v Rowland* (1866) LR 3 Eq 368, 371 (Malins V-C).

¹⁰⁰ *Ibid* 371–2.

¹⁰¹ (1833) 1 My & K 200, 208–9; 39 ER 657, 660 (Leach MR).

proceedings having been taken, the Court will protect the administrator against any future claim. (emphasis added)

11.79 Compliance with this procedure protected a personal representative from liability in respect of claims made against the estate after the period of time set by the Master for notifying claims. However, '[t]he court's decree could not and was never intended to oust the rights of persons clearly entitled'.¹⁰²

They had lost their remedy against the personal representative, who had the protection of the Court's decree, but they were entitled to any fund that might still be in Court, or to claim against the persons among whom the estate had been distributed, and whose title remained defeasible. (notes omitted)

11.80 In 1859, the enactment of *Lord St Leonards' Act*¹⁰³ created a statutory procedure under which a personal representative could distribute an estate after publishing notices calling for the submission of any claims against the estate. The purpose of the legislation was to give the personal representative 'the same protection as he would have received under a decree for general administration, but without the grave disadvantages inseparable from that procedure'.¹⁰⁴

11.81 The statutory protection afforded to a personal representative by the section depended on the personal representative giving such notices as would have been given by the Court of Chancery in an administration suit. As a result, the giving of a notice requiring persons to notify the personal representative of any claims against the estate did not protect a personal representative if the notice was not advertised sufficiently widely or if the period allowed to a claimant to advise of a claim against the estate was too short.¹⁰⁵

11.82 It has been suggested that, although a personal representative was required to 'correctly anticipate the opinion of the Court in which he might be sued as to what advertisements or notices would have been given by the Court of Chancery in an administration suit', this 'was not as perilous an undertaking for the personal representative as it might at first sight appear'.¹⁰⁶ There were two main reasons for this:¹⁰⁷

At an early stage the Consolidated Orders of the Court of Chancery created the machinery for persons to settle the form of advertisements, and later the Rules of the Supreme Court of England made provision for that matter. Furthermore,

¹⁰² GP Barton, 'The Ascertainment of Missing Beneficiaries: The New Zealand Experience' (1960–1962) 5 *University of Western Australia Law Review* 257, 264.

¹⁰³ *An Act to Further Amend the Law of Property, and to Relieve Trustees*, 22 & 23 Vict, c 35, s 29. See now *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 27.

¹⁰⁴ GP Barton, 'The Ascertainment of Missing Beneficiaries: The New Zealand Experience' (1960–1962) 5 *University of Western Australia Law Review* 257, 265.

¹⁰⁵ See *Wood v Weightman* (1872) LR 13 Eq 434 where Lord Romilly MR held (at 436) that the executors were liable despite having given notices purporting to comply with s 29 of *Lord St Leonards' Act*. Lord Romilly MR held that the executors, who had advertised in local newspapers in the neighbourhood where the testator had resided, but not in the *London Gazette*, had not advertised sufficiently widely. Lord Romilly MR also held that the period allowed by the notices for advising of a claim (three weeks) was too short.

¹⁰⁶ GP Barton, 'The Ascertainment of Missing Beneficiaries: The New Zealand Experience' (1960–1962) 5 *University of Western Australia Law Review* 257, 266.

¹⁰⁷ *Ibid.*

there were sufficient precedents in decisions of the Court to indicate to the personal representative what was required. (note omitted)

11.83 Section 29 of *Lord St Leonards' Act* did not afford any protection to a beneficiary to whom the estate, or a part of the estate, was distributed. In this respect, it provided similar protection to the distribution of an estate under an administration decree, which, as noted above, did not protect a beneficiary to whom the estate was distributed.¹⁰⁸

11.84 However, mere compliance with the requirements of section 29 did not guarantee protection from liability. Section 29 did not protect a personal representative in respect of a claim of which the personal representative had notice, even though no claim was submitted in response to the personal representative's advertisement.¹⁰⁹

Section 67

11.85 Section 67 of the *Trusts Act 1973* (Qld) has its origins in section 29 of *Lord St Leonards' Act*, but provides protection to trustees as well as personal representatives. Section 67 provides:

67 Protection of trustees by means of advertisements

- (1) With a view to the distribution of any trust property or estate a trustee or personal representative may give notice by advertisement in—
- (a) if the deceased's last known address is more than 150 km from Brisbane—a local newspaper circulated and sold at least once each week in the area of the deceased's last known address; or
 - (b) otherwise—a newspaper circulating throughout the State or a newspaper approved for the area of the deceased's last known address by the Chief Justice under a practice direction;

and such other notices as would be directed by the court to be given in an action for administration, requiring any person having any claim, whether as creditor or beneficiary or otherwise, to send particulars of the person's claim not later than the date fixed in the notice, being a date at least 6 weeks after the date of publication of the notice.

- (2) Notice of advertisement is sufficient if given in the approved form.
- (3) After the date fixed by the last of the notices to be published the trustee or personal representative may distribute the trust property or estate having regard only to the claims, whether formal or not, of which the trustee or personal representative has notice at the time of the distribution; and the trustee or personal representative shall not, as respects any trust property or estate so distributed, be liable to any person of whose claim the trustee or personal representative had no notice at the time of the distribution.

¹⁰⁸ See [11.79] above.

¹⁰⁹ *Re Land Credit Co of Ireland* (1872) 21 WR 135, 135 (Lord Romilly MR).

- (4) Nothing in this section—
- (a) prejudices the right of any person to enforce (subject to the provisions of section 113) any remedy in respect of the person's claim against a person to whom a distribution of any trust property or estate has been made; or
 - (b) relieves the trustee or personal representative 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.

11.86 Similar provision is made in all other Australian jurisdictions, as well as in New Zealand and England.¹¹⁰

The manner in which notice is to be given

11.87 In order to obtain the protection afforded by section 67(3), the notice of intended distribution must be given in accordance with section 67(1). That section provides for the notice to be given by advertisement:

- if the deceased's last known address is more than 150 km from Brisbane — in a local newspaper circulated and sold at least once each week in the area of the deceased's last known address; or
- otherwise — in a newspaper circulating throughout the State or a newspaper approved for the area of the deceased's last known address by the Chief Justice under a practice direction.

11.88 Section 67(1) also makes it a condition for protection that the trustee or personal representative has given 'such other notices as would be required by the court to be given in an action for administration'.¹¹¹ A similar requirement applies in the ACT, the Northern Territory, South Australia and Victoria.¹¹²

11.89 Depending on the circumstances of the case, it might be necessary for the trustee or personal representative to give additional notices outside Queensland if there is a likelihood that there are creditors or other claimants outside the jurisdiction. This part of section 67 recognises the importance of ensuring that the

¹¹⁰ *Trustee Act 1925* (ACT) s 60; *Trustee Act 1925* (NSW) s 60; *Trustee Act* (NT) s 22; *Trustee Act 1936* (SA) s 29; *Trustee Act 1898* (Tas) s 25A; *Trustee Act 1958* (Vic) s 33; *Trustees Act 1962* (WA) s 63; *Trustee Act 1956* (NZ) s 35; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 27. A number of these jurisdictions also include a similar provision in their administration and probate legislation: *Administration and Probate Act 1929* (ACT) s 64; *Probate and Administration Act 1898* (NSW) s 92; *Administration and Probate Act* (NT) s 96; *Administration and Probate Act 1935* (Tas) ss 54–55.

¹¹¹ For a discussion of the notices that are required to be given in an administration action see [11.78], [11.81] above.

¹¹² *Trustee Act 1925* (ACT) s 60(2); *Trustee Act* (NT) s 22(1); *Trustee Act 1936* (SA) s 29(1); *Trustee Act 1958* (Vic) s 33(1)(a). In Tasmania, a trustee or personal representative must publish additional notices if he or she has reason to believe that any person who has a claim against the property or estate resides outside Tasmania: *Trustee Act 1898* (Tas) s 25A(3). In Western Australia, a trustee must, in addition to publishing a notice in the *Gazette*, publish a notice in a newspaper circulating in each locality in which, in the opinion of the trustee, claims are likely to arise. Those localities must include each locality in which the deceased resided or carried on business at any time during the year preceding his or her death: *Trustees Act 1962* (WA) s 63(1), (4).

localities in which notice is given are referable to the localities in which claims are likely to arise.

11.90 Section 67 is of particular importance in relation to the administration of deceased estates, as the personal representative of a deceased person is unlikely to be aware of all the creditors of the deceased.

11.91 Under the *Uniform Civil Procedure Rules 1999* (Qld), a person who is proposing to apply for a grant must, at least 14 days before filing the application, give notice in the approved form of intention to apply for a grant.¹¹³ Rule 599 permits the notice of intention to apply for a grant to incorporate a notice that satisfies the requirements of section 67 of the *Trusts Act 1973* (Qld),¹¹⁴ thus enabling the applicant to avoid incurring two sets of advertising costs in Queensland.

11.92 Rule 599(3) provides for the places in which the notice of intention to apply for a grant must be published. That provision is in identical terms to paragraphs (a) and (b) of section 67(1). The newspapers that have been 'approved for the area of the deceased's last known address' are *The Gold Coast Bulletin*, *The Toowoomba Chronicle*, *The Sunshine Coast Daily* and *The Queensland Times* (where the deceased's last known address falls within the circulation district for the newspaper).¹¹⁵

11.93 Although the Practice Directions made under rule 599(3) of the *Uniform Civil Procedure Rules 1999* (Qld) do not refer to section 67 of the *Trusts Act 1973* (Qld), these newspapers, being 'approved for the area of the deceased's last known address', would appear also to be the newspapers approved for the purposes of section 67(1)(b) of the *Trusts Act 1973* (Qld).

11.94 In the Administration of Estates Report, the National Committee for Uniform Succession Laws noted the concerns that had been expressed about the utility of the provisions requiring notice of intention to apply for a grant to be published in a newspaper. It considered that:¹¹⁶

it would be a significant advance if the Supreme Courts of all Australian jurisdictions made available on their websites an electronic facility on which such notices could be published, as has recently occurred in Victoria. This would provide a central, reliable means for the searching of a notice of intention to apply for a grant.

11.95 The National Committee also recommended that the provision in the model administration of estates legislation dealing with notices of intended

¹¹³ *Uniform Civil Procedure Rules 1999* (Qld) r 598(1).

¹¹⁴ *Uniform Civil Procedure Rules 1999* (Qld) r 599.

¹¹⁵ 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.

¹¹⁶ 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) vol 1, [8.26].

distribution should be generally based on section 67 of the Queensland Act.¹¹⁷ However, consistent with its view in relation to notices of intention to apply for a grant, the National Committee recommended that the model legislation should provide for a notice of intended distribution (that is, a section 67 notice) to be published:¹¹⁸

- in a newspaper circulating throughout the particular jurisdiction and sold at least once a week (which, for Queensland, would be satisfied by publishing the notice in *The Courier-Mail* or *The Australian*); or
- on a dedicated, publicly searchable section of the website of the Supreme Court of the jurisdiction.

11.96 In Victoria, an application for a grant must not be made unless notice of the application has been posted on the Supreme Court's website.¹¹⁹ At the time of the National Committee's Report, Victoria was the only Australian jurisdiction with that facility. From 21 January 2013, that facility will also be available in New South Wales, and publishing a notice of intended application for a grant on the Court's Online Registry website will be the sole means of meeting the advertising requirements under the *Supreme Court Rules 1970* (NSW).¹²⁰

11.97 In Queensland, there is currently no facility to publish a notice of intention to apply for a grant (including one that incorporates a notice that complies with section 67 of the *Trusts Act 1973* (Qld)) on the Supreme Court website. If, however, such a facility became available, and publishing a notice of intention to apply for a grant on the court website became a mandatory requirement for a grant, section 67(1) of the *Trusts Act 1973* (Qld) would need to be amended so that giving notice on the court website was one of the ways in which a section 67 notice could be advertised. That change would ensure that the current practice of incorporating a section 67 notice into the application of intention to apply for a grant could continue.

11.98 It would still be necessary, however, to retain an alternative method for advertising a section 67 notice, because, in the case of an inter vivos trust, there would be no concurrent application for a grant.

11-6 Would it be desirable for the Supreme Court to develop an online facility on which notices of intention to apply for a grant (including notices that incorporate a notice under section 67 of the *Trusts Act 1973* (Qld)) can be published?

¹¹⁷ Ibid vol 2, Rec 21-1.

¹¹⁸ Ibid [21.138], Rec 21-1(b).

¹¹⁹ *Supreme Court (Administration and Probate) Rules 2004* (Vic) rr 2A.01, 2A.03(1), 3.01, 3.02(1)(c), 4A.01, 4A.03(1).

¹²⁰ *Supreme Court Rules 1970* (NSW) pt 78 rr 3(1), 4(1), inserted by *Supreme Court Rules (Amendment No 421) 2012* (NSW) sch.

11-7 Should section 67(1) of the *Trusts Act 1973 (Qld)* be amended to provide that it is sufficient for a notice of intended distribution to be advertised in either of the following ways:

- (a) in a newspaper circulating throughout Queensland and sold at least once a week; or**
- (b) on a dedicated, publicly searchable section of the website of the Supreme Court of Queensland?**

Period of time for submitting claim

11.99 Under section 67(1), the notice of intended distribution must give claimants a minimum of six weeks in which to submit their claims.

11.100 Different minimum periods are provided for in the other Australian jurisdictions.¹²¹ The shortest minimum period is one month,¹²² and the longest is 'not less than four months nor more than eight months'.¹²³ Three jurisdictions provide for a minimum period of two months.¹²⁴

11.101 In the interests of achieving uniformity in relation to the issue of notice periods, the National Committee for Uniform Succession Laws recommended that the period of time for submitting claims should be a minimum of two months.¹²⁵

11.102 The Commission endorses that recommendation, and seeks submissions on the following proposal:

11-8 The period of time in section 67(1) of the *Trusts Act 1973 (Qld)* for a creditor, beneficiary or another person to submit a claim to the trustee or personal representative should be changed from six weeks to two months.

¹²¹ *Trustee Act 1925* (ACT) s 60(3) (two months); *Trustee Act 1925* (NSW) s 60(1), *Civil Procedure Act 2005* (NSW) s 17, Form 114 (30 days); *Administration and Probate Act* (NT) s 96, *Supreme Court Rules* (NT) r 88.88, Form 88ZF (two months); *Trustee Act 1898* (Tas) s 25A(4) (not less than one month nor more than two months if the notice is published only in Tasmania; not less than two months nor more than four months if the notice is published in another Australian jurisdiction or in New Zealand; not less than four months nor more than eight months if the notice is published in any other place); *Trustee Act 1958* (Vic) s 33(1)(a) (two months); *Trustees Act 1962* (WA) s 63(3) (one month).

¹²² This applies in New South Wales and Western Australia. It also applies in Tasmania if the notice is published only in that State: see n 121 above.

¹²³ This applies in Tasmania if the notice is published other than in Tasmania, another Australian jurisdiction or New Zealand: *Trustee Act 1898* (Tas) s 25A(4)(b)(iii).

¹²⁴ This applies in the ACT, the Northern Territory and Victoria: see n 121 above.

¹²⁵ 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) vol 2, [21.151], Rec 21-1(c).

Scope of protection

11.103 Section 67 enables a trustee or personal representative to obtain protection by publishing a notice requiring any person having a claim, whether as creditor, beneficiary or otherwise. After the expiry of the relevant notice period, the trustee may then distribute the trust property or estate to, or among, the persons entitled having regard only to the claims, whether formal or not, of which he or she has notice, and is protected from liability in respect of a claim, including the claim of a beneficiary, of which he or she did not have notice at the time of distribution.¹²⁶

11.104 However, the provisions do not protect a trustee or personal representative in respect of a claim of which he or she has notice at the time of distribution.¹²⁷ In *MCP Pension Trustees Ltd v Aon Pension Trustees Ltd*, the English Court of Appeal held that the trustees of a pension scheme had actual notice of the interests of certain beneficiaries, notwithstanding that the beneficiaries had not replied to the trustees' advertisement.¹²⁸ The trustees had received notice of the beneficiaries' interests at the time the beneficiaries had been transferred into the scheme, but had subsequently forgotten the fact of their transfer. Elias LJ stated that '[o]nce actual notice is given, then in general it will persist'.¹²⁹

11.105 Section 55 of the *Administration and Probate Act 1935* (Tas) refers to 'claims of which [the personal representative] then has notice, whether as a result of such claims being filed as provided by this Act or otherwise'. In this respect, it recognises that a personal representative may have 'notice' of a claim even though no claim has been submitted.

11.106 The National Committee for Uniform Succession Laws recommended that the model provision dealing with notices of intended distribution should include a provision to the general effect of section 67(3) of the *Trusts Act 1973* (Qld). However, it also recommended that the provision should incorporate a reference, similar to that found in section 55 of the *Administration and Probate Act 1935* (Tas), to claims of which the personal representative has notice, whether as a result of claims submitted in response to the published notice or otherwise.¹³⁰

11.107 The Commission endorses that recommendation, and seeks submissions on the following proposal:

126 *Trusts Act 1973* (Qld) s 67(1), (3).

127 *Nowell v Palmer* (1993) 32 NSWLR 574, 582 (Handley JA). See also [11.84] above. See also the discussion at [11.126] below of s 69 of the *Trusts Act 1973* (Qld), which provides that, in the absence of fraud, a trustee who is acting for more than one trust or estate is not affected by notice of anything in relation to a particular trust or estate if the trustee has notice of it only because of the trustee acting or having acted for another trust or estate.

128 [2012] Ch 1, 28 (Elias LJ; Dyson and Arden LJJ agreeing).

129 *Ibid* 29.

130 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) vol 2, [21.153], Rec 21-1(d).

11-9 Section 67 of the *Trusts Act 1973* (Qld) should be amended to refer to claims, whether formal or not, of which the personal representative has notice, and whether or not as the result of a claim being submitted in response to the published notice.

THE BARRING OF CLAIMS

11.108 If a trustee 'knows that there is a claim outstanding against the trust estate the trustee must take it into account before finalising the distribution'.¹³¹ That may involve setting aside a 'sum sufficient to meet any claims'.¹³² However, the situation becomes more complicated if the claim is for an unliquidated sum or is speculative in nature.¹³³

If a claim against the trustee is for an unliquidated sum or if it is of a speculative nature it may be difficult for the trustee to decide whether he or she should compromise the claim and the trustee may feel that her or his discretion to compromise is itself prejudiced if the trustee wishes to complete her or his duties as trustee and distribute, because the trustee might be tempted to compromise on terms disadvantageous to the trust.

11.109 A provision dealing with the barring of claims facilitates the efficient administration of trusts and deceased estates. In the absence of such a provision, a trustee who has notice that a claim might potentially be made against the estate or trust property might consider it prudent to delay distributing at least part of the estate or trust property until after the expiry of the limitation period applicable to the particular claim.

11.110 Section 68 of the *Trusts Act 1973* (Qld) provides a mechanism by which trustees can require a claimant or potential claimant to pursue his or her claim, failing which the claim is barred.¹³⁴ It provides:

68 Barring of claims

- (1) Where a trustee wishes to reject a claim (not being a claim in respect of which any insurance is on foot, being insurance required by any Act) which has been made, or which the trustee has reason to believe may be made—
- (a) to or against the estate or property which the trustee is administering; or

¹³¹ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Law Book, 2nd ed, 1990) [1630].

¹³² Ibid.

¹³³ Ibid.

¹³⁴ 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. In Chapter 16, the Commission has sought submissions on whether it is appropriate for those provisions to enable a claim to be barred without obtaining a court order to that effect: see Question 16-7 below.

- (b) against the trustee personally, by reason of the trustee being under any liability in respect of which the trustee is entitled to reimburse himself or herself out of the estate or property which the trustee is administering;

the trustee may serve upon the claimant or the person who may become a claimant a notice calling upon the claimant, within a period of 6 months from the date of service of the notice, to take legal proceedings to enforce the claim and also to prosecute the proceedings with all due diligence.

- (2) At the expiration of the period stipulated in a notice served under subsection (1), the trustee may apply to the court for an order under subsection (3), and shall serve a copy of the application on the person concerned.
- (3) Where, on the hearing of an application made under subsection (2), the person concerned does not satisfy the court that the person has commenced proceedings and is prosecuting them with all due diligence, the court may make an order—
 - (a) extending the period, or barring the claim, or enabling the trust property to be dealt with without regard to the claim; and
 - (b) imposing such conditions and giving such directions, including a direction as to the payment of the costs of or incidental to the application, as the court thinks fit.
- (4) Where a trustee has served any notices under this section in respect of claims on 2 or more persons, and the period specified in each of those notices has expired, the trustee may, if the trustee thinks fit, apply for an order in respect of the claims of those persons by a single application, and the court may, on that application, make an order accordingly.
- (5) This section applies to every claim therein mentioned, whether the claim is or may be made as creditor or next of kin or beneficiary under the trust or otherwise; but it does not apply to any claim under the *Succession Act 1867*, part 5 and no order made under this section shall affect any application for revocation of any grant of probate or of letters of administration, whether that application is made before or after the order.
- (6) Where any person beneficially entitled to the estate or property is not made a party to an application by a trustee under this section an order made by the court on the application shall not affect the right of that person to contest the claim of the trustee to be entitled to indemnify himself or herself out of the estate or property.
- (7) Any notice or application which is to be served in accordance with the provisions of this section may be served—
 - (a) by delivering it to the person for whom it is intended or by sending it by prepaid registered letter addressed to that person at the person's usual or last known place of abode or business; or
 - (b) in such other manner as may be directed by an order of the court.

- (8) Where a notice is sent by post as provided by this section, it shall be deemed to be served at the time at which the letter would have been delivered in the ordinary course of post.

11.111 Similar provisions are found in all of the other Australian jurisdictions, although the provisions in the ACT, New South Wales and Victoria apply only to executors and administrators rather than to trustees generally.¹³⁵ These provisions were introduced to complement the provisions for giving notice of intended distribution.¹³⁶

Claims to which section 68 applies

11.112 Section 68(1) of the *Trusts Act 1973* (Qld) enables a trustee to serve on a claimant or potential claimant a notice calling on the claimant to take legal proceedings within six months to enforce the claim.¹³⁷ The provision is not limited to claims made in response to a notice of intended distribution, but applies in relation to a claim that has been made or that the trustee 'has reason to believe may be made'.¹³⁸

11.113 A trustee may use this procedure in relation to the claims of creditors, beneficiaries and next of kin.¹³⁹ However, the procedure cannot be used to bar:

- a claim 'in respect of which any insurance is on foot' (section 68(1));
- a family provision claim (section 68(5)); or
- a claim that a personal representative has no right to administer the relevant estate — for example, where a claimant gives notice that he or she intends to apply for the revocation of the grant in favour of the personal representative (section 68(5)).¹⁴⁰

¹³⁵ *Administration and Probate Act 1929* (ACT) s 65; *Probate and Administration Act 1898* (NSW) s 93; *Trustee Act* (NT) s 22(2), *Administration and Probate Act* (NT) s 97; *Trustee Act 1936* (SA) s 29(2); *Trustee Act 1898* (Tas) s 25A(5)–(6); *Administration and Probate Act 1958* (Vic) s 30; *Trustees Act 1962* (WA) s 64. For a detailed discussion of these provisions, see 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, vol 2, [22.62] ff.

¹³⁶ See the discussion of s 67 of the *Trusts Act 1973* (Qld) at [11.77] ff above.

¹³⁷ A six month period is also allowed in the ACT, the Northern Territory, South Australia and Tasmania: *Administration and Probate Act 1929* (ACT) s 65(1); *Trustee Act* (NT) s 22(2), *Administration and Probate Act* (NT) s 97(1); *Trustee Act 1936* (SA) s 29(2); *Trustee Act 1898* (Tas) s 25A(5). In New South Wales, Victoria and Western Australia, a three month period is allowed: *Probate and Administration Act 1898* (NSW) s 93(1); *Administration and Probate Act 1958* (Vic) s 30(1); *Trustees Act 1962* (WA) s 64(1).

¹³⁸ Cf *Administration and Probate Act 1929* (ACT) s 65(1); *Probate and Administration Act 1898* (NSW) s 93(1); *Administration and Probate Act* (NT) s 97(1); *Trustee Act 1898* (Tas) s 25A(5). See also *Ludwig v Public Trustee* (2006) 68 NSWLR 69, 82 (Campbell J).

¹³⁹ *Trusts Act 1973* (Qld) s 68(5).

¹⁴⁰ See *Guardian Trust & Executors Co of New Zealand Ltd v Public Trustee of New Zealand* [1942] AC 115, 125 (PC). See also *Re Timm* [1912] VLR 460; *Bramston v Morris* (Unreported, Supreme Court of New South Wales, Powell J, 20 August 1993).

11.114 In relation to a claim 'in respect of which any insurance is on foot', Ford and Lee have explained:¹⁴¹

This exception is intended for the case of motor accident claims of a kind required by law to be insured. Since such a claim would be fought out in reality between the claimant and the insurance company of the deceased person (whose death might have nothing to do with the incident giving rise to the insurance claim) it should not have any effect upon the distribution of the deceased's estate. It is accordingly not a suitable sort of claim to be the subject of this procedure.

11.115 In relation to family provision claims, section 68(5) presently refers to claims under 'the *Succession Act 1867*, part 5'. By virtue of section 14H(1)(b) of the *Acts Interpretation Act 1954* (Qld), section 68(5) applies to a family provision claim made under Part 4 of the *Succession Act 1981* (Qld). The section should, however, be updated to refer to the current legislation, rather than rely on the operation of the *Acts Interpretation Act 1954* (Qld).

Application of section 68

11.116 Section 68 of the *Trusts Act 1973* (Qld) applies where a trustee 'wishes to reject' a claim to which the section applies.¹⁴²

11.117 The National Committee for Uniform Succession Laws was of the view that the model provision for the barring of claims should generally be based on section 68 of the *Trusts Act 1973* (Qld).¹⁴³ However, it recommended that the model provision should be expressed to apply where a trustee (or personal representative) 'does not accept a claim'.¹⁴⁴ In its view, this 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'.¹⁴⁵

11.118 The Commission endorses that recommendation, and invites submissions on the following proposal:

11-10 Section 68(1) of the *Trusts Act 1973* (Qld) should be amended so that it applies where a trustee 'does not accept a claim' to which the section applies.

¹⁴¹ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* [16.340].

¹⁴² *Trusts Act 1973* (Qld) s 68(1).

¹⁴³ 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) vol 2, [22.98].

¹⁴⁴ *Ibid* [22.100]. See also Rec 22-6(b).

¹⁴⁵ *Ibid*.

The court's powers

11.119 If a claimant has not, within six months of service of the notice, commenced legal proceedings to enforce his or her claim, the trustee may apply to the court for an order under section 68(3) of the *Trusts Act 1973* (Qld).¹⁴⁶ If, as is usually the case, the application is made *ex parte*, 'the applicant is under the obligations of frank disclosure which attach to any *ex parte* application'.¹⁴⁷

11.120 Section 68(3) enables the court to make an order:¹⁴⁸

- extending the period of time in which the claimant may commence proceedings;
- barring the claim; or
- enabling the trust property or the estate to be dealt with without regard to the claim.

11.121 The court has a broad discretion under section 68, and will not make an order barring a claim simply because the conditions for the making of an order have been satisfied.¹⁴⁹ In exercising its discretion, the court will take into account:¹⁵⁰

- the nature of the claim;
- the fact that the effect of an order under the section 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
- the interests of the beneficiaries in the estate and the desire of the personal representative to conclude the administration of the estate.

11.122 In most Australian jurisdictions, the statutory provisions dealing with the barring of claims enable the court to make an order barring the claim against the trustee (or against the executor or administrator).¹⁵¹ This means that the trustee, executor or administrator may distribute the estate without regard to the claim.

¹⁴⁶ *Trusts Act 1973* (Qld) s 68(2).

¹⁴⁷ *Ludwig v Public Trustee* (2006) 68 NSWLR 69, 77 (Campbell J).

¹⁴⁸ *Trusts Act 1973* (Qld) s 68(3)(a). In addition to making any of these orders, the court may impose such conditions and give such directions, including a direction as to the payment of the costs of or incidental to the application, as the court thinks fit: s 68(3)(b).

¹⁴⁹ *Re the Will of McNeill* (Unreported, Supreme Court of Queensland, Master Weld, 26 February 1982) 2–3.

¹⁵⁰ *Ibid* 3–4.

¹⁵¹ See *Administration and Probate Act 1929* (ACT) s 65(2); *Probate and Administration Act 1898* (NSW) s 93(2)(a); *Administration and Probate Act* (NT) s 97(2), *Trustee Act* (NT) s 22(2); *Trustee Act 1936* (SA) s 29(2); *Trustee Act 1898* (Tas) s 25A(6).

However, such an order would not prevent a claimant from bringing proceedings against a person to whom any part of the estate or trust property is distributed.¹⁵²

11.123 Because the Queensland provision 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,¹⁵³ it appears 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. The Victorian counterpart to section 68 confers this power more explicitly by providing that the court may make an order that the claim of any person 'be for all purposes barred'.¹⁵⁴

11.124 The National Committee for Uniform Succession Laws considered that one of the options that should be available to the court on an application for the barring of a claim should be to bar the claim for all purposes. In its view, the court should not be limited to barring the claim against the trustee or personal representative only, as is the case in some Australian jurisdictions.¹⁵⁵ While the National Committee considered that the court's power under section 68(3)(a) of the *Trusts Act 1973* (Qld) would include the power to bar a claim for all purposes, it recommended that:¹⁵⁶

to avoid any doubt about the extent of the court's power, the model provision should provide expressly, in terms similar to section 30(3)(b) of the *Administration and Probate Act 1958* (Vic), that the court may make an order that the claim be barred for all purposes.

11.125 In the Commission's view, there should not be any doubt about the scope of the court's powers under section 68(3)(a). The Commission endorses the National Committee's recommendation, and invites submissions on the following proposal:

11-11 Section 68(3)(a) of the *Trusts Act 1973* (Qld) should be amended to clarify that the court's power to make an order barring the claim includes the power to make an order that the claim be barred 'for all purposes'.

¹⁵² See *Trusts Act 1973* (Qld) s 67(4)(a). See also 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) vol 2 ch 26 for a discussion of the extent to which an action that survives against the estate of a deceased person may be brought against a beneficiary to whom part of the estate has been distributed.

¹⁵³ *Trusts Act 1973* (Qld) s 68(3)(a).

¹⁵⁴ *Administration and Probate Act 1958* (Vic) s 30(3)(b).

¹⁵⁵ 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) vol 2, [22.101].

¹⁵⁶ *Ibid.* See also Rec 22-6(c).

PROTECTION IN RELATION TO NOTICE WHEN A PERSON IS TRUSTEE OF MORE THAN ONE TRUST

11.126 Section 69 of the *Trusts Act 1973* (Qld) provides that, where a trustee is acting for more than one trust, he or she is not, in the absence of fraud, affected by notice of any instrument, matter, fact or thing in relation to any particular trust or estate if it was obtained merely by reason of the trustee acting, or having acted, for another trust or estate. It provides:

69 Protection in regard to notice when a person is trustee etc of more than 1 estate or trust

A trustee acting for the purposes of more than 1 trust or estate shall not, in the absence of fraud, be affected by notice of any instrument, matter, fact or thing in relation to any particular trust or estate if the trustee has obtained notice thereof merely by reason of the trustee acting or having acted for the purposes of another trust or estate.

11.127 This section is based on section 28 of the English *Trustee Act 1925*, and has been adopted in all Australian jurisdictions (except Tasmania and the Northern Territory) and in New Zealand.¹⁵⁷

Application of legislative provision

11.128 Whether or not a trustee has notice of a matter is especially important in relation to the protection from liability that is available to the trustee under section 67 of the *Trusts Act 1973* (Qld). As explained earlier in this chapter, if a trustee gives notice in accordance with section 67(1), calling for creditors, beneficiaries and other persons to submit particulars of any claim in respect of the trust property or estate, the trustee is not subsequently liable to any person of whose claim the trustee had no notice at the time of the distribution.

11.129 Section 69 'is of particular value to public trustees and trustee companies who act as trustees for large numbers of separate trusts'.¹⁵⁸ As the Law Reform Sub-Committee of the Law Society of Western Australia explained in relation to the counterpart in that jurisdiction:¹⁵⁹

This section is inserted primarily for the protection of trustee corporations and all professional trustees who may be acting in more than one trust. Such persons cannot in fact avoid notice of various matters affecting trusts other than the ones with which they happen to be dealing at any particular time, but this section prevents such actual notice affecting the trustee in the discharge of his duties. He is, in the absence of fraud, protected against the consequences of

¹⁵⁷ *Trustee Act 1925* (ACT) s 62; *Trustee Act 1925* (NSW) s 62; *Trustee Act 1936* (SA) s 34A; *Trustee Act 1958* (Vic) s 35(1); *Trustees Act 1962* (WA) s 68; *Trustee Act 1956* (NZ) s 36. Both the Ontario Law Reform Commission and, more recently, the British Columbia Law Institute have recommended the adoption of a provision in similar terms: Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 2, 385–6, Draft Bill: An Act to revise the *Trustee Act*, cl 53; British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 71, Proposed *Trustee Act*, cl 49.

¹⁵⁸ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 1 November 2011) [18.810]. See also LA Sheridan, *The Law of Trusts* (Barry Rose, 12th ed, 1993) 466.

¹⁵⁹ Law Reform Sub-Committee of the Law Society (WA), *The Law of Trusts*, Report (1961), Supplement 66.

notice which he may have obtained merely by reason of his having acted in more than one trust.

EXONERATION OF TRUSTEES IN RESPECT OF CERTAIN POWERS OF ATTORNEY

Introduction

11.130 Under the general law, trustees were under a duty to pay or transfer the trust property to the correct beneficiaries.¹⁶⁰

11.131 Trustees could make the payment or distribution to the beneficiary directly, or to an agent authorised by the beneficiary to receive it, for example, by a power of attorney.¹⁶¹ However, the trustee would need to 'look well to the genuineness of the authority',¹⁶² for if the payment was made to the wrong party, the trustee would be liable for the loss.¹⁶³ The duty to pay the correct beneficiaries was 'absolute' in the sense that neither honest mistake by the trustee¹⁶⁴ nor inducement by forgery¹⁶⁵ was an excuse.¹⁶⁶ As such, a trustee might be liable if the trust money was paid to an attorney for the beneficiary if it turned out that the power of attorney had been revoked, by the death of the attorney or otherwise, or had been forged.

Section 70

11.132 Section 70 of the *Trusts Act 1973* (Qld) affords trustees some relief in circumstances where they act or pay money in good faith in reliance on a power of attorney. It provides:¹⁶⁷

70 Exoneration of trustees in respect of certain powers of attorney

- (1) A trustee acting or paying money in good faith in reliance on any power of attorney and on a statutory declaration or other sufficient evidence that the power of attorney had not been revoked shall not be liable for that act or payment by reason of the fact that at the time of the act or payment the person who gave the power of attorney was subject to any disability or bankrupt or dead, or had done or suffered some act or

¹⁶⁰ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1735]. That duty has since taken on less significance in light of 'the proliferation of discretionary trusts which relieve trustees of such strict obligations in the distribution of the capital and income of the trust': M Evans, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2012) [31.54].

¹⁶¹ R Cozens-Hardy Home, *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 259.

¹⁶² *Ibid.*

¹⁶³ *Ashby v Blackwell* (1765) Amb 504, 505; 27 ER 326, 327 (Lord Northington LC).

¹⁶⁴ *Hilliard v Fulford* (1876) 4 Ch D 389; *Re Hulkes* (1886) 33 Ch D 552.

¹⁶⁵ *Ashby v Blackwell* (1765) Amb 504; 27 ER 326; *Eaves v Hickson* (1861) 30 Beav 136; 54 ER 840.

¹⁶⁶ See generally JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1735].

¹⁶⁷ *Trusts Act 1973* (Qld) s 70 applies whether or not a contrary intention is expressed in the trust instrument: s 65.

thing to avoid the power, if this fact was not known to the trustee at the time of the trustee's so acting or paying.

- (2) Nothing in this section affects the right of any person entitled to money paid by a trustee, in circumstances mentioned in subsection (1), against the person to whom the payment is made; and the person so entitled shall have the same remedy against the person to whom payment is made as the person would have had against the trustee.

11.133 Section 70 was modelled on section 69 of the *Trustees Act 1962* (WA) and section 29 of the English *Trustee Act 1925*, which have their origins in *Lord St Leonards' Act*.¹⁶⁸ Similar provision is made in the trustee legislation of most of the other Australian jurisdictions, and in New Zealand.¹⁶⁹

11.134 These provisions were intended to protect trustees who make payments in reliance on a power of attorney where the power of attorney has been invalidated without the trustee's knowledge.¹⁷⁰ They do not address the circumstance where a trustee relies on a power of attorney that has been forged.¹⁷¹

11.135 Section 70(1) protects a trustee from liability for an act or payment made in good faith in reliance on a power of attorney, and on a statutory declaration or other sufficient evidence that the power of attorney had not been revoked,¹⁷² if the trustee did not know, at the time of making the payment, that the person who gave the power 'was subject to any disability, bankrupt or dead, or had done or suffered some act or thing to avoid the power'.¹⁷³

11.136 Section 70(2) is a saving provision to the effect that the protection given to the trustee under section 70(1) does not affect the right of any person entitled to the money against the person to whom the payment was wrongly made. Provision in more general terms is made in section 113 of the Act dealing with remedies for the wrongful distribution of trust property.¹⁷⁴

168 See *Law of Property and Trustees Relief Amendment Act 1859*, 22 & 23 Vict, c 35, s 26, which was replaced by *Trustee Act 1893*, 56 & 57 Vict, c 53, s 23, which was itself re-enacted with minor changes by *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 29. Section 29 of the 1925 Act was subsequently repealed by the *Powers of Attorney Act 1971* (UK) c 27. In Queensland, s 70 of the *Trusts Act 1973* (Qld) was preceded by *Trustees and Executors Act 1897* (Qld) s 24.

169 *Trustee Act 1925* (ACT) s 58; *Trustee Act 1925* (NSW) s 58; *Trustee Act* (NT) s 25; *Trustee Act 1898* (Tas) s 26; *Trustee Act 1958* (Vic) s 35(2); *Trustees Act 1962* (WA) s 69; *Trustee Act 1956* (NZ) s 37.

170 JS Vaizey, *Lord St Leonards' Act to Further Amend the Law of Property and to Relieve Trustees, With Notes* (Wildy & Sons, 1860) 86; Law Reform Committee of the Law Society (WA), *The Law of Trusts*, Report (1961), Supplement 66–7.

171 See Law Reform Committee of the Law Society (WA), *The Law of Trusts*, Report (1961), Supplement 67.

172 The words 'and on a statutory declaration or other sufficient evidence that the power of attorney had not been revoked' were adopted from s 69(1) of the *Trustees Act 1962* (WA). They did not appear in any of the former English provisions, nor are they used in any of the provisions of the other Australian jurisdictions.

173 The original English provision was limited to the circumstance where the donor of the power was 'dead or had done some act to avoid the power': *Law of Property and Trustees Relief Amendment Act 1859*, 22 & 23 Vict, c 35, s 26. The provision was modified to refer to the circumstances where the donor of the power was 'subject to any disability or bankrupt or dead, or had done or suffered some act or thing to avoid the power' when it was re-enacted in *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 29.

174 *Trusts Act 1973* (Qld) s 113 is discussed in Chapter 14.

Powers of attorney legislation

11.137 In England, section 29 of the *Trustee Act 1925* was repealed by the *Powers of Attorney Act 1971* (UK). It was replaced by a general provision in the *Powers of Attorney Act 1971* (UK) dealing with the protection of attorneys and third persons where the power of attorney has been revoked.¹⁷⁵

11.138 Similar provisions are included in Queensland's powers of attorney legislation.¹⁷⁶ In particular, section 99 of the *Powers of Attorney Act 1998* (Qld) provides protection to third parties (such as trustees) who deal with attorneys without knowing that the power of attorney was invalid. Section 99 provides:

99 Protection for person dealing with attorney and next person if unaware of invalidity

(1) A person who—

(a) deals with an attorney under a general power of attorney made under this Act, or an enduring document,¹⁷⁷ (the **document**); and

...

(b) does not know, or have reason to believe, the principal did not have capacity to make the document;

is entitled to rely on the certificate of the witness to the document as evidence of the principal's capacity to make the document.

(2) A transaction between—

(a) an attorney purporting to use a power that is invalid; and

(b) someone else (the **third person**) who does not know of the invalidity;¹⁷⁸

¹⁷⁵ *Powers of Attorney Act 1971* (UK) c 27, s 5. That Act also repealed s 124 of the *Law of Property Act 1925*, 15 & 16 Geo, c 20, which had replaced s 47 of the *Conveyancing and Law of Property Act 1881*, 44 & 45 Vict, c 41. The latter provisions had extended protection to all persons making a payment or doing an act in reliance on a power of attorney.

¹⁷⁶ See *Powers of Attorney Act 1998* (Qld) ss 98–99.

¹⁷⁷ An 'enduring document' is an enduring power of attorney or an advance health directive neither of which is revoked by the principal becoming a person with impaired capacity: *Powers of Attorney Act 1998* (Qld) ss 3, 28, 32(2), 35(4), sch 3 (definitions of 'enduring document', 'enduring power of attorney', and 'advance health directive').

¹⁷⁸ 'Invalidity' and 'know' are defined in s 96 of the *Powers of Attorney Act 1998* (Qld):

96 Interpretation

In this part—

invalidity, of a power under a document, means invalidity because—

(a) the document was made in another State and does not comply with the other State's requirements; or

(b) the power is not exercisable at the time it is purportedly exercised; or

(c) the document has been revoked.

know, of a power's invalidity, includes—

(a) know of the happening of an event that invalidates the power; or

is, in favour of the third person, as valid as if the power were not invalid.

- (3) If the interest of a purchaser depends on whether a transaction between an attorney and a third person was valid because of subsection (2), it is conclusively presumed in favour of the purchaser that the third person did not at the material time know of the invalidity of the attorney's power if—
- (a) the third person makes a statutory declaration before or within 3 months after the completion of the purchase that the third person did not at the material time know of the invalidity of the attorney's power; or
 - (b) the transaction between the attorney and the third person was completed within 1 year after the power of attorney was made.

- (4) In subsections (2) and (3)—

attorney means an attorney under—

- (a) a general power of attorney made under this Act; or
- (b) an enduring document; or
- (c) a power of attorney made otherwise than under this Act, whether before or after its commencement. (notes added)

11.139 Of particular relevance is section 99(2) of that Act, which ensures that the transaction between the attorney and a third party who does not 'know' of the 'invalidity' of the power is, in favour of the third party, as valid as if the power were not invalid.

11.140 Relevantly, a general power of attorney is revoked (and, therefore, 'invalid' for the purposes of section 99) if the principal revokes the power, becomes a person with impaired capacity, or dies.¹⁷⁹ Similarly, an enduring power of attorney is revoked if the principal revokes the power, makes a later, inconsistent document, or dies.¹⁸⁰ It is also revoked by the marriage of the principal (to the extent that the document gives power to someone other than the principal's husband or wife) and by the divorce of the principal (to the extent that the document, if made before the divorce, gives power to the divorced spouse).¹⁸¹

11.141 The protection afforded by section 99(2) applies if the third party does not know of the invalidity. There is no additional requirement, as there is under section 70(1) of the *Trusts Act 1973* (Qld), that the person acted on a statutory declaration or other sufficient evidence that the power had not been revoked.

Editor's note—

For example, a principal's enduring power of attorney is revoked if the principal dies (section 24) or, to the extent an attorney was given power, if the attorney becomes a health provider for the principal (section 59).

- (b) have reason to believe the power is invalid.

179 *Powers of Attorney Act 1998* (Qld) ss 17–19.

180 *Powers of Attorney Act 1998* (Qld) ss 47, 49–51.

181 *Powers of Attorney Act 1998* (Qld) ss 51–52.

11.142 Although the *Powers of Attorney Act 1998* (Qld) is silent as to the effect of the principal's bankruptcy, section 99 would seem to confer the same protection on a third party in respect of that event as section 70(1) of the *Trusts Act 1973* (Qld) confers on a trustee. On the bankruptcy of a principal, the principal's property would vest in the Official Trustee.¹⁸² Thereafter, the power of attorney (general or enduring) would not give the attorney any power to deal with the principal's property, and the attorney's power under the document would be 'invalid' within the meaning of paragraph (b) of the definition of 'invalidity' in section 96 of the *Powers of Attorney Act 1998* (Qld).¹⁸³ A trustee who dealt with an attorney not knowing of the principal's bankruptcy would have the protection of section 99(2).

11.143 The circumstances of invalidity in section 70(1) do not reflect all the circumstances in which a power of attorney may be revoked. In particular, the section refers only to circumstances affecting the principal. In contrast, the *Powers of Attorney Act 1998* (Qld) provides that a number of circumstances affecting an attorney will also cause a general power of attorney or enduring power of attorney to be revoked.¹⁸⁴

11.144 It has been suggested that, in light of the provisions in the powers of attorney legislation, it may be unnecessary to retain a provision like section 70 of the *Trusts Act 1973* (Qld).¹⁸⁵ The British Columbia Law Institute has recommended that the equivalent provision in the trustee legislation of that province¹⁸⁶ be omitted on the basis that the same result is achieved by the relevant provisions of the *Power of Attorney Act*.¹⁸⁷

11.145 This approach has the advantage of consistency and simplicity. Trustees would have the same protection as any other person who relies on a power of attorney that, without his or her knowledge, was invalid. Their protection would not depend on showing that they had acted on a statutory declaration or other sufficient evidence that the power had not been revoked.

182 *Bankruptcy Act 1966* (Cth) s 58(1)(a).

183 *Powers of Attorney Act 1998* (Qld) s 96 is set out at n 178 above.

184 A general power of attorney is also revoked if the attorney resigns, becomes a person with impaired capacity, becomes bankrupt or insolvent or takes advantage of the laws of bankruptcy as a debtor, or dies: *Powers of Attorney Act 1998* (Qld) ss 21–24. An enduring power of attorney is also revoked if the attorney resigns, becomes a person with impaired capacity, becomes bankrupt or insolvent or takes advantage of the laws of bankruptcy as a debtor, dies, or becomes a paid carer, health provider or service provider for the principal: ss 55–59AA.

185 See, eg, HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 15 July 2009) [81.6940], referring to the equivalent provision in Western Australia.

186 *Trustee Act*, RSBC 1996, c 464, s 94.

187 British Columbia Law Institute, *A Modern Trustee Act for British Columbia*, Report No 33 (2004) 111, referring to *Power of Attorney Act*, RSBC 1996, c 370, ss 3–4 which provide protection, respectively, for agents and third persons who act without knowing that the agent's power has been terminated.

11-12 Should section 70 of the *Trusts Act 1973* (Qld) be omitted, so that the protection afforded to a trustee who acts, or pays money, in reliance on a power of attorney would be governed solely by the provisions of the *Powers of Attorney Act 1998* (Qld)?

PROTECTION AGAINST LIABILITY IN RESPECT OF RENTS AND COVENANTS

Introduction

11.146 Part 6 of the *Trusts Act 1973* (Qld) contains two provisions that are intended to enable a personal representative (or trustee) to distribute the estate free from unknown or contingent future claims. One of these is section 66, which deals with contingent liabilities in respect of leaseholds and rentcharges.¹⁸⁸

11.147 Under the general law, the personal representative of a lessee is liable for the covenants of the lease in his or her representative capacity to the extent of the deceased's assets, on the basis of privity of contract.¹⁸⁹ The liability continues for the whole term of the lease and the lessor may pursue the personal representative for breaches of covenants even after the lease is assigned to a third party.¹⁹⁰

11.148 The earlier practice of the courts, in actions for administration of estates, was to set apart 'a reasonable sum to cover any liability which might in any reasonable probability arise by reason of a future breach', in cases where the property comprised in the lease did not of itself furnish sufficient security.¹⁹¹ The fund would be released when there was no longer any possibility of any claim being brought.¹⁹² This had the unsatisfactory effect, however, of withholding part of the

¹⁸⁸ The other is s 75, which deals with future calls on company shares: see [11.175] ff below.

¹⁸⁹ *Youngmin v Heath* [1974] 1 WLR 135, 137 (Lord Denning MR), 137 (Stamp LJ), 138 (Roskill LJ), applied in *Basch v Stekel* [2001] L & TR 1, [15] (Chadwick LJ; Buxton LJ agreeing). See also *Wollaston v Hakewill* (1841) 3 Man & G 297, 320; 133 ER 1157, 1166–7 (Tindal CJ); *Helier v Casebert* (1663) 1 Lev 127; 83 ER 332. A personal representative is ordinarily liable, in that character and to the extent of the assets of the deceased in his or her hands, for the contracts of the deceased: see generally AA Preece, *Lee's Manual of Queensland Succession Law* (Lawbook, 6th ed, 2007) [9.230]–[9.250]. As explained earlier, a trustee is personally liable for the contracts that he or she enters into, although subject to a right to be indemnified out of the trust property: see [11.67] above.

¹⁹⁰ Sir RLV Williams and AR Ingpen, *A Treatise on the Law of Executors and Administrators* (Stevens & Sons, 10th ed, 1905) vol 2, 1385. See generally P Butt, *Land Law* (Thomson Reuters, 6th ed, 2009) [15140].

¹⁹¹ *Dodson v Sammell* (1861) 1 Dr & Sm 575, 577; 62 ER 498, 498–9 (Kindersley V-C). It was considered unnecessary to do so if the lease was sufficiently valuable, the 'ground rent' being small compared with the 'rack rent', and the purchaser having given an indemnity, in which case the landlord is more likely to forfeit the lease than to enforce the covenants: *Dean v Allen* (1855) 20 Beav 1, 4; 52 ER 502, 503 (Romilly MR); *Dodson v Sammell* (1861) 1 Dr & Sm 575, 579–80; 62 ER 498, 499–500 (Kindersley V-C); *Re Lawley* [1911] 2 Ch 530, 533 (Swinfen Eady J). It appears that the court sometimes alternatively ordered the distribution of the residuary estate on the legatee giving a security to refund if a claim against the personal representative should afterwards be pursued: *Dean v Allen* (1855) 20 Beav 1, 4; 52 ER 502, 503 (Romilly MR); *Dobson v Carpenter* (1850) 12 Beav 370, 375; 50 ER 1103, 1104–5 (Lord Langdale MR).

¹⁹² *Re Lewis* [1939] 1 Ch 232, 236–7 (Simonds J).

estate from the beneficiaries,¹⁹³ in some cases for long periods.¹⁹⁴

11.149 It was later considered unnecessary in the ordinary course to set apart an indemnity fund since the decree of the court in an administration action was itself sufficient protection for the personal representative.¹⁹⁵ The courts limited the practice of ordering an indemnity fund to be set aside to those cases in which the personal representative had become *personally* liable — as where he or she entered into possession of the leasehold premises, becoming liable on the basis of privity of estate as an assignee of the lease¹⁹⁶ — rather than where the liability was representative only.¹⁹⁷

11.150 Section 66 of the *Trusts Act 1973* (Qld) enables the estate to be distributed without setting apart an indemnity fund for unascertained or contingent future liabilities and without having to obtain an order for distribution from the court.

Section 66

11.151 Section 66 of the *Trusts Act 1973* (Qld) is based on section 26 of the English *Trustee Act 1925*, which originated in *Lord St Leonards' Act*.¹⁹⁸ Similar provisions are found in the trustee legislation of most of the other Australian jurisdictions, as well as New Zealand.¹⁹⁹ The provisions in the ACT, New South Wales and the Northern Territory are found in the administration and probate statutes of those jurisdictions, although (except in the Northern Territory) their application is extended to trustees.

11.152 The object of these provisions is to facilitate the conveyance of the leasehold or other property and the distribution of the rest of the estate.²⁰⁰

11.153 Section 66 is in the following terms:

¹⁹³ *Dodson v Sammell* (1861) 1 Dr & Sm 575, 578; 62 ER 498, 499 (Kindersley V-C); *Re Nixon* [1904] 1 Ch 638, 647 (Byrne J).

¹⁹⁴ For example, in *Re Lewis* [1939] 1 Ch 232, the funds had been held in court for almost 50 years.

¹⁹⁵ *Dodson v Sammell* (1861) 1 Dr & Sm 575, 577–8; 62 ER 498, 499 (Kindersley V-C); *Re Nixon* [1904] 1 Ch 638, 646 (Byrne J).

¹⁹⁶ *Youngmin v Heath* [1974] 1 WLR 135, 137 (Lord Denning MR), 137 (Stamp LJ), 138 (Roskill LJ); *Re Owers* [1941] 1 Ch 389, 390 (Simonds J); *Wollaston v Hakewill* (1841) 3 Man & G 297, 320; 133 ER 1157, 1166 (Tindal CJ). See also *Rowand v Equity Trustees Executors and Agency Co Ltd* (1896) 22 VLR 1; *Rendall v Andreæ* (1892) 61 LJQB 630, 633 (Smith J); *Tilney v Norris* (1700) 1 Ld Raym 553; 91 ER 1269.

¹⁹⁷ *Re Nixon* [1904] 1 Ch 638, 643–4, 646–7 (Byrne J); *Re Owers* [1941] 1 Ch 389, 390–1 (Simonds J); *Re Bennett* [1943] 1 All ER 467.

¹⁹⁸ See *Law of Property and Trustees Relief Amendment Act 1859*, 22 & 23 Vict, c 35, ss 27–28. In Queensland, s 66 of the *Trusts Act 1973* (Qld) was preceded by *Trustees and Executors Act 1897* (Qld) s 21.

¹⁹⁹ *Administration and Probate Act 1929* (ACT) s 66 (which applies ‘in like manner’ to trustees pursuant to *Trustee Act 1925* (ACT) s 61); *Probate and Administration Act 1898* (NSW) s 94 (which applies ‘in like manner’ to trustees pursuant to *Trustee Act 1925* (NSW) s 61); *Administration and Probate Act* (NT) s 98 (which applies to executors and administrators only); *Trustee Act 1936* (SA) s 30; *Trustee Act 1958* (Vic) s 32; *Trustees Act 1962* (WA) s 62; *Trustee Act 1956* (NZ) s 34.

²⁰⁰ RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (LBC Information Services, 1996) [94.01]; *Re Lawley* [1911] 2 Ch 530, 533 (Swinfen Eady J); *Dodson v Sammell* (1861) 1 Dr & Sm 575, 577–8; 62 ER 498, 499 (Kindersley V-C).

66 Protection against liability in respect of rents and covenants

- (1) Where a personal representative²⁰¹ or trustee who is for any reason liable for—
- (a) any rent, covenant or agreement reserved by or contained in any lease; or
 - (b) any rent, covenant or agreement payable under or contained in any grant made in consideration of a rentcharge; or
 - (c) any indemnity given in respect of any rent, covenant or agreement referred to in paragraph (a) or (b);

satisfies all liabilities under the lease or grant that may have accrued, and been claimed up to the date of the conveyance hereinafter mentioned, and, where necessary, sets apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum which the lessee or grantee agreed to lay out on the property demised or granted, although the period for laying out the same may not have arrived, then and in any such case the personal representative or trustee may convey the property demised or granted to a purchaser, legatee, devisee or other person entitled to call for a conveyance thereof and thereafter—

- (d) the personal representative or trustee may distribute the residuary real and personal estate of the deceased testator or intestate, or as the case may be, the trust estate other than the fund (if any) set apart under this subsection to or amongst the persons entitled thereto without appropriating any part, or any further part (as the case may be) of the estate of the deceased or of the trust estate to meet any future liability under the said lease or grant;
 - (e) notwithstanding such distribution the personal representative or trustee shall not be personally liable in respect of any subsequent claim under the said lease or grant.
- (2) This section shall operate without prejudice to the right of the lessor or grantor or the persons deriving title under the lessor or grantor, to follow the assets of the deceased or the trust property into the hands of the persons amongst whom the same may have been respectively distributed, and shall apply notwithstanding anything to the contrary in the will or other instrument (if any) creating the trust.²⁰²
- (3) In this section—

grant applies to a grant whether the rent is created by limitation, grant, reservation or otherwise, and includes an agreement for a grant and any instrument giving any such mentioned indemnity or varying the liabilities under the grant.

lease includes an under-lease and an agreement for a lease or under-lease and any instrument giving any such indemnity as is mentioned in subsection (1) or varying the liabilities under the lease.

²⁰¹ See [11.159] below.

²⁰² See [11.158] below.

lessee and *grantee* include persons respectively deriving title under them. (notes added)

11.154 In order to obtain the protection afforded by section 66, a personal representative or a trustee must have:²⁰³

- satisfied all liabilities under the lease or grant that may have accrued and have been claimed up to the date of the conveyance of the leasehold or other property; and
- where necessary, set apart a sufficient fund to answer any future claim that may be made in respect of any *fixed* and *ascertained* sum which the lessee or grantee *agreed* to lay out on the property.

11.155 If those conditions are satisfied, the personal representative or trustee may convey the leasehold or other property to a purchaser, legatee, devisee or other person entitled to call for a conveyance, and distribute the residuary estate of the deceased or the trust estate without appropriating any part, or further part, of the estate to meet any future liability under the lease or grant.²⁰⁴

11.156 The section confirms that, notwithstanding such distribution, the personal representative or trustee will not be personally liable in respect of any subsequent claim under the lease or grant.²⁰⁵

11.157 Under section 66(2), the protection given to the personal representative or trustee does not prejudice the right of the lessor or grantor to follow the assets of the deceased or the trust property into the hands of the distributees.

11.158 Section 66 is intended to operate invariably. Section 66(2) provides that the section 'shall apply notwithstanding anything to the contrary in the will or other instrument (if any) creating the trust'.²⁰⁶ Similar provision is made in the equivalent sections of most of the other jurisdictions.²⁰⁷

11.159 Section 66 applies both to personal representatives and to trustees.²⁰⁸ This ensures that the protection applies to a trustee who, having originally been a

²⁰³ *Trusts Act 1973* (Qld) s 66(1).

²⁰⁴ *Trusts Act 1973* (Qld) s 66(1)(d).

²⁰⁵ *Trusts Act 1973* (Qld) s 66(1)(e).

²⁰⁶ The inclusion of those words in s 66(2) appears to be unnecessary in light of the operation of s 65 of the Act which provides that, except where otherwise provided, the provisions in pt 6 (including s 66) 'shall apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust'. The reference in s 66(2) to a contrary intention in the will or other trust instrument seems to have been included because those words appeared in the equivalent provisions in the other jurisdictions on which s 66 was modelled.

²⁰⁷ *Trustee Act 1936* (SA) s 30(3); *Trustee Act 1958* (Vic) s 32(2); *Trustees Act 1962* (WA) s 62(3). See also *Trustee Act 1956* (NZ) s 34(3); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 26(2). The provisions in the ACT and New South Wales are silent as to the effect of a contrary intention in the will or other trust instrument.

²⁰⁸ The original English provisions, on which s 66 and the equivalent provisions in the other jurisdictions were modelled, applied to executors and administrators only. The English provisions were extended to cover trustees when they were re-enacted in s 26 of the *Trustee Act 1925*. The separate reference to personal representatives in s 66 does not appear to be strictly necessary since s 5(1) of the Act defines 'trustee' to include a personal representative (which is in turn defined as an executor, original or by representation, or the administrator for the time being of the estate of a deceased person).

personal representative in relation to the estate, has completed his or her functions as personal representative and has been holding the estate, or part of it, on trust. It also applies more generally to trustees who were not also personal representatives.²⁰⁹

Scope of the protection in section 66

11.160 In most of the other Australian jurisdictions, as in England, the provisions apply if a personal representative or trustee is liable 'as such' for the relevant rents, covenants or agreements.²¹⁰ It was held in relation to the English provision that this limited the scope of the protection to a personal representative's 'representative' liability and is not intended to cover the cases where the personal representative has additionally incurred the personal liability of an assignee.²¹¹

11.161 Section 66 of the *Trusts Act 1973* (Qld) confers a wider protection than the equivalent provisions in these jurisdictions. It applies if a personal representative or trustee is 'for any reason' liable for the relevant rents, covenants or agreements. These words were included to ensure that the provision was not limited in its application to the liability that attaches to a personal representative in his or her representative capacity, but was wide enough to apply to any additional *personal* liability arising if the personal representative, or trustee, enters into possession of the subject matter of the lease or grant.²¹²

11.162 In Western Australia and New Zealand,²¹³ the provisions apply where a trustee is liable 'as such' for the relevant rents, covenants or agreements, but then deem the trustee to be liable 'as such' for any liabilities arising from privity of estate that may be incurred for any liabilities contained in a lease or grant, if the personal representative or trustee is entitled to be reimbursed out of the trust property for all expenses incurred in respect of the liabilities.²¹⁴

209 A trustee may become liable in respect of a leasehold if the leasehold forms part of the original trust property (as an assignee of the lease), or if he or she enters into a new lease during the administration of the trust: see J Mowbray et al, *Lewin on Trusts* (Thomson, 18th ed, 2008) [26-33].

210 *Administration and Probate Act 1929* (ACT) s 66(1) (which applies 'in like manner' to trustees pursuant to *Trustee Act 1925* (ACT) s 61(1)); *Probate and Administration Act 1898* (NSW) s 94(1)(a) (which applies 'in like manner' to trustees pursuant to *Trustee Act 1925* (NSW) s 61(1)); *Administration and Probate Act* (NT) s 98(1); *Trustee Act 1936* (SA) s 30(1); *Trustee Act 1958* (Vic) s 32(1); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 26(1).

211 *Re Owers* [1941] 1 Ch 389, 391 (Simonds J). The South Australian provision, which applies where a trustee, including a personal representative, is liable 'as such', expressly provides that the section does not apply 'where the trustee is himself an original party to a lease, grant or indemnity or a party otherwise than as trustee': *Trustee Act 1936* (SA) s 30(2)(b).

212 Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 50. See also HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* [16.420].

213 *Trustees Act 1962* (WA) s 62(2); *Trustee Act 1956* (NZ) s 34(2). A trustee is entitled to an indemnity against the trust assets (or, in certain circumstances, against the beneficiaries personally) for expenses and liabilities properly incurred in the discharge of the trust: *Trusts Act 1973* (Qld) s 72, discussed at [11.64] above.

214 In its 1971 Report, this Commission was critical of the wording of these provisions: Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 50.

Liability if the property is assigned without consideration

11.163 Provided that the conditions in section 66 are satisfied, the section relieves the personal representative or trustee from further liability in respect of the property on its being conveyed to 'a purchaser, legatee, devisee or other person entitled to call for a conveyance thereof'. The same wording is used in the provisions of the other jurisdictions.²¹⁵

11.164 There may be some doubt as to whether the property is so conveyed if it is transferred, other than to a beneficiary, without consideration, for example, where the property is transferred to a volunteer or a person who is paid to take an onerous title.²¹⁶

11.165 The original English provision applied where the property in question was conveyed to a 'purchaser'.²¹⁷ It was held in relation to that provision that the word 'purchaser' means 'a person to whom the lease is sold, and who pays a price in money for it', and does not include an assignment to a person who was paid to take an onerous title.²¹⁸

11.166 In recommending a provision in the terms of section 66 in its 1971 Report, the Commission expressed the view that it would not be desirable to extend the section to situations in which the property is assigned to a person paid to take an onerous title.²¹⁹

11.167 In that situation, the personal representative or trustee may therefore still consider it prudent to set apart an indemnity fund to meet any contingent future liabilities under the lease or grant.²²⁰

A more general provision

11.168 The trustee legislation in Ontario includes provisions in similar terms to section 66 of the *Trusts Act 1973* (Qld) which apply to personal representatives.²²¹ In its report on the administration of estates, the Ontario Law Reform Commission noted that these 'complex provisions respond to a narrow problem'.²²² The

²¹⁵ *Administration and Probate Act 1929* (ACT) s 66(1)(c); *Probate and Administration Act 1898* (NSW) s 94(1)(b)(iii); *Administration and Probate Act* (NT) s 98(1)(c); *Trustee Act 1936* (SA) s 30(1); *Trustee Act 1958* (Vic) s 32(1); *Trustees Act 1962* (WA) s 62(1); *Trustee Act 1956* (NZ) s 34(1); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 26(1).

²¹⁶ See HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Law Book, 1983) [1639]. Under s 38 of the *Trusts Act 1973* (Qld), trustees (including personal representatives) are empowered to surrender a lease or freehold property that is subject to onerous covenants, provided that the trustee complies with certain conditions. That section applies whether or not a contrary intention is expressed in the trust instrument: s 31(1). Section 38 is discussed in Chapter 8.

²¹⁷ *Law of Property and Trustees Relief Amendment Act 1859*, 22 & 23 Vict, c 35, s 27.

²¹⁸ *Re Lawley* [1911] 2 Ch 530, 533 (Swinfen Eady J).

²¹⁹ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 50.

²²⁰ *Ibid*; HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Law Book, 1983) [1639].

²²¹ *Trustee Act*, RSO 1990, c T23, ss 51–52.

²²² Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 100.

Commission observed that the current provisions ‘reflect a concern that the ease of administration not be impeded by the existence of contingent liabilities’, and considered that this policy ‘is applicable to all situations where an asset of the estate is subject to continuing liability’.²²³

11.169 Accordingly, it recommended the inclusion of a provision in more general terms, which would apply in respect of any long-term obligation to which the estate is subject, to the effect that:²²⁴

where an estate trustee holds as an asset a long-term lease, mortgage or other instrument that imposes upon the estate a liability beyond one year from the death of the deceased, and she assigns this asset to a person approved by the person to whom the estate otherwise would have been liable for the full term of the instrument, the liability of the estate trustee for further payment under the instrument should cease from the moment of the assignment. The person to whom the estate otherwise would have been liable for the full term of the instrument should not be entitled to withhold her approval arbitrarily.

11.170 In making that proposal, the Ontario Law Reform Commission acknowledged that it was ‘accepting that considerations of contract ought to defer to the policy in favour of the ease of administration of estates’.²²⁵ Its proposal has not been implemented.

11.171 The provision proposed by the Ontario Law Reform Commission is obviously a much shorter provision than section 66 of the *Trusts Act 1973* (Qld). However, this Commission does not consider that the provision proposed by the Ontario Law Reform Commission would be suitable for adoption in Queensland. The provision has a much wider effect than section 66, as it does not require the personal representative to set apart a fund to answer future liabilities that are fixed and ascertained. Accordingly, from the moment of assigning the property, the provision would relieve the personal representative from *all* future liabilities, rather than from only those future liabilities that cannot be fixed and ascertained. Given that the Queensland provision also applies to trustees, who would otherwise be personally liable in respect of any leasehold interests that they had taken (and not simply to the extent of the trust assets in their hands), the provision would give trustees an advantage in relation to their future liabilities that would not be available to other lessees.

RELIEF FROM LIABILITY IN RESPECT OF CALLS MADE AFTER TRANSFER OF SHARES

Introduction

11.172 Under the *Corporations Act 2001* (Cth), if shares in a company (other than a no liability company) are partly paid, the shareholder is liable to pay calls on them

223 Ibid 101.

224 Ibid 102.

225 Ibid.

in accordance with the terms on which the shares are on issue.²²⁶ Further, in the event that the company is wound up, the shareholder may be liable to meet calls as a contributory²²⁷ under sections 514–529 of the Act. That liability is generally limited to the amount of the unpaid calls on the shares.²²⁸

11.173 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’.²²⁹

11.174 The personal representative of a deceased shareholder may elect to be registered as the holder of the shares or, alternatively, transfer the shares to another person.²³⁰ Rather than ‘be registered as a member in the ordinary way’, the personal representative of a deceased shareholder may instead be registered as the holder of the shares in the ‘character of personal representative’.²³¹ If the personal representative is registered in that capacity, he or she is, while registered, subject to the same liabilities in respect of the shares as those to which he, she or it would have been subject if the shares had remained, or had been, registered in the name of the dead person, but is subject to no other liabilities in respect of the shares.²³²

Section 75

11.175 Section 75 of the *Trusts Act 1973* (Qld) deals with the liability of a personal representative in relation to calls on partly-paid shares. It provides:

75 Personal representatives relieved from personal liability in respect of calls made after transfer of shares

A personal representative of a deceased person who was registered as the holder of shares not fully paid up in any incorporated company may distribute the assets of the estate of that deceased person as soon as the personal representative has procured the registration of some other person as the holder of the shares without reserving any portion of the estate for the payment of any calls made after the date of that registration, whether made by the company or its directors or by its liquidators in a winding-up, but nothing in this section affects any right which the company or its liquidator may have to follow the assets of the deceased person into the hands of any persons to or amongst whom they have been transferred or distributed.

²²⁶ *Corporations Act 2001* (Cth) s 254M.

²²⁷ A ‘contributory’ is defined in s 9 of the *Corporations Act 2001* (Cth) to include ‘a past or present member liable to contribute if the company is wound up’.

²²⁸ *Corporations Act 2001* (Cth) s 516. 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 a year or more before the winding up: s 521.

²²⁹ *Corporations Act 2001* (Cth) s 528. See also s 586(2).

²³⁰ *Corporations Act 2001* (Cth) s 1072A(2)(a).

²³¹ HAJ Ford, RP Austin and IM Ramsay, LexisNexis Butterworths, *Ford’s Principles of Corporations Law*, vol 2 (at service 86) [21.424.3]; *Corporations Act 2001* (Cth) s 1072E(2).

²³² *Corporations Act 2001* (Cth) s 1072E(8).

11.176 Under section 75, a personal representative may distribute partly-paid shares as soon as he or she has procured the registration of some other person as the holder of the shares. The provision specifies that the personal representative may distribute the shares without having to reserve a separate fund to meet any possible future calls. It relieves a personal representative who has transferred the shares from the liability that might accrue in a winding up of the company.²³³

11.177 The provision also clarifies that it does not affect any right that the company or its liquidator may have to follow the assets of the deceased person into the hands of any persons to or amongst whom they have been transferred or distributed.

11.178 Similar provision is made in the ACT, New South Wales, South Australia, Victoria and Western Australia.²³⁴

Background

11.179 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.²³⁵

11.180 A provision in similar terms to section 75 of the *Trusts Act 1973* (Qld) was first enacted in Victoria as section 2 of the *Trusts Act 1901* (Vic). A provision in similar terms was adopted in New South Wales in 1938,²³⁶ in South Australia in 1941,²³⁷ in Western Australia in 1962 and, finally, in Queensland in 1973.

11.181 Section 2 of the *Trusts Act 1901* (Vic) was intended to enable personal representatives 'to distribute an estate without having regard to any uncalled liability that may exist in connexion with shares', to overcome the 'great difficulty and perplexity' faced by personal representatives in the distribution of partly-paid shares.²³⁸

11.182 In recommending a provision to the effect of section 75 in its 1971 Report, the Commission explained that 'since calls on shares are comparatively unusual it

233 *Re Blackwood* [1908] VLR 517.

234 *Trustee Act 1925* (ACT) s 61A; *Trustee Act 1925* (NSW) s 61A; *Trustee Act 1936* (SA) s 31; *Trustee Act 1958* (Vic) s 34; *Trustees Act 1962* (WA) s 74.

235 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) 370–1; *Re King* [1907] 1 Ch 72; *Day v Day* (1903) 4 SR (NSW) 21; *Chisolm v Gilchrist* (1902) 2 SR (NSW) Eq 84. However, because the personal representative could obtain full protection by distributing under the court's direction in an administration action, it was not the court's practice to order that a fund be set apart to meet any future call on shares: *Addams v Ferick* (1859) 26 Beav 384; 53 ER 946; *Re Nixon* [1904] 1 Ch 638. See also RE Megarry and PV Baker, *Snell's Principles of Equity* (Sweet & Maxwell, 26th ed, 1966) 370.

236 *Conveyancing, Trustee and Probate (Amendment) Act 1938* (NSW) s 5(q).

237 *Trustee Act Amendment Act 1941* (SA) s 15.

238 Victoria, *Parliamentary Debates*, Legislative Assembly, 18 December 1901, 3708 (Sir Samuel Gillott). See also *Re Blackwood* [1908] VLR 517, 522 (Cussen J).

would not be desirable for trust funds to be retained indefinitely to meet that contingency — hence this provision, exonerating the trustee'.²³⁹

Scope of the provision

11.183 Section 75 of the *Trusts Act 1973* (Qld) applies to a 'personal representative of a deceased person'. The provisions in Victoria and Western Australia are also expressed to apply to a 'personal representative of a deceased person'.²⁴⁰

11.184 In contrast, the provisions in the ACT and New South Wales apply to the 'legal representative or trustee of the will of a deceased person'.²⁴¹ This wider expression would apply to the trustee of a testamentary trust created by the will of a deceased person, whether or not the trustee had also been the personal representative. The application of the provision to a testamentary trustee could be desirable, for example, if the trustee was holding the shares during the minority of a beneficiary. When the time for distribution arrived, it would exonerate the trustee from further liability after transferring the shares to the beneficiary.

11-13 Should section 75 of the *Trusts Act 1973* (Qld) be amended so that it also applies to the trustee of the will or estate of a deceased person?

POWER OF COURT TO MAKE BENEFICIARY INDEMNIFY FOR BREACH OF TRUST

11.185 Section 77 of the *Trusts Act 1973* (Qld) gives the court a discretionary power to impound all, or any part, of a beneficiary's interest in the trust estate by way of indemnity to the trustee, where the trustee has committed a breach of trust at the instigation or request, or with the written consent, of the beneficiary.²⁴² It provides:

77 Power of court to make beneficiary indemnify for breach of trust

- (1) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the court may, if it thinks fit, make such order as to the court seems just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or persons claiming through the trustee.
- (2) This section applies to breaches of trust committed as well before as after the commencement of this Act.

²³⁹ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 57.

²⁴⁰ *Trustee Act 1958* (Vic) s 34; *Trustees Act 1962* (WA) s 74.

²⁴¹ *Trustee Act 1925* (ACT) s 61A; *Trustee Act 1925* (NSW) s 61A.

²⁴² A provision in similar terms was previously included in the *Trustees and Executors Act 1897* (Qld) s 44.

11.186 Similar provision is made in the other Australian jurisdictions, as well as in New Zealand and England.²⁴³

11.187 A provision in these terms first appeared in section 6 of the English *Trustee Act 1888*. That section was replaced by section 45 of the *Trustee Act 1893*, which was re-enacted as section 62 of the *Trustee Act 1925*, which remains in force today.

General law

11.188 Under the general law, a distinction was made between the liability of a beneficiary who instigated a breach of trust and one who merely consented to it.

11.189 The Courts of Equity could require a beneficiary, 'at whose instance or request a breach of trust had been committed', to indemnify the trustees to the extent to which the beneficiary had received a benefit from the breach of trust.²⁴⁴

11.190 A beneficiary who had consented to (but not instigated) a breach of trust could not sustain an action against the trustee to make good the loss occasioned by the breach.²⁴⁵ However, the trustee generally had no right to impound the beneficiary's interest by way of indemnity.²⁴⁶

Effect of the legislative provision

11.191 As noted above, section 77 of the *Trusts Act 1973* (Qld) has its origins in section 6 of the English *Trustee Act 1888*. That provision extended the power of the court by giving it the power to impound any part of the interest in the trust property of a beneficiary who consented to the breach of trust, provided that the consent was given in writing.²⁴⁷ The section did not, however, deprive a trustee of the right to resist the claim of a beneficiary who had consented to the breach of trust.²⁴⁸

11.192 The requirement for writing applies only in relation to consent. An instigation or request need not be writing.²⁴⁹

11.193 In order to rely successfully on the provision, the trustee must establish not only that the beneficiary instigated, requested, or consented in writing to the breach of trust, but also that the beneficiary knew of the facts that constituted the

²⁴³ *Trustee Act 1925* (ACT) s 86; *Trustee Act 1925* (NSW) s 86; *Trustee Act* (NT) s 50; *Trustee Act 1936* (SA) s 57; *Trustee Act 1898* (Tas) s 53; *Trustee Act 1958* (Vic) s 68; *Trustees Act 1962* (WA) s 76; *Trustee Act 1956* (NZ) s 74; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 62.

²⁴⁴ *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.

²⁴⁵ *Evans v Benyon* (1887) 37 Ch D 329, 344–5 (Cotton LJ); *Fletcher v Collis* [1905] 2 Ch 24, 32–3 (Romer LJ).

²⁴⁶ PH Pettit, *Equity and the Law of Trusts* (Butterworths, 8th ed, 1997) 494–5.

²⁴⁷ *Fletcher v Collis* [1905] 2 Ch 34–5 (Romer LJ).

²⁴⁸ *Ibid* 35. See also *Bolton v Curre* [1895] Ch 544, 549 (Romer J).

²⁴⁹ *Griffith v Hughes* [1892] 3 Ch 105, 109–10 (Kekewich J).

breach of trust.²⁵⁰

11.194 It has been held that an order impounding the interest of a beneficiary can be made in favour of a former trustee, as the right to impound is not dependent on the trustee's possession of the trust fund.²⁵¹

ABOLITION OF RULE IN *ALLHUSEN v WHITTELL*

Introduction

11.195 The rule in *Allhusen v Whittell*²⁵² 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.²⁵³ The tenant for life of the residuary estate is not entitled to such income; he or she is entitled to receive the income of the net estate (the estate that remains after debts and legacies have been paid).²⁵⁴ 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; or, as Ford and Lee put it, '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'.²⁵⁵

11.196 In *Princess Anne of Hesse v Field*, the Supreme Court of New South Wales further observed that:²⁵⁶

The rule was the equitable requirement that an adjustment be made based upon the presumed intention of the testator. The rule is that if a testator, after providing for payment of his debts or legacies out of his personalty, proceeds to give the residue of his personalty to a life tenant with remainders over, then since the life tenant was entitled only to the income of what was left after the payment had been made he was not entitled to the income of any funds which had to be used in making the payments. That being the rule, the consequence followed that it was necessary to make an adjustment so as to provide that the capital of the payments, together with any interest thereon, should be paid, not entirely out of the corpus of the residue, but rateably out of the corpus together

²⁵⁰ *Re Somerset* [1894] 1 Ch 231, 265 (Lindley LJ), 270 (Smith LJ), 274 (Davey LJ). See also PH Pettit, *Equity and the Law of Trusts* (Butterworths, 8th ed, 1997) 495.

²⁵¹ *Re Pauling's Settlement Trusts (No 2)* [1963] 1 Ch 576, 583–5 (Wilberforce J).

²⁵² (1867) LR 4 Eq 295.

²⁵³ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [22.150].

²⁵⁴ 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].

²⁵⁵ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* [11.3020].

²⁵⁶ [1963] NSW 998, 1017 (Jacobs J).

with such income as had been earned by the corpus between the date of the testator's death and the time when the payment was made.

11.197 The rule is 'disliked because it obliges trustees to make quite complex arithmetical calculations, which are generally of insignificant advantage to the estate'.²⁵⁷

11.198 The rule in *Allhusen and Whittell* has been abolished by statute in most Australian jurisdictions and in New Zealand.²⁵⁸ In the ACT, New South Wales and the Northern Territory, the relevant provisions are found in the administration and probate legislation, rather than in the trustee legislation.

11.199 Ford and Lee have described the effect of these provisions as follows:²⁵⁹

The intention of the provisions is that the trustees should not have to make adjustments to the capital and income accounts by reason of the fact that the income beneficiary has received income from the assets of a deceased estate that are later sold to pay the debts and other expenses. In consequence the income beneficiary may receive rather more income during the administration period but rather less thereafter because the capital will be reduced in value. Therefore, the trustee is absolved from making a whole series of difficult calculations.

Section 78

11.200 Section 78 of the *Trusts Act 1973* (Qld) provides:

78 Abolition of rule in *Allhusen v Whittell*

- (1) Where, under the provisions of the will of a person (***the deceased***) who dies on or after 1 July 1973, any real or personal estate included (either by specific or general description) in a residuary gift is settled by way of succession, no part of the income of that property shall be applicable in or towards the payment of the debts and liabilities which have accrued at the date of death or in payment of the funeral, testamentary and administration expenses, or of any legacies bequeathed by the will.
- (2) Subsection (1) does not apply to any commission which is payable to the trustee in respect of any such income as is mentioned in that subsection or to any testamentary or administration expenses which, apart from that subsection, would be payable wholly out of income.
- (3) The income of the settled property shall be applicable in priority to any other assets in payment of the interest (if any) accruing due on the debts, liabilities, funeral, testamentary and administration expenses, and legacies, after the date of the death of the deceased and up to the payment thereof, and the balance of the income shall be payable to the person for the time being entitled to the income of the property.

²⁵⁷ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 58.

²⁵⁸ *Administration and Probate Act 1929* (ACT) s 41D; *Probate and Administration Act 1898* (NSW) s 46D; *Administration and Probate Act* (NT) s 58; *Trusts Act 1973* (Qld) s 78; *Trustee Act 1958* (Vic) s 74; *Trustees Act 1962* (WA) s 104; *Trustee Act 1956* (NZ) s 84.

²⁵⁹ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* [11.3040].

- (4) Where, after the death of the deceased, income of assets which are ultimately applied in or towards payment of the debts, liabilities, funeral, testamentary and administration expenses, and legacies, arises pending such application, that income shall, for the purposes of this section, be deemed income of the residuary estate of the deceased.
- (5) In this section—
administration expenses includes duty payable under the *Succession and Probate Duties Act 1892* and estate duty payable under any Commonwealth Act and any duty payable in any State or country outside Queensland on or consequent on or arising out of the death of the deceased to the extent to which such duties are payable out of residue.
- (6) This section shall only affect the rights of beneficiaries under the will as between themselves, and shall not affect the rights of creditors of the deceased.
- (7) This section shall have effect subject to the provisions (if any) to the contrary contained in the will and to the provisions of any Act as to charges on the property of the deceased.

11.201 Section 78 is complemented by section 114, which provides:

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.

11.202 Both provisions were recommended by the Commission in its 1971 Report. Section 78 was modelled primarily on the Victorian provision (except for section 78(2), which is modelled on the Western Australian provision).²⁶⁰

11.203 The purpose of section 78(1) is to ensure that the debts, liabilities, legacies, and funeral, testamentary and administration expenses are paid out of capital. Similar provision is made in the ACT, New South Wales, the Northern Territory, Victoria, Western Australia and New Zealand.²⁶¹

11.204 However, section 78(2) provides that section 78(1) does not apply to any commission that is payable to the trustee in respect of the income of the trust or to any testamentary or administration expenses that would normally be payable entirely out of the income of the estate. As explained by the Law Reform Sub-Committee of Western Australia 'these will continue to be paid out of income in priority over capital'.²⁶² This provision is included only in Queensland and Western

²⁶⁰ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 58.

²⁶¹ *Administration and Probate Act 1929* (ACT) s 41D(1)–(2); *Probate and Administration Act 1898* (NSW) s 46D(1); *Administration and Probate Act* (NT) s 58(1)–(2); *Trustee Act 1958* (Vic) s 74(1); *Trustees Act 1962* (WA) s 104(1); *Trustee Act 1956* (NZ) s 84(1).

²⁶² Law Reform Sub-Committee of the Law Society (WA), *The Law of Trusts*, Report (1961), Supplement 90.

Australia.²⁶³

11.205 Section 78(3) provides that the income of the settled property is applicable in priority to any other assets in payment of any interest accruing on the debts, liabilities, funeral, testamentary and administration expenses, and legacies, after the date of the death of the deceased, and that the balance of the income shall be payable to the person for the time being entitled to the income of the property. Similar provision is made in the ACT, New South Wales, the Northern Territory, Victoria, Western Australia and New Zealand.²⁶⁴

11.206 Section 78(4) clarifies that, if any assets that are ultimately applied in or towards payment of the expenses and liabilities produce income themselves pending their application, then that income is deemed income of the residuary estate of the deceased.²⁶⁵ Similar provision is made in the ACT, New South Wales, the Northern Territory, Victoria, Western Australia and New Zealand.²⁶⁶

11.207 In *Princess Anne of Hesse v Field*, the Supreme Court of New South Wales explained the significance of the NSW counterpart to subsection 78(4) in relation to the application of dividends:²⁶⁷

it seems to me that s 46D(3) makes it clear that where dividends are paid on shares which are ultimately applied in or towards the payment of debts and expenses those dividends shall for the purpose of s 46D be deemed income of the residuary estate. The use of the word 'deemed' is significant ... The income is to be deemed income of the residuary estate even though in fact it cannot truly be described.

England

11.208 The rule in *Allhusen v Whittell* still applies in England, although it is said that, in practice, it is 'excluded as a matter of course in well-drafted wills'.²⁶⁸

²⁶³ *Trusts Act 1973* (Qld) s 78(2); *Trustees Act 1962* (WA) s 104(2). The authors of the Model Trustee Code were of the view that this should be included in a model provision, suggesting that 'it is proper for income received to be applied to income purposes': WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 85 (cl 3.19(2)(b)(c)).

²⁶⁴ *Administration and Probate Act 1929* (ACT) s 41D(3); *Probate and Administration Act 1898* (NSW) s 46D(2); *Administration and Probate Act* (NT) s 58(3); *Trustee Act 1958* (Vic) s 74(2); *Trustees Act 1962* (WA) s 104(3); *Trustee Act 1956* (NZ) s 84(2).

²⁶⁵ Law Reform Sub-Committee of the Law Society (WA), *The Law of Trusts*, Report (1961), Supplement 90.

²⁶⁶ *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).

²⁶⁷ [1963] NSW 998, 1018 (Jacobs J).

²⁶⁸ Law Commission of England and Wales, *Capital and Income in Trusts: Classification and Apportionment*, Consultation Paper No 175 (2004) [3.53]. The Trusts Law Committee observed that the rule 'generally only affects ill-drawn and home-made wills, in whose administration it must often be overlooked. Indeed it is often deliberately disregarded': Trusts Law Committee (UK), *Consultation Paper on Capital and Income of Trusts* (1999) [4.5].

11.209 In 1999, the Trust Law Committee in England recommended the abolition of the rule, without an alternative apportionment mechanism.²⁶⁹

It will have been observed that no substitute has been suggested above for the Rule in *Allhusen v Whittell*, assuming that it is abolished. The antipodean legislation abolishing it enacts no alternative apportionment. It will be recalled that the Rule requires the income of the income beneficiary of a residuary estate to be reduced during the period of administration to allow for the fact that during that period it is swollen by income from assets that are sold during the period to pay the deceased's debts. Abolishing the rule increases the income slightly during the administration period. Against that, however, it reduces the income very slightly after that period, by the amount that would have been earned by the small sums that under the Rule would have been added to capital during the administration period, and in the usual case this reduction will be suffered by the income beneficiary during the rest of his, or more likely her, life. (note omitted)

11.210 Most recently, the Law Commission of England and Wales has recommended the abolition of the rule in *Allhusen v Whittell*. It considered that the most significant criticism of the rule is that 'it requires complex and cumbersome calculations, which in most cases affect only small sums of money'.²⁷⁰ The Law Commission was initially in favour of replacing the rules with a general discretionary allocation power, which would confer on trustees a general discretion to apportion receipts and expenses. However, it was ultimately unable to recommend that approach.²⁷¹

We have considered whether it would be possible to provide a general discretion or power of apportionment in place of the equitable rules of apportionment. However, we have concluded that it would not be possible to do so for three reasons. First, it would be difficult to provide a firm basis for the exercise of such a discretion or power beyond the broad principles of balance and fairness. Secondly, such a discretion or power may appear overly dispositive. Finally, such a discretion or power would suffer the same problems as those associated with the [Consultation Paper's] provisionally proposed power of allocation, discussed above, and in particular would inevitably give rise to unwelcome tax consequences.

11.211 It therefore recommended that the rule should simply be abolished in relation to trusts created or arising in the future, although it would remain open to future settlors to incorporate express provision in the trust deed if they wished to replicate the rule.²⁷² This recommendation is reflected in the Trusts (Capital and Income) Bill, which is currently before the Parliament of the United Kingdom.²⁷³ The Bill provides that the following rule does not apply to a trust created or arising after the relevant section comes into force:

²⁶⁹ Trusts Law Committee (UK), *Consultation Paper on Capital and Income of Trusts* (1999) [6.15].

²⁷⁰ Law Commission of England and Wales, *Capital and Income in Trusts: Classification and Apportionment*, Consultation Paper No 175 (2004) [3.53].

²⁷¹ Law Commission of England and Wales, *Capital and Income in Trusts: Classification and Apportionment*, Report No 315 (2009) [6.61].

²⁷² *Ibid* [6.54]–[6.65].

²⁷³ UK Parliament, Trusts (Capital and Income) Bill cl 1(2)(d) (accessed at 28 November 2012) <<http://services.parliament.uk/bills/2012-13/trustscapitalandincomebill.html>>.

the rule known as the rule in *Allhusen v Whittell* (which requires a contribution to be made from income for the purpose of paying a deceased person's debts, legacies and annuities);

Scotland

11.212 The Scottish Law Commission considered the apportionment of trust receipts and outgoings in a 2003 Discussion Paper. It expressed a preference for the introduction of a general discretionary allocation power, in order for trustees to maintain a fair balance between the income and capital beneficiaries of a trust.²⁷⁴ It considered that this was a better solution to the problems faced by trustees, and proposed the abolition of the rule in *Allhusen v Whittell*.²⁷⁵

Whether section 78 should be omitted

11.213 As explained above, the rule in *Allhusen v Whittell* is to be abolished in England without the enactment of any replacement rule, such as appears in section 78 of the *Trusts Act 1973* (Qld).

11.214 Given the complexity of section 78, and the relatively small advantage that would accrue to the life tenant by simply omitting the provision, the Commission is seeking submissions on whether a simpler approach would be to omit section 78.²⁷⁶

11-14 Should section 78 of the *Trusts Act 1973* (Qld) be omitted?

References to succession duty and estate duty

11.215 Section 78(5) of the *Trusts Act 1973* (Qld) defines 'administration expenses' to include:

duty payable under the *Succession and Probate Duties Act 1892* and estate duty payable under any Commonwealth Act and any duty payable in any State or country outside Queensland on or consequent on or arising out of the death of the deceased to the extent to which such duties are payable out of residue.

11.216 A similar provision is still included in Victoria and Western Australia,²⁷⁷ but not in the ACT, New South Wales, the Northern Territory or New Zealand.

²⁷⁴ Scottish Law Commission, *Apportionment of Trust Receipts and Outgoings*, Discussion Paper No 124 (2003) [2.33], [2.42].

²⁷⁵ Ibid [2.41], [2.42].

²⁷⁶ As a drafting issue, it might also be necessary to provide that the omission of s 78 does not have the effect of reviving the rule in *Allhusen v Whittell*.

²⁷⁷ *Trustee Act 1958* (Vic) s 74(4); *Trustees Act 1962* (WA) s 104(5).

11.217 Succession duty was abolished in Queensland from 1 January 1977.²⁷⁸ However, despite the repeal of the *Succession and Probate Duties Act 1892* (Qld),²⁷⁹ the Act continues to apply to the estate of a person who died before 1 January 1977.²⁸⁰ Commonwealth estate duty was abolished from 1 July 1979.²⁸¹

11.218 Although it is not uncommon for a testator's estate to be administered only after the life tenant has died and the family home is sold,²⁸² which could substantially extend the period of administration, given the length of time since succession duty and estate duty were abolished, it would now be extremely rare for there to be estates with outstanding duty.

11-15 If section 78 of the *Trusts Act 1973* (Qld) is retained, should it be amended to omit the definition of 'administration expenses' in section 78(5)?

POWER OF COURT TO RELIEVE TRUSTEE FROM PERSONAL LIABILITY

11.219 Section 76 of the *Trusts Act 1973* (Qld) gives the court the power to relieve trustees from personal liability for a breach of trust. It provides:²⁸³

76 Power of court to relieve trustee from personal liability

If it appears to the court that a trustee, whether appointed by the court or otherwise, is, or may be, personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach, then the court may relieve the trustee either wholly or partly from personal liability for that breach.

11.220 A provision in similar terms is also included in the trustee legislation of the other Australian jurisdictions, New Zealand and England.²⁸⁴

11.221 Section 76, like the provisions in the other jurisdictions, has its origins in section 3 of the English *Judicial Trustees Act 1896*, which was enacted to 'lessen

²⁷⁸ *Succession and Gift Duties Abolition Act 1976* (Qld) s 4.

²⁷⁹ *Statute Law Revision Act 1995* (Qld) s 5(1), sch 6.

²⁸⁰ *Statute Law Revision Act 1995* (Qld) s 5(4), sch 10.

²⁸¹ *Estate Duty Assessment Amendment Act 1978* (Cth) s 4.

²⁸² 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) vol 3, [35.132].

²⁸³ *Trustees and Executors Act 1897* (Qld) s 51 was in similar terms.

²⁸⁴ *Trustee Act 1925* (ACT) s 85; *Trustee Act 1925* (NSW) s 85; *Trustee Act* (NT) s 49A; *Trustee Act 1936* (SA) s 56; *Trustee Act 1898* (Tas) s 50; *Trustee Act 1958* (Vic) s 67; *Trustees Act 1962* (WA) s 75; *Trustee Act 1956* (NZ) s 73; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 61. See also *Trusts (Scotland) Act 1921* (Scot) s 32; *Trustee Act*, RSBC 1996, c 464, s 96; *Trustee Act*, RSO 1990, c T23, s 35.

the severity of the law against trustees'.²⁸⁵ The general object of the provision is to relieve honest trustees who have acted reasonably. Given its remedial purpose, and the broad language used, it has been held that the provision should not be narrowly construed.²⁸⁶

11.222 Section 76 applies where it appears to the court that a trustee is, or may be, personally liable for a breach of trust. The inclusion of the words 'may be' clarifies that the trustee need not show a breach of trust in order to avail himself or herself of the protection: 'It is enough that in the opinion of the court he may be under some personal liability'.²⁸⁷ However, the section does not enable the court to relieve a trustee of liability for a future breach of trust.²⁸⁸

Conditions for relief

11.223 In order for relief to be granted, a trustee must satisfy the court that he or she has acted honestly and reasonably, and ought fairly to be excused for the breach and for omitting to obtain the directions of the court.²⁸⁹

11.224 The court has a wide discretion. Whether a trustee has acted honestly and reasonably is a question of fact to be determined on the circumstances of each case. No general rules or principles can be laid down.²⁹⁰ It has been observed that, although 'the Court does not wish to be hard on a trustee who has tried to act honestly and reasonably', it must 'take care not to encourage laxity of dealing', bearing in mind that the relief granted to the trustee is at the expense of the beneficiaries.²⁹¹

11.225 Generally, 'honesty' requires the trustee to have acted in good faith and for the welfare of the trust.²⁹² 'Reasonable' means 'reasonable as trustees'.²⁹³ Whether or not the trustee sought and acted on legal advice will be relevant to the

²⁸⁵ United Kingdom, *Parliamentary Debates*, House of Lords, 20 July 1896, vol 43, col 117–8 (The Lord Chancellor).

²⁸⁶ *Re Grindey* [1898] 2 Ch 593, 601 (Chitty LJ); *Re Stuart* [1897] 2 Ch 583, 588 (Stirling J); *Re Allsop* [1914] 1 Ch 1, 11 (Cozens-Hardy MR), 21 (Swinfen Eady LJ).

²⁸⁷ *Re Mackay* [1911] 1 Ch 300, 306 (Parker J). See also HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 4 February 2010) [18.450].

²⁸⁸ *Re Tollemache* [1903] 1 Ch 457; *Re Rosenthal* [1972] 1 WLR 1273.

²⁸⁹ *The General Finance Agency and Guarantee Co of Australia Ltd v The National Trustees Executors and Agency Co of Australia Ltd* (1904) 29 VLR 610; *Dalrymple v Melville* (1932) 32 SR (NSW) 596; *Pateman v Heyen* (1993) 33 NSWLR 188, 199–200 (Cohen J); *Craven-Sands v Koch* (2000) 34 ACSR 341, 368 (Bergin J); *Port of Brisbane Co v ANZ Securities Ltd* [2001] QSC 466, [82] (Chesterman J); *The Congregation of the Religious Sisters of Charity of Australia v A-G (Qld)* [2011] QSC 100, [38] (Martin J).

²⁹⁰ *Re Turner* [1897] 1 Ch 536, 542 (Byrne J); *McMahon v Cooper* (1904) 4 SR (NSW) 433, 438 (AH Simpson CJ in Eq).

²⁹¹ *McMahon v Cooper* (1904) 4 SR (NSW) 433, 438 (AH Simpson CJ in Eq). See also *Craven-Sands v Koch* (2000) 34 ACSR 341, 368 (Bergin J); *The Congregation of the Religious Sisters of Charity of Australia v A-G (Qld)* [2011] QSC 100, [39] (Martin J). See also the remarks of Madden CJ in *The General Finance Agency and Guarantee Co of Australia Ltd v The National Trustees Executors and Agency Co of Australia Ltd* (1904) 29 VLR 610, 621.

²⁹² GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [24.2405]. See also *Ede v Ede* [2006] QSC 378, [25]–[29] (Muir J).

²⁹³ *Re Grindey* [1898] 2 Ch 593, 601 (Chitty J).

reasonableness of the trustee's conduct, but reliance on such advice will not automatically entitle a trustee to relief.²⁹⁴

11.226 The fact that a trustee has acted gratuitously is a relevant factor to be taken into account.²⁹⁵ Conversely, the High Court has stated that a professional trustee should be 'particularly careful to act strictly within the line of its duty and would have to establish a strong case before the court would apply the section in its favour'.²⁹⁶

11.227 The requirement for the court to be satisfied that the trustee 'ought fairly to be excused' for the breach is a final safeguard, and the court may, in its discretion, decline to grant relief even if the trustee has acted honestly and reasonably.²⁹⁷ It has been held that 'fairly', in this context, means fair to the trustee 'and to the other people who may be affected'.²⁹⁸

11.228 The trustee must also satisfy the court that he or she ought fairly to be excused for omitting to obtain the directions of the court in the matter in which the trustee committed the breach. This is a reference to section 96 of the Act, under which a trustee may apply to the court for its directions concerning trust property or the management or administration of trust property. A trustee who acts in accordance with the court's directions is, by section 97, deemed to have discharged the trustee's duty in the matter.²⁹⁹ A failure to obtain the directions of the court has also been held as going to whether the trustee has acted reasonably,³⁰⁰ especially where a large estate is at stake.³⁰¹

Corporations Act 2001 (Cth)

11.229 A provision in similar terms to section 76 of the *Trusts Act 1973* (Qld) is found in section 1318 of the *Corporations Act 2001* (Cth). That provision and its

294 *The General Finance Agency and Guarantee Co of Australia Ltd v The National Trustees Executors and Agency Co of Australia Ltd* (1904) 29 VLR 610, 623–4 (Madden CJ; Hood J agreeing).

295 *Re Lord de Clifford's Estate* [1900] 2 Ch 707, 713 (Farwell J). See also *The Congregation of the Religious Sisters of Charity of Australia v A-G (Qld)* [2011] QSC 100, [39] (Martin J).

296 *Partridge v Equity Trustees Executors and Agency Co Ltd* (1947) 75 CLR 149, 165 (Starke, Dixon and Williams JJ). See also *Port of Brisbane Co v ANZ Securities Ltd* [2001] QSC 466, [84] (Chesterman J).

297 See, eg, *The General Finance Agency and Guarantee Co of Australia Ltd v The National Trustees Executors and Agency Co of Australia Ltd* (1904) 29 VLR 610, 623 (Madden CJ; Hood J agreeing).

298 *Marsden v Regan* [1954] 1 WLR 423, 434 (Evershed MR).

299 *Trusts Act 1973* (Qld) ss 96–97 are considered in Chapter 12.

300 See, eg, *Re Gee* [1948] Ch 284, in which Harman J stated (at 297):

I ought, perhaps, to add that the defendant executors sought to rely on s 61 of the *Trustee Act, 1925*. In the upshot this point does not arise, but if I had held that either of the alleged breaches of trust had been committed, I should not have felt able to absolve the executors under this section. No doubt they behaved honestly, but, having chosen to act without the directions of the court, always available to them, they would not in my judgment, have satisfied the second condition, that of acting reasonably, and therefore ought not to be excused.

301 *Partridge v Equity Trustees Executors and Agency Co Ltd* (1947) 75 CLR 149, 165 (Starke, Dixon and Williams JJ).

predecessors also have their origins in the English *Judicial Trustees Act 1896*.³⁰² Section 1318(1) provides:

1318 Power to grant relief

- (1) If, in any civil proceeding against a person to whom this section applies for negligence, default, breach of trust or breach of duty in a capacity as such a person, it appears to the court before which the proceedings are taken that the person is or may be liable in respect of the negligence, default or breach but that the person has acted honestly and that, having regard to all the circumstances of the case, including those connected with the person's appointment, the person ought fairly to be excused for the negligence, default or breach, the court may relieve the person either wholly or partly from liability on such terms as the court thinks fit.

11.230 Under section 1318, it must appear to the court that the person seeking relief has acted 'honestly' and that, 'having regard to all the circumstances of the case, the person ought fairly to be excused'. Previously, under the *Companies Act 1961* (Qld), it had been necessary for it to appear that the person had acted honestly *and reasonably*,³⁰³ but the latter requirement was omitted with the introduction of the *Companies (Queensland) Code 1981*.³⁰⁴

11.231 Commentators have suggested that the requirement to have acted reasonably was removed because it 'did not sit well with breaches of duty constituted by a failure to act with reasonable care'.³⁰⁵

11.232 In *ASIC v Vines*, Austin J noted that that the courts have continued to treat 'reasonableness' as a factor relevant to whether an officer 'ought fairly to be excused' and that honesty alone is not sufficient for relief.³⁰⁶ His Honour suggested that there may be a 'conceptual dilemma' in finding that a person has acted both negligently and reasonably:³⁰⁷

[A] finding that a person has failed to discharge his or her statutory duty of care and diligence under s 232(4) is necessarily a finding of unreasonable conduct or omission. This is because s 232(4) expresses the statutory standard as the degree of care and diligence that a reasonable person in a like position in the corporation would exercise in the corporation's circumstances, and so a finding of departure from the standard is necessarily a finding of failure to act as a reasonable person would act in a like position.

302 *Edwards v A-G* (2004) 60 NSWLR 667, 674 (Spigelman CJ), 689 (Young CJ in Eq). See also *ASIC v Vines* (2005) 65 NSWLR 281, 285 (Austin J), citing *Report of the Company Law Amendment Committee*, Cd 3052 (UK) (1906).

303 *Companies Act 1961* (Qld) s 365.

304 *Companies (Queensland) Code 1981*, s 535.

305 WE Paterson, HH Ednie and HAJ Ford, *A Guide to the National Scheme and Revised Companies Bill 1980* (Butterworths, 1980) [1121].

306 (2005) 65 NSWLR 281, 288–90, discussing *Advance Bank Australia Ltd v FAI Insurances Ltd* (1987) 9 NSWLR 464; *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115; *Maelor Jones Investments (Noarlunga) Pty Ltd v Heywood-Smith* (1989) 54 SASR 285; *Circle Petroleum (Qld) Pty Ltd v Greenslade* (1998) 16 ACLC 1577; *Kenna & Brown Pty Ltd v Kenna* (1999) 32 ACSR 430; *ASIC v Plymin (No 2)* (2003) 21 ACLC 1237; *Wall v Timbertown Community Enterprises Ltd (in liq)* (2002) 42 ACSR 1.

307 (2005) 65 NSWLR 281, 290 (Austin J),

11.233 Austin J held, however, that, although a finding that a defendant's conduct has contravened the statutory duty of care and diligence necessarily implies that the conduct was not reasonable, the degree of reasonableness of the defendant's conduct (that is, the extent to which the conduct has fallen short of the statutory standard of care and diligence) is a relevant consideration when determining whether to relieve the defendant from liability under section 1318.³⁰⁸

'[R]easonableness' is not a black and white concept. It seems to me sensible, and relevant to the exercise of the statutory discretion, to consider the degree to which the defendants' conduct has fallen short of the statutory standard of reasonable care and diligence. In that sense reasonableness (more precisely, the degree of unreasonableness) is a relevant consideration for the court when considering whether to relieve a defendant from contravention of the statutory duty of care and diligence. That, it seems to me, is the concept underlying the judicial pronouncements that reasonableness is still a factor to be considered in applying the exoneration provision, notwithstanding the removal of the word 'reasonably'.

11.234 His Honour concluded that a person may be excused from liability under section 1318 even though the contravening conduct has been found to have been unreasonable.³⁰⁹

This reasoning leads to the conclusion that a person may be excused from liability even though the contravening conduct has been found to have been unreasonable. It is impracticable and probably undesirable to attempt to define 'unreasonableness' for present purposes. A relevant consideration may be, in some circumstances, whether competent expert advice was sought and obtained (*Maelor Jones Investments (Noarlunga)*). It appears that unreasonableness in post-contravention conduct is relevant to be taken into account (*Pacific Acceptance Corporation Ltd v Forsyth* (at 119), per Moffitt J).

Whether section 76 should be consistent with section 1318 of the Corporations Act 2001 (Cth)

11.235 In proceedings where the trustee concerned is a corporation, it is possible that the trustee might be seeking relief from liability under section 76 of the *Trusts Act 1973* (Qld), while its officers might be seeking similar relief under section 1318 of the *Corporations Act 2001* (Cth).

11.236 The main differences between section 76 of the *Trusts Act 1973* (Qld) and section 1318 of the *Corporations Act 2001* (Cth) are the requirements in section 76:

- for the trustee to have acted reasonably (as well as honestly); and
- for the court to be satisfied that the trustee ought fairly to be excused for omitting to obtain the directions of the court.

11.237 As explained above, the reasonableness of an officer's conduct is nevertheless a factor for the court to consider in deciding whether to relieve the officer of liability under section 1318 of the *Corporations Act 2001* (Cth).

308 Ibid 291.

309 Ibid.

11.238 Further, in relation to the second of these matters, the courts have considered a trustee's omission to seek the court's directions as going to the reasonableness of the trustee's conduct.³¹⁰

11-16 Should section 76 of the *Trusts Act 1973* (Qld) be generally retained in its current form? Alternatively, should the section be amended so that it is not necessary for it to appear to the court that:

- (a) the trustee has acted reasonably;
- (b) the trustee ought fairly to be excused for omitting to obtain the directions of the court in the matter in which the trustee committed the breach?

PROTECTION OF THIRD PARTIES

Protection to purchasers and mortgagees dealing with trustees

11.239 Section 46 of the *Trusts Act 1973* (Qld) is a protective provision for purchasers and mortgagees³¹¹ who deal with trustees. It provides:³¹²

46 Protection to purchasers and mortgagees dealing with trustees

A purchaser or mortgagee paying or advancing money to the trustee on a sale³¹³ or mortgage of trust property shall not be concerned to see that such money is wanted, or that no more than is wanted is raised or otherwise as to the application thereof, or that the trustee has power to effect such sale or mortgage. (note added)

11.240 Similar provision is made in several of the other Australian jurisdictions.³¹⁴

11.241 Section 46 provides that a purchaser or mortgagee 'shall not be concerned to see' whether the money being paid or advanced is wanted and that no more money than is wanted is raised, that the money is properly applied, or whether the trustee has the power to effect such a sale or mortgage.

³¹⁰ See [11.228] above.

³¹¹ 'Mortgagee' is defined to include 'every person having an estate or interest regarded at law or in equity as merely a security for money and every person deriving title to the mortgage under the original mortgagee' and 'mortgage' is defined to have 'a corresponding meaning': *Trusts Act 1973* (Qld) s 5(1).

³¹² *Trusts Act 1973* (Qld) s 46 was based on s 17 of the *Trustee Act 1925*, 15 & 16 Geo 5, c 19.

³¹³ 'Sale' is defined to include an exchange: *Trusts Act 1973* (Qld) s 5(1).

³¹⁴ *Trustee Act 1925* (ACT) s 39; *Trustee Act 1925* (NSW) s 39; *Trustee Act 1958* (Vic) s 21; *Trustees Act 1962* (WA) s 44. A similar provision, although in slightly different terms, also applies in New Zealand: *Trustee Act 1956* (NZ) s 22.

Background

11.242 Prior to the introduction of legislation to this effect, the rules that had developed in the Courts of Equity gave purchasers and mortgagees only limited protection from having to 'pay the purchase money over again',³¹⁵ if it were misapplied by the trustees. The payment of the purchase money to, and the receipt of, the trustees was sometimes not sufficient on its own to discharge the purchaser or mortgagee from liability. In certain circumstances, depending on the terms of the trust, a purchaser was also expected to see to the proper application of the money according to the trust so that, for example, the purchaser was bound to see that the proceeds were paid over to the legatee or creditor to whom they were due under the trust.³¹⁶ As Sugden explained:³¹⁷

notwithstanding that a purchaser would, at law, be safe in paying the money to the vendors, although they were trustees, yet equity will, in some cases, bind purchasers to see the money applied according to the trust, if they be not expressly relieved from that obligation by the author of the trust; and where the purchaser is bound to see to the application of the money, great inconvenience frequently ensues, and, in some instances, it would be difficult to compel the purchaser to complete the contract.

Purpose of section 46

11.243 A statutory provision like section 46 relieves a purchaser or mortgagee from the obligation to make the inquiries that might otherwise be expected:³¹⁸

Clause 46 contains a form of provision, common to all modern trustee legislation which is intended to protect a purchaser or mortgagee dealing with a trustee and to dispense with the necessity for the former to inquire whether the trustee is acting within the limits of his power.

11.244 Unlike the equivalent provisions in the other Australian jurisdictions, section 46 expressly saves a purchaser or mortgagee from enquiring whether the trustee has the power to effect the sale or mortgage. In its 1971 Report, the Commission explained that:³¹⁹

³¹⁵ *Balfour v Welland* (1809) 16 Ves Jun 151, 155; 33 ER 941, 943 (Grant MR). See also J Hill, *A Practical Treatise on the Law Relating to Trustees, Their Powers, Duties, Privileges and Liabilities* (Stevens & Norton, 1845) 520:

If he paid over the money to the trustees, and they misapplied it, the parties interested under the trust, would have been entitled to come upon the estate in the hands of the purchaser, and compel the performance of the trust.

³¹⁶ See, eg, *Lloyd v Baldwin* (1748) 1 Ves Sen 173, 173–4; 27 ER 964, 964–5 (Lord Hardwicke LC); *Doran v Wiltshire* (1792) 3 Swans 699, 701; 36 ER 1027, 1028; *Binks v Lord Rokeby* (1817) 2 Mad 227, 238; 56 ER 319, 323 (Plumer MR). 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.

³¹⁷ E Sugden, *A Practical Treatise of the Law of Vendors and Purchasers of Estates* (Sweet, 9th ed, 1834) vol 2, 30.

³¹⁸ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 40.

³¹⁹ *Ibid.*

the foregoing sections [in England and Western Australia] do not protect a purchaser or mortgagee who does not ascertain whether the trustee has a power to sell. Since we think it desirable that a purchaser or mortgagee dealing with a trustee should be put to no more inquiries than a person dealing with an absolute owner, we have accordingly extended the provision so as to ensure that a purchaser or mortgagee from a trustee is saved from making any inquiries regarding the substantive provisions of the trust.

11.245 The Commission considers that section 46 is a beneficial provision, which should be retained.

PROTECTION OF FINANCIAL INSTITUTIONS

11.246 Section 55 of the *Trusts Act 1973* (Qld) gives certain protections to financial institutions acting on the authority of trustee clients. It provides:³²⁰

55 Protection of financial institutions

- (1) Where there are 2 or more trustees of a trust and the trustees by writing under their hands authorise a financial institution—
- (a) to pay bills of exchange drawn upon the financial institution account of the trustees by the trustee or trustees named in that behalf in the authority; or
 - (b) to recognise as a valid endorsement upon any bill of exchange payable to the order of the trustees the endorsement thereon by the trustee or trustees named in that behalf in the authority; or
 - (c) to pay money out of any account of the trust in a financial institution, on presentation of withdrawal forms signed in the manner specified in the authority;

the financial institution acting in pursuance of that authority shall not be deemed privy to a breach of trust on the ground only of notice that the persons giving the authority were trustees, or that the instrument (if any) by which the trust was created did not contain any express power to give such an authority.

- (2) The protection afforded to financial institutions by subsection (1) does not apply in the case of anything done by a financial institution, in pursuance of an authority given under that subsection, after the financial institution has received notice in writing of the revocation, by death or otherwise, of the authority.
- (3) This section does not affect any question of the liability of any trustee for breach of trust in authorising a financial institution as provided by subsection (1).
- (4) Nothing in this section or in any rule of law prevents trustees opening an account named an imprest account at a financial institution and authorising any 1 or more of their number or any other person or persons to operate upon the imprest account.

³²⁰

Trusts Act 1973 (Qld) s 55 applies whether or not a contrary intention is expressed in the instrument (if any) creating the trust: s 31(1).

(5) In this section—

bill of exchange has the same meaning as in the *Bills of Exchange Act 1909* (Cwlth).

11.247 Section 55 applies where two or more trustees give their written authority to a financial institution to:

- pay bills of exchange drawn on the financial institution account of the trustees by the trustee or trustees named in that behalf in the authority;
- recognise, as a valid endorsement on any bill of exchange payable to the order of the trustees, the endorsement thereon by the trustee or trustees named in that behalf in the authority; or
- pay money out of any account of the trust in the financial institution, on presentation of withdrawal forms signed in the manner specified in the authority.

11.248 Where the financial institution acts on that authority, it is not privy to a breach of trust by reason only that it has notice that the persons giving the authority were trustees, or that the trust instrument did not contain any express power to give the authority.³²¹ However, this protection does not apply after the financial institution has received written notice of the revocation of the authority.³²²

11.249 Section 55(3) clarifies that the section does not affect any question of the liability of any trustee for a breach of trust in authorising the financial institution in any of the ways mentioned in section 55(1).

11.250 Finally, section 55(4) ensures that nothing in the section, or in any rule of law, prevents trustees opening an imprest account at a financial institution, and authorising one or more of their number, or any other person, to operate upon the that account.

11.251 Ford and Lee have observed that section 55:³²³

makes it clear that banks are not expected to concern themselves with the fact that moneys deposited with them are subject to any trust. They are not involved in any breach of trust committed by a trustee with respect to any deposit, eg an instruction to pay out moneys made in breach of trust.

11.252 Similar provision is made in the trustee legislation of the ACT, New South Wales, Victoria, Western Australia and New Zealand.³²⁴ In the Northern Territory

³²¹ *Trusts Act 1973* (Qld) s 55(1). This reflects the principle that 'those dealing with trustees should see only the trustees' public legal title and should not become involved with the restricting equitable duties imposed on the trustees': HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (21 November 2012) [9.12190].

³²² *Trusts Act 1973* (Qld) s 55(2). As explained in Chapter 7, the second limb of the rule in *Barnes v Addy* (1874) LR 9 Ch App 244 'exposes a third party to the full range of equitable remedy available against a trustee if that person knowingly or recklessly assists in or procures a breach of trust or of fiduciary duty by a trustee': *ASC v AS Nominees Ltd* (1995) 62 FCR 504, 523 (Finn J).

³²³ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 12 June 2009) [61.5540].

³²⁴ *Trustee Act 1925* (ACT) ss 54–54A; *Trustee Act 1925* (NSW) ss 54–54A; *Trustee Act 1958* (Vic) s 25(2); *Trustees Act 1962* (WA) s 101; *Trustee Act 1956* (NZ) s 81.

and South Australia, the provisions dealing with bank accounts are expressed differently. They give trustees authority to sign cheques and to do other acts, but do not confer protection on the bank.³²⁵

11.253 There is no equivalent provision in England.

Background

11.254 Before the enactment of section 55 of the *Trusts Act 1973* (Qld), section 6 of the *Trustees and Executors Acts Amendment Act 1906* (Qld) dealt with trustees' bank accounts. It provided:

6 Trustee's bank account

Trustees may, by written notice signed by them, authorise any bank to honour cheques, bills, and drafts drawn upon the banking account of the trust by any one or more of such trustees, and to honour the indorsement of any one or more of such trustees upon any cheque, bill, or draft payable to the order of the trustees; and, until such authority is cancelled by written notice to the bank, the latter shall be entitled to pay all cheques, bills, and drafts so drawn, and to honour all such indorsements.

Every trustee who gives or joins in giving any such authority shall be liable for the acts and defaults of the trustee or trustees to whom the authority is given as if they were his own acts and defaults.

11.255 In its 1971 Report, the Commission observed that it is 'clearly essential that trustees should have the power to open a bank account and that a banker should not be subjected to greater liability where he is dealing with a trustee than where he is dealing with a person who is not a trustee'.³²⁶

11.256 However, the Commission was equivocal about including a provision to the effect of section 55. It noted that section 6 of the *Trustees and Executors Acts Amendment Act 1906* (Qld) was enacted at a time when there was no general statutory authority to enable a trustee to appoint an agent.³²⁷ In the Commission's view, it was probable that the reason for the absence of a similar provision in the English *Trustee Act 1925* was that the English Act included a general power for the appointment of agents in section 31 (the equivalent of section 54 of the Queensland Act).³²⁸

11.257 The Commission considered the relative advantages and disadvantages of including a provision in the legislation:³²⁹

³²⁵ *Trustee Act* (NT) sch 3 (*Trustee Act 1907* s 5); *Trustee Act 1936* (SA) s 19. Tasmania used to have a similar provision, but it was omitted by the *Trustee Amendment (Investment Powers) Act 1997* (Tas).

³²⁶ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 43.

³²⁷ *Ibid.*

³²⁸ *Ibid.*

³²⁹ *Ibid.* 44.

The advantage of the particular authority is that it may relieve the minds of bankers. Its disadvantage is that it is probably unnecessary, having regard to the breadth of the general power trustees are now given to employ agents.

11.258 Ultimately, the Commission decided to include the provision.³³⁰

On the whole, then, whilst there is some argument for omitting the provision altogether on the grounds that it is redundant, it is recommended that it be adopted for the easier comprehension by trustees of the extent of their powers.

Whether section 55 should be retained

11.259 Section 55 applies where ‘two or more trustees’ give the relevant authority to a financial institution. The section does not afford any protection to a financial institution where the authority to pay bills of exchange or to pay money out of any account of the trust is given by a sole trustee.

11.260 The authors of the Model Trustee Code were of the view that these provisions are ‘narrow and old fashioned and confuse protection which it is desired to afford banks with an attempt to ensure that there are at least two trustees or a trustee corporation acting’.³³¹ They considered that the provisions could discourage sole trustees from disclosing to the bank that they are acting as a trustee, which might well put the beneficiaries in a worse position because.³³²

the bank will not be put on guard if its client draws a cheque which would arouse suspicion if it were drawn by a person known to be a trustee — eg, a cheque in reduction of his personal overdraft on another account of his kept in the same bank.

11-17 Should section 55 of the *Trusts Act 1973* (Qld) be retained or omitted?

INDEMNITY

11.261 Section 112 of the *Trusts Act 1973* (Qld) provides:

112 Indemnity

This Act, and every order purporting to be made under this Act, shall be a complete indemnity to all persons for any acts done pursuant thereto; and it shall not be necessary for any person to inquire concerning the propriety of the order, or whether the court had jurisdiction to make the same.

330 Ibid.

331 WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 128.

332 Ibid 128–9.

11.262 Similar provision is also made in the trustee legislation of the other Australian jurisdictions, New Zealand and England.³³³

Historical background

11.263 An early form of this provision was found in the English *Transfer of Trust Estates Act 1830*. That provision declared that the Act shall be:³³⁴

a full and complete Indemnity and Discharge to the Governor and Company of the Bank of *England*, and all other Companies and Societies, and their Officers and Servants, for all Acts and Things done or permitted to be done pursuant thereto, and that such Acts and Things shall not be questioned or impeached by any Court of Law or Equity to their Prejudice or Detriment.

11.264 A similar indemnity was included in the English *Trustee Act 1850*, in relation to court orders vesting the right to transfer stock (either in persons or in companies or the Bank of England).³³⁵ That provision was replaced by section 49 of the English *Trustee Act 1893*, and then by section 66 of the English *Trustee Act 1925*, which remains in force today.

11.265 In Queensland, a provision in similar terms to section 49 of the English *Trustee Act 1893* (omitting the reference to the Bank of England) was included in section 58 of the *Trustees and Executors Act 1897* (Qld). That provision was carried over into the *Trusts Act 1973* (Qld) without amendment.³³⁶

Effect of provisions

11.266 Section 112 of the *Trusts Act 1973* (Qld), and its counterparts in the other jurisdictions, provide that the Act, and every order purporting to be made under it, is a complete indemnity for any acts done pursuant thereto. They further provide that it is not necessary for any persons to inquire concerning the propriety of the order, or whether the court had jurisdiction to make it.³³⁷

³³³ *Trustee Act 1925* (ACT) s 103; *Trustee Act 1925* (NSW) s 103; *Trustee Act* (NT) s 80; *Trustee Act 1936* (SA) s 93; *Trustee Act 1898* (Tas) s 65; *Trustee Act 1958* (Vic) s 78; *Trustees Act 1962* (WA) s 100; *Trustee Act 1956* (NZ) s 80; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 66.

³³⁴ *Transfer of Trust Estates Act 1830*, 11 Geo IV & 1 Wm IV, c 60, s 33.

³³⁵ *Trustee Act 1850*, 13 & 14 Vict, c 60, s 20. A general indemnity was then extended to the whole of the 1850 Act by *Trustee Extension Act 1852*, 15 & 16 Vict, c 55, s 7.

³³⁶ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 73. As enacted, this provision was included in s 108 of the *Trusts Act 1973* (Qld), but was later renumbered as s 112: see *Criminal Proceeds Confiscation and Other Acts Amendment Act 2009* (Qld) s 83(2).

³³⁷ See, eg, *Re Spurling* [1909] 1 Ch 199, which concerned an order purporting to be made under the English *Lunacy Act 1890*, authorising a receiver to receive and give a discharge for dividends payable to the adult in relation to securities with the Bank of England. The Bank objected, claiming that the order was not made in such a way as to give protection to either the Bank or to anybody else acting upon the faith of the order. It was held that the bank may safely act upon the order. Further, it was held that the objection ought not to have been made at all, as it clearly fell within the general indemnity provision in s 333 of the *Lunacy Act 1890*, (which was in similar terms to the indemnity provision in the trustee legislation). Fletcher Moulton LJ noted (at 207) that 'the Bank must obey court orders, like anybody else'. See also the comments of Farwell LJ at 208.

11.267 It was noted, in relation to section 49 of the English *Trustee Act 1893*, that the indemnity was particularly relevant to transfers of stocks and shares that were directed by the court under vesting orders.³³⁸

11.268 In Queensland, the ACT and Tasmania, the provisions are expressed in more general terms than the provisions in other jurisdictions, providing a complete indemnity to 'all persons' or, in the ACT, to 'anyone'.³³⁹ In the other jurisdictions, the indemnity is provided in more specific terms — to 'all companies associations and persons' (New South Wales),³⁴⁰ 'all companies and persons' (the Northern Territory and South Australia),³⁴¹ 'all chartered and incorporated banking companies and all other companies and associations whatsoever, and all persons' (Victoria),³⁴² banks, companies, societies, associations or persons (Western Australia and New Zealand),³⁴³ and 'the Bank of England, and to all other persons' (the United Kingdom).³⁴⁴

11.269 In its 1971 Report, the Commission commented that:³⁴⁵

It seems strange that in other States the similar provision has been in effect restricted in operation by references (eg in s 100 of the Western Australian Act) to 'every bank, company, society, association or person'. It could conceivably be argued that some persons or bodies might be excluded as not being *ejusdem generis* with this list.

11.270 The Commission noted, in any event, that 'person' is defined in section 36 of the *Acts Interpretation Act 1954* (Qld) to include a body corporate.³⁴⁶

338 FG Champernowne and H Johnston, *The Trustee Act, 1893, And Other Recent Statutes Relating to Trustees With Notes* (William Clowes & Sons, 1904) 161.

339 *Trusts Act 1973* (Qld) s 112. See also *Trustee Act 1925* (ACT) s 103(1); *Trustee Act 1898* (Tas) s 65.

340 *Trustee Act 1925* (NSW) s 103(1).

341 *Trustee Act* (NT) s 80; *Trustee Act 1936* (SA) s 93.

342 *Trustee Act 1958* (Vic) s 78.

343 *Trustees Act 1962* (WA) s 100; *Trustee Act 1956* (NZ) s 80.

344 *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 66.

345 Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 73.

346 *Ibid.* *Acts Interpretation Act 1954* (Qld) s 36 defines 'person' to include 'an individual and a corporation'.

Chapter 12

Powers of the Court

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INTRODUCTION

12.1 Part 7 of the *Trusts Act 1973* (Qld) deals with the jurisdiction of the court to make orders in relation to trustees and trust and other property, including orders to:¹

- appoint or remove a trustee;
- vest property in a new or continuing trustee or in some other person;
- authorise a trustee to deal with trust property when it is expedient to do so;
- authorise the variation of the beneficial interests under a trust;
- give advice or directions concerning trust property or a trustee's powers;
- review the acts, omissions or decisions of a trustee; and
- authorise the remuneration of a trustee.

1

Except where otherwise provided in pt 7 of the *Trusts Act 1973* (Qld), the provisions of that Part apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust: s 79.

12.2 These statutory powers supplement the court's inherent jurisdiction to 'supervise trustees in the administration of trusts'.²

12.3 This chapter gives an overview of the provisions contained in Part 7 of the *Trusts Act 1973* (Qld) and raises questions for consideration.

12.4 With one exception,³ the powers conferred by Part 7 are conferred on the Supreme Court or a judge thereof.⁴ The issue of whether the jurisdiction to hear and determine trusts disputes under the *Trusts Act 1973* (Qld) should also be conferred on another court or tribunal is discussed in Chapter 15.

APPOINTMENT OF TRUSTEES

12.5 Division 2 of Part 7 of the *Trusts Act 1973* (Qld) deals with the court's statutory powers to appoint and remove trustees.

The court's statutory power to appoint, remove or replace a trustee

12.6 The court has both an inherent and a statutory jurisdiction to appoint, remove and replace trustees.⁵ The statutory jurisdiction arises under section 80 of the *Trusts Act 1973* (Qld), which provides:

80 Power of court to appoint new trustees

- (1) The court may, 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, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.
- (2) In particular and without prejudice to the generality of subsection (1) the court may make an order appointing a new trustee in substitution for a trustee who desires to be discharged, or who is convicted of a crime or misdemeanour, or is a bankrupt, or is a corporation that is under official management or is in liquidation or has been dissolved, or who for any other reason whatsoever appears to the court to be undesirable as a trustee.
- (3) An order under this section and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

² *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, 734; *Colston v McMullen* [2010] QSC 292, [38]–[40] (White J).

³ See *Trusts Act 1973* (Qld) s 86. For the purposes of that section, 'court' is defined to include the District Court, or a District Court judge, where the amount or subject matter is within the jurisdiction of the District Court: s 86(3).

⁴ See *Trusts Act 1973* (Qld) s 5(1) (definition of 'court').

⁵ *Letterstedt v Broers* (1884) 9 App Cas 371; *Miller v Cameron* (1936) 54 CLR 572; *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709; *Re Matheson* (1994) 121 ALR 605, 613–14 (Spender J); *Colston v McMullen* [2010] QSC 292, [38]–[40] (White J).

- (4) Nothing in this section confers power to appoint an executor or administrator.

12.7 Section 80(1) empowers the court to appoint a new trustee or trustees in place of, or in addition to, any existing trustee or trustees or otherwise where there is no existing trustee. The court's jurisdiction is limited to the circumstances in which it is 'expedient'⁶ to make an appointment and it is 'inexpedient, difficult or impracticable to do so without the assistance of the court'.⁷

12.8 Without limiting the court's general power under section 80(1), section 80(2) lists the particular circumstances in which the court can make an order appointing a new trustee in place of an existing trustee. These circumstances are where the existing trustee desires to be discharged, or is convicted of a crime or misdemeanour, or is a bankrupt, or is a corporation that is under official management or is in liquidation or has been dissolved, or for any other reason whatsoever appears to the court to be undesirable as a trustee.

12.9 In exercising both its inherent and statutory 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 order the removal of 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.⁸ The court will not lightly exercise the power to remove a trustee.⁹ In *Re Whitehouse*, Macrossan J said:¹⁰

So far as the position of CM Whitehouse as trustee is concerned, there is an undoubted power of removal. The question is whether it should be exercised. The leading authority appears to be *Letterstedt v Broers* (1884) 9 AC 371. At p 386 of the report of that case Lord Blackburn, in delivering judgment, said that even though charges of misconduct against a trustee were not made out or were greatly exaggerated, so that the trustee was justified in resisting the charges, yet if the court was 'satisfied that the continuation of the trustee would prevent the trust being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of trust has given the trust estate'. At p 387 he continued:

⁶ 'Expedient' has been held to mean 'conducive to, or fit and proper or suitable' having regard to 'the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound execution of the powers conferred upon the trustee': *Re Roberts* (1983) 70 FLR 158, 162 (O'Leary J), applying *Miller v Cameron* (1936) 54 CLR 572, 580–1 (Dixon J). See also *Porteous v Rinehart* (1998) 19 WAR 495; *Wendt v Orr* [2004] WASC 28, [250] (Commissioner Johnson QC).

⁷ There is judicial authority that suggests that, where there is a valid existing power of appointment and a person willing to exercise it, the court will not exercise its power: *Re Sutton* (1885) WN 122; *Re Gibbons' Trusts* (1882) WN 12; *Re Higginbottom* [1892] 3 Ch 132, 135 (Kekewich J). Cf *Will of Tunstall* [1921] VLR 559; *Re Gadd* (1883) 23 Ch D 134, 137 (Jessel MR; Baggallay and Lindley LJJ agreeing).

⁸ *Letterstedt v Broers* (1884) 9 App Cas 371, 387; *Miller v Cameron* (1936) 54 CLR 572, 575 (Latham CJ), 579 (Starke J), 580–1 (Dixon J); *Re Whitehouse* [1982] Qd R 196, 205–6 (Macrossan J); *Re Matheson* (1994) 121 ALR 605, 613–14 (Spender J); *Colston v McMullen* [2010] QSC 292, [38]–[40] (White J); *Coral Vista Pty Ltd v Halkeas* [2010] QSC 449, [49] (White J).

⁹ *Miller v Cameron* (1936) 54 CLR 572, 580–1 (Dixon J); *Re Whitehouse* [1982] Qd R 196, 205–6 (Macrossan J); *Re Matheson* (1994) 121 ALR 605, 613–14 (Spender J); *Porteous v Rinehart* (1998) 19 WAR 495; *Wendt v Orr* [2004] WASC 28, [250] (Commissioner Johnson QC); *Coral Vista Pty Ltd v Halkeas* [2010] QSC 449, [49] (White J).

¹⁰ [1982] Qd R 196, 205–6.

In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details of great nicety.

Dixon J (as he then was) in *Miller v Cameron* (1936) 54 CLR 572 at p 580, stated as follows:

The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee. In deciding to remove a trustee the court forms a judgment based upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such a judgment must be largely discretionary. A trustee is not to be removed unless circumstances exist which afford ground upon which the jurisdiction may be exercised.

12.10 Therefore, the determination of whether or not it is proper to remove a trustee will depend on the particular circumstances involved. The court has recognised, for example, that, although there are cases that suggest that bankruptcy is a *prima facie* ground for the removal of a trustee,¹¹ there is no strict rule that a bankrupt trustee must be removed from office.¹²

12.11 Section 81 of the *Trusts Act 1973* (Qld) deals with the effect of an appointment by the court. It provides:

82 Powers of new trustee

Every trustee appointed by the court has, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in the trustee, the same powers, authorities and discretions, and may in all respects act, as if the trustee had been originally appointed a trustee by the instrument (if any) creating the trust.

12.12 The trustee legislation of the other Australian jurisdictions, New Zealand and England also confers a statutory jurisdiction on the court to appoint, remove or replace a trustee.¹³

¹¹ *Chambers v Jones* (1902) 2 SR (NSW) Eq 177; *Re Barker's Trusts* (1875) 1 Ch D 43.

¹² *Miller v Cameron* (1936) 54 CLR 572, 575, 579 (Starke J), 580–1 (Dixon J); *Re Matheson* (1994) 121 ALR 605, 613–15 (Spender J). In *Re Matheson*, Spender J declined to exercise his discretion to remove the sole trustee of a family trust who was also a bankrupt. In that case, no material had been placed before the court as to the trustee's fitness to continue in that role, the future management of the trust in the trustee's absence or whether it was practicable for someone other than the court to appoint a new trustee.

¹³ *Trustee Act 1925* (ACT) s 70; *Trustee Act 1925* (NSW) s 70; *Trustee Act* (NT) s 27; *Trustee Act 1936* (SA) s 36; *Trustee Act 1898* (Tas) s 32; *Trustee Act 1958* (Vic) ss 48–50; *Trustees Act 1962* (WA) s 77; *Trustee Act 1956* (NZ) s 51; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 41.

VESTING ORDERS

12.13 The *Trusts Act 1973* (Qld) empowers the court to order, in a wide range of circumstances, the vesting of trust property in new or continuing trustees (a vesting order) where it is not possible to obtain the requisite participation of a trustee or a former trustee.¹⁴ The effect of such an order is to vest the property to which it relates in the persons named in the order without any conveyance, transfer or assignment. A vesting order ensures that ‘a trust can achieve its purpose for which it was created and that those persons entitled to an interest pursuant to, or as a result of, a trust can receive the benefit or interest to which they are entitled’.¹⁵

12.14 The court also has statutory powers under the Act to make orders, in situations not connected with the transmission of trusteeship, to vest the legal estate or interest in property where, in practice, it is impossible or difficult to deal with the property. For example, the court can make a vesting order in respect of property affected by contingent rights, mortgagees under a legal disability and property the subject of an order for specific performance. The court can also make a vesting order to effect a sale or mortgage of trust property in particular circumstances.

12.15 As an alternative to making a vesting order, the Act also empowers the court, if it is more convenient, to make an order appointing a person to convey the property or release any contingent right, and having the same effect as a vesting order.

12.16 Most of the provisions conferring these statutory powers have their origins in nineteenth-century English trustee legislation.¹⁶ Prior to that time, the Court of Chancery had no power to vest the legal estate in the trust property by decree or order, but had power by virtue of several statutes either to direct trustees under a disability to convey or to appoint persons to convey for them.¹⁷

12.17 These statutory vesting provisions continue to be included in the trustee legislation in England.¹⁸ They are also contained in the trustee legislation of the other Australian jurisdictions and New Zealand.

¹⁴ The provisions of the *Trusts Act 1973* (Qld) that deal with the vesting of trust property in new and continuing trustees other than by a court order are discussed in Chapter 5.

¹⁵ *Re Purkiss* [1999] 3 VR 223, 228 (Warren J).

¹⁶ *Trustee Act 1850*, 13 & 14 Vict, c 60; *Trustee Extension Act 1852*, 15 & 16 Vict, c 55. These provisions are now found in the *Trustee Act 1925*, 15 & 16 Geo 5, c 19, ss 44–56. See also HB Ince, *A Systematic Arrangement of the Trustee Act 1850 and the Extension Act of 1852* (VR Stevens & VS Norton, 1858) 1; HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 March 2009) [8640].

¹⁷ FG Champernowne and H Johnston, *The Trustee Act, 1893, And Other Recent Statutes Relating to Trustees With Notes* (William Clowes & Sons, 1904) 110. See also the discussion of vesting orders in HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 March 2009) [8640].

¹⁸ *Trustee Act 1925*, 15 & 16 Geo 5, c 19, ss 44–56.

The circumstances in which a vesting order may be made

12.18 Section 82(2) of the *Trusts Act 1973* (Qld) deals with the situation where the transmission of trusteeship is involved. It lists the following circumstances in which the court may make a vesting order:

- the court appoints or has appointed a new trustee;
- a new trustee has been appointed out of court under any statutory or express power;
- a trustee retires or has retired;
- a trustee is under a disability;
- a trustee is out of the jurisdiction of the court;
- a trustee cannot be found;
- a trustee, being a corporation, has ceased to carry on business or is under official management or is in liquidation or has been dissolved;
- a trustee neglects or refuses to convey any property, or to receive the dividends or income of any property, or to sue or recover any property according to the direction of the person absolutely entitled to the same for 28 days next after a request in writing has been made to the trustee by that person;
- it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any property;
- it is uncertain whether the last trustee known to have been entitled to or possessed of any property is alive or dead;
- there is no personal representative of the last trustee who was entitled to or possessed of any property, it is uncertain who is the personal representative of that trustee, or the personal representative of that trustee cannot be found;
- any person neglects or refuses to convey any property, or to receive the dividends or income of any property, or to sue for or recover any property in accordance with the terms of an order of the court;
- a deceased person was entitled to or possessed of any property and his or her personal representative is under a disability; and
- property is vested in a trustee and it appears to the court to be expedient to make a vesting order.

12.19 Section 82(2) is concerned with three kinds of situation: first, where there is a change in the composition of the trustees; secondly, where circumstances exist that disable a trustee from acting or acting effectively; and thirdly, where a trustee is refusing to deal with the trust property in accordance with his or her duties.

12.20 Where any of the matters mentioned in section 82(2) are applicable, they are extended, under section 82(3), to a trustee entitled to or possessed of any property either solely or jointly with any other person and whether by way of mortgage or otherwise. This ensures that the matters mentioned in section 82(2) are not limited to sole trustees.

The scope of a vesting order

12.21 Section 83 of the *Trusts Act 1973* (Qld) deals with the scope of a vesting order. It provides:

83 In whom property to be vested etc

- (1) Where the making of a vesting order is consequential on the appointment of a new trustee, the property shall be vested in the persons who, on the appointment, are the trustees.
- (2) Where the making of a vesting order is consequential on the retirement of 1 or more of a number of trustees, the property may be vested in the continuing trustees alone.
- (3) Subject to the provisions of subsection (1), a vesting order may vest the property in any such person in any such manner and for any such estate or interest as the court may direct, or may release or dispose of any contingent right to such person as the court may direct.
- (4) The fact that a vesting order is founded or purports to be founded on an allegation of the existence of any of the matters mentioned or referred to in section 82 shall be conclusive evidence of the matter so alleged in any court upon any question as to the validity of the order.
- (5) Nothing in this Act shall prevent the court from directing a reconveyance or the payment of costs occasioned by any such order if improperly obtained, or from making a further vesting order.
- (6) A vesting order shall not vest in any person shares which are not fully paid up unless that person applies for the order or consents to the order being made or unless the court directs that the person's consent be dispensed with.

12.22 Where the making of a vesting order is consequential on the appointment of a new trustee, section 83(1) vests the property in the persons who, on the appointment, are the trustees. Where the making of a vesting order is consequential on the retirement of one or more of a number of trustees, section 83(2) vests the property in the continuing trustees alone. These provisions 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'.¹⁹

12.23 Subject to the provisions of section 83(1), the court is given a broad discretion under section 83(3) to make an order vesting trust property in 'any such person in any such manner and for any such estate or interest as the court may

¹⁹

Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 60.

direct', or releasing or disposing of 'any contingent right to such person as the court may direct'.

12.24 Ford and Lee have observed that, 'if a vesting order were held to be void, rather than voidable, on the grounds that it was made on the court's erroneous belief, difficulties would arise in relation to any transaction such as a sale, entered into in reliance of the validity of the order'.²⁰

12.25 Section 83(4) provides that the fact that a vesting order is, or purports to be, founded on an allegation of the existence of any of the circumstances mentioned in section 82 is conclusive evidence of the matter so alleged in any court upon any question as to the validity of the order. Section 83(5) ensures that there is nothing in the legislation that would prevent the court from directing a reconveyance or the payment of costs occasioned by any such order if improperly obtained, or from making a further vesting order.

12.26 Section 83(6) deals with the liability arising from partly paid shares. It ensures that the court cannot make a vesting order vesting in any person shares which are not fully paid up unless that person applies for the order or consents to the order being made or unless the court directs that the person's consent be dispensed with.

Vesting orders made in other cases

12.27 The *Trusts Act 1973* (Qld) also empowers the court to make vesting orders in a range of other cases that are not related to the transmission of trusteeship.

Orders as to contingent rights of unborn persons

12.28 Section 84 of the *Trusts Act 1973* (Qld) provides:

84 Orders as to contingent rights of unborn persons

Where any property is subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence, would become entitled to or possessed of the property on any trust, the court may make an order releasing the property from the contingent right or may make an order vesting in any person the estate or interest to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the property.

12.29 This provision applies where any property is subject to a contingent right in an unborn person (or class of unborn persons) who, on coming into existence, would become entitled to or possessed of the property on any trust. In this circumstance, the court has the power to order the release of the property from the contingent right²¹ or to vest in any person the estate or interest that the unborn

²⁰ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 March 2009) [8500].

²¹ A 'contingent right', in relation to land, is defined in the Act to include '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 also a right of entry, whether immediate or future, and whether vested or contingent': *Trusts Act 1973* (Qld) s 5(1) (definition of 'contingent right').

person (or class of unborn persons) would, on coming into existence, be entitled or possessed in the property.

12.30 The purpose of section 84 is to facilitate dealings in land where the contingent right of any unborn person in the land would make it impossible for a purchaser to obtain a conveyance from living persons of the whole interest in the land (including that of any unborn person).²² It has been explained that:²³

The section will apply wherever the trust property consists of a contingent right in property which would arise in the future and vest in some person or some class of persons unborn, as trustees. In order to liberate the property itself from this possibility, the Court may make an order releasing the property from the contingent right; and, to give effect to the trust, the Court may cause the contingent right to vest immediately in such persons as it thinks fit.

12.31 The provision is in virtually identical terms to section 16 of the English *Trustee Act 1850*, which has been retained in subsequent revisions of the English *Trustee Acts*.²⁴ A similar provision is also found in the trustee legislation of the other Australian jurisdictions and in New Zealand.²⁵

12.32 There are few reported cases about the form of vesting order provided for in section 84 and its counterparts in other jurisdictions. In *Wake v Wake*,²⁶ Stewart V-C held that the provision enabled the court 'to effect a sale and to make a good title to purchasers', free of the contingent rights of unborn children, while also making a vesting order as to the rights and interests of the unborn children.

12.33 When the earlier English provision,²⁷ and other related vesting provisions,²⁸ were first enacted in the mid-1800s, the real property of a deceased person passed directly to the person named in the will, or if there was no will, to the deceased's heir. This presented a problem for a creditor of the deceased unless the creditor could proceed against the recipient of the deceased's real property. In limited cases, land could be sold and the proceeds applied to satisfy the debt owed to the creditor. Procedural difficulties, however, often arose since the land vested in

²² Law Reform Sub-Committee of the Law Society (WA), *The Law of Trusts*, Report (1961), Supplement 75–6. See also Law Reform Commission of British Columbia, *Obsolete Remedies Against Estate Property: Estate Administration Act, Part 9*, Report No 91 (1987), 11–13; Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 1, 160.

²³ Law Reform Sub-Committee of the Law Society (WA), *The Law of Trusts*, Report (1961), Supplement 75–6.

²⁴ *Trustee Act 1850*, 13 & 14 Vict, c 60, s 16 was replaced by *Trustee Act 1893*, 56 & 57 Vict, c 53, s 27, which was in turn replaced by *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 45.

²⁵ *Trustee Act 1925* (ACT) s 72; *Trustee Act 1925* (NSW) s 72; *Trustee Act* (NT) s 29; *Trustee Act 1936* (SA) s 38; *Trustee Act 1898* (Tas) s 35; *Trustee Act 1958* (Vic) s 53; *Trustees Act 1962* (WA) s 80; *Trustee Act 1956* (NZ) s 53. The Northern Territory, South Australian and New Zealand provisions (like their English counterpart) are limited to where 'any interest in land' is subject to a contingent right of an unborn person or class of unborn persons.

²⁶ (1853) 1 WR 283, 284.

²⁷ *Trustee Act 1850*, 13 & 14 Vict, c 60, s 16.

²⁸ *Debt Recovery Act 1830*, 1 Wm 4, c 47, ss 11–12; *Trustee Act 1850*, 13 & 14 Vict, c 60, ss 29–30; *Trustee Extension Act 1852*, 15 & 16 Vict, c 55, s 1. Sections 88 and 89 of the *Trusts Act 1973* (Qld) are based on ss 29 and 30 of the *Trustee Act 1850*, 13 & 14 Vict, c 60.

the deceased's successors on his or her death.²⁹ These legislative provisions addressed these difficulties by providing that the person who received an interest in land by will or on intestacy (including an unborn person) was a trustee of the land, and the court was given the power to discharge a contingent interest of an unborn person from the land itself and to vest that interest in another person on behalf of the unborn person.³⁰ In such cases, the contingent right was not extinguished, but became attached to the proceeds of sale.³¹

12.34 Since that time, the law in relation to the devolution of real property has been reformed, so that real property now vests in the deceased person's personal representative,³² and is available to satisfy the deceased's debts and liabilities before it is transferred to the deceased's successors. This reform has had the effect of removing the procedural difficulties attending decrees for the sale of a deceased's land to meet creditors' claims where the land had devolved upon the devisee or heir.³³

12.35 Although the earlier English provision was previously used, in conjunction with other vesting provisions, to effect good title in the context of the sale of land for the payment of the debts of a deceased person,³⁴ the provision is not limited to that purpose.³⁵

²⁹ Law Reform Commission of British Columbia, *Obsolete Remedies Against Estate Property: Estate Administration Act, Part 9*, Report No 91 (1987) 13.

³⁰ *Debt Recovery Act 1830*, 1 Wm 4, c 47, ss 11–12; *Trustee Act 1850*, 13 & 14 Vict, c 60, ss 16, 29–30; *Trustee Extension Act 1852*, 15 & 16 Vict, c 55, s 1. See, eg, *Bank of Australasia v Balbirnie Vans* (1861) 1 W & W Eq 120.

³¹ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 16 September 2010) [8520].

³² See, in Queensland, *Succession Act 1981* (Qld) s 45.

³³ Law Reform Commission of British Columbia, *Obsolete Remedies Against Estate Property: Estate Administration Act, Part 9*, Report No 91 (1987) 13.

³⁴ See, eg, *Bank of Australasia v Balbirnie Vans* (1861) 1 W & W Eq 120.

³⁵ See also *Trusts Act 1973* (Qld) s 88, which has its origins in s 29 of the English *Trustee Act 1850*, 13 & 14 Vict, c 60. That provision specifically empowered the Court to wholly discharge the contingent right of unborn persons when a decree was made for the sale of real estate for the payment of debts. However, s 1 of the *Trustee Extension Act 1852*, 15 & 16 Vict, c 55 extended that provision and other provisions to apply to sales for any purpose, and to sales directed by both orders and decrees. Section 1 of the *Trustee Extension Act 1852* was replaced by s 30 of the *Trustee Act 1893*, 56 & 57 Vict, c 53, which was in turn replaced by s 47 of the *Trustee Act 1925*, 15 & 16 Geo 5, c 19. Section 88 of the *Trusts Act 1973* (Qld) is set out at [12.44] below.

For example, in *Wake v Wake* (1853) 1 WR 283, a petition was made to the court to discharge the contingent rights of unborn children in the property in favour of purchasers and to make an order vesting in the purchasers the contingent estates of unborn persons. The petition was made in the context of a claim by the testator's wife for the payment of arrears in her annuity. The court had ordered that certain land be sold to meet the claim, and the parties brought the petition to overcome concerns raised by the purchasers. It was contended that s 16 of the English *Trustee Act 1850* (the equivalent of s 84 of the *Trusts Act 1973* (Qld)), read together with s 1 of the English *Trustee Extension Act 1852* (the equivalent of s 88 of the *Trusts Act 1973* (Qld)), authorised the court to make an order wholly releasing and discharging the contingent rights of unborn children, and to declare them trustees as they come into existence, whenever any decree should have been made for the sale of lands for any purpose whatever. Stuart V-C made the orders as sought, observing that the object of the Acts was plainly 'to enable the Court to effect a sale and make a good title to purchasers'.

12.36 Section 84 of the *Trusts Act 1973* (Qld), however, cannot be used as a form of variation of trusts provision to extinguish the contingent rights of an unborn child.³⁶

Vesting order in place of conveyance by mortgagee under disability

12.37 Section 85 of the *Trusts Act 1973* (Qld) provides:

85 Vesting order in place of conveyance by mortgagee under disability

Where any person entitled to or possessed of any property by way of mortgage is under a disability the court may make an order vesting or releasing or disposing of the property in like manner as in the case of a trustee under like disability.

12.38 The purpose of this provision is to empower the court to make a vesting order where a person who is entitled to or possessed of the property by way of a mortgage is under a disability and therefore cannot participate as mortgagee in a transfer when needed.³⁷ Section 85 has its origins in English trustee legislation.³⁸ There are similar provisions in the other Australian jurisdictions and in New Zealand.³⁹

Contracts by guardian on behalf of infants

12.39 Section 86 of the *Trusts Act 1973* (Qld) is unique to Queensland. It empowers the court, in certain cases, to authorise a guardian of an infant or 'some other fit and proper person' to enter into a contract on behalf of the infant.⁴⁰ Section 86 provides:

86 Contracts by guardians on behalf of infants

- (1) The court, where it considers it necessary or desirable in the interest of an infant or of an infant and some other person, may on the application of a guardian or next friend of the infant, make an order appointing the guardian of the infant, or some other fit and proper person, to enter into any agreement for or on behalf of such infant.

³⁶ *Re McCready* [2004] NSWSC 887, [27] (Barrett J). In Queensland, the court has a statutory jurisdiction under s 95 of the *Trusts Act 1973* (Qld) to consent to an arrangement to vary or revoke a trust. Section 95 is discussed at [12.77] ff below.

³⁷ Law Reform Sub-Committee of the Law Society (WA), *The Law of Trusts*, Report (1961), Supplement 76.

³⁸ *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 46. In contrast to s 85 of the *Trusts Act 1973* (Qld), s 46 of the English *Trustee Act 1925* applies only in cases where the mortgagee was an infant; and does not extend to all cases where the mortgagee was under a legal disability. It also applies only to mortgaged land, and not to other forms of mortgaged property.

³⁹ *Trustee Act 1925* (ACT) s 74; *Trustee Act 1925* (NSW) s 74; *Trustee Act 1898* (Tas) s 36; *Trustee Act 1958* (Vic) s 54; *Trustees Act 1962* (WA) s 81; *Trustee Act 1956* (NZ) s 54.

⁴⁰ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 61. The effect of the provision is to preserve and extend the powers previously conferred by s 27 of the *Settled Land Act 1886* (Qld) and s 53 of the *Trustees and Incapacitated Persons Act 1867* (Qld).

(2) An agreement entered into in accordance with this section shall be as effectual and binding as if the infant had been a person of full age and mental capacity and had himself or herself entered into that agreement.

(3) In this section—

court includes, where the amount or subject matter is within the jurisdiction of the District Court, the District Court or a District Court judge.

12.40 Section 86 also enables the District Court or a District Court judge to exercise the power to authorise a compromise or other contract on behalf of a minor in cases otherwise falling within the jurisdiction of that court.⁴¹

Vesting orders etc in relation to infant's beneficial interests

12.41 Section 87 of the *Trusts Act 1973* (Qld) empowers the court to make various orders, including vesting orders, in relation to an infant's beneficial interest in any property where there is no trustee. It provides:

87 Vesting orders etc. in relation to infant's beneficial interests

(1) Where an infant is beneficially entitled to any property of which there is no trustee, the court, where it considers it necessary or desirable in the interest of the infant or of the infant and some other person, may on the application of a guardian or next friend of the infant make an order—

(a) appointing the guardian of the infant, or some other fit and proper person, to sell and convey, lease, mortgage or charge the property, or otherwise to exercise such of the powers as are conferred by or under this Act on a trustee, as the court may in the order specify; or

(b) in the case of stock or a thing in action—vesting in the guardian of the infant, or some other fit and proper person, the right to transfer or call for a transfer of that stock, or to receive the dividends or income thereof, or to sue for and recover that thing in action, upon such terms as the court thinks fit.

(2) An act done in accordance with this section shall be as effectual and binding as if the infant had been a person of full age and mental capacity and had himself or herself done that act.

12.42 Under section 87(1)(a), the court may authorise the appointee to exercise 'such powers as are conferred by or may be conferred under this Act on a trustee'. This gives the court the flexibility to confer on the appointee any power that it considers is expedient for the appointee to have (such as an order made under section 94 of the *Trusts Act 1973* (Qld) or an order for the maintenance or advancement of the infant).

⁴¹

The jurisdiction of the court is discussed in Chapter 15.

12.43 A provision to the general effect of section 87 is also contained in the trustee legislation of the ACT, Victoria, Western Australia and England.⁴²

Vesting order consequential on order for sale or mortgage of land

12.44 Section 88 of the *Trusts Act 1973* (Qld) applies where the court has given a judgment or made an order directing the sale or mortgage of any land. It empowers the court, if it considers it expedient, to make a vesting order. It provides:

88 Vesting order consequential on order for sale or mortgage of land

Where the court gives a judgment or makes an order directing the sale or mortgage or the release of a mortgage of any land, every person who is entitled to or possessed of the land, or entitled to a contingent right therein, and is a party to the action or proceeding in which the judgment or order is given or made, or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee for the purposes of this Act; and the court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate as the court thinks fit in the purchaser or mortgagor or in any other person.

12.45 Section 88 follows the form of an earlier English provision which was enacted to facilitate the vesting of land following the sale of the land.⁴³ A provision of similar effect is included in the trustee legislation of the other Australian jurisdictions, and of New Zealand and England.⁴⁴

Vesting order consequential on judgment for specific performance etc

12.46 Section 89 of the *Trusts Act 1973* (Qld) provides:

89 Vesting order consequential on judgment for specific performance

Where a judgment is given for the specific performance of a contract concerning any land, or for the partition, or sale in lieu of partition, or exchange, of any land, and generally when a judgment is given for the conveyance of any land either in cases arising out of the doctrine of election or otherwise, the court may declare that any of the parties to the action are trustees of the land or any part thereof within the meaning of this Act, or may declare that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any person deceased who was during the person's lifetime a party to the contract or transactions concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of this Act, and thereupon the court may make a vesting order, relating to the rights of those persons, born and unborn, as if they had been trustees.

⁴² *Trustee Act 1925* (ACT) s 73; *Trustee Act 1958* (Vic) s 55; *Trustees Act 1962* (WA) s 82; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 53.

⁴³ *Trustee Extension Act 1952*, 15 & 16 Vict, c 55, s 1, which was replaced by *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 47. See n 35 above.

⁴⁴ *Trustee Act 1925* (ACT) s 76; *Trustee Act 1925* (NSW) s 76; *Trustee Act* (NT) s 32; *Trustee Act 1893* (SA) s 32; *Trustee Act 1898* (Tas) s 38; *Trustee Act 1958* (Vic) s 56; *Trustees Act 1962* (WA) s 83; *Trustee Act 1956* (NZ) s 55; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 47.

12.47 The section applies where the court has given a judgment for the specific performance of a contract concerning any land, or the sale, partition, exchange or conveyance of any land, or for the conveyance of any land. Its object is to ensure that the judgment can be enforced in the event that the defendant refuses to obey it, or if the interest of a person under a disability, or an unborn person, is involved.

12.48 If the court has given such a judgment, the court may:

- declare that:
 - any of the parties to the proceeding are trustees of the land or any part of it within the meaning of the *Trusts Act 1973* (Qld); or
 - the interests of unborn persons who might claim under any party to the proceeding, or under the will or voluntary settlement of any deceased person, who was during his or her lifetime a party to the contract or transactions concerning which the order is made, are the interests of persons who, on coming into existence, would be trustees within the meaning of the Act; and
- make a vesting order relating to the rights of those persons (born and unborn) as if they had been trustees.

12.49 The provision originally appeared in England as section 30 of the *Trustee Act 1850*, and now appears as section 48 of the *Trustee Act 1925*.⁴⁵ A similar provision is contained in the trustee legislation of the other Australian jurisdictions and New Zealand.⁴⁶

The effect of a vesting order

12.50 Section 90 of the *Trusts Act 1973* (Qld) states the effect of a vesting order. It provides:

90 Effect of vesting order

- (1) Subject to the provisions of any other Act, a vesting order vests the property to which it relates in the persons named in the order without any conveyance, transfer or assignment.
- (1A) Such property shall vest in the persons named as trustees or otherwise as appears from the order.
- (2) Where more than 1 person is named in the order, the order vests as aforesaid the property to which it relates in those persons as joint tenants.

⁴⁵ The provision has been applied in *Basnett v Moxon* (1875) LR 20 Eq 182 (interest of an heir); *Hall v Hale* (1884) 51 LT 226 (court appointed a person to execute a lease, the unsuccessful defendant in a specific performance action having failed to do so); *Re Bolton* (1888) WN 243 (court dealt with the interest of a tenant in tail in common who was under a disability, where the land was sold in lieu of partition).

⁴⁶ *Trustee Act 1925* (ACT) s 77; *Trustee Act 1925* (NSW) s 77; *Trustee Act* (NT) s 34; *Trustee Act 1893* (SA) s 34; *Trustee Act 1898* (Tas) s 39; *Trustee Act 1958* (Vic) s 57; *Trustees Act 1962* (WA) s 84; *Trustee Act 1956* (NZ) s 56.

- (3) Where, by reason of the provisions of any other Act or for the protection of any trust property to which the order relates, it is requisite that the order should be notified to or registered or recorded by the registrar or other person having the duty or function of registering or recording the order, the trustees shall—
- (a) produce the order to the registrar or such other person; and
 - (b) do such other act or acts as may properly be required by the registrar or such other person;
- for the purpose of effecting the notification, registration or recording of that order.
- (4) Where the consent of any person is requisite to the conveyance, transfer or assignment of any property to which a vesting order relates the order shall, unless it otherwise specifies, be subject to such consent; but the consent may be obtained after the making of the order by the persons named in the order.
- (5) The order, or the registration or recording thereof, shall not operate as a breach of covenant or condition or occasion any forfeiture of any lease, under-lease, agreement for lease, or other property.
- (6) The person in whose favour a vesting order as trustee is made has and may exercise in relation to the property the subject of the order all the powers by this Act conferred on or capable of being exercised by a trustee; but the court may by the order limit or, under section 95, enlarge those powers as it thinks fit.

12.51 As stated in section 90(1), the effect of a vesting order is to vest trust property in the person named in the order without any conveyance, transfer or assignment. Section 90(2) makes it clear that, if the order names more than one person, the order vests the property to which it relates in those persons as joint tenants.

12.52 Where the property, in order to be vested or divested, requires that the vesting in the new trustee must be notified, registered or recorded by the registrar or some other person, section 90(3) requires the trustees to take the necessary steps to have the vesting notified, registered or recorded.

12.53 In some cases, a trust instrument might require the consent of a specified person before the trust property can be transferred. To avoid the possibility that the vesting of property under section 90(1) or (2) before that consent is obtained might invalidate the vesting, section 90(4) 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 execution of the instrument of appointment or discharge.⁴⁷

12.54 It may sometimes happen 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

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In *Perkins v Permanent Trustee Co Ltd* (1923) 23 SR (NSW) 358, Street CJ in Eq held (at 364) that there was no rigid rule that the consent must always be obtained before the trustee's power was exercised, especially where the power was exercised for the benefit of the person whose consent was required.

assign such rights without licence or consent'.⁴⁸ Section 90(5) ensures that an instrument of appointment or discharge that effects a change in trustees does not operate as a breach of covenant or occasion the forfeiture of any lease.

12.55 Section 90(6) clarifies that, while a person in whose favour a vesting order as trustee is made has and may exercise in relation to the property the subject of the order all the powers that may be exercised by a trustee, the court can limit or, under section 95, enlarge those powers as it thinks fit.

12.56 Section 90 of the *Trusts Act 1973* (Qld), and the similar provisions in the other Australian jurisdictions and New Zealand,⁴⁹ are derived from an English provision that was enacted in 1925.⁵⁰ The Queensland provision is the most modern and comprehensive of these provisions.

Other powers relating to vesting orders

12.57 In addition to the provisions discussed earlier in this chapter, the *Trusts Act 1973* (Qld) also confers on the court power to make other orders that are consequential to, or in lieu of, its powers to make vesting orders.

Power to appoint persons to convey in lieu of vesting order

12.58 Section 92 of the *Trusts Act 1973* (Qld) provides that the court may, in all cases where it may make a vesting order under the Act, if it is more convenient, appoint a person to convey the land or release the contingent right. It also provides that a conveyance or release by that person in conformity with the order will have the same effect as a vesting order made under the appropriate provision of the Act.

12.59 The provision recognises that, while, in most cases, it may be more convenient for the court to make a vesting order, in some cases, it may be preferable to appoint a person to convey the land or release the contingent right.⁵¹ For example, in *Hancox v Spittle*,⁵² numerous estates in land, which had been devised to the defendants (several of whom were under a legal disability), were sold in several lots. To avoid making a large number of vesting orders, the court made an order under the equivalent English provision appointing the plaintiff's solicitor to convey the estates of the defendants.

⁴⁸ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 13 March 2009) [8430].

⁴⁹ *Trustee Act 1925* (ACT) s 78; *Trustee Act 1925* (NSW) s 78; *Trustee Act* (NT) s 35; *Trustee Act 1936* (SA) s 39; *Trustee Act 1898* (Tas) s 40; *Trustee Act 1958* (Vic) s 58; *Trustees Act 1962* (WA) s 85; *Trustee Act 1956* (NZ) s 57.

⁵⁰ *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 49.

⁵¹ FG Champernowne and H Johnston, *The Trustee Act, 1893, And Other Recent Statutes Relating to Trustees With Notes* (William Clowes & Sons, 1904) 110.

⁵² (1857) 3 Sm & G 478; 65 ER 745.

12.60 A provision to the general effect of section 92 is contained in the trustee legislation of all Australian jurisdictions, and in New Zealand and England.⁵³

Directions etc as to transferring stock or thing in action

12.61 Section 91 of the *Trusts Act 1973* (Qld) enables the court to make declarations and directions concerning the manner in which the right to transfer any stock or thing in action under the provisions of the Act is to be exercised.

12.62 A similar provision is found in the trustee legislation of the Northern Territory, South Australia, Tasmania, Victoria and Western Australia.⁵⁴

Vesting orders of charity property

12.63 Section 93 of the *Trusts Act 1973* (Qld) clarifies that the powers conferred by the Act as to vesting orders may be exercised for 'vesting any property in any trustee of a charity or society over which the court would have jurisdiction upon action duly instituted'. The provision applies whether the appointment of the trustee was by instrument under a power or by the court under its general or statutory jurisdiction.

12.64 There are comparable provisions in the trustee legislation of the other Australian jurisdictions and New Zealand.⁵⁵

THE COURT'S JURISDICTION TO MAKE OTHER ORDERS

12.65 Division 4 of Part 7 of the *Trusts Act 1973* (Qld) deals with the court's powers to make other orders. These include orders to vary trusts in particular circumstances.

Power of court to authorise dealings with trust property

12.66 Historically, there was some doubt about the extent of the court's inherent jurisdiction to authorise a trustee to carry out transactions not expressly authorised by the trust instrument. However, in *Re New*,⁵⁶ the English Court of Appeal held that the court has a limited and exceptional inherent jurisdiction to authorise a trustee to deviate from the terms of the trust if there is an emergency and the

⁵³ *Trustee Act 1925* (ACT) s 79; *Trustee Act 1925* (NSW) s 79; *Trustee Act* (NT) s 36; *Trustee Act 1936* (SA) s 40; *Trustee Act 1898* (Tas) s 41; *Trustee Act 1958* (Vic) s 60; *Trustees Act 1962* (WA) s 87; *Trustee Act 1956* (NZ) s 58; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 50.

⁵⁴ *Trustee Act* (NT) ss 37–38; *Trustee Act 1936* (SA) s 41; *Trustee Act 1898* (Tas) s 34(7); *Trustee Act 1958* (Vic) s 59; *Trustees Act 1962* (WA) s 86.

⁵⁵ *Trustee Act 1925* (ACT) s 80; *Trustee Act 1925* (NSW) s 80; *Trustee Act* (NT) s 42; *Trustee Act 1936* (SA) s 45; *Trustee Act 1898* (Tas) s 45; *Trustee Act 1958* (Vic) s 61; *Trustees Act 1962* (WA) s 88; *Trustee Act 1956* (NZ) s 61.

⁵⁶ [1901] 2 Ch 534.

variation is necessary to salvage the trust property:⁵⁷

As a rule, the court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not, on the face of the instrument creating the trust, authorised by its terms ... But in the management of a trust estate ... it not infrequently happens that some peculiar state of circumstances arises for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may be even essential, for the benefit of the estate and in the interest of all the cestuis que trust, that certain acts should be done by the trustees which in ordinary circumstances they would have no power to do. In a case of this kind, which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by the emergency that has arisen and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being sui juris or in existence, then it may be right for the Court ... to sanction on behalf of all concerned such acts on behalf of the trustees.

12.67 It was subsequently held in *Re Tollemache*⁵⁸ that the rule laid down in *Re New* is limited to cases of emergency and does not cover every case in which a particular act is required to be done merely because it is beneficial to the estate.

12.68 It has also been clarified that the inherent jurisdiction of the court does not extend to re-arrangements of or changes to the beneficial interests under the trust (as distinct from re-arrangements or reconstructions of the trust property itself).⁵⁹

12.69 The subsequent enactment of section 57 of the English *Trustee Act 1925* broadened the court's powers by conferring on it a statutory jurisdiction to authorise a trustee to undertake certain dealings with trust property where the court considers that the dealing is expedient in the management or administration of the trust property.

12.70 This provision has been adopted, in some cases with minor variations, in all Australian jurisdictions and in New Zealand.⁶⁰

12.71 In Queensland, the equivalent of the English provision is section 94 of the *Trusts Act 1973* (Qld). It provides:

⁵⁷ Ibid 544–5 (Romer LJ). See also the comments in *Re Downshire Settled Estates* [1953] Ch 218, 235 (Evershed MR and Romer LJ); *Chapman v Chapman* [1954] AC 429, 445 (Lord Simonds LC); and *Riddle v Riddle* (1952) 85 CLR 202, 227 (Fullagar J).

⁵⁸ [1903] 1 Ch 955.

⁵⁹ *Re Downshire Settled Estates* [1953] Ch 218, 235 (Evershed MR and Romer LJ).

⁶⁰ *Trustee Act 1925* (ACT) s 81; *Trustee Act 1925* (NSW) s 81; *Trustee Act* (NT) s 50A; *Trusts Act 1973* (Qld) s 94; *Trustee Act 1936* (SA) s 59B; *Trustee Act 1898* (Tas) s 47; *Trustee Act 1958* (Vic) s 63; *Trustees Act 1962* (WA) s 89; *Trustee Act 1956* (NZ) s 64. Under the ACT, New South Wales and South Australian provisions, the court may by its order confer on a trustee power to adjust the respective rights of the beneficiaries as the court thinks fit: *Trustee Act 1925* (ACT) s 81(1)(a); *Trustee Act 1925* (NSW) s 81(1)(a); *Trustee Act 1936* (SA) s 59B(1)(a). For the purposes of those provisions, an adjustment refers to the altered conditions of the trust property as a result of the conferring or exercise of the new power. However, the court 'cannot increase or decrease the interests of beneficiaries' or 'subvert the beneficial disposition in the trust instrument': *Perpetual Trustee Co Ltd v Godsall* [1979] 2 NSWLR 785, 795 (Rath J).

94 Court's jurisdiction to make other orders

- (1) Where in the opinion of the court any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, retention, expenditure or other transaction is expedient in the management or administration of any property vested in a trustee, or would be in the best interests of the persons, or the majority of the persons, beneficially interested under the trust, but it is inexpedient or difficult or impracticable to effect the disposition or transaction without the assistance of the court, or it or they can not be effected by reason of the absence of any power for that purpose vested in the trustee by the trust instrument (if any) or by law, the court may by order confer upon the trustee, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions (if any) as the court may think fit, and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne, and as to the incidence thereof between capital and income.
- (2) The court may from time to time rescind or vary any order made under this section, or may make any new or further order; but such a rescission or variation of any order shall 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.
- (3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

The scope of the court's power

12.72 Section 94 of the *Trusts Act 1973* (Qld) authorises the court, either generally or in any particular instance, to give trustees 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.

12.73 The courts have construed the test of expediency liberally. In *Riddle v Riddle*,⁶¹ a case which considered the equivalent New South Wales provision, Williams J defined 'expedient' as meaning 'advantageous', 'desirable', or 'suitable to the circumstances of the case',⁶² while Dixon J described the term as meaning

⁶¹ (1952) 85 CLR 202.

⁶² *Ibid* 224.

'expedient in the interests of the beneficiaries'.⁶³ Dixon J also said that the provision.⁶⁴

is a provision conferring very large and important powers upon the Court which depend upon the Court's opinion of what is expedient, a criterion of the widest and most flexible kind. The power necessarily carries with it responsibilities of equal extent. The responsibilities imposed involve business and financial considerations, but responsibilities of that description have always fallen on courts of administration. I do not think that the powers given by [the provision] were intended to be restricted by any implications.

12.74 The words 'management or administration' have a limiting effect upon the jurisdiction of the court under section 94.⁶⁵ Nonetheless, it has been held that:⁶⁶

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)

12.75 The court must also be satisfied that it is 'inexpedient or difficult or impracticable' to effect the disposition or transaction without the assistance of the court, or that the disposition or transaction cannot be effected because there is an absence of power in the trust instrument.⁶⁷ The purpose of including the requirement that it must be 'inexpedient or difficult or impracticable' to effect the disposition or transaction without the assistance of the court is to make it clear that the court has jurisdiction where the trustee has no clear power or where there are difficulties in the exercise of a power by the trustee.⁶⁸ The circumstances in which a disposition or transaction cannot be effected because there is an absence of power in the trust instrument are wide enough to extend to the situation where the trust instrument does not confer the power or prohibits the exercise of the power.⁶⁹

12.76 The power conferred by the provision is limited to the managerial supervision and control of trust property on behalf of beneficiaries, and does not

63 Ibid 214.

64 Ibid.

65 *Re Craven's Estate (No 2)* [1937] Ch 431, 436 (Farwell J); *Degan v Lee* (1939) 39 SR (NSW) 234, 241–2 (Nicholas J); *Riddle v Riddle* (1952) 85 CLR 202, 222 (Williams J), 227 (Fullagar J); *Re Downshire Settled Estates* [1953] Ch 218, 245–8 (Evershed MR and Romer LJ); *Chapman v Chapman* [1954] AC 429; *Perpetual Trustee Co Ltd v Godsall* [1979] 2 NSWLR 785; *Re Earl of Strafford* [1980] Ch 28, 45 (Buckley LJ); *Re Estate of Barns* [2011] VSC 314; *Ballard v A-G (Vic)* (2010) 30 VR 413, 419–20 (Kyrour J).

66 *Ballard v A-G (Vic)* (2010) 30 VR 413, 419–20 (Kyrour J), considering the equivalent Victorian provision.

67 The equivalent Western Australian provision contains a similar phrase: *Trustees Act 1962* (WA) s 89(1).

68 Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 65.

69 *Perpetual Trustees WA Ltd v A-G (WA)* (1992) 8 WAR 441; *Stein v Sybmore Holdings Pty Ltd* [2006] NSWSC 1004, [63]–[64] (Campbell J); *Barry v Borlas Ltd* [2012] NSWSC 831, [19] (White J).

include any modification of the beneficial interests created in that property.⁷⁰ This is because variations of the beneficial interests under the trusts are not matters in the 'management or administration' of the trust property and 'trust property' cannot be equated with the beneficial interests in the trust property.⁷¹ However, it would also appear that an application to confer powers for the purposes of a proposed transaction is within the jurisdiction of the court, if the exercise of the powers conferred by the court under the provision might only incidentally affect the beneficial interests in the trust property.⁷² In appropriate circumstances, the court has a statutory power under section 95 of the *Trusts Act 1973* (Qld) to consent to an arrangement to vary or revoke the beneficial interests under a trust.⁷³

Power to authorise the variation of the beneficial interests under the trust

12.77 The rule that trustees must obey the directions contained in the trust instrument is subject to modification if all parties beneficially interested are of full age and capacity and concur in putting an end to or amending the trust. However, in some cases, it may not be possible to obtain the concurrence of all the beneficiaries, either because some of them are not of full age or capacity, or because potential beneficiaries include unascertained or unborn persons.⁷⁴

12.78 It was previously assumed that the court had jurisdiction to sanction on behalf of minors and potential beneficiaries a rearrangement of the provisions of a settlement that was for their benefit and to which they would (if well advised) have agreed if they could. In England, these types of applications had become 'fairly common' in court chambers by the end of the second World War.⁷⁵

12.79 In the landmark English case of *Chapman v Chapman*, the Court of Appeal⁷⁶ and the House of Lords (on appeal)⁷⁷ held that the court does not have unlimited inherent jurisdiction to approve, on behalf of infants and potential beneficiaries, arrangements to vary the beneficial interests in the trust fund, even though every beneficiary who is of full age and capacity consents, and the change is shown to be for the benefit of infants and potential beneficiaries.

12.80 However, the Judges who so decided did not agree among themselves as to the limits of the court's inherent jurisdiction. The majority of the House of Lords (Lord Simonds, Lord Moreton and Lord Asquith) held that the jurisdiction of the

⁷⁰ *Re Downshire Settled Estates* [1953] Ch 218, 245–8 (Evershed MR and Romer LJ); *Chapman v Chapman* [1954] AC 429; *Re Lyell (decd)* [1977] 1 NZLR 713, 716–17 (Beattie J); *Perpetual Trustee Co Ltd v Godsall* [1979] 2 NSWLR 785, 795 (Rath J).

⁷¹ *Re Downshire Settled Estates* [1953] Ch 218, 245, 248 (Evershed MR and Romer LJ) (not disapproved on appeal); *Chapman v Chapman* [1954] AC 429; *Re Lyell (decd)* [1977] 1 NZLR 713, 716–17 (Beattie J); *Perpetual Trustee Co Ltd v Godsall* [1979] 2 NSWLR 785, 795 (Rath J).

⁷² *Re Downshire Settled Estates* [1953] Ch 218, 245, 248 (Evershed MR and Romer LJ).

⁷³ See [12.84] below.

⁷⁴ See the discussion in Ontario Law Reform Commission, *The Law of Trusts*, Report (1984) vol 2, 389 ff.

⁷⁵ Law Reform Committee (UK), *Court's Power to Sanction Variation of Trusts*, 6th Report (1957) Cmnd 310, 4.

⁷⁶ *Re Downshire Settled Estates* [1953] Ch 218.

⁷⁷ *Chapman v Chapman* [1954] AC 429.

court (except, perhaps in the case of 'salvage') is limited to cases where there is a genuine dispute about the existence of the rights of the beneficiaries, or genuine difficulty in enforcing those rights.⁷⁸ They drew a distinction between compromises of disputed rights (which, in their view, did not involve any alteration of beneficial interests) and alterations of beneficial interests where the rights of the parties are undisputed. Lord Cohen, on the other hand, considered that a compromise of disputed rights effected an alteration of beneficial interests just as much as a rearrangement of undisputed rights. He shared the view of the majority of the Court of Appeal (Evershed MR and Romer LJ) that the question of whether the court had an inherent jurisdiction did not depend on whether rights were in dispute or not, but depended on whether the proposed scheme represented a bargain between different classes of beneficiary (for example, those interested in income on the one hand and those interested in capital on the other) or merely amounted to a rearrangement of beneficial interests within the same class.⁷⁹

12.81 The House of Lords was concerned only with the inherent jurisdiction of the Court, and not with its statutory jurisdiction under section 57 of the *Trustee Act 1925*. The Court of Appeal, on the other hand, expressed the view that section 57 was limited to questions touching the management of trust property, and had no bearing on the beneficial interests arising under the trust.⁸⁰

12.82 The decision in *Chapman v Chapman* created distinctions between cases in which trusts could be varied and cases in which they could not be varied, which were not relevant to the merits of the proposed variations. In England, concern about the anomalies created by the decision led, on the recommendation of the Law Reform Committee made to the Lord High Chancellor,⁸¹ to the enactment of the English *Variation of Trusts Act 1958*. The principal provision of that Act created a new statutory jurisdiction which enables the court to consent, on behalf of a beneficiary who is otherwise unable to consent, to an arrangement between the beneficiaries to vary the terms of a trust, if the carrying out of the arrangement would be advantageous for that beneficiary.⁸²

12.83 This provision is mirrored in the trustee legislation of Queensland, South Australia, Tasmania, Victoria, Western Australia and New Zealand.⁸³

12.84 In Queensland, the equivalent of the English provision is section 95 of the *Trusts Act 1973* (Qld). It provides:

78 Ibid 444–7, 457–68, 469–71.

79 Ibid 472–4.

80 *Re Downshire Settled Estates* [1953] Ch 218, 247 (Evershed MR and Romer LJ).

81 Law Reform Committee (UK), *Court's Power to Sanction Variation of Trusts*, 6th Report (1957) Cmnd 310, 8–10.

82 *Variation of Trusts Act 1958*, 6 & 7 Eliz 2, c 53, s 1. A beneficiary of full age and capacity is not within the court's jurisdiction because he or she is able to approve of any arrangement so far as his or her interest is concerned. Accordingly, the court cannot dispense with such a beneficiary's consent: *Re Holt's Settlement* [1969] 1 Ch D 100.

83 *Trusts Act 1973* (Qld) s 95; *Trustee Act 1936* (SA) s 59C; *Variation of Trusts Act 1994* (Tas) ss 13–14; *Trustee Act 1958* (Vic) s 63A; *Trustees Act 1962* (WA) s 90; *Trustee Act 1956* (NZ) s 64A.

95 Power of court to authorise variations of trust

- (1) Where property, whether real or personal, is held on trusts arising, whether before or after the commencement of this Act, under any instrument creating the trust, the court may if it thinks fit by order approve on behalf of—
- (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting; or
 - (b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class (as the case may be) if the said date had fallen or the said event had happened at the date of the application to the court; or
 - (c) any person unborn; or
 - (d) any person in respect of any discretionary interest of the person under protective trusts where the interest of the principal beneficiary has not failed or determined;

any arrangement (by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts.

- (1A) However, except—
- (a) in the case of an unascertained person whose entitlement is dependent on a future event which the court is satisfied is unlikely to occur; or
 - (b) where the court approves of an arrangement on behalf of a person referred to in subsection (1)(d);

the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person.

- (2) In subsection (1)—

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.⁸⁴

- (3) Notice of an application to the court for an order pursuant to subsection (1) shall be given to such persons as the court may direct.
- (4) Nothing in subsections (1) to (3) shall apply to trusts affecting property settled by Act of Parliament.

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Trusts Act 1973 (Qld) s 64 is discussed in Chapter 10.

- (5) Nothing in this section shall limit the powers conferred by section 94.
(note added)

The nature and scope of the power

12.85 Section 95 of the *Trusts Act 1973* (Qld) applies where property is held upon trusts arising under any instrument creating the trust, other than trusts affecting property settled by an Act of Parliament.⁸⁵

12.86 Section 95(1) authorises the Supreme Court, if it thinks fit, by order to approve on behalf of a person who comes within any one of four specified categories of persons ‘any arrangement (by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts’.⁸⁶

12.87 The four categories of persons are specified in section 95(1).

12.88 The term ‘arrangement’ in the provision is ‘deliberately used in the widest possible sense so as to cover any proposal which any person may put forward for varying or revoking the trusts’.⁸⁷ An arrangement may be proposed by any person; however, to be effective, it must be acceptable to all of the adult, ascertained and capable beneficiaries.⁸⁸ The court’s power to approve an arrangement is not conditional on the consent of those beneficially or otherwise interested under the trust.⁸⁹ In giving approval to an arrangement, a court does not itself amend or vary the trusts. As explained by Lord Reid in *Re Holmden’s Settlement Trusts* (which considered the equivalent provision in the English *Variation of Trusts Act*):⁹⁰

Under the *Variation of Trusts Act* the court does not itself amend or vary the trusts of the original settlement. The beneficiaries are not bound by variations because the court has made the variation. Each beneficiary is bound because he has consented to the variation. If he was not of full age when the arrangement was made he is bound because the court was authorised by the Act to approve of it on his behalf and did so by making an order. If he was of full age and did not in fact consent he is not affected by the order of the court and he is not bound. So the arrangement must be regarded as an arrangement made by the beneficiaries themselves. The court merely acted on behalf of or as representing those beneficiaries who were not in a position to give their own consent and approval.

85 *Trusts Act 1973* (Qld) s 95(1), (4).

86 *Trusts Act 1973* (Qld) s 95(1).

87 *Re Steed’s Will Trusts* [1960] Ch 407, 419 (Lord Evershed MR; Willmer and Upjohn LJJ agreeing). Lord Evershed MR also observed (at 419–20) that the approval of the trustees is not essential, although the court will pay regard to the trustees’ views.

88 If any adult beneficiary (other than those on behalf of whom the court may consent) refuses to accept a proposal for variation, this will prevent its implementation.

89 *Re Longman’s Settlement Trusts* [1962] 1 WLR 455; *Perpetual Trustees Victoria Ltd v Bams* [2012] VSCA 77.

90 [1968] AC 685, 701.

12.89 Section 95(3) requires that notice of an application to the court for an order pursuant to section 95(1) be given to any person as the court may direct. Such a person could include the settlor of the trust.

12.90 Section 95(5) ensures that section 95 does not limit the powers of the court conferred by section 94 of the Act.

The requirement of benefit

12.91 Section 95(1A) provides that the court cannot approve an arrangement on behalf of any person 'unless the carrying out thereof would be for the benefit of that person'. Thus, the requirement of benefit is a limitation on the court's power to approve an arrangement for the variation of trusts.

12.92 The court must consider the benefit that will accrue to each affected beneficiary, and must be satisfied that the proposed variation is reasonable and one that an adult would be prepared to accept, while appearing to be advantageous to the beneficiary. In *Re Cohen's Settlement Trusts*, Stamp J said:⁹¹

In my judgment, the court has to be satisfied in the case of each individual infant that on balance the proposed variation is for his benefit. Similarly, in my judgment, the court must be satisfied that the proposed variation is for the benefit of any individual person who may hereafter come into existence and become interested under the trusts of the settlement ... The court does not have to be satisfied that by the effect of a proposed variation each individual infant is bound to be better off than he would otherwise have been, but that that infant is making a bargain which is a reasonable one and one which an adult would be prepared to make.

12.93 The 'benefit' referred to in subsection (1A) is not limited to a financial benefit or other benefits of a tangible nature. In some cases, the court has held that it is sufficient that there is a benefit of a moral or social kind.⁹² However, the court will not approve a financially disadvantageous arrangement on behalf of a beneficiary where the compensation or advantage otherwise provided to the beneficiary is of a 'remote, indirect and insubstantial kind'.⁹³

Exceptions to the requirement of benefit

12.94 Section 95(1A) makes two exceptions to the requirement of benefit.

12.95 The first exception applies where the court makes an arrangement on behalf of a person who comes within section 95(1)(d) — that is, any person in respect of any discretionary interest of the person under protective trusts where the interest of the principal beneficiary has not failed or determined. A similar exception applies in Victoria, Western Australia and New Zealand.

⁹¹ [1965] 1 WLR 1229, 1236. See also *Re Blocksidge* [1997] 1 Qd R 234, 237 (Williams J).

⁹² *Re Pittari* [1967] VR 800; *Re Holt's Settlement* [1969] 1 Ch 100, 121 (Megarry J); *Re Weston's Settlements* [1969] 1 Ch 223; *Re CL* [1969] 1 Ch 587; *Re Remnant's Settlement Trusts* [1970] Ch 560.

⁹³ *Re Christmas's Settlement Trusts* [1986] 1 Qd R 372, 378 (McPherson J).

12.96 The second exception, unique to the Queensland provision, relates to remote contingent claims. The court does not have to ensure that an arrangement of which it approves is for the benefit of ‘an unascertained person whose entitlement is dependent on a future event which the court is satisfied is unlikely to occur’. The rationale for introducing this provision was to counter the difficulty that the courts had in assessing the benefit of beneficiaries with remote contingent claims.⁹⁴

Judicial advice and directions

12.97 In some circumstances, a trustee may be unsure about what course of action he or she should take in the administration of an estate. It has been observed that:⁹⁵

A trustee is not obliged to take any risks by deciding in a doubtful case what are the respective rights of the beneficiaries, or ... by exercising a power or discretion where there is a possibility that the propriety of such exercise might afterwards be called in question by the beneficiaries.

12.98 Where a trustee is in doubt as to the course of action to be adopted, he or she is entitled to seek the advice or directions of the court.⁹⁶ A trustee who follows the advice or directions of the court is protected from any claim by a beneficiary or creditor in respect of the course of action adopted.⁹⁷

12.99 This jurisdiction, which was originally exercised by the Court of Chancery in England, ‘was intended to assist or relieve personal representatives’.⁹⁸ It is said that:⁹⁹

Without the benevolent jurisdiction of the Chancellor the lot of the personal representative would have been intolerable. Since he was liable on the one hand to account, so, on the other hand, he might for his indemnity apply to the Court of Chancery to administer the estate amongst the parties interested. Once the estate was administered in accordance with such a decree the personal representative was relieved of personal liability. In that legitimate desire he was encouraged by the Court, which interpreted its function as one of helping rather than hindering the administrator.

12.100 It has also been said that ‘trustees are responsible to the court for what they do, and that has the corollary that trustees must feel free to approach the Court in difficult situations’.¹⁰⁰

⁹⁴ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 65–6.

⁹⁵ JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2132].

⁹⁶ *Re Atkinson* [1971] VR 612, 615 (Gillard J). See also *Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All ER 198, 201 (PC).

⁹⁷ *Re Atkinson* [1971] VR 612, 615 (Gillard J). That protection is dependent on making proper disclosure to the court of the relevant facts.

⁹⁸ GP Barton, ‘The Ascertainment of Missing Beneficiaries: The New Zealand Experience’ (1960–1962) 5 *University of Western Australia Law Review* 257, 259.

⁹⁹ *Ibid* 259–60.

Historical background

12.101 Historically, in order for a trustee or personal representative to obtain the court's advice or directions, he or she was required to institute a suit for the general administration of the estate:¹⁰¹

There were formerly in the Court of Chancery numbers and numbers of cases in which an administration suit was necessarily instituted, not because the parties desired the administration of the estate generally, but because there were certain questions—they may have been minute, they may have been limited, they may have been very important—over which the Court would have had no control without the existence of an administration suit.

12.102 As a result, a practice developed by which a trustee or personal representative would commence an administration action, which was stayed after the trustee had obtained the court's advice or directions.¹⁰² However, the commencement of an administration action was a costly and inefficient way to obtain relief, particularly where the only relief sought was the court's advice or directions on a fairly narrow issue.¹⁰³

12.103 In 1859, the enactment in England of *Lord St Leonards' Act* created a procedure under which a trustee or a personal representative could, without instituting proceedings for the administration of an estate, obtain the opinion, advice or directions of the court in relation to any question concerning the 'management or administration' of the trust or estate property.

12.104 Section 30 of *Lord St Leonards' Act* provided:

Any Trustee, Executor, or Administrator shall be at liberty, without the Institution of a Suit, to apply by Petition to any Judge of the High Court of Chancery, or by Summons upon a written Statement to any such Judge at Chambers, for the Opinion, Advice, or Direction of such Judge on any Question respecting the Management or Administration of the Trust Property or the Assets of any Testator or Intestate, such Application to be served upon or the Hearing thereof to be attended by all Persons interested in such Application, or such of them as the said Judge shall think expedient; and the Trustee, Executor, or Administrator acting upon the Opinion, Advice, or Direction given by the said Judge shall be deemed, so far as regards his own Responsibility, to have discharged his Duty as such Trustee, Executor, or Administrator in the Subject Matter of the said Application; provided nevertheless, that this Act shall not extend to indemnify any Trustee, Executor, or Administrator in respect of any Act done in accordance with such Opinion, Advice, or Direction as aforesaid, if such Trustee, Executor, or Administrator shall have been guilty of any Fraud or wilful Concealment or Misrepresentation in obtaining such Opinion, Advice, or

100 *Re Permanent Trustee Nominees (Canberra) Ltd* (Unreported, Supreme Court of New South Wales, Young J, 24 June 1985).

101 *Re Wilson* (1885) 28 Ch D 457, 460 (Pearson J). Administration proceedings may be instituted for a wide range of reasons, not merely in order to obtain advice or directions from the court: see JR Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (Sweet & Maxwell, 19th ed, 2008) [60–01].

102 *Application of Macedonian Orthodox Community Church St Petka Inc (No 2)* (2005) 63 NSWLR 441, 445 (Palmer J).

103 *Ibid.* See also *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623, 634 (Young J).

Direction; and the Costs of such Application as aforesaid shall be in the Discretion of the Judge to whom the said Application shall be made.

12.105 Under this provision, a trustee or personal representative who acted on the opinion, advice or direction of the court was taken, as regards his or her own liability, to have discharged his or her duty as trustee or personal representative. However, that protection applied only if the trustee or personal representative was not guilty of any fraud, wilful concealment or misrepresentation in obtaining the opinion, advice or direction.

12.106 Section 30 of *Lord St Leonards' Act* was repealed in 1893,¹⁰⁴ following the implementation of a range of reforms in relation to administration actions that provided, amongst other things, a summary method of obtaining partial relief without the necessity to institute an administration suit.¹⁰⁵

Statutory provisions

12.107 In most Australian jurisdictions, the trustee legislation gives a trustee the statutory right to approach the court for advice or directions.¹⁰⁶ These judicial advice provisions are modelled on section 30 of *Lord St Leonards' Act*.

12.108 In Queensland, the judicial advice provisions are sections 96 and 97 of the *Trusts Act 1973* (Qld).¹⁰⁷ Those sections provide:

96 Right of trustee to apply to court for directions

- (1) Any trustee may apply upon a written statement of facts to the court for directions concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee.
- (2) Every application made under this section shall be served upon, and the hearing thereof may be attended by, all persons interested in the application or such of them as the court thinks expedient.

97 Protection of trustees while acting under direction of court

- (1) Any trustee acting under any direction of the court shall be deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in the subject matter of the direction, notwithstanding that the order giving the direction is subsequently

¹⁰⁴ *Trustee Act 1893*, 56 & 57 Vict, c 53, s 51, sch.

¹⁰⁵ As to the development of general administration proceedings and partial relief: see 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) vol 3, [20.8]–[20.38].

¹⁰⁶ *Trustee Act 1925* (ACT) s 63; *Trustee Act 1925* (NSW) s 63; *Trusts Act 1973* (Qld) ss 96–97; *Trustee Act 1936* (SA) s 91 (applying s 69 of the *Administration and Probate Act 1919* (SA)); *Trustees Act 1962* (WA) ss 92, 95. For a discussion of the origins of the South Australian provision, see *Martin v Hayward* [1908] SALR 187, 191–2 (Way CJ); *Re Grose* [1949] SASR 55, 59–60 (Mayo J).

¹⁰⁷ The provisions in the ACT, New South Wales and South Australia have a broader ambit than the provisions in Queensland and Western Australia. In the ACT and New South Wales, the court's advice or opinion may be obtained on the construction of the 'trust instrument': *Trustee Act 1925* (ACT) s 63(1); *Trustee Act 1925* (NSW) s 63(1). In South Australia, the court's advice or opinion may be obtained on the construction of 'any will, deed or document': *Trustee Act 1936* (SA) s 91; *Administration and Probate Act 1919* (SA) s 69(1).

invalidated, overruled, set aside or otherwise rendered of no effect, or varied.

- (2) This section does not indemnify any trustee in respect of any act done in accordance with any direction of the court if the trustee has been guilty of any fraud or wilful concealment or misrepresentation in obtaining the direction or in acquiescing in the court making the order giving the direction.

12.109 Section 96 permits a trustee to apply to the court for directions concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee. The trustee must serve the application on ‘all persons interested in the application or such of them as the court thinks expedient’, and those persons may attend the hearing.

12.110 By virtue of section 97(1), a trustee who acts in accordance with the court’s direction is protected from liability for breach of trust in the event that the order giving the direction is subsequently set aside or varied. However, under section 97(2), that protection does not apply if the trustee has been guilty of ‘any fraud or wilful concealment or misrepresentation in obtaining the direction or in acquiescing in the court making the order giving the direction’.

12.111 Proceedings on judicial advice applications are intended to provide a ‘cheap and simple process of determining questions’, and are therefore of an informal nature.¹⁰⁸ These types of proceedings operate as an exception to the court’s ordinary function of deciding disputes between competing litigants,¹⁰⁹ and enable the court to give ‘private advice’ to a trustee, the function of which is to give personal protection to the trustee.¹¹⁰

12.112 It is inappropriate to read in limitations on the power of the court to give advice.¹¹¹ The only express requirement for the court’s jurisdiction is that the direction sought concerns any property subject to a trust, the management or administration of that property, or the exercise of any power or discretion vested in the trustee.¹¹²

12.113 The costs of an application for judicial advice are generally the subject of a complete indemnity out of the trust fund, provided that the appropriate procedure is followed by the trustee. A trustee may lose his or her right to costs if the trustee has

¹⁰⁸ *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66, 91 (Gummow ACJ, Kirby, Hayne and Heydon JJ) (*‘Macedonian Church Case’*), quoting Lord St Leonards’ First Reading Speech, Trustee Relief Bill, United Kingdom, House of Lords, *Parliamentary Debates: Hansard*, series 3, vol 145, 11 June 1857, col 1557.

¹⁰⁹ *Macedonian Church Case* (2008) 237 CLR 66, 91 (Gummow ACJ, Kirby, Hayne and Heydon JJ). See also *Martin v Hayward* [1908] SALR 187, 197 (Way CJ); *Re Jackson* [1944] SASR 82, 85 (Mayo J).

¹¹⁰ *Macedonian Church Case* (2008) 237 CLR 66, 91 (Gummow ACJ, Kirby, Hayne and Heydon JJ).

¹¹¹ *Ibid* 89–90.

¹¹² *Plan B Trustees Ltd v A-G (WA)* [2012] WASC 392, [38] (Edelman J), in which the court considered the equivalent Western Australian provision to s 96 of the *Trusts Act 1973* (Qld).

unnecessarily applied to the court, has litigated unreasonably or has incurred unnecessary expense in the proceedings before the court.¹¹³

12.114 The situations in which an approach to the court is likely to be made under the judicial advice provisions include where:

- a trustee is in doubt about the extent of his or her powers under the trust instrument;¹¹⁴
- the issue is whether legal proceedings can and ought to be commenced or defended;¹¹⁵
- it is desired to effect an early distribution of an estate;¹¹⁶ or
- a trustee is unsure as to whether inquiries about next of kin should be pursued or should be continued.¹¹⁷

12.115 The type of judicial advice that may be sought includes questions in connection with the rights and interests of beneficiaries and creditors, jurisdictional queries, whether further inquiries should be made in particular circumstances, the ascertainment of any class of beneficiaries or creditors, the provision of accounts, the settling of minor administration problems and the approval of dealings with trust property.¹¹⁸

Decisions about commencing or defending legal proceedings

12.116 The protection that is provided to a trustee who acts in accordance with the court's advice or directions may be particularly important where the trustee is faced with the decision of whether to commence litigation on behalf of the estate or to defend litigation brought against the estate.

12.117 In *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand*¹¹⁹ ('*Macedonian Church Case*'), the High Court explained the nature of the court's jurisdiction to give judicial advice. In that case, the trustee had sought judicial advice under section 63 of the *Trustee Act 1925* (NSW) relating to the defence of legal proceedings and whether it was entitled to an indemnity from trust property in order to fund that defence.

¹¹³ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [23.185].

¹¹⁴ *Re Falls' Will Trusts* (1874) 12 SCR (NSW) Eq 89; *Re Union Trustee Co of Australia Ltd* [1936] QWN 6; *Re Barry* [1936] QWN 12.

¹¹⁵ See *Loughnan v McConnell* [2006] QSC 359, where Atkinson J at [55] gave directions under s 96 of the *Trusts Act 1973* (Qld) that the applicant executor, on behalf of the estate, 'can and ought to commence proceedings' against the other executor.

¹¹⁶ In these cases, it is mandatory to seek judicial advice: *Re Cassidy* [1979] VR 369.

¹¹⁷ *Re Cave-Brown-Cave* [1906] VLR 283.

¹¹⁸ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [20.175].

¹¹⁹ (2008) 237 CLR 66.

12.118 The High Court explained that the judicial advice provisions and the provision enabling the court to relieve the trustee from personal liability in trustee legislation create a 'legislative scheme', to the effect that it is desirable that trustees in doubt as to a course of action should not proceed with it and then seek relief under the relief from liability provision but rather seek judicial advice first:¹²⁰

The legislative scheme, then, is that it is desirable that trustees in doubt as to a course of action should not proceed with it and seek relief under s 85¹²¹ afterwards, but rather seek s 63 advice first. That is because one of the things which a trustee invoking s 85 requires to be excused from is failure to seek s 63 advice. (note added)

12.119 The High Court also observed generally that it might not be correct for the court to give advice in all cases where the trustee is in dispute with beneficiaries or other interested persons; the decision to give or withhold advice will depend on the circumstances of the case:¹²²

the application of s 63 will tend to vary with the type of trust involved. Where there is a non-charitable private trust involving a conflict between beneficiaries, or between beneficiaries alleging a breach of trust out of which a trustee has profited and that trustee, and where the defendants in those proceedings have a personal capacity to fund the defence, it might not be correct to give the trustee an opinion, advice or direction. The position is not necessarily the same where the trust is for a charitable purpose, where the public interest is involved since ex hypothesi the trust is beneficial to the public, where none of the contestants in the litigation about the trust is suing or defending in order to augment, defend or seek the restoration of personal assets, and where a crucial question is the precise terms of the purpose for which the trust exists.

12.120 The High Court went on to explain the relationship between the judicial advice provisions and the trustee's right to indemnity:¹²³

While trustees acting gratuitously are entitled both under the general law and s 59(4) of the Act¹²⁴ to an indemnity out of the trust assets for expenses incurred in administering the trust, it was understandable that the legislature should enact provisions enabling them to take advice before embarking on any course which might carry a risk of incurring costs that might be outside the indemnity.

In particular, trustees who are sued, particularly for breach of trust, may sometimes experience uncertainty about whether they will be able to obtain indemnity as to the costs of their defence under s 59(4) in any event. Perhaps they will if their breach is excused under s 85(2);¹²⁵ but they cannot be sure, in

120 Ibid 83 (Gummow ACJ, Kirby, Hayne and Heydon JJ). Nevertheless, it has also been observed that, as the court has power to forgive a failure to seek advice under the provisions conferring a general power to excuse breaches of trust, 'it cannot be said that the legislative scheme prescribes the seeking of advice': VJ Vann, 'The High Court gives some advice to trustees: The Macedonian Church Case' (2009) 32 *Australian Bar Review* 123, 126.

121 *Trustee Act 1925* (NSW) s 85 (Excusable breaches of trust) is equivalent to s 76 of the *Trusts Act 1973* (Qld).

122 (2008) 237 CLR 66, 92 (Gummow ACJ, Kirby, Hayne and Heydon JJ).

123 Ibid 93–4.

124 *Trustee Act 1925* (NSW) s 59(4) (Implied indemnity) is equivalent to s 72 of the *Trusts Act 1973* (Qld) (Reimbursement of trustee out of trust property).

125 *Trustee Act 1925* (NSW) s 85 (Excusable breaches of trust) is equivalent to s 76 of the *Trusts Act 1973* (Qld).

advance, that the court's discretionary power to excuse the breach will be exercised in their favour, and one of the matters to be excused is their failure to obtain the court's direction under s 63 or otherwise. This points strongly to the conclusion that an application under s 63 by a trustee sued for breach of trust (including a breach of trust alleged to arise in the very defence of the proceedings) is not to be seen as one which should rarely if ever succeed. Instead it should be seen as a standard instance to which s 63 can in appropriate circumstances apply.

In short, provision is made for a trustee to obtain judicial advice about the prosecution or defence of litigation in recognition of both the fact that the office of trustee is ordinarily a gratuitous office and the fact that a trustee is entitled to an indemnity for all costs and expenses *properly* incurred in performance of the trustee's duties. Obtaining judicial advice resolves doubt about whether it is proper for a trustee to incur the costs and expenses of prosecuting or defending litigation. No less importantly, however, resolving those doubts means that the interests of the trust will be protected; the interests of the trust will not be subordinated to the trustee's fear of personal liability for costs.

It is, therefore, not right to see a trustee's application for judicial advice about whether to sue or defend proceedings as directed only to the personal protection of the trustee. Proceedings for judicial advice have another and no less important purpose of protecting the interests of the trust.

The fact that one of the purposes of proceedings for judicial advice is to protect the interests of the trust has particular importance where, as in this case, the trust concerned is a charitable purpose trust. In litigation brought by private persons having a particular view about the terms of a trust, the trustee will ordinarily be joined as a necessary and proper party to the proceedings. Unless some other party will act as contradictor, the burden of defending the suit will fall upon the trustee. If, as will often be the case with a charitable purpose trust, there is no other party that will act as contradictor, the claims made about the terms of the trust will go unanswered unless the trustee can properly resort to the trust funds to meet the costs of defending the litigation. And even if there is another party that will act as contradictor, it is almost always desirable, even necessary, for the trustee to take an active part in the proceedings so that issues are properly ventilated and argued.

A necessary consequence of the [judicial advice provisions] is that a trustee who is sued should take no step in defence of the suit without first obtaining judicial advice about whether it is proper to defend the proceedings. In deciding that question a judge must determine whether, on the material then available, it would be proper for the trustee to defend the proceedings. But deciding whether it would be proper for a trustee to defend proceedings instituted about the trust is radically different from deciding the issues that are to be agitated in the principal proceeding. The two steps are not to be elided. In particular, the judicial advice proceedings are not to be treated as a trial of the issues that are to be agitated in the principal proceedings. (notes added, original emphasis)

Issue for consideration

12.121 The decision of the High Court in the *Macedonian Church Case* may suggest that a trustee who is sued has a *duty* in every instance to approach the

court for judicial advice before defending legal proceedings.¹²⁶

12.122 In subsequent cases, the Supreme Court of Queensland has referred to the *Macedonian Church Case*, but not specifically to the existence of such a duty.¹²⁷

12.123 In *Glasscock v Trust Company (Aust) Pty Ltd*,¹²⁸ a recent decision of the Supreme Court of Queensland, Boddice J summarised the principles for dealing with an application under section 96 of the *Trusts Act 1973* (Qld) for judicial advice concerning litigation:¹²⁹

Where an executor or trustee is in doubt as to the course of action to be adopted, the executor or trustee is entitled to seek the opinion of the Court as to what it should do. In determining such an application, it is not the function of the Court to investigate the evidence and make a finding whether or not the trustees will be successful in the litigation. The Court has merely to determine whether or not the proceedings should be taken. However, the matter should be sufficiently investigated to determine whether or not the proceedings would be fruitless.

The sole purpose in giving advice is to determine what should be done in the best interests of the trust estate. The Court's ambit includes obtaining advice about whether it is proper for the trustee to incur the cost and expense of prosecuting or defending litigation. The function of the power is not merely to afford personal protection to the trustees. It is also to protect the interests of the trust. (notes omitted)

12.124 These principles were adopted in *Re Public Trustee of Queensland*, in which Applegarth J stated that '[q]uestions concerning litigation provide a familiar context for the seeking of judicial advice'.¹³⁰

12.125 An issue to consider, in light of the *Macedonian Church Case*, is whether there is any need to clarify the circumstances in which a trustee ought to apply to the court for directions under section 96 of the *Trusts Act 1973* (Qld), or the matters about which directions may be sought under that section.

12-1 Is there is any need to clarify the circumstances in which a trustee ought to apply to the court for directions under section 96 of the *Trusts Act 1973* (Qld), or the matters about which directions may be sought under that section?

¹²⁶ Although the High Court did not put it in those terms, it stated that such a course would be 'desirable' and 'should' be taken: *Macedonian Church Case* (2008) 237 CLR 66, 83, 94 (Gummow ACJ, Kirby, Hayne and Heydon JJ).

¹²⁷ *Glasscock v Trust Company (Aust) Pty Ltd* [2012] QSC 15; *Re Public Trustee of Queensland* [2012] QSC 281. Both of these cases concerned an application for directions as to whether it would be proper for the trustee to commence legal proceedings.

¹²⁸ [2012] QSC 15.

¹²⁹ *Ibid* [14]–[15].

¹³⁰ [2012] QSC 281, [18].

The protection given by section 97(2)

12.126 Section 97(2) of the *Trusts Act 1973* (Qld) limits the scope of the protection provided by section 97(1) of the Act. Section 97(2) does not indemnify any trustee in respect of any act done in accordance with any direction of the court 'if the trustee has been guilty of any fraud or wilful concealment or misrepresentation in obtaining the direction or in acquiescing in the court making the order giving the direction'. This limitation has its origins in section 30 of *Lord St Leonards' Act*,¹³¹ and is included in the other Australian statutory judicial advice provisions.¹³²

12.127 In *Re Grose*,¹³³ the Supreme Court of South Australia considered the scope of the protection generally provided under statutory judicial advice provisions. In construing section 69 of the *Administration and Probate Act 1919* (SA) — which also has its origins in section 30 of *Lord St Leonards' Act* and applies to trustees and personal representatives¹³⁴ — Mayo J explained that a person who holds an office of that kind is entitled to seek judicial advice and direction, and to obtain the protection on the facts submitted in their own statement of facts:¹³⁵

Persons holding an office of the kind described are entitled to seek judicial advice and direction, and to obtain the protection mentioned on their own submission of facts ...

...

The easy method of approach for trustees by s 69 had its origin in England in such enactments as [*Lord St Leonards' Act*]. By s 30 of that Act trustees were given the means to apply by petition to a Judge of the High Court of Chancery for his opinion, advice or direction. It was necessary that the trustee's petition contain all the necessary information. ... It seems to me trustees are entitled under s 69 of the *Administration and Probate Act 1919* to obtain protection on the facts they submit.

12.128 Although section 69 of the *Administration and Probate Act 1919* (SA) does not provide expressly that the protection afforded by that section is restricted to where the trustee or personal representative has not been guilty of any fraud or wilful concealment or misrepresentation,¹³⁶ the court nevertheless held that a trustee or personal representative will be protected under section 69 only when 'all material and relevant facts are substantially as submitted upon the application':¹³⁷

131 See [12.104] above.

132 *Trustee Act 1925* (ACT) s 63(2); *Trustee Act 1925* (NSW) s 63(2); *Trustees Act 1962* (WA) s 95(2).

133 [1949] SASR 55.

134 *Administration and Probate Act 1919* (SA) s 69. That section applies to trustees generally because of the operation of s 91 of the *Trustee Act 1936* (SA).

135 [1949] SASR 55, 59–60.

136 See, eg, *Trustee Act 1925* (ACT) s 63(2); *Trustee Act 1925* (NSW) s 63(2); *Trusts Act 1973* (Qld) s 97(2); *Trustees Act 1962* (WA) s 95(2), which include this restriction.

137 *Re Grose* [1949] SASR 55, 60 (Mayo J).

If there are omitted circumstances, that are material and relevant, which, if proved, would have altered the advice or direction given, the order may be no defence to the trustees.

12.129 The statement of Mayo J in *Re Grose* was approved and applied by the Supreme Court of Queensland in *Re Sportsman's Leisure & Hobby Warehouse Pty Ltd (in liq)*,¹³⁸ which dealt with the analogous position of a liquidator seeking the advice and directions of the court.

12.130 The test in section 97(2) uses the words 'fraud or wilful concealment or misrepresentation'. Arguably, those words might not cover an innocent omission, whereas the test in *Re Grose* would cover that circumstance. This raises the issue of whether there is a need to clarify the test in section 97(2) of the *Trusts Act 1973* (Qld) and, if so, what the test should be.

12-2 Is there a need to clarify the test in section 97(2) of the *Trusts Act 1973* (Qld) for excluding the protection afforded to a trustee under section 97(1) of the Act and, if so, what should the test be?

Remuneration of trustees

Introduction

12.131 Historically, equity regarded trusteeship as an honorary position. For that reason, the general rule is that a trustee 'shall have no allowance for his care and trouble'.¹³⁹ The requirement for a trustee to act gratuitously is derived from the trustee's fiduciary duty not to profit personally from the trusteeship, or to place himself or herself in a position where his or her interest and duty might conflict.¹⁴⁰

12.132 There are, however, exceptions to this principle under the general law: the trust instrument may make provision for remuneration;¹⁴¹ or the trustee and the beneficiaries¹⁴² might agree that the services of the trustee are to be provided for a charge.¹⁴³

12.133 A Court of Equity may also authorise remuneration to a trustee in its inherent jurisdiction where it considers such a course to be necessary for the

¹³⁸ [1990] 2 Qd R 93, 98 (Cooper J).

¹³⁹ *Robinson v Pett* (1734) 3 P Wms 249; 24 ER 1049.

¹⁴⁰ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1739]; HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 16 September 2010) [13.610]; *Bray v Ford* [1896] AC 44, 51 (Lord Herschell); *Scott v Murray* (1887) 13 VLR 425, 426 (Webb J); *Re Queensland Coal and Oil Shale Mining Industry (Superannuation) Ltd* [1999] 2 Qd R 524, 526 (Williams J).

¹⁴¹ See, eg, *Re Thorly* [1891] 2 Ch 613 (CA); *Commissioner of Stamp Duties (NSW) v Pearse* [1954] AC 91; (1953) 89 CLR 51; *Princess Ann of Hesse v Field* (1962) 80 WN (NSW) 66; *Re Dowling* [1961] VR 615.

¹⁴² See, eg, *Re Sherwood* (1840) 3 Beav 338; 49 ER 133; *Re Moore* (1896) 17 LR (NSW) B & P 78.

¹⁴³ *Robinson v Pett* (1734) 3 P Wms 249; 24 ER 1049.

proper administration of the trust.¹⁴⁴ The court may also approve an agreement for the remuneration of a trustee.¹⁴⁵

12.134 Unlike the English Court of Chancery, which traditionally exercised this jurisdiction sparingly, the inherent jurisdiction of the Australian courts has developed so that ‘allowance of commission is the rule not the exception’.¹⁴⁶

12.135 In addition, legislation in most of the Australian jurisdictions, including Queensland,¹⁴⁷ confers a statutory power on the court to authorise trustee remuneration.¹⁴⁸

Section 101

12.136 In Queensland, statutory jurisdiction to authorise the remuneration of trustees is conferred on the court under section 101(1) of the *Trusts Act 1973* (Qld).¹⁴⁹ Section 101(2) additionally provides for the charging of fees by professional trustees. Section 101 provides:¹⁵⁰

101 Remuneration of trustee

- (1) The court may, in any case in which the circumstances appear to it so to justify, authorise any person to charge such remuneration for the person’s services as trustee as the court may think fit.
- (2) In the absence of a direction to the contrary in the instrument creating the trust, a trustee, being a person engaged in any profession or business for whom no benefit or remuneration is provided in the instrument, is entitled to charge and be paid out of the trust property all usual professional or business charges for business transacted, time expended, and acts done by the person or the person’s firm in connection with the trust, including acts which a trustee not being in any profession or business could have done personally; and, on any application to the court for remuneration under subsection (1), the court

¹⁴⁴ *Duke of Norfolk’s Settlement Trusts* [1982] 1 Ch 61, 78 (Fox LJ); *Re Queensland Coal and Oil Shale Mining Industry (Superannuation) Ltd* [1999] 2 Qd R 524, 526 (Williams J).

¹⁴⁵ *Re Gambling* [1966] SASR 134, 136–7 (Walters AJ).

¹⁴⁶ RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (LBC Information Services, 1996) [86.02]. See *Nissen v Grunden* (1912) 14 CLR 297, 304–5 (Griffith CJ), 314 (Isaacs J); *Re Whitehead* [1958] VR 143, 145 (Herring CJ, Dean J); *Re the Will of Stratton* [1981] WAR 58, 61 (Brinsden J); *Re Lack* [1983] 2 Qd R 613, 614 (McPherson J); *Zevering v Callaghan* [2011] QCA 180. See also 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) vol 3, [27.10]–[27.11].

¹⁴⁷ *Trusts Act 1973* (Qld) s 101.

¹⁴⁸ *Trustee Act* (NT) s 78; *Administration and Probate Act 1919* (SA) s 70(1); *Trustee Act 1898* (Tas) s 58; *Trustee Act 1958* (Vic) s 77; *Trustees Act 1962* (WA) s 98. See also *Trustee Act 1956* (NZ) s 72. Cf *Trustee Act 2000* (UK) c 29, pt V.

¹⁴⁹ *Trusts Act 1973* (Qld) s 101 was inserted as a new provision into the *Trusts Act 1973* (Qld) on the recommendation of this Commission in its 1971 Report: Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 68–9.

¹⁵⁰ *Trusts Act 1973* (Qld) s 79 provides that, except where otherwise provided in pt 7, the provisions of that part (including s 101) apply whether or not a contrary intention is expressed in the instrument (if any) creating the trust.

may take into account any charges that have been paid out of the trust property under this subsection.

(3) For the purpose of this section—

trustee includes a custodian trustee.¹⁵¹ (note added)

12.137 Similar provisions are included in most of the other Australian jurisdictions.¹⁵² Provisions dealing with the remuneration of personal representatives, the Public Trustee, and licensed trustee companies¹⁵³ are also included in other specific legislation.¹⁵⁴

Section 101(1): Authorisation of remuneration by the court

12.138 Section 101(1) of the *Trusts Act 1973* (Qld) gives the court a broad power to authorise, 'in any case in which the circumstances appear to it so to justify', remuneration of a trustee 'as the court may think fit'.¹⁵⁵ The equivalent provisions in other jurisdictions similarly provide the court with a discretion to allow trustee remuneration as is 'just and reasonable'.¹⁵⁶

12.139 The legislation in the Northern Territory, Victoria and Western Australia is more restrictive in its terms than section 101(1) as it provides that a trustee's commission or percentage allowed out of the trust funds or trust property must not

¹⁵¹ As to the role and appointment of custodian trustees, see s 19 of the *Trusts Act 1973* (Qld), which is discussed in Chapter 5.

¹⁵² See n 148 above.

¹⁵³ A 'licensed trustee company' is 'a trustee company that holds an Australian financial services licence covering the provision of one or more traditional trustee company services': *Corporations Act 2001* (Cth) s 601RAA (definition of 'licensed trustee company'). See Chapter 7, n 165 above in relation to the background to the regulation of licensed trustee companies.

¹⁵⁴ *Succession Act 1981* (Qld) s 68; *Public Trustee Act 1978* (Qld) s 17; *Corporations Act 2001* (Cth) ch 5D pt 5D.3. The *Trusts Act 1973* (Qld) applies to the Public Trustee and to licensed trustee companies in addition to the provisions that apply to those entities under the *Public Trustee Act 1978* (Qld) and the *Corporations Act 2001* (Cth): see, respectively, *Public Trustee Act 1978* (Qld) s 120(1); *Corporations Act 2001* (Cth) s 601RAE(4)(b), *Corporations Regulations 2001* (Cth) reg 54.1.04(3), sch 8AD.

¹⁵⁵ An application for remuneration under s 101 of the *Trusts Act 1973* (Qld) (or under s 68 of the *Succession Act 1981* (Qld)) may be made to the court under the *Uniform Civil Procedure Rules 1999* (Qld) r 657C. The court may make any order for commission it considers appropriate, and may take into account the value and composition of the estate, the provisions of the will or trust instrument for the estate, the conduct of all persons (including the parties) connected with the administration of the estate, the nature, extent and value of work done by persons other than the trustee, including non-professional work delegated to a lawyer, the result of any assessment of the estate account, including the scope and merit of any objections raised in a notice of objection before the estate account is passed, the efficiency of the administration of the estate, and any other matter it considers relevant: *Uniform Civil Procedure Rules 1999* (Qld) r 657E.

In particular, under s 101(1) of the *Trusts Act 1973* (Qld), the court will have 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: *Re Postle and Hodson's Application* [1991] 1 Qd R 160, 163–4 (Byrne J). The court will often describe the remuneration it authorises in terms of a rate or percentage and, in practice, awards of remuneration may range from below 1% to above 7%. But, 'any suggestion that there is a set rate of remuneration allowable to ... trustees according to the nature of the work done is misleading': see HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 16 September 2010) [13.3610]. For a discussion of the calculation of remuneration for personal representatives, see 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) vol 3, [27.40] ff.

¹⁵⁶ *Trustee Act* (NT) s 78; *Administration and Probate Act 1919* (SA) s 70(1); *Trustee Act 1898* (Tas) s 58; *Trustee Act 1958* (Vic) s 77; *Trustees Act 1962* (WA) s 98(1). See also *Trustee Act 1956* (NZ) s 72.

exceed 5 per cent.¹⁵⁷ Nevertheless, in those jurisdictions, the court may allow commission, in its inherent jurisdiction, at a rate higher than the amount allowed by the statute.¹⁵⁸

12.140 Section 101(1) does not limit the court's inherent jurisdiction to authorise remuneration; nor does it limit the court's general power under its statutory 'expediency' jurisdiction in section 94 of the Act,¹⁵⁹ under which the court may authorise trustee remuneration if such payment 'is necessary or expedient to the proper management and administration of the trust'.¹⁶⁰

Section 101(2): Remuneration of professional trustees (statutory charging clause)

12.141 Under the general law, professional trustees (such as solicitor-trustees) could not charge professional fees, unless authority to do so was expressly conferred by the trust instrument.¹⁶¹ Moreover, charging clauses for professional services included in trust instruments were strictly construed, and a distinction was made between professional and non-professional work.¹⁶²

12.142 Section 101(2) of the *Trusts Act 1973* (Qld) overcomes these restrictions by providing that, in the absence of a direction to the contrary in the trust instrument, a professional trustee for whom 'no benefit or remuneration' is provided in the instrument is entitled to charge and be paid out of the trust property 'all usual professional or business charges for business transacted, time expended, and acts done by the person or the person's firm in connection with the trust'.

12.143 Section 101(2) also obviates the need for the trust instrument to include a charging clause for professional trustee services, which had previously become a widespread practice.¹⁶³

12.144 Section 101(2) does not preclude the court from authorising the payment of professional costs, although the court may take into account any charges that have been paid pursuant to that provision in an application for remuneration made under subsection (1).

¹⁵⁷ *Trustee Act* (NT) s 78; *Trustee Act 1958* (Vic) s 77; *Trustees Act 1962* (WA) s 98(2). The Western Australian provision provides that the aggregate commission or percentage allowed shall not exceed 5% of the gross value of the trust property.

¹⁵⁸ *Re the Will of Stratton* [1981] WAR 58, 64 (Brinsden J).

¹⁵⁹ *Re Gambling* [1966] SASR 134, 136 (Walters AJ); *Re the Will of Stratton* [1981] WAR 58, 61 (Brinsden J); *Re Queensland Coal and Oil Shale Mining Industry (Superannuation) Ltd* [1999] 2 Qd R 524, 527 (Williams J).

¹⁶⁰ *Re Queensland Coal and Oil Shale Mining Industry (Superannuation) Ltd* [1999] 2 Qd R 524, 527 (Williams J). Section 94 of the *Trusts Act 1973* (Qld) is set out at [12.71] above.

¹⁶¹ *Re Sherwood* (1840) 3 Beav 338; 49 ER 133; *Re Gates* [1933] 1 Ch 913; *Re Hill* [1934] Ch 623; *Re Edmonds* [1943] VLR 97. The one exception to this rule is that, where a solicitor-trustee acts in legal proceedings on behalf of the solicitor-trustee and a co-trustee or on behalf of the solicitor-trustee and beneficiaries, the solicitor-trustee or the solicitor-trustee's firm will be allowed to receive the usual costs: *Cradock v Piper* (1850) 1 Mac & G 664; 41 ER 1422; *Re Corsellis* (1887) 34 Ch D 675; *Umphelby v Grey* (1899) 24 VLR 979.

¹⁶² *Re Ames* (1883) 25 Ch D 72; *Clarkson v Robinson* [1900] 2 Ch 722; *Re Smith* (1916) 16 SR (NSW) 422.

¹⁶³ See Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 68–9.

12.145 Similar provision to section 101(2) is included in the trustee legislation in Western Australia.¹⁶⁴

Excessive remuneration of professional trustees

12.146 From time to time, concerns have been raised that professional trustees (or personal representatives) may sometimes charge remuneration at higher rates than might be authorised on application to the court.¹⁶⁵ It has been observed, for example, that:¹⁶⁶

Professional trusteeship is a business, and those offering it do so to profit by it. Sometimes it is difficult for the investor in a commercial trust to discover what remuneration the trustee may earn. Sometimes one might be pardoned for coming to the conclusion that remuneration can be excessive.

12.147 One way to address these concerns is by the introduction of a provision allowing the court to review and, if appropriate, reduce the amount of a trustee's remuneration. For example, section 86A of the *Probate and Administration Act 1898* (NSW) provides:

86A Reduction of excessive commission etc

Where the Court is of the opinion that a commission or amount charged or proposed to be charged in respect of any estate, or any part of any such commission or amount, is excessive, the Court may, of its own motion, or on the motion of any person interested in the estate, review the commission, amount or part and may, on that review, notwithstanding any provision contained in a will authorising the charging of the commission, amount or part, reduce that commission, amount or part.

12.148 Both the National Committee for Uniform Succession Laws and the authors of the Model Trustee Code recommended the introduction of provisions based on section 86A of the *Probate and Administration Act 1898* (NSW).¹⁶⁷

12.149 The National Committee considered that the court's power to review under such a provision should be capable of being exercised despite any provision of a will or statute authorising the charging of the amount. In its view, it should enable

¹⁶⁴ *Trustees Act 1962* (WA) s 98(5). See also Unif Trust Code § 708(a) (amended 2010), which provides that '[i]f the terms of a trust do not specify a trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances'. Cf *Trustee Act 2000* (UK) c 29, s 29.

¹⁶⁵ See, eg, 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) vol 3, [27.112], [27.124]; WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 189.

¹⁶⁶ WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 189, citing *McLean v Burns* (1985) 2 NSWLR 623.

¹⁶⁷ 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) vol 3, [27.128]; WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 188 (cl 6.20(3)). For an explanation of the origins of the Model Trustee Code and the membership of the working party that prepared it, see Chapter 5, n 75 above.

the court to review the fees and charges of the Public Trustee (or its equivalent) and trustee companies.¹⁶⁸

12.150 The authors of the Model Trustee Code recommended that the provision should enable both beneficiaries and trustees to apply to the court to vary a remuneration provision in the trust instrument if it is not, or is no longer, just and reasonable, by either increasing or decreasing the remuneration payable.¹⁶⁹ They also recommended that the court should be empowered to order the trustee to repay excessive remuneration that it has received.¹⁷⁰

12.151 Detailed provision is also made in the *Corporations Act 2001* (Cth) for the court¹⁷¹ to review the fees charged by licensed trustee companies. Section 601TEA of that Act provides that, if the court is of the opinion that the fees charged by a licensed trustee company in respect of any estate are excessive, the court may review the fees and, on the review, reduce them.¹⁷² The court may review the fees either on its own motion, or on the application of a person with a proper interest in the estate,¹⁷³ including a beneficiary or the settlor of the trust.¹⁷⁴ In considering whether the fees are excessive, the court may consider any or all of the following:¹⁷⁵

- (a) the extent to which the work performed by the trustee company was reasonably necessary;
- (b) the extent to which the work likely to be performed by the trustee company is likely to be reasonably necessary;
- (c) the period during which the work was, or is likely to be, performed by the trustee company;
- (d) the quality of the work performed, or likely to be performed, by the trustee company;
- (e) the complexity (or otherwise) of the work performed, or likely to be performed, by the trustee company;

¹⁶⁸ 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) vol 3, Rec 27-5.

¹⁶⁹ WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 188 (cl 6.20(3)). See also, eg, Unif Trust Code § 708(b) (amended 2010), which provides that, if the terms of the trust specify the trustee's compensation, the court may allow more or less compensation if 'the duties of the trustee are substantially different from those contemplated when the trust was created' or 'the compensation specified by the terms of the trust would be unreasonably low or high'.

¹⁷⁰ WA Lee (ed), *Model Trustee Code for Australian States and Territories* (1989) vol 1, 188 (cl 6.20(4)).

¹⁷¹ That is, the Federal Court, a Supreme Court, or the Family Court: see *Corporations Act 2001* (Cth) s 58AA(1).

¹⁷² *Corporations Act 2001* (Cth) s 601TEA(1).

¹⁷³ *Corporations Act 2001* (Cth) s 601TEA(4).

¹⁷⁴ A 'person with a proper interest in the estate' is defined in s 601RAD(1). The definition is set out in full at [7.205] above.

¹⁷⁵ *Corporations Act 2001* (Cth) s 610TEA(3). If the fees are reduced by more than 10%, the trustee company must ordinarily pay the costs of the review: s 601TEA(5). Costs are otherwise in the court's discretion: s 601TEA(6).

- (f) the extent (if any) to which the trustee company was, or is likely to be, required to deal with extraordinary issues;
- (g) the extent (if any) to which the trustee company was, or is likely to be, required to accept a higher level of risk or responsibility than is usually the case;
- (h) the value and nature of any property dealt with, or likely to be dealt with, by the trustee company;
- (i) if the fees are ascertained, in whole or in part, on a time basis—the time properly taken, or likely to be properly taken, by the trustee company in performing the work;
- (j) any other relevant matters.

12.152 However, the court's power to review and reduce a trustee company's fees under section 601TEA is significantly restricted: it does not apply to fees that are charged in accordance with a direction in the testator's will, or an agreement made between the trustee company and a person having the authority to deal with the company.¹⁷⁶ This contrasts with the approaches outlined above, which have the express purpose of enabling the court to review remuneration charged in accordance with a provision in the will or trust instrument.

12-3 Should the *Trusts Act 1973* (Qld) include a provision empowering the court to review the remuneration charged by a person for the person's services as trustee and, if so, what should the scope of the court's power be?

Persons entitled to apply to court

12.153 Section 98 of the *Trusts Act 1973* (Qld) is a general provision that deals with standing to apply for various kinds of orders that may be made by the court under the Act. It provides:

98 Persons entitled to apply to court

- (1) An order under this Act for the appointment of a new trustee or concerning any property subject to a trust, may be made on the application of any person beneficially interested in the property, whether under disability or not, or on the application of any person duly appointed trustee thereof or intended to be so appointed.
- (2) An order under this Act concerning any interest in any property subject to a mortgage may be made on the application of any person beneficially interested in the property, whether under disability or not, or of any person interested in the money secured by the mortgage.

¹⁷⁶

Corporations Act 2001 (Cth) ss 601TEA(2)(a), 601TBB. Neither does the court's power to review under s 601TEA apply with respect to fees relating to a charitable trust that are charged as permitted by pt 5D.3 div 4 subdiv A.

12.154 Section 98 of the *Trusts Act 1973* (Qld) has its origins in section 37 of the English *Trustee Act 1850*.¹⁷⁷ There is an equivalent provision in the trustee legislation of the other Australian jurisdictions, and in New Zealand and England.¹⁷⁸

Persons entitled to apply under section 98(1)

12.155 Section 98(1) of the *Trusts Act 1973* (Qld) identifies the persons who are entitled to apply for an order under the Act for the appointment of a new trustee or concerning any trust property. They are a person who is beneficially interested in the trust property, whether under disability or not, or who is duly appointed as a trustee or intended to be appointed as a trustee.

Persons 'beneficially interested in the trust property, whether under a disability or not'

12.156 The persons who have been held by the court to have a 'beneficial interest' in the trust property and standing to apply have included a purchaser of trust property (where the purchase money has been paid),¹⁷⁹ a creditor in an administration action,¹⁸⁰ and a person who has a contingent interest in the trust property.¹⁸¹

12.157 The nature of a beneficiary's interest in an express trust will depend on the terms of the trust and the particular circumstances involved. A beneficiary under a discretionary trust arguably has no standing under section 98(1) to apply for an order to appoint, remove or replace a trustee or concerning trust property, since ordinarily¹⁸² the beneficiary has no beneficial interest in the trust property.¹⁸³ The

¹⁷⁷ *Trustee Act 1850*, 13 & 14 Vict, c 60, s 37 was replaced by s 36 of the *Trustee Act 1893*, 56 & 57 Vict, c 53, which was in turn replaced by s 58 of the *Trustee Act 1925*, 15 & 16 Geo 5, c 19. A provision in similar terms to s 98 of the *Trusts Act 1973* (Qld) was previously included in s 36 of the *Trustees and Executors Act 1897* (Qld).

¹⁷⁸ *Trustee Act 1925* (ACT) s 92; *Trustee Act 1925* (NSW) s 92; *Trustee Act* (NT) s 39; *Trustee Act 1936* (SA) s 42; *Trustee Act 1898* (Tas) s 42; *Trustee Act 1958* (Vic) s 64; *Trustees Act 1962* (WA) s 93; *Trustee Act 1956* (NZ) s 67; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 58.

¹⁷⁹ *Ayles v Cox* (1853) 17 Beav 584; 51 ER 1161.

¹⁸⁰ *Re Wragg* (1863) 1 De GJ & S 356; 46 ER 143.

¹⁸¹ *Re Sheppard's Trusts* (1862) 4 De GF & J 423; 45 ER 1247. In that case, the court suggested that a 'mere possibility', as opposed to a contingent interest, would not be enough to be a person 'beneficially interested' within the meaning of the section. In *Davis v Angel* (1862) 31 Beav 224; 54 ER 1123, the court held that a person whose interest in the trust property relied on three contingencies, including a condition precedent which had not been performed, had only a 'mere possibility' and could not maintain a suit in respect of it. In that case, the plaintiff would be entitled to a one-fifteenth share in the trust property provided that his father married EG, he attained the age of twenty-one and he survived his father. At the time of the suit, his father had not married EG, but was in fact married to another woman. It was held that the plaintiff had no standing to maintain his suit, as he had no present title or right to the fund, and would not have any right unless and until his father married EG.

¹⁸² See, however, *ASIC v Carey (No 6)* (2006) 153 FCR 509, 520, in which French J observed:

The difficulty with applying the notion of contingent interests to beneficiaries of a discretionary trust lies partly in the uncertain scope of the distribution be it income or capital, which may be made in favour of any given beneficiary. I am inclined to think that a beneficiary in such a case, at arms length from the trustee, does not have a 'contingent interest' but rather an expectancy or mere possibility of a distribution. In some discretionary trusts, and there is an example among those of which Mr Beck is a beneficiary, charities as a class are included in the class of beneficiaries. It could hardly be said that every charity in Australia has thereby acquired a contingent interest in that trust. On the other hand, where a discretionary trust is controlled by a trustee who is in

law generally recognises that a discretionary beneficiary's interest is no more than a mere expectancy; it is simply an expectation or hope that the trustee will exercise the discretion to distribute in his or her favour.¹⁸⁴ A beneficiary under a discretionary trust acquires an interest in the trust property only when the trustee, in exercising his or her discretion, makes a distribution to the beneficiary.¹⁸⁵ Like beneficiaries of all trusts, however, a discretionary beneficiary has the right to compel the trustee to consider whether or not to make a distribution to him or her and a right to the proper (or due) administration of the trust.¹⁸⁶

12.158 The court also has a statutory jurisdiction, under section 8 of the Act, to review or give directions about any past or future act, omission or decision of a trustee.¹⁸⁷ A discretionary beneficiary, being a person who has a right to the due administration of the trust, is within the class of persons who may apply to the court under that provision. Amongst other things, the court may make any order 'as the circumstances require' (including, where a trustee has appointed a new trustee in substitution for an existing trustee, an order setting aside the appointment of the new trustee),¹⁸⁸ subject to the applicant satisfying the court that the trustee's act, omission or decision should be reviewed.

12.159 A person who is 'beneficially interested' in the trust property also has standing to apply under the general standing provision in the Northern Territory, South Australia, Tasmania, Victoria, Western Australia, New Zealand and England.¹⁸⁹

truth the alter ego of a beneficiary, then at the very least a contingent interest may be identified because, to use the words of Nourse J, 'it is as good as certain' that the beneficiary will receive the benefits of distributions either of income or capital or both.

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A discretionary beneficiary does not have an interest in possession (namely, a present right of present enjoyment of the property): *Gartside v Inland Revenue Commissioners* [1968] AC 553, 607 (Lord Reid), 617 (Lord Wilberforce). Nor does he or she have an immediate right to income as it accrues, or a contingent interest in the trust property: *Gartside v Inland Revenue Commissioners* [1968] AC 553, 607 (Lord Reid), 617 (Lord Wilberforce); *Queensland Trustees Ltd v Commissioner of Stamp Duties* (1952) 88 CLR 54, 62–5 (Dixon CJ, McTiernan, Webb and Kitto JJ); *ASIC v Carey (No 6)* (2006) 153 FCR 509, 520 (French J); *Hunt v Muollo* [2003] 2 NZLR 322, 325. Consequently, a discretionary beneficiary has no legal or equitable interest in the trust property: *Queensland Trustees Ltd v Commissioner of Stamp Duties* (1952) 88 CLR 54, 62–5; *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 (PC); *Pearson v Inland Revenue Commissioners* [1981] AC 753, 775 (Viscount Dilhorne), 786 (Lord Keith); *Hunt v Muollo* [2003] 2 NZLR 322, 325–6 (Tipping, Salmon and Doogue JJ). Dal Pont has suggested that a discretionary beneficiary cannot require the trustee to make a distribution, for this would not be consistent with the nature of the discretion vested in the trustee by the settlor: GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [20.125].

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Gartside v Inland Revenue Commissioners [1968] AC 553, 607 (Lord Reid), 617 (Lord Wilberforce).

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Re Vestey's Settlement [1951] 1 Ch 209, 220 (Evershed MR); *Queensland Trustees Ltd v Commissioner of Stamp Duties* (1952) 88 CLR 54, 62–5; *Hunt v Muollo* [2003] 2 NZLR 322, 325 (Tipping, Salmon and Doogue JJ).

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Gartside v Inland Revenue Commissioners [1968] AC 553, 607 (Lord Reid), 617 (Lord Wilberforce); *Kennon v Spry* (2008) 238 CLR 366, 393 (French CJ).

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Trusts Act 1973 (Qld) s 8, which is discussed at [12.168] ff below.

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Re Whitehouse [1982] Qd R 196, 203, 207–8 (Macrossan J).

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See *Trustee Act 1898* (Tas) s 42; *Trustee Act 1958* (Vic) s 64; *Trustees Act 1962* (WA) s 93; *Trustee Act 1956* (NZ) s 67, which confer standing to apply on a person beneficially interested in the trust property. See also *Trustee Act* (NT) s 39; *Trustee Act 1936* (SA) s 42; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 58, which confer standing to apply on a person beneficially interested in the land, stock or thing in action subject to a trust.

12.160 A different test applies in the ACT and New South Wales. In those jurisdictions, 'any person interested' in the trust property has standing to apply.¹⁹⁰ For the reasons explained above, the test arguably excludes a beneficiary of a discretionary trust (until the trustee exercises his or her discretion to distribute in favour of the discretionary beneficiary).

Persons who are duly appointed as a trustee or intended to be appointed as a trustee

12.161 Section 98(1) of the *Trusts Act 1973* (Qld) also entitles a person duly appointed as a trustee, or intended to be appointed as a trustee, to apply for an order under the Act for the appointment of a new trustee or concerning any trust property.

12.162 The Western Australian and New Zealand provisions are in similar terms.¹⁹¹ The provisions in the other Australian jurisdictions and England do not extend to a person intended to be appointed as a trustee.

Persons entitled to apply to the court under section 98(2)

12.163 Section 98(2) of the *Trusts Act 1973* (Qld) gives the right to apply for an order under the Act concerning any interest in property subject to a mortgage to a person who is beneficially interested in the property, or a person who is interested in the money secured by the mortgage (for example, a mortgagee or a mortgagor).

12.164 The general standing provisions in all of the other jurisdictions, except South Australia, include a similar provision.¹⁹²

Application to court to review acts, omissions and decisions

12.165 Traditionally, the exercise by trustees of a discretion in the execution of the trust is a matter for them and not the court provided, broadly speaking, that they act within power, bona fide and in accordance with the purposes for which the discretion was conferred.¹⁹³

12.166 In *Re Londonderry's Settlement*,¹⁹⁴ Harman LJ described this principle as a long-standing one which rested largely on the view that nobody could be called upon to accept a trusteeship involving the exercise of a discretion unless, in the

¹⁹⁰ In New South Wales, the Supreme Court has held that a person who might be entitled to take the trust assets by default of appointment at the distribution date is a person who is 'interested' in the trust property: *Re Louis Contini Foundation Trust* [2004] NSWSC 881; *Macarthur v Cawdor Nominee Pty Ltd* [2003] NSWSC 249, citing *Hartigan Nominees Pty Ltd v Rydge* [1992] 29 NSWLR 405, 426–7 (Mahoney JA; Kirby P agreeing).

¹⁹¹ *Trustees Act 1962* (WA) s 93(1); *Trustee Act 1956* (NZ) s 67(1).

¹⁹² *Trustee Act 1925* (ACT) s 92(2); *Trustee Act 1925* (NSW) s 92(2); *Trustee Act* (NT) s 39(2); *Trustee Act 1898* (Tas) s 42(2); *Trustee Act 1958* (Vic) s 64(2); *Trustees Act 1962* (WA) s 93(2); *Trustee Act 1956* (NZ) s 67(2); *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 58(2).

¹⁹³ *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); *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440, 448; 42 ER 330, 333 (Truro LC); *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 431 (Mahoney JA), 442–5 (Sheller JA); *Edge v Pensions Ombudsman* [1998] Ch D 512, 534 (Sir Richard Scott V-C). See also [7.38] ff above.

¹⁹⁴ [1965] Ch 918.

absence of bad faith, he were not liable to have his motives or his reasons called in question either by the beneficiaries or by the court.¹⁹⁵ Harman LJ added the rider that 'if trustees do give reasons, their soundness can be considered by the court'.¹⁹⁶

12.167 It has been suggested, however, that the traditional approach should not be applied as an invariable principle.¹⁹⁷

The outcome must vary from trust to trust because ... the answer must lie in what equity would regard as the faithful performance of the settlor's likely intentions of the terms of the particular trust in question.

Application to the court to review acts, omissions and decisions

12.168 Section 8 of the *Trusts Act 1973* (Qld) confers a statutory jurisdiction on the court, on the application of specified persons, to review an act, omission or decision of a trustee, or to give directions about an apprehended act, omission or decision.

12.169 Section 8(1) is a densely worded provision. It provides:

8 Application to court to review acts and decisions

- (1) Any person who has, directly or indirectly, an interest, whether vested or contingent, in any trust property or who has a right of due administration in respect of any trust, and who is aggrieved by any act, omission or decision of a trustee or other person in the exercise of any power conferred by this Act or by law or by the instrument (if any) creating the trust, or who has reasonable grounds to apprehend any such act, omission or decision by which the person will be aggrieved, may apply to the court to review the act, omission or decision, or to give directions in respect of the apprehended act, omission or decision; and the court may require the trustee or other person to appear before it and to substantiate and uphold the grounds of the act, omission or decision which is being reviewed and may make such order in the premises (including such order as to costs) as the circumstances require.
- (2) An order of the court under subsection (1) shall not—

¹⁹⁵ Ibid 928–9.

¹⁹⁶ Ibid. See also *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440, 448; 42 ER 330, 333–4, in which Truro LC commented:

If, however, as stated by Lord Ellenborough in *The King v The Archbishop of Canterbury* (15 East, 117), trustees think fit to state a reason, and the reason is one which does not justify their conclusion, then the Court may say that they have acted by mistake and in error, and it will correct their decision; but if, without entering into details, they simply state, as in many cases it would be most prudent and judicious for them to do, that they have met and considered and come to a conclusion, the Court has then no means of saying they have failed in their duty, or to consider the accuracy of their conclusion.

¹⁹⁷ 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) [63], [68].

- (a) disturb any distribution of the trust property, made without breach of trust, before the trustee became aware of the making of the application to the court; or
 - (b) affect any right acquired by any person in good faith and for valuable consideration.
- (3) Where any application is made under this section, the court may—
- (a) if any question of fact is involved—determine that question or give directions as to the manner in which that question shall be determined; and
 - (b) if the court is being asked to make an order which may adversely affect the rights of any person who is not a party to the proceedings—direct that that person shall be made a party to the proceedings.

12.170 Similar, albeit narrower, provisions apply in Western Australia and New Zealand.¹⁹⁸

12.171 Section 8(1) provides that an application may be made to the court by a person who:

- is aggrieved by any act, omission or decision of a trustee or other person in the exercise of any power conferred by the *Trusts Act 1973* (Qld) or by law or by the instrument (if any) creating the trust; or who has reasonable grounds to apprehend any such act, omission or decision by which the person will be aggrieved; and
- has either:
 - directly or indirectly, an interest, whether vested or contingent, in any trust property; or
 - a right of due administration in respect of any trust.

12.172 Under section 8(1), 'a person who is aggrieved' is only required to be a person with a proper interest in the determination of the matter.¹⁹⁹ The person must also have direct or indirect interest in the trust property or a right of due administration in respect of the trust. The last group contemplates not only a person who is a taker in default of appointment but also a person who is a beneficiary under a discretionary trust.

¹⁹⁸

Trustee Act 1962 (WA) s 94; *Trustee Act 1956* (NZ) s 68. The Western Australian provision limits the persons who have standing to apply to a person who has 'directly or indirectly, an interest, whether vested or contingent, in any trust property', which does not extend to the objects of a discretionary trust: IJ Hardingham, 'Controlling Discretionary Trustees' (1975) *University of Western Australia Law Review* 91, 118. The New Zealand provision limits the persons who have standing to apply to a person who is 'beneficially interested' in the trust property, which also would arguably exclude the objects of a discretionary trust: see CEF Rickett, 'Reviewing a Trustee's Act, Omission or Decision under s 68 of the *Trustee Act 1956*' [1990] *New Zealand Recent Law Review* 69, 80.

¹⁹⁹

Re Whitehouse [1982] Qd R 196, 204 (Macrossan J).

12.173 The provision applies to ‘any power conferred by this Act or by law or by the instrument (if any) creating the trust’.²⁰⁰

12.174 Section 8(1) also empowers the court to make ‘such order in the premises (including such order as to costs) as the circumstances require’. These orders could include, for example, an order setting aside the appointment of a trustee.²⁰¹

12.175 Under section 8(2), the court cannot make an order that would disturb any distribution of the trust property, made without breach of trust, before the trustee became aware of the making of the application to the court, or affect any right acquired by any person in good faith and for valuable consideration.

12.176 Section 8(3) concerns the situation where the order sought may prejudice the rights of a person who is not a party to the proceedings (such as may occur where the applicant is one of a number of beneficiaries).²⁰² In that case, the court may direct that the person to be made a party to the proceedings.

The nature and scope of the court’s statutory power

12.177 The court has a wide jurisdiction under section 8 to review a trustee’s decision.²⁰³ Speaking of the ambit of section 8, Macrossan J in *Re Whitehouse* said:²⁰⁴

The power of the court under s 8 to review a trustee’s decision is one which should not be narrowly construed. By this I mean that the jurisdiction should not be read down or unduly confined.

12.178 Macrossan J also observed that, in this context, the court does not lightly interfere with a discretionary decision made by a trustee, and will interfere only if a proper case is established by the person seeking the review:²⁰⁵

On the other hand, I think it would be wrong to suggest that although the jurisdiction to undertake a review is wide, the court would lightly interfere with a discretionary decision made by a trustee. The courts will continue to bear in mind that discretionary trust powers are vested in trustees for the purpose of decision by them and the traditional reluctance to interfere with their decisions will, for good reason, continue. If, notwithstanding this reluctance, a proper case is made out, then I do not doubt that the court has wide power. Speaking for myself, I am not persuaded that it is possible or advisable to attempt to limit in advance the ambit of the cases in which the court will move under its ... statutory power of review. ... [T]he practical limitations upon the court’s power under s 8(1) of the *Trusts Act* [arises] out of the traditional reluctance of the courts to interfere with the discretionary acts of private trustees ... [A] heavy onus lies upon a person seeking a review of a trustee’s decision.

200 See, eg, *Re Faulkner* [1999] 2 Qd R 49.

201 *Re Whitehouse* [1982] Qd R 196, 203, 207–8 (Macrossan J).

202 *Bergade v La Provence Developments Pty Ltd* [1995] QSC 56.

203 *Re Whitehouse* [1982] Qd R 196, 203–4 (Macrossan J); *Burns v Burns* [2008] QSC 173, [30] (Chesterman J).

204 [1982] Qd R 196, 203.

205 *Ibid* 203–4.

12.179 This approach was approved by the Full Court of the Supreme Court of Queensland in *Tierney v King*.²⁰⁶ In that case, Matthews J (with whom Kelly and Macrossan JJ agreed) said:²⁰⁷

[A]lthough the right to review a decision conferred by s 8 ... should not be unduly confined the object of the section is not the substitution of a Judge's opinion for that of a trustee. The applicant carries a heavy onus of satisfying the Judge that there is a good reason for adoption of such a course and that the trustee has not exercised that 'sound discretion' referred to by Fry J in *In Re Roper's Trusts* (1879) 21 Ch D 272.

12.180 Where a court does examine the exercise of a trustee's discretion under section 8, it may consider the purpose for which the discretion was conferred, and whether it was 'exercised with an entire absence of indirect motive, with honesty of intention, and with a fair consideration of the subject'.²⁰⁸

12.181 In *Burns v Burns*,²⁰⁹ Chesterman J held that section 8 does not change the general law rule that a trustee's exercise of discretion cannot be impugned merely because it is unfair or unreasonable or unwise.²¹⁰

The applicant does not contend that the trustee, Duncan, has acted in bad faith or other than diligently and conscientiously in the exercise of the discretion conferred on him by the will. His complaint is that the manner in which Duncan proposes to exercise the discretion does not accord with the testatrix's letter of instruction that Ian's wishes be respected in the administration of the trust and Adrian's expressed wish that Ian be the recipient of the trust estate.

Such a complaint falls squarely within that class of case in which it is said the trustee's decision was unfair, or unreasonable, or unwise. These are beyond the review of the courts. Section 8 does not change the position. Ian's complaint cannot be accepted.

12.182 His Honour continued, citing with approval the statement of Truro LC in *Re Beloved Wilkes's Charity*.²¹¹

The duty of supervision on the part of this court will thus be confined to the question of the honesty, integrity and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at, except in particular cases.

206 [1983] 2 Qd R 580.

207 Ibid 583.

208 *Re Koczorowski* [1974] Qd R 177, 185 (Dunn J). See also *Burns v Burns* [2008] QSC 173, [36]–[37] (Chesterman J).

209 [2008] QSC 173.

210 Ibid [34]–[35].

211 Ibid [36], citing *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440, 448; 42 ER 330, 333.

12.183 His Honour observed that where solely the ‘accuracy of the [trustee’s] conclusion’ is challenged, the applicant must present cogent reasons for interfering with the trustee’s discretion:²¹²

To make out a ‘particular case’ an applicant must demonstrate cogent reasons for interfering with the discretion: see *Re Koczorowski* [1974] Qd R 177 at 185–6 per Dunn J. I apprehend that the phrase calls to mind those cases where the result of the discretion is plainly unreasonable or unjust giving rise to an inference that the discretion has miscarried or been affected by some impropriety.

12.184 The court has entertained applications under section 8 in relation to a range of matters, including investments,²¹³ a trustee’s replacement of a co-trustee,²¹⁴ maintenance and advancement decisions,²¹⁵ and requests for information.²¹⁶

The grounds for a review of a trustee’s act, omission or decision

12.185 An issue to consider is whether section 8 of the *Trusts Act 1973* (Qld) should be amended to state the grounds on which a review of a trustee’s act, omission or decision may be sought. At present, section 8 of the Act does not contain a statement as to the grounds for a review. Such a statement may provide greater clarity for both applicants and trustees. On the other hand, the current approach gives the court flexibility in dealing with the individual circumstances in which an application to review a trustee’s act, omission or decision may be made. The outcome of such an application will necessarily require a consideration of a trustee’s act, omission or decision in the context of the nature of the applicant’s interest in the trust and the powers and discretions conferred on the trustee.

12-4 Should section 8 of the *Trusts Act 1973* (Qld) be amended to state the grounds for a review of a trustee’s act, omission or decision and, if so, what should they be?

Power of court to make order in absence of parties

12.186 Section 99 of the *Trusts Act 1973* (Qld) authorises the court to make orders in the absence of the parties. It provides:

²¹² Ibid. In this context, Chesterman J also referred (at [37]) to the following statement of Dixon, Evatt and McTiernan JJ in *House v The King* (1936) 55 CLR 499, 505:

It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the Appellate Court may infer in the same way there has been a failure properly to exercise the discretion ...

²¹³ *Re Koczorowski* [1974] Qd R 177; *Jacques v Public Trustee of Queensland* [2008] QSC 108.

²¹⁴ *Re Whitehouse* [1982] Qd R 196.

²¹⁵ *Re Koczorowski* [1974] Qd R 177.

²¹⁶ *Tierney v King* [1983] 2 Qd R 580.

99 Power of court to make orders in absence of parties

- (1) Where in any proceedings the court is satisfied that diligent search has been made for any person, who, in the character of trustee, is made a defendant in any action, to serve the person with a process of the court, and that the person can not be found, the court may hear and determine the proceedings and give judgment therein against that person, in the person's character of a trustee, as if the person had been duly served or had entered an appearance in the action, and had also appeared by the person's counsel or solicitor at the hearing, but (except as provided in subsection (2)) without prejudice to any interest the person may have in the matters in question in the proceedings in any other character.
- (2) Where any party to any proceedings relating to a trust, or where any person or class of persons that the court thinks should be made a party or parties to those proceedings or otherwise be given an opportunity to attend and be heard in those proceedings, at the time of the proceedings—
- (a) is not within the jurisdiction; or
 - (b) is under disability; or
 - (c) can not be found; or
 - (d) is unborn; or
 - (e) is not capable of being identified or ascertained;

the court may appoint some person to represent that party, person or class, or may proceed in the person's or their absence, and all orders made in the proceedings are as binding on that party, person or class as if personally present and of full capacity.

12.187 Section 99(1) empowers the court to give judgment against a trustee in his or her absence, where a diligent search has been made and the trustee cannot be located. Section 99 has its origins in section 43 of the English *Trustee Act 1893*, which has since been replaced by section 59 of the English *Trustee Act 1925*. A similar provision is included in the trustee legislation of the ACT, New South Wales, the Northern Territory, Tasmania, Victoria, Western Australia and New Zealand.²¹⁷

12.188 Section 99(2) enables the court to appoint someone to represent the interests of any person who should be a party to any action but who is out of the jurisdiction, under a disability, 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 in a trust.

Power of court to charge costs on trust estate

12.189 Section 100 of the *Trusts Act 1973* (Qld) gives the court a broad power to order that the costs and expenses of an application made to the court be paid out

²¹⁷

Trustee Act 1925 (ACT) s 88; *Trustee Act 1925* (NSW) s 88; *Trustee Act* (NT) s 47; *Trustee Act 1898* (Tas) s 51; *Trustee Act 1958* (Vic) s 65; *Trustees Act 1962* (WA) s 96(1); *Trustee Act 1956* (NZ) s 70.

of the trust funds, and to apportion the costs and expenses in the manner it considers just. It provides:

100 Power of court to charge costs on trust estate

The court may order the costs and expenses of and incident to any application for an order appointing a new trustee, or for a vesting order, or of and incident to any such order, or any conveyance or transfer in pursuance thereof, or for the directions of the court, to be paid or raised out of the land or personal estate in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the court may seem just.

12.190 Section 100 has its origins in the English trustee legislation.²¹⁸ A similar provision is contained in the trustee legislation of New South Wales, Tasmania, Victoria, Western Australia, New Zealand and England.²¹⁹

Payment into court by trustee

12.191 Section 102 of the *Trusts Act 1973* (Qld) provides:

102 Payment into court by trustee

- (1) A trustee or trustees, or the majority of trustees, having in his, her or their hands or under his, her or their control money or securities belonging to a trust, may pay the same into court; and the same shall, subject to rules of court, be dealt with according to the orders of the court.
- (2) The receipt or certificate of the proper officer shall be a sufficient discharge to the trustee or trustees for the money or securities so paid into court.
- (3) Where money or securities are vested in any persons as trustees, and the majority are desirous of paying the same into court, but the concurrence of the other or others can not be obtained, the court may order the payment into court to be made by the majority without the concurrence of the other or others.
- (4) Where any money or securities ordered to be paid into court under subsection (3), are deposited with any financial institution, broker, or other depository, the court may order payment or delivery of the money or securities to the majority of the trustees for the purpose of payment into court.
- (5) Every transfer payment and delivery made in pursuance of any order under this section shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the money and securities so transferred, paid, or delivered.

²¹⁸ A provision to that effect first appeared in s 51 of the *Trustee Act 1850*, 13 & 14 Vict, c 60. That provision was replaced by s 38 of the *Trustee Act 1893*, 56 & 57 Vict, c 53, which was subsequently replaced by s 60 of the *Trustee Act 1925*, 15 & 16 Geo 5, c 19.

²¹⁹ *Trustee Act 1925* (NSW) s 93; *Trustee Act 1898* (Tas) s 44; *Trustee Act 1958* (Vic) s 66; *Trustees Act 1962* (WA) s 97; *Trustee Act 1956* (NZ) s 71; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, s 60.

12.192 Section 102 of the *Trusts Act 1973* (Qld) provides in general terms that a trustee may pay trust funds into court. An example may be 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. In such cases, the court can accept the funds and hold them on behalf of the person entitled. Once paid into court, the funds are held subject to the rules and orders of the court.²²⁰

12.193 It is also provided under section 102 that the receipt or certificate of the proper officer is a sufficient discharge to the trustee or trustees for the funds paid into court.

12.194 A similar provision is contained in the trustee legislation in the other Australian jurisdictions, and in New Zealand and England.²²¹

12-5 Subject to the matters mentioned in Questions 12-1 to 12-4 above, is there any need to modify the existing statutory powers conferred on the court by the provisions in Part 7 of the *Trusts Act 1973* (Qld) and, if so, what modifications should be made?

12-6 Is there is a need for the *Trusts Act 1973* (Qld) to confer any additional statutory powers on the court?

220

Uniform Civil Procedure Rules 1999 (Qld) rr 560–561. Generally, money paid into or deposited in court is dealt with under the *Court Funds Act 1973* (Qld); *Uniform Civil Procedure Rules 1999* (Qld) r 561(3).

221

Trustee Act 1925 (ACT) ss 94F–98; *Trustee Act 1925* (NSW) ss 95–99; *Trustee Act* (NT) s 44; *Trustee Act 1936* (SA) s 47; *Trustee Act 1898* (Tas) ss 48–49; *Trustee Act 1958* (Vic) s 69; *Trustees Act 1962* (WA) s 99; *Trustee Act 1956* (NZ) ss 77–79; *Trustee Act 1925*, 15 & 16 Geo 5, c 19, ss 63–63A.

Chapter 13

Charitable Trusts and Gifts for Philanthropic Purposes

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INTRODUCTION

13.1 This chapter examines the provisions in Part 8 of the *Trusts Act 1973* (Qld) that deal with charitable trusts and raises for consideration the question whether, in addition to the court, the Attorney-General should be empowered to approve *cy pres* schemes for certain charitable trusts.

13.2 It also outlines the provisions in Part 9 of the Act, which were included in 2009 to facilitate the making of philanthropic gifts by the trustees of particular trusts.

CHARITABLE TRUSTS

Overview

13.3 Charities and charitable trusts, being 'dedicated to the benefit of the community', are accorded a number of privileges at law:¹

(1) they are treated favourably by taxation statutes; (2) they enjoy an extensive exemption from the rule against perpetuities; (3) they do not fail for lack of certainty of objects; (4) if the settlor does not set out sufficient directions, the court will supply them by designing a scheme; (5) courts may apply trust property *cy-près*, providing they can discern a general charitable intention.

13.4 Because of this different treatment, the need arises for the law to 'provide a standard to distinguish the charitable from the non-charitable'.²

¹ *Re Canada Trust Co and Ontario Human Rights Commission* (1990) 69 DLR (4th) 321, 353 (Tarnopolsky JA). For a detailed explanation of these 'privileges', see GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) pt 3.

² GE Dal Pont, 'Why Define "Charity"? Is the Search for Meaning Worth the Effort?' (2002) 8(1) *Third Sector Review* 5, 6.

Charitable purposes

13.5 Under the general law, a charitable trust must, therefore, have a recognised charitable purpose.³ The foundation for the modern legal meaning of what is a 'charitable' purpose was established by the *Statute of Charitable Uses 1601*.⁴ That Act provided for the appointment of commissioners to enforce charitable gifts and uses, and to remedy abuses and misuses of charity property. The preamble to the Act rehearsed a list of 'charitable and godly uses' for which people had given their property.⁵

some for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, sea banks and highways, some for education and [preferment] of orphans, some for or towards relief, stock or maintenance for houses of correction, some for marriages of poor maids, some for support, aid and help of young tradesmen, handicraftsmen, and decayed persons, and others for relief or redemption of prisoners or captives and for aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes ...

13.6 Although the *Statute of Charitable Uses 1601* was not intended to define 'charity', the courts have continued to refer to its preamble in determining whether a given purpose is 'charitable' at law.⁶ Thus, the charitable purposes recognised at law include 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 of the *Statute of Charitable Uses 1601*.⁷

13.7 To be recognised as 'charitable', a charitable trust must also be of public benefit.⁸ That is, it must have some public, as distinct from a private, purpose, which is beneficial to the community or a section of the community.⁹

13.8 Section 103 of the *Trusts Act 1973* (Qld) deals with the meaning of 'charity'. Section 103(1) preserves the established rules of law relating to charity, despite the repeal of the *Statute of Charitable Uses 1601*.¹⁰ Section 103(2) of the

³ *Re Flatman* [1953] VLR 33, 36 (Barry J); *Morice v Bishop of Durham* (1804) 9 Ves Jun 399, 404–5; 32 ER 656, 658–9 (Grant MR).

⁴ 43 Eliz 1, c 4. See GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [4.3].

⁵ The preamble is set out in *Trustee Act 1925* (ACT) sch 1.

⁶ GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [2.1].

⁷ *Commissioners for Special Purposes of Income Tax v Pemsell* [1891] AC 531, 583 (Lord Macnaghten); *Incorporated Council of Law Reporting v Federal Commissioner of Taxation* (1971) 125 CLR 659, 666–7 (Barwick CJ); *Re Hoey* [1994] 2 Qd R 510, 512–13 (Demack J). The list of purposes that are recognised as 'charitable' at law is not closed: *A-G (NSW) v Sawtell* [1978] 2 NSWLR 200, 204 (Holland J).

⁸ *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 Norman).

⁹ 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.

¹⁰ The application of the *Statute of Charitable Uses 1601*, 43 Eliz 1, c 4 in Queensland was repealed by the *Trusts Act 1973* (Qld) s 3(1) sch 1 as passed.

Act extends the recognition of what is charitable to the provision, 'in the interests of social welfare', of 'facilities for recreation or other leisuretime occupation'.¹¹ However, such facilities are not in the interests of social welfare unless:¹²

- (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 such facilities by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances; or
 - (ii) the facilities are to be available to the members or to the male members or to the female members of the public at large.

13.9 Similar provision to recognise trusts for the provision of recreational facilities is made in some of the other Australian jurisdictions.¹³

13.10 In addition, section 116 of the *Trusts Act 1973* (Qld) provides that a local government may be appointed as a trustee for 'any charitable or public purpose, or for any purpose of recreation or other leisuretime use or occupation'.¹⁴

13.11 Section 103(4) further provides that nothing in section 103 is to be taken to derogate from the principle that, in order to be charitable, a gift, trust or institution must be for the public benefit.

Mixed charitable and non-charitable purposes

13.12 Ordinarily, a gift that is expressed for both charitable and non-charitable purposes will not be considered as a valid gift for charitable purposes.¹⁵ However, a gift may be regarded as a valid charitable gift if the non-charitable purpose is merely incidental and ancillary to the main charitable purpose, or if there can be an

¹¹ This provision was modelled on the *Recreational Charities Act 1958*, 6 & 7 Eliz 2, c 17, s 1 (see now *Charities Act 2011* (UK) c 25, s 5); see *Re Samford Hall Trust* [1995] 1 Qd R 60, 62 (Macrossan CJ); *Re Hoey* [1994] 2 Qd R 510, 513 (Demack J). The original English provision was introduced to confirm the charitable status of a range of recreational organisations which had been put in doubt by the decision of the House of Lords in *Inland Revenue Commissioners v Baddeley* [1955] AC 572 in which it was held that a trust for the promotion of the religious, social and physical wellbeing of persons resident in named localities who are members or likely to become members of the Methodist Church was not a valid charitable trust: see Charity Commission (England and Wales), *Review of the Register of Charities: The Recreational Charities Act 1958* (August 2000) [6].

¹² *Trusts Act 1973* (Qld) s 103(3).

¹³ *Trustee Act 1936* (SA) s 69C; *Variation of Trusts Act 1994* (Tas) s 4(1); *Charitable Trusts Act 1962* (WA) s 5. The Tasmanian provision does not include the 'interests of social welfare' or any other public benefit limitation.

¹⁴ That provision was inserted by the *Trusts Act Amendment Act 1979* (Qld) s 5. It appears that this was principally intended to cover trusts for recreational purposes for the use and benefit of particular sections of the community, such as the members of an association: Queensland, *Parliamentary Debates*, Legislative Assembly, 23 May 1979, 4750 (WD Lickiss, Minister for Justice and Attorney-General). That Act (s 6) also inserted s 117 of the *Trusts Act 1973* (Qld) to ensure that, where a local government holds property as a sole trustee, the trust documents are available for public scrutiny: Queensland, *Parliamentary Debates*, Legislative Assembly, 23 May 1979, 4750 (WD Lickiss, Minister for Justice and Attorney-General).

¹⁵ *Re Clarke* [1923] 2 Ch 407, 414, 417 (Romer J); *A-G (NSW) v Adams* (1908) 7 CLR 100, 113 (Barton J); *Smith v West Australian Trustee Executor & Agency Co Ltd* (1950) 81 CLR 320, 323 (Latham CJ). See also GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [13.1]–[13.9].

apportionment or severance made between the charitable and non-charitable purposes.¹⁶

13.13 Section 104 of the *Trusts Act 1973* (Qld) provides that the inclusion in a charitable trust of a non-charitable and invalid purpose will not invalidate the trust, and that such a trust is to be construed and given effect as if the non-charitable and invalid purpose had not been included in the trust. Similar provision is made in most of the other Australian jurisdictions.¹⁷

Applying trust property *cy pres*

13.14 It is possible to create a charitable trust that endures indefinitely. Provided that the gift vests in the trustee within the perpetuity period,¹⁸ it may be held indefinitely for the charitable purpose.¹⁹

13.15 This ‘perpetual dedication to charity’ necessitates ‘a mechanism ... to ensure that those objects remain capable of fulfilment over time’ and that the settlor’s intention in dedicating the property to a charitable purpose can be given effect.²⁰ That mechanism is the court’s inherent jurisdiction to settle a ‘*cy pres* scheme’.²¹

13.16 The court may allow the property to be applied *cy pres*, that is, to a charitable purpose as near as possible to the original, where it is impossible or impracticable to carry out the trust according to its terms.²² It has been said that this means ‘something less than physical impossibility’, but more than mere inexpediency.²³ Impossibility may arise in a number of circumstances:²⁴

¹⁶ See, eg, *Re Hood* [1931] 1 Ch 240; *Re Clarke* [1923] 2 Ch 407, 414–15, 418 (Romer J). See also GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [13.11], [13.12]–[13.14].

¹⁷ *Charitable Trusts Act 1993* (NSW) s 23; *Trustee Act 1936* (SA) s 69A; *Variation of Trusts Act 1994* (Tas) s 4(2)–(3); *Charities Act 1978* (Vic) s 7M; *Trustees Act 1962* (WA) s 102.

¹⁸ The ‘rule against perpetuities’, which is concerned with the remoteness of vesting (see [3.3] above), applies to charitable trusts, except in relation to a gift over from one charity to another: JHC Morris and WB Leach, *The Rule Against Perpetuities* (Stevens & Sons, 2nd ed, 1962) 189–90; *Property Law Act 1974* (Qld) s 219(2).

¹⁹ GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [6.10]; *Monds v Stackhouse* (1948) 77 CLR 232, 243 (Latham CJ).

²⁰ GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [14.6].

²¹ Ibid [14.6], [15.1]. In addition, where the particular means by which property is to be applied for charitable purposes have not been, or have not been sufficiently, specified by the trust instrument, the court has inherent jurisdiction to provide the necessary machinery for the administration of the trust by settling an ‘administrative scheme’ for the trust: *Mills v Farmer* (1815) 1 Mer 55, 95; 35 ER 597, 611 (Lord Eldon); *Re Gott* [1944] Ch 193, 197 (Uthwatt J); *Kytherian Association of Queensland v Sklavos* (1958) 101 CLR 56, 66 (McTiernan, Fullagar and Taylor JJ). See generally GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [14.6], [14.10]–[14.15].

²² GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [15.1] ff.

²³ *Re Trustees of the Kean Memorial Trust Fund* (2003) 86 SASR 449, 463–4 (Besanko J). See also *Parker v Moseley* [1965] VR 580, 583–4 (Starke J).

²⁴ GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [15.20].

Typical examples of practical impossibility are those involving bequests that are insufficient in amount to adequately fulfil their intended purpose, that are in favour of institutions that no longer exist, or that are disclaimed by the intended trustee. Other examples include gifts to an institution that no longer carries on the work for which the disposition is expressed, and gifts that an institution is prohibited by its constitution from accepting. (notes omitted)

13.17 The impossibility may be an ‘initial impossibility’ where, ‘from the outset’, the designated purpose does not exist, is illegal or cannot otherwise be carried out. For example, a bequest to erect a church in a particular locality was held to be impracticable at the time of the testator’s death on the basis that there were insufficient funds provided to build the church and an insufficient congregation to maintain it.²⁵

13.18 There might also be a ‘supervening impossibility’ where the purposes of the trust were initially possible but, with the passage of time, have ceased to be so.²⁶ For example, a trust established in the late 1940s for the maintenance of children in orphanages had, by 1995, become impracticable of performance in its original terms because of changes in social and economic conditions and in government policy regarding the residential care of disadvantaged children.²⁷

13.19 In cases of initial impossibility, a gift or trust for a charitable purpose may be saved by a *cy pres* scheme only if its terms indicate a general, as distinct from a merely particular, charitable intention.²⁸ It is not necessary, however, to find a general charitable intention in cases of supervening impossibility.²⁹

13.20 Section 105 of the *Trusts Act 1973* (Qld) sets out the circumstances in which the original purposes of a charitable trust can be altered to allow the property, or part of it, to be applied *cy pres*. Similar provision is made in most of the other Australian jurisdictions, and in New Zealand.³⁰

13.21 Section 105 widens the circumstances in which property may be applied *cy pres*:³¹

²⁵ *Re Tyrrie* [1970] VR 264.

²⁶ JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1070]. The impossibility might also arise ‘because a surplus remains after the designated purpose has been exhausted’: *ibid*.

²⁷ *Re Peirson Memorial Trust* [1995] QSC 308. See also, eg, *Re Anzac Cottages Trust* [2000] QSC 175, discussed in Chapter 3.

²⁸ See *A-G (NSW) v Perpetual Trustees Co Ltd* (1940) CLR 209, 225 (Dixon and Evatt JJ), quoted with approval in *Re Annandale* [1986] 1 Qd R 353, 358 (Derrington J). See also *Royal North Shore Hospital of Sydney v A-G (NSW)* (1938) 60 CLR 396, 428–9 (Dixon J); *Re Pitt* (2002) 84 SASR 109, 116 (Duggan J); JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [1070].

²⁹ *Re Tacon* [1958] 1 Ch 447, 453–4 (Lord Evershed MR); *Cram Foundation v Corbett-Jones* [2006] NSWSC 495, [49] (Brereton J).

³⁰ *Charitable Trusts Act 1993* (NSW) ss 9–11; *Trustee Act 1936* (SA) s 69B(1)–(2); *Variation of Trusts Act 1994* (Tas) ss 5, 10; *Charities Act 1978* (Vic) s 2; *Charitable Trusts Act 1962* (WA) s 7(1); *Charitable Trusts Act 1957* (NZ) s 32(1).

³¹ *The Congregation of the Religious Sisters of Charity of Australia v A-G (Qld)* [2011] QSC 100, [22] (Martin J), citing *Re Anzac Cottages Trust* [2000] QSC 175.

Under that section it is no longer necessary to establish that actual compliance with the original terms of the trust is impossible, rather it is now sufficient that an applicant demonstrate that the original terms have ceased to provide a suitable and effective method of using the trust property.

13.22 It provides:

105 Occasions for applying property cy pres

- (1) Subject to subsection (2), the circumstances in which the original purposes of a charitable trust can be altered to allow the property given or part of it to be applied cy pres shall be as follows—
- (a) where the original purposes, in whole or in part—³²
 - (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;³³
 - (b) where the original purposes provide a use for part only of the property available by virtue of the trust;
 - (c) where the property available by virtue of the trust and other property applicable for similar purposes can be more effectively used in conjunction, and to that end can suitably, regard being had to the spirit of the trust, be made applicable to common purposes;
 - (d) where the original purposes were laid down by reference to an area which then was but has since ceased to be a unit for some other purpose, or by reference to a class of persons or to an area which has for any reason since ceased to be suitable, regard being had to the spirit of the trust, or to be practical in administering the trust;
 - (e) where the original purposes, in whole or in part, have, since they were laid down—
 - (i) been adequately provided for by other means; or
 - (ii) ceased, as being useless or harmful to the community or for other reasons, to be in law charitable; or
 - (iii) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the trust, regard being had to the spirit of the trust.

³² It has been held, with respect to a provision in virtually the same terms as s 105(1)(a), that ‘the circumstances in which the statutory power can be exercised are wide enough to include gifts which would otherwise fail at the outset’: *Re Pitt* (2002) 84 SASR 109, 119 (Duggan J).

³³ The term ‘spirit of the trust’ refers to ‘the basic intention underlying the gift so far as it can be ascertained from the terms of the relevant instrument in the light of admissible evidence’: *The Congregation of the Religious Sisters of Charity of Australia v A-G (Qld)* [2011] QSC 100, [24] (Martin J), citing *Cram Foundation v Corbett-Jones* [2006] NSWSC 495, [45] (Brereton J). See also *Re Anzac Cottages Trust* [2000] QSC 175, [19] (Atkinson J), citing *Varsani v Jesani* [1999] Ch 219, 233 (Morritt LJ).

- (2) Subsection (1) shall not affect the conditions which must be satisfied in order that property given for charitable purposes may be applied cy pres, except in so far as those conditions require a failure of the original purposes.³⁴
- (3) References in subsections (1) and (2) to the original purposes of a trust shall be construed, where the application of the property given has been altered or regulated by a scheme or otherwise, as referring to the purposes for which the property is for the time being applicable.
- (4) It is hereby declared that a trust for charitable purposes places a trustee under a duty, where the case permits and requires the property or some part of it to be applied cy pres, to secure its effective use for charity by taking steps to enable it to be so applied.
- (5) Nothing in this section shall affect the application of the provisions of the *Charitable Funds Act 1958* to the funds to which that Act applies.³⁵ (notes added)

Applications to the court

13.23 Section 106 of the *Trusts Act 1973* (Qld) empowers the court, upon application, to give directions in respect of the administration of a charitable trust and to make orders requiring a trustee to carry out the trust, to comply with any scheme, or to satisfy the trustee's liability for any breach of trust.³⁶

13.24 An application to the court under section 106 may be made by the Attorney-General³⁷ or a person authorised by the Attorney-General, by the charity or any trustee of the trust, or by any person interested in the due administration of the trust. Notice of the application is to be given to the Attorney-General, the trustee of the trust, and such other person as the court directs.

13.25 The relevant legislation in most of the other Australian jurisdictions also confers statutory powers on the court to make orders regarding the administration

³⁴ Section 105(2) preserves the requirement to find a general charitable intention in cases of initial impossibility: *Re Pitt* (2002) 84 SASR 109, 118 (Duggan J). Cf *Charitable Trusts Act 1993* (NSW) s 10(2) which provides that 'a general charitable intention is to be presumed unless there is evidence to the contrary in the instrument establishing the charitable trust'.

³⁵ The *Charitable Funds Act 1958* (Qld) sets out a statutory procedure for the application to other purposes of funds raised for specified charitable purposes by public collection, including by lotteries, where the original purpose is frustrated. Section 2 of that Act defines 'charitable purpose' widely to encompass purposes not otherwise recognised as charitable at law, including benevolent and philanthropic purposes. Legislative provision to deal with 'dormant' or 'excess' charitable and benevolent funds raised by collection, or for specific charitable purposes that fail where the donor is unknown or has disclaimed, is also made in some of the other Australian jurisdictions: *Dormant Funds Act 1942* (NSW); *Collections for Charitable Purposes Act 1939* (SA) s 16; *Variation of Trusts Act 1994* (Tas) s 11; *Charities Act 1978* (Vic) s 3; *Charitable Collections Act 1946* (WA) s 16.

³⁶ See also *Trusts Act 1973* (Qld) s 93, discussed in Chapter 12, which provides for the court to make vesting orders in the case of charity trustees.

³⁷ Under the general law, enforcement of charitable trusts falls to the Attorney-General, as representative of the Crown in its *parens patriae* function: see GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [14.23]–[14.25]. In Victoria and Western Australia, the Attorney-General is given express power to make inquiries in the administration of charitable trusts, and, in Victoria, to receive applications from trustees of charitable trusts, where the value of the corpus of the property is less than \$500 000, for an opinion or advice on matters affecting the performance of the trustees' duties: *Charities Act 1978* (Vic) ss 5, 9; *Charitable Trusts Act 1962* (WA) s 20.

of charitable trusts.³⁸ Express provision is also made in some of the other jurisdictions for trustees of a charitable trust to apply to the court for approval of a scheme to vary the purposes of the trust.³⁹

Variation schemes by the Attorney-General

13.26 As explained above, the court has inherent jurisdiction to settle *cy pres* schemes, and section 106 of the *Trusts Act 1973* (Qld) provides expressly for the court to make orders, on application, to require the trustee to comply with a scheme for the trust.

13.27 Under the general law, the Attorney-General, representing the objects of the charity, has the right and duty to assist the court in the formulation of *cy pres* schemes for the execution of charitable trusts,⁴⁰ but 'has no independent authority to change the destination of a trust fund against the will of the testator'.⁴¹

13.28 However, the legislation in some of the Australian jurisdictions empowers the Attorney-General, in particular circumstances, to approve *cy pres* schemes for the variation of the purposes of charitable trusts.⁴² Most of those provisions are included in separate legislation dealing with charities and charitable trusts.

13.29 In Victoria, for example, section 4 of the *Charities Act 1978* (Vic) provides that, 'in lieu of making application to the court', the trustees of a charitable trust may apply to the Attorney-General for directions for the application of the property *cy pres*. An application may be made if, either, the total value of the corpus of the property is less than \$500 000 or, where the property was given for specific charitable purposes which fail, the total value does not exceed \$50 000.⁴³

13.30 On receiving an application, the Attorney-General may make investigations and inquiries and require the trustees to provide information or advice as he or she thinks fit.⁴⁴ The Attorney-General may, on any conditions,

38 *Trustee Act 1925* (ACT) ss 94A–94E; *Charitable Trusts Act 1993* (NSW) ss 5–8; *Trustee Act 1936* (SA) ss 60–69; *Charities Act 1978* (Vic) s 13 (court may order removal of trustee or executor); *Charitable Trusts Act 1962* (WA) s 21.

39 *Trustee Act 1936* (SA) s 69B(3)(a), (6); *Variation of Trusts Act 1994* (Tas) ss 5(2), 6; *Charitable Trusts Act 1962* (WA) s 10(2). See also *Charitable Trusts Act 1957* (NZ) ss 35(2), 53. In Western Australia, the Attorney-General is required to assess and report to the trustees on any scheme prepared by the trustees prior to its submission to the court: *Charitable Trusts Act 1962* (WA) s 10. Similar provision is made in New Zealand: *Charitable Trusts Act 1957* (NZ) s 35.

40 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, 62 (Lord Simonds); *Re Davies* (1940) 58 WN (NSW) 35, 36–7 (Roper J).

41 *Re Vosz* [1926] SASR 218, 233 (Murray CJ).

42 *Charitable Trusts Act 1993* (NSW) pt 4; *Trustee Act 1936* (SA) s 69B(3)(b), (4)–(9); *Variation of Trusts Act 1994* (Tas) s 7; *Charities Act 1978* (Vic) ss 4–4B; *Charitable Trusts Act 1962* (WA) ss 10–19. In England, the Charity Commission has power to approve *cy pres* schemes under the *Charities Act 2011* (UK) c 25, s 67. In New South Wales and Western Australia, the Attorney-General has additional powers to approve 'administrative schemes' for charitable trusts: *Charitable Trusts Act 1993* (NSW) s 12(1)(b), (c); *Charitable Trusts Act 1962* (WA) ss 9(1), 10A. As to the court's power to approve administrative schemes, see n 21 above.

43 *Charities Act 1978* (Vic) s 4(1).

44 *Charities Act 1978* (Vic) s 4(2).

sanction a *cy pres* scheme proposed by the trustees and authorise the sale, conversion or vesting of such property by the trustees, if satisfied that:⁴⁵

- the property, valuing less than \$500 000, was given for charitable purposes and may be applied *cy pres*; or
- the property, valuing less than \$50 000, was given for a specific charitable purpose that failed and the person(s) who would otherwise be entitled to the property has, unless it would be unreasonable to require the applicant to incur the expense of identifying or locating the person(s), consented.

13.31 Section 4 of the *Charities Act 1978* (Vic) provides:

4 Power of Attorney-General to sanction schemes

(1) The trustees of any property given for charitable purposes where—

- (a) the total value of the corpus of the property is less than \$500 000 or an amount fixed under section 4A,⁴⁶ whichever is the greater; or
- (b) the total value of the corpus of the property does not exceed \$50 000 or an amount fixed under section 4A, whichever is the greater, and the property is given for specific charitable purposes which fail—

may (in lieu of making application to the court) in writing and upon payment of the relevant prescribed fee (if any)⁴⁷ apply to the Attorney-General for directions for the application of such property *cy pres*.

- (2) Upon receiving any application the Attorney-General may make such investigations and inquiries as he thinks fit and may require the trustees to furnish such information, opinions or advice as he thinks fit.
- (3) Where the Attorney-General is satisfied either—
 - (a) that—
 - (i) the property was given for charitable purposes and may pursuant to section 2 or 3 be applied *cy pres*,⁴⁸ and
 - (ii) the total value of the corpus of the property is less than \$500 000 or an amount fixed under section 4A, whichever is the greater; or

⁴⁵ *Charities Act 1978* (Vic) s 4(3).

⁴⁶ Under s 4A of the *Charities Act 1978* (Vic), the Governor in Council may increase the monetary limits in s 4(1) of the Act by order published in the Government Gazette. To date, no such order has been published.

⁴⁷ The prescribed fees for making an application to the Attorney-General are on a sliding scale ranging from \$300 (where the total value of the corpus of the trust property is \$25 000 or more, but less than \$50 000) to \$1500 (where the total value of the corpus of the trust property is \$ 250 000 or more, but less than \$500 000): *Charities Regulations 2005* (Vic) reg 4.

⁴⁸ *Charities Act 1978* (Vic) s 2 sets out the occasions for applying property *cy pres* in similar terms to s 105 of the *Trusts Act 1973* (Qld), set out at [13.22] above. *Charities Act 1978* (Vic) s 3 deals with the *cy pres* application of gifts given for specific charitable purposes which fail where the donor is unknown or has disclaimed: see n 35 above.

- (b) that—
 - (i) such property was given for specific charitable purposes which fail; and
 - (ii) the total value of the corpus of the property does not exceed \$50 000 or an amount fixed under section 4A, whichever is the greater; and
 - (iii) unless the Attorney-General considers it would be unreasonable to require the applicant to incur expense with a view to identifying or locating the person or persons who would be entitled to the property but for the operation of this section, the consent of the person or persons so entitled has been obtained—

he may in his absolute discretion and subject to such provisions and conditions (if any) as he thinks fit—

 - (c) sanction any scheme proposed by the trustees for the application *cy près* of such property; and
 - (d) authorize the sale transfer conversion or vesting of any such property by the trustees notwithstanding that the trustees have no such power pursuant to the trust instrument.
- (4) The Attorney-General shall not by virtue of this section—
 - (a) have any greater powers than are exercisable by the court in charity proceedings; or
 - (b) have power to try or determine—
 - (i) the title at law or in equity to any property as between a charity or trustee for a charity and a person holding or claiming the property or an interest in it adversely to the charity;
 - (ii) any question as to the existence or extent of any charge or trust;
 - (iii) any dispute as to whether the trustees are trustees of a charitable trust; or
 - (iv) any dispute as to whether the property may be applied *cy près* pursuant to section 2 or 3.
- (5) In any case where the Attorney-General in accordance with subsection (2) sanctions any scheme or gives any authority the trustees shall not thereafter be subject to any liability for breach of trust arising solely from their application of property *cy près* in accordance with such scheme or authority. (notes added)

13.32 Provision is also made in New South Wales, South Australia, Tasmania and Western Australia for the Attorney-General to establish or approve a *cy pres* scheme on the application of the trustees, where the value of the property does not

exceed the prescribed amount.⁴⁹ In New South Wales, the Attorney-General also has power to establish a *cy pres* scheme on the referral of the court or, in 'special cases', on his or her own initiative.⁵⁰

13.33 A scheme to vary the purposes of the trust may be approved by the Attorney-General in accordance with the provisions, similar to section 105 of the *Trusts Act 1973* (Qld), which set out the occasions on which property may be applied *cy pres*.⁵¹

13.34 In addition, the South Australian, Tasmanian and Western Australian provisions specify additional matters of which the Attorney-General must be satisfied before approving a *cy pres* scheme. In South Australia and Tasmania, the Attorney-General must be satisfied that the proposed variation or scheme accords as far as reasonably practicable with the spirit of the trust,⁵² and is justified in the circumstances of the particular case.⁵³ In Western Australia, the Attorney-General must be satisfied that the scheme is a proper one that should carry out the desired purpose or proposal and is not contrary to law, public policy or good morals, and that every proposed purpose is charitable and can be carried out.⁵⁴

13.35 Apart from Victoria, the provisions in the other jurisdictions also impose public notice or inspection requirements in respect of applications made to the Attorney-General,⁵⁵ and approvals given by the Attorney-General.⁵⁶

13.36 These provisions effectively enable trustees of certain smaller charitable trusts to elect whether to apply to the court or to the Attorney-General for the approval of a *cy pres* scheme. A particular advantage of allowing an application to

49 *Charitable Trusts Act 1993* (NSW) s 14(1)(a) (\$500 000); *Trustee Act 1936* (SA) s 69B(3)(b) (\$300 000); *Variation of Trusts Act 1994* (Tas) s 7(1) and *Variation of Trusts Regulations 2004* (Tas) reg 4 (\$200 000 if the property consists of or includes real property or \$100 000 if the property consists of personal property only); *Charitable Trusts Act 1962* (WA) s 10A(1) (less than \$50 000, or where the income in the previous financial year was less than \$10 000).

50 *Charitable Trusts Act 1993* (NSW) s 13(1).

51 *Charitable Trusts Act 1993* (NSW) ss 9, 12(1)(a); *Trustee Act 1936* (SA) s 69B(1), (3)(b); *Variation of Trusts Act 1994* (Tas) ss 5(2)–(3), 7(2); *Charities Act 1978* (Vic) ss 2, 4(3)(a)(i); *Charitable Trusts Act 1962* (WA) ss 7(1), 9(1), 10A. *Trusts Act 1973* (Qld) s 105 is set out at [13.22] above.

52 The term 'spirit of the trust' refers to the basic intention underlying the gift: see n 33 above.

53 *Trustee Act 1936* (SA) s 69B(6); *Variation of Trusts Act 1994* (Tas) s 7(2)(b), (5)(a). In addition in Tasmania, the Attorney-General must not approve a scheme varying the purposes of the trust unless, in the case of a failure of the original purposes of the trust, any person who has, or may acquire, a claim to any of the trust property consents to the exercise of those powers: s 7(5)(b).

54 *Charitable Trusts Act 1962* (WA) s 18(1).

55 *Charitable Trusts Act 1993* (NSW) s 15 (notice of the proposed scheme to be published in the Gazette or a newspaper circulating throughout New South Wales not less than one month prior to establishing the scheme); *Trustee Act 1936* (SA) s 69B(5) (notice of an application to be given as the Attorney-General directs); *Charitable Trusts Act 1962* (WA) s 10A(5)(a) (Attorney-General may require trustees to give public notice of the scheme in such manner as the Attorney-General thinks fit). Similar provision is not made in Tasmania.

56 *Charitable Trusts Act 1993* (NSW) s 16(1) (copy of the order establishing the scheme, and address at which a copy of the order may be inspected, to be published in the Gazette or a newspaper circulating throughout New South Wales); *Trustee Act 1936* (SA) s 69B(9) (register of approvals given by Attorney-General to be kept available for public inspection); *Variation of Trusts Act 1994* (Tas) s 9 (register of all certificates of approval to be kept and available for inspection by any person); *Charitable Trusts Act 1962* (WA) s 10A(6) (notice of approval to be published in the Gazette).

be made to the Attorney-General in the case of smaller trusts is the saving in costs that would otherwise be incurred by an application to the court. On the other hand, requiring that applications be made to the court ensures that the court's particular expertise is brought to bear on the issues involved.

13-1 Should the *Trusts Act 1973* (Qld) be amended to allow an application to be made to the Attorney-General for approval of a *cy pres* scheme for a charitable trust and, if so:

- (a) in respect of which charitable trusts should an application be capable of being made (by reference to the value of the property of the trust);
- (b) who should be entitled to make an application;
- (c) what specific matters should the Attorney-General need to be satisfied of before approving a *cy pres* scheme; and
- (d) what notice requirements should be imposed in respect of applications made to the Attorney-General, and approvals given by the Attorney-General?

Section 110 of the *Anti-Discrimination Act 1991* (Qld)

13.37 Certain activities related to charities and charitable benefits are the subject of exemptions under anti-discrimination legislation.

13.38 In particular, section 110 of the *Anti-Discrimination Act 1991* (Qld) provides an exemption to the prohibitions that apply under that Act for documents that make provision for charitable benefits.⁵⁷ Section 110 of the Act provides:⁵⁸

110 Charities

A person may include a discriminatory provision in a document that provides exclusively for charitable benefits, and may do an act that is required to give effect to such a provision.

13.39 Similar, but differently worded, provisions are included in the anti-discrimination statutes of the other Australian jurisdictions, and in New Zealand.⁵⁹

⁵⁷ See also *Anti-Discrimination Act 1991* (Qld) s 91 (accommodation with charitable purposes).

⁵⁸ *Anti-Discrimination Act 1991* (Qld) s 103 provides that it is not unlawful to discriminate with respect to a matter that is otherwise prohibited under pt 4 of the Act (which sets out the areas of activity in which discrimination is prohibited) if an exemption in ss 104–113 applies.

⁵⁹ *Age Discrimination Act 2004* (Cth) s 34; *Disability Discrimination Act 1992* (Cth) s 49(1); *Racial Discrimination Act 1975* (Cth) s 8(2); *Sex Discrimination Act 1984* (Cth) s 36; *Anti-Discrimination Act 1977* (NSW) s 55; *Anti-Discrimination Act* (NT) s 52; *Equal Opportunity Act 1984* (SA) ss 45, 64, 80, 85N, 85ZI; *Anti-Discrimination Act 1998* (Tas) s 23; *Equal Opportunity Act 2010* (Vic) s 80; *Equal Opportunity Act 1984* (WA) s 70; *Human Rights Act 1993* (NZ) s 150. See also Human Rights and Anti-Discrimination Bill 2012 (Cth) cl 34. An exposure draft of that Bill was released in November 2012 but has not yet been introduced into Parliament.

13.40 Section 110 refers to the inclusion of ‘a discriminatory provision in a document⁶⁰ that provides exclusively for charitable benefits’.⁶¹ ‘Document’ has a wide meaning,⁶² and would include, among other things, a will or trust instrument.

13.41 The wording of section 110 raises the possibility that the exemption in section 110 may not apply to all charitable trusts.⁶³ On one reading of section 110, it is the *document*, rather than the relevant provision in the document, that must provide exclusively for charitable benefits. On this interpretation, section 110 would not apply in the case of a will or trust instrument that included several gifts or assignments, only some of which were charitable.

13.42 Section 110 is not specific in its terms to trusts. Moreover, the scope of the provision raises issues that are primarily concerned with anti-discrimination law, rather than trusts law. Whether, and how, the exemption in section 110 should be clarified is a matter for consideration within the particular context and policy setting of the *Anti-Discrimination Act 1991* (Qld), and does not fall within the scope of this review.

GIFTS FOR PHILANTHROPIC PURPOSES

13.43 Part 9 of the *Trusts Act 1973* (Qld), which was inserted in 2009,⁶⁴ makes provision for trustees of prescribed trusts to provide money, property or benefits to a deductible gift recipient under the *Income Tax Assessment Act 1997* (Cth). As explained below, these provisions enable gifts to be made to government-linked entities that are not charities at law, without compromising the tax exempt status of the donor.⁶⁵

⁶⁰ ‘Document’ is not defined in the *Anti-Discrimination Act 1991* (Qld). However, it is defined in the *Acts Interpretation Act 1954* (Qld) s 36 to include ‘(a) any paper or other material on which there is writing; and (b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; and (c) any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device)’.

⁶¹ *Anti-Discrimination Act 1998* (Tas) s 23(a) is in similar terms. In contrast, with the exception of South Australia, the equivalent provisions in the other jurisdictions refer to a provision in a deed, will or other document that confers charitable benefits on persons of a particular class, where ‘charitable benefits’ means benefits for purposes that are exclusively charitable according to law: see n 59 above.

⁶² *Anti-Discrimination Act 1991* (Qld) s 110 has been held to apply to the conditions imposed by an admission contract and accompanying code of conduct on clients of the Salvation Army drug and alcohol rehabilitation program: *Millen v The Salvation Army (Queensland) Property Trust* [2004] QADT 33.

⁶³ See *Perpetual Trustees Queensland Ltd v The Smith Family* (Unreported, Supreme Court of Queensland, A Lyons J, 19 March 2012), where counsel for the Attorney-General submitted that the exemption in *Anti-Discrimination Act 1991* (Qld) s 110 may not, in fact, apply to the trust in question. That case concerned a testamentary trust for educational scholarships for children, excluding children who are followers or devotees of Islam. Because of the inclusion of the discriminatory provision in the trust, concerns had been raised that the scholarships could not be advertised and the funds could not be distributed without possible infringement of the anti-discrimination legislation. The court approved a *cy pres* scheme allowing the distribution of the funds with the discriminatory provision removed.

⁶⁴ *Criminal Proceeds Confiscation and Other Acts Amendment Act 2009* (Qld) s 84.

⁶⁵ 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).

Charitable trusts are the legal conduit for the making of philanthropic donations. These are generally family-controlled charitable funds. These funds are known as prescribed private funds, or PPFs.⁶⁶ Another type of charitable trust is the ancillary fund. The number of these charitable funds is increasing, and they are estimated to hold more than \$1 billion in capital. They make substantial donations each year.

PPFs and ancillary funds enjoy a number of tax exemptions. Previously, for these charitable funds to retain their tax exempt status, they could only donate to organisations that were deductible gift recipients for tax purposes, and also charities at law.

Because of their connection to government, many institutions in Queensland which operate for charitable purposes, such as the Queensland Art Gallery and the State Library of Queensland, are not considered charities at law. This prevents charitable foundations from donating to them. The trust instruments of PPFs and ancillary funds also reflect this limitation. (note added)

13.44 Amendments were made to the *Income Tax Assessment Act 1997* (Cth) in 2005⁶⁷ to allow relevant trustees to donate to any deductible gift recipient, regardless of whether it is recognised at law as a 'charity', and still retain their tax exempt status.⁶⁸ As a result, donations may be made, for example, to public hospitals, universities, libraries, museums and art galleries, and approved scientific research institutions.⁶⁹ The provisions were intended 'to open up a new vehicle for private philanthropy'.⁷⁰

13.45 However, the terms of trust instruments had tended to limit trustees' powers to make donations to deductible gift recipients to those that are 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 their ... trust instruments'.⁷¹ The provisions in Part 9 of the *Trusts Act 1973* (Qld) were inserted to overcome this lack of power.⁷²

For most trustees it is not possible to simply alter the trust deed to include deductible gift recipients that are not charities.

The amendments to the Trust Act open the way for charitable funds to donate to public institutions such as art galleries, libraries, and health research

66 These are now known as 'private ancillary funds': see *Income Tax Assessment Act 1997* (Cth) s 30-15 table item 2; Australian Taxation Office, *GiftPack: Guide for Deductible Gift Recipients and Donors* (2011) 7, 56. See also GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [17.48].

67 See *Tax Laws Amendment (2005 Measures No 3) Act 2005* (Cth) s 3, sch 1.

68 See *Income Tax Assessment Act 1977* (Cth) ss 50-1, 50-2, 50-52, 50-72. See also s 30-15 table items 1-2, pt 2.5 div 30 subdiv 30-B.

69 See *Income Tax Assessment Act 1977* (Cth) ss 50-72, 30-15 table item 1, pt 2-5 div 30 subdiv 30-B.

70 GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010) [17.48].

71 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).

72 Ibid.

facilities. Similar amendments have been made to New South Wales and Victorian legislation.⁷³

The bill gives trustees of existing and new charitable trusts the power to give to eligible gift recipients whether or not they are charitable at law, so long as they are recognised by the Commonwealth tax legislation. This power is also granted whether or not the power is expressly contained in the trust instrument.⁷⁴

The bill contains a provision stating that having this power or exercising it does not affect the trust's charitable status. (notes added)

13.46 The Commission is not aware of any issue in relation to these provisions and does not propose any change to them.

⁷³ *Charitable Trusts Act 1993* (NSW) pt 4A; *Charities Act 1978* (Vic) s 7K. See also *Charitable Trusts Act 1962* (WA) pt VA which was inserted into that Act by *Charitable Trusts Amendment Act 2011* (WA) s 4.

⁷⁴ However, the statutory power to provide money, property or benefits to or for an eligible gift recipient, whether or not the recipient is charitable at law, does not apply 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 the particular eligible recipient or class of eligible recipients, or for the establishment of that eligible recipient or class of eligible recipients: *Trusts Act 1973* (Qld) s 109(2)(b).

Chapter 14

Miscellaneous Issues

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INTRODUCTION

14.1 This chapter examines section 113 of the *Trusts Act 1973* (Qld), which is contained in Part 10 of the Act. Sections 112 and 114–117, which are also included in Part 10 of the Act, have been considered earlier in this Discussion Paper.¹

REMEDIES FOR THE WRONGFUL DISTRIBUTION OF TRUST PROPERTY

Introduction

14.2 In *Re Diplock*,² 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 two remedies available against a person to whom the property has been wrongfully distributed.

14.3 First, the creditor or beneficiary has a personal action in equity (described as a claim '*in personam*'³) against the person to whom the property has been wrongfully distributed, regardless of whether the distribution was made as a result of a mistake of fact or of law.⁴ The Court of Appeal considered that:⁵

as regards the conscience of the defendant upon which ... equity is said to act, it is prima facie at least a sufficient circumstance that the defendant ... has received some share of the estate to which he was not entitled.

1 *Trusts Act 1973* (Qld) ss 112 and 114 are considered in Chapter 11, s 115 is considered in Chapter 9 (in conjunction with s 33(1)(j)), and ss 116 and 117 are considered in Chapter 13.

2 [1948] Ch 465, affd *Ministry of Health v Simpson* [1951] AC 251.

3 Ibid 476.

4 Ibid 502.

5 Ibid 503.

14.4 The Court of Appeal held, however, that the claim of the creditor or beneficiary is subject to the qualification that, since the wrong payment was attributable to the 'blunder' of the personal representative, the person's claim must, in the first instance, be against the personal representative. The direct action against a person to whom a distribution has been incorrectly made should be limited to the amount that cannot be recovered from the personal representative.⁶

14.5 Secondly, an unpaid or underpaid creditor or beneficiary may have a right to trace the money (described as a claim '*in rem*'⁷), provided that it is possible to identify or disentangle the money where it has been mixed with assets of the recipients.⁸ This second remedy is distinguished from the personal action described above because it presupposes 'the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund'.⁹ The Court of Appeal observed that:¹⁰

If, on the facts of any individual case, such continued existence is not established, equity is as helpless as the common law itself. If the fund, mixed or unmixed, is spent upon a dinner, equity, which dealt only in specific relief and not in damages, could do nothing. ... It is, therefore, a necessary matter for consideration in each case where it is sought to trace money in equity, whether it has such a continued existence, actual or notional, as will enable equity to grant specific relief.

14.6 The decision in *Re Diplock*, which concerned the remedies for the wrongful distribution of property by executors, was affirmed by the House of Lords in *Ministry of Health v Simpson*.¹¹ Lord Simonds considered that the reasoning and conclusion of the Court of Appeal were 'unimpeachable',¹² but raised a doubt as to whether the principles articulated by the Court of Appeal would also apply to a trustee who had wrongfully distributed trust property:¹³

I think that it is important in the discussion of this question to remember that the particular branch of the jurisdiction of the Court of Chancery with which we are concerned relates to the administration of assets of a deceased person. While in the development of this jurisdiction certain principles were established which were common to it and to the comparable jurisdiction in the execution of trusts, I do not find in history or in logic any justification for an argument which denies the possibility of an equitable right in the administration of assets because, as it is alleged, no comparable right existed in the execution of trusts. I prefer to look solely at the authorities which are strictly germane to the present question: it is from them alone that the nature and extent of the equity are to be ascertained.

6 Ibid 503.

7 Ibid 476.

8 Ibid 536–7. See also JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2710].

9 [1948] Ch 465, 521.

10 Ibid.

11 [1951] AC 251.

12 Ibid 265.

13 Ibid 265–6.

14.7 Lord Simonds also effectively excluded any defence of change of position in relation to the claim *in personam*.¹⁴

Legislative responses to *Re Diplock*

14.8 Only two Australian jurisdictions, Queensland and Western Australia, have legislative provisions that deal with the issues raised in *Re Diplock*.

Queensland

14.9 In its 1971 Report, this Commission recommended a provision to remove any doubt arising from the statement of Lord Simonds in *Ministry of Health v Simpson* that the action *in personam* referred to in *Re Diplock* was not necessarily available if the distribution was made of trust property.¹⁵

14.10 The Commission also considered that the denial of the defence of change of position in *Ministry of Health v Simpson* was 'regrettable', and recommended that the defence be available to an incorrectly paid recipient of property.¹⁶ These recommendations were implemented by the enactment of section 109 of the *Trusts Act 1973* (Qld), which in 2009 was renumbered as section 113.¹⁷

14.11 Section 113 of the *Trusts Act 1973* (Qld) provides:

113 Remedies for wrongful distribution of trust property

- (1) In any case where a trustee has wrongfully distributed trust property any person who has suffered loss by that distribution may enforce the same remedies against the trustee and against any person to whom the distribution has been made as in the case where a personal representative has wrongfully distributed the estate of a deceased person.
- (2) Except by leave of the court, no person who has suffered loss by reason of the wrongful distribution of trust property or of the estate of a deceased person may enforce any remedy against any person to whom such property or estate has been wrongfully distributed until the person has first exhausted all remedies which may be available to the person against the trustee or personal representative.
- (3) Where any remedy is sought to be enforced against a person to whom a wrongful distribution of trust property or the estate of a deceased person has been made and that person has received the distribution in good faith and has so altered the person's position in reliance on the propriety of the distribution that, in the opinion of the court, it would be inequitable to enforce the remedy, the court may make such order as it considers to be just in all the circumstances.

¹⁴ Ibid 276.

¹⁵ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 73–4.

¹⁶ Ibid 74.

¹⁷ See *Criminal Proceeds Confiscation and Other Acts Amendment Act 2009* (Qld) s 83(2).

14.12 Section 113(1) ensures that ‘the remedies for the wrongful distribution of trust property are the same as in the case of the wrongful distribution of a deceased estate’.¹⁸

14.13 Section 113(2) generally reiterates the requirement enunciated in *Re Diplock*¹⁹ that a person must exhaust his or her remedies against the personal representative before pursuing the recipient of the property that has been wrongfully distributed.²⁰ Ford and Lee note that section 113(2) mitigates the harshness of that rule by enabling the court to give leave to a claimant to enforce his or her remedies against the recipient without first exhausting his or her remedies against the trustee or personal representative.²¹

14.14 In recommending a provision to the effect of section 113(2), the Commission, in its 1971 Report, expressly rejected the approach found in section 65 of the *Trustees Act 1962 (WA)*,²² which reverses the effect of *Re Diplock* in terms of the order in which remedies are to be enforced. The Commission stated that ‘there seems to be no virtue whatever in placing the primary responsibility for a wrongful distribution on the distributee’.²³

14.15 In *Hagan v Waterhouse*, Kearney J of the Supreme Court of New South Wales held that the requirement in *Re Diplock* to exhaust available remedies against the personal representative before enforcing a remedy against the wrongly paid recipient applied only to a claim *in personam* and did not apply to a tracing claim.²⁴ It is unclear, however, whether that statement reflects the position under section 113(2) of the *Trusts Act 1973 (Qld)* or whether, because section 113(2) refers to ‘any remedy’, the requirement to exhaust available remedies against the personal representative would also apply to a tracing claim (even though that claim is not one that could be brought against the trustee who had parted with the property).

Western Australia

14.16 In Western Australia, section 65 of the *Trustees Act 1962 (WA)* deals with the remedies in relation to the distribution of both the estate of a deceased person and trust property.

¹⁸ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 74.

¹⁹ [1948] Ch 465, 503.

²⁰ See [14.4] above.

²¹ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 4 February 2010) [17.7010]. It has been suggested that a court would exercise its power to allow a beneficiary to pursue a remedy against a recipient before pursuing the personal representative ‘where the representative is bankrupt or where the recipient still has the legacy paid or transferred, or its traceable product’: AA Preece, *Lee’s Manual of Queensland Succession Law* (Lawbook, 6th ed, 2007) [10.200].

²² See, in particular, s 65(7) of the *Trustees Act 1962 (WA)*, which is discussed at [14.18] ff below.

²³ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 74.

²⁴ (1991) 34 NSWLR 308, 370.

14.17 Section 65(2)–(3) creates ‘a new statutory right (in favour of beneficiaries of a trust, and others) to claim against persons to whom trust assets have been distributed’.²⁵ The provisions enable the court to make an order that a person to whom assets have been distributed, or who has received any interest in assets, pay to the person making the claim a sum not exceeding the value of those assets or the value of that interest. The statutory claim given to the person is in addition to ‘all other rights and remedies available to the person’.²⁶

14.18 Section 65(7) reverses the effect of *Re Diplock* concerning the order in which an unpaid claimant may exercise his or her remedies against the trustee and the person to whom the distribution has been made. It provides:

- (7) Notwithstanding any rule of law to the contrary, where a trustee has made a distribution of any assets forming part of the estate of a deceased person or subject to a trust—
- (a) a person may exercise the remedies (if any) given to him by this section and all other rights and remedies available to him (including all rights that he may have to follow assets and any money or property into which they have been converted) without first exercising the rights and remedies (if any) available to him against the trustee in consequence of the making of the distribution; and
 - (b) a person shall not exercise any remedy that may be available to him against the trustee in consequence of the making of the distribution, until he has exhausted all other remedies available to him, whether under this section or in equity or otherwise.

14.19 A person is not required to exhaust all claims against the trustee who made the distribution before enforcing a remedy against a recipient of the property. On the contrary, the person must not exercise any remedy that he or she may have against the trustee in respect of the distribution until he or she has exhausted all remedies available to the person, whether under that section or in equity or otherwise. This difference of approach has been said to stem from ‘a perception that a recipient receives an unjustifiable windfall if the trustee is first pursued’.²⁷

14.20 The effect of section 65(7) of the *Trustees Act 1962* (WA) was considered by Beech J in *Corporate Systems Publishing Pty Ltd v Lingard (No 4)*:²⁸

In terms of the language of s 65(7)(b), the question is whether a plaintiff ‘exercises a remedy’ by commencing (and prosecuting) an action, as the trustee defendants contend, or whether a person exercises a remedy only when a remedy is obtained and enforced (as the plaintiffs contend).

²⁵ *Corporate Systems Publishing Pty Ltd v Lingard (No 4)* [2008] WASC 21, [177] (Beech J). See also HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 4 February 2010) [17.7030].

²⁶ *Trustees Act 1962* (WA) s 65(4).

²⁷ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 4 February 2010) [17.7030].

²⁸ [2008] WASC 21, [174].

14.21 His Honour rejected the defendants' argument that the plaintiffs were precluded from commencing the current action:²⁹

[Section 65(7)] does not prohibit the commencement and prosecution of concurrent proceedings against the trustee and against recipients (or those who have assisted the trustee in the breach), so long as any judgment against the recipients or assisters is satisfied before any judgment is sought to be enforced against the trustee.

14.22 Beech J concluded that a 'person who commences an action may be said to have exercised a right, in that litigation, but not to have exercised any remedy until a court decree is obtained'.³⁰

14.23 Section 65(8) of the Western Australian legislation, although worded differently from section 113(3) of the *Trusts Act 1973* (Qld), also creates a statutory defence of change of position.

Retention of a provision dealing with remedies for wrongful distribution

14.24 As explained earlier, section 113 of the *Trusts Act 1973* (Qld) ensures that the same remedies that are available in relation to the wrongful distribution of the estate of a deceased person are also available in relation to the wrongful distribution of trust property. For that reason alone, a provision to the general effect of section 113 should be retained in the Act.

The order in which remedies should be enforced

14.25 As explained earlier, section 113(2) of the *Trusts Act 1973* (Qld) provides that, except with the leave of the court, a person who has suffered loss as the result of the wrongful distribution of trust property or an estate may not enforce any remedy against any person to whom the property has been distributed, unless the person has first exhausted all remedies that may be available to the person against the trustee.

14.26 In contrast, section 65(7) of the *Trustees Act 1962* (WA) provides that a person may not exercise any remedy against the trustee in relation to the wrongful distribution until he or she has exhausted all other remedies available to the person, whether under section 65 or in equity or otherwise.

14.27 Ford and Lee have suggested that, in light of developments in the law since *Re Diplock*, the law should now enable a claimant to pursue the trustee and the wrongly paid recipient at the same time.³¹

[T]he reason given [in *Re Diplock* for the requirement to exhaust all remedies against the personal representative] by the court is illuminating. The court had mentioned that a personal representative could not recover at law moneys paid under a mistake of law (at 502–3). Their Lordships then said at 503–504:

²⁹ Ibid [184].

³⁰ Ibid [189].

³¹ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* [17.5010].

In our judgment the absence or exhaustion of the beneficiary's right to go against the wrongdoing executor or administrator ought properly to be regarded as the justification for calling upon equity to come to the aid of the law by providing a remedy which would otherwise be denied to the party who has been deprived of that which is justly his.

Equity is here rejecting the rule that moneys paid under a mistake of law cannot be recovered and is justifying the rejection by recourse to one of the most fundamental purposes of equity, namely that of 'aiding' the law where justice requires it. But equity still required that the personal remedies against the trustees should first be exhausted.

Now that the defence of mistake of law has been rejected by the High Court of Australia in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 ... in an action for money had and received; a Diplock trustee can recover directly from the recipient: one could hardly argue otherwise. It is therefore submitted that the law should now permit the beneficiaries to pursue both trustee and recipient at the same time, as in *Eaves v Hickson* (1861) 30 Beav 143; 54 ER 840; ...

14.28 In the Administration of Estates Report, the National Committee for Uniform Succession Laws commented that the general requirement in section 113(2) of the *Trusts Act 1973* (Qld) for a claimant first to exhaust any remedy against the trustee was an unnecessary restriction.³² It therefore recommended that the model legislation should provide that a person who has suffered loss as a result of the wrongful distribution of an estate or of trust property should not be required first to exhaust all remedies against the trustee.³³

14-1 Should section 113(2) of the *Trusts Act 1973* (Qld) be amended to provide that a person who has suffered loss because of the wrongful distribution of trust property may enforce any remedy against a person to whom the wrongful distribution has been made without first exhausting all remedies that may be available against the trustee? Alternatively, should section 113(2) be changed in some other way and, if so, how?

The defence of change of position

14.29 Section 113(3) of the *Trusts Act 1973* (Qld) provides for the situation where the recipient of the property has received it in good faith and has so altered his or her position in reliance on the propriety of the distribution that the court would consider it inequitable to enforce the remedy against the person. In that situation, the court may make such order as it considers to be just in all the circumstances.

14.30 Commentators on the law of trusts are divided in their opinion as to whether, in the absence of a statutory provision, change of position is now

³² 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) vol 2, [22.57].

³³ *Ibid*, Rec 22-2(c)(ii).

generally available as a defence to a claim against a person to whom trust property has been wrongfully distributed.

14.31 Ford and Lee consider that section 113(3) of the *Trusts Act 1973* (Qld) anticipated the subsequent developments in the law in *David Securities Pty Ltd v Commonwealth Bank of Australia*.³⁴ However, they suggest that the section now reflects what is probably a narrower defence than has been recognised in England by the House of Lords in *Lipkin Gorman v Karpnale Ltd*.³⁵

The section is restricted to the case where there has been reliance, foreshadowing the justification referred to in *David Securities Pty Ltd v Commonwealth Bank of Australia* ... ; but it is narrower than that now acknowledged in *Lipkin Gorman v Karpnale Ltd* ...

14.32 In their view, section 113 of the *Trusts Act 1973* (Qld) 'answered difficulties that were believed to subsist in the law' at the time it was enacted. They suggest, however, that, although the provision may still be of procedural value, it is no longer needed.³⁶

14.33 In contrast, the authors of *Jacobs' Law of Trusts in Australia* express a more cautious view about whether the defence of change of position is available to a party to whom trust property has been wrongfully distributed:³⁷

It remains to be seen whether the principle, if there be one, be recognised in Australia, and, if so, what form that recognition will take.

14.34 In the Administration of Estates Report, the National Committee for Uniform Succession Laws considered that, given the developments in the law concerning the recovery of money paid under a mistake of law,³⁸ the model legislation should make it clear that the provision that was to be based on section 113(3) of the *Trusts Act 1973* (Qld) would 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 has been made. In its view, that approach would also ensure that, if, as a result of developments in the law, section 113(3) ultimately provided a narrower defence than was available under the general law, there could be no argument that

³⁴ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 4 February 2010) [17.7010]. In *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, a majority of the High Court stated that 'the central element' in the defence of change of position, in jurisdictions where it has been accepted, 'is that the defendant has acted to his or her detriment *on the faith of the receipt*': 385 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ), citing P Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1989), 410.

³⁵ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 4 February 2010) [17.7010]. In *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, a majority of the House of Lords expressly recognised that the defence of change of position in good faith is available against restitution claims based on unjust enrichment, but declined to define its scope so as to inhibit its development on a case-by-case basis: 558 (Lord Bridge), 568 (Lord Ackner), 580 (Lord Goff). With that qualification in mind, Lord Goff stated (at 580) that:

I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full.

³⁶ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 4 February 2010) [17.7010].

³⁷ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) [2712].

³⁸ See [14.27] ff above.

a person to whom property had been wrongfully distributed would be restricted to the statutory defence under the provision that was to be based on section 113(3).³⁹

14.35 The Commission endorses the National Committee's recommendation, which would retain the certainty currently afforded by section 113(3), while ensuring that the provision does not limit any other defence that might be available to the person to whom the wrongful distribution has been made. The Commission invites submissions on the following proposal:

14-2 The *Trusts Act 1973* (Qld) should be amended to provide that section 113(3) of the Act does not limit any other defence that might be available, under an Act or at law or in equity, to the person to whom the wrongful distribution has been made.

Contribution and indemnity

14.36 In the Administration of Estates Report, the National Committee for Uniform Succession Laws recommended that the model legislation should provide that, if a proceeding is brought against a person to whom a wrongful distribution has been made, the person should be:⁴⁰

- entitled to contribution and indemnity from the personal representative or trustee in the amount or on the terms that the court considers appropriate; and
- able to join the personal representative or trustee as a party to the proceeding brought against him or her.

14.37 The Commission endorses that recommendation, and invites submissions on the following proposal:

14-3 The *Trusts Act 1973* (Qld) should provide that, if a person who suffers loss because of a trustee's wrongful distribution brings a proceeding against a person to whom the wrongful distribution has been made, the person against whom the proceeding is brought:

(a) is entitled to contribution and indemnity from the trustee in the amount or on the terms that the court considers appropriate; and

³⁹ 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) vol 2, [22.61], Rec 22-5(b).

⁴⁰ Ibid [22.59], Rec 22-3. Similar provision is made in s 66(7) of the *Succession Act 1981* (Qld) in relation to an action that survives against the estate of a deceased person under s 66(1) and is brought, under s 66(6), against a beneficiary to whom any part of the estate has been distributed.

- (b) may join the trustee as a party to the proceeding brought against him or her.

Extent of the liability of the person to whom the wrongful distribution is made

14.38 In the Administration of Estates Report, the National Committee for Uniform Succession Laws noted that it is possible that a claimant's loss might exceed the amount of the wrongful distribution that has been made. In its view, provided that the person to whom the wrongful distribution has been made received the distribution in good faith, a judgment against the person should not exceed the amount of the wrongful distribution that was made to the person.⁴¹ As a corollary to that recommendation, the National Committee made the further recommendation that, because of the possibility that a judgment may include an award of interest,⁴² the model legislation should make it clear that, in deciding whether the amount of the judgment is more than the amount of the distribution, any amount awarded by way of interest should be disregarded.⁴³

14.39 The Commission endorses the National Committee's approach in relation to these issues, and invites submissions on the following proposal:

14-4 The *Trusts Act 1973* (Qld) should be amended to provide that, if a person to whom a wrongful distribution has been made has received the distribution in good faith:

- (a) any judgment against the person must not be more than the amount of the distribution made to the person; and
- (b) in deciding whether the amount of the judgment is more than the amount of the distribution, any amount awarded by way of interest is to be disregarded.

⁴¹ Similar provision is made in s 66(9) of the *Succession Act 1981* (Qld) in relation to an action that survives against the estate of a deceased person under s 66(1) and is brought, under s 66(6), against a beneficiary to whom any part of the estate has been distributed.

⁴² See, eg, *Civil Proceedings Act 2011* (Qld) s 58.

⁴³ 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) vol 2, [22.60], Rec 22-4.

Chapter 15

Jurisdiction to Hear Disputes in Relation to Trusts

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INTRODUCTION

15.1 The terms of reference require the Commission to consider:

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.

15.2 One issue for consideration is whether jurisdiction to hear and determine trust disputes under the *Trusts Act 1973* (Qld) should remain with the Supreme Court, or should also be conferred on other courts or tribunals.

TYPES OF AVAILABLE RELIEF

Equitable relief

15.3 Equity furnishes the court with wide powers to deal with trusts. As Ford and Lee have stated, '[e]quity ensures such remedial assistance to trustees and beneficiaries as is necessary to ensure the proper conduct of every trust'.¹ Principal among the forms of equitable relief available with respect to trusts are the following:²

¹ HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 20 February 2012) [17.010].

² See generally *ibid* [17.600]–[17.640], [17.1510]–[17.2540], [17.2630].

- Declaratory judgments,³ being authoritative but non-coercive statements of the law or the parties' rights,⁴ which might be used, for example, to construe a will or trust instrument, to determine whether a party is, or is not, a beneficiary or trustee, or to resolve a doubt about whether a course of conduct is, or was, in breach of trust.⁵
- Injunctions,⁶ 'forbidding or commanding the person to whom they are addressed to do something',⁷ which might be sought by a beneficiary or co-trustee to restrain a trustee from committing an apprehended or continuing breach of trust, or to compel a trustee to perform his or her duty under the trust.⁸
- Accounts, compelling an accounting party, such as a trustee, to produce records of, and explain, his or her dealings with the relevant property,⁹ by which a beneficiary might seek an account of profits made in breach of trust or the restoration of trust funds that have been misappropriated.¹⁰
- Equitable compensation (or 'damages'),¹¹ which is available, to effect a restitution to the estate by a judgment in a sum of money, wherever there has been a breach of trust causing loss.¹²

³ The jurisdiction to make declaratory judgments originated in equity but is now sourced in statute and no longer considered a strictly equitable remedy: see GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [37.05]. In Queensland, see *Civil Proceedings Act 2011* (Qld) s 10 (which applies to the Supreme Court only); and *District Court of Queensland Act 1967* (Qld) ss 68(1)(b)(viii), (xiii), 69(2)(a) (which give the District Court limited powers to make declarations relating to trusts).

⁴ GE Dal Pont, *Equity and Trusts in Australia* (Thomson Reuters, 5th ed, 2011) [37.05].

⁵ See, eg, *Public Trustee of Queensland v Smith* [2009] 1 Qd R 26 (declarations, on the proper construction of a will, of the class of beneficiaries under a will trust); *Thiess Watkins White Ltd v Equiticorp Australia Ltd* [1991] 1 Qd R 82 (declaration that defendant held monies on trust for the plaintiff); *Corozo Pty Ltd v Total Australia Pty Ltd* [1987] 2 Qd R 11, affd [1988] 2 Qd R 366 (declarations that the plaintiff was validly appointed, and the defendant was validly removed, as trustee of a trust).

⁶ The court's inherent jurisdiction to grant injunctions is reflected in statute: see *Civil Proceedings Act 2011* (Qld) s 9. See also *District Court of Queensland Act 1967* (Qld) ss 68(1)(b)(viii), (xiii), 69(2)(b) (which give the District Court limited powers to grant injunctions relating to trusts).

⁷ RP Meagher, JD Heydon and MJ Leeming, *Equity Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002) [21-005].

⁸ See generally M Evans, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2012) [40.4]. See also, eg, *Yunghanns v Candoora No 19 Pty Ltd* [1999] VSC 524 (interlocutory injunction restraining defendant trustee from exercising certain powers as trustee); *Thiess Watkins White Ltd v Equiticorp Australia Ltd* [1991] 1 Qd R 82 (injunction to restrain any dealing by the defendant with the fund contrary to the trust).

⁹ Lord Brennan and W Blair (eds), *Bullen & Leake & Jacob's Precedents of Pleadings* (Sweet & Maxwell, 14th ed, 2001) vol 2 [46-01].

¹⁰ See generally HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 12 June 2012) [17.1510], [17.2540], [17.3010]. See also, eg, *Johnston v Herrod* [2012] QSC 98 (plaintiffs entitled, at their election, either to an account of the profits accrued to the defendants in breach of their duty, or to equitable compensation); *Wallerstein v Bedington* [2012] QSC 71 (defendant trustee, who had mixed trust funds with his own, ordered to pay an amount to the beneficiaries to restore the trust funds).

¹¹ The court's inherent jurisdiction to award equitable compensation is reflected in statute: see *Civil Proceedings Act 2011* (Qld) s 8; *District Court of Queensland Act 1967* (Qld) s 68(1)(a)(i).

15.4 Equity also provides a mechanism to assist beneficiaries' claims for the recovery of trust funds that have been wrongly distributed to a third party or have been mixed with other funds.¹³ 'Tracing' allows a beneficiary to follow property into the hands of a third party (other than a bona fide purchaser for value without notice of the trust) or to trace it into the different form it has taken.¹⁴

Statutory relief under the *Trusts Act 1973* (Qld)

15.5 Statutory relief is also available under the *Trusts Act 1973* (Qld). Under the Act, the Supreme Court may exercise various powers, including the power to:¹⁵

- review an act, omission or decision of a trustee (section 8);
- relieve a trustee from personal liability for a breach of trust (section 76);
- appoint or remove a trustee (section 80);
- vest trust property in a new or continuing trustee (section 82);
- confer an additional power on a trustee to deal with trust property (section 94);
- authorise a variation of the beneficial interests under a trust (section 95);
- give directions to a trustee in relation to particular matters concerning the trust (section 96);
- charge costs on a trust estate (section 100); and
- authorise the remuneration of a trustee (section 101).

¹² HAJ Ford and WA Lee et al, Thomson Reuters, *The Law of Trusts* (at 12 June 2012) [17.1610], citing *Re Dawson* [1966] 2 NSWLR 211, 214 (Street J). See also, eg, *Johnston v Herrod* [2012] QSC 98 (plaintiffs entitled, at their election, either to equitable compensation or an account of the profits accrued to the defendants in breach of their duty); *Henderson v Harburg* [2000] QCA 228 (appellant awarded equitable compensation in the amount of the value of the land sold by the respondent in breach of trust).

¹³ See *Foskett v McKeown* [2000] 3 All ER 97, 120 (Lord Millett), cited in *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230 in which the New South Wales Court of Appeal explained (at 252) that:

Tracing has been said to be neither a claim nor a remedy, rather the process by which a claimant demonstrates what has happened to its property, identifies its proceeds and the persons who have handled or received them; and the successful completion of a 'tracing exercise' may be a preliminary to the making of a personal or proprietary claim, to the extent such is available.

¹⁴ M Evans, *Equity and Trusts* (LexisNexis Butterworths, 3rd ed, 2012) [36.2], [36.19]. See also the discussion of tracing at [14.5] above.

¹⁵ The District Court, or a District Court judge, has a concurrent jurisdiction to exercise power under s 86 of the *Trusts Act 1973* (Qld). See [15.14] below.

JURISDICTION OF QUEENSLAND COURTS AND TRIBUNALS

Supreme Court

15.6 As mentioned above, the jurisdiction, powers and authorities under the *Trusts Act 1973* (Qld) are, with one exception,¹⁶ conferred exclusively on the Supreme Court or a judge thereof.¹⁷ The position is similar in the other Australian jurisdictions,¹⁸ except for Victoria, which confers statutory jurisdiction on the County Court (the equivalent of the District Court) in addition to the Supreme Court.¹⁹

15.7 Unlike other courts and tribunals in Queensland, the Supreme Court has unlimited jurisdiction at law, in equity and otherwise.²⁰ Significantly, it has inherent jurisdiction to supervise the administration of trusts and advise trustees,²¹ and has the power to grant declaratory relief, independent of the granting of any other relief.²²

15.8 In contrast, the District Court, Magistrates Courts, and the Queensland Civil and Administrative Tribunal have only the jurisdiction, powers and functions that are expressly or impliedly conferred by their constituting statutes, or that are incidental or necessary to the exercise of jurisdiction.²³

¹⁶ See *Trusts Act 1973* (Qld) s 86. For the purposes of that section, 'court' is defined to include the District Court, or a District Court judge, where the amount or subject matter is within the jurisdiction of the District Court: s 86(3).

¹⁷ See *Trusts Act 1973* (Qld) s 5(1) (definition of 'court').

¹⁸ *Trustee Act 1925* (ACT) pt 3 (Powers of Supreme Court); *Trustee Act 1925* (NSW) s 5 (definition of 'court'); *Trustee Act* (NT) pt 3 (Powers of the Court); *Trustee Act 1936* (SA) pt 3 (Powers of the Court); *Trustee Act 1898* (Tas) s 4 (definition of 'court'); *Trustees Act 1962* (WA) s 6(1) (definition of 'court').

¹⁹ *Trustee Act 1958* (Vic) s 3(1) defines 'court' to mean the Supreme Court and, in relation to property or an estate or interest in property the value of which does not exceed the jurisdictional limit of the County Court, the Supreme Court or the County Court. The jurisdictional monetary limit for all civil cases in the County Court of Victoria was removed in 2006 by the *Courts Legislation (Jurisdiction) Act 2006* (Vic) s 3(1). See also Victoria, *Parliamentary Debates*, Legislative Assembly, 7 June 2006, 1774 (R Hulls, Attorney-General):

This will enable litigants to have a choice between the County and Supreme courts in deciding the forum for the resolution of their disputes, with the Supreme Court retaining its exclusive jurisdiction over prerogative writs, judicial review and its appellate jurisdiction.

²⁰ *Constitution of Queensland 2001* (Qld) s 58.

²¹ See generally *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, vol 2 (2009) ch 20 (Obtaining the Court's advice or directions); LexisNexis, *Halsbury's Laws of Australia*, 'Trusts, Advice and Direction from the Court', [430-5055]–[430-5075]. See also LexisNexis, *Encyclopaedic Australian Legal Dictionary*, 'Inherent jurisdiction, citing *R v Forbes; Ex Parte Bevan* (1972) 127 CLR 1:

'Inherent jurisdiction' refers to the authority to adjudicate vested in a court as a consequence of it being a court of a particular description, notably a superior court of unlimited jurisdiction.

²² The Supreme Court also has the power to grant declaratory relief (ie, to make binding declarations of right), independent of the granting of any other relief: *Civil Proceedings Act 2011* (Qld) s 10. See also the discussion of declaratory relief at [15.3] above.

²³ LexisNexis, *Encyclopaedic Australian Legal Dictionary*, 'inferior courts', 'inherent jurisdiction'; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 623–4 (Deane J), 630–1 (Toohey J); *Parsons v Martin* (1984) 5 FCR 235, 241 (Bowen CJ, Northrop and Toohey JJ). See also *Grassby v The Queen* (1989) 168 CLR 1, 16 (Dawson J).

District Court

15.9 Under the *District Court of Queensland Act 1967* (Qld), the District Court has jurisdiction to hear and determine personal actions up to the amount of \$750 000,²⁴ including equitable claims or demands for the recovery of money or damages.²⁵ This has provided the jurisdictional basis for the District Court to hear and determine claims by trustees to be indemnified by beneficiaries personally in respect of liabilities properly incurred as trustee.²⁶

15.10 The District Court is also given jurisdiction, up to the monetary limit of \$750 000, 'for the determination of any question of construction arising under a deed, will or other written instrument, and for a declaration of the rights of the persons interested'.²⁷

15.11 In addition, section 68(1)(b)(viii) of the *District Court of Queensland Act 1967* (Qld) gives the District Court jurisdiction to hear and determine actions and matters:²⁸

for the execution of a trust or a declaration that a trust subsists, where the estate or fund subject or alleged to be subject to the trust does not exceed in amount or value the monetary limit [of \$750 000];

15.12 It appears that this confers a wide jurisdiction with respect to trusts. It has been said that the jurisdiction to hear and determine actions for 'the execution of a trust' enables the Court to make orders 'to ensure the proper carrying out of a trust'.²⁹ Of the original English provision conferring jurisdiction on the County Courts 'in all suits for the execution of a trust',³⁰ it was held that the jurisdiction extended to constructive trusts and was not limited to express trusts:³¹

²⁴ *District Court of Queensland Act 1967* (Qld) s 68(2).

²⁵ *District Court of Queensland Act 1967* (Qld) s 68(1)(a)(i).

²⁶ *Belar Pty Ltd v Mahaffey* [2000] 1 Qd R 477. See also, eg, *Esanda Finance Corporation Ltd v Meehan* [2010] QDC 374 (claim by a financier seeking return of monies advanced to vendor on alternative bases of monies had and received, unjust enrichment, and *Quistclose* trust).

²⁷ *District Court of Queensland Act 1967* (Qld) s 68(1)(b)(xiii).

²⁸ This provision was modelled on *District Court Act 1973* (NSW) s 134(1)(e): see Queensland Law Reform Commission, *A Bill to Alter the Civil Jurisdiction of the District Court of Queensland*, Report No 36 (1985) 23, draft Bill cl 4(B).

²⁹ JS Douglas (ed), LexisNexis, *Civil Procedure Queensland: District Court and Magistrates Courts Practice* (at December 2012) [310,900.90].

More generally, 'execution' has been defined as, among other things, '[t]he carrying out of a trust': ER Hardy Ivamy, *Mozley and Whiteley's Law Dictionary* (Butterworths, 10th ed, 1988) 172. This interpretation is also supported by the terms of the *Trusts Act 1973* (Qld) itself, which contains several references to the phrase 'execution of the trust', or similar: see ss 12(1)(b) (Power of appointing new trustees), 53 (Power to concur with others), 54(1), (2) (Power to employ agents), 56(1), (4), (7), (8) (Power to delegate trusts), 72 (Reimbursement of trustee out of trust property). For example, s 72 of the Act provides that 'a trustee may reimburse himself or herself for or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers'.

³⁰ See *County Courts (Equity Jurisdiction) Act 1865*, 28 & 29 Vict, c 99, s 1(2), which provided:

The language of the statute is general, and by the 2nd clause of the first section gives jurisdiction in all cases of trusts, but however peculiar the jurisdiction exercised by this Court in constructive trusts, such a trust is as much a trust as any other. On what principle can this Court hold that, when the statute declares that the County Courts shall have jurisdiction in all cases of trust, that they have no jurisdiction in one description of trusts?

15.13 For matters that fall within its jurisdiction, section 69(1) of the *District Court of Queensland Act 1967* (Qld) gives the District Court the same powers and authorities as the Supreme Court, including the power to grant declaratory and injunctive relief,³² as well as the powers conferred on the Supreme Court by an Act. Arguably, the powers and authorities conferred on the District Court would include at least some of the powers conferred on the Supreme Court under the *Trusts Act 1973* (Qld).³³

15.14 As noted above, the District Court (or a District Court judge) is also specifically empowered under section 86 of the *Trusts Act 1973* (Qld) to appoint a guardian or some other fit and proper person to enter into an agreement for or on behalf of an infant, where the amount or subject matter involved is within the District Court's jurisdiction.³⁴

Magistrates Courts

15.15 The civil jurisdiction of a Magistrates Court is limited to actions up to \$150 000.³⁵ A Magistrates Court does not have any general equitable or declaratory jurisdiction.³⁶ However, it does have a limited equitable jurisdiction to hear and determine an equitable claim or demand against another person in respect of which the only relief claimed is the recovery of a sum of money or damages.³⁷ This has provided the jurisdictional basis for the determination, by a Magistrates Court, of the claim of a creditor of a trustee to be indemnified by the

1. The County Courts ... shall have and exercise all the power and authority of the High Court of Chancery in the suits and matters hereinafter mentioned; that is to say,

...

2. In all suits for the execution of trusts in which the trust estate or fund shall not exceed in amount or value the sum of five hundred pounds;

...

See JE Davis, *The County Courts Equitable Jurisdiction Act: with the orders and rules for regulating the practice of the courts* (Butterworths, 1866) 20. See now *County Courts Act 1984* (UK) c 28, s 23(b)(1), which continues to confer jurisdiction on the County Courts in proceedings 'for the execution of any trust'.

31 *Clayton v Renton* (1867) LR 4 Eq 158, 161 (Stuart V-C).

32 *District Court of Queensland Act 1967* (Qld) s 69(2)(a), (b).

33 See, eg, *Re Clarke Trust* (1999) 20 Qld Lawyer Reps 74 in which the District Court heard an application by a trustee, remitted from the Supreme Court, for the advice and opinion of the court in relation to the construction of a deed of trust. Although the judgment in that case does not specifically mention the *Trusts Act 1973* (Qld), a trustee may apply to the Supreme Court for directions under s 96 of that Act: see Chapter 12.

34 *Trusts Act 1973* (Qld) s 86(3).

35 *Magistrates Courts Act 1921* (Qld) ss 2 (definition of 'prescribed limit'), 4.

36 *Chief Executive Department of Transport v Glasgow* [2001] QSC 378, [9] (Thomas JA).

37 *Magistrates Courts Act 1921* (Qld) s 4(c).

beneficiaries personally, exercising the trustee's right to be indemnified by the beneficiaries.³⁸

Queensland Civil and Administrative Tribunal

15.16 The civil jurisdiction of the Queensland Civil and Administrative Tribunal ('QCAT') is limited to minor civil disputes³⁹ up to \$25 000,⁴⁰ and certain other matters for which jurisdiction is conferred under an enabling Act (including, for example, residential tenancy disputes, body corporate and community management scheme disputes, and building disputes).⁴¹ QCAT does not have any general equitable jurisdiction. However, section 9(4) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) states that the tribunal has jurisdiction to 'do all things necessary or convenient for exercising its jurisdiction'.

15.17 In several recent decisions, the President of QCAT has held that the Tribunal has an implied jurisdiction to hear equitable defences and grant equitable relief if the equitable claim and relief are sufficiently connected to the primary proceeding.⁴² In addition, legally qualified members of the Tribunal have the power to make declarations and grant injunctions, and to make interim orders that are considered appropriate in the interests of justice (including the power to require or permit something to be done to secure the effectiveness of the exercise of the Tribunal's jurisdiction for the proceeding).⁴³

DISCUSSION

15.18 An argument in support of the express conferral of a trusts jurisdiction on other courts or tribunals is that of improving access to justice, in particular by reducing costs.

15.19 Litigation in the Supreme Court is more expensive than in the District Court, a Magistrates Court or QCAT. The fee for filing any claim or application by

³⁸ *Ron Kingham Real Estate Pty Ltd v Edgar* [1999] 2 Qd R 439, 44–5 (McPherson JA). See [11.70] above in relation to a trustee's right to be indemnified by the beneficiaries.

³⁹ 'Minor civil dispute' means 'a claim to recover a debt or liquidated demand of money, with or without interest, of up to the prescribed amount': *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 8, sch 3 (definition of 'minor civil dispute' para 1(a)). The definition also includes a number of specific claims, up to the prescribed amount, including consumer disputes, residential tenancy disputes, property damage disputes and dividing fence disputes: s 8, sch 3 (definition of 'minor civil dispute' para 1(b)–(g)).

⁴⁰ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 8, sch 3 (definition of 'prescribed amount').

⁴¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 9(1), 10(1). An 'enabling Act' is an Act (or in some cases subordinate legislation), other than the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), that confers jurisdiction on the tribunal: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 6(2). The Acts conferring jurisdiction on QCAT are listed on the QCAT website: QCAT, 'QCAT Rules and Legislation' (8 March 2010) <<http://www.qcat.qld.gov.au/using-qcat/qcat-rules-and-legislation>>.

⁴² *Davies v Murphy* [2011] QCATA 111, [17]–[18]; *Batwing Resorts Pty Ltd v Body Corporate for Liberty on Tedder* [2011] QCAT 277, [38]–[40]; *SCV Group Limited v Body Corporate for Parkview Gardens* [2011] QCAT 299, [15]–[17].

⁴³ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 58(1)(b), 59, 60, sch 3 (definition of 'legally qualified member').

an individual is \$775 in the Supreme Court,⁴⁴ \$700 in the District Court,⁴⁵ between \$140 and \$535 (depending on the amount claimed in the dispute) in a Magistrates Court,⁴⁶ and between \$21.50 and \$275 (depending on the amount claimed in respect of a 'minor civil dispute') in QCAT.⁴⁷ However, in certain circumstances, including on the ground of financial hardship, a reduced fee of \$105 may be available in the Supreme Court and the District Court instead of the usual filing fee for a claim or application, setting down fee or hearing fee.⁴⁸

15.20 The professional costs of solicitors also vary between the courts; the costs being the highest in the Supreme Court, followed by the District Court and then a Magistrates Court.⁴⁹ In QCAT, the parties ordinarily represent themselves, although they may seek leave to be represented in certain cases.⁵⁰ If a barrister appears on the hearing of a trust dispute, his or her fees will be an additional expense for that party.

15.21 The Supreme Court, the District Court and a Magistrates Court have the power to order one party to pay the other party's legal costs.⁵¹ QCAT may make an order requiring a party to pay all or a stated part of the costs of another party if it considers the interests of justice require it.⁵²

15.22 However, trusts law is a highly technical and specialised area of the law, and often raises issues of both legal and factual complexity. One such example is the determination of the nature of the beneficial interests under the trust.⁵³ It has

⁴⁴ *Uniform Civil Procedure (Fees) Regulation 2009* (Qld) s 4(1), sch 1 item 1(3)–(4). A setting down fee of \$1295 and a hearing fee of between \$520 and \$1810 are also payable for a trial or hearing that is set down for more than one day (but not if the hearing relates to an interlocutory application): *Uniform Civil Procedure (Fees) Regulation 2009* (Qld) s 4A(1), sch 1 items 5(2), 6(2).

⁴⁵ *Uniform Civil Procedure (Fees) Regulation 2009* (Qld) s 4(1), sch 1 item 1(3)–(4). A setting down fee of \$1165 and a hearing fee of between \$465 and \$1630 are also payable for a trial or hearing that is set down for more than one day (but not if the hearing relates to an interlocutory application): *Uniform Civil Procedure (Fees) Regulation 2009* (Qld) s 4A(1), sch 1 items 5(2), 6(2).

⁴⁶ *Uniform Civil Procedure (Fees) Regulation 2009* (Qld) s 5(1), sch 2 pt 1 item 1.

⁴⁷ *Queensland Civil and Administrative Tribunal Regulation 2009* (Qld) s 5(1).

⁴⁸ *Uniform Civil Procedure (Fees) Regulation 2009* (Qld) ss 9–10A, sch 1 item 7(b), sch 3 (definition of 'reduced fee'). In certain cases, the registrar must approve that the party may pay the reduced fee: *Uniform Civil Procedure (Fees) Regulation 2009* (Qld) s 10. If the registrar approves payment of a reduced filing fee, neither a setting down or hearing fee is payable for the proceeding: *Uniform Civil Procedure (Fees) Regulation 2009* (Qld) s 9(3). If the registrar approves payment of a reduced setting down fee, a hearing fee is not payable for the proceeding: *Uniform Civil Procedure (Fees) Regulation 2009* (Qld) s 9(4).

⁴⁹ *Uniform Civil Procedure Rules 1999* (Qld) r 691, schs 1–3.

⁵⁰ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 43.

⁵¹ See *Uniform Civil Procedure Rules 1999* (Qld) pt 17A.

⁵² *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 102(1). In the case of a minor civil dispute other than a minor debt claim, the costs are limited to the QCAT application fee: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 102(2); *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 83(b). In the case of a minor debt claim, the costs are limited to one or more of the following: the QCAT application fee, a fee charged by a service provider for electronically filing a document, a service fee and travelling allowance at the rate of the prescribed bailiff fees, and a business name or company search fee: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 102(2); *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 84.

⁵³ Law Commission of New Zealand, *Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts*, Issues Paper No 28 (2011) [3.43]; Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) [12.15].

been argued that, generally, the exercise of jurisdiction in a trust matter requires 'judicial expertise',⁵⁴ and 'a consistent and principled approach that is best achieved by allocating all such cases to a single court'.⁵⁵ In addition, the effective resolution of some trust disputes may require the granting of one or more forms of statutory or equitable relief that may fall beyond the jurisdiction of a lower court or tribunal.

CLARIFICATION OF THE DISTRICT COURT'S JURISDICTION

15.23 As mentioned above, section 68(1)(b)(viii) of the *District Court of Queensland Act 1967* (Qld) gives the District Court jurisdiction to hear and determine actions and matters for 'the execution of a trust' that are within the Court's monetary limit of \$750 000.⁵⁶ For the purposes of exercising that jurisdiction, section 69(1) of the Act gives the District Court the same powers and authorities as the Supreme Court, including the power to grant declaratory and injunctive relief,⁵⁷ as well as the powers conferred on the Supreme Court by an Act.

15.24 In its 1985 Report on a bill to alter the civil jurisdiction of the District Court of Queensland, the Queensland Law Reform Commission considered whether the powers conferred by the *Trusts Act 1973* (Qld) should be extended to the District Court. It concluded that they should not, given the novel features of the Act at that time.⁵⁸

The Queensland *Trust Act 1973–1981* is a fairly radical piece of legislation and until some of its novel features become better known and understood we consider that the powers it confers should not be extended to the District Court. On the other hand, we recommend that the District Courts in Queensland be given jurisdiction ... in respect of execution of trusts and declarations that a trust subsists.

15.25 Given that the *Trusts Act 1973* (Qld) has now been in force for almost forty years, and the jurisdiction of the District Court has expanded considerably since that time, it is now timely to reconsider that position.

15.26 It would also appear, in any event, that the conferral of jurisdiction on the District Court to hear and determine actions for the execution of a trust is a wide conferral of jurisdiction that would apply to many of the matters dealt with under the *Trusts Act 1973* (Qld). It seems likely, for example, that an application for judicial advice would fall within the District Court's jurisdiction to hear matters for the

⁵⁴ Law Commission of New Zealand, *Court Jurisdiction, Trading Trusts and Other Issues: Review of the Law of Trusts*, Issues Paper No 28 (2011) [3.43]; Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) [12.15].

⁵⁵ Scottish Law Commission, *Supplementary and Miscellaneous Issues Relating to Trust Law*, Discussion Paper No 148 (2011) [7.13].

⁵⁶ This provision was modelled on *District Court Act 1973* (NSW) s 134(1)(e): see Queensland Law Reform Commission, *A Bill to Alter the Civil Jurisdiction of the District Court of Queensland*, Report No 36 (1985) 23, draft Bill cl 4(B).

⁵⁷ *District Court of Queensland Act 1967* (Qld) s 69(2)(a), (b).

⁵⁸ Queensland Law Reform Commission, *A Bill to Alter the Civil Jurisdiction of the District Court of Queensland*, Report No 36 (1985) 23.

execution of the trust.⁵⁹ The precise boundaries of this jurisdiction, however, are perhaps unclear, and it does not appear that the jurisdiction has been widely used.

15.27 The Victorian County Court (the equivalent of the District Court) was given a concurrent trusts jurisdiction under the *Trustee Act 1958* (Vic) in 1985. The enlargement of the Court's jurisdiction was 'designed to assist in reducing delays and improving access to justice'.⁶⁰

15.28 In New Zealand, District Courts have the same equitable jurisdiction as the High Court to hear and determine any proceeding where the amount claimed or the value of the property claimed or in issue does not exceed \$200 000.⁶¹ However, where a provision of an Act (other than section 16 of the *Judicature Act 1908* (NZ)) confers jurisdiction in respect of any proceeding on the High Court or any other court (not being a District Court), a District Court does not have the equitable jurisdiction of the High Court in respect of that proceeding.⁶² The Law Commission of New Zealand has observed that, as a result, District Courts in New Zealand have jurisdiction to determine breach of trust claims within their monetary limit (of \$200 000), but cannot exercise any powers under the *Trustee Act 1956* (NZ).⁶³

15.29 The Law Commission of New Zealand has recently proposed that District Courts should have jurisdiction, concurrent with the High Court (the equivalent of the Supreme Court), to hear and determine proceedings and make any order where the amount claimed or the value of the property claimed or in issue does not exceed \$500 000.⁶⁴ It also proposed that District Courts should have jurisdiction, concurrent with the High Court, to determine any proceedings or applications, such as those to appoint or remove a trustee, that do not involve any claims for money or property.⁶⁵ Under the second of these proposals, 'irrespective of the value of the assets in the trust, [a District Court] could determine any proceeding or application under the new Act that does not involve any claim for money or property'.⁶⁶

15.30 An issue to consider is whether the section 68(1)(b)(viii) of the *District Court of Queensland Act 1967* (Qld) should be amended to clarify the extent of the jurisdiction of the District Court to hear and determine actions for 'the execution of a trust' and, if so, what types of powers and authorities the District Court should be able to exercise.

59 See n 33 above.

60 Victoria, *Parliamentary Debates*, Legislative Assembly, 28 November 1985, 2606 (C Mathews, Minister for the Arts).

61 *District Courts Act 1947* (NZ) s 34(1)(a).

62 *District Courts Act 1947* (NZ) s 34(2).

63 Law Commission of New Zealand, *Review of the Law of Trusts: Preferred Approach*, Issues Paper No 31 (2012) [12.5].

64 *Ibid* 287 (Proposal P50(2)). See also at [12.37].

65 *Ibid* 287 (Proposal P50(3)). See also at [12.37].

66 *Ibid* [12.37].

15-1 Should the *District Court of Queensland Act 1967 (Qld)* be amended to clarify the extent of the jurisdiction of the District Court to hear and determine actions for ‘the execution of a trust’ and, if so, what types of powers and authorities should the District Court be able to exercise?

THE CONFERRAL OF JURISDICTION ON MAGISTRATES COURTS OR QCAT

15.31 As explained earlier, Magistrates Courts do not have any general equitable or declaratory jurisdiction. However, they do have a limited equitable jurisdiction, conferred under the *Magistrates Court Act 1921 (Qld)*, to hear and determine an equitable claim or demand for money or damages (such as a claim for breach of trust causing loss) within the monetary limit of \$150 000.⁶⁷ Where this is the only relief sought, it provides a convenient and low cost avenue for the resolution of a trust dispute involving a lower monetary value. However, if any additional relief is sought (such as where a trustee seeks to be relieved from liability under section 76 of the *Trusts Act 1973 (Qld)*), an application may need to be made to the Supreme Court.

15.32 QCAT does not have a general equitable jurisdiction. However, the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* does confer on judicial members (who hear only a small percentage of applications) the power to make declarations and injunctions. It has also been held that QCAT has an implied jurisdiction to hear equitable defences and grant equitable relief, if the equitable claim and relief are sufficiently connected to the primary proceeding.⁶⁸

15.33 An issue to consider is whether it would be appropriate or desirable to confer jurisdiction to hear and determine trust disputes under the *Trusts Act 1973 (Qld)* on Magistrates Courts or QCAT.

15.34 A Magistrates Court or QCAT, having lower costs, may be a cheaper and more convenient forum for hearing and determining trust disputes.

15.35 However, one concern that might be raised about the conferral of a general trusts jurisdiction on Magistrates Courts or QCAT is that trusts law is a complex and specialised area of law, based predominantly on the body of equitable rules and principles developed by the courts of equity. The determination of these matters requires judicial expertise and is assisted by the legal representation of the parties. It is arguable that the conferral of a general trusts jurisdiction on Magistrates Courts or QCAT would not readily lend itself to the work of those

⁶⁷ See [15.15] above.

⁶⁸ See [15.16]–[15.17] above.

bodies, which have a focus on the speedy resolution of more minor civil disputes in relatively large numbers.⁶⁹

15.36 One option might be to confer on Magistrates Courts or QCAT a limited statutory jurisdiction to exercise a specific power or powers under the *Trusts Act 1973* (Qld), such as the power to appoint a new trustee. A disadvantage of this approach is that aspects of a trust dispute that is consequently heard and determined by a Magistrates Court or QCAT (as the case may be) might still raise issues that fall beyond the Magistrates Court's or QCAT's jurisdiction. It also raises the question, particularly in the case of Magistrates Courts, of whether it may, or may not, be appropriate to confer jurisdiction to grant equitable or declaratory relief (for example, in relation to tracing) and, if such jurisdiction was granted, whether it would be appropriate to limit the jurisdiction to trust disputes.

15.37 In Scotland, the Sherriff Courts, which are local inferior courts, have a concurrent jurisdiction with the Court of Session (the equivalent of the Supreme Court) to make orders for the appointment and removal of trustees and the completion of title, and for certain matters relating to charitable bodies and public trusts.⁷⁰ The Scottish Law Commission has recommended that the Court of Session should have exclusive jurisdiction in all trust applications.⁷¹ It noted that trusts jurisdiction, particularly in the area of trust variation, often confers significant discretion on the court, requiring a consistent and principled approach. It was also conscious that trusts involve issues of some complexity, requiring specialised knowledge of the law:⁷²

we are conscious that trust law is a technical and specialised area. It requires considerable expertise not merely at a judicial level but among those who present the cases in court ... We are doubtful whether in practice these requirements would be satisfied in every sheriff court.

15-2 Would it be appropriate or desirable to extend the jurisdiction to hear and determine trust disputes involving less complex matters and disputes involving lower monetary values to:

- (a) the Magistrates Courts of Queensland; or**
- (b) the Queensland Civil and Administrative Tribunal?**

⁶⁹ During the 2011–12 reporting period, Magistrates Courts dealt with 29 776 civil claims. Magistrates in regional areas outside South-East Queensland, sitting as ordinary QCAT members, also dealt with 9098 minor civil disputes on behalf of QCAT: Magistrates Court of Queensland, *Annual Report 2011–12*, 28–9. During the 2011–12 reporting period, 17 414 cases were lodged in the minor civil disputes jurisdiction of QCAT, with a clearance rate of 95%. In the 2010–11 reporting period, 17 871 cases were lodged, with a reported clearance rate of 91%: Queensland Civil and Administrative Tribunal, *Annual Report 2011–12* (17 December 2012) <<http://www.qcat.qld.gov.au/about-qcat/publications/qcat-annual-report-2011-12/our-year>>.

⁷⁰ *Trusts (Scotland) Act 1921* (Scot) ss 22–24.

⁷¹ Scottish Law Commission, *Supplementary and Miscellaneous Issues relating to Trust Law*, Discussion Paper No 148 (2011) [7.13].

⁷² *Ibid.*

Chapter 16

Other Queensland Legislation Relating to Trusts

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INTRODUCTION

16.1 The terms of reference require the Commission to review:¹

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.

16.2 This entails a consideration of those provisions of the *Public Trustee Act 1978* (Qld) and the *Trustee Companies Act 1968* (Qld) that deal with substantive areas of the law — such as the powers and protections of trustees — that are also addressed in the *Trusts Act 1973* (Qld).

16.3 It is also necessary for the Commission to consider what consequential amendments might need to be made as a result of the recommendations made in this review. As explained later in this chapter, a number of Acts refer to specific provisions of the *Trusts Act 1973* (Qld), and might need to be amended as a result of any recommendations that are ultimately made to the effect that particular provisions of the *Trusts Act 1973* (Qld) should be omitted or renumbered, or that the Act should be replaced by a new Act.

***Public Trustee Act 1978* (Qld)**

16.4 The *Public Trustee Act 1978* (Qld) establishes the Public Trustee of Queensland (the ‘Public Trustee’),² and provides for the appointment of the Public Trustee to a wide range of offices. While these include appointment to act as a

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

² *Public Trustee Act 1978* (Qld) s 7(1).

trustee, executor or administrator, the scope for appointment is considerably wider than the offices that are subject to the provisions of the *Trusts Act 1973* (Qld).³ Section 27(1)–(2) of the *Public Trustee Act 1978* (Qld) provides:

27 Rights and duties to which public trustee may be appointed

- (1) Where any person or corporation may be appointed or act as a trustee, executor, administrator, next friend, guardian, committee, agent, attorney, liquidator, receiver, manager or director or to or in any other office of a fiduciary nature the public trustee may be so appointed or may so act.
- (2) Where an official liquidator may be appointed liquidator by a court or judge, such appointment may be made of the public trustee where, in the opinion of the court or judge, there are special reasons for so doing.

16.5 Part 4 of the *Public Trustee Act 1978* (Qld) confers a number of powers on the Public Trustee. Some of these powers are conferred specifically when the Public Trustee is acting as a trustee, and apply in addition to the powers that the Public Trustee has under any other Act (including the *Trusts Act 1973* (Qld)).⁴

16.6 However, other provisions give the Public Trustee powers in relation to ‘an estate under administration’.⁵ Those powers are not confined to estates where the Public Trustee is acting as a trustee (or personal representative), but apply where the Public Trustee holds, administers, manages or controls property ‘in any capacity (including, for example, as personal representative, trustee, administrator, guardian, committee, manager, liquidator or receiver)’.⁶

16.7 The Act also includes provisions that protect the Public Trustee from liability in particular circumstances. Some of those provisions relate to matters addressed in the *Trusts Act 1973* (Qld), but deal with those matters differently from that Act.

***Trustee Companies Act 1968* (Qld)**

16.8 The *Trustee Companies Act 1968* (Qld) makes provision for trustee companies⁷ to be appointed to a wide range of offices. Section 21(1) provides:

21 Trustee company may be appointed trustee receiver etc

- (1) Subject to this section, any court, Judge or person (not being himself or herself a trustee) who has power to appoint or approve of any person as—

³ As previously explained, the *Trusts Act 1973* (Qld) defines ‘trustee’ to include a personal representative, being the executor, original or by representation, or the administrator for the time being of the estate of a deceased person: *Trusts Act 1973* (Qld) s 5(1) (definitions of ‘trustee’ and ‘personal representative’).

⁴ *Public Trustee Act 1978* (Qld) s 48. See also *Trusts Act 1973* (Qld) s 4(4).

⁵ See, eg, *Public Trustee Act 1978* (Qld) s 49 (Provision of dwelling house).

⁶ See *Public Trustee Act 1978* (Qld) s 6 (definition of ‘estate under administration’).

⁷ *Trustee Companies Act 1968* (Qld) s 4 defines ‘trustee company’ to mean ‘a licensed trustee company under the Corporations Act, section 601RAA’. See Chapter 7, n 165 above.

- (a) trustee; or
- (b) receiver; or
- (d) guardian of any person or of his or her estate; or
- (e) liquidator or official liquidator; or
- (f) guarantor or surety for any person appointed as administrator whether solely or jointly with any person;

may appoint or approve of the appointment of, a trustee company either solely or jointly with any other person to any of those offices or positions in respect of which it or he or she has the said power.

16.9 The Act confers a large number of specific powers on trustee companies. These powers do not appear to be limited to the situation where a trustee company is acting as a trustee (or personal representative).⁸ Many of these powers are also conferred on trustees by the *Trusts Act 1973* (Qld), although the powers conferred by the *Trustee Companies Act 1968* (Qld) tend to be expressed in a slightly different (and often more concise) way. When a trustee company is acting as a trustee, the powers conferred by the *Trustee Companies Act 1968* (Qld) apply in addition to the powers that the trustee company has under the *Trusts Act 1973* (Qld).⁹

16.10 The *Trustee Companies Act 1968* (Qld) also includes some protective provisions for trustee companies, including a provision dealing with the barring of certain claims (which is also the subject of a provision, in different terms, in the *Trusts Act 1973* (Qld)).

POWERS

16.11 The powers conferred by the *Trusts Act 1973* (Qld) apply in addition to the powers conferred by any other Act.¹⁰ Both the *Public Trustee Act 1978* (Qld) and the *Trustee Companies Act 1968* (Qld) confer various powers on, respectively, the Public Trustee and trustee companies.

16.12 This part of the chapter raises for consideration whether, in light of the wide powers that are conferred by the *Trusts Act 1973* (Qld), it is necessary for the *Public Trustee Act 1978* (Qld) and the *Trustee Companies Act 1968* (Qld) to retain all of the specific powers that are conferred by those Acts on trustees.

16.13 Further, where the *Public Trustee Act 1978* (Qld) or the *Trustee Companies Act 1968* (Qld) confers power on the Public Trustee or a trustee company when acting in a range of capacities and not just as trustee, this part of the chapter also considers whether, when the Public Trustee or a trustee company is acting as a trustee, it should be able to exercise the particular power conferred

⁸ See, eg, *Trustee Companies Act 1968* (Qld) s 28.

⁹ *Trustee Companies Act 1968* (Qld) s 4AA. See also *Trusts Act 1973* (Qld) s 4(4).

¹⁰ *Trusts Act 1973* (Qld) s 4(4). See also *Public Trustee Act 1978* (Qld) s 48; *Trustee Companies Act 1968* (Qld) s 4AA.

by that legislation or should be limited to the similar power conferred by the *Trusts Act 1973* (Qld).

Powers of the Public Trustee

Powers as trustee

16.14 Section 48 of the *Public Trustee Act 1978* (Qld) confers a range of powers on the Public Trustee when acting as a trustee. The main areas of overlap with the powers conferred by the *Trusts Act 1973* (Qld) relate to:

- specific management powers — namely, the powers to enter into a sharefarming agreement for a period not exceeding three years; and expend capital not exceeding \$75 000 (or a greater amount with the sanction of the court) in the purchase of livestock and machinery or in any undertaking as may reasonably be required for the better management of the property (section 48(a)–(b));¹¹
- the administrative power to exercise, as if the Public Trustee were the absolute owner, all rights in relation to investments, including rights to acquire stock (section 48(e));¹² and
- the power of appropriation (section 48(i)).¹³

16.15 In Chapter 8, the Commission has proposed that a trustee should have, in relation to the trust property, all the powers of an absolute owner (the ‘general property power’). In view of that proposal, the Commission has sought submissions on whether various specific powers in the *Trusts Act 1973* (Qld) should be omitted or should be retained as specific powers (whether in a shortened list or in a stand-alone provision).

16.16 If the Commission ultimately recommends the conferral on trustees of a general property power, it may not be necessary for all of the specific management powers in section 48 of the *Public Trustee Act 1978* (Qld) to be retained.

16.17 There is also an issue as to whether the provisions dealing with the Public Trustee’s powers in relation to rights arising out of an investment and of appropriation are needed in light of the provisions of the *Trusts Act 1973* (Qld) that deal with those matters.

16-1 Should any of the provisions of section 48 of the *Public Trustee Act 1978* (Qld) be omitted in light of the provisions of general application in the *Trusts Act 1973* (Qld)?

¹¹ See, eg, *Trusts Act 1973* (Qld) ss 32(1)(d), 33(1)(a)–(b).

¹² See, eg, *Trusts Act 1973* (Qld) s 25.

¹³ See, eg, *Trusts Act 1973* (Qld) s 33(1)(l).

Powers in relation to an 'estate under administration'

16.18 Unlike section 48 of the *Public Trustee Act 1978* (Qld), which applies specifically when the Public Trustee is acting as a trustee, the *Public Trustee Act 1978* (Qld) also gives the Public Trustee various powers in relation to 'an estate under administration'. Those powers are not confined to estates where the Public Trustee is acting as a trustee (or personal representative), but apply where the Public Trustee holds, administers, manages or controls property 'in any capacity (including, for example, as personal representative, trustee, administrator, guardian, committee, manager, liquidator or receiver)'.¹⁴

16.19 The relevant powers that may be exercised in relation to an estate under administration include:

- the power to expend capital for the provision of a dwelling house (section 49), which confers a similar power to section 28 of the *Trusts Act 1973* (Qld), although section 49 is slightly wider in that it confers an express power on the Public Trustee to purchase land for the erection thereon of a dwelling house and to erect a dwelling house; and
- the power to make advances of capital to an infant beneficiary who is entitled to the capital of an estate under administration (section 50), which confers a similar power to section 62 of the *Trusts Act 1973* (Qld), except that section 62 is not confined to infant beneficiaries.

16.20 Because these provisions may be exercised by the Public Trustee when acting in a capacity other than as a trustee (or personal representative), it would not be feasible to omit these provisions, as the similar provisions in the *Trusts Act 1973* (Qld) would not apply in those circumstances. However, there is an issue as to whether the Public Trustee, *when acting as a trustee*, should be able to exercise both the specific powers conferred by the *Public Trustee Act 1978* (Qld) and the similar powers under the *Trusts Act 1973* (Qld), or should be limited to the powers conferred by the *Trusts Act 1973* (Qld), which apply to all trustees.

16-2 Should the Public Trustee, when acting as a trustee, be able to exercise the powers conferred by sections 49 and 50 of the *Public Trustee Act 1978* (Qld)? Alternatively, should the Public Trustee, when acting as a trustee, be limited to the powers conferred by sections 28 and 62 of the *Trusts Act 1973* (Qld)?

Powers of trustee companies

General powers

16.21 Section 28 of the *Trustee Companies Act 1968* (Qld) confers extensive powers on trustee companies in relation to a range of matters. When a trustee

¹⁴

See *Public Trustee Act 1978* (Qld) s 6 (definition of 'estate under administration').

company is acting as a trustee, the powers conferred by section 28 of the *Trustee Companies Act 1968* (Qld) overlap with a number of the powers conferred by the *Trusts Act 1973* (Qld). The main areas of overlap relate to:

- specific management powers — namely, the powers to sell property; subdivide property; exchange property or join in a partition of property; expend capital not exceeding \$50 000 (or a greater amount with the consent of the court or the beneficiaries) in the improvement or development of the property; lease property for a term not exceeding 21 years and enter into a sharefarming agreement; and repair any property (section 28(1)(a), (c), (d), (h), (l), (n));¹⁵
- administrative powers — for example, to take up share offers, employ agents, and insure any property (section 28(1)(e), (g), (o));¹⁶ and
- the power of appropriation (section 28(1)(f)).¹⁷

16.22 As mentioned earlier, the powers conferred by section 28 of the *Trustee Companies Act 1968* (Qld) do not appear to be limited to the situation where a trustee company is acting as a trustee (or personal representative). A number of the powers may be exercised in connection with an 'estate', which is defined to include 'all real and personal property of whatever nature or kind committed to the administration or management of a trustee company'.¹⁸

16.23 Because these provisions may be exercised by a trustee company when acting in a capacity other than as a trustee (or personal representative), it would not be feasible to omit these provisions, as the similar provisions in the *Trusts Act 1973* (Qld) would not apply in those circumstances. However, there is an issue as to whether a trustee company, *when acting as a trustee*, should be able to exercise both the specific powers conferred by the *Trustee Companies Act 1968* (Qld) and the similar powers under the *Trusts Act 1973* (Qld), or should be limited to the powers conferred by the *Trusts Act 1973* (Qld), which apply to all trustees.

16-3 Should a trustee company, when acting as a trustee, be able to exercise the powers conferred by section 28 of the *Trustee Companies Act 1968* (Qld)? Alternatively, should a trustee company, when acting as a trustee, be limited to the powers conferred by the *Trusts Act 1973* (Qld)?

Carrying on the business of an intestate

16.24 Section 29 of the *Trustee Companies Act 1968* (Qld) applies where a trustee company has been granted administration of the estate of an intestate and

¹⁵ See, eg, *Trusts Act 1973* (Qld) ss 32(1)(a)–(b), (d)–(e), 33(1)(a)–(b), (e).

¹⁶ See, eg, *Trusts Act 1973* (Qld) ss 25, 54, 47.

¹⁷ See, eg, *Trusts Act 1973* (Qld) s 33(1)(l).

¹⁸ *Trustee Companies Act 1968* (Qld) s 4 (definition of 'estate').

two further conditions apply: the property (or part of the property) of the intestate was, at the date of his or her death, employed in a business or undertaking; and the beneficiaries of the property so employed include minor beneficiaries. The section provides that it is lawful for the trustee company, with the sanction of the court and with the consent of such persons as the court may direct, to postpone the sale and conversion of the property, and to manage and carry on the business during the minority of the beneficiaries.

16.25 As explained in Chapter 8, section 57 of the *Trusts Act 1973* (Qld) also provides for the situation where trust property was being used in carrying on a business. While that section does not provide a specific power for the court to authorise the carrying on of the business during the minority of the beneficiaries, the section nevertheless authorises a trustee to carry on a business for two years from the commencement of the trust, or, relevantly, for such further period as the court may approve.

16-4 In light of the power to carry on a business conferred by section 57 of the *Trusts Act 1973* (Qld), is it necessary or desirable to retain section 29 of the *Trustee Companies Act 1968* (Qld)?

Power to apply income and capital for maintenance of beneficiary

16.26 Section 31 of the *Trustee Companies Act 1968* (Qld) applies where an infant is entitled to a share in an estate, whether testate or intestate, under administration by a trustee company. The section empowers the trustee company, in its discretion, to apply income and capital for the maintenance, education advancement or benefit of the infant during his or her minority.

16.27 As explained in Chapter 10, powers of advancement in relation to income and capital are also provided by sections 61 and 62 of the *Trusts Act 1973* (Qld), although these provisions are not identical to the provisions of the *Trustee Companies Act 1968* (Qld).

16-5 In light of the power to apply income and capital for the advancement of a beneficiary under sections 61 and 62 of the *Trusts Act 1973* (Qld), is it necessary or desirable to retain section 31 of the *Trustee Companies Act 1968* (Qld)?

INDEMNITIES AND PROTECTION

Advertisement for claims and payments

16.28 Section 129 of the *Public Trustee Act 1978* (Qld) provides a mechanism for the Public Trustee to publish an advertisement requiring persons having any claim against 'an estate under administration' and, after the expiry of the date fixed

in the notice, to distribute the estate having regard only to the claims of which the Public Trustee has notice as the time of distribution. It provides:

129 Advertisement for claims and payment

- (1) The public trustee may, at such times as the public trustee thinks fit, cause advertisements to be published in such newspapers as the public trustee considers suitable, requiring any person having any claim in regard to an estate under administration, whether as creditor or beneficiary or otherwise, to send to the public trustee particulars of such claim on or before a date to be fixed in such notice.
- (2) After the date fixed by the notice or the last of the notices to be published, the public trustee may distribute or otherwise deal with the estate under administration having regard only to the claims made, whether formally or not, of which the public trustee has notice at the time of distribution and the public trustee shall not, in regard to any part of an estate so distributed or disposed of, be liable to any person of whose claim the public trustee had no notice at the time of the distribution or disposal.

16.29 The procedure in section 129 is similar to the procedure available under section 67 of the *Trusts Act 1973* (Qld). However, the provisions differ in several respects.

16.30 Section 67(1) of the *Trusts Act 1973* (Qld) stipulates the places in which the notice is to be advertised, whereas section 129(1) of the *Public Trustee Act 1978* (Qld) provides for the advertisements to be published in 'such newspapers as the public trustee considers suitable'. Given the range of circumstances in which the Public Trustee might be giving a notice under this section, it might be desirable for the Public Trustee to have some flexibility in this regard.

16.31 Further, section 67(1) of the *Trusts Act 1973* (Qld) provides that the date fixed in the notice for sending particulars of a claim must be at least six weeks after the publication of the notice. In Chapter 11, the Commission has proposed that the minimum notice period in section 67 should be increased to two months.¹⁹ In contrast, section 129 of the *Public Trustee Act 1978* (Qld) does not provide for any minimum notice period.

16.32 Finally, section 67(4)(a) of the *Trusts Act 1973* (Qld) ensures that nothing in that section prejudices the right of any person to enforce any remedy against a person to whom the trust property has been distributed. No similar provision is found in section 129 of the *Public Trustee Act 1978* (Qld).

16-6 Should the Public Trustee, when acting as a trustee, be able to advertise for claims using the procedure in section 129 of the *Public Trustee Act 1978* (Qld)? Alternatively, should the Public Trustee, when acting as a trustee, be limited to the procedure in section 67 of the *Trusts Act 1973* (Qld)?

¹⁹

See [11.102], Proposal 11-8 above.

The barring of claims against the Public Trustee or a trustee company

16.33 In Chapter 11, the Commission has considered the mechanism provided by section 68 of the *Trusts Act 1973* (Qld) for the barring of claims. Provisions dealing with the barring of claims are also included in the *Public Trustee Act 1978* (Qld) and the *Trustee Companies Act 1968* (Qld). Unlike section 68 of the *Trusts Act 1973* (Qld), these provisions enable a claim to be barred without the need for the Public Trustee or the trustee company to obtain a court order to that effect.

Public Trustee

16.34 Section 131 of the *Public Trustee Act 1978* (Qld) provides:

131 Barring of claims

(1) Where—

- (a) the public trustee refuses to recognise, whether wholly or partially, a claim which has been made—
 - (i) to or against an estate under administration or any part thereof; or
 - (ii) against the public trustee on the ground of the public trustee being under any liability in respect of which the public trustee would be entitled to reimbursement out of an estate under administration; or
 - (iii) to the ownership of, or of any interest in, any property which the public trustee has in the public trustee's possession or under the public trustee's control and which appears to the public trustee to be an asset in an estate under administration; or
- (b) any person who has been called upon by notice in writing to lodge such a claim fails for a period of 1 month so to lodge the person's claim;

the public trustee may give notice in writing to the claimant or the person called upon to claim of the public trustee's refusal to recognise any such claim, in whole or in part, or of the public trustee's non-receipt of such claim, whichever the case may be.

- (2) If such claimant or person called upon does not, within 3 months after the service of such notice, either satisfy the public trustee of the validity of the person's claim or institute legal proceedings to enforce such claim and serve the public trustee with the originating process, the public trustee may deal with the estate or property without taking into consideration the existence of any such claim, or taking into consideration only that portion of a claim of which the public trustee has not given notice of refusal to recognise, and thereupon the right of such claimant or person called upon to recover the amount of the claim or the portion thereof in respect of which such notice was given shall be absolutely barred as against so much of the estate or property as has been distributed.

16.35 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.

16.36 Section 131 applies in relation to an 'estate under administration' by the Public Trustee. As a result, it is not confined to estates where the Public Trustee is acting as a trustee (or personal representative), but applies in a wider range of circumstances.²⁰ Where the Public Trustee is acting as a trustee (or personal representative), section 131 provides an additional mechanism to section 68 of the *Trusts Act 1973* (Qld) for the barring of a claim.

Trustee companies

16.37 Section 32 of the *Trustee Companies Act 1968* (Qld) provides:

32 Power to distribute assets of estate after notice on failure of action by claimant creditor

- (1) Where a trustee company refuses to recognise in whole or in part the claim of any person who claims to be a creditor against the estate of any deceased person, the trustee company may give notice in writing of that refusal to the person so claiming.
- (2) If the person to whom a notice has been given under subsection (1) does not within 6 months after the receipt of the notice institute any proceeding to enforce the claim, the trustee company may distribute the assets of the deceased person without regard to the claim or to so much thereof as the trustee company has by the notice refused to recognise, and thereupon the right of the person to whom such notice was given to recover from the trustee company the amount of the claim or the part thereof which the trustee company has by the notice refused to recognise shall be absolutely barred.
- (3) For the purposes of this section, a notice may be served on any person claiming to be a creditor against the estate by posting it to the person in a registered post letter addressed to the address given in the claim, and every such notice shall be deemed to have been received by that person in the ordinary course of post unless the trustee company has notice to the contrary before the distribution of the assets.

16.38 Section 32 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

²⁰

See [16.6] above.

includes a similar, although not identical, procedure to that in section 131 of the *Public Trustee Act 1978* (Qld).

16.39 Under section 32(1), 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. 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.

Whether claims against the Public Trustee or a trustee company should be barred without a court order

16.40 The procedure for the barring of claims in section 131 of the *Public Trustee Act 1978* (Qld) and section 32 of the *Trustee Companies Act 1968* (Qld) is obviously administratively convenient for those entities, as it enables claims against estates administered by them to be barred without the need to apply to the court for an order to that effect.

16.41 However, the barring of a claim is a significant matter, and the issue is whether, where the Public Trustee or a trustee company is *acting as a trustee*, it should be able to avail itself of the specific provision under the *Public Trustee Act 1978* (Qld) or the *Trustee Companies Act 1968* (Qld) or should be confined to the procedure under section 68 of the *Trusts Act 1973* (Qld), which applies to all trustees.

16.42 The National Committee for Uniform Succession Laws considered that, although it is desirable to encourage the efficient and expeditious administration of estates, the barring of a claim is a significant step. It noted that, even if a claim is barred only against the trustee (or personal representative), it has the potential to significantly affect the claimant's rights. The beneficiary to whom the estate has been distributed may have dissipated the distribution and may not otherwise be able to meet any judgment in favour of the claimant.²¹

16.43 The National Committee considered that the barring of claims should occur only by court order. In its view, the provisions in the various public trustee and trustee company Acts that enable claims to be barred simply by a failure to commence proceedings after being served with a notice are anomalous and should be repealed.²²

21 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, vol 2, [22.102].

22 Ibid [22.102]–[22.103], Rec 22-7.

16-7 Is it appropriate for section 131 of the *Public Trustee Act 1978* (Qld) and section 32 of the *Trustee Companies Act 1968* (Qld) to enable a claim to be barred without the Public Trustee or trustee company obtaining a court order to that effect? Alternatively, where the Public Trustee or a trustee company is acting as a trustee, should those entities be confined to the mechanism for the barring of claims under section 68 of the *Trusts Act 1973* (Qld)?

OTHER POSSIBLE CHANGES

16.44 As mentioned earlier, some of the powers conferred by the *Public Trustee Act 1978* (Qld) are exercisable by the Public Trustee in relation to an 'estate under administration'. Similarly, some of the powers conferred by the *Trustee Companies Act 1968* (Qld) apply in relation to an estate 'committed to the administration or management of a trustee company'. Those powers apply not only when the Public Trustee or a trustee company is acting as a trustee, but also when those entities are acting in other capacities.

16.45 The Commission has raised as an issue whether the Public Trustee or a trustee company, *when acting as a trustee*, should be confined to exercising the powers that are conferred on trustees by the *Trusts Act 1973* (Qld). More generally, it may be desirable for some of the provisions of the *Public Trustee Act 1978* (Qld) and the *Trustee Companies Act 1968* (Qld), despite their wider application, to be expressed in terms that are more consistent with the similar provisions in the *Trusts Act 1973* (Qld).

16-8 Are there any particular provisions of the *Public Trustee Act 1978* (Qld) or the *Trustee Companies Act 1968* (Qld) that should be amended to achieve greater consistency with the *Trusts Act 1973* (Qld)?

POSSIBLE CONSEQUENTIAL AMENDMENTS

16.46 As mentioned earlier, a number of Acts refer to specific provisions of the *Trusts Act 1973* (Qld) (or more generally to the Act), and might need to be amended as a result of any recommendations that particular provisions of the *Trusts Act 1973* (Qld) be omitted or renumbered, or that the Act be replaced. The provisions that could potentially be affected in this way are listed in Table 16.1 below.

16.47 Whether these provisions ultimately need to be amended will depend on the recommendations made by the Commission in the next stage of this review.

Name of Act and provision	<i>Trusts Act 1973 (Qld)</i> provision	Summary
Aboriginal Land Act 1991 (Qld) pt 21 s 267	whole Act to the extent prescribed	The <i>Trusts Act 1973 (Qld)</i> applies to a land trust and its members in relation to dealings with Aboriginal land only to the extent, and with the changes, prescribed under pt 21.
Aboriginal Land Act 1991 (Qld) pt 21 s 268(1)	no specific provision mentioned	Subject to any other provision of the Act, a land trust may perform all the functions and exercise all the powers of a trustee under the <i>Trusts Act 1973 (Qld)</i> .
Aboriginal Land Act 1991 (Qld) pt 21 s 269	no specific provision mentioned, but relates, for example, to pt 7	The jurisdiction of the Supreme Court under the <i>Trusts Act 1973 (Qld)</i> includes matters arising under the Act, and is to be exercised in accordance with pt 21.
Aboriginal Land Regulation 2011 (Qld) s 24(1)	s 21	A land trust may invest trust property only under the <i>Trusts Act 1973 (Qld)</i> , s 21.
Charitable Funds Act 1958 (Qld) s 21(c), editor's note	no specific provision mentioned, but relates to pt 7 div 3	An order of a judge under the Act vesting the property in a person shall have the same effect as if it were a vesting order made under the <i>Trusts Act 1973 (Qld)</i> and, where necessary, the provisions of that Act relating to such an order, with all necessary adaptations thereof, shall apply for this purpose.
Collections Regulation 2008 (Qld) s 31(1)	pt 3, s 22(1)	Part 3 of the <i>Trusts Act 1973 (Qld)</i> , other than s 22(1), applies in relation to a charity or association as if the charity or association were a trustee, and the assets of the charity or association were trust funds.
Court Funds Act 1973 (Qld) s 11(2)	pt 3	Money in court paid in after the commencement of this Act shall not be invested other than under pt 3 of the <i>Trusts Act 1973 (Qld)</i> .
Funeral Benefit Business Act 1982 (Qld) s 40(1)(a)	pt 3	Moneys standing to the credit of the funeral benefit business trust fund of a corporation may be invested by the corporation under the <i>Trusts Act 1973 (Qld)</i> , pt 3.
Funeral Benefit Business Act 1982 (Qld) s 79	pts 1–9, ss 17–18, 28, 30, 30A, 32–48, 53, 57, 66–67, 73–75, 78, 84, 86–89, 93, 95, 110, 112–113	The following provisions of the <i>Trusts Act 1973 (Qld)</i> apply to payments made by a contributor under a funeral benefits agreement to particular entities, as if the entity were a trustee and the payments were trust property within the meaning of the <i>Trusts Act 1973 (Qld)</i> : (a) pt 1; (b) pt 2, other than ss 17 and 18; (c) pt 3, other than ss 28, 30 and 30A; (d) pt 4, other than ss 32 to 48, 53 and 57; (e) pt 5; (f) pt 6, other than ss 66, 67, 73 to 75, and 78; (g) pt 7, other than ss 84, 86 to 89, 93 and 95; (h) pt 9, other than ss 110, 112 and 113.

Name of Act and provision	<i>Trusts Act 1973 (Qld)</i> provision	Summary
<i>Guardianship and Administration Act 2000 (Qld) s 3 sch 4 (Dictionary)</i>	pt 3	In this Act, 'authorised investment' means an investment which, if the investment were of trust funds by a trustee, would be an investment by the trustee exercising a power of investment under pt 3 of the <i>Trusts Act 1973 (Qld)</i> , or an investment approved by the Tribunal.
<i>Land Act 1994 (Qld) s 90</i>	whole Act	The <i>Trusts Act 1973 (Qld)</i> does not and is taken never to have applied to trustees and trusts under pt 1 of the Act.
<i>Land Act 1994 (Qld) s 375A(1)(b)</i>	no specific provision mentioned, but relates to pt 7	A request to vest an interest in a person as trustee may be registered only if, among other things, the request gives effect to an order made under the <i>Trusts Act 1973 (Qld)</i> or another Act.
<i>Land Title Act 1994 (Qld) s 110A(2)</i>	no specific provision mentioned, but relates to pt 7	A request to vest an interest in a lot in a trustee must give effect to an order made under the <i>Trusts Act 1973 (Qld)</i> or another Act.
<i>Land Valuation Act 2010 (Qld) s 210</i>	ss 5(1) (definition of 'trustee'), 30(1)(a)	An assessment under s 209 is a valuation that complies with the requirements of s 30(1)(a) of the <i>Trusts Act 1973 (Qld)</i> . For s 210, a 'trustee' means a person who is a trustee within the meaning of s 5 of the <i>Trusts Act 1973 (Qld)</i> .
<i>Legal Aid Queensland Act 1997 (Qld) s 45(2)</i>	no specific provision mentioned	An amount or other property held by Legal Aid on trust must be dealt with by Legal Aid as trustee under the <i>Trusts Act 1973 (Qld)</i> .
<i>Limitation of Actions Act 1974 (Qld) s 5(1)</i>	no specific provision mentioned, but relates to s 5(1) (definitions of 'trust' and 'trustee')	In this Act, 'trust' and 'trustee' have the meaning given by the <i>Trusts Act 1973 (Qld)</i> .
<i>Nature Conservation Act 1992 (Qld) s 31(5)</i>	whole Act	The <i>Trusts Act 1973 (Qld)</i> does not apply to trusts created under s 31, for areas dedicated as conservation parks or resources reserves, or to trustees of such trusts.
<i>Powers of Attorney Act 1998 (Qld) s 84(4)(a)</i>	pt 3	'Authorised investments' for the power of investment of an attorney for financial matters means an investment which, if the investment were of trust funds by a trustee, would be an investment by the trustee exercising a power of investment under pt 3 of the <i>Trusts Act 1973 (Qld)</i> , or an investment approved by the Tribunal.
<i>Property Agents and Motor Dealers Regulation 2001 (Qld) s 54(4)(c)</i>	s 67	One of the circumstances in which money held in a trust account must be transferred, under s 54(3), is if, among other things, the former licensee or partnership has given a notice under s 67 of the <i>Trusts Act 1973 (Qld)</i> for the money.
<i>Property Law Act 1974 (Qld) s 38(3A)</i>	s 90	On the appointment of a trustee or trustees under s 38(3), the property shall, subject to s 90 of the <i>Trusts Act 1973 (Qld)</i> , vest in the trustees.

Name of Act and provision	<i>Trusts Act 1973 (Qld)</i> provision	Summary
<i>Property Law Act 1974 (Qld) s 222(2)</i>	no specific provision mentioned	Nothing in s 222(1) shall affect any power of a trustee under the <i>Trusts Act 1973 (Qld)</i> .
<i>Public Trustee Act 1978 (Qld) s 19(1)(d)</i>	no specific provision mentioned, but relates to s 5(1) (definition of 'authorised investments')	Investments may be made from the common fund in any of the investments in which, under the <i>Trusts Act 1973 (Qld)</i> , trustees are authorised to invest trust funds.
<i>Public Trustee Act 1978 (Qld) s 40(1)</i>	ss 12(1)(a)–(h), 19	Where the public trustee has been appointed custodian trustee under the provisions of s 19 of the <i>Trusts Act 1973 (Qld)</i> and, by reason of any of the events enumerated in s 12(1)(a)–(h) of that Act, there is no managing trustee capable of acting in the execution of the trust, the public trustee may act as managing trustee and shall have all the powers given to managing trustees by s 19 of the <i>Trusts Act 1973 (Qld)</i> until such time as new managing trustees are appointed.
<i>Public Trustee Act 1978 (Qld) s 40(3)</i>	no specific provision mentioned, but relates to s 5(1) (definition of 'statutory trustee') and s 6	Where the public trustee is a statutory trustee within the meaning of the <i>Trusts Act 1973 (Qld)</i> , the public trustee shall have all the powers given to and may in every respect act as a trustee who is not a statutory trustee, until some other person becomes trustee.
<i>Retirement Villages Act 1999 (Qld) ss 95, 101</i>	no specific provision mentioned, but relates to s 5(1) (definition of 'authorised investments')	A scheme operator must not invest an amount standing to the credit of the retirement village's capital replacement fund or maintenance reserve fund other than in an authorised investment under the <i>Trusts Act 1973 (Qld)</i> .
<i>Succession Act 1981 (Qld) s 5</i>	no specific provision mentioned, but relates to s 5(1) (definition of 'statutory trustee') and s 6	In this Act 'trustee' includes a statutory trustee within the meaning of the <i>Trusts Act 1973 (Qld)</i> .
<i>Succession Act 1981 (Qld) s 6(4)</i>	no specific provision mentioned, but relates, for example, to pt 7	The court has jurisdiction to make, for the more convenient administration of any property comprised in the estate of a deceased person, any order which it has jurisdiction to make in relation to the administration of trust property under the provisions of the <i>Trusts Act 1973 (Qld)</i> .
<i>Succession Act 1981 (Qld) s 36(12)</i>	s 67(3)	Section 67(3) of the <i>Trusts Act 1973 (Qld)</i> does not authorise a personal representative to distribute an entitlement of the spouses before the time the personal representative becomes entitled to distribute the entitlement under s 36(1) (where there is more than one spouse entitled to the intestate's residuary estate).
<i>Succession Act 1981 (Qld) s 45(5)</i>	s 16	For the purposes of s 45, and notwithstanding the provisions of s 16 of the <i>Trusts Act 1973</i> , an executor includes an executor by representation under the provisions of section 47 of this Act.

Name of Act and provision	<i>Trusts Act 1973 (Qld)</i> provision	Summary
<i>Succession Act 1981 (Qld) s 49(1)</i>	no specific provision mentioned	In relation to the real and personal estate of the deceased, the personal representative has, from the death of the deceased, all the powers conferred on personal representatives by the <i>Trusts Act 1973 (Qld)</i> .
<i>Torres Strait Islander Land Act 1991 (Qld) pt 15 s 173</i>	whole Act to the extent prescribed	The <i>Trusts Act 1973 (Qld)</i> applies to a land trust and its members in relation to dealings with Torres Strait Islander land only to the extent, and with the changes, prescribed under pt 15.
<i>Torres Strait Islander Land Act 1991 (Qld) pt 15 s 174</i>	no specific provision mentioned, but relates, for example, to pt 7	The jurisdiction of the Supreme Court under the <i>Trusts Act 1973 (Qld)</i> includes matters arising under this Act, and is to be exercised in accordance with pt 15.
<i>Torres Strait Islander Land Regulation 2011 (Qld) s 24(1)</i>	s 21	A land trust may invest trust property only under the <i>Trusts Act 1973 (Qld)</i> , s 21.
<i>Trustee Companies Act 1968 (Qld) s 37(2)(a)</i>	no specific provision mentioned, but relates to s 5(1) (definition of 'authorised investments')	Investment of moneys as one fund under s 37(1) shall be made either in investments authorised by each of the trust instruments or for the time being authorised by the <i>Trusts Act 1973 (Qld)</i> or any other Act for the investment of trust funds.
<i>Uniform Civil Procedure Rules 1999 (Qld) r 599(2)</i>	s 67	If a notice for intention to apply for a grant includes a statement calling on anyone who has a claim against the estate to give particulars of the claim, the notice must comply with s 67 of the <i>Trusts Act 1973 (Qld)</i> .
<i>Uniform Civil Procedure Rules 1999 (Qld) r 644</i>	s 101(1)	For ch 15 pts 10 and 11 of the Act, dealing with assessment of estate accounts, 'commission' means remuneration a trustee may charge under s 101(1) of the <i>Trusts Act 1973 (Qld)</i> .
<i>United Grand Lodge of Antient Free and Accepted Masons of Queensland Trustees Act 1942 (Qld) s 3D</i>	no specific provision mentioned, but relates to s 5(1) (definition of 'authorised investments')	The board shall not invest moneys held by it in any investment that is not an authorised investment within the meaning of the <i>Trusts Act 1973</i> save with the approval of grand lodge first had and obtained.

Table 16.1: Provisions referring to the *Trusts Act 1973 (Qld)*

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